

Amex, CBOE, and PSE proposals were each published for comment in the Federal Register on November 21, 1994.⁵ No comments were received on the proposed rule changes. This order approves the Exchanges' proposals, as amended.

II. Description of Proposals

The Commission recently approved proposals submitted by the options exchange concerning a market maker exemption⁶ to the NASD bid test rule⁷ applicable to short sales to NM securities traded through Nasdaq. The purposes of the market maker exemption is to allow options market makers⁸ to hedge their options positions by buying or selling (including selling short) shares of underlying stock or underlying component stocks contained in stock indexes; such short sales are referred to as "exempt hedge transactions."⁹ The Exchange proposals were approved on a temporary basis to remain in effect concurrently with the NASD's bid test rule pilot program.¹⁰

Currently, the NASDA provides an exemption from the short sale bid test for risk arbitragers (and other NASD members) who take positions in the

security involved in an M&A to qualify as an exempt hedge transaction pursuant to the current proposal, the M&A must be publicly announced. See letter from Michael D. Pierson, Senior Attorney, Market Regulation, PSE, to Francois Nazur, Attorney, Division, Commission ("PSE Amendment No. 1"). The Commission notes that the Amex proposal, as originally proposed requires the M&A to be publicly announced.

⁵ See Securities Exchange Act Release Nos. 34971 (November 14, 1994), 59 FR 60027 (Amex); 34972 (November 14, 1994), 59 FR 60028 (CBOE); and 34970 (November 14, 1994), 59 FR 60029 (PSE).

⁶ Securities Exchange Act Release No. 34632 (September 2, 1994), 59 FR 46999 (approving proposals by the Amex, CBOE, New York Stock Exchange, Inc., PSE, and Philadelphia Stock Exchange, Inc.).

⁷ The NASD bid test rule prohibits broker-dealers from effecting short sales, for themselves or their customers, at or below the "bid" when the current "inside" or best bid is below the previous inside bid. NASD Rules of Fair Practice ("NASD Rules"), Art. III, Section 48. See Securities Exchange Act Release No. 34277 (June 6, 1994), 59 FR 34885 (amending the NASD Rules to add the short sale rule).

⁸ For purposes of this order, a "market Maker" is a Market Maker as referred to in the CBOE and PSE Rules, and a Specialist or Registered Options Trader as referred to in the Amex Rules.

⁹ An "exempt hedge transaction" is a short sale in an NM security effected to hedge, and which in fact serves to hedge, an existing offsetting options positions or an offsetting contemporaneous with the short sale. See Amex Rule 957(d)(2)(b)(ii), CBOE Rule 15.10(c)(2)(iii)(A), and Rule 4.19(c)(2)(B)(9).

¹⁰ See Securities Exchange Act Release No. 34277, *supra* note 6. The Commission approved the NASD's short sale rule on an eighteen month temporary basis, effective September 6, 1994, through March 5, 1996. *Id.*

stocks involved in M&G transactions.¹¹ Consequently, the Exchange desire to amend their respective rules to extend the market maker exemption from the bid test rule to certain short sales of the stock of a company that is involved in a publicly announced M&A with a company whose stock is a designated Nasdaq/NM security.¹²

III. Discussion

The Commission believes that the Exchanges' proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to national securities exchanges. In particular, the Commission believes the Exchanges' proposals are consistent with the requirements of Section 6(b)(5) of the Act¹³ in that they are designed to remove impediments to, and perfect the mechanism of, a free and open market, and to protect investors and the public interest.

The Commission approved the NASD's short sale rule proposal on June 29, 1994,¹⁴ and in so doing stated that the short sale rule, together with the market maker exemption, is a reasonable approach to regulating short sales of Nasdaq/NM securities. The Commission believes that the Exchanges' proposals are consistent with the NASD's bid test rule and address the limitations established by the NASD concerning the applicability of the market maker exemption.

Specifically, the Exchanges' proposals are designed to extend the market maker exemption to the stock of a company that is involved in a publicly announced M&A with a company whose stock is designated Nasdaq/NM security. The Commission believes that when a designated Nasdaq/NM security becomes involved in an M&A, options market makers may need to hedge positions in options overlying such a designated Nasdaq/NM security by buying or selling the securities of the other company involved in the M&A, whether or not the other company's stock has listed overlying options.

¹¹ See Securities Exchange Act Release No. 34277, *supra* note 7. The NASD short sale rule states that once an M&A has been two affected securities may immediately register as a qualified market maker in the other M&A security. See NASD Rules, Article III, 48(1)(3)(iii). Consequently, such a market maker may rely on the market maker exemption for short sales of the other M&A security.

¹² Proposed Rule 957(d)(2)(b)(iv); Proposed CBOE Rule 15.10(a)(2)(ii)(D); and Proposed PSE Rule 4.19(c)(2)(B)(iv). A "designated NM security" is an NM security which the market maker has designated as qualifying for the bid test exemption. See e.g., CBOE Rule 15.10(c)(2)(B).

