proposed Rule 7090(e) Nasdaq is only using the term to refer to firms that distribute the MFQS data to third parties.

The Market Data Distribution Department will identify the firms that distribute the mutual fund data to third parties. These firms will be required to confirm their usage and distribution of the data and execute the appropriate amendment to the Nasdaq Distributor Agreement.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,[4] in general and with section 15A(b)(5)[5] of the Act, in particular, in that the proposal provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the NASD operates or controls. The proposed fee will be assessed on all firms that receive the MFQS data and distribute it to third parties, thus gaining a commercial advantage.

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

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

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

Written comments on the proposed rule change were neither solicited nor received.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer 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 such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

[4] 15 U.S.C. 78o–3

[5] 15 U.S.C. 78o–3(b)(5).

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, NW., Washington, DC 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. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to file number SR–NASD–2003–52 should be submitted by May 15, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[6]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–10103 Filed 4–23–03; 8:45 am]

BILLING CODE 8010–01–P

[6] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47689; File No. SR–NYSE–99–51]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Order Tracking

April 17, 2003.

I. Introduction

On December 27, 1999, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''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 require the recording of details of orders in Exchange listed securities by its members and member organizations. On May 24, 2000, the Exchange filed Amendment No. 1 to the proposal.[3] On August 14, 2001, the Exchange filed Amendment No. 2 to the proposal.[4] On January 17, 2002, the Exchange filed Amendment No. 3 to the proposal.[5] The proposed rule change, as amended, was published for comment in the **Federal Register** on January 30, 2002.[6]

On February 28, 2002, the Exchange filed Amendment No. 4 to the proposal.[7] The proposed rule change, as amended, was again published for comment in the **Federal Register** on March 15, 2002.[8]

The Commission received one comment on the proposal.[9] This order approves the proposed rule change, as amended.

II. Background

The proposed rule change is intended to fulfill certain of the undertakings contained in the order issued by the Commission relating to the settlement of an enforcement action against the NYSE for failure to enforce compliance with section 11(a) and Rule 11a–1 of the Act and NYSE Rules 90, 95, and 111.[10] The SEC Order found that the NYSE's floor broker regulatory program suffered from two major deficiencies: (1) The NYSE failed to take appropriate action to police for profit-sharing or other performance-based compensation of independent floor brokers; and (2) the NYSE suspended its routine independent floor broker surveillance for extensive periods of time. As part of the SEC Order, the NYSE agreed and was ordered to comply with a variety of undertakings. Among other things, it agreed to, and was ordered to, continue the development and implementation of an electronic floor system (''Phase I

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

[2] 17 CFR 240.19b–4.

[3] *See* Letter from James E. Buck, Senior Vice President and Secretary, NYSE, to Jennifer Colihan, Attorney, Division of Market Regulation, Commission, dated May 22, 2000 (''Amendment No. 1'').

[4] *See* Letter from Darla C. Stuckey, Assistant Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division, Commission, dated August 14, 2001 (''Amendment No. 2'').

[5] *See* Letter from Darla C. Stuckey, Assistant Secretary, NYSE to Belinda Blaine, Associate Director, Division, Commission, dated January 17, 2002 (''Amendment No. 3'').

[6] *See* Securities Exchange Act Release No. 45326 (January 23, 2002), 67 FR 4479.

[7] *See* Letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy Sanow, Assistant Director, Division, Commission, dated February 28, 2002 (''Amendment No. 4'').

[8] *See* Securities Exchange Act Release No. 45521 (March 8, 2002), 67 FR 11735.

[9] *See* Letter from Stuart J. Kaswell, Senior Vice President and General Counsel, Securities Industry Association (''SIA''), to Jonathan Katz, Secretary, Commission, dated April 26, 2002.

[10] *See* In the Matter of New York Stock Exchange, Inc., SEC Release No. 34–41574, June 29, 1999; Administrative Proceeding File No. 3–9925 (''SEC Order'').

