

applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b)(5) of the Act.<sup>14</sup> Section 6(b)(5) requires that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, and, in general, to protect investors and the public interest. Further, the Commission finds that the proposal is consistent with Section 11(b) of the Act<sup>15</sup> and Rule 11b-1 thereunder,<sup>16</sup> which allow exchanges to promulgate rules relating to specialists to ensure fair and orderly markets. For the reasons set forth below, the Commission believes that the consideration of the near neighbor analysis by the Allocation Committee should enhance the Exchange's allocation process and encourage improved specialist performance, consistent with the protection of investors and the public interest.

Specialists play a crucial role in providing stability, liquidity and continuity to the trading of securities. Among the obligations imposed upon specialists by the Exchange, and by the Act and rules thereunder, is the maintenance of fair and orderly markets in designated securities.<sup>17</sup> To ensure that specialists fulfill these obligations, it is important that the Exchange develop objective measures of specialist performance and prescribe stock allocation procedures and policies that encourage specialists to strive for optimal performance. The Commission supports the NYSE's effort to develop the near neighbor measure to encourage improved specialist performance and market quality.

The Commission believes that the near neighbor measure should provide the NYSE Allocation Committee with an objective measure of specialist performance that will refine the Exchange's allocation process. The NYSE's Allocation Policy emphasizes that the most significant allocation criterion is specialist performance. In the Commission's view, performance based stock allocations not only help to ensure that stocks are allocated to specialists who will make the best markets, but will provide an incentive for specialists to improve their performance or maintain superior performance.

The Commission believes that the near neighbor measure, which compares a specialist's performance in an issue to

the performance of other stocks with similar trading characteristics,<sup>18</sup> has the potential to be a significant advance in the NYSE's evaluation of a specialist's market making. The near neighbor program analyzes four market quality measures: continuity, market depth, quotation spread, and capital utilization. The Commission believes these market quality measures identify aspects of market making that are directly relevant to the specialist's maintenance of fair and orderly markets. Thus, the Commission believes that the near neighbor approach could aide the Allocation Committee in allocating stocks to specialists who commit their own capital to maintain stable and liquid markets.

Finally, the Commission believes that it is appropriate for the NYSE to implement the near neighbor measure on a pilot basis until September 10, 1996. A pilot will provide the Exchange and the Commission with an opportunity to study the effects of the use of the measure on the NYSE's allocation process. The Commission also has approved an extension of the NYSE's specialist capital utilization measure so that the two objective measures can be evaluated simultaneously.<sup>19</sup> During the pilot

<sup>18</sup>The NYSE believes preliminarily that the stocks being excluded from the near neighbor measure do not lend themselves to comparison with other stocks and therefore could tend to inappropriately affect the results obtained from the analysis. The Commission therefore believes that it is appropriate that the Exchange also exclude the securities from the capital utilization program, which reports to the Allocation Committee a specialist unit's commitment of capital relative to other specialist units. As the NYSE gains experience with the near neighbor approach, it should evaluate whether some categories of the excluded stocks can be included in the programs in order to expand the universe of stocks being examined via these approaches.

<sup>19</sup>See *supra* note 4. The Commission recently extended the Exchange's Rule 103A pilot program so that it would run concurrently with the near neighbor and capital utilization pilot programs. See Securities Exchange Act Release No. 35704 (May 10, 1995), 60 FR 26060 (May 16, 1995). Rule 103A grants authority to the Exchange's Market Performance Committee to develop and administer systems and procedures, including the determination of appropriate standards and measurements of performance, designed to measure specialist performance and market quality on a periodic basis to determine whether or not particular specialist units need to take actions to improve their performance. The Commission emphasized in the extension order its belief that objective measures of specialist performance should be incorporated into the evaluation process. During the pilot period, the Market Performance Committee will receive quarterly reports on the near neighbor initiative, with a view toward their recommending such enhancements or modifications as may seem appropriate based on actual experience with the measure. The Commission believes that the Exchange should have sufficient experience with the capital utilization and near neighbor measures of specialist performance at the end of the pilot

