

III. Discussion

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, with the requirements of section 6(b) of the Act.¹⁴ Specifically, the Commission finds that the proposed rule change is consistent with section 6(b)(5) of the Act,¹⁵ in that it is designed, among other things, to facilitate transactions in securities; to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; 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 does not permit unfair discrimination among issuers.

In the Commission's view, the proposed rule change will foster greater transparency, accountability, and objectivity in the oversight by, and decision-making processes of, the boards and key committees of Amex listed issuers. The proposal also will promote compliance with high standards of conduct by the issuers' directors and management. The Commission notes that the Amex has amended its proposal to harmonize it in many areas with rule changes recently approved by the Commission for the New York Stock Exchange, Inc. and the National Association of Securities Dealers, Inc.

In addition, in the Commission's view, the proposed rule change is consonant with Rule 10A-3, which requires that the rules of a national securities exchange prohibit the initial or continued listing of any security of an issuer that is not in compliance with the requirements of any portion of paragraph 9(b) or (c) of Rule 10A-3. In this regard, the proposed rule change will promote independent and objective review and oversight of an Amex-listed issuer's financial reporting practices.

The Commission believes that the provisions that the Amex has included to accommodate small business filers by requiring them to have 50%, rather than a majority, of their boards comprised of independent directors, and by requiring them to have two, rather than three, members on their audit committees, are reasonable.

The Commission also believes that the provision added by Amex to prohibit a listed company from appointing or permitting an employee or Floor Member of the Exchange to serve on its board is reasonable and appropriate, as is the provision placing certain limits on the division of a listed company's board of directors into classes.

The Commission notes that other provisions proposed by Amex vary somewhat from corporate governance rules recently approved by the Commission for other SROs. For example, with respect to the proposed three-year "look back" periods that would apply to relationships that preclude a finding of director independence, certain "look-back" periods would cover only one year for the first year following Commission approval of the requirements, while other "look-back" periods would cover three years following Commission approval of the requirements. Amex also would require each company listed on the Exchange to adopt either a formal written charter or board resolution, as applicable, that addresses the nominations process. Amex also has included a provision to explicitly require an audit committee to meet on a quarterly basis. The Commission believes that these provisions are reasonable.

Furthermore, the Commission finds good cause, consistent with section 19(b)(2) of the Act,¹⁶ to approve Amendment No. 2 to the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. The Commission notes that most of the changes proposed in Amendment No. 2 correspond to similar provisions approved by the Commission for other self-regulatory organizations,¹⁷ and raise no new issues. With respect to changes proposed in Amendment No. 2 that are unique with respect to Amex, the Commission believes that these provisions are reasonable and that accelerating their approval will enable Amex to put into place its complete set of corporate governance standards for listed companies in time for the 2004 proxy season for the large majority of its listed companies. In addition, the Amex provisions relating to audit committees respond to the mandate of Rule 10A-3, which requires SROs to have such rules in place by December 1, 2003.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 2, including whether Amendment No. 2 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. 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 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 filings will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-Amex-2003-65 and should be submitted by December 29, 2003.

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act¹⁸, that Amendment No. 2 be granted accelerated approval and that the proposed rule change (File No. SR-Amex-2003-65), as amended, be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁹

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48859; File No. SR-CHX-2003-23]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Stock Exchange, Incorporated to Amend Article XX, Rule 37(a)(4) Relating to the Definition of Preopening Order

December 1, 2003.

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

¹⁴ 15 U.S.C. 78(b). In approving the proposed rule change, as amended, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁵ 15 U.S.C. 78(b)(5).

¹⁶ 15 U.S.C. 78s(b)(2).

¹⁷ See NYSE/NASD Corporate Governance Release, *supra* n. 11.

¹⁸ 15 U.S.C. 78s(b)(2).

¹⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

notice is hereby given that on August 1, 2003, the Chicago Stock Exchange, Incorporated ("CHX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange submitted an amendment to the proposed rule change on November 6, 2003.³ 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 CHX Article XX, Rule 37(a)(4), which governs execution of preopening orders on the CHX. Specifically, the CHX seeks to modify the definition of "preopening order" to provide that preopening orders for Nasdaq/NM securities must be received at or prior to 8:20 a.m. (CT), instead of the 8:25 (CT) deadline currently set forth in the rule.⁴ Below is the text of the proposed rule change, as amended. New language is *italicized*, and deletions are bracketed.

