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

1. Purpose

CBOE Rule 8.95(f) permits a trading crowd to indicate that it no longer wishes to trade an option class opened for trading prior to May 1, 1987, in which event the Exchange's Allocation Committee or Special Product Assignment Committee, as applicable,[4] may reallocate the class to another trading crowd or to a Designated Primary Market-Marker. The purpose of proposed Interpretation and Policy 8.95.03 is to adopt procedures for the administration of CBOE Rule 8.95(f) that specify how a trading crowd may manifest an indication that it no longer wishes to trade a class of options for purposes of that rule.

Two procedural aspects of the administration of CBOE Rule 8.95(f) are embodied in proposed Interpretation and Policy 8.95.03. The first is to define who constitutes a trading crowd for purposes of the rule, and the second is to adopt voting procedures to be used for purposes of determinations made under the rule. Proposed Interpretation and Policy 8.95.03 provides that members of a trading crowd for purposes of CBOE Rule 8.95(f) are those market-makers and floor brokers who have transacted at least 80% of their market-maker contracts (in the case of market-makers) or orders (in the case of floor brokers) in each of the three immediately preceding calendar months in option classes traded at that trading crowd's station, and who continue to be present in the trading crowd in the capacity of a market maker or floor broker at the time of the vote. These provisions are intended to ensure that determinations made under CBOE Rule 8.95(f) will be made by those members who are currently engaged as market-makers or floor brokers in the trading crowd, and who have concentrated their activity in the trading crowd over the last three months.

The proposed Interpretation and Policy also provides that a crowd will be deemed to have indicated that it no longer wishes to trade an option class only if (i) the question is put to a vote of the members of the trading crowd, (ii) a majority of the members of the trading crowd participate in the vote, and (iii) a majority of the votes cast are in favor of not wanting to continue to trade the class. At least 24 hours posted notice to the trading crowd of the time and date of the vote is required before a vote may take place. These voting procedures are substantially the same as those set forth in CBOE Rule 2.40(d) concerning recommendations of a market-maker surcharge under that rule, except that a specified quorum requirement and a longer (90-day) eligibility period for participation in the vote are provided under Interpretation and Policy 8.95.03 in light of the greater significance to a trading crowd of a determination not to continue to trade a class of options. In other respects, the Allocation Committee or Special Product Assignment Committee, as applicable, shall determine administrative procedures for conducting the vote.[5]

2. Statutory Basis

Proposed Interpretation and Policy 8.95.03 is consistent with and in furtherance of the objectives of Section 6(b)(5) of the Act[6] in that it is designed to promote just and equitable principles of trade and to remove impediments to and perfect the mechanisms of a free and open market, because it will provide fair and orderly procedures for the administration of CBOE Rule 8.95(f).

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

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 written comments with respect to the proposed rule change.

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

The foregoing rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the Exchange, and therefore, has become effective pursuant to Section 19(b)(3)(A)(i) of the Act[7] and paragraph (f)(1) of Rule 19b–4.[8] At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. 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, N.W., Washington, D.C. 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 in the Commission's Public Reference Room in Washington, D.C. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR–CBOE–99–31 and should be submitted by August 20, 1999.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

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[4] *Id.*

[5] *See* Amendment No. 1, *supra* note 3.

[6] 15 U.S.C. 78f(b(5).

[7] 15 U.S.C. 78s(b)(3)(A)(i).

[8] 17 CFR 240.19b–4(f)(1).

[9] 17 CFR 200.30–3(a)(12)

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–41647; File No. SR–NASD–98–61]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Granting Approval to Proposed Rule Change Relating to Reporting Transactions in Exchange-Listed Securities

July 23, 1999.

I. Introduction

On August 12, 1998, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association''), through its wholly-owned subsidiary, Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act''

or ''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to eliminate an unnecessary provision of an NASD rule relating to the reporting of transactions in exchange-listed securities traded in the third market.

The proposed rule change was published for comment in Exchange Act Release No. 40360 (August 25, 1998), 63 FR 46267 (August 31, 1998). No comments were received on the proposal.[3] This order approves the proposed rule change.

II. Description

The NASD proposes to eliminate an unnecessary provision of its rules applicable to the reporting of transactions in exchange-listed securities. Specifically, NASD Rule 6420(d)(3)(A), which is the general rule requiring NASD members to report all principal transactions in exchange-listed securities in the third market, currently contains language requiring members to report transactions in a manner ''reasonably related to the prevailing market taking into considerations all relevant circumstances * * *.'' Although this provision accompanied a change to the trade reporting rules approved in 1980 (which was intended to make comparable the reporting of third market trades with exchange transactions), Nasdaq believes that this particular language is superfluous in the context of exchange-listed securities and does not serve any meaningful purpose with respect to the trade reporting of these securities.

