

of the subaccount. The amount recaptured will equal the amount of the 5% Credits paid out of its general account assets. Although the owner will be entitled to retain any investment gain attributable to the 5% Credit, the amount of such gain will be determined on the basis of the current net asset value of the relevant subaccounts. Thus, no dilution will occur upon the recapture of the 5% Credit. Also, the second harm that Rule 22c-1 was designed to address, namely, speculative trading practices calculated to take advantage of backward pricing, will not occur as a result of the recapture of the 5% Credit. However, to avoid any uncertainty as to full compliance with the Act, Applicants request an exemption from the provisions of Rule 22c-1 to the extent deemed necessary to permit the recapture of the 5% Credits under the Amended Contracts and Future Contracts.

3. Applicants submit that their request for an order, which applies to any Future Contracts that are substantially similar in all material respects to the Amended Contracts described herein, to Contracts described herein, and Future Contracts Covered by the Existing Order, that are substantially similar in all material respects to the Contracts, is appropriate in the public interest. Applicants state that such an order would promote competitiveness in the viable annuity market by eliminating the need to file redundant exemptive applications in the future, thereby reducing administrative expenses and maximizing the efficient use of Applicants' resources. Applicants state that requiring them to file additional Applications would impair their ability effectively to take advantage of business opportunities as they arise, and that investors would not receive any benefit or additional protection by requiring Applicants to repeatedly seek exemptive relief that would present no issue under the Act that has not already been addressed in this Application.

### Conclusion

Applicants submit that their request for an order of exemption that applies to the recapture of bonus credits paid on the Amended Contracts described herein or Future Contracts that are substantially similar in all material respects to the Amended Contracts and underwritten or distributed by Allstate Distributors, Affiliated Broker-Dealers, or Unaffiliated Broker-Dealers, and to Future Accounts Covered by the Existing Order, Contracts and Future Contracts Covered by the Existing Order, is appropriate in the public

interest for the reasons described above. Applicants submit, based on the ground summarized above, that their exemptive request meets the standards set out in section 6(c) of the Act, namely, that the exemptions requested are necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act, and that, therefore, the Commission should grant the requested order.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 02-28484 Filed 11-7-02; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46759; File No. SR-BSE-2002-14]

### Self-Regulatory Organizations; Order Granting Accelerated Approval to Proposed Rule Change by the Boston Stock Exchange, Inc. Relating to an Interpretation of its Execution Guarantee Rule

November 1, 2002.

#### I. Introduction

On September 5, 2002, the Boston Stock Exchange, Inc. ("BSE" or "Exchange") submitted to the Securities and Exchange Commission ("SEC" or "Commission"), 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> a proposed rule change to render voluntary a CHX specialist's obligation to fill limit orders in the specialist's book following a primary market trade-through, if such trade-through occurs in an exchange-traded funds ("ETFs") tracking the Nasdaq-100 Index ("QQQs"), the Dow Jones Industrial Average ("DIAMONDS"), and the Standard & Poor's 500 Index ("SPDRs").

The proposed rule change was published for comment in the **Federal Register** on October 8, 2002.<sup>3</sup> No

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

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

<sup>3</sup> See Securities Exchange Act Release No. 46580 (October 1, 2002), 67 FR 62839. The proposed rule change is currently in effect as a pilot. See Securities Exchange Act Release Nos. 46482 (September 10, 2002), 67 FR 58662 (September 17, 2002) (notice of immediate effectiveness of pilot for the period September 4, 2002 to October 4, 2002); 46651 (October 11, 2002), 67 FR 64669 (October 21,

comments were received on the proposal. This order approves the proposal.

