

refer to File No. SR-CHX-00-09 and should be submitted by May 17, 2000.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁰

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-42698; File No. SR-NASD-00-13]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Valuation of Illiquid Direct Participation Program and Real Estate Investment Trust Securities on Customer Account Statements

April 18, 2000.

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 28, 2000, the National Association of Securities Dealers, Inc. (“NASD” or “Association”), through its wholly-owned subsidiary, NASD Regulation, Inc. (“NASD Regulation”), 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 NASD Regulation. 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

NASD Regulation proposes to amend NASD Conduct Rules 2340, “Customer Account Statements,” 2710, “Corporate Financing Rule—Underwriting Terms and Arrangements,” and 2810, “Direct Participation Programs.”³ The text of the proposed rule change appears below. Proposed new language is in

italics; proposed deletions are in brackets.

Rule 2340 Customer Account Statements

(a) General

Each general securities member shall, with a frequency of not less than once every calendar quarter, send a statement of account (“*account statement*”) containing a description of any securities positions, money balances, or account activity to each customer whose account had a security position, money balance or account activity during the period since the last such statement was sent to the customer.

(b) DPP/REIT Securities

(1)(A) Voluntary Estimate Value

A general securities member may provide a per share estimated value for a direct participation program (“DPP”) or real estate investment trust (“REIT”) security on an account statement, provided the member meets the conditions of paragraphs (b)(2) and (3) below.

(B) Mandatory Estimated Value

If the annual report of a DPP or REIT includes a per share estimated value for a DPP or REIT security that is held in the customer’s account or included on the customer’s account statement, a general securities member must include an estimated value from the annual report, an independent valuation service, or any other source, in the first account statement issued by the member thereafter, provided that the member meets the conditions of paragraphs (b)(2) and (3) below.

(2) A member may only provide a per share estimated value for a DPP or REIT security on an account statement if:

(A) after considering any relevant information about the market and the particular investment in its possession, the member has no reason to believe that the estimated value is inaccurate; and

(B) the estimated value has been developed from data that is as of a date no more than 18 months prior to the date that the statement is issued.

(3) If an account statement provides an estimated value for a DPP or REIT security, it must include:

(A) a brief description of the estimated value, its source, and the method by which it was developed; and
(B) disclosure that DPP or REIT securities are generally illiquid, and that the estimated value may not be realized when the investor seeks to liquidate the security.

(4) If an account statement does not provide an estimated value for a DPP or

REIT security, it must include disclosure that:

(A) DPP or REIT securities are generally illiquid;

(B) the value of the security will be different than its purchase price; and

(C) if applicable, that accurate valuation information is not available.

(c)[(b)] Definitions

For purposes of this Rule, *the following terms will have the stated meanings:*

(1) [the term] “account activity” [shall] includes, but is not [be] limited to, purchases, sales, interest credits or debits, charges or credits, divided payments, transfer activity, securities receipt or delivers, and/or journal entries relating to securities or funds in the possession or control of the member.

(2) [(c) For purposes of this Rule,] [the term] a “general securities member” [shall] refers to any member which conducts a general securities business and is required to calculate its net capital pursuant to the provisions of SEC Rule 15c3-1(a), except for paragraph (a)(2) and (a)(3). Notwithstanding the foregoing definition, a member which does not carry customer accounts and does not hold customer funds and securities is exempt from the provisions of this section.

(3) “direct participation program” or “direct participation program security” refers to the publicly issued equity securities of a direct participation program as defined in Rule 2810 (including limited liability companies), but does not include securities on deposit in a registered securities depository and settled regular way, securities listed on a national securities exchange or The Nasdaq Stock Market, or any program registered as a commodity pool with the Commodity Futures Trading Commission.

(4) “real estate investment trust” or “real estate investment trust security” refers to the publicly issued equity securities of a real estate investment trust as defined in Section 856 of the Internal Revenue Code, but does not include securities on deposit in a registered securities depository and settled regular way or securities listed on a national securities exchange or The Nasdaq Stock Market.

(5) “annual report” means the most recent annual report of the DPP or REIT distributed to investors pursuant Section 13(a) of the Act.

