

period after credit application without the recapture of the credits, the Insurer may not be able to fully recover its costs. If the Insurer did not recapture the credits and instead raised other charges under the Contract, the Insurer could be charging persisting owners enrolled in the product more than may otherwise be necessary to recover the costs attributable to such owners.

13. Applicants seek the relief requested herein not only with respect to themselves and the Contracts described above, but also with respect to Future Contracts issued by themselves through Future Accounts and underwritten by Future Underwriters. Applicants represent that the terms of the relief requested with respect to any Future Contract, Future Account, and Future Underwriter are consistent with standards set forth in section 6(c) of the 1940 Act.

14. Applicants state that, without the requested class relief, exemptive relief for any Future Contract, Future Account, and Future Underwriter would have to be requested and obtained separately. Applicants assert that these additional requests for exemptive relief would present no issues under the 1940 Act not already addressed in this application. Applicants state that if the Applicants were to repeatedly seek exemptive relief with respect to the same issues, investors would not receive additional protection or benefit, and investors and the Applicants could be disadvantaged by increased costs from preparing such additional requests for relief. Applicants argue that the requested class relief is appropriate in the public interest because the relief will promote competitiveness in the variable annuity market by eliminating the need for Applicants to file redundant exemptive applications, thereby reducing administrative expenses and maximizing efficient use of resources. Elimination of the delay and the expense of repeatedly seeking exemptive relief would, Applicants argue, enhance each Applicant's ability to effectively take advantage of business opportunities as such opportunities arise. Applicants assert, for all the reasons stated herein, that their request for class exemptions is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the Contract and provisions of the 1940 Act, and that an order of the Commission including such class relief, should, therefore, be granted.

## Conclusion

For the reasons stated above, Applicants assert that the requested

exemptions, in accordance with the standards of section 6(c), are appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 00-31896 Filed 12-13-00; 8:45 am]

BILLING CODE 8010-01-M

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-43685; File No. SR-BSE-00-04]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change, as Amended by the Boston Stock Exchange, Inc., Relating to an Amendment to the Post Primary Session ("PPS")

December 6, 2000.

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 March 9, 2000, the Boston Stock Exchange, Inc. ("BSE" 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 December 6, 2000, the BSE 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 seeks to amend existing rules under Chapter IIB, *Post 4:00 P.M. Trading*, which will allow member firms to accommodate various customer average pricing programs based on the primary market's primary trading session and to permit risk based portfolio programs which are based on the primary market's closing price.

<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 Boese, Assistant Vice President, BSE, to Alton Harvey, Office Chief, Office of Market Watch, Division of Market Regulation, Commission, dated December 1, 2000 ("Amendment No. 1"). In Amendment No. 1, the BSE made corrections to its rule text and clarified issues regarding the language used in its filing.

The proposed rule language is as follows: The new language is in *italics*.

## CHAPTER IIB

### Facilitation of GTX Orders

#### Application of Chapter

Sec. 1. This chapter applies to the facilitation of certain orders after the close of the 9:30 a.m. to 4:00 p.m. trading session. All other provisions of the Constitution and Rules of the Exchange are applicable unless superseded by this chapter.

#### Facilitation of Customer Average Pricing Programs "CP"s Eligible for Reporting During PPS

Sec. 4. *This section applies to the facilitation of certain transactions hereinafter referred to as Customer Average Pricing Programs, "CP"s, which are reported during the PPS to facilitate transactions in single issue, or portfolios of stocks. In order to be eligible under this rule, all CPs must facilitate customer-to-customer (agency), or customer-to-principal (principal) average pricing programs that are based on primary market average prices. For the purposes of this Section and Section 5, only those stocks that are listed on the Exchange, or that are traded pursuant to Unlisted Trading Privileges (UTP), shall be eligible for these programs.*

*(a) CPs are not exposed to the Exchange's PPS auction, are not price protected during PPS, and thus, may not be broken-up upon entry to the Exchange.<sup>1</sup>*

