

the Commission's Internet Web site (<http://www.sec.gov/rules/delist.shtml>). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>4</sup>

**Jonathan G. Katz,**  
*Secretary.*

[FR Doc. 04-11841 Filed 5-25-04; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

### Issuer Delisting; Notice of Application of Bentley Pharmaceuticals, Inc. To Withdraw Its Common Stock, \$.02 Par Value, From Listing and Registration on the American Stock Exchange LLC File No. 1-10581

May 19, 2004.

On May 11, 2004, Bentley Pharmaceuticals Inc., a Delaware corporation ("Issuer"), filed an application with the Securities and Exchange Commission ("Commission"), pursuant to section 12(d) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 12d2-2(d) thereunder,<sup>2</sup> to withdraw its common stock, \$.02 par value ("Security"), from listing and registration on the American Stock Exchange LLC ("Amex" or "Exchange").

The Board of Directors ("Board") of the Issuer unanimously approved a resolution on March 26, 2004 to withdraw the Issuer's Security from listing on the Amex, and to list the Security on the New York Stock Exchange, Inc. ("NYSE"). The Board states that it is taking such action to avoid the direct and indirect costs, and the division of the market, resulting from dual listing on the Amex and NYSE. In addition, the Board determined that it is in the best interest

of the Issuer to list the Security on the NYSE.

The Issuer stated in its application that it has met the requirements of Amex Rule 18 by complying with all applicable laws in the State of Delaware, in which it is incorporated, and with the Amex's rules governing an issuer's voluntary withdrawal of a security from listing and registration.

The Issuer's application relates solely to the withdrawal of the Security from listing on the Amex, and shall not affect its continued listing on the NYSE or its obligation to be registered under section 12(b) of the Act.<sup>3</sup>

Any interested person may, on or before June 11, 2004, comment on the facts bearing upon whether the application has been made in accordance with the rules of the Amex, and what terms, if any, should be imposed by the Commission for the protection of investors. All comment letters may be submitted by either of the following methods:

#### *Electronic comments:*

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include the File Number 1-10581 or;

#### *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 1-10581. This file number should be included on the subject line if e-mail is used. To help us 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/delist.shtml>). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>4</sup>

**Jonathan G. Katz,**  
*Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49736; File No. SR-CHX-2003-21]

### Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment No. 1 and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2 by the Chicago Stock Exchange, Inc., Relating to the Price Improvement of Orders Executed Automatically on the Exchange

May 19, 2004.

#### I. Introduction

On July 17, 2003, the Chicago Stock Exchange, Inc. ("CHX" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC"), 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> a proposed rule change to amend CHX Article XX, Rule 37, to revise the rules governing the CHX's SuperMAX 2000 program. The CHX filed Amendment Nos. 1 and 2 to the proposal on March 30, 2004,<sup>3</sup> and May 18, 2004,<sup>4</sup> respectively.

The proposed rule change and Amendment No. 1 were published for comment in the **Federal Register** on April 12, 2004.<sup>5</sup> The Commission received no comments regarding the proposal. This order approves the proposed rule change, as amended. In addition, the Commission is publishing

<sup>4</sup> 17 CFR 200.30-3(a)(1).

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

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

<sup>3</sup> See letter from Kathleen M. Boege, Vice President and Associate General Counsel, CHX, to Nancy J. Sanow, Division of Market Regulation ("Division"), Commission, dated March 29, 2004.

<sup>4</sup> See letter from Kathleen M. Boege, Vice President and Associate General Counsel, CHX, to Nancy J. Sanow, Division, Commission, dated May 18, 2004 ("Amendment No. 2"). Amendment No. 2 revises the proposal to: (1) Indicate that an order must receive the national best bid, or better, or the national best offer, or better, at the time the order was received; and (2) clarify that the CHX is deleting CHX Article XX, Rule 37(d)(1)(d) because the CHX intends for CHX Article XXXI to govern the execution prices due odd-lot orders. In addition, Amendment No. 2 states that it replaces an earlier version of Amendment No. 2 that the CHX filed with the Commission on May 12, 2004.

<sup>5</sup> See Securities Exchange Act Release No. 49530 (April 6, 2004), 69 FR 19253.

<sup>4</sup> 17 CFR 200.30-3(a)(1).

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

<sup>2</sup> 17 CFR 240.12d2-2(d).

<sup>3</sup> 15 U.S.C. 781(b).

notice to solicit comments on and is simultaneously approving, on an accelerated basis, Amendment No. 2.