(d) Exemptions

Pursuant to the Rule 9600 Series, the Association may exempt any member

¹⁰ See 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ As discussed more fully below, the current proposal replaces File No. SR-NASD-97-12 (“1997 Proposal”). The 1997 Proposal was published for comment in the **Federal Register** on April 3, 1997. NASD Regulation subsequently withdrew the 1997 Proposal. See Letter from Suzanne E. Rothwell, Chief Counsel, Corporate Financing, NASD Regulation, to Katherine A. England, Assistant Director, Division of Market Regulation (“Division”), Commission, dated March 27, 2000 (“March 27 Letter”).

from the provisions of this Rule for good cause shown.

**2710. Corporate Financing Rule—
Underwriting Terms and Arrangements**

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**(c) Underwriting Compensation and
Arrangements**

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**(6) Unreasonable Terms and
Arrangements**

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(B) Without limiting the foregoing, the following terms and arrangements, when proposed in connection with the distribution of a public offering of securities, shall be unfair and unreasonable:

* * * * *

(xv)⁴ for a member or person associated with a member to participate in a public offering of real estate investment trust securities, as defined in Rule 2340(c)(4), unless the trustee will disclose in each annual report distributed to investors pursuant Section 13(a) of the Act a per share estimated value of the trust securities, the method by which it was developed, and the date of the data used to develop the estimated value.

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**Rule 2810. Direct Participation
Programs**

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(b) Requirements

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**(5) Valuation for Customer Account
Statements**

No member may participate in a public offering of direct participation program securities unless:

(A) the general partner or sponsor of the program will disclose in each annual report distributed to investors pursuant Section 13(a) of the Act a per share estimated value of the direct participation program securities, the method by which it was developed, and the date of the data used to develop the estimated value.

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

In its filing with the Commission, NASD Regulation included statements

⁴ The NASD has filed with the SEC a proposed rule change (File No. SR-NASD-00-04), that would amend paragraph (c)(6)(B). The Commission has not taken action regarding File No. SR-NASD-00-04. If the Commission approves File No. SR-NASD-00-04, proposed paragraph (c)(B)(xv) would be renumbered (xiv).

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. NASD Regulation has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

(a) Purpose

1. Background

Customer Account Statement Policy

NASD Rule 2340 requires members who conduct a general securities business to send account statements to customers on at least a quarterly basis.⁵ The statements must include a description of any securities position, money balances or account activity since the prior account statement was sent.⁶ A member that does not carry customer accounts and does not hold customer funds and securities is exempt from the provisions of NASD Rule 2340.

Request for Regulatory Action

By letter dated March 9, 1994, the Subcommittee or Telecommunications and Finance of the U.S. House of Representatives ("House Subcommittee"), expressed to the NASD its concern regarding the sufficiency of information provided on customer account statements regarding the current value of illiquid partnership securities.⁷ The House Subcommittee recommended that investors in illiquid partnerships receive better information on the current value of their investments.

By letter dated June 14, 1994, the SEC's Division of Market Regulation ("Division") requested information from the NASD on where it would be

⁵ "General securities member" is defined in the rule to mean any member that conducts a general securities business and is required to calculate its net capital pursuant to the provisions of SEC Rule 15c3-1(a), except for paragraphs (a)(2) and (a)(3).

⁶ "Account activity," as defined in the rule, includes, but is not limited to, purchases, sales, interest credits or debits, charges or credits, dividend payments, transfer activity, securities receipts or deliveries, and/or journal entries relating to securities of funds in the possession or control of the member.

⁷ See Letter from Edward J. Markey, Chairman, and Jack Fields, Ranking Republican Member, Subcommittee on Telecommunications and Finance, U.S. House of Representatives, dated March 9, 1994. The House Subcommittee also expressed concerns to the SEC, the National Association of State Securities Administrators, and the Investment Program Association.

appropriate for self-regulatory organizations to require that members make certain disclosures regarding illiquid partnerships on customer account statements.⁸ The Division suggested that, at a minimum, a member should disclose that: (1) There is no liquid market for most limited partnership interests; (2) the value of partnership, if any reported on the account statement may not reflect a value at which customers can liquidate their positions; and (3) the source of any reported value, a short description of the methodology used to determine the value, and the date the value was last determined.