*(b) CPs must be electronically communicated to the Exchange via BEACON, identified as "CP" on each cross, entered by symbol and price, into the system, identified as to "principal" or "agency", and when applicable, identified as "short exempt". The time slice must be identified on the cross, identifying the beginning and ending slice for CP entered crosses.*

*BEACON will record the transaction for Tape reporting with the identifier "W", to the nearest fraction or decimal eligible for reporting by the Exchange.*

*(c) The following CP crossed orders are eligible for Reporting during the PPS:*

*(i) Primary Market Average Price—Benchmark +/- (Plus or Minus)*

*This CP Program provides customers with average pricing based on the primary market's trading session transactions that are reported to the consolidated tape. The Benchmark is the primary market's average price for the duration of the CP Program. If the Benchmark is exceeded, the customer will receive a better price. If the*

*Benchmark is not reached, the customer will receive a price less than the Benchmark price.*

*(ii) Primary Market Average Price—Guaranteed*

*This CP Program provides customers with a guarantee of receiving the Benchmark. Customers electing to participate in this Program will not be eligible to obtain a better, or an inferior price.*

*(iii) Primary Market Average Price—Stop*

*This CP Program provides customers with the Benchmark, or better.*

**After-Hours Risk Portfolio Crosses “RP”s Eligible for PPS**

*Sec. 5. After-Hours Risk Portfolio Crosses, “RP”s, provide customers with the ability to sell (buy) baskets of stocks (at least 15 stocks, \$1 million or more in value) where the member firm guarantees to the customer the primary market closing price, less a discount (plus a premium) for the components that comprise the basket.*

*(a) RP’s are not exposed to the Exchange’s PPS auction, and are not price protected.<sup>2</sup>*

*(b) RPs must be electronically communicated to the Exchange via BEACON, identified as “RF” on each cross, entered by symbol and price into the system, identified as “principal” or “agency”, and if appropriate identified as “short exempt”. BEACON will record and enter the transaction, and report RPs to the consolidated tape in the aggregate. BEACON will record these transactions as RP Programs and provide regularly available information on aggregate volume levels by individual stock components on T+3, or thereafter<sup>3</sup>.*

<sup>1</sup> These orders are not afforded price protection generally available to members under BSE Rules of Board of Governors, Chapter II, Section 33, Execution Guarantee.

<sup>2</sup> These orders are not afforded price protection generally available to members under BSE Rules of Board of Governors, Chapter II, Section 33, Execution Guarantee.

<sup>3</sup> Transactions which occur “regular way” will settle within the standard T+3 settlement period. Cash settlements may settle beyond the standard T+3 settlement period, according to the agreement of the parties to the transaction. The overwhelming majority of transactions occur “regular way”.

**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 III 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 is seeking to amend existing rules under Chapter IIB, *Post 4:00 P.M. Trading*, to incorporate new language which will permit members and member firms to use the PPS: (1) to accommodate various customer average pricing programs, in issues eligible to trade on the Exchange,<sup>4</sup> that are based on the primary market trading session; and (2) to permit risk based portfolio programs, which are based on the primary market’s closing price. In a side letter, the Exchange is also seeking an exemption to the short sale rule for purposes of supporting the programs described herein.<sup>5</sup>

**a. Background**

The Exchange initiated its PPS program on January 13, 2000.<sup>6</sup> The program runs from 4:00 p.m. through 4:15 p.m. (EST). Only orders entered after the Exchange’s 4:00 p.m. close and designated as “PPS” are eligible for participation during this session. All PPS designated orders not executed during the PPS expire at the end of the PPS session and are not carried over to the next PPS session. Orders eligible for the Exchange’s primary trading session are not eligible to participate during the PPS.

