

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 extend a temporary exemption granted to the Exchange regarding an Interpretation of its Execution Guarantee Rule in response to Commission action concerning *de minimis* trades through of certain ETFs in ITS.

The Exchange's original rule proposal in this matter was filed in response to a Commission order issued August 28, 2002, granting a *de minimis* exemption for transactions in certain ETFs from the Trade-Through Provisions of the ITS Plan ("Order").³ As of the implementation date of the Order, September 4, 2002, certain executions that took place according to the Rules of the Exchange would have been deemed violative of the provisions thereof.⁴ On September 9, 2002, the Exchange requested, and was subsequently granted, a thirty day implementation of a proposed rule, which would allow the Exchange to not enforce a specific provision of its rules relating to trade-through protection for certain securities.⁵ The Commission granted this temporary exemption for a period of thirty days, set to expire October 3, 2002, and the exemption was subsequently extended to June 4, 2003.⁶ The Exchange is now seeking to extend the period of the effectiveness of the Commission's order until March 4, 2004, consistent with a recent order extending the overall ETF *de minimis*

exemption until that date.⁷ The Exchange has requested that the proposed rule be effective retroactively to June 5, 2003, to avoid a lapse of the previous exemptions.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act⁸ and furthers the objectives of Section 6(b)(5),⁹ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to facilitate transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, in that it is designed to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers or dealers.

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.

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. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change 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. 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. Copies of such filing will also be available for inspection and copying at

the principal office of the BSE. All submissions should refer to the file number in the caption above and should be submitted by July 22, 2003.

IV. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁰ In particular, the Commission finds that the proposed rule is consistent with the requirements of Section 6(b)(5) of the Act¹¹ because it is designed to facilitate transactions in securities; 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; and is not designed to permit unfair discrimination between customers, issuers, brokers or dealers.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of the publication of notice thereof in the **Federal Register**, and for granting approval retroactively to June 5, 2003, the date of the Commission's extension of the ITS exemption. The Commission believes that by extending the Exchange's proposed exemption for its members, the Exchange removes the specialist's obligation to provide trade-through protection in situations where it will not be permitted to seek satisfaction through ITS from the primary market.

This obligation was one the BSE assumed voluntarily in order to make its market more attractive to sources of order flow, not an obligation the Act imposes on a market. The Commission believes that the business decision to potentially forego order flow by no longer providing print protection is a judgment the Act allows the BSE to make.¹²

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹³ that the proposed rule change (SR-BSE-2003-11) is approved on an accelerated basis and is effective retroactively to June 5, 2003.

¹⁰ In approving this rule proposal, the Commission notes that it has also considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹¹ 15 U.S.C. 78f(b)(5).

¹² The Commission notes that the BSE's proposed rule change will remain in effect only until the expiration of the extension of Commission's ITS Exemption Order on March 4, 2004.

¹³ 15 U.S.C. 78f(b)(2).

¹⁴ 17 CFR 200.30-3(a)(12).

³ See Securities Exchange Act Release No. 46428 (August 28, 2002), 67 FR 56607 (September 4, 2002). Pursuant to this Release, participants of the ITS Plan were exempt from Section 8(d) of the Plan, for the period of September 4, 2002 until June 4, 2003, with respect to transactions in QQQs, DIAMONDS, and SPDRs, that are executed at a price that is no more than three cents lower than the highest bid displayed in CQS and no more than three cents higher than the lowest offer displayed in CQS.

⁴ Chapter II, *Dealings on the Exchange*, Section 33, *Execution Guarantee*, of the BSE Rules paragraph (c)(2) states that "[a]ll agency limit orders will be filled if one of the following conditions occur * * * (2) there has been price penetration of the limit in the primary market * * *." There are similar provisions in various sections of Chapter XV, *Dealer Specialists*. These provisions, in particular those set forth in Chapter II, guarantee that a limit order in a BSE specialist's book will be filled if the primary market trades through the limit price. When the BSE specialist provides this trade-through protection to its customer limit orders, he is permitted to seek relief through ITS.

⁵ See Securities Exchange Act Release No. 46482 (September 10, 2002), 67 FR 58662 (September 17, 2002) (SR-BSE-2002-13).

⁶ See Securities Exchange Act Release No. 46651 (October 11, 2002), 67 FR 64669 (October 21, 2002) (SR-BSE-2002-18).

⁷ See Securities Exchange Act Release No. 47950 (May 30, 2003), 68 FR 33748 (June 5, 2003).

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(5).