In Notice to Members 94-96 (December 1994), the NASD requested comments concerning a proposed rule establishing requirements for illiquid direct participation program⁹ ("DPP") securities listed on customer account statement. As described more fully below, the NASD received comments from 36 commenters regarding the proposal. In response to the commenters, NASD Regulation revised the proposal published for comment in Notice to Members 94-96 and filed the revised rule with the Commission in the 1977 proposal.¹⁰

The 1997 Proposal required general securities members to include estimated values for illiquid DPP and real estate investment trust ("REIT") securities on customer account statements under certain circumstances.¹¹ Among other things, the 1997 Proposal required a general securities member that provided individual valuations for illiquid DPP or REIT securities on its retirement account statements to provide the same valuation to other customers owning such securities. The Commission published the 1997 Proposal for comment in the **Federal Register** on April 3, 1997¹² and received nine comment letters regarding the proposal.

NASD Regulation states that, as a result of further discussions with industry members, concerns arose regarding potential conflicts between the requirements of the 1997 Proposal

⁸ See Letter from Brandon Becker, Director, Division, Commission, to Richard G. Ketchum, Executive Vice President and Chief Operating Officer, NASD, dated June 14, 1994.

⁹ NASD Rule 2810(a)(4) defines "direct participation program" as a "program that provides for flow-through tax consequences regardless of the structure of the legal entity or vehicle for distribution * * *;" This definition covers most limited partnerships and specifically excludes real estate investment trust.

¹⁰ See note 3, *supra*.

¹¹ REIT securities were covered by the proposal to ensure similar treatment of the two products under NASD rules.

¹² See 1997 Notice, *supra* note 3.

and the obligations of a member acting as a retirement account fiduciary under the Employee Retirement Income Securities Act ("ERISA") and Internal Revenue Service ("IRS") regulations. Therefore, NASD Regulation withdrew the 1997 Proposal¹³ and has replaced it with the current proposal, which amends NASD Rules 2340, 2710, and 2810.

2. Description of the Current Proposal

A. Proposed Amendments to NASD Rule 2340

Scope: NASD Regulation proposes to apply the new requirements in NASD Rule 2340 to DPP securities and REIT securities sold in a public offering. The definitions of "DPP" and "REIT" proposed in NASD Rule 2340(c)(3) and (4) would exclude securities listed on a national securities exchange or the Nasdaq Stock Market, as well as securities that are in a depository and settle regular way. NASD Regulation believes that the excluded securities are more likely to trade regularly and, accordingly, that investors will have ready access to current market value information. The proposed definition of "DPP" in NASD Rule 2340(c)(3) also would exclude any program registered as a commodity pool because those programs generally offer investors a security that is redeemable by the issuer at the customer's option at regular intervals and at ascertainable values.

Voluntary Estimated Value: Proposed NASD Rule 2340(b)(1) states that a general securities member may provide a per share estimated value for a DPP or REIT security on an account statement, provided that the member complies with the requirements in paragraphs (b)(2) and (3) that are intended to ensure that the estimated value is reliable and that certain disclosures accompany the estimated value. Specifically, as discussed more fully below, NASD Rule 2340(b)(2) allows a member to provide estimated DPP or REIT valuations if the member has no reason to believe that the estimated value is inaccurate and the estimated value has been developed from data that is as of a date no more than 18 months prior to the date that the statement is issued. NASD Rule 2340(b)(3) requires an account statement that provides an estimated DPP or REIT valuation to include (1) a brief description of the estimated value, its source, and the method by which it was developed; and (2) disclosure that DPP or REIT securities are generally illiquid and that the estimated value may not be

realized when the investor seeks to liquidate the security.

Mandatory Estimated Value: Proposed NASD Rule 2340(b)(1)(B) would require a general securities member to include a per share estimated value for any DPP or REIT security on an account statement if the annual report of the DPP or REIT provides a per share estimated value for the security. Although the inclusion of the estimated value in the issuer's annual report would trigger the member's obligation, the estimated value included on the account statement could be obtained from the annual report or from an independent valuation service or another source, e.g., an estimated value generated by the member. The estimated value must be included in the first customer account statement issued after the annual report is available. Proposed NASD Rule 2340(c)(5) defines the term "annual report" as the most recent annual report of a DPP or REIT distributed to investors pursuant to Section 13(a) of the Act.¹⁴ A general securities member that provides a per share estimated value pursuant to NASD Rule 2340(b)(1)(B) also must comply with the requirements of NASD Rules 2340(b)(2) and (b)(3).