period, the Commission expects the NYSE to monitor carefully the effects of the near neighbor and capital utilization programs and report its findings to the Commission. Specifically, the Commission requests that the NYSE report the near neighbor and capital utilization data as presented to the Allocation Committee. In addition, the Exchange should, for a three month sample period,<sup>20</sup> submit a report that identifies the specialist units, the securities for which they applied, the stocks that were allocated to them, and the specialist units' SPEQ ratings as presented to the Allocation Committee.<sup>21</sup> In the report, the Exchange should identify allocations that were made to specialist units with relatively poor tier ratings in the objective measures and discuss the reasons the Allocation Committee made such allocations.<sup>22</sup> Because near neighbor also measures, among other things, capital utilization, the Exchange also should address in its report how the two measures work together and whether there is a need for a separate capital utilization standard if they determine to continue the near neighbor measure.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>23</sup> that the proposed rule change (SR-NYSE-95-05) is approved through September 10, 1996.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>24</sup>

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

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**BILLING CODE 8010-01-M**

period to judge whether these objective measures should be incorporated into the Rule 103A evaluation criteria.

<sup>20</sup>This sample period shall be January 1, 1996, through March 31, 1996.

<sup>21</sup>The Commission believes that this information will allow it to evaluate to the extent to which the Allocation Committee's decisions appear consistent with the relative performance of specialist units according to the objective measures. In this regard, however, the Commission recognizes that the Allocation Committee also considers the SPEQ results and may use its professional judgment in making allocation decisions. See *supra* note 12.

<sup>22</sup>The Exchange may submit one report for both the near neighbor and capital utilization pilots. This report should be submitted to the Commission by May 15, 1996, along with the Exchange's request for permanent approval or extension of the pilot programs.

<sup>23</sup>15 U.S.C. 78s(b)(2) (1988).

<sup>24</sup>17 CFR 200.30-3(a)(12) (1994).

<sup>14</sup>15 U.S.C. 78f(b)(5) (1988).

<sup>15</sup>15 U.S.C. 78k(b) (1988).

<sup>16</sup>17 CFR 240.11b-1 (1994).

<sup>17</sup>See, e.g., 17 CFR 240.11b-1 (1994); NYSE Rule 104.

[Release No. 34-35931; File No. SR-NYSE-95-22]

**Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to the Exchange's Wireless Data Communications Initiatives**

June 30, 1995.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on June 1, 1995, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange is proposing to introduce onto its trading floor wireless data communications technology that allows a member in a trading crowd or elsewhere on the floor to communicate with others by means of a hand-held wireless device. The Exchange is also proposing to issue an interpretation with respect to NYSE Rule 117 which requires members' orders to be in writing.

**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 self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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

**Purpose**

The Exchange is proposing to introduce wireless data communications in order to expedite, and make more efficient, the process by which members receive and execute orders on the floor of the Exchange. The Exchange also is

proposing to issue an interpretation to NYSE Rule 117 (Orders of Members To Be in Writing) that would deem a transmission of an order that a member receives by means of an authorized hand-held device to constitute a "written order."

**a. Interpretation of NYSE Rule 117**

The use of the Exchange's proposed wireless data communications technology will affect Exchange Rule 117 which prohibits members on the floor of the Exchange from making a bid, offer or transaction for or on behalf of another member except pursuant to a written order.<sup>1</sup> The Exchange is proposing an interpretation that will deem a transmission of an order that a member located on the floor of the Exchange receives by means of an authorized hand-held device to constitute a "written order" for the purposes of Rule 117 if the member can show that the transmission of the order:

- (i) Provides adequate information relating to the price, size and time of the order, the cancellation of the order, and the like;<sup>2</sup>
- (ii) Satisfies the Exchange's audit trail requirements; and
- (iii) Satisfies all other Exchange reporting and recordkeeping requirements.<sup>3</sup>

<sup>1</sup> Rule 117 also provides that if a member to whom an order has been entrusted leaves the trading crowd without actually transferring the written order to another member, the order shall not be represented in the market during his absence. The use of wireless data communications devices does not affect this portion of Rule 117. If a member receives an order by means of a transmission to his wireless device and he leaves a trading crowd without transferring a written version of the order to another member, the order may not be represented in the market in his absence.