Floor Audit Trail'') that will be used to enter details related to orders before these orders can be represented on the trading floor. To accomplish this undertaking, the NYSE was ordered to submit a proposed rule change setting forth the complete details and specifications of the Phase I Floor Audit Trail and to implement fully the Phase I Floor Audit Trail nine months after Commission approval of the proposal. The Exchange complied with this aspect of the SEC Order.[11]

In addition, as part of the SEC Order, the Exchange undertook and was ordered ''to design and implement'' ''an audit trail sufficient to enable the NYSE to reconstruct its market promptly, to effectively surveil the NYSE, and to facilitate the effective enforcement of the federal securities laws and NYSE rules.'' In connection with this undertaking, at a minimum, the Exchange was required to provide: (a) an accurate, time-sequenced record of orders, quotations and transactions, beginning with the receipt of an order by any NYSE member firm and further documenting the life of the order through the process of execution or cancellation of that order; and (b) for synchronization of clocks used in connection with the audit trail (''Phase II Floor Audit Trail''). This proposed rule change addresses that undertaking.

III. Description of Proposal

The Exchange has proposed the adoption of four new rules which would require members and member organizations (herein referred to collectively as ''members'') to record and retain order information, to synchronize their time keeping equipment with a time source designated by the Exchange, and to provide the Exchange with information on orders upon request. Specifically, the Exchange has adopted requirements for the electronic capture of orders at the point of sale (front end systemic capture, or ''FESC'')[12] and at the point of receipt (order tracking system, or ''OTS''). The purpose of the requirements is to create a complete systemic record of orders handled by members and member organizations. The proposed rules and amendments are described below.

i. NYSE Rule 123(f)

Proposed NYSE Rule 123(f) requires that order execution reports be entered into FESC and that any member organization proprietary system used to record the details of an order must also be capable of transmitting a report of the order's execution to FESC. The proposed rule further requires that the details of each execution report required to be recorded must include the following data elements: (1) Order identifier that uniquely identifies the order as required by paragraph 123(e); (2) symbol; (3) number of shares or quantity of security; (4) transaction price; (5) time the trade was executed; (6) executing broker badge number, or alpha symbol as may be used from time to time, in regard to its side of the contract; (7) executing broker badge number, or alpha symbol as may be used from time to time, of the contra side to the contract; (8) clearing firm number, or alpha symbol as may be used from time to time, in regard to its side of the contract; (9) clearing firm number, or alpha symbol as may be used from time to time, in regard to the contra side of the contract; (10) whether the account for which the order was executed was that of a member or member organization or of a non-member or non-member organization; (11) identification of member or member organization which recorded order details as required by paragraph (e); (12) date the order was entered into an Exchange system; (13) indication as to whether this is a modification to a previously submitted report; (14) settlement instructions (*e.g.,* cash, next day, or seller's option); (15) Special Trade Indication, if applicable; (16) Online Comparison System (OCS) Control Number; and (17) such other information as the Exchange may from time to time require.

ii. NYSE Rule 132A

Proposed NYSE Rule 132A requires members to synchronize the business clocks used to record the date and time of any event that the Exchange requires to be recorded. The Exchange will require that the date and time of orders in securities listed on the Exchange be so recorded. The proposed Rule also requires that members maintain the synchronization of this equipment in conformity with procedures prescribed by the Exchange. The Exchange intends to coordinate time synchronization with the National Association of Securities Dealers Inc.'s (''NASD'') identical requirements.[13]

iii. NYSE Rule 132B

Proposed NYSE Rule 132B prescribes requirements and procedures with respect to orders in any security listed on the Exchange received or originated by a member. Paragraph (a) of the proposed rule requires immediate recordation of the data elements described in paragraph (b). If an order is transmitted to another member or is transmitted to another department of the same member, information detailed in paragraph (c) must be recorded. If an order is modified or cancelled, information required by paragraph (d) must be recorded. The various data elements and information required by the proposed rule must be recorded in an electronic format prescribed by the Exchange. Time records must be expressed in hours, minutes and seconds. The Rule makes clear that the records required therein must be preserved pursuant to Rule 17a–4(b) under the Act and that these records may be produced or reproduced on ''micrographic media'' as contemplated under Rule 17a–4(f) under the Act.

