The existing fee schedule was established in 1990.[104] Inflation has risen 25% since that time.[105] Moreover, the NASD's arbitration facilities have grown in the past eight years since the fees were last revised.[106] In dollar amounts, the additional cost to investors with smaller claims as a result of the fee increased would not be substantial. For large claims, a significant amount of money already is at stake in the litigation and the amounts that the arbitrators may assess against one or both of the parties is not so large that it should affect the decision to pursue claims, especially when the arbitrators assess fees only after fully considering each party's position. Again, the NASD's financial hardship fee waiver process should help assure that investors do not forego their claims solely on account of the fee increase.

Comments challenging the efficiency and quality of arbitration administered by the NASD reinforce the importance of the work undertaken by the NASD's Arbitration Policy task Force and its NAMC, as well as the Commission's own oversight of the arbitration process.[107] These criticisms, however, do not refute NASD Regulation's demonstration that it expends significant amounts of money administering its arbitration program that have not in the past been matched by fee revenue, and that these fee increases are directed at recovering the direct costs of administering the forum. More importantly, they also are outweighed by the fact that arbitrators make fee allocations after a hearing on the record.

Some commenter's other broad attacks against the proposed fee are equally unpersuasive. As noted above, several commenters, citing *McMahon,* questioned whether the fee increases would prevent claimants from being able to vindicate their rights in arbitration. Because the fee increases will not affect the substantive rights of claimants, and because NASD Regulation has a fee waiver process for claimants who have a financial inability to pay the fees, the Commission sees no conflict with *McMahon.*[108] As to the comments regarding whether arbitrators require periodic payments of hearing session deposits and how arbitrators allocate fees in their awards, NASD Regulation states it is revising its arbitrator training to clarify the issues and factors arbitrators should consider in assessing forum fees, in order to ensure that those fees are assessed fairly.[109] It is clear that determinations about whether to request additional hearing session deposits from the parties during a case are at the sole discretion of the arbitrators.

In conclusion, the proposed fee increases are reasonable because they do not exceed the direct average cost of resolving a dispute. Moreover, the NASD's financial hardship fee waiver process should help assure that investors do not forego filing their claims solely on account of the fee increase. Finally, the proposed fee increases are equitably allocated because it is the arbitrators who decide who will pay them in any individual case.

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[110] that the proposed rule change (SR–NASD–97–79) is approved.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

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[104] Securities Exchange Act Release No. 28086 (June 1, 1990), 55 FR 23493 (June 8, 1990).

[105] Consumer Price Index, All Urban Consumers, All Items, U.S. Department of Labor, Bureau of Labor Statistics.

[106] For example, 3,617 cases were filed in 1990, and 5,997 cases were filed in 1997. To administer these cases, NASD Regulation has developed a new computer system to process the selection of arbitrators under a list selection system for selecting arbitrators that the Commission recently approved. *See supra* note 53.

[107] The NASD has reported that it has implemented steps to improve efficiency, including the early selection of arbitrators. The increase in arbitrator honoraria proposed in this filing is part of NASD Regulation's effort to attract and retain qualified arbitrators. Moreover, the Commission has recently approved NASD Regulation's list selection method for choosing arbitrators, which may be preferred by investors. *See* Securities Exchange Act Release No. 40555 (October 14, 1998), 63 FR 56670 (October 22, 1998). NASD Regulation also has reported to the Commission initiatives to improve case processing and administration by, among other things, upgrading its computerized case tracking system and hiring additional staff.

The comments that arbitration fees are higher than court fees do not on their own indicate that the proposed fees are not reasonable. Litigation is likely to involve other significant costs associated with depositions and attorney fees that would likely be lower in an arbitration setting.

[108] We also do not agree with the commenters' statements that the fee increases would raise equal protection or due process concerns. A threshold requirement of any constitutional claim is the presence of state action. *See, e.g., Lugar* v. *Edmondson,* 457 U.S. 922, 936 (1982). A government agency's oversight or approval of a regulated entity's business and operations does not constitute state action. *See, e.g., Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, 357 (1974). Courts that have considered the issue have concluded that the NASD's operation of an arbitration forum does not constitute state action simply because the Commission reviews and approves arbitration rules. *See, e.g., Cremin* v. *Merrill Lynch Pierce Fenner & Smith, Inc.,* 957 F. Supp. 1460, 1465–1470 (N.D. Ill. 1997).

[109] *See* NASD Response One.

[110] 15 U.S.C. 78s(b)(2).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–41084; File No. SR–NYSE–98–34]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by the New York Stock Exchange, Inc. to Amend Rule 104.10 to Require Floor Official Approval for Destabilizing Odd-Lot Transactions

February 22, 1999.

I. Introduction

On October 16, 1998, the New York Stock Exchange, Inc. (''NYSE'') submitted to the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Rule 104.10 by deleting the odd-lot exception. The proposed rule change was published for comment in the **Federal Register** on December 4, 1998.[3] On November 20, 1998, the NYSE submitted a letter to the Commission clarifying the treatment of odd-lot offsets, the substance of which was incorporated into the notice and this order.[4] The Commission received no comments on the proposal. This order approves the proposal.

II. Description of the Proposal

The Exchange is proposing to amend NYSE Rule 104.10(b)(i) by eliminating paragraph (C), which provides an exception to the Floor Official approval requirement for specialist purchases and sales on destabilizing ticks to offset position acquired by the specialist in executing odd-lot orders in the same day.

