

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-52350; File No. 4-429)

August 26, 2005

Joint Industry Plan; Order Approving Amendment No. 17 to the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage Regarding Modifying the 80/20 Test for Determining Limitations on Principal Order Access to Linkage

I. Introduction

On April 20, 2005, May 20, 2005, May 12, 2005, April 13, 2005, April 27, 2005 and May 11, 2005, the American Stock Exchange LLC (“Amex”), the Boston Stock Exchange, Inc. (“BSE”), the Chicago Board Options Exchange, Incorporated (“CBOE”), the International Securities Exchange (“ISE”), the Pacific Exchange, Inc. (“PCX”), and the Philadelphia Stock Exchange, Inc. (“Phlx”) (collectively, “Participants”), respectively, filed with the Securities and Exchange Commission (“Commission”) Joint Amendment No. 17 to the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage (“Linkage Plan”).¹ In Joint Amendment No. 17, the Participants propose to modify the 80/20 Test to determine limitations on Principal Order² access to Linkage.³

¹ On July 28, 2000, the Commission approved a national market system plan for the purpose of creating and operating an intermarket options market linkage (“Linkage”) proposed by Amex, CBOE, and ISE. See Securities Exchange Act Release No. 43086 (July 28, 2000), 65 FR 48023 (August 4, 2000). Subsequently, Phlx, PCX, and BSE joined the Linkage Plan. See Securities Exchange Act Release Nos. 43573 (November 16, 2000), 65 FR 70851 (November 28, 2000); 43574 (November 16, 2000), 65 FR 70850 (November 28, 2000); and 49198 (February 5, 2004), 69 FR 7029 (February 12, 2004).

² A “Principal Order” is an order for the principal account of an eligible market maker that does not relate to a customer order the market maker is holding. See Section 2(16)(b) of the Linkage Plan.

³ Specified in Section 8(b)(iii) of the Linkage Plan.

The proposed amendment to the Linkage Plan was published in the Federal Register on July 27, 2005.⁴ No comments were received on the proposed amendment. This order approves the proposed amendment to the Linkage Plan.

II. Description and Purpose of the Proposed Amendment

The purpose of the Joint Amendment is to modify the 80/20 Test contained in Section 8(b)(iii) of the Linkage Plan, which provides that market makers should send Principal Orders through the Linkage on a limited basis and not as a primary aspect of their business. The 80/20 Test implements this general principle by prohibiting a market maker from sending Principal Orders in an eligible option class if, in the last calendar quarter, the market maker's Principal Order contract volume is disproportionate to the market maker's contract volume executed against customer orders in its own market.

The Participants have expressed concern that the application of the 80/20 Test has resulted in anomalies for market makers with limited volume in an eligible option class. Specifically, if a market maker has very little overall trading volume in an option, the execution of one or two Principal Orders during a calendar quarter could result in the market maker failing to meet the 80/20 Test. This would bar the market maker from using the Linkage to send Principal Orders for the following calendar quarter. The Participants contend that it was not their intent to bar market makers with limited volume from sending Principal Orders through the Linkage in these circumstances since such trading clearly was not "a primary aspect of their business." Thus, in Joint Amendment No. 17, the Participant propose to create a de minimis exemption from the 80/20 Test for market makers that have total contract volume of less than 1,000 contracts in an options class for a calendar quarter.

⁴ See Securities Exchange Act Release No. 52074 (July 20, 2005), 70 FR 43469.

III. Discussion

After careful consideration, the Commission finds that the proposed amendment to the Linkage Plan seeking to create a de minimis exception to the 80/20 Test is consistent with the requirements of the Act and the rules and regulations thereunder. Specifically, the Commission finds that the proposed amendment to the Linkage Plan is consistent with Section 11A of the Act¹⁰ and Rule 11Aa3-2 thereunder,¹¹ in that it will increase the availability of Linkage to members of the Participants by limiting the applicability of the 80/20 Test in situations where market makers have minimal trading volume in a particular options class.

The Commission recognizes that the Participants do not believe that it is necessary to bar market makers with limited volume from sending Principal Orders through the Linkage, as such trading does not raise concerns that a member is sending such orders as "a primary aspect of their business." The Commission believes that the de minimis exemption from the 80/20 Test proposed by the Participants for market makers that have total contract volume of less than 1,000 contracts in an options class for a calendar quarter should ensure that market makers with relatively low volume in a particular options class can send a reasonable number of Principal Orders without being barred by application of the 80/20 Test from using the Linkage in the following calendar quarter.

¹⁰ 15 U.S.C. 78k-1.

¹¹ 17 CFR 240.11Aa3-2.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 11A of the Act¹² and Rule 11Aa3-2 thereunder,¹³ that the proposed Joint Amendment No. 17 is hereby approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

Margaret H. McFarland
Deputy Secretary

¹² 15 U.S.C. 78k-1.

¹³ 17 CFR 240.11Aa3-2.

¹⁴ 17 CFR 200.30-3(a)(29).