## II. Description of the Proposal

The CHX proposes to amend CHX Article XX, Rule 37, to revise its rules governing the SuperMAX 2000 program. SuperMAX 2000 is a program within the CHX's MAX® execution system that uses a computerized algorithm to provide automated price improvement to orders executed automatically within the MAX system. SuperMAX 2000 is a voluntary price improvement program, and CHX specialists may elect to engage SuperMAX 2000 on an issue-by-issue basis.<sup>6</sup>

Currently, the CHX's rules provide that in securities for which SuperMAX 2000 has been enabled: (1) An order for at least 100 shares will be executed at the ITS Best Offer or NBO (for a buy order) or the ITS Best Bid or NBB (for a sell order) if the spread in the security at the time the order is received is less than \$.02; (2) an order for 100 shares will be executed at a price at least \$.01 lower than the ITS Best Offer or NBO (for a buy order) or at least \$.01 higher than the ITS Best Bid or the NBB (for a sell order) if the spread in the security at the time the order is received is \$.02 or more; and (3) an order for more than 100 shares will be executed at the ITS Best Offer or NBO, or better, (for a buy order) or the ITS Best Bid or NBB, or better, (for a sell order) as the specialist may designate and as is approved by the CHX.<sup>7</sup> Thus, for orders of more than 100 shares, CHX specialists may establish price improvement algorithms to provide varying levels of price improvement for each issue, based on factors including order size, the bid/offer spread at the time the order is received, and other objective market factors.

The CHX proposes to revise SuperMAX 2000 to: (1) Change the name of the program to "SuperMAX;" (2) provide that any order of 100 shares or more will receive the ITS Best Bid or ITS Best Offer in effect at the time the order was received,<sup>8</sup> or better, or the NBB or NBO in effect at the time the order was received, or better, as the specialist may designate and as is approved by the CHX; and (3) delete CHX Article XX, Rule 37(d)(1)(d), which concerns odd-lot orders for which SuperMAX 2000 has been enabled.<sup>9</sup> In

lieu of CHX Article XX, Rule 37(d)(1)(d), CHX Article XXXI, "Execution of Odd-Lot Orders during the Primary Market Trading," will govern the execution prices due odd-lot orders.<sup>10</sup>

According to the CHX, SuperMAX 2000, which was adopted in 2000,<sup>11</sup> combined five different price improvement programs formerly contained in the CHX's rules. Each of the programs was based on factors including order size and best bid or offer spread. Largely for marketing reasons, SuperMAX 2000 contained separate provisions for price improvement of 100-share orders to establish a minimum threshold of price improvement for small orders.

The CHX believes that separate treatment of 100-share orders is no longer warranted and that the elimination of special treatment for 100-share orders could reduce confusion. In addition, the CHX believes that it is appropriate for CHX specialists to exercise the same discretion with respect to 100-share orders that they currently exercise with respect to larger orders in determining the level of price improvement that they are willing to provide.<sup>12</sup> Although the revised rule would permit CHX specialists to give 100-share orders worse execution prices than would be due under the current rule, the Exchange does not believe that the proposal would result in widespread specialist refusal to price improve 100-share orders.<sup>13</sup> Moreover, the CHX notes that even if a number of CHX specialists declined to price improve 100-share orders, the CHX's rules would continue to obligate CHX specialists to execute such orders at a price no worse than the national best bid or offer.

On May 18, 2004, the CHX filed Amendment No. 2 to the proposal. Amendment No. 2 modifies the proposal by: (1) Revising the text of the proposed rule to indicate that an order will receive the national best bid or offer

in effect at the time the order was received, or better; and (2) clarifying that the CHX is deleting CHX Article XX, Rule 37(d)(1)(d) because the Exchange intends for CHX Article XXXI to govern the execution prices due odd-lot orders.<sup>14</sup>

## III. Discussion

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<sup>15</sup> and, in particular, with the requirements of Section 6(b)(5) of the Act,<sup>16</sup> which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, 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. As described more fully above, the proposal modifies the CHX's SuperMAX rules to eliminate the requirement that 100-share orders receive price improvement of at least \$.01 when the national best bid or offer spread at the time the order is received is at least \$.02. Under the revised SuperMAX rules, 100-share orders will receive the same treatment provided currently for orders of more than 100 shares. Thus, both 100-share orders and orders of more than 100 shares will receive the national best bid or offer in effect at the time the order was received, or a better price, as determined by the specialist and approved by the CHX. In addition, the proposal will delete the current SuperMAX provisions concerning odd-lot orders and make clear that CHX Rule XXXI will govern the execution prices due odd-lot orders.

The Commission believes that the proposal should provide CHX specialists with greater flexibility in determining the level of price improvement that they will provide for 100-share orders, as well as for orders of more than 100 shares. Although 100-share orders in securities for which SuperMAX has been enabled no longer will receive minimum price improvement of at least \$.01 when the national best bid or offer spread at the time the order is received is at least \$.02, as provided under the current rule, the CHX's rules will continue to require the CHX's specialists to execute 100-

be executed at the ITS Best Offer or NBO (for a buy order) or the ITS Best Bid or NBB (for a sell order) if the spread in the security at the time the order is received is less than \$.05. If the spread is \$.05 or greater, the odd-lot order will be executed at a price at least \$.01 lower than the ITS Best Offer or NBO (for a buy order) or at least \$.01 higher than the ITS Best Bid or NBB (for a sell order).

<sup>10</sup> See Amendment No. 2, *supra* note 4.