Paragraph (b) of the proposed rule contains the sixteen data elements to be recorded for an order. These include: (1) An order identifier; (2) stock symbol; (3) identification of the member; (4) department identification of the member or terminal identification number for orders received via a SuperDOT terminal; (5) department of the member which originated the order; (6) number of shares; (7) buy or sell order designation; (8) whether the order is a short sale order; (9) whether the order is a market, limit, stop or stop limit order (which terms are defined in Rule 13 of the Exchange); (10) any limit price, stop price or stop limit price prescribed in the order; (11) the date, if any, that an order expires or, if the order is in force for less than a day, the time when it expires; (12) the time limit the order is in force; (13) any request by the customer that the order not be displayed pursuant to Rule 11Ac1–4 under the Act; (14) any special handling requests (such as fill or kill, market-on-close, limit-on-close, not held, etc); (15) date and time of origination or receipt of the order;[14] and (16) the type of account for which the order is entered. Each of these data elements are commonly understood and used by members.

Paragraph (e) of the proposed rule explains that the order identifier is the order identifier required by NYSE Rule 123(e). This is the identifier assigned to an order in connection with the

[11] *See* Securities Exchange Release No. 43689 (December 7, 2000), 65 FR 79145 (December 18, 2000) (''Phase I Floor Audit Trail Approval Order'').

[12] *See id.*

[13] *See* NASD Rule 6953.

[14] For purposes of NYSE Rule 132B(b)(15), for electronic orders, order origination and time of receipt of an order is the time the order is captured by a member organization's electronic order-routing or execution system. For manual orders, order origination and time of receipt of an order is the time the order is first received by the member organization from the customer.

Exchange's FESC initiative. Under NYSE Rule 123(e), before an order is represented or executed on the Floor of the Exchange, a member must assign a unique identifier to it. This identifier will stay with the order throughout its processing life, through cancellation or execution.

Paragraph (c) of proposed NYSE Rule 132B requires that certain information be recorded when an order is transmitted to another department within the member, to another member, or to a non-member. When transmitted to another department, the following must be recorded: the order identifier, identification of the member, the date of receipt or origination of the order, the identification of the department to which the order was transmitted and the date and time the order was received by the department.

Paragraph (c)(2) contains requirements for both receiving and transmitting members when an order is transmitted from one member to another. The transmitting member must record whether the order was transmitted manually or electronically, the order identifier, market participant symbol for both receiver and transmitter, date of origination or receipt by the transmitting member, the date and time the order was transmitted, the number of shares so transmitted and, if the order is included in a bunched order, the bunched order route indicator assigned by the member. A bunched order is any aggregation of two or more orders. The receiving member must record whether the transmitted order was received manually or electronically, the order identifier, and the identifier of the member transmitting the order.

Exceptions to the requirement for recording information for both the transmitting and receiving member are contained in proposed NYSE Rules 132B(c)(2)(C) and 132(c)(2)(D). These exceptions are for orders transmitted to the Floor via SuperDOT, the Exchange's automated order routing system, and orders transmitted to another member on the Floor of the Exchange, where the order was entered into an Exchange data base pursuant to NYSE Rule 123(e), the Exchange's front-end systemic order capture requirements. In light of the objective of being able to identify an order from start to finish, both the receiving and transmitting members must record the order identifier and the identity of the member transmitting and receiving the order.

For orders transmitted to a non-member, the member must record that fact as well as the order identifier, member's identity, date of receipt or origination of the order, date and time of the order, number of shares, and, if applicable, any bunched order route indicator.