<sup>2</sup> All orders entered from off the floor must be transmitted to a booth terminal before they are retransmitted to a hand-held device.

<sup>3</sup> In the case where an order is transmitted electronically from a member's off-floor location to a booth terminal and then the order is retransmitted from the booth terminal to a member's hand-held device, a record must be established and maintained which reflects the time the order was received by the booth terminal and the time the order was received by the hand-held device. The record of time of receipt by the booth terminal may be established and maintained by such terminal or by a server which records the time such terminal acknowledges receipt of the order. The booth terminal must display the order (and the time of receipt, on inquiry) and the automated record of the order (including time of receipt) must be supplemented by a paper record of the order at the booth. If the paper record cannot be produced at the booth terminal, it must then be produced by hand. The record of time of receipt by a hand-held device may be established and maintained by such device or by the server or the booth terminal which receives a message acknowledgement from the hand-held device. Regardless of whether the hand-held device records are maintained in such device or in the booth terminal or a server, such records must be capable of being printed at the booth location.

**b. Wireless Communications Plan**

The Exchange's proposed wireless data communications technology involves the floor-based use of wireless hand-held data communications devices. The Exchange proposes to adopt a four-phase process to integrate new technology into the floor environment. The Exchange's basic operating premise is to allow private vendors to provide wireless data communications services to Exchange members on the floor, but only in a manner that treats members equitably and does not unfairly discriminate among members. The Exchange also proposes to provide its own wireless data communications service on a non-discriminatory basis.

**Phase I**

In Phase I, which the Exchange has already completed, the Exchange supervised and monitored three "proof-of-concept" pilot programs on the floor of the Exchange.<sup>4</sup> Each of the programs tested the viability of the operation and functionality of wireless hand-held data devices on the floor. Members participating in the pilot programs were instructed to use the devices strictly for the purposes of evaluating the devices and to compare results that might have been achieved had the devices been used for actual trading purposes with results from actual trades using traditional paper tickets, telephones and the like.

The Phase I pilot programs allowed the Exchange to conclude that the technology will function in the Exchange's floor environment and would improve broker efficiency. They also made clear that introducing the technology on the floor on a wide scale (*i.e.*, allowing the technology to be offered to all members) would require the Exchange to install a robust, standardized, Exchange-controlled infrastructure in order to ensure reliable, secure wireless data communications.

**Phase II**

Phase II, which the Exchange proposes to commence upon Commission approval of the proposed rule change, would involve additional, more structured, pilot testing of independent wireless data communications services, including that offered by the Exchange. A prototype of the infrastructure that the Exchange hopes will eventually support all such

<sup>4</sup> One pilot program was conducted by the Exchange and the other two were conducted by member-sponsored, private wireless data communications vendors.

services will support the Exchange's Phase II pilot program. A description of the primary characteristics of the Phase II pilot programs follows.

1. *Scope of Phase II Pilot Programs.*

(a) *Functions of Pilot Programs.* For the purposes of the Phase II pilot programs, the Exchange proposes to permit members to use hand-held data devices for actual trading purposes. That is, a participating member may rely on the information it receives on the floor by means of the device to make trading decisions, without having to rely on such conventional trading tools as paper tickets and telephones.

(b) *Number of Pilot Programs.* In order to preserve the ability of the Exchange to satisfy its regulatory oversight responsibilities, the Exchange reserves the right to limit the number of private vendors that it will allow to provide those pilot programs. The Exchange will choose vendors in its sole discretion. In the absence of mitigating circumstances, the Exchange currently contemplates that it will accept vendor Phase II pilot programs on a "first-come, first-serve" basis.