Nasdaq believes that the language has served only to promote the misperception that the rule provides flexibility in the manner in which NASD members may report third market transactions. The rule was intended to require third market trades to be reported on a ''gross'' basis, exclusive of any mark-up or mark-down charged to the customer.[4] Nasdaq believes that this has led to inaccurate trade reporting, and has been used by ITS Participants[5] as a reason for not extending the NASD's Intermarket Trading System/Computer Assisted Execution System (''ITS/CAES'') link to all exchange-listed securities. Accordingly, Nasdaq believes that the best practice would be to remove the unclear language from the rule.

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 the Association and, in particular, with the requirements of Section 15A(b)(6).[6] Section 15A(b) requires that the rules of the association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating 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 are not designed to permit unfair discrimination between customers, issuers, brokers, and dealers.[7]

The Commission also finds that the proposed rule change is consistent with Section 11A of the Act.[8] Specifically, the Commission finds that the proposed rule change should facilitate the further development of the National Market System by eliminating any confusion regarding the trade reporting responsibilities of third market makers.

Prior to July 1980, the NASD required that third market makers report transactions to the tape at the ''net'' price to the customer—that is, inclusive of mark-ups, mark-downs, commission equilavents, or service charges (collectively, ''charges''). In contrast, exchange rules have always required a trade to be reported to the tape at the ''gross'' transaction price—that is, exclusive of charges. In July 1980, the Commission approved an NASD rule change providing that members would be required to report transactions to the tape exclusive of charges. The NASD's rule also allowed members to report prices ''reasonably related to the market, taking into consideration all relevant circumstances. * * *''

The NASD's proposed rule change deletes the ''reasonably related to the market'' language. The Commission believes that the proposed rule change clarifies that third market makers will no longer have the perceived latitude to determine the price at which exchange-listed securities transactions are reported. The proposed rule change further promotes the comparability of transaction prices reported in the consolidated system and improves the manner in which transaction prices are disclosed to public investors.

The Commission notes that the ITS Participants have expressed concern that the perceived lack of comparability between the trade reporting requirements in the third market and those in the exchange markets results in disparate prices and obligations regarding the protection of quotations under the ITS Trade-Through Rule and Block Policy.[9] The Participants note that the

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

[2] 17 CFR 240.19b–4.

[3] Although the Commission did not receive any comments on this specific proposed rule change, the Chicago Stock Exchange (''CHX'') submitted a comment letter on the Commission's proposal to expand the Intermarket Trading System linkage to all listed securities. The CHX's letter questioned the practical effect of the NASD's proposed rule change. Specifically, CHX questioned whether the NASD's proposed rule change truly eliminated the discretionary nature of the current rule. *See* Letter to Jonathan G. Katz, Secretary, Commission, from Robert H. Forney, President and Chief Executive Officer, CHX, dated August 28, 1998. The NASD responded in December 1998. *See* Letter to Jonathan G. Katz, Secretary, Commission, from Richard G. Ketchum, President and Chief Operating Officer, NASD, dated December 17, 1998.

[4] *See* Exchange Act Release No. 16960 (July 7, 1980), 45 FR 47291 (July 14, 1980) (approving SR–NASD–80–03).

[5] ITS is a communications and order routing network linking eight national securities exchanges and the electronic over-the-counter market operated by the NASD. ITS was designated to facilitate intermarket trading in exchange-listed equity securities based on current quotation information emanating from the linked markets. The NASD's computer assisted execution system (''CAES'') enables participating firms to route their orders for listed securities through ITS to obtain executions against quotations of third market makers participating in Nasdaq. The ITS/CAES interface allows participant exchanges and Nasdaq market makers to route commitments to other participant exchange markets for execution.

Participants to the ITS Plan include the American Stock Exchange LLC, the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Inc., the CHX, the Cincinnati Stock Exchange, Inc., the NASD, the New York Stock Exchange, Inc. (''NYSE''), the Pacific Exchange, Inc., and the Philadelphia Stock Exchange, Inc. (collectively, ''Participants'').

[6] 15 U.S.C. 78o–3(b)(6).

[7] *See* 15 U.S.C. 78o–3. In approving this rule change, the Commission notes that it has considered the proposal's impact on efficiency, competition, and capital formation, consistent with Section 3 of the Act. *Id.* at 78c(f).

[8] 15 U.S.C. 78k–1.

[9] *See, e.g.,* CHX letter; Letter to Jonathan G. Katz, Secretary Commission, from James E. Buck, Senior Vice President and Secretary, NYSE, dated August 31, 1998 (comment letter to File No. 4–208, Exchange Act Release No. 40260 (July 24, 1998), 63 FR 40748 (July 30, 1998) nn.63, 67) (''NYSE letter'').