Reliability of Estimated Values: NASD Rule 2340(b)(2) imposes various conditions designed to ensure that any voluntary or mandatory per share estimated value provided on a customer account statement is reliable, current, and not misleading. Proposed NASD Rule 2340(b)(2) states that a member may only provide a per share estimated value on an account statement if the member, after considering all relevant information about the market and the particular investment in its possession, has no reason to believe that the estimated value is inaccurate. Thus, the proposal would prohibit a member from including a per share estimated value on the account statement if the member reasonably believed that the estimated value was inaccurate at the time it was developed or was no longer accurate as a result of changing circumstances.

In addition, proposed NASD Rule 2340(b)(2) requires that the estimated value be developed from data that is of a date no more than 18 months prior to the date that the statement is issued. NASD Regulation believes that the 18-month standard provides sufficient time for the member and for an independent

valuation source to develop an estimated value for DPP/REIT securities based on the audited financial statements contained in the Form 10-K of the DPP or REIT. For example, an estimated value based on December 31, 1999, financial statements may be used from January 1, 2000, through June 30, 2001, thereby allowing time between April and June 2001 for a new estimated value to be developed based on the December 31, 2000, financial statements.

Disclosures Required When An Estimated Value Is Provided: Under proposed NASD Rule 2340(b)(3), a customer account statement that includes an estimated value for a DPP or REIT security must include a brief description of the estimated value, its source, and the method by which it was developed. In addition, the account statement must disclose that DPP or REIT securities are generally illiquid and that the estimated value disclosed may not be realized when the customer seeks to liquidate the security.

Disclosures Required When An Estimated Value Is Not Provided: Proposed NASD Rule 2340(b)(4) requires that an account statement that does not provide a valuation for DPP or REIT securities disclose that the securities are generally illiquid, the value of the security will be different from its purchase price, and, if applicable, the accurate valuation information is not available.

B. Proposed Amendments to NASD Rules 2710 and 2810

NASD Regulation states that the proposed rule change also will ensure that DPP sponsors and REIT trustees provide estimated per share values in their annual reports. In this regard, NASD Regulation proposes to amend NASD Rules 2710 and 2810 to prohibit members from participating in a public offering of a DPP or REIT unless the general partner, sponsor, or trustee agrees to include in each annual report a per share estimated value, a description of the method by which the estimated value was developed, and the date of the data used to develop the estimated value.

3. Implementation of Proposed Rule Change

To provide members and their service organizations with sufficient time to modify their computer systems to comply with the proposed rule change, NASD Regulation is requesting that the proposed rule change become effective six months after SEC approval. During that time, NASD Regulation will issue a Notice to Members announcing SEC

¹³ See March 27 Letter, *supra* note 3.

¹⁴ See discussion below of proposed related amendments to NASD Rules 2710 and 2810 that would prohibit members from participating in a public offering of a DPP or REIT unless the general partner, sponsor, or trustee agreed to include an estimated value for the securities in each annual report.

approval of the proposed rule change and the anticipated effective date.

(b) Statutory Basis

NASD Regulation believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, which require that the Association adopt and amend its rules to promote just and equitable principles of trade and generally provide for the protection of customers and the public interest, in that the proposed rule change significantly improves disclosure to public customers on their account statements of information concerning the value of illiquid DPP or REIT securities, while providing safeguards for both member firms and public customers against the publication of inaccurate values for such securities.

