

Notice of the proposal was published in the **Federal Register** on January 13, 2004.<sup>2</sup> No comment letters were received. For the reasons discussed below, the Commission is approving the proposed rule change.

## II. Description

The purpose of the proposed rule change is to amend certain sections of the BSE Constitution and Rules to clarify BSE's liability with respect to its members' contractual obligations.<sup>3</sup>

In particular, BSE is modifying Articles XII and XIII of its Constitution to insure that any BSE member who is a party to a transaction remains solely liable for the transaction. This language is consistent with similar language and approaches of other exchanges in limiting the liability of an exchange with respect to contracts entered into by members.<sup>4</sup> In Article XIII of its Constitution, the BSE is also adding certain language from the BSECC Participant Hypothecation Agreement. The provision to be inserted into the Constitution would prevent BSE from becoming a de facto guarantor of an insolvent member's contractual obligations.

BSE is amending other sections of its Rules consistent with this theme. Chapter III, "Comparisons—Liability on Contracts," Section 4, "Failures to Compare," now states that BSE shall have no liability to any of the original parties to a contract entered into by a member. Chapter VI, "Failure to Fulfill Contracts," Section 1, "Closing Contracts," now makes it clear that no action taken by BSE in closing or assisting to close a contract entered into by a BSE member shall have the effect of transferring any liability related to that contract to BSE. Chapter VI, Section 2, "Notice of Closing Contracts," echoes this approach for instances in which BSE takes action to attempt to close a contract on behalf of a member in default. None of these changes are in response to any recent circumstance. They are only aimed at clarifying BSE's unique position in relation to assisting its members in other contractual matters

<sup>2</sup> Securities Exchange Act Release No. 49026 (January 6, 2004), 69 FR 2026.

<sup>3</sup> The Commission approved a companion proposed rule change filed by the Boston Stock Exchange Clearing Corporation ("BSECC") to amend various sections of its Rules as they pertain to BSECC's liability in order to maintain a consistent approach with the changes approved in this filing. Securities Exchange Act Release No. 49305 (February 23, 2004), [File No. SR-BSECC-2003-01].

<sup>4</sup> See, e.g., New York Stock Exchange Rules 137 and 142; Chicago Stock Exchange Rules, Article XXV, Rule 11; and Philadelphia Stock Exchange Rule 254.

exclusively linked to conducting transactions in the buying and selling of equity securities.

## III. Discussion

Section 6(b)(5) of the Act requires that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.<sup>5</sup> The Commission finds that BSE's proposed rule change is consistent with these requirements because it clarifies BSE's liability with respect to its members' contractual obligations.

## IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular section 6(b)(5) of the Act and the rules and regulations thereunder.

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act, that the proposed rule change (File No. SR-BSE-2002-06) be and hereby is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>6</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49297; File No. SR-CHX-2003-39]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Stock Exchange, Inc. Relating to Membership Dues and Fees

February 23, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup>

<sup>1</sup> 15 U.S.C. 78f(b)(5).

<sup>2</sup> 17 CFR 200.30-3(a)(12).

<sup>3</sup> 15 U.S.C. 78s(b)(1).

<sup>4</sup> 17 CFR 240.19b-4.

notice hereby is given that on December 31, 2003, the Chicago Stock Exchange, Inc. ("CHX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. On February 19, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its membership dues and fees schedule (the "Fee Schedule"), effective January 1, 2004, to clarify the applicability of certain Fee Schedule provisions relating to transaction fees, and establish a schedule of maximum monthly transaction fees for certain agency orders executed through a CHX floor broker.

Below is the text of the proposed rule change. Proposed new language is *italicized*; proposed deletions are in [brackets].

\* \* \* \* \*

### Membership Dues and Fees

#### F. Transaction and Order Processing Fees

- 1-3. No change to text.
4. Transaction Fees.
  - a. Market orders sent via MAX, *except agency orders executed through floor brokers—No charge.*
  - b. All orders sent via MAX in Tape B eligible issues or in the stocks comprising the Standard & Poor's 500 Stock Price Index, *except agency orders executed through floor brokers—No charge.*
  - c. No change to text
  - d. [Through June 30, 2001, all orders that are executed during the E-Session] *Reserved for future use—[No charge.]*
  - e. In Nasdaq/NM securities, agency executions executed through a floor broker and market maker execution—\$.0025 per share (up to a maximum of \$100 per side), subject to the fee reduction described in (i), below[,] *and the fee cap described in (j) below.*
  - f. In Dual Trading System issues, agency executions executed through a

<sup>3</sup> See facsimile from Ellen J. Neely, Senior Vice President & General Counsel, CHX, to A. Michael Pierson, Attorney, and Marisol Rubecindo, Law Clerk, Division of Market Regulation ("Division"), Commission, dated February 19, 2004 ("Amendment No. 1"). Amendment No. 1 replaced the proposed rule change in its entirety.

floor Broker and market maker Executions—\$.0035 per share (up to a maximum of \$100 per side), subject to the fee reduction described in (i), below. (Effective January 1, 2001)] and the fee cap described in (j) below.

g. All other MAX orders, except agency orders executed through floor brokers.