(c) *Size of Pilot Programs.* Similarly, the Exchange will initially limit the number of members that may participate in any vendor's Phase II pilot program to 25. That is, at the commencement of Phase II, no vendor may provide its pilot program to more than 25 members. This limitation will facilitate the control, monitoring and evaluation of pilot program operations. Where more than 25 members wish to participate in a vendor's Phase II pilot program, the Exchange will require the vendor to describe its procedures for selecting which 25 members it will allow to participate. Those procedures must provide a fair and non-discriminatory environment and must otherwise comply with the Exchange's selection requirements. The Exchange will develop procedures for selecting its own pilot program participants on the same basis.

If the Exchange determines that circumstances so warrant (based on its actual experience with the Phase II pilot programs), it may permit increases, or require decreases, in the maximum allowable number of pilot programs or the number of participants in any or all Phase II pilot programs.

2. *Exchange Support of Vendor Systems.*

The Exchange will use reasonable efforts to accommodate the installation of a participating vendor's base stations, battery charging equipment, antennae and other such service facilities. However, the Exchange will do so only at the vendor's expense and only insofar as any such

installation does not necessitate any substantial modification to the Exchange's facilities and does not interfere with the Exchange's development and installation of its planned wireless data communications system infrastructure or other aspects of the Exchange's wireless data communications, or other Exchange technology upgrade initiatives.

The Exchange will have no other obligation to support any aspect of the vendor's communications system. This means, among other things, that the Exchange will have no obligation to install, maintain or support base stations, base antennae, battery charging equipment, user equipment, user training, or any other special facilities, services or features related to the vendor's system.

3. *Exchange Charges.* Except as described above in connection with vendor responsibility for installation costs, the Exchange does not currently plan to charge vendors for the privilege of providing a Phase II pilot program. However, the Exchange may impose charges on vendors that provide wireless data communications services during Phase IV. If the Exchange does determine to impose Phase IV charges or any other charges, it would first seek Commission approval of any such charge.

4. *Vendor Requirements.* (a) *Contract with the Exchange.* The Exchange will not permit a vendor to provide a Phase II pilot program until the vendor and the Exchange have entered into the Exchange's Phase II pilot program agreement.<sup>5</sup> That agreement codifies the terms and conditions that are described in the proposed rule change and pursuant to which the Exchange is willing to allow a vendor to provide its Phase II pilot program.

(b) *Contracts with Participating Members.* The Exchange will not permit a vendor to provide its Phase II pilot program to a particular member until the vendor and the member have entered into an agreement which (i) extends to the Exchange third-party beneficiary status and the right to enforce the agreement, (ii) codifies the Exchange's required provisions regarding the terms and conditions pertaining to members' receipt of a wireless data communications service that the proposed rule change describes ("Service Agreement Terms")<sup>6</sup> and (iii)

specifies the parties' obligations as to the following matters:

(A) The degree of responsibility and liability, if any, that the vendor agrees to assume in the event that data is lost or delayed through the system or losses otherwise occur as a result of the member's use of the system;

(B) the amount of training that the vendor will provide;

(C) the maintenance and system support that the vendor will provide;

(D) any technological limitations or other restrictions on the member's participation (e.g., restrictions on where the member may use the device or the types of orders or other messages that the member may receive or transmit by means of the device);

(E) the availability of equipment and spare parts; and

(F) any charges that the vendor may impose for the use of its system.

In addition, a vendor's agreements with members receiving its service must be non-discriminatory. That is, the vendor must agree to offer its system to members pursuant to fair and unbiased terms and conditions that do not unfairly discriminate against any Exchange member. The Exchange will require each vendor to submit each such agreement or any form of agreement to the Exchange for the Exchange's prior approval so as to allow the Exchange to monitor that it comports with the Exchange's Service Agreement Terms and does not give one or more of the vendor's subscribing members an unfair competitive advantage over other of the vendor's subscribing members.

