

accelerated basis, for a six-month pilot period until August 6, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04-3023 Filed 2-11-04; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49191; File No. SR-BSE-2004-04]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the Boston Stock Exchange, Inc. To Add a New Section to the Rules of the Boston Options Exchange Relating to the Exercise and Delivery of Options Contracts

February 4, 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 is hereby given that on January 29, 2004, the Boston Stock Exchange, Inc. ("BSE" or "Exchange") submitted to 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 BSE. On February 4, 2004, the BSE amended 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 the Rules of the Boston Options Exchange (the "BOX Rules") regarding the exercise and delivery of options contracts. Below is the text of the proposed rule change, as amended. Proposed new language is italicized; proposed deleted text is [bracketed].

\* \* \* \* \*

## RULES OF THE BOSTON STOCK EXCHANGE

### RULES OF THE BOSTON OPTIONS EXCHANGE FACILITY

Trading of options contracts on BOX

#### Chapter VII. Exercises and Deliveries

##### Sec. 1 Exercise of Options Contracts

(a) Subject to the restrictions set forth in Chapter III, Section 9 of these Rules (Exercise Limits) and to such restrictions as may be imposed pursuant to Chapter III, Section 12 of these Rules (Other Restrictions on Options Transactions and Exercises) or pursuant to the Rules of the Clearing Corporation, an outstanding options contract may be exercised during the time period specified in the Rules of the Clearing Corporation by the tender to the Clearing Corporation of an exercise notice in accordance with the Rules of the Clearing Corporation. An exercise notice may be tendered to the Clearing Corporation only by the Clearing Participant in the account of which such options contract is carried with the Clearing Corporation. *Participants may establish fixed procedures as to the latest time they will accept exercise instructions from customers.*

[(b) The exercise cutoff time for all non cash-settled options shall be 5:30 p.m. EST on the business day immediately prior to the expiration date. This is the latest time at which an exercise instruction for expiring non cash-settled options positions may be:

- i. Prepared by a Clearing Participant for positions in its proprietary trading account;
- ii. Submitted to a Clearing Participant by an Options Participant for positions in the Options Participant's account or error account;
- iii. Accepted by an Options Participant from any customer for its positions in the customer's account.

(c) Notwithstanding the foregoing, Options Participants may receive and Options Participants may submit exercise instructions after the exercise cutoff time but prior to expiration in the circumstances listed below. A memorandum setting forth the circumstance giving rise to instructions after the exercise cutoff time shall be maintained by the Participant and a copy thereof shall be promptly filed with BOXR. An exercise instruction after the exercise cutoff may be received or submitted:

- i. in order to remedy mistakes or errors made in good faith;
- ii. where exceptional circumstances relating to a customer's or person's ability to communicate exercise

instructions to the Participant (or the Participant's ability to receive exercise instructions) prior to such cutoff time warrant such action.

(d) Submitting or preparing an exercise instruction after the exercise cutoff time in any expiring options on the basis of material information released after the cutoff time is activity inconsistent with just and equitable principles of trade.

(e) For purposes of this Chapter VII with respect to any Options Participant, the word "customer" shall mean every person or organization other than a Market Maker, broker or the Participant itself. The term "exercise instruction," with respect to a Market Maker, broker and Clearing Participant, shall also mean a notice either not to exercise an options position which would otherwise be exercised, or to exercise an options position which would otherwise not be exercised, by operation of the Rules of the Clearing Corporation, or to modify or withdraw a previously submitted instruction. All exercise instructions must be time stamped at the time they are prepared.

(f) No Options Participant may prepare, time stamp or submit an exercise instruction prior to the purchase of the exercised contracts if the Options Participant knew or had reason to know that the contracts had not yet been purchased.