\* \* \* \* \*

h. The monthly maximum for transaction fees for orders sent via MAX, except agency orders executed through floor brokers, is \$10,000 or, if less, \$.40 per 100 average monthly gross round lot shares.

i. No change to text

j. The transaction fees set forth in Sections F.4(e) and (f) shall be subject to the following monthly maximums:

(i) If the order-sending firm has routed an average of 7,000–9,999 executed round lot orders per day in a given month to the Exchange via the MAX system, a maximum of \$40,000 for that month;

(ii) If the order-sending firm has routed an average of 10,000–12,499 executed round lot orders per day in a given month to the Exchange via the MAX system, a maximum of \$35,000 for that month;

(iii) If the order-sending firm has routed an average of 12,500–15,000 executed round lot orders per day in a given month to the Exchange via the MAX system, a maximum of \$30,000 for that month;

(iv) If the order-sending firm has routed an average of more than 15,000 executed round lot orders per day in a given month to the Exchange via the MAX system, a maximum of \$25,000 for that month.

k. An order-sending firm will not be eligible for any of the transaction fee caps or reductions set forth in Section F.4 if the number of orders cancelled during the subject month by the member firm exceeds 50% of the member firm's total CHX executions for the month.

\* \* \* \* \*

## II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

#### 1. Purpose

The Exchange proposes to amend Section F ("Transactions and Order Processing Fees") of the Fee Schedule, effective January 1, 2004, by clarifying the applicability of certain Fee Schedule provisions relating to transaction fees, and establishing a schedule of maximum monthly transaction fees for certain agency orders executed through a CHX floor broker.

Order-sending firms, which are members of the Exchange,<sup>4</sup> generally route agency orders to the CHX via the Exchange's Midwest Automated Execution system, commonly referred to as the MAX'' system.<sup>5</sup> The Exchange currently does not assess its order-sending firms a transaction fee for most orders sent through MAX and executed by specialists.<sup>6</sup> If an agency order is routed by MAX to a CHX floor broker for execution, however, such order is assessed a transaction fee in accordance with Section F.4(e) and (f). The Exchange is proposing changes to Sections F.4(a), (b), (g) and (h) of the Fee Schedule to clarify the applicability of a transaction fee to MAX agency orders executed through a CHX floor broker.<sup>7</sup>

<sup>4</sup> Telephone conversation between Kathleen M. Boege, Vice President and Associate General Counsel, CHX, and Lisa N. Jones, Special Counsel, Division, Commission (February 17, 2004).

<sup>5</sup> At the order-sending firm's request, however, an agency order routed through the MAX system may be sent directly to a CHX floor broker for handling.

<sup>6</sup> See CHX Schedule of Membership Dues and Fees at Section F.4(a)–(c). Sections (b) and (c) of Section F.4 were added to clarify that orders in Tape B eligible issues, in the stock of the Standard & Poor's 500 Stock Price Index, and in Nasdaq/NMS securities are not assessed a transaction fee when sent through MAX and executed by a specialist. Telephone conversation between Ellen J. Neely, CHX, A. Michael Pierson, and Marisol Rubecindo, Division, Commission (February 23, 2004).

<sup>7</sup> To summarize the interplay between the provisions of Section F.4, as a general rule, the Exchange notes that most orders sent via MAX and executed by the MAX system are not subject to a transaction fee. See Sections F.4(a), (b), (c), and (g). Telephone conversation between Ellen J. Neely, CHX, A. Michael Pierson, and Marisol Rubecindo, Division, Commission (February 23, 2004). Orders that are sent via MAX and require the assistance of a CHX floor broker, however, are assessed a transaction fee, to compensate for the costs associated with the floor broker's services. See Sections F.4(e), (f) and proposed amendments to Section F.4(a), (b) and (g). Section F.4 also establishes monthly maximum aggregate transaction fees. According to the Exchange, Section F.4(h) has always been interpreted as a cap on MAX order transaction fees other than the fees for MAX-delivered, floor broker-assisted orders. Section F.4(i) provides for fee reductions applicable to floor broker-assisted orders, but is based on total shares traded, thus rendering the fee reductions largely unavailable to order-sending firms that route

Thus, the proposed rule change does not impose any new transaction fees.

