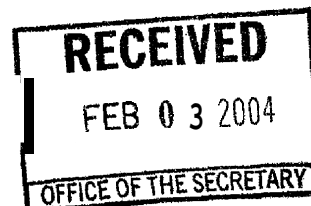




BOSTON  
STOCK EXCHANGE



George W. Mann, Jr.  
Executive Vice President  
and General Counsel

February 2, 2004

**Via Federal Express**

Mr. Jonathan G. Katz, Secretary  
Office of the Secretary  
U.S. Securities and Exchange Commission  
450 5th St., NW  
Washington, DC 20549

**Re: The Boston Stock Exchange, Inc. - Request for Exemption  
from Rule 11Aa3-2(d) regarding Sections 4, 5, and 11 of  
the Intermarket Option Linkage Plan**

Dear Mr. Katz:

The Boston Stock Exchange Inc. (“BSE” or “Exchange”), respectfully requests that the Commission grant the BSE an exemption from paragraph (d) of Rule 11Aa3-2<sup>1</sup> under the Securities Exchange Act of 1934 (“Exchange Act”). Rule 11Aa3-2(f) under the Exchange Act permits the Commission to grant exemptions from the requirements of the rule.<sup>2</sup> As more specifically discussed below, the BSE seeks an exemption from Rule 11Aa3-2(d)<sup>3</sup> under the Exchange Act to allow the BSE not to comply with the fee provisions of the plan governing Intermarket Option Linkage (“Plan”).

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<sup>1</sup> 17 CFR 240.11Aa3-2.

<sup>2</sup> Rule 11Aa3-2(f) under the Exchange Act permits the Commission to grant an exemption to any SRO from the requirements of Rule 11Aa3-2, either unconditionally or on specified terms and conditions, “if the Commission determines that such exemption is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a national market system.” 17 CFR 240.11Aa3-2(f).

<sup>3</sup> Rule 11Aa3-2(d) under the Exchange Act requires each SRO “to comply with the terms of any effective national market system plan of which it is a sponsor or a participant.”

### **Introduction**

**The BSE is in the process** of creating a new electronic options trading **facility** of the Exchange, called the Boston Options Exchange (“BOX”), to be operated by the Boston Options Exchange Group LLC. The **BSE currently** does not trade options. As **part** of the steps **necessary** to start trading options on the BSE through BOX, the BSE must **become a new** participant as defined in the Plan (“Plan Participant”)<sup>4</sup> and comply with all Plan provisions. The current self-regulatory organization (“SRO”) participants in the Plan (“Current Participants”) administer the Plan through the Option Linkage Authority (“OLA”) and the OLA’s Operating Committee (“OLAOC”).

In connection with the BSE’s efforts to become a new **Plan Participant**, the **OLAOC** has granted the BSE interim participant status **allowing** the BSE to participate in OLAOC meetings. However, in order to commence options trading, among other things the BSE must:

- 1) **become** a new Plan Participant by following Section 4(c)(i) of the Plan; and
- 2) pay the fee specified in Sections 4(c), 5(c), and 11(b) of the Plan.

**Rule 11Aa3-2(d) requires** the BSE comply with all the provisions of the Plan as well as the requirements of Rule 11Aa3-2, **and the BSE is** able to comply with the **Plan’s** provisions except **as** to those provisions for which the BSE is seeking an exemption in this letter. **The BSE** believes, for reasons more fully discussed below, **that it is appropriate** for the Commission to **exempt** the BSE from compliance with such provisions because an exemption is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a national market system.

### **The Fee Provisions of the Plan and the Fee Dispute**

Section 11(b) of the Plan, entitled “New Participants” states:

“Any Eligible Exchange that **seeks to become** a new Participant shall be required to pay a participation fee. The Operating Committee shall establish the participation fee no less frequently than once a calendar year. The participation fee shall reasonably reflect a new Participant’s pro rata

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<sup>4</sup> **The Plan defines a Participant as “an Eligible Exchange whose participation in the Plan has become effective pursuant to Section 4(c) of the Plan.”**

share of costs of initially developing the Linkage, as well as any additional development costs the Participants incur maintaining and enhancing the Linkage. Upon payment, such fee shall be distributed equally to the then-current Participants.”

In addition, Sections 4(c)(i)(iv) and 5(c)(ii) of the Plan also require new Plan Participants to pay the fee required by Section 11(b). The BSE and the OLAOC are currently in disagreement regarding the payment to be made by BSE under the terms of Section 11(b) of the Plan. In particular, the BSE disagrees with the amount of the fee demanded by the OLAOC.