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

NASD Regulation 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

Notice to Members 94-96 (December 1994)

In Notice to Members 94-96 (December 1994), the NASD published for comment a proposed rule change establishing requirements for illiquid DPP securities listed on customer account statements. The NASD received 39 comments regarding the proposal from 36 commenters. Thirty of the 36 commenters generally favored the NASD's effort to provide regulatory guidance regarding the disclosure of partnership valuations on customer account statements, although every letter contained suggested revisions. Six commenters were opposed to the adoption of the proposed rule change. The proposal published for comment in Notice to Members 94-96 required that customer account statements:

1. Segregate DPP securities from other securities on the account statement;
2. For illiquid DPP securities listed without a price, disclose that accurate pricing information was not available because the value of the security was not determinable until the liquidation of the partnership and no secondary market existed;
3. If DPP securities were listed with a price:
 - a. Not aggregate the value of the DPP securities with the value of any other

securities on the statement or include their value in the customer account net worth calculation;

b. Disclose the methodology used for obtaining the valuation; and

c. Disclose that DPP securities are generally illiquid securities and the price listed may not be realizable if the customer seeks to liquidate the security.

Scope and Definitions: NASD Regulation agreed with the views of commenters on the rule proposed in Notice to members 94-96 that the regulatory concerns surrounding the value of DPP securities should only extend to unlisted DPPs because an investment in Nasdaq or exchange-listed securities provides investors with some measure of liquidity and recent market values. Accordingly, the current proposal adopts definitions of DPP and REIT securities that exclude securities listed on a national securities exchange or The Nasdaq Stock Market, as well as securities that are in a depository and settle regular way. NASD Regulation also determined to except from the definition of DPP securities any program registered as a commodity pool because those programs offer investors a security that is redeemable by the issuer at the customer's option at regular intervals and at ascertainable values.

Prices vs. Estimated Values: In response to the commenters, NASD Regulation amended the current proposal to eliminate the word "price" and insert the phrase "estimated value" throughout the proposed rule. Commenters stated that a "price" carried on a customer account statement gives the appearance to the investor that the security can be liquidated for an amount that is roughly equivalent to the price set forth on the customer account statement.

Requirement to Place Estimated Values on Customer Account Statements: Commenters generally agreed with the proposed mandatory requirement for disclosure of values for DPP securities. However, commenters differed as to the value to be disclosed, with the greatest amount of comment focused on valuation methodologies (whether net asset value or securitized value) and their source (*i.e.*, whether generated by the member or obtained from the general partners or third-party independent evaluators).

NASD Regulation agrees with the sentiment expressed in a majority of the comment letters and with the views of correspondence received from the House Subcommittee that investors in non-publicly traded partnerships and trusts should know how their investment is performing. However, NASD Regulation believes that there are

practical problems to requiring that all members provide disclosure of the estimated values of all DPP and REIT securities held by their customers.

Therefore, the current proposal will require a general securities member to include a per share estimated value for illiquid DPP or REIT securities on customer account statements when the DPP or REIT includes a per share estimated value in the program's or trust's annual report. In addition, the current proposal will prohibit a member from participating in a public offering a DPP or REIT unless the general partner, sponsor, or trustee agrees to include a per share estimated value for the program or trust securities in the annual report.

Appropriate Source for Estimated Values: Commenters on the proposal published in Notice to Members 94-96 expressed concern that the proposal did not provide guidance on the different sources of an estimated value considered appropriate by the Association. The current proposal permits the per share estimated value that is included on a customer account statement to be from the program or trust's annual report, from an independent valuation service, or another source. The latter category is intended to permit the use of an estimated value generated by the member.

Prohibition on Using Stale Data: Many commenters on the proposal published for comment in Notice to Member 94-96 stated that an estimated value, accurate upon its first use on a customer account statement, may become stale or inaccurate due to lengthy time of subsequent events, such as the sale of a major asset of the partnership. NASD Regulation agrees that an estimated value based on stale information eventually becomes sufficiently misleading to investors to constitute a fraud. Therefore, the current proposal precludes members from disclosing an estimated value if the financial statements and other underlying data used to determine that value are of a date more than 18 months prior to the date the account statement is issued. In addition, the current proposal requires that a member have no reason to believe that the estimated value is inaccurate.

Segregation of DPP/REIT Securities: Several commenters on the proposal published for comment in Notice to Members 94-96 objected to the requirement that DPP and REIT securities be segregated from other securities into a separate location on the customer account statement. The

current proposal does not include this requirement.