If an order is modified, proposed NYSE Rule 132B(d) requires that the order identifier (and any new order identifier, if applicable), date and time of modification and date the original order was received or originated be recorded. If an order is cancelled, (d)(2) requires the date and time of cancellation, whether the customer or the member cancelled the order, and the number of shares cancelled if there is a partial execution. This is in addition to the basic requirements to record the order identifier, identity of the member and the date and time when the order was first received or originated.

The same exceptions with respect to SuperDOT orders and orders on the Floor entered into a database under NYSE Rule 123(e) will apply to modifications and cancellations. Modification and cancellation will be elements captured in these systems and will not need to be captured by the member on the Floor.

Paragraph (f) of proposed NYSE Rule 132B provides an exception to the Rule for proprietary transactions of specialists, Registered Competitive Market Makers, and Competitive Traders. The transactions these members effected for their own accounts are not orders as contemplated by the Rule. Information with respect to these transactions is recorded and maintained by these members pursuant to the recordkeeping requirements of Exchange [15] and Commission Rules.[16]

iv. NYSE Rule 132C

Proposed NYSE Rule 132C requires members, upon request, to transmit order tracking data to the Exchange. This parallels the approach used under NYSE Rule 410A (Automated Submission of Trading Data) for submission of transaction information. The Exchange will make requests for order tracking information on an as-needed basis in order to carry out its surveillance and regulatory functions.[17] The NYSE has represented that this data will be used for regulatory purposes only and will not be used by the Exchange to gain an unfair competitive advantage over other market participants.

Members will be required to submit the data in an automated format. It is the Exchange's experience that submission of data by request has proven to be effective and efficient from both the Exchange's and its members' viewpoint.

Integration with Existing Exchange Requirements

With the implementation of NYSE Rule 132B, Exchange rules will provide a complete audit trail of orders from receipt through execution. As mentioned above, NYSE Rule 123(e) provides for the systemic capture of orders before they are represented or executed on the Floor. This includes the assignment of the unique identifier to each order. In addition, the Exchange will require that all orders be systemically delivered to its Floor, thus providing an electronic capture of order data from receipt or origination of an order. The audit trail requirements of proposed NYSE Rule 132B require information on the execution and clearance of transactions, the so-called ''back end'' of orders. With the addition of NYSE Rule 123(f), which requires recordation of the unique order identifier as part of the execution report, the Exchange represents that an order could be tracked throughout the life of the order. The unique order identifier would link the execution report to the original order.

Violation of Order Tracking Requirements

If, upon investigation, the Exchange determines that a violation of the Rule proposed to be amended or adopted herein has occurred, the Exchange will take appropriate action under the procedures of its disciplinary rules, including NYSE Rule 476. If a particular violation is deemed minor in nature, this could include issuance of a cautionary letter.[18]

Effective Date

The provisions of the rules and amendments proposed herein will become effective 15 months after the date of this order, except that the requirement in NYSE Rule 123 that copies of execution reports be entered into an Exchange database will become effective six months after the date of this order.[19]

[15] *See* NYSE Rules 123 and 410.

[16] *See* CFR 240.17a–3.

[17] The Exchange does not believe that it is cost-effective to store all order tracking data collected from members on a daily basis, and that members should be required to submit data to the NYSE on an ''as requested'' basis rather than daily as a matter of routine.

[18] In the future, the Exchange may consider seeking Commission approval to add these rules to the list of rules contained in NYSE Rule 476A, which provides for the imposition of fines for minor violations of rules.

[19] *See* note 7, *supra,* Amendment No. 4.

IV. Summary of Comments

The Commission received one comment letter on the proposal.[20] In its letter, the commenter raised concerns with respect to four subjects: the proposed rule's application to manual orders, how the order identifier would be used, the proposed rule's requirement to record Online Comparison System (''OCS'') control numbers, and the proposed rule's requirement to include a Bunched Order Route Indicator.