(g) Clearing Participants must follow the procedures of the Clearing Corporation when exercising expiring non cash-settled equity options contracts. Options Participants also must follow the procedures set forth below with respect to the exercise of non cash-settled equity options contracts which would otherwise not be exercised, or the non exercise of contracts which otherwise would be exercised, by operation of Clearing Corporation Rule 804:

i. For all contracts so exercised or not exercised, a "contrary exercise advice," must be delivered by the Market Maker, broker or clearing firm, as applicable, in such form or manner prescribed by BOXR no later than 5:30 p.m. est.

ii. Subsequent to the delivery of a "contrary exercise advice," should the Market Maker, broker, customer or firm determine to act other than as reflected on the original advice form, the Market Maker, broker, or clearing firm, as applicable, must also deliver an "advice cancel," in such form or manner prescribed by BOXR no later than 5:30 p.m. est.

iii. Options Participants shall properly communicate to BOX final exercise decisions in respect of

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

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

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

<sup>3</sup> See letter from John A. Boese, Vice President, Legal and Compliance, BSE, to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, dated February 4, 2004 ("Amendment No. 1"). In Amendment No. 1, the BSE made technical corrections to its rule text, changing two references of the term "Exchange" to "BOX."

positions for which they are responsible.

iv. The preparation, time stamping or submission of a "contrary exercise advise" prior to the purchase of the contracts to be exercised or not exercised shall be deemed a violation of this Section.

v. All of the above procedures of this paragraph (g) are in full force and effect whether or not the Clearing Corporation waives the exercise by exception provisions of its Rule 804; in the event of such waiver the procedures of this paragraph shall be followed as if such provisions of Clearing Corporation Rule 804 were in full force and effect. The Clearing Corporation rules may require the submission of an affirmative exercise notice even in circumstances where a contrary exercise advise is not submitted.

vi. The failure of any Options Participant to follow the procedures in this paragraph (g) may result in the assessment of a fine, which may include but is not limited to disgorgement of potential economic gain obtained or loss avoided by the subject exercise, as determined by BOXR.]

(b) *Special procedures apply to the exercise of equity options on the last business day before their expiration ("expiring options"). Unless waived by the Clearing Corporation, expiring options are subject to the Exercise-by-Exception ("Ex-by-Ex") procedure under Clearing Corporation Rule 805. This Rule provides that, unless contrary instructions are given, option contracts that are in-the-money by specified amounts shall be automatically exercised. In addition to the Rules of the Clearing Corporation, the following BOX requirements apply with respect to expiring options. Option holders desiring to exercise or not exercise expiring options must either:*

(i) *take no action and allow exercise determinations to be made in accordance with the Clearing Corporation's Ex-by-Ex procedure where applicable; or*

(ii) *submit a "Contrary Exercise Advice" to BOX by the deadline specified in paragraph (c) below. A Contrary Exercise Advice is a communication either: (a) To not exercise an option that would be automatically exercised under the Clearing Corporation's Ex-by-Ex procedure, or (b) to exercise an option that would not be automatically exercised under the Clearing Corporation's Ex-by-Ex procedure. A Contrary Exercise Advice may be submitted by a Participant by using BOX's Contrary Exercise Advice Form, the Clearing Corporation's ENCORE*

*system, a Contrary Exercise Advice form of any other national securities exchange of which the firm is a Participant and where the option is listed, or such other method as BOX may prescribe. A Contrary Exercise Advice may be canceled by filing an "Advice Cancel" with BOX or resubmitted at any time up to the submission cut-off times specified below.*

(c) *Exercise cut-off time. Option holders have until 5:30 p.m. Eastern Time on the business day immediately prior to the expiration date to make a final decision to exercise or not exercise an expiring option. For customer accounts, Participants may not accept exercise instructions after 5:30 p.m. Eastern Time but have until 6:30 p.m. Eastern Time to submit a Contrary Exercise Advice. For non-customer accounts, Participants may not accept exercise instructions after 5:30 p.m. Eastern Time but have until 6:30 p.m. Eastern Time to submit a Contrary Exercise Advice if such Participant employs an electronic submission procedure with time stamp for the submission of exercise instructions by option holders. Consistent with Supplemental Material .03, Participants are required to submit a Contrary Exercise Advice by 5:30 p.m. for non-customer accounts if such Participants do not employ an electronic submission procedure with time stamp for the submission of exercise instructions by option holders.*