Required Disclosure for Unpriced Securities: The proposal published for comment in Notice to members 94-96 would have required a customer account statement that included no price for DPP securities to indicate that accurate pricing information is not available because the value of the DPP security is not determinable until the liquidation of the partnership and no active secondary market exists. In response to comments, the current proposal requires disclosure that DPP and/or REIT securities are generally illiquid securities; that the value of the security may be different than its purchase price; and, if applicable, that accurate valuation information is not available.

The 1997 Proposal

The NASD filed the 1997 Proposal with the SEC on February 21, 1997. The Commission published the 1997 Proposal for comment in the **Federal Register** on April 3, 1997,¹⁵ and received nine comment letters. NASD Regulation notes that, in general, the commenters supported the proposal but believed that it did not go far enough. The 1997 Proposal required that a general securities member:

1. Provide an estimated value for illiquid DPP and REIT securities on all customer account statements if the member:
 - a. Provided such values to its retirement account customers (except when the retirement account statement only included an aggregate valuation for all of the assets in the account); or
 - b. Participated in the public offering of the DPP or REIT and could obtain such a value from a periodic report filed with the SEC or from an independent source; and
2. If the member provided a valuation, obtain estimated values from a periodic filing with the SEC, an independent source, or develop its own value that is based on data that was of a date more than 18 months before the date the statement was issued;
3. Segregate illiquid DPP and REIT securities from other securities on the account statement;
4. Not aggregate the value of DPP/REIT securities with the value of other securities in the total account value unless the statement included the disclosure on the illiquidity of the securities;
5. Include a brief description in the account statement of the type of estimated value, its source, and how a

customer could obtain a detailed explanation of the valuation methodology, and disclose that DPP/REIT securities are generally illiquid and that the value disclosed may not be realizable upon sale by the customer;

6. If illiquid DPP and REIT securities were listed on the account statement without a value, disclose in the account statement that DPP/REIT securities are illiquid, that the value of the security may be different than its purchase price, and that accurate pricing information was not available; and

7. Not include the original issue price of a DPP or REIT security as the estimated value on an account statement.

Objection to the Exception for Retirement Accounts: Five of the commenters urged the Association to make it mandatory for members to provide an estimated value on the account statement for the publicly sold DPP/REIT securities in their customers' accounts. In particular, several commenters objected to an exception that would have permitted members to provide an aggregate valuation for the assets in a retirement account.¹⁶

NASD Regulation has concluded that the mandatory disclosure of estimated values for DPP and REIT securities in retirement accounts would impose a burdensome requirement on broker-dealers that would not, according to NASD Regulation, also be applicable to non-member fiduciaries that are responsible for the majority of the accounts in which such illiquid DPP/REIT securities reside. Moreover, NASD Regulation believes that basing the mandatory disclosure of estimated values for illiquid DPP/REIT securities on the treatment of such securities in a retirement account inappropriately intrudes the rules of the NASD into the regulation of retirement accounts by the Department of Labor and the IRS.¹⁷

Therefore, the current proposal eliminate the requirement that members include estimated values for illiquid DPP and REIT securities in retirement accounts. Instead, the current proposal would require that a general securities member provide an estimated value for

¹⁶ The Division asked NASD Regulation to amend its proposal to require members acting in a fiduciary capacity to list on customer account statements the individual valuations for illiquid DPPs and REITs that they would be required to obtain for IRS purposes. See Letter from Robert L.D. Colby, Deputy Director, to Charles L. Bennett, Director, Corporate Finance, NASD Regulation, dated October 6, 1997.

¹⁷ NASD Regulation believes that the need for greater and more frequent disclosure of individual values for retirement account assets, as urged by the commenters, is more appropriately addressed by the IRS and the Department of Labor.

an illiquid DPP or REIT in the first account statement issued after a per share estimated value is provided in the program's or trust's annual report. According to NASD Regulation, the member's issuance of an annual retirement account statement in accordance with ERISA and IRS regulations will not be affected by this NASD account statement requirement, although members may need to advise customers of the reason for the different information provided in the two account statements.