A. Manual Orders

The commenter objected to both the proposal's general requirement that firms be required to record information, including time of receipt, regarding manual orders and in particular the requirement that they assign manual orders an order identification number. The commenter explained that at many small firms, recordation of order information is still done primarily by order ticket. According to the commenter, in these cases, the order information is not electronically captured and cannot be linked to other data for the purpose of creating a complete systemic record of the order. The commenter contends that in order to comply with the NYSE's proposed rule to capture order information relating to manual orders, there would be costs in addition to the cost of new technology needed for compliance by members. The commenter believes that there would be a ''huge cost'' to investors because, the commenter argues, sales-traders would need to divert their attention from handling customer orders in order to collect and electronically all the data elements required by the proposed rule. The commenter believes that a ''legion of sales-traders performing clerical duties rather than monitoring markets for execution opportunities will make the markets riskier, less efficient and less accessible to investors.''

B. Order Identifier

The commenter also explained that because manual orders are typically written down and are not entered into the receiving firm's system, no systemic order identifier is generated. The commenter believes that assigning a trader the responsibility of generating and appending an order identifier to manual orders could result in inefficient handling of orders. The commenter further believes that the risk of confusion, duplication, and bad data will be exacerbated as the order identifier is then orally relayed and recorded. Lastly, the commenter argues that because the NYSE rules contain an exception from the order tracking requirements for orders transmitted to the NYSE floor via SuperDot, market centers that are not already hard-wired to a member firm would be at a competitive disadvantage.

C. Online OCS Control Number

Pursuant to proposed NYSE Rule 123(f), members would be required to record an Online OCS Control Number as part of the order execution report entered into FESC. This identifier would allow members to check on settlement problems that may occur between a member and the Exchange. The commenter contends that the proposed rule's requirement to record an OCS Control Number is not reasonable, and the cost to build a feed to incorporate this information would be significant. The commenter also argues that this information should not be required as part of the audit trail, but instead should be maintained by members in a manner that they find efficient for use by regulators upon request.

D. Bunched Order Route Indicator

The commenter argues that compliance with the NYSE's requirement to include a ''Bunched Order Route Indicator'' may be impossible because a firm typically does not know at the time an order is received whether the order will ultimately be part of a bunched order. The commenter contends that this provision could only be complied with by retroactively attaching an indicator where necessary after personnel search for and locate the appropriate part of the order to which they must attach the indicator. The commenter believes that the amount of time that this process would take makes the rule unworkable.

The NYSE addressed these concerns in letters to the Commission dated August 15, 2002 and April 4, 2003.[21] The Exchange noted that the proposed rule was undertaken pursuant to the SEC Order that requires the Exchange to design and implement a comprehensive audit trail for all orders. The order audit trail must, among other matters, encompass ''an accurate, time-sequenced record of orders, quotations and transactions, beginning with the receipt of an order by any NYSE member firm, and documenting the life of the order through the process of execution or cancellation of that order. * * *''[22] Thus, the Exchange addressed the SIA comment letter by indicating that the components of a complete audit trail require all of the components specified in their OTS rule. The Exchange acknowledged that ''interpretative questions may surface during the practical implementation of the OTS system, and [it] is committed to working with the SIA to provide appropriate guidance to its members and member organizations as particular issues are identified.''[23]

Further, the Exchange specifically addressed issues raised regarding the OCS Control Number and the Bunched Order Route Indicator.[24] With respect to the OCS Control Number, the Exchange represented that it did not believe, contrary to the assertion of the commenter, that inclusion of this identifier would be unduly burdensome, particularly in light of its value. The Exchange stressed the importance of the OCS Control Number as ''a critical component in establishing a complete order audit trail from order entry through execution.'' The Exchange explained that the OCS Control Number would allow the Exchange to link the entry of an order, the execution report, and any modification to such report, thus providing a complete trail for each order.