<sup>11</sup> See Securities Exchange Act Release No. 43742 (December 19, 2000), 65 FR 83119 (December 29, 2000) (order approving File No. SR-CHX-00-37).

<sup>12</sup> The CHX specialist's discretion is limited by the CHX Article XX, Rule 37(d)(2), which prohibits changing SuperMAX 2000 price improvement parameters more than once per month.

<sup>13</sup> In this regard, the CHX believes that specialist business considerations, including competitive forces in the securities markets, may dictate that CHX specialists continue to price improve most 100-share orders.

<sup>14</sup> See Amendment No. 2, *supra* note 4.

<sup>15</sup> In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>16</sup> 15 U.S.C. 78f(b)(5).

<sup>6</sup> The CHX estimates that SuperMAX 2000 is enabled for over 90% of the issues traded on the CHX.

<sup>7</sup> See CHX Article XX, Rule 37(d)(1).

<sup>8</sup> See Amendment No. 2, *supra* note 4.

<sup>9</sup> Under CHX Rule XX, Article 37(d)(1)(d), an odd-lot order in which SuperMAX 2000 is enabled will

share orders at a price no worse than the national best bid or offer in effect at the time the order was received. In addition, CHX specialists may continue to offer price improvement for 100-share orders.

Notwithstanding the foregoing, the Commission cautions that the duty of best execution requires a broker-dealer to seek the most favorable terms reasonably available under the circumstances for a customer's transaction.<sup>17</sup> A broker-dealer's duty of best execution is not necessarily satisfied by routing orders to a market center that merely guarantees an execution at the national best bid or offer.<sup>18</sup> Various markets and market makers may provide opportunities for executions at prices superior to the national best bid and offer. The Commission believes that broker-dealers deciding where to route or execute small customer orders must carefully evaluate the extent to which this order flow would be afforded better terms if executed in a market or with a market maker offering price improvement opportunities. In conducting the requisite evaluation of its internal order handling procedures, a broker-dealer must regularly and rigorously examine execution quality likely to be obtained from the different markets or market makers trading a security.<sup>19</sup>

With respect to odd-lots, because the CHX intends for CHX Article XXXI to govern the execution of odd-lot orders,<sup>20</sup> the Commission believes that deleting CHX Rule Article XX, Rule 37(d)(1)(d), will clarify the CHX's rules and eliminate potential confusion concerning the execution prices due to odd-lot orders.

The Commission finds good cause for approving Amendment No. 2 prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. Amendment No. 2 clarifies the proposal by indicating that an order must receive the national best bid or offer in effect at the time the order was received, and by stating that the CHX intends for CHX Article XXXI to govern the execution prices due odd-lot orders. Accordingly, the Commission

finds that it is consistent with Sections 6(b)(5) and 19(b) of the Act to approve Amendment No. 2 on an accelerated basis.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 2, including whether Amendment No. 2 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-CHX-2003-21 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-CHX-2003-21. 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 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 Section, 450 Fifth Street, NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the CHX. 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-CHX-2003-21 and should be submitted on or before June 16, 2004.

#### V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>21</sup> that the proposed rule change (SR-CHX-2003-21), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>22</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04-11842 Filed 5-25-04; 8:45 am]

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49728; File No. SR-CHX-2004-15]

#### **Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by The Chicago Stock Exchange, Inc. To Set Fees for Member Firms for Computer Hardware Stored on the Exchange Premises and for the Connection of that Hardware to the CHX System**

May 19, 2004.

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 April 30, 2004, the Chicago Stock Exchange, Inc. ("CHX" 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 Exchange. The CHX has designated this proposal as one establishing or changing a due, fee, or other charge imposed by the CHX under Section 19(b)(3)(A)(ii) of the Act,<sup>3</sup> which renders the proposal effective upon filing with the Commission. 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 Exchange proposes to amend its membership dues and fees schedule (the "Fee Schedule") to charge member firms a fee for computer hardware stored on Exchange premises, and for the connection of that hardware to CHX systems, where that hardware is associated with systems that are used solely for any purpose other than transmitting orders to the Exchange for

<sup>17</sup> See, e.g., Securities Exchange Act Release Nos. 37619A (September 6, 1996), 61 FR 48290 (September 12, 1996) (adopting Exchange Act Rule 11Ac1-4 and amending Exchange Act Rule 11Ac1-1) ("Order Handling Rules Release") at Section III.C.2.

<sup>18</sup> See, e.g., Order Handling Rules Release at III.C.2. and Securities Exchange Act Release No. 42450 (February 23, 2000), 65 FR 10577 (February 28, 2000) (notice of filing of SR-NYSE-99-48 and Commission request for comment on issues relating to market fragmentation) at Section IV.A.3.c.

<sup>19</sup> See Order Handling Rule Release, *supra* note 17 at Section III.C.2.

<sup>20</sup> See Amendment No. 2, *supra* note 4.

<sup>21</sup> 15 U.S.C. 78s(b)(2).

<sup>22</sup> 17 CFR 200.30-3(a)(12).

<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)(ii).