¹³ 15 U.S.C. 78f(b)(5) (1988).

¹⁴ Securities Exchange Act Release No. 34277, *supra* note 7.

Indeed, where there are no options on the other company's stock, buying or selling that company's stock at times may be the only feasible way for a market maker to hedge positions in options on the designated Nasdaq/NM security, given the risk arbitrage relationship that is likely to exist between the two stocks. Therefore, the Commission believes that by allowing market makers to sell short, for hedging purposes, shares of a company that is involved in an M&A with a company whose stock is a designated Nasdaq/NM security, and to designate such sales as bid test exempt, the Exchanges' proposals will enhance the ability of their market makers perform their market making functions, thereby contributing to the liquidity of the market for options, as well as to the liquidity of the market for the stocks of both companies.

The Commission notes that the proposed extension of the market maker exemption from the short sale rule is limited to publicly announced M&As. Moreover, market makers may avail themselves of the M&A extension to the exemption only when the short sales are made to hedge existing or prospective positions in options on a security of another company involved in the M&A, the options positions are or will be in a class of options for which the market maker is registered and are or will be an "exempt hedge transaction" as defined in the Exchanges' rules.¹⁵

IV Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁶ that the Amex, CBOE, and PSE proposed rule changes (SR-Amex-94-42, SR-CBOE-94-27, and SR-PSE-94-23, respectively), as amended, are approved on a temporary basis, to remain in effect so long as their respective rules regarding the market maker exemption¹⁷ to the NASD's bid test rule remain in effect.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority,¹⁸

Margaret H. McFarland,

Deputy Secretary.

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¹⁵ See *supra* note 9.

¹⁶ 15 U.S.C. 78s(b)(2) (1982).

¹⁷ Amex Rule 957, CBOE Rule 15.10, and PSE Rule 4.19.

¹⁸ 17 CFR 200.30-3(a)(12) (1993).

[Release No. 34-35220; File No. SR-CBOE/94-48]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Chicago Board Options Exchange, Inc.; Relating to the Placement of CBOE Memberships in Trust

January 11, 1995.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on December 1, 1994, the Chicago Board Options Exchange, Inc. ("CBOE" or "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 self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CBOE proposes to adopt a new Rule 3.25 that would enable an individual CBOE member to place his membership in trust for estate planning purposes, subject to certain conditions and requirements.

The text of the proposed rule change is available at the Office of the Secretary, CBOE and at the Commission.

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 self-regulatory organization included statements concerning the purpose of an 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 IV below. The self-regulatory organization 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

The purpose of the proposed rule change is to include in CBOE's membership rules a new Rule 3.25 that would enable any individual member to place his membership in trust, subject to various conditions and requirements set forth in the rule. Rule 3.25 is designed to make the membership transfer process simple for members and for the Exchange and is structured to correlate

the substance and mechanics of the new rule with CBOE's existing rules, including, for example, CBOE's rules respecting sales and leases of memberships and transfers of memberships to family members.

The Exchange believes that the proposed rule change will provide members with useful, but appropriately controlled, estate planning flexibility. For example, the proposal will permit a member who has placed his membership in trust to provide for the appointment of a successor trustee in the event of the member's disability. The successor trustee would then hold the membership for the benefit of the member during the disability period, provided the membership is leased during that period in accordance with CBOE's membership lease rules.

Specifically, the proposed rule change would provide that an individual member in good standing may, during his lifetime, transfer his membership to a trust for which he is the sole trustee and sole present beneficiary. Under paragraph (c) of proposed Rule 3.25 a member who has placed his membership in trust ("Trust Member") may transfer his membership, in accordance with the provisions of Rule 3.14(c)(1), to an eligible family member who is approved for Exchange membership, or, in accordance with Rule 3.14(c)(3), to a member organization. Any such transfer must conform to the collateral deposit requirements of the final sentence in Rule 3.14(c). In addition, the proposed rule change provides that a Trust Member may transfer his membership from the trust to himself to be held directly.

Paragraph (b) of the proposed rule change would authorized a Trust Member to provide in his trust agreement for the appointment of a successor trustee in the event the Trust Member dies, is declared legally incompetent, or becomes disabled. A successor trustee could be so appointed for one of two purposes only—either to effect a transfer of the membership after the member's death in accordance with the Exchange's membership transfer rules, or, to retain the membership in trust for the benefit of an incompetent or disable Trust Member, provided the membership is leased in accordance with Exchange Rule 3.16(b) ("Leased Memberships").

Any transfer of a membership into trust would be subject to Exchange review. Under paragraph (d) of proposed Rule 3.25, a member seeking to effect such a transfer must furnish the Exchange with a copy of the trust agreement together with an attorney's

certification that the agreement conforms to the requirements of the new rule. The Exchange may disapprove a transfer by written notice to the member if the Exchange finds that the trust agreement does not so conform. In addition, the new rule specifies that, notwithstanding a transfer into trust, the membership must remain subject to all Exchange rules, and the Trust Member must remain personally responsible for all obligations and liabilities associated with use of the membership.