The Exchange also addressed the commenter's concerns regarding the Bunched Order Route Indicator. The Exchange noted that this indicator would likely be used infrequently as in many instances, a firm receiving additional trading interest from a customer would choose to modify an existing order rather than create an additional order which might then have to be bunched with a prior order. The Exchange also explained that in the event a Bunched Order Route Indicator was needed, the OCS Control Number could be utilized to locate and link together any parts of an order to which a Bunched Order Route Indicator might need to be appended.

V. 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

[20] *See* note 9, *supra,* SIA Letter.

[21] *See* Letters from Mary Yeager, Assistant Secretary, NYSE, to Jonathan G. Katz, Secretary, Commission, dated August 15, 2002; and Darla Stuckey, Corporate Secretary, NYSE, Commission, dated April 3, 2003.

[22] *See* Letter from Mary Yeager, Assistant Secretary, NYSE, to Jonathan G. Katz, Secretary, Commission, dated August 15, 2002, quoting Securities Exchange Act Release No. 41574 (June 29, 1999).

[23] *Id.*

[24] *See* Letter from Darla Stuckey, Corporate Secretary, NYSE, Commission, dated April 3, 2003.

securities exchange.[25] In particular, the Commission believes that the proposal is consistent with section 6(b)(5) of the Act,[26] which requires, among other things, 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 to protect investors and the public interest.

The Commission also finds that the Exchange, through the proposed rule change, satisfies an undertaking set forth in the SEC Order. Specifically, the SEC Order directed the Exchange to ''design and implement * * * an audit trail sufficient to enable the NYSE to reconstruct its market promptly, to effectively surveil the NYSE and to facilitate the effective enforcement of the federal securities laws and NYSE rules.'' At a minimum, the SEC Order called for the NYSE to provide ''an accurate, time-sequenced record of orders * * *'' throughout an order's life, from receipt through execution or cancellation and for synchronization of clocks used in connection with the audit trail of orders.

The proposed rule change will implement: (1) NYSE Rule 123(f) to require that order execution reports containing certain data elements be entered into FESC and that any member organization proprietary system used to record the details of an order must also be capable of transmitting a report of the order's execution to FESC; (2) NYSE Rule 132C to require members, upon request, to transmit order tracking data to the Exchange; and (3) NYSE Rule 132B to prescribe requirements and procedures with respect to orders in any security listed on the Exchange received or originated by a member. The Commission believes that the implementation of this proposed rule change will establish a complete and comprehensive audit trail which will provide the NYSE with an effective means to track and surveil an order from receipt through execution (or cancellation).

The Commission finds that the proposed rule change was designed to comply with, and fulfills an undertaking contained in the SEC Order relating to the Exchange's regulatory responsibilities to establish the Phase II Order Audit Trail. As specified in the SEC Order, this proposed rule change establishes an audit trail that will enable the Exchange to fulfill its regulatory responsibilities to effectively surveil its market and facilitate the effective enforcement of the Exchange Act and NYSE rules.

As described above, the sole commenter to the proposed rule change expressed concerns regarding the proposal's requirement that firms record information, including the time of receipt, for manual orders. The commenter also expressed dissatisfaction with the requirement that members must assign manual orders an order identification number. While the Commission appreciates these concerns, it notes that manual orders often are large or block-sized orders, therefore such orders have great potential to significantly impact the market and are particularly susceptible to manipulation. In the Commission's view, it is therefore essential to the creation of a complete and effective systemic order audit trail that the life of manual orders is captured to guard against, and aid surveillance for, potential manipulation.

The commenter also argued the proposal's requirement that members record an OCS Control Number is not reasonable because it would require members to build a feed to incorporate this information into the audit trail and the cost would be significant. Again, the Commission appreciates the concerns regarding potential costs associated with providing the Exchange with an OCS Control Number. However, in light of the vital regulatory purpose that will be achieved by the creation of an effective and complete systemic order audit trail, the Commission believes that the anticipated development costs are not undue or unwarranted. In the Commission's view, the OCS Control Number, or its equivalent, is an important part of the audit trail. The OCS Control Number will permit the Exchange to establish a complete order audit trail from order receipt through execution, thus permitting the Exchange to comply with its obligations under the SEC Order. Specifically, the Commission notes that the OCS Control Number will allow the Exchange to link the entry of an order, the execution report, and any modification to such report, thus providing a complete, systemic trail for each order.