(c) *Use of Radio Frequencies.* (i) *Pre-Infrastructure Frequencies.* During Phase II, the Exchange will test a prototype of its proposed wireless data communications infrastructure and will design and, perhaps during Phase II, install and test the infrastructure itself. The Exchange plans to use the 2.4 Ghz "unlicensed" radio band for both the prototype and the actual infrastructure.

Because the Exchange cannot yet assess whether, or the extent to which, vendor pilot programs will interfere with the infrastructure or with other Exchange uses of radio frequencies, the Exchange reserves the right to require a vendor to refrain from using a particular frequency if the Exchange determines that the use would interfere with any of the Exchange's wireless systems. In particular, the Exchange plans to preclude Phase II pilot program vendors from using the 2.4 Ghz radio band for part or all of the Phase II period.

<sup>5</sup> A copy of the Exchange's Phase II pilot program agreement is included in the Exchange's Form 19b-4 which may be examined at the places specified in Item IV below.

<sup>6</sup> The Exchange's Service Agreement Terms are set forth in Attachment B to Exhibit A in the

Exchange's Form 19b-4 which may be examined at the places specified in Item IV below.

To ensure an absence of interference with Exchange systems, the Exchange will require vendors to receive advance Exchange approval of any radio frequency that a vendor may wish to use for the purposes of its Phase II pilot program.

In addition, the Exchange reserves the right to notify a vendor of any interference with Exchange systems that the vendor's wireless transmissions may be causing. The vendor would then have to cease to use the interfering frequency immediately or would have to otherwise resolve the interference problem to the Exchange's satisfaction.

The Exchange will not allow a vendor to use infrared technology.

(ii) *Post-Infrastructure Frequencies.* The Exchange, after consultation with its system integrator, will determine when the Exchange's proposed wireless data communications infrastructure is ready for pre-production pilot testing and/or full production implementation. The Exchange will then direct the orderly migration of the wireless data communications services to the infrastructure. Pursuant to a time schedule that the Exchange will establish, the Exchange will then require each vendor that wishes to continue to provide a wireless data communications system on the floor to conform its system to, and cause its system to interface with, the infrastructure. The vendors would bear all expenses of migrating from its Phase II radio frequency to the radio frequency that the Exchange's infrastructure will support, and of adopting the communications specifications and protocols that the infrastructure will require.

(d) *Permissible Communications.* A vendor's Phase II pilot program must restrict wireless data communications to communications between a hand-held device used by a member on the floor and a terminal in a floor booth location. The Exchange will prohibit all floor-based wireless data communications between any other points.

However, a pilot program participant may effect communications between a floor booth terminal and a member's off-floor system in the same "wired" manner as it can today, subject to applicable rules and policies. In addition, the pilot program participant's booth terminal may interface with the Exchange's Common Message Switch ("CMS") in order to allow the member to enter orders into the Exchange's SuperDOT System complex. That interface would not differ from today's booth/CMS interfaces and would be subject to existing CMS interface standards.

(e) *Fair Treatment of Participating Members.* Because wireless data communications systems may imbue users with real or perceived competitive advantages, each vendor must demonstrate to the Exchange that it is willing and able to offer any member who wishes to use that vendor's system the opportunity to participate in the vendor's pilot program, subject to (i) the capacity constraints of the vendor's system, (ii) reasonable lead-time that the vendor may need to bring new users on-line and (iii) the above-mentioned limit of 25 participants per pilot program. The Exchange will require each vendor to provide its pilot program to participating members on fair, unbiased, non-discriminatory terms, including the provision of adequate support for all such participating members. Creating a level playing field requires each vendor, among other things, to offer its service in a reasonable manner that does not give the vendor (if it is also a member), or a member that is a sponsor or affiliate of the vendor, an unfair advantage over other of the vendor's competing members.