To preserve the CHX's competitive position with respect to MAX agency orders executed through a CHX floor broker, the Fee Schedule is also being amended to incorporate a monthly maximum transaction fee schedule for order-sending firms that meet certain monthly volume thresholds. The CHX believes that the proposed transaction fee schedule represents a reasonable balance between the need to maintain a competitive pricing structure and the need to assess a reasonable transaction fee when the assistance of a floor broker is required.<sup>8</sup> In addition, the CHX believes that the transaction fee maximums represent a reasonable allocation of transaction fees, chiefly because the maximums apply to benefit the order-sending firms that route significant levels of order flow to the CHX, which generates increased revenues for the CHX. The CHX also believes that the maximums are fair to all members because they are available to any order-sending firm that chooses to meet the volume thresholds.

#### 2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with the provisions of Section 6(b) of the Act,<sup>9</sup> in general, and Section 6(b)(4) of the Act,<sup>10</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members.

smaller orders to floor brokers via MAX. The proposed amendment would add Section F.4(j) to establish new transaction fee maximums for MAX-delivered, floor broker-assisted orders, based on the number of MAX orders routed to the CHX by the order-sending firm. This change will permit order-sending firms that route a large number of small orders to qualify for a transaction fee cap. The CHX believes that the clarifying provisions of the amendment are necessary to avoid disputes as to the applicability of existing provisions imposing transaction fees and providing for caps. The Exchange notes that no order-sending firm would qualify for both the fee cap in F.4(j) and the fee reduction in F.4(i) because, if an order-sending firm had sufficient numbers of MAX-delivered orders to qualify for the fee cap in (j), the proposed cap would prevent it from generating monthly charges sufficient to qualify for the fee reduction in (i).

<sup>8</sup> The Exchange is also proposing Section F.4(k) to the Fee Schedule to provide that the monthly transaction fee caps are not available to an order-sending firm that cancels a number of orders that exceeds 50% of the firm's CHX executions during the month. The CHX believes that this limitation is an appropriate means of deterring abusive cancellation practices because repetitive cancellations are extremely disruptive to floor members and to the CHX's automated systems.

<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(4).

*B. Self-Regulatory Organization's Statement of Burden on Competition*

The Exchange does not believe that the proposed rule change, as amended, will impose any burden on competition.

*C. Self-Regulatory Organization's Statement on Comments Regarding the Proposed Rule Change Received from Members, Participants or Others*

No written comments were either solicited or received with respect to the proposed rule change, as amended.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing proposed rule change, as amended, has become effective pursuant to Section 19(b)(3)(A)(ii)<sup>11</sup> of the Act, and Rule 19b-4(f)(2)<sup>12</sup> thereunder, because it establishes or changes a due, fee or other charge imposed by the Exchange. At any time within 60 days of the filing of such rule change, the Commission may summarily abrogate such proposed rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.<sup>13</sup>

**III. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549-0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No.

SR-CHX-2003-39. The file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change, as amended, between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to the File No. SR-CHX-2003-39 and should be submitted by March 22, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>14</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-49298; File No. SR-CHX-2004-01]

**Self-Regulatory Organizations; Notice of Filing of a Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Stock Exchange, Inc. Relating to Membership Dues and Fees**

February 23, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice hereby is given that on January 21, 2004, the Chicago Stock Exchange, Inc. ("CHX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. On February 19, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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Below is the text of the proposed rule change. Proposed new language is *italicized*; proposed deletions are in [brackets].

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**MEMBERSHIP DUES AND FEES**

**F. Transaction and Order Processing Fees**

1-3. No change to text.

4. Transaction Fees.

- a. Market orders sent via MAX, *except agency orders executed through floor brokers.* No charge.
- b. All orders sent via MAX in Tape B eligible issues or in the stocks comprising the Standard & Poor's 500 Stock Price Index, *except agency orders executed through floor brokers.* No charge.

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>12</sup> 15 CFR 240.19b-4(f)(2).

<sup>13</sup> See 15 U.S.C. 78s(b)(3)(C). For purposes of calculating the 60-day abrogation period, the Commission considers the period to commence on February 19, 2004, the date the CHX filed Amendment No. 1.

<sup>14</sup> 17 CFR.200.30-3(a)(12).

<sup>15</sup> U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See facsimile from Ellen J. Neely, Senior Vice President & General Counsel, CHX, to A. Michael Pierson, Attorney, and Marisol Rubecindo, Law Clerk, Division of Market Regulation ("Division"), Commission, dated February 19, 2004 ("Amendment No. 1"). Amendment No. 1 replaced the proposed rule change in its entirety.

<sup>4</sup> On December 31, 2003, the Exchange filed an identical amendment to the Fee Schedule, as immediately effective. See SR-CHX-2003-39. Because the Exchange also seeks to apply the Fee Schedule amendments on a retroactive basis (*i.e.*, to the months of November and December, 2003), the Exchange is submitting this proposal for notice and comment.