(d) *If the Clearing Corporation has waived the Ex-by-Ex procedure for an options class, Participants must either:*

(i) *submit to BOX, a Contrary Exercise Advice, in a manner specified by BOX, within the time limits specified in paragraph (c) above if the holder intends to exercise the option; or*

(ii) *take no action and allow the option to expire without being exercised. In cases where the Ex-by-Ex procedure has been waived, the Rules of the Clearing Corporation require that Participants wishing to exercise such options must submit an affirmative Exercise Notice to the Clearing Corporation, whether or not a Contrary Exercise Advice has been filed with BOX.*

(e) *A Participant that has accepted the responsibility to indicate final exercise decisions on behalf of another Participant or non-Participant broker-dealer shall take the necessary steps to ensure that such decisions are properly indicated to BOX. Such Participant may establish a processing cut-off time prior to BOX's exercise cut-off time at which it will no longer accept final exercise decisions in expiring options from*

*option holders for whom it indicates final exercise decisions. Each Participant that indicates final exercise decisions through another broker-dealer is responsible for ensuring that final exercise decisions for all of its proprietary (including market maker) and public customer account positions are indicated in a timely manner to such broker-dealer.*

(f) *Notwithstanding the foregoing, Participants may make final exercise decisions after the exercise cut-off time but prior to expiration without having submitted a Contrary Exercise Advice in the circumstances listed below. A memorandum setting forth the circumstance giving rise to instructions after the exercise cutoff time shall be maintained by the Participant and a copy thereof shall be filed with BOX no later than 12:00 noon Eastern Time on the first business day following the respective expiration. An exercise decision after the exercise cut-off time may be made:*

(i) *in order to remedy mistakes or errors made in good faith; or*

(ii) *where exceptional circumstances have restricted an option holder's ability to inform a Participant of a decision regarding exercise, or a Participant's ability to receive an option holder's decision by the cut-off time. The burden of establishing any of the above exceptions rests solely on the Participant seeking to rely on such exceptions.*

(g) *In the event BOX provides advance notice on or before 5:30 p.m. Eastern Time on the business day immediately prior to the last business day before the expiration date indicating that a modified time for the close of trading in equity options on such last business day before expiration will occur, then the deadline to make a final decision to exercise or not exercise an expiring option shall be 1 hour 28 minutes following the time announced for the close of trading on that day instead of the 5:30 p.m. Eastern Time deadline found in Paragraph (c) of this Section 1. However, Participants may deliver a Contrary Exercise Advice or Advice Cancel to BOX within 2 hours 28 minutes following the time announced for the close of trading in equity options on that day instead of the 6:30 p.m. Eastern Time deadline found in Paragraph(c) of this Section 1 for customer accounts and non-customer accounts where such Participant employs an electronic submission procedure with time stamp for the submission of exercise instructions. For non-customer accounts, Participants that do not employ an electronic procedure with time stamp for the*

submission of exercise instructions are required to deliver a Contrary Exercise Advice or Advice Cancel within 1 hour and 28 minutes following the time announced for the close of trading on that day instead of the 5:30 p.m. Eastern Time deadline found in Paragraph(c) of this Section 1.

(h) Modification of cut-off time.

(i) BOX may establish extended cut-off times for decision to exercise or not exercise an expiring option and for the submission of Contrary Exercise Advices on a case-by-case basis due to unusual circumstances. For purposes of this subparagraph (h)(i), an "unusual circumstance" includes, but is not limited to, increased market volatility; significant order imbalances; significant volume surges and/or systems capacity constraints; significant spreads between the bid and offer in underlying securities; internal system malfunctions affecting the ability to disseminate or update market quotes and/or deliver orders; or other similar occurrences.