A ''trade-through'' occurs when a transaction is effected at a price below the best bid, or above the best prevailing offer. The ITS Trade-Through Rule requires that members of ITS Participant markets avoid initiating a trade-through when purchasing or selling, either as principal or agent, any ITS security on the Participant market or when sending a commitment to trade through ITS. The ITS Block Trade Policy provides that the member who represents a block-size order(s) shall, at the time of execution of the block trade, send, or cause to be sent, through ITS to each participating ITS market center displaying a bid (or offer) superior to the execution price, a commitment to trade at the execution price and for the number of shares displayed with that market center's better-priced bid (or offer). This policy is intended to enable

Continued

price at which a transaction is reported to the Consolidated Tape System determines whether or not a member in one Participant market who has displayed a better bid or offer within the linked ITS market is entitled to satisfaction as a consequence of an inferior priced transaction reported to the tape in another market. The ITS Participants believe that the current NASD trade reporting rule, containing the ''reasonably related to the market'' provision, provides latitude to NASD members to report a price to the tape different from the execution price confirmed to customers, thereby creating the potential to avoid the Trade-Through Rule.

In its letter to the Commission, CHX asserts that the NASD's proposed rule change does not address the discretionary nature of the NASD's current trade reporting rule because it ''would merely eliminate the standard articulating how to calculate the markup or markdown.'' The NASD responds that it ''fails to see the relevance of the argument that a third market maker could avoid a trade-through by reporting a price within the national best bid and offer while providing a different price to its customer, when that difference must be disclosed to the customer and assessed as a cost of trading on the same basis as any other charge or commission.'' [10] The NASD further disagrees with the CHX's assertion that the NASD's proposed rule change limits the value of a trade-through rule. CHX argues that a market maker's discretion to report a trade at a prevailing market price at the time of the trade, as long as the customer is made aware of the difference between the reported price and the net price (the markup), enables a market maker to avoid a trade-through. In response, the NASD states that its trade reporting rule emphasizes the value of a trade-through rule by encouraging market participants to provide an execution at a better price than the national best bid or offer. The NASD further believes that such an execution would be ''exactly comparable with orders executed on an exchange where the reported price does not include the broker's commission.'' [11]

The Commission finds that eliminating the ''reasonably related to the market'' language helps to clarify the NASD's trade reporting rule. As the NYSE stated, removal of the ''reasonably related to the prevailing market'' language would resolve its long-standing concern [12] with the trade reporting issue.[13] Furthermore, effective surveillance and confirmation disclosure of the charges to the customer should help to enforce these trade reporting obligations.[14] Specifically, in the event a broker-dealer is acting as principal in a transaction in a reporting security, the confirmation disclosure rule, Exchange Act Rule 10b–10, requires a broker-dealer to disclose to a customer the trade price reported to the Consolidated Tape, the net price to the customer in the transaction, and the difference, if any, between the reported price and the price to the customer. If a broker-dealer is acting as agent for a customer, the member must confirm to the customer the gross trade price (which is the price reported to the Consolidated Tape), and the commission equivalent as well as the net price to the customer.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[15] that the proposed rule change (SR–NASD–98–61) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

Margaret H. McFarland,

Deputy Secretary.

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other markets to derive the benefit of the block without breaking it up.

[10] *See* NASD letter.

[11] *See* NASD letter.

[12] *See, e.g.,* Letter to Jonathan G. Katz, Secretary, Commission, from James E. Buck, Senior Vice President and Secretary, NYSE, dated June 25, 1997.

[13] *See* NYSE letter.

[14] *See* Exchange Act Release No. 18713 (May 6, 1982), 47 FR 20413, 20415 n.13 (May 12, 1982).

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

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–41646; File No. SR–Phlx–99–21]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. To Establish Fees for Transactions Executed Through the Volume Weighted Average Price (''VWAP'') Trading System (''VTS'')

July 23, 1999.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 28, 1999, the Philadelphia Stock Exchange, Inc. (''Exchange'' or ''Phlx'') 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 Commission is publishing this notice to solicit comments on the proposed rule change form interested persons.

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

The Commission recently approved the Exchange's proposal to operate the Volume Weighted Average Price (''VWAP''®) Trading System (''VTS''™) [3] as a facility of the Exchange.[4] The VTS will provide a daily pre-opening order matching session for the execution of large stock orders at the VWAP. The Exchange now proposes to establish a fee schedule for trades executed through the VTS.

The text of the proposed rule change is available at the Office of the Secretary, the Exchange, 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 Exchange 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. The Exchange 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

1. Purpose

On March 24, 1999, the Exchange received Commission approval to operate the VTS as a facility of the Exchange. The VTS will provide a daily pre-opening order matching session for the execution of large stock orders at the VWAP. Approximately 300 of the most highly capitalized and highly liquid equity securities that are listed on the New York Stock Exchange will be

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

[2] 17 CFR 240.19b–4.

[3] VWAP is a registered trademark of the Universal Trading Technologies Corporation (''UTTC''). The VTS™ is the property of UTTC.

[4] *See* Securities Exchange Act Release No. 41210 (Mar. 24, 1999), 64 FR 15857 (Apr. 1, 1999) (''VTS Approval Order''). The approval is effective for a 1 year pilot period.