* * * * *

Chicago Stock Exchange Rules

ARTICLE XX

Regular Trading Sessions

Guaranteed Execution System and Midwest Automated Execution System RULE 37.

- (a) No change to text.
1-3. No change to text.

4. Preopenings. Preopening orders in Dual Trading System issues must be accepted and filled at the primary market opening trading price. In trading halt situations occurring in the primary market, orders will be executed based upon the reopening price. Preopening orders in NASDAQ/NM securities must be accepted and filled on a single price opening at or better than the NBBO at the first unlocked, uncrossed market. In trading halt situations, orders will be executed based on the Exchange reopening price. For purposes of this rule, (a) pre-opening orders in Dual Trading System Issues are orders that are received before a primary market opens a subject security based on a print

or based on a quote and (b) preopening orders in NASDAQ/NM securities are orders received at or prior to 8:20 [25] a.m. (Central Time) on the date of the opening.

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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 CHX included statements concerning the purpose of and basis for the proposed rule change, as amended, and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The CHX 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 CHX seeks to amend CHX Article XX, Rule 37(a)(4), which governs execution of preopening orders on the CHX, by modifying the definition of "preopening order" to provide that preopening orders for Nasdaq/NM securities must be received at or prior to 8:20 a.m. (CT), instead of the 8:25 (CT) deadline currently set forth in the rule.

Under the current version of the CHX rule, all preopening orders for Nasdaq/NM securities are accepted and filled on a single price opening at or better than the national best bid or offer ("NBBO") at the first unlocked, uncrossed market. The Exchange represents that the single price opening for preopening orders was enacted voluntarily by the Exchange in early 2001⁵ as an execution guarantee similar to the Exchange's provisions relating to price improvement. The Exchange believes that the single price opening, like price improvement, often provides for execution of preopening orders at execution prices more favorable than if the Exchange did not offer a single price opening. The Exchange's 2001 submission established an 8:25 (CT) deadline for preopening orders. Orders received after 8:25 (CT) are treated as standard market orders under the Exchange's general rules governing execution of market orders.

The proposed change to the rule governing the 8:25 (CT) deadline for preopening orders was formulated by

the Exchange's OTC Subcommittee, which is composed of CHX specialists who trade Nasdaq/NM securities. The members of the OTC Subcommittee believe that an earlier deadline for preopening orders is a modest yet important modification to their single price execution guarantee for preopening orders.

To place their request in context, the CHX represents that it is virtually the only market center that guarantees a single price opening at or better than the NBBO at the first unlocked, uncrossed market. The Exchange's competitors generally base their execution of preopening orders on the prices and order imbalances within their own systems, rather than the NBBO for Nasdaq/NM securities. Accordingly, the Exchange believes that its OTC specialists bear a significantly higher degree of risk with respect to preopening orders, since they are obligated to execute such orders based on the first unlocked, uncrossed NBBO. In situations where there is a significant imbalance in preopening orders for a particular issue, this execution guarantee can result in significantly adverse swings in a CHX specialist's position. The Exchange believes that an earlier deadline for preopening orders, by operating to reduce the aggregate amount of preopening orders received by a CHX specialist, would better enable the CHX specialist to manage his position and to better fulfill his specialist duties by giving him time to fully evaluate his position and to make a professional price assessment that would inform his executions once trading commences for the day.⁶

An additional reason for an 8:20 (CT) deadline relates to the operation of NASDAQ's SuperMontage® system, in which the CHX participates. The SuperMontage rules establish 8:20:00 (CT) through 8:29:59 (CT) as the time period during which NASDAQ market makers (including electronic communication networks) can route "trade or move" messages to SuperMontage participants whose quotes might be inferior in price to a price that another participant seeks to

⁶ Significantly, an order received prior to the open which is not a "preopening" order (*i.e.*, which is received between the preopening order deadline and the 8:30 (CT) open) must still be executed in accordance with the Exchange's BEST rule (CHX Article XX, Rule 37(a)), which requires execution of market and marketable limit orders at the NBBO, or requires a CHX specialist to act as agent for the order to obtain the best available price in the marketplace, using order routing systems where appropriate. The CHX thus does not anticipate that such orders would be disadvantaged in terms of price once they are executed following the open; the orders simply would not participate in the single price opening.

