

Proposed Joint Amendment No. 4 was published for comment in the **Federal Register** on December 27, 2002.⁴ No comments were received on the proposal. On January 28, 2003, January 28, 2003, January 29, 2003, January 29, 2003, and January 29, 2003, the ISE, the Phlx, the Amex, the PCX, and the CBOE, respectively, filed with the Commission an amendment to proposed Joint Amendment No. 4 to provide that the limitation on the liability for trade-throughs for the last seven minutes of the trading day would be effective for a one-year pilot period and to clarify that the limitation on liability would apply to each Satisfaction Order ("Pilot Amendment").⁵ This order approves Joint Amendment No. 4, as modified by the Pilot Amendment, on a temporary basis not to exceed 120 days, and solicits comment on the Pilot Amendment from interested persons.

II. Description of Proposed Joint Amendment No. 4

In proposed Joint Amendment No. 4, as modified by the Pilot Amendment, the Participants propose to clarify that the proposed limitation on liability for trade-throughs for the last seven minutes of the trading day would apply to the filling of 10 contracts per exchange, per transaction. Pursuant to the Pilot Amendment, this proposal would be effective for a one-year pilot period, and would apply to each Satisfaction Order. The proposed Linkage Plan amendment also would: (1) Decrease the time period a member must wait after sending a linkage order to a market before that member can trade through that market from 30

seconds to 20 seconds; (2) prohibit linkage fees for executing satisfaction orders; and (3) make other nonsubstantive revisions to the Linkage Plan.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the Pilot Amendment, including whether the proposed Pilot Amendment 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 submissions, all subsequent amendments, all written statements with respect to the proposed Pilot Amendment that are filed with the Commission, and all written communications relating to the proposed Pilot Amendment 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 filings will also be available for inspection and copying at the principal offices of the Amex, CBOE, ISE, Phlx, and PCX. All submissions should refer to File No. 4-429 and should be submitted by February 28, 2003.

IV. Discussion

After careful consideration, the Commission finds that the proposed Joint Amendment to the Linkage Plan, as amended by the Pilot Amendment, is consistent with the requirements of the Act and the rules and regulations thereunder.⁶ Specifically, the Commission finds that the proposed Joint Amendment, as modified by the Pilot Amendment, is consistent with section 11A of the Act,⁷ and Rule 11Aa3-2 thereunder,⁸ in that it is appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets. In addition, the Commission finds, as described further below, that it is appropriate to approve summarily the proposed amendment to the Linkage Plan, as amended, upon publication of the notice on a temporary basis for 120 days. The Commission believes that such action is appropriate in the public interest, for the protection of investors

and the maintenance of fair and orderly markets, to remove impediments to, and perfect mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act.⁹

The Participants have represented to the Commission that members of various exchanges have raised concerns regarding their obligations to fill Satisfaction Orders (which result after a trade-through¹⁰) at the close of trading in the underlying security. Specifically, these members are concerned that they may not have sufficient time to hedge the positions they acquire.¹¹ The Participants believe their proposal to limit liability for trade-throughs for the last five minutes of trading in the underlying security to the filling of 10 contracts per exchange, per transaction will protect small customer orders, yet establish a reasonable limit for their members' liability. The Participants represent that this proposal should not affect a member's potential liability under an exchange's disciplinary rule for engaging in a pattern or practice of trading through other markets under section 8(c)(i)(C) of the Linkage Plan.

The Pilot Amendment clarifies that the limitation on liability would apply to each Satisfaction Order. As amended, the proposal is limited to a one-year pilot period. The Commission believes this one-year pilot period will give the Participants and the Commission an opportunity to evaluate: (1) The need for the limitation on liability for trade-throughs near the end of the trading day; (2) whether 10 contracts per Satisfaction Order is the appropriate limitation; and (3) whether the opportunity to limit liability for trade-throughs near the end of the trading day leads to an increase in trade-throughs. The Commission expects the Participants to provide a report to the Commission at least sixty days prior to seeking permanent approval of the pilot program. The report should include information about the number and size of trade-throughs that occur during the last seven minutes of the trading day and the number and size of trade-throughs that occur during the rest of the trading day, the number and size of Satisfaction Orders that the Participants might be required to fill without the limitation on liability and how those amounts are affected by the limitation on liability, and the extent to which the

CBOE, and ISE. See Securities Exchange Act Release No. 43086 (July 28, 2000), 65 FR 48023 (August 4, 2000). Subsequently, Phlx and PCX joined the Linkage Plan. See Securities Exchange Act Release Nos. 43573 (November 16, 2000), 65 FR 70850 (November 28, 2000) and 43574 (November 16, 2000), 65 FR 70851 (November 28, 2000). On June 27, 2001, May 30, 2002, and January 29, 2003, respectively, the Commission approved amendments to the Linkage Plan. See Securities Exchange Act Release Nos. 44482 (June 27, 2001), 66 FR 35470 (July 5, 2001), 46001 (May 30, 2002), 67 FR 38687 (June 5, 2002), and 47274 (January 29, 2003).

⁴ See Securities Act Release No. 47028 (December 18, 2002), 67 FR 79171.

⁵ See letters from Michael Simon, Senior Vice President and General Counsel, ISE, to Jonathan Katz, Secretary, Commission, dated January 27, 2003; Charles Rogers, Executive Vice President, Phlx, to Jonathan Katz, Secretary, Commission, dated January 27, 2003; Jeffrey Burns, Assistant General Counsel, Amex, to Jonathan Katz, Secretary, Commission, dated January 28, 2003; Kathryn L. Beck, Senior Vice President, General Counsel and Corporate Secretary, PCX, to Jonathan Katz, Secretary, Commission, dated January 28, 2003; and Edward J. Joyce, President and Chief Operating Officer, CBOE, to Jonathan Katz, Secretary, dated January 29, 2003.

⁶ In approving this proposed Linkage Plan amendment, the Commission has considered its impact on efficiency, competition, and capital formation.

⁷ 15 U.S.C. 78k-1.

⁸ 17 CFR 240.11Aa3-2.

⁹ 17 CFR 240.11Aa3-2(c)(2).

¹⁰ Trade-throughs occur when broker-dealers execute customer orders on one exchange at prices inferior to another exchange's disseminated quote.

¹¹ See letter from Michael Simon, Senior Vice President and General Counsel, ISE, to Annette Nazareth, Director, Division of Market Regulation, Commission, dated November 19, 2002.