Finally, the commenter expressed concern that compliance with the NYSE's requirement to include a ''Bunched Order Route Indicator'' may be impossible because a firm typically does not know at the time an order is received whether the order will ultimately be part of a bunched order. The Commission notes, however, that in order to comply with this provision, a member can make use to the OCS Control Number to locate and link together any parts of an order to which a Bunched Order Route Indicator might need to be appended. Further, the Commission notes that while this process may be somewhat time consuming, it does not expect that orders will be bunched on a regular basis; thus the process will be utilized only on rare occasions.

In approving this proposed rule change, the Commission emphasizes that the Exchange has committed to the following:

> The Exchange believes it should not have access to data generated by members and member organizations pursuant to these requirements for the purpose of gaining an unfair advantage over other market participants. In this vein, the Exchange commits that it will not use data received from its members and member organizations pursuant to these requirements to gain a competitive advantage over another self-regulatory organization or broker-dealer (market maker or electronic communications network).[27]

The Commission would be concerned if the information gained pursuant to OTS were used for any purpose other than regulatory surveillance.

In sum, the Commission recognizes that OTS will require some degree of system changes by NYSE members that will vary depending upon the business mix of the particular firm. These changes will entail costs for all NYSE members. Nevertheless, the Commission believes any costs are far outweighed by the substantial benefit to NYSE surveillance and enforcement that will be derived from OTS. The Commission expects that during the process of implementing and reviewing OTS, the Commission, the NYSE and NYSE members may identify ways in which to improve OTS to make it more efficient and effective from a technological or cost perspective. The Commission encourages a cooperative effort between the NYSE and its members to develop proposals that could achieve such efficiency while satisfying the requirements of the Exchange Act and the SEC Order for the NYSE audit trail.[28]

[25] 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).

[26] 15 U.S.C. 78f(b)(5).

[27] See Letter from Darla C. Stuckey, Assistant Secretary, NYSE to Belinda Blaine, Associate Director, Division, Commission, dated January 17, 2002 (''Amendment No. 3'').

[28] The Exchange states it is committed to a cooperative effort between the NYSE and its members and member organizations in implementing OTS. See Letter from Mary Yeager, Assistant Secretary, NYSE, to Jonathan G. Katz, Secretary, Commission, dated August 15, 2002.

VI. Conclusion

The Commission believes that the proposal, as amended, should significantly assist the NYSE's efforts in fulfilling its regulatory responsibilities. The Commission further believes that the proposed rules meet the minimum requirements for an order audit trail system imposed by the Commission in the SEC Order, which required a time-sequenced record of orders and market-wide synchronization of all member firms' business clocks. In addition, OTS should provide a useful surveillance tool that will allow earlier detection of fraudulent activity for the benefit of investors and the public. Therefore, the Commission believes the approval of the proposed OTS, as amended, is appropriate and consistent with the requirements of the Act applicable to a national securities exchange, and in particular, with the requirements of section 6(b)(5) of the Act,[29] and the rules and regulations thereunder.

It is therefore Ordered, pursuant to section 19(b)(2) of the Act,[30] that the proposed rule change, as amended, (NYSE–99–51) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[31]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–10098 Filed 4–23–03; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47690; File No. SR–NYSE–2003–07]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc. To Extend the Pilot Program Relating to the Allocation Policy for Trading of Exchange-Traded Funds on an Unlisted Trading Privileges Basis

April 17, 2003.