NYSE Rule 104 governs specialists' dealings in their specialty stocks. In particular, NYSE Rule 104.10(6) describes the manner in which a specialist may liquidate or increase his or her position in a specialty stock. In general, the rule requires such

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 40711 (November 25, 1998), 63 FR 67160.

[4] Letter from Agnes Gautier, Vice President, Market Surveillance, NYSE, to Richard Strasser, Assistant Director, Division of Market Regulation (''Division''), Commission, dated November 20, 1998 (''NYSE Letter'').

transactions to be effected ''in a reasonable and orderly manner'' in relocation to the overall market. The rule also requires the market in the particular stock and the adequacy of the specialist's position to meet the reasonably anticipated needs of the market. NYSE Rule 104.10(6)(i)(A) provides that specialist may liquidate a position by selling stock on a direct minus tick or by purchasing stock on a direct plus tick (destabilizing ticks), only if the transaction is reasonably necessary in relation to the specialist's overall position in the stock and if the specialist obtains Floor Official approval. Floor Official approval provides an independent review of these destabilizing transactions for compatibility with the reasonableness test.

NYSE Rule 104.10(6)(i)(C) provides an exception to the Floor Official approval requirement for specialist purchases and sales on destabilizing ticks to offset positions acquired by the specialist in executing odd-lot orders on the same day. Odd-lot orders are executed throughout the day in the odd-lot system against the specialist in that stock. Periodically, the specialist receives an automated notification of the net amount of odd-lots that have been executed against his or her position. The specialist can then offset these odd-lot transactions by buying or selling for his or her own account.

The basis for the exception was that these odd-lot offsets would not have an impact on the market as a whole. However, there has been a marked increase in the volume of odd-lot transactions in the last several years [5] and, as a result, an increase in specialist offset transactions. The Exchange believes that odd-lot offsets should be treated as other liquidating transactions and be netted with round lot transactions. All destabilizing transactions would require Floor Official approval pursuant to Exchange Rules.[6] Therefore, the Exchange is proposing to delete the exception for odd-lots in paragraph (C).

III. 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.[7] In Particular, the Commission believes the proposal is consistent with the requirements of sections 6(b)(5) and 11(b) of the Act.[8] Section 6(b)(5) provides, in part, that the rules of an 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, in general, to protect investors and the public interest. Section 11(b) allows exchanges to promulgate rules relating to specialists to maintain fair and orderly markets.

Pursuant to Rule 11b–1(a)(2)(ii) under the Act, the rules of a national securities exchange must provide, as a condition of a specialist's registration, that a specialist engage in a course of dealings for his own account to assist in the maintenance, so far as practicable, of a fair and orderly market.[9] NYSE Rule 104.10(6) regulates specialist transactions on the Exchange. Currently, odd-lot transactions are excluded from Exchange Rule 104.10(6)(i)(A), which regulates when specialists may trade, for their own account on destabilizing ticks. These transactions were excluded from the provisions of Rule 104.10(6)(i)(A) because odd-lot volume was relatively small and presumably did not have significant market impact.

The Exchange represents that odd-lot volume has increased significantly.[10] As a result, odd-lot destabilizing transactions could impact the market price of a security. The Commission believes that specialist purchases and sales on destabilizing ticks should be effected in a reasonable manner because of their potential destabilizing effect on the market. Under the proposed rule change, these destabilizing odd-lot transactions would be governed by NYSE Rule 104.10(6)(i)(C), which permits such transactions if they are reasonably necessary and the specialist obtains the prior approval of a Floor Official.[11] The Commission believes that it is reasonable and consistent with the Act to subject destabilizing odd-lot transactions to the same level of scrutiny currently applicable to other destabilizing transactions. The proposal should help ensure that odd-lot destabilizing transactions are effected in a manner consistent with the maintenance of fair and orderly markets.

IV. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[12] that the proposed rule change (SR–NYSE–98–34) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Margaret H. McFarland,

Deputy Secretary.

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[5] Odd-lot volume exceeded 1 billion shares on the NYSE in 1997, an 87% increase from 1994. Telephone conversation between Agnes Gautier, Vice President, Market Surveillance, NYSE, and Robert B. Long, Attorney, Division, Commission, on October 23, 1998.

[6] *See* NYSE Letter, *supra* note 4.

[7] In approving this proposal, the Commission has considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[8] 15 U.S.C. 78f(b)(5) and 78k(b).

[9] 17 CFR 240.11b–1(a)(2)(ii).

[10] *See* telephone conversation discussed in note 5.

[11] *See* NYSE Rule 104.10(6)(i)(A).

[12] 15 U.S.C. 78s(b)(2).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–41089; File No. SR–OCC–98–14]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change Relating to Closing Prices in Expiration Processing

February 23, 1999.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on November 3, 1998, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which items have been prepared primarily by OCC. The Commission is publishing this notice and order to solicit comments on the proposed rule change from interested persons and to grant accelerated approval of the proposal.

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

The purpose of the proposed rule change is to revise OCC Rule 805 with respect to closing prices in expiration processing.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC included statements concerning the purpose of and 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. OCC has prepared summaries, set forth in sections (A), (B),

[1] 15 U.S.C. 78s(b)(1).