Member firms may wish to use the Exchange’s PPS to facilitate execution of certain customer average pricing and risk based portfolio programs on either an agency basis (wherein member firms act as an agent facilitating customers on both sides of the transaction) or as principal (wherein member firms act as principal on one side of the transaction). The main purpose of accessing the PPS to report these programs is to expedite execution and customer reporting of these particular crosses that would otherwise be reported later, such as at 5:15 p.m. (EST), during the New York

Stock Exchange’s (“NYSE”) Crossing Session II.<sup>7</sup>

The Exchange proposes to implement two general programs; the Customer Average Pricing Facilitation Programs (“CP Programs”), and Post Primary Session Risk Portfolio Facilitation Programs (“RP Programs”). Both of these programs are described below.

**b. The Customer Average Pricing Facilitation Programs**

The CP Programs will allow member firms to act as a principal on one side of the cross (principal cross), or as an agent facilitating customers on both sides (agency cross), and may include single stocks or portfolios of stocks.

Member firms facilitate their customer requests for average pricing based on primary market transactions reported over some specific period of time during the day (a so-called “time slice”). A time slice can incorporate a full trading day or some part thereof. CP Programs will be “time sliced” during the primary market’s trading session so that some will begin during the trading day (upon receipt of the program) and end prior to the close. Others will begin at some point during the trading day and last through the primary market’s close. Lastly, a full day average pricing program will include all trading day primary market prints from the opening transaction to the last/closing transaction. For example, a customer may seek a guarantee of receiving the primary market average price from noon to 3:00 p.m. (a time slice) on an order to sell 100,000 shares of a particular stock. The member firm accepts the conditions so it can facilitate the customer’s order. At the same time, the member firm assumes the pricing risk since it may not be able to obtain the average price. Thus, the customer directly benefits from this transaction because the price performance is guaranteed.

There will be two types of reported facilitation crosses: (1) An agency cross, where the member firm has matched a buyer with a seller; and (2) a principal cross, where the member firm has assumed the contra-side of the

<sup>7</sup> NYSE’s Crossing Session II facilitates the crossing of portfolios and operates between 4:00 p.m. and 5:15 p.m. (EST). This session is designed to facilitate trading of baskets of at least 15 NYSE securities valued at \$1 million or more. Members that have either facilitated a basket trade, or have paired two customer baskets, submit aggregate information to the NYSE for execution. At 5:15 p.m., the NYSE prints the aggregate information of all baskets executed in this session to the consolidated tape. On the third day after the trade date (T+3), the individual component stocks executed as part of a basket are printed in aggregate form in the NYSE’s Daily Sales Report.

<sup>4</sup> Issues eligible to trade are those listed on the Exchange or listed pursuant to unlisted trading privileges.

<sup>5</sup> 17 CFR 240.10a–1. Review of the BSE’s request for an exemption from the short sale rule is still pending before the Commission.

<sup>6</sup> See Securities Exchange Act Release No. 41814 (August 31, 1999); 64 FR 48885 (September 8, 1999).

customer's order. To facilitate a transaction where customers seek to participate on the buy side, member firms will need to sell to their customers irrespective of the tick. Therefore, an exemption to the short sale rule is required.<sup>8</sup>

Member firms may offer three types of average price orders to their customers: (1) Best efforts to obtain the average price, but with no guarantee; (2) a stop order guaranteeing the average price; and (3) a stop order guaranteeing the average price with the ability to improve the average price. As these transactions will be reported as averaged priced crosses during the Exchange's PPS session, they will not be exposed to the PPS auction. In that way, member firms will be able to immediately report these transactions to their customers.

The three specific order types eligible for the CP program are the following:

*Primary Market Average Price—Benchmark+/- (Plus or Minus)*

This order type provides customers with average pricing based on the primary market's trading session transactions, which are reported to the consolidated tape. The Benchmark price ("Benchmark") is the primary market's average price for the duration of the time slice. If the Benchmark is exceeded, the customer will receive the better price. If the Benchmark is not achieved, the customer will receive the actual price which will be less than the Benchmark price.