Description of Type of Estimated Value: Commenters also suggested that the provision requiring a description of the type of estimated value be amended to only permit members to report a fair market value that incorporates a control and marketability discount, as required to be reported on IRS Forms 1099-R and 5498. A general partner's valuation is typically a net asset value and does not include a discount for illiquidity or lack of control. Therefore, NASD Regulation believes that the change requested by these commenters would limit members to an estimated value provided by an independent valuation firm because such organizations normally incorporate this type of discount in developing a valuation. NASD Regulation believes that members should be able to provide different types of per share estimated values, as long as the member makes appropriate disclosures.

Definition of DPP: In response to the request of a commenter, Regulation has revised the definition of DPP security in the current proposal to clarify that limited liability companies are covered by the proposed rule.

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 Exchange 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, including whether the proposed rule change is consistent with the Act. Persons mailing written submissions

¹⁵ See 1997 Notice, *supra* note 2.

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 relation to the proposed rule change between the Commission and any persons, 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 NASD Regulation. All submission should refer to File No. SR-NASD-00-13 and should be submitted by May 17, 2000.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁸

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-42702, File No. SR-Phlx-00-19]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Changing the Name of the VWAP System to "eVWAP"

April 19, 2000.

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 3, 2000, the Philadelphia Stock Exchange, Inc. ("PHLX" or "Exchange"), filed a proposed rule change with the Securities and Exchange Commission ("SEC" or "Commission"). The proposed rule change is described in Items I, II, and III below, which Items have been prepared by Exchange. On April 12, 2000, the Exchange filed Amendment No. 1 to the proposed rule change.³ The Exchange filed the

proposed rule change, as amended, pursuant to section 19(b)(3)(A) of the Act,⁴ and Rule 19b-4(f)(6) thereunder,⁵ which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The Exchange proposes to amend Phlx Rule 237 so that the name of an electronic trading system, and the name of the calculation component of this system, currently referred to as "Universal Trading System," "UTS," "Volume Weighted Average Price Trading System," "VTS," "Volume Weighted Average Price" and "VWAPTM," would be changed to "eVWAPTM." eVWAP would denote both the name of the system and the name of the calculation component, depending upon the context in which the term is used.

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

The Exchange proposes to change the name of this electronic trading system and the terminology for its pricing calculation to "eVWAP." The system, which was developed by Universal Trading Technologies Corporation ("UTTC"), is operated as a facility of the

4(f)(6) thereunder. 15 U.S.C. 78s(b)(3)(A) and 17 CFR 240.19b-4(f)(6). The Exchange also requested that the Commission waive the 5-day notice of its intent to file the proposal by treating the original proposed rule change as the pre-filing notice required under Rule 19b-4(f)(6); and requested that the Commission waive the 30-day period before the proposal becomes effective to permit the proposed rule change to become immediately effective.

⁴ 15 U.S.C. 78s(b)(3)(A).

⁵ 17 CFR 240.19b-4(f)(6).

Exchange under Section 3(a)(2) of the Act. The Commission approved the Exchange's operation of the system on March 24, 1999.⁶

UTTC has informed the Exchange that the proposed name and reference changes will be consistent with and facilitate the registration of a certain trademark by UTTC in "eVWAP". The "e" will promote UTTC's branding strategy regarding the system and more clearly reflect the electronic character of the system and its calculation component. The proposed rule change does not change the substance or operation of the system or the calculations.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)(5) of the Act⁷ in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

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

The Exchange does not believe that the proposed rule change, as amended, will result in 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, as amended.

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

The foregoing rule change has become effective upon filing pursuant to section 19(b)(3)(A)(iii) of the Act⁸ and Rule 19b-4(f)(6)⁹ thereunder because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which the proposed rule change was filed, or such shorter time as the Commission may

⁶ See Securities Exchange Act Release No. 41210 (March 24, 1999), 64 FR 15857 (April 1, 1999) (SR-Phlx-96-14).

⁷ 15 U.S.C. 78f(b)(5).

⁸ 15 U.S.C. 78s(b)(3)(A).

⁹ 17 CFR 240.19b-4(f)(6).

¹⁸ 27 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See April 12, 2000 letter from Nandita Yagnik, Exchange, to Rebekah Liu, Special Counsel, Division of Market Regulation, SEC ("Amendment No. 1"). In Amendment No. 1, the Exchange requested that the proposed rule change be filed under Section 19(b)(3)(A) of the Act and Rule 19b-