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 March 31, 2003, the New York Stock Exchange, Inc. (''NYSE'' 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 proposed rule change has been filed by the NYSE as a ''non-controversial'' rule change under Rule 19b–4(f)(6) of the Act.[3] 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 NYSE seeks to extend the pilot program relating to the allocation policy for trading certain Exchange-Traded Funds (''ETFs''), for an additional year. The current pilot program is set to expire on May 8, 2003. For purposes of the allocation policy, ETFs include both Investment Company Units (as defined in paragraph 703.16 of the Listed Company Manual) and Trust Issued Receipts (as defined in Rule 1200), which trade on an Unlisted Trading Privileges (''UTP'') basis. The text of the proposed rule change is available at the Office of the Secretary, NYSE 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 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 NYSE 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

This proposed rule change was originally filed as a one-year pilot in SR–NYSE–2001–07[4] and Amendment No. 1 thereto, and subsequently amended by SR–NYSE–2001–10[5] and SR–NYSE–2002–07.[6] The pilot was subsequently extended for another year and is due to expire on May 8, 2003.[7] Therefore, the Exchange seeks to extend the pilot relating to the allocation policy for trading certain Exchange-Traded Funds, for an additional year.

Since the inception of the Allocation Policy, the Exchange states that 36 different ETFs have been allocated. This includes 17 Merrill Lynch Holding Company Depositary Receipts (HOLDRs), a type of Trust Issued Receipt, 9 different types of Select Sector SPDRs, 1 MidCap SPDR, 5 different types of iShares, 1 VIPER, the Nasdaq-100 Index Tracking Stock (symbol QQQ), the Standard & Poor's Depositary Receipts (symbol SPY), and The Dow Industrials DIAMONDS (symbol DIA).

Allocation Policy for ETFs Trading Under UTP

The Exchange states that the intent of the Exchange's Allocation Policy and Procedures (the ''Policy'') is: (1) To ensure that the allocation process is based on fairness and consistency and that all specialist units have a fair opportunity for allocations based on established criteria and procedures; (2) to provide an incentive for ongoing enhancement of performance by specialist units; (3) to provide the best possible match between specialist unit and security; and (4) to contribute to the strength of the specialist system.

The Allocation Committee has sole responsibility for the allocation of securities to specialist units under this policy pursuant to authority delegated by the Board of Directors and is overseen by the Quality of Markets Committee of the Board (''QOMC''). The Allocation Committee renders decisions based on the allocation criteria specified in this policy.[8]

The Exchange believes that it would be appropriate to extend the pilot that modifies the conventional allocation process to provide that ETFs traded on a UTP basis be allocated by a special committee, consisting of the Chairman of the Allocation Committee, the three most senior Floor broker members of the Allocation Committee, and four members of the Exchange's senior management as designated by the Chairman of the Exchange. This will permit Exchange management, acting with key members of the Allocation Committee, to oversee directly the introduction of the UTP concept to the NYSE. For purposes of the Allocation Policy, ETFs collectively include Investment Company Units (as defined in paragraph 703.16 of the Listed Company Manual) and Trust Issued

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[29] 15 U.S.C. 78f(b)(5).

[30] 15 U.S.C. 78s(b)(2).

[31] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] *See* Securities Exchange Act Release No. 44272 (May 7, 2001), 66 FR 26898 (May 15, 2001) (SR–NYSE–2001–07).

[5] *See* Securities Exchange Act Release No. 44306 (May 15, 2001), 66 FR 28008 (May 21, 2001) (SR–NYSE–2001–10).

[6] *See* Securities Exchange Act Release No. 45729 (April 10, 2002), 67 FR 18970 (April 17, 2002) (SR–NYSE–2002–07).

[7] *See* Securities Exchange Act Release No. 45884 (May 6, 2002), 67 FR 32073 (May 13, 2002) (SR–NYSE–2002–17).

[8] *See* Securities Exchange Act Release No. 42746 (May 2, 2000), 65 FR 30171 (May 10, 2000) (SR–NYSE–99–34).