*Primary Market Average Price—Guaranteed*

This order type provides customers with a guarantee of receiving the Benchmark. Customers electing to participate in this Program will not be eligible to obtain a better, nor an inferior price.

*Primary Market Average Price—Stop*

This order type provides customers with the Benchmark, or better, for the duration of the time slice. Customers will not receive an inferior price to the Benchmark.

*c. The PPS Risk Portfolio Facilitation Programs*

Under the RP Program, member firms will offer customers a guaranteed price for the sale or purchase of a basket containing at least 15 stocks, \$1 million in value or more. Member firms will provide customers with a guarantee of receiving the primary market's closing price, less a discount (or fee) in return for assuming the market risk of the

basket. Thus, where member firms facilitate a transaction by being on the buy side, with the customer on the sell side, the discounted price of each component of the basket will be at a price less than the primary market's last sale. Conversely, where customers seek to be on the buy side, member firms will facilitate on the sell side and mark-up the value of the basket.

Each component of a basket will be electronically reported during the PPS as principal facilitation crosses. These principal facilitation crosses will not be exposed to the PPS auction. The shares will be reported to the consolidated tape in the aggregate, not unlike the NYSE's Crossing Session II,<sup>9</sup> to prevent disclosure of the side that the member firm has facilitated. This process is also similar to the system in place for NYSE Crossing Session program where reporting is in the aggregate for shares and not made available until T+3. In order to provide the ability to facilitate customers seeking to participate on the buy side, member firms will need to sell to their customers irrespective of the tick. Therefore, an exemption to the short sale rule is required.<sup>10</sup>

An example of a risk portfolio is where a customer sells a basket of stocks to the member firm at the primary market closing price. In return for assuming the risk, the member firm discounts the basket from the closing price. Another potential program may involve equities-futures programs (EFP). For example, a mutual fund that needs to purchase securities after the close of trading for the amount of investment funds (cash) it has received during the trading day may purchase futures contracts because the stock market is closed. Because the mutual fund must convert the futures to stock at some point, a member firm may buy the futures from the mutual fund and sell the component or underlying stocks in return.

These strategies require that the transactions not be immediately reported to the tape, because price exposure can disclose to competitors the position the member firm has assumed. Anonymity permits the member firm to unwind its position without risk of disclosure. The Exchange would emulate the process currently used by

the NYSE and report to the tape in the aggregate and then provide additional information on T+3, or thereafter.<sup>11</sup> As the closing prices are discounted, these programs may be priced away from the primary market's last sale and potentially outside of the day's trading range.

For regulatory oversight purposes, the Exchange will require each member firm that reports transactions in CP or RP Programs to: (1) Identify the issue, shares, and price on each cross; (2) indicate whether the firm is facilitating as agent or principal; (3) indicate, if principal, that it is short exempt; (4) identify the time slice period for CP entered crosses; (5) indicate the average (Benchmark) price determined by the member firm; and (6) for RP programs, identify all crosses in a particular basket. The Exchange may also require other identifiers deemed necessary to monitor pricing. This information will be used to validate Benchmark prices.

*d. Application of Rule 10a-1 of the Exchange Act*

The Exchange is separately requesting that the Commission exempt both the CP and RP Programs from Rule 10a-1, the short sale rule.<sup>12</sup> Based on the manner of pricing transactions that will occur within the CP and RP programs, the practices that Rule 10a-1 is designed to prevent are not at issue. Specifically, over the course of the CP and RP Programs the price direction of a particular stock, *i.e.*, the tick, will not be a factor in determining to fill customer CP and RP orders. Member firms will be acting as facilitators.