The Exchange will prohibit a vendor from commencing to provide its pilot program to any member that primarily trades<sup>7</sup> in one stock unless and until (i) the vendor is prepared to provide its service to all members who primarily trade in the same stock and who desire to participate in the pilot program or (ii) the Exchange otherwise permits.

In addition, the Exchange will require each vendor to refrain from falsely representing that it is the sole vendor of wireless data communications services on the floor and to assure that each member that expresses an interest in participating in its Phase II pilot program is aware that the Exchange will require the vendor's service to move to the wireless data communications infrastructure that the Exchange plans to develop and install.

(f) *Description of System.* As a condition precedent to the Exchange's approval of a vendor's pilot program, the Exchange will require each vendor to provide the Exchange with a detailed description of the capabilities and limitations of the vendor's system and its functionality. That description must be approved by the Exchange and must satisfy the description requirements set forth in the Exchange's proposed "Agreement for Wireless Data

<sup>7</sup>The Exchange deems a member to "primarily trade in one stock" if more than 50 percent of either his trades or share volume occur in that stock. The Exchange will base determinations of percentages of trades and share volumes on, among other things, the Exchange's audit trail data.

Communications Service,"<sup>8</sup> including a description of such things as:

(i) The number of members that the system can support (and if the number of users needs to be "scaled", a description of the time frame required for each upgrade to the system's capacity);

(ii) Technical specifications (e.g., the radio frequency, the transmission method (such as frequency hopping spread spectrum), system protocols and hardware descriptions, etc.);

(iii) Operating plans (e.g., the manner for charging devices, for distributing them to members each day and for collecting them at day's end);

(iv) The functionality of the vendor's hand-held device;

(v) The manner for assuring compliance with all rules and regulatory requirements of the Exchange, the Commission and the Federal Communications Commission; and

(vi) Such other technical information, records and other items as the Exchange may require to determine whether the vendor's proposed pilot program will interfere with the Exchange's proposed infrastructure or the pilot programs of the Exchange or of any other vendor or to determine whether the vendor is complying with its agreement with the Exchange.

The Exchange will further require each vendor to provide advance notice of any changes to the technical specifications of its system, to update its description as necessary to keep the description current and to cause its pilot program to perform in compliance with its description at all times. The Exchange may prohibit a vendor from effecting a proposed modification to its pilot program if the Exchange determines that the modification would interfere with other aspects of Phase II or other operations of the Exchange.

In addition, if the Exchange determines that equipment or software that a vendor uses for the purposes of its service interferes, or is otherwise inconsistent, with other aspects of the wireless data communications technology on the floor or other Exchange systems, the Exchange may require the vendor to change the equipment or software or to modify the manner in which it provides its service.

(g) *Reporting and Cooperation.* The Exchange will require vendors to submit to the Exchange whatever documentation and/or periodic reports that the Exchange may require to assure

<sup>8</sup>A copy of the Exchange's proposed "Agreement for Wireless Data Communications Service" is set forth in *Attachment A to Exhibit A* in the Exchange's Form 19b-4 which may be examined at the places specified in Item IV below.

that the vendor's Phase II pilot program is operating in compliance with existing regulatory requirements and is not interfering with other pilot programs or production operations of the Exchange. The Exchange will also require vendors to supply the Exchange with such data relating to its pilot program as the Exchange may reasonably request so as to enable the Exchange to evaluate the features of the vendor's pilot program and to develop the Exchange's infrastructure in a way that provides adequate support of private systems.

In addition, each vendor must agree to cooperate with the Exchange as necessary to assist the Exchange in its dealings with the Commission. That may mean providing information concerning such matters as complaints received, system and device failures, the perceived strengths and weaknesses of the system, the number of pilot program participants, the number of pilot program transmissions and such other information as the Commission may require.