(ii) BOX with at least one (1) business day prior advance notice, by 12:00 noon on such day, may establish a reduced cut-off time for the decision to exercise or not exercise an expiring option and for the submission of Contrary Exercise Advices on a case-by-case basis due to unusual circumstances; provided, however, that under no circumstances should the exercise cut-off time and the time for submission of a Contrary Exercise Advice be before the close of trading. For purposes of this subparagraph (h)(ii), an "unusual circumstance" includes, but is not limited to, a significant news announcement concerning the underlying security of an option contract that is scheduled to be released just after the close on the business day immediately prior to expiration.

(i) Submitting or preparing an exercise instruction, contrary exercise advice or advice cancel after the applicable exercise cut-off time in any expiring options on the basis of material information released after the cut-off time is activity inconsistent with just and equitable principles of trade.

(j) The failure of any Participant to follow the procedures in this Section 1 may result in the assessment of a fine, which may include but is not limited to disgorgement of potential economic gain obtained or loss avoided by the subject exercise, as determined by BOX.

#### Supplementary Material

.01 For purposes of this Section 1, the terms "customer account" and "non-customer account" have the same meaning as defined in the Clearing

Corporation By-Laws Article I(C)(28) and Article I(N)(2), respectively.

.02 Each Participant shall prepare a memorandum of every exercise instruction received showing the time when such instruction was so received. Such memoranda shall be subject to the requirements of SEC Rule 17a-4(b).

.03 Although the deadline for all option holders to make a final decision to exercise or not exercise is 5:30 p.m. Eastern Time, the deadline for the submission of the Contrary Exercise Advice in the case of non-customer accounts will depend on the manner of the decision to exercise or not exercise.

(i) For electronic time stamp submissions of the exercise decision by non-customer option holders, a Contrary Exercise Advice submitted by Participants must be received by BOX by 6:30 p.m. Eastern Time.

(ii) For manual submissions of the exercise decision by non-customer option holders, a Contrary Exercise Advice submitted by Participants must be received by BOX by 5:30 p.m. Eastern Time.

.04 Each Participant shall establish fixed procedures to insure secure time stamps in connection with their electronic systems employed for the recording of submissions to exercise or not exercise expiring options.

.05 The filing of a Contrary Exercise Advice required by this Section 1 does not serve to substitute as the effective notice to the Clearing Corporation for the exercise or non-exercise of expiring options.

\* \* \* \* \*

## 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 BSE 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 and is set forth in sections A, B, and C below.

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

#### 1. Purpose

The purpose of the proposed rule change is to amend the BOX Rules relating to the exercise of options contracts. Chapter VII, *Exercises and Deliveries*, Section 1, *Exercise of Options Contracts* contains various procedures, requirements, and

guidelines regarding the exercise of options contracts. Due to recent changes in the practices and rules of other options exchanges in this area, particularly in regard to contrary exercise advices, the BSE proposes to amend Chapter VII, *Exercises and Deliveries*, Section 1, *Exercise of Options Contracts* in order to remain consistent with the similar rules of other options exchanges.

#### 2. Statutory Basis

The Exchange believes that its proposed rule change is consistent with Section 6(b) of the Act in general<sup>4</sup> and furthers the objectives of Section 6(b)(5) in particular,<sup>5</sup> because it is designed 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 to protect investors and the general public by adopting rules for the exercise of options contracts consistent with the rules of the Options Clearing Corporation.

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

The Exchange believes that the proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

The Exchange has neither solicited nor received comments on the proposed rule change.

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

The proposed rule change, as amended, has been filed by the Exchange pursuant to Section 19(b)(3)(A) of the Act<sup>6</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>7</sup> Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for thirty days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section

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

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

<sup>6</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>7</sup> 17 CFR 240.19b-4(f)(6).