**2. Statutory Basis**

The statutory basis for the proposed rule change is section 6(b)(5) of the Act, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating securities transactions, to remove impediments 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.<sup>13</sup>

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

The Exchange does not believe that the proposed rule change will impose

<sup>9</sup> Under the Rules of the NYSE, members that have either facilitated a basket trade, or have paired two customer baskets, submit aggregate information to the NYSE for execution. At 5:15 p.m., the NYSE prints the aggregate information of all baskets executed in this session to the consolidated tape. On the third day after the trade date (T+3), the individual component stocks executed as part of a basket are printed in aggregate form in the NYSE's Daily Sales Report.

<sup>10</sup> See *supra* note 5.

<sup>11</sup> Transactions which occur "regular way" will settle within the standard T+3 settlement period. Cash settlements may settle beyond the standard T+3 settlement period, according to the agreement of the parties to the transaction. The overwhelming majority of transactions occur "regular way." See Amendment No. 1, *supra* note 3.

<sup>12</sup> 17 CFR 240.10a-1. See *supra* note 5.

<sup>13</sup> 15 U.S.C. 78f(b)(5).

<sup>8</sup> See *supra* note 5.

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*

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 BSE has requested accelerated approval of the proposed rule change, as amended. While the Commission is not prepared to grant accelerated approval at this time, the Commission will consider granting accelerated approval of the proposal 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, N.W., Washington, D.C. 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 at the Commission's Public Reference Room or the principal office of the BSE. 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-BSE-00-04 and should be submitted by December 29, 2000.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 00-31805 Filed 12-13-00; 8:45 am]

**BILLING CODE 8010-01-M**

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-43677; File No. SR-CBOE-00-49]

**Self-Regulatory Organizations; Notice of Filing by Chicago Board Options Exchange, Inc., Relating to RAES Eligibility Requirements for SPX Options**

December 5, 2000.

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 September 20, 2000, the Chicago Board Options Exchange, Incorporated ("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 Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Chicago Board Options Exchange, Inc. ("CBOE" or the "Exchange") proposes to amend Rule 24.16, which governs the eligibility requirements of Market-Makers to participate on the Exchange's Retail Automatic Execution System ("RAES") in options on the Standard & Poor's 500 Index ("SPX").

The text of the proposed rule change is available at the CBOE and the Commission.

**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 CBOE 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 CBOE 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 purpose of the proposed rule change is to amend Rule 24.16, "RAES Eligibility in SPX," to: (1) eliminate the in-person and volume quotas from the eligibility requirements of Rule 24.16; and (2) eliminate the cap on the maximum number of Market-Makers that may participate in a RAES group. The proposed rule changes will make the RAES eligibility requirements of SPX Market-Makers the same as for other Market-Makers in non-index option classes and will enhance the depth and liquidity of the RAES markets in SPX.

Currently, Rule 24.16(a)(iv) sets forth four eligibility requirements that a Market-Maker must meet before he or she can participate in RAES in SPX. One of these requirements is that the Market-Maker must execute at least fifty percent of his or her Market-Maker contracts for the preceding calendar month in SPX. Another requirement is that the Market-Maker must execute at least seventy-five percent of his or her Market-Maker trades for the preceding calendar month in SPX in person. No comparable RAES eligibility requirements are imposed upon Market-Makers trading in non-index option classes. The Exchange proposes to eliminate the in-person and volume quotas from the eligibility requirements of Rule 24.16, so that the RAES eligibility requirements of SPX Market-Makers are the same as for other Market-Makers.

Recently, Market-Maker participation on RAES in index options has been low compared to historical levels. This problem has been aggravated by the fact that the in-person and volume requirements have forced the Exchange to delay new Market-Makers who wish to participate on RAES from logging onto RAES for at least 30 days. The proposed rule change would allow a new Market-Maker to log onto RAES so long as that Market-Maker: (1) Has signed the RAES Participation Agreement and completed the RAES instructional program (Rule 24.16(a)); (2) has been approved under Exchange Rules as a Market-Maker with a letter of guarantee (Rule 24.16(a)(iv)(A)); and (3) maintains his or her principal business

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

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

<sup>2</sup> 17 C.F.R. 240.19b-4.