(h) *Compliance with Regulatory Requirements.* The Exchange will require each vendor to acknowledge, and to assure that each of its pilot program participants acknowledges, that (i) it understands that the Exchange has submitted to the Commission, and the Commission has approved, the terms and conditions governing the Phase II pilot programs and (ii) it is familiar with those terms and conditions. The Exchange will require each vendor to agree to comply, and to cause each of its pilot program participants to agree to comply, with those terms and conditions.

In addition, the Exchange will hold each vendor responsible for assuring that its pilot program complies with all Exchange rules and with any rules and regulations of the Commission or the Federal Communications Commission. This includes compliance with Exchange Rule 117 (Orders of Members to Be in Writing), which require certain orders to be in writing, and Commission Rule 17a-3, which imposes record-keeping requirements.

The Exchange will also require each vendor to agree to comply with, and to assure that its participating members will comply with, such other limitations and restrictions as the Exchange may determine to be necessary to assure the integrity of other aspects of the Phase II pilot programs, the Exchange's development of the infrastructure or other Exchange systems.

(i) *Exculpation of the Exchange.* The Exchange will require each vendor to agree that the Exchange assumes no liability or responsibility for any

inaccuracies, delays, omissions, security breaches or other failures that may result from any use of the vendor's wireless data communications system. Furthermore, the Exchange will require any vendor to agree, and to cause each of its participating members or member organizations to agree, to indemnify and defend the Exchange against, and hold the Exchange harmless from, any losses or claims arising from any use of the vendor's system.

(j) *Termination of Service.* (i) *By the Exchange.* The Exchange reserves the right to withdraw its permission for a vendor to provide a Phase II pilot program, either in its entirety or as to any particular member or function. The Exchange will base any determination to withdraw its permission on feedback that the Exchange receives from the program's participants or other members, or other evidence that the Exchange may collect. In making any such determination, the Exchange will examine the merits of the vendor's particular pilot program. In addition, the Exchange will examine whether one or more Phase II pilot programs, whether alone or in combination, is disrupting the fair, orderly and efficient conduct of business, including any interference with the Exchange's systems and any reduction in the ability of program participants (A) to communicate orders, reports and related information in a timely and accurate manner and (B) to provide their customers with an opportunity to receive best-price executions.

(ii) *By the Vendor.* The Exchange will allow a vendor to terminate its provision of the service to a participating member only (A) for "cause", upon 10 days written notice to the Exchange and the member (unless the Exchange agrees that circumstances warrant a shorter termination period or immediate termination), which notice must explain the "cause" in detail, or (B) because the vendor no longer wishes to provide its service on the floor of the Exchange to any and all members, upon 60 days written notice to the Exchange and each of the vendor's participating members.

(iii) *By a Participating Member.* The Exchange will require each vendor to allow any member participating in the vendor's Phase II pilot program to cease its participation immediately upon notice to the vendor.

(iv) *Removal of Equipment.* Insofar as a vendor ceases to provide a Phase II pilot program, either in its entirety or as to any particular member, whether because the Exchange determines to withdraw its permission as to that vendor or member or as to all vendors

or because the vendor determines to cease providing its service, then the Exchange will require the affected vendor to remove, and to assure that each of its participating members removes, from the floor all affected pilot program equipment.

5. *Participating Member Requirements.* The Exchange will require each member that wishes to participate in a vendor's Phase II pilot program to agree to comply with Exchange-prescribed terms and conditions. The Exchange will not contract directly with those participating members, but, instead, will require each vendor to contract with each of the vendor's participating members for the benefit of the Exchange, as described above. The Exchange will require vendors to include in those contracts the following member acknowledgements:

(a) That the Exchange has no responsibility or liability with respect to the vendor's system;

(b) That the member will indemnify and defend the Exchange and hold the Exchange harmless for claims or losses evolving from the member's use of the system;

(c) That the Exchange can direct the vendor to terminate its service, or to terminate the vendor's provision of the service to the member, if the Exchange deems the circumstances to warrant that action; and

(d) That the member's use of the vendor's system shall be subject to all applicable rules, regulations and other requirements of the Exchange, the Commission and the Federal Communications Commission.

