

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-49626; File No. SR-BSE-2004-11)

April 28, 2004

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the Boston Stock Exchange, Inc. Relating to an Interpretation of ITS Trade-Throughs and Locked Markets

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 23, 2004, the Boston Stock Exchange, Inc. (“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 filed the proposal pursuant to Section 19(b)(3)(A) of the Act,<sup>3</sup> and Rule 19b-4(f)(1) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. On April 5, 2004, the Exchange submitted Amendment No. 1 to the proposed rule change.<sup>5</sup> On April 22, 2004, the Exchange submitted Amendment No. 2 to the proposed rule change.<sup>6</sup> The Commission is

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

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

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

<sup>4</sup> 17 CFR 19b-4(f)(1).

<sup>5</sup> See letter from John A. Boese, Vice President, Legal and Compliance, BSE, to Nancy Sanow, Assistant Director, Division of Market Regulation (“Division”), Commission, dated April 2, 2004 (“Amendment No. 1”). Amendment No. 1 adds an exhibit to the proposed rule change to include the proposed interpretation as rule text, and replaces the original filing in its entirety.

<sup>6</sup> See letter from John A. Boese, Vice President, Legal and Compliance, BSE, to Nancy Sanow, Assistant Director, Division, Commission, dated April 21, 2004 (“Amendment No. 2”). Amendment No. 2 clarifies the proposed interpretation by adding the term “contemporaneously” to the proposed rule text.

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 is proposing to codify an interpretation concerning ITS Trade-Throughs and Locked Markets. The text of the proposed rule change is below. Additions are in italics.

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**Chapter XXXI**

Intermarket Trading System

Secs. 1 – 3 no change

Sec. 4(a) – (f) no change

••• Supplementary Material

(1) – (10) no change

(11)(a) The terms “trade through” and “third participating market center trade-through” do not include the situation where a member who initiated the purchase (sale) of an ITS security at a price which is higher (lower) than the price at which the security is being offered (bid) in another ITS participating market, contemporaneously sends through ITS to such ITS participating market a commitment to trade at such offer (bid) price or better and for at least the number of shares displayed with that market center’s better-priced offer (bid); and

(b) a trade-through complaint sent in these circumstances is not valid, even if the commitment sent in satisfaction cancels or expires, and even if there is more stock behind the quote in the other market.

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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 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 purpose of the filing is to codify a long-standing interpretation of Chapter XXXI (Intermarket Trading System), Section 4 (Trade-Throughs and Locked Markets) of the Rules of the Board of Governors of the Boston Stock Exchange ("BSE Rules"). This section of the BSE Rules uses certain defined terms as follows:

(a)(1) A "trade-through", as that term is used in this Rule, occurs whenever a member on the Exchange purchases a security traded through ITS (referred to in this Rule as "an ITS Security") on the Exchange at a price which is higher than the price at which the security is being offered (or sells such a security on the Exchange at price which is lower than the price at which the security is being bid for) at the time of the purchase (or sale) in another ITS participating market center

as reflected by the offer (bid) then being displayed on the Floor from such other market center. The member described in the foregoing sentence is referred to in this Rule as the member who initiated a trade-through.

(2) A "third participating market center trade-through", as that term is used in this Rule, occurs whenever a member on the Exchange initiates the purchase of an ITS Security by sending a commitment to trade through the System and such commitment results in an execution at a price which is higher than the price at which the security is being offered (or initiates the sale of such a security by sending a commitment to trade through the System and such commitment results in an execution at a price which is lower than the price at which the security is being bid for) at the time of the purchase (or sale) in another ITS participating market center as reflected by the offer (bid) then being displayed on the Exchange from such other market center. The member described in the foregoing sentence is referred to in this Rule as the "member who initiated a third participating market center trade-through."

According to the BSE, the basic concept of the Trade-Through Rule ("Rule") is that superior priced quotations in a security displayed from other ITS Participant markets should be protected/satisfied if, in another ITS Participant market, an execution in the security occurs at an inferior price ("trade-through"). One of the remedies the Rule provides is that, upon a valid complaint of a trade-through, a commitment to trade, at the price and for the number of shares in the disseminated quotation, must be sent to the other ITS Participant market to fully satisfy such quotation. The proposed interpretation being filed by the BSE has long recognized that superior quotations are fully

protected/satisfied if an ITS commitment is sent to trade with a bid/offer that would otherwise appear to have been traded-through. That is, a trade will not be considered a trade-through if an ITS commitment is sent contemporaneously from the ITS Participant executing the trade for the purpose of being executed against the better-priced displayed bid or offer. A trade-through complaint is not valid even if a commitment cancels or expires or there is more stock behind the away quote. Furthermore, the BSE believes that the proposed interpretation recognizes the impracticality of having to wait for the other market to revise its quotation as a result of trading with a satisfying commitment before trade activity may occur in other markets.

Specifically, the proposed interpretation is that:

- i. the terms “trade-through” and “third participating market center trade-through” do not include the situation where a member who initiated the purchase (sale) of an ITS security at a price which is higher (lower) than the price at which the security is being offered (bid) in another ITS participating market, sends through ITS to such ITS participating market a commitment to trade at such offer (bid) price or better and for at least the number of shares displayed with that market center’s better-priced offer (bid); and,
- ii. a trade-through complaint sent in these circumstances is not valid, even if the commitment sent in satisfaction cancels or expires, and even if there is more stock behind the quote in the other market.

## 2. Statutory Basis

The Exchange believes that the statutory basis for the proposed rule change is Section 6(b)(5) of the Act,<sup>7</sup> 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 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.

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

The Exchange does not believe that the proposed rule change will 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

Written comments on the proposed rule change were neither solicited nor received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(i) of the Act<sup>8</sup> and subparagraph (f)(1) of Rule 19b-4 thereunder,<sup>9</sup> because it is concerned solely with the interpretation of the meaning, administration or enforcement of an existing BSE Rule. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the

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<sup>7</sup> 15 U.S.C. 78f(b)(5).

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

<sup>9</sup> 17 CFR 240.19b-4(f)(1).

protection of investors, or otherwise in furtherance of the purposes of the Act.<sup>10</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. Comments may be submitted by any of the following methods:

##### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an E-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number **SR-BSE-2004-11** on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number **SR-BSE-2004-11**. 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, please use only one method. The Commission will post all comments on the Commission's Internet Web site

(<http://www.sec.gov/rules/sro.shtml>). 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

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<sup>10</sup> For purposes of determining the effective date of the filing and calculating the 60-day abrogation date, the Commission considers the period to commence on April 22, 2004, the date the BSE filed Amendment No. 2.

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 also will be available for inspection and copying at the principal office of the BSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number **SR-BSE-2004-11** and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>11</sup> 17 CFR 200.30-3(a)(12).