19(b)(3)(A) of the Act<sup>8</sup> and Rule 19b-4(f)(6)<sup>9</sup> thereunder.<sup>10</sup>

A proposed rule change filed under Rule 19b-4(f)(6)<sup>11</sup> normally does not become operative prior to thirty days after the date of filing. However, pursuant to Rule 19b-4(f)(6)(iii), the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The BSE has requested that the Commission accelerate the thirty-day operative date so that the Exchange may remain competitive with other exchanges that currently have similar rules in effect.

The Commission believes that waiving the thirty-day operative date is consistent with the protection of investors and the public interest.<sup>12</sup> Accelerating the operative date will allow the BSE to immediately implement rules similar to ones already in place at the other options exchanges,<sup>13</sup> and will simplify and clarify the process by which BOX Participants accept exercise decisions from options holders and submit such decisions to the Exchange. For these reasons, the Commission designates the proposed rule change, as amended, as effective and operative immediately. At any time within 60 days of the filing of the proposed rule change, as amended, 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>14</sup>

#### 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. Comments may also be submitted electronically at the following e-mail address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-BSE-2004-04. This 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 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 File No. SR-BSE-2004-04 and should be submitted by March 4, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>15</sup>

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04-3027 Filed 2-11-04; 8:45 am]

BILLING CODE 8010-01-P

#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49194; File No. SR-CBOE-2003-59]

#### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Board Options Exchange, Inc. Relating to the Exchange's Obvious Error Rule

February 5, 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 is hereby given that on December 22, 2003, the Chicago Board Options Exchange, Inc. ("CBOE" 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 CBOE. On January 20, 2004, CBOE submitted 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

CBOE proposes to extend portions of its obvious error rule to open outcry transactions. Proposed new language is *italicized*; proposed deletions are in [brackets].

\* \* \* \* \*

#### Rule 6.25 Nullification and Adjustment of [Electronic] Transactions

This Rule governs the nullification and adjustment of options trades [executed electronically and has no application to options trades executed in open outcry]. *Paragraphs (a)(1), (2), and (6) of this Rule have no applicability to trades executed in open outcry.*

(a)-(e) No change.

#### Interpretations and Policies \* \* \*

.01—.02 No change.

\* \* \* \* \*

#### 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.

<sup>3</sup> See letter from Steve Youhn, Legal Division, CBOE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated January 16, 2004. Amendment No. 1 amended the introductory paragraph of CBOE Rule 6.25 to clarify that existing paragraphs (b)-(e) of CBOE Rule 6.25 will apply to the adjustment and nullification of open outcry transactions in the exact same manner that they apply to electronic transactions. Amendment No. 1 also amended the title of CBOE Rule 6.25 to eliminate the word "Electronic."

<sup>8</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>9</sup> 17 CFR 240.19b-4(f)(6).

<sup>10</sup> As required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to the filing date or such shorter period as designated by the Commission.

<sup>11</sup> 17 CFR 240.19b-4(f)(6).

<sup>12</sup> For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation.<sup>15</sup> U.S.C. 78c(f).

<sup>13</sup> See Securities Exchange Act Release Nos. 47885 (May 16, 2003), 68 FR 28309 (May 23, 2003) (SR-Amex-2001-92); 48505 (September 17, 2003), 68 FR 55680 (September 26, 2003) (SR-ISE-2003-20); 48640 (October 16, 2003), 68 FR 60757 (October 23, 2003) (SR-PCX-2003-47); and 48639 (October 16, 2003), 68 FR 60764 (October 23, 2003) (SR-Phlx-2003-65).

<sup>14</sup> For purposes of calculating the sixty-day abrogation period, the Commission considers the period to commence on February 4, 2004, the date at which the Exchange filed Amendment No. 1.

<sup>15</sup> 17 CFR 200.30-3(a)(12).

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

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