## II. Description of the Proposal

### A. Background

The BSE is a participant in the Intermarket Trading System ("ITS"). The ITS is an order routing network designed to facilitate intermarket trading in exchange-listed equity securities among participating self-regulatory organizations ("SROs") based on current quotation information emanating from their markets. The terms of the linkage are governed by the ITS Plan, a national market system plan approved by the Commission pursuant to Section 11A of the Act and Rule 11Aa3-2 thereunder.<sup>4</sup>

Section 8(d)(i) of the ITS Plan provides that absent reasonable justification or excuse, a member of a Participant Exchange should not effect trade-throughs.<sup>5</sup> If, however, a trade-through does occur and a complaint is received through ITS from the party whose bid or offer was traded through, the party who initiated the trade-through may be required to satisfy the bid or offer traded through or take other remedial action.<sup>6</sup> Each Participant Exchange, including the Phlx,<sup>7</sup> has adopted and obtained Commission approval of a "trade-through rule," which is substantively the same as that provided in the ITS Plan.

In a recent Order, the Commission recognized that the ITS trade-through provisions were designed to encourage market participants to display their trading interest, and to help achieve best execution for customer orders in exchange-listed securities.<sup>8</sup> The Commission also acknowledged, however, that these rules were designed at a time when "the order routing and

2002) (notice of immediate effective of extension of pilot to November 3, 2002.)

<sup>4</sup> See Securities Exchange Act Release No. 19456 (January 27, 1983), 48 FR 4938 (February 3, 1983). The SROs participating in ITS include the American Stock Exchange LLC ("Amex"), the Boston Stock Exchange, Inc. ("BSE"), the Chicago Board Options Exchange, Inc. ("CBOE"), the Chicago Stock Exchange, Inc. ("CSE"), the Cincinnati Stock Exchange, Inc. ("Cincinnati"), the National Association of Securities Dealers, Inc. ("NASD"), the New York Stock Exchange, Inc. ("NYSE"), the Pacific Stock Exchange, Inc. ("PCX"), and the Phlx (collectively "Participant Exchanges").

<sup>5</sup> A trade-through results when a member purchases (or sells) a security at a price that is higher (lower) than the price offered in one or more of the other ITS participant's markets. See ITS Plan, Section 8(d)(i).

<sup>6</sup> See ITS Plan, Exhibit B.

<sup>7</sup> See Phlx Rule 2001A.

<sup>8</sup> See Securities Exchange Act Release No. 46428 (August 28, 2002), 67 FR 56607 (September 4, 2002) at 56607 ("ITS Exemption Order").

execution facilities of markets were much slower, intermarket competition was less keen, and the minimum quote increment for exchange-listed securities was 1/8 of a dollar (\$ 0.125).<sup>9</sup> The Commission noted that with the introduction of decimal pricing and technology changes that greatly reduced execution times, the trade-through provisions of the ITS Plan have limited the ability of a Participant to provide an automated execution when a better price is displayed by another Participant that does not offer automated executions.<sup>10</sup> In support of this conclusion, the Commission explained that certain electronic systems are able to deliver executions in a fraction of a second, while ITS participants have, at a minimum, thirty seconds to respond to a commitment to trade. Because of this, "an ITS Participant seeking to execute a transaction at a price inferior to the price quoted by another ITS Participant must generally either (i) attempt to access the other Participant's quote, which could delay the customer's transaction by thirty seconds or more, or (ii) become potentially liable to the other Participant for the amount by which its quote was traded through."<sup>11</sup>

In its Order, the Commission stated that the ITS trade-through provisions were particularly restrictive in the case of the QQQs, DIAMONDS and SPDRs, as these ETFs are highly liquid securities, and their value is derived from the values of the underlying shares. The Commission noted that immediate execution of these securities might be more important than the opportunity to obtain a better price to certain investors.<sup>12</sup> To address this issue, the Commission granted a *de minimis* exemption from the trade-through provisions of the ITS Plan with respect to transactions in the QQQs, DIAMONDS and SPDRs that are effected at a price no more than three cents away from the best bid and offer quoted in the Consolidated Quote System ("CQS"). This exemption, which went into effect on September 4, 2002 and will remain in effect until June 4, 2003, allows Participants to execute transactions, through automatic execution or otherwise, without attempting to access the quotes of other Participants when