On September 15, 2003, the OLAOC suggested a new Plan Participant fee for BSE of \$439,377. In a letter dated December 5, 2003, the BSE offered \$163,660. In a letter dated December 23, 2003, the OLAOC rejected the BSE's offer and repeated its demand for \$439,377. Most recently, in a letter dated December 31, 2003, the BSE repeated its desire to pay a fair fee, disputed whether the OLAOC's suggested fee was fair, and reiterated the BSE's desire to receive and evaluate documentation of the actual costs faced by the OLA in connection with the BSE's entry as a new Plan Participant.

**The BSE believes the OLAOC is dismissing the BSE's views regarding the appropriate fee without any effort to address the questions raised by the BSE in its earlier letters, and without providing the documentation requested. As a result, the BSE has not been able to comply with the Section 11(b) fee provision and is unsure when it will be able to comply. For the same reasons, the BSE is unsure when it will be able to comply with the fee provisions of Sections 4(c)(i)(iv) and 5(c)(ii). Therefore, BSE is seeking an exemption from the Commission from the Rule 11Aa3-2(d) requirement to comply with the fee provisions of Sections 11(b), 4(c)(i)(iv), and 5(c)(ii) of the Plan and thereby permit BSE to be a new Plan Participant prior to its payment of the required fee.**

#### **Exemption Request**

Due to the disagreement between the BSE and OLAOC regarding the appropriate fee to be paid, the BSE has yet to pay a fee as required by the Plan and doubts whether its fee dispute with the OLAOC will be resolved prior to the time the BSE wishes to commence the operation of BOX. Therefore, the BSE respectfully requests an exemption, in accordance with Rule 11Aa3-2(f) under the Exchange Act from the requirement of Rule 11Aa3-2(d) under the Exchange Act that the BSE follow Sections 4(c)(i)(iv), 5(c)(ii), and 11(b) of the Plan regarding the payment of a participation fee by new Plan Participants.

With respect to an exemption from the requirement of Rule 11Aa3-2(d) that the BSE pay the participation fee, the BSE requests such exemption until such time as the BSE and the OLAOC are able to resolve the issue of the appropriate new participant fee for the BSE. As a condition of such exemption, the BSE is willing

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to place in escrow with the Options Clearing Corporation ("OCC") the full amount of the fee requested by the OLAOC until resolution of the dispute.

The exemptions the BSE requests from Rule 11Aa3-2(d) satisfy the requirements of Rule 11Aa3-2(f) that an exemption be consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a national market system. As a general matter, such exemption will allow the BSE to participate in the Plan upon the start of BOX trading without the assistance or consent of the BSE's competitors. By its very nature, the Plan itself is designed to perfect the mechanisms of a national market system through the linkage of options exchanges; thus, to permit the BSE to participate in the Plan would be to link the BSE to all other options exchanges through the Plan that would otherwise not be linked, possibly leading to fragmentation.

Permitting the BSE to delay payment of the participation fee does not harm investors or the goals of a national market system. The BSE is willing to pay a fair fee for participation in the Plan as demonstrated by the BSE's offer to place in escrow with the OCC the full amount of the fee requested by the OLAOC until resolution of the dispute, and pay such full amount if the OLAOC can demonstrate the fairness of such fee.

As noted, such exemption will allow the BSE to start options trading without the assistance or consent of the BSE's competitors and is consistent with the public interest. The ability for new options exchanges to become a participant in the linkage plan fosters competition among options exchanges which inures to the benefit of investors in terms of better execution. Further, the BSE believes its BOX trading facility will enhance execution quality for options trading in the U.S. (especially in light of the fact that BOX guarantees price improvement) which is in the public interest and enhances the protection of investors.

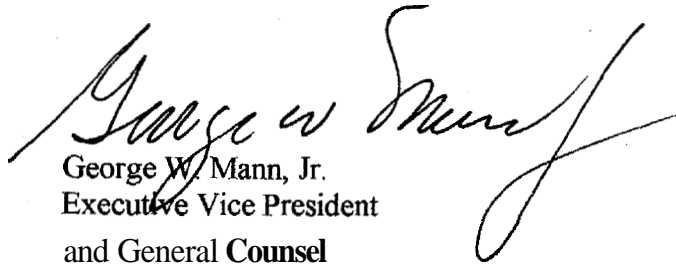
For the foregoing reasons, the BSE respectfully requests that the Commission grant an exemption to the BSE from Rule 11Aa3-2 under the terms and conditions specified above.

### **Conclusion**

Thank you for your time and attention to this matter. If you have any questions please feel free to call Neal Sullivan at 202-778-6159, Wayne Pestone at 202-778-3189 or me at 617-235-2005.

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Sincerely yours,

A handwritten signature in cursive script that reads "George W. Mann, Jr." The signature is written in black ink and is positioned above the printed name and title.

George W. Mann, Jr.  
Executive Vice President  
and General Counsel

Enclosures

Cc: **Elizabeth King**, SEC's Division of Market Regulation  
**Kelly McCormick Riley**, SEC's Division of Market Regulation