³ See letter from Kathleen M. Boege, Associate General Counsel, CHX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated November 4, 2003, replacing Form 19b-4 in its entirety ("Amendment No. 1"). In Amendment No. 1, the CHX expands upon the purpose of the proposed rule change.

⁴ All times referred to in the proposed rule change, as amended, are Central Time (CT).

⁵ See Securities Exchange Act Release No. 44062 (March 12, 2001), 66 FR 15514 (March 19, 2001).

disseminate. Before a CHX specialist can respond to a "trade or move" request in an informed fashion, he must be fully apprised of his updated position, based on the comprehensive data of all preopening orders that he has received. The Exchange believes that an 8:20 (CT) deadline for CHX preopening orders would better enable CHX specialists to comply with SuperMontage rules and procedures governing the vital "trade or move" functionality.

Accordingly, the Exchange believes that the modification requested by the OTC Subcommittee is appropriate. Because the Exchange believes that the current single price opening guarantee was enacted voluntarily as a means of attracting customer order flow and is not required under the Act or any other legislative mandate, the Exchange believes that it is appropriate for OTC specialists to modify slightly the parameters under which this guarantee is available.

2. Statutory Basis

The CHX believes the proposal, as amended, is consistent with the requirements of Section 6(b)⁷ of the Act in general, and Section 6(b)(5) of the Act⁸ in particular, because it is designed to promote just and equitable principles of trade, to remove impediments and to perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

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 inappropriate burden on competition.

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

No written comments were either solicited or received.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or

(ii) as to which the Exchange consents, the Commission will:

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

The CHX has requested accelerated approval of the proposed rule change, as amended. While the Commission will not grant accelerated approval at this time, the Commission will consider granting accelerated approval of the proposal, as amended, at the close of an abbreviated comment period of 15 days from the date of publication of the proposal in the **Federal Register**.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, 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. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change, as amended, 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 CHX. All submissions should refer to File No. SR-CHX-2003-23 and should be submitted by December 23, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁹

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48860; File No. SR-CHX-2003-19]

Self-Regulatory Organizations; Order Granting Partial Approval of Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 1 Thereto by the Chicago Stock Exchange, Inc. Relating to Governance of Issuers on the CHX

December 1, 2003.

I. Introduction

On July 28, 2003, the Chicago Stock Exchange, Inc. ("CHX" or "Exchange"), filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² a proposed rule change to amend certain provisions of its rules relating to the governance of issuers that list securities on the CHX.

The proposed rule change, among other things, would require each issuer listed on the CHX to establish an independent audit committee and to comply with the standards for audit committees mandated by Section 10A(m) of the Act³ and Rule 10A-3 thereunder.⁴ The proposal also would amend the CHX's Tier I and Tier II listing standards to enhance its requirements relating to the roles and responsibilities of independent directors and independent board committees, including audit committees, nominating committees and compensation committees. The proposal further includes amendments to the CHX's maintenance standards to set out a process that would allow an issuer an opportunity to cure a failure to meet the Exchange's maintenance listing standards, including its governance-related standards.

On October 28, 2003, the Commission published the proposed rule change for comment in the **Federal Register**.⁵ The Commission received no comments on the proposal. On November 24, 2003, the Exchange filed Amendment No. 1 to the proposal.⁶

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78j-1(m).

⁴ 17 CFR 240.10A-3.

⁵ See Securities Exchange Act Release No. 48669 (October 21, 2003), 68 FR 61500 (October 28, 2003).

⁶ See letter from Ellen J. Neely, Senior Vice President and General Counsel, CHX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated November 21, 2003 ("Amendment No. 1"). In Amendment No. 1, the Exchange requested that the Commission grant approval at this time to: (a) the sections that relate

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(5).

⁹ 17 CFR 200.30-3(a)(12).