the expected price improvement would not be significant.<sup>13</sup>

### B. Applicability to the BSE

Chapter II, *Dealings on the Exchange*, Section 33, *Execution Guarantee*, of the BSE Rules paragraph (c)(2) states that "(a)ll agency limit orders will be filled if one of the following conditions occur \* \* \* (2) there has been price penetration of the limit in the primary market \* \* \*". There are similar provisions in various sections of Chapter XV, *Dealer Specialists*.<sup>14</sup> These provisions, in particular those set forth in Chapter II, guarantee that a limit order in a BSE specialist's book will be filled if the primary market trades through the limit price. When the BSE specialist provides this trade-through protection to its customer limit orders, he is permitted to seek relief through ITS.

Under the Commission's ITS Exemption Order, however, certain primary market trades-through in the QQQs, DIAMONDS and SPDRs will constitute exempt trades-through, and therefore the specialist will no longer be able to seek recourse to seek satisfaction through ITS from the primary market even though the BSE Rules will require the BSE specialists to provide trade-through protection. Therefore, the BSE has proposed to add Paragraph .07 to the Interpretations and Policies section of Chapter II, *Dealings on the Exchange*, Section 33, *Execution Guarantee*, of the BSE that will permit the Exchange to not enforce the provisions of Paragraph (c)(2) of Section 33 following a *de minimis* trade through of certain ETFs outlined in the ITS Exemption Order.

### III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>15</sup> In particular, the

<sup>13</sup> *Id.* at 56608.

<sup>14</sup> See, e.g., the Commentary to Section 1, *Specialists*, which sets forth a specialist's obligations in relation to buying and selling on a principal basis while holding unexecuted orders in his book; Section 2, *Responsibilities*, which sets forth, in part, a specialist's primary duties as agent; Section 4, *Precedence to Orders in the Book*, which sets forth the precedence parameters a specialist must adhere to; and Section 18, *Procedures for Competing Specialists*, which sets forth, in various paragraphs, obligations which may conflict with the *de minimis* exemption in the Order.

<sup>15</sup> In approving this rule proposal, the Commission notes that it has also considered the

Commission finds that the proposed rule is consistent with the requirements of section 6(b)(5) of the Act<sup>16</sup> because it is designed to facilitate 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 is not designed to permit unfair discrimination between customers, issuers, brokers or dealers.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of the publication of notice thereof in the **Federal Register**. By adopting the proposed exemption, the Exchange removes the specialist's obligation to provide trade-through protection in situations where it will not be permitted to seek satisfaction through ITS from the primary market. This obligation was one the BSE assumed voluntarily in order to make its market more attractive to sources of order flow, not an obligation the Act imposes on a market. The Commission believes that the business decision to potentially forego order flow by no longer providing print protection is a judgment the Act allows the BSE to make.<sup>17</sup> Further the Commission notes that it approved similar proposed rule changes for the Chicago Stock Exchange, Inc. ("CHX") and the Philadelphia Stock Exchange, Inc. ("PHLX"), and believes that it is appropriate to grant the same relief to the BSE in a timely manner.<sup>18</sup>

### IV. Conclusion

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act,<sup>19</sup> that the proposed rule change (SR-BSE-2002-14) is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>20</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>16</sup> 15 U.S.C. 78f(b)(5).

<sup>17</sup> The Commission notes that the BSE's proposed rule change will remain in effect only until the expiration of the Commission's ITS Exemption Order on June 4, 2003.

<sup>18</sup> See Securities Exchange Act Release Nos. 46760 (November 1, 2002) (order approving SR-CHX-2002-31); and 46761 (November 1, 2002) (order approving SR-PHLX-2002-49).

<sup>19</sup> 15 U.S.C. 78f(b)(2).

<sup>20</sup> 17 CFR 200.30-3(a)(12).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 56607-8.

<sup>12</sup> *Id.*