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act and with Section 6(b)(1) of the Act in particular in that it is designed to enable the Exchange to enforce members' compliance with Exchange rules and 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.

C. Self-Regulatory Organization's Statement on Comments Received From Members, Participants or Others

Comments were neither solicited nor received.

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

Within 35 days of the publication of this notice in the Federal Register or within such other period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) By order approve the proposed rule change, or
- (B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. 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 Section, 450 Fifth Street NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the CBOE. All submissions should refer to the file number in the caption above and should be submitted by February 9, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 95-1282 Filed 1-18-95; 8:45 am]

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[Release No. 34-35217; File No. SR-NASD-94-70]

**Self-Regulatory Organizations;
National Association of Securities
Dealers, Inc.; Order Approving
Proposed Rule Change Relating to
Consolidation of the Level 1 and Last
Sale Information Services and
Subscriber Fees**

January 11, 1995.

On December 1, 1994, the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder.² The rule change will effectuate a consolidation of the Nasdaq Level 1 and Last Sale Information services and of the corresponding subscriber charges. The rule change modifies Sections A (1) and (5) of Part VIII of Schedule D to the NASD By-Laws.

Notice of the proposed rule change, together with its terms of substance was provided by issuance of a Commission release³ and by publication in the Federal Register.⁴ No comments were received in response to the notice. This order approves the proposed rule change.

This rule change establishes a single service offering comprised of the existing Nasdaq Level 1 ("Level 1") quotation and last sale ("last sale")

information services. The monthly charge to be levied for the consolidated service will be \$19/terminal, the sum of the monthly charges previously assessed for receipt of the last sale and Level 1 services on an authorized terminal device.⁵ The combined service will be distributed by commercial vendors of market data for which their subscribers will pay a single monthly charge.

The Commission has determined to approve the NASD's proposal. The Commission finds that the rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the NASD, including the requirements of Section 15A(b)(5) of the Act.⁶ Section 15A(b)(5) requires, in part, that the rules of a national securities association provide for the equitable allocation of reasonable dues, fees and other charges among members, issuers and other persons using any facility or system that the Association operates or controls. While the consolidation will result in a fee increase for a small portion of subscribers, the additional cost will be partially offset by administrative savings for large subscribers and vendors. Moreover, the rule will effect a simplification in the fee structure applicable to receipt of two major data services.

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that the proposed rule change SR-NASD-94-70 be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁷

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 95-1229 Filed 1-18-95; 8:45 am]

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[Rel. No. IC-20832; 812-9208]

**Brandes International Fund, et al.;
Notice of Application**

January 12, 1995.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for exemption under the Investment Company Act of 1940 (the "Act").

APPLICANTS: Brandes International Fund (the "Company"), Brandes Investment Partners, Inc. (the "Adviser"), and First Fund Distributors, Inc. (the "Distributor").

RELEVANT ACT SECTIONS: Order requested under section 6(c) of the Act to grant an exemption from sections 2(a)(32), 2(a)(35), 18(f), 18(g), 18(i), 22(c), and 22(d) of the Act, and rule 22c-1 thereunder.

SUMMARY OF APPLICATION: Applicants request an order to permit the Funds to issue multiple classes of shares representing interests in the same portfolio of securities and assess and, under certain circumstances waive, a contingent deferred sales charge ("CDSC") upon the redemption of certain shares.

FILING DATES: The application was filed on October 7, 1994 and amended on December 14, 1994. Applicants agree to file an additional amendment, the substance of which is incorporated herein, during the notice period.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on February 6, 1995, and should be accompanied by proof of service on the applicants, in the form of an affidavit or, for lawyers, a certificate of service.

Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested.

Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street NW., Washington, DC 20549. Applicants: Brandes International Fund, Brandes Investment Partners, Inc., 12750 High Bluff Drive, Suite 420, San Diego, California 92130; First Fund Distributors, Inc., 4455 E. Camelback Rd., Suite 261E, Phoenix, AZ 85018.

FOR FURTHER INFORMATION CONTACT: Sarah A. Buescher, Staff Attorney, at (202) 942-0573, or Robert A. Robertson, Branch Chief, at (202) 942-0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch.

Applicants' Representations

1. The Company is a registered open-end management investment company organized as a Delaware business trust. The Company currently has one series. It does not propose to offer or sell shares until the issuance of the order requested

¹ 17 CFR 200.3(a)(12) (1993).

² 15 U.S.C. 78s(b)(1).

³ 17 CFR 240.19b-4.

⁴ Securities Exchange Act Release No. 35054 (December 6, 1994).

⁵ 59 FR 64225 (December 13, 1994).

⁶ The rule change will result in higher fees, however, for some Level 1 subscribers who do not currently pay for receipt of last sale data.

⁷ 15 U.S.C. 78o-3(b)(5).

⁸ 17 CFR 200.30-3(a)(12).