### Phase III

In Phase III, the Exchange will conduct on the floor a preproduction pilot test of its wireless data communications system infrastructure. The Exchange will design that infrastructure to use the 2.4 Ghz radio frequency band and to support all hand-held device wireless data communications services of the Exchange and vendors. The Exchange will select an integrator to assist in the design, installation, testing and maintenance of the infrastructure.<sup>9</sup>

During Phase III, the Exchange plans to allow its wireless data communications service to interface with the Exchange's Broker Booth Support System.

As the Exchange gains confidence in the capacity and reliability of the

<sup>9</sup>The Exchange plans to have the integrator define requirements, analyze technology and design the infrastructure during Phase II.

infrastructure, the Exchange may invite, or even require, vendors to test their systems on the infrastructure and/or to migrate to it. The timing of such invitations or requirements will depend on the timing and success of the testing of the infrastructure.

The Exchange will continue to limit the size of each vendor's wireless data communications system during Phase III.

#### Phase IV

One Phase IV commences, the Exchange will have installed and tested the infrastructure, which would then be fully operational and will have moved its own wireless data communications system to the infrastructure. At that point, the Exchange will have commenced the production roll-out of the wireless data communications infrastructure and will have directed all vendors to migrate their systems to the infrastructure.

During Phase IV, the Exchange will permit all authorized vendors to offer their wireless data communications services (and the Exchange will offer its own system) to such number of members as their respective systems can accommodate. At that point, the Exchange anticipates that floor-based wireless data communications technology will be available to all members.

Terms and Conditions Applicable to Vendors and Members During Phase III and Phase IV

As in respect to Phase II, the Exchange reserves the right to limit the number of vendors that may provide wireless data communications systems on the floor during Phase III and Phase IV, based on the ability of the Exchange to maintain its regulatory oversight responsibilities in a satisfactory manner. In addition, as the Exchange gains experience with the use of wireless data communications technology on its floor, it may determine that additional restrictions, such as in respect of permissible transmissions or hardware, are warranted.

The Exchange anticipates that it will impose the same contract structure on vendors and members during Phase III and Phase IV as it will impose in Phase II. The continued use of Phase II contracts in the later phases will assure that vendors and members remain subject to regulatory, reporting and other applicable requirements in an uninterrupted manner.

#### Statutory Basis

The basis under the Act for the proposed rule change is the requirement

under Section 6(b)(5) that an exchange have rules that are designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, 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, to protect investors and the public interest, and that are not designed to permit unfair discrimination between customers, issuers, brokers or dealers. In addition, the proposed rule change is based on the requirement under Section 6(b)(4) that an exchange have rules that provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is 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 on the proposed rule change.

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

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

(A) By order approve the proposed rule change, or

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

#### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule

change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Section, 450 Fifth Street N.W., Washington, D.C. 20549. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. All submissions should refer to File No. SR-NYSE-95-22 and should be submitted by August 1, 1995.

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

**Jonathan G. Katz,**  
Secretary.

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BILLING CODE 8010-01-M

[Release No. 34-35925; File No. SR-PHLX-95-35]

#### **Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 to the Proposed Rule Change by the Philadelphia Stock Exchange, Inc., Relating to the Routing and Delivery of Broker-Dealer Orders in USTOP 100 Index Options Through the Automated Options Market System**

June 30, 1995.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on May 22, 1995, the Philadelphia Stock Exchange, Inc. ("PHLX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization.<sup>1</sup> 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**

Currently, only public customer orders are eligible for delivery through

<sup>1</sup> The PHLX amended its proposal to limit the scope of the proposed rule change to one index option, the USTOP 100 Index ("TPX"). See Letter from Gerald D. O'Connell, First Vice President, Market Regulation and Trading Operations, PHLX, to Michael Walinskas, Branch Chief, Office of Market Supervision, Division of Market Regulation, Commission, dated June 14, 1995 ("Amendment No. 1").