

to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549.

Dated: February 24, 2004.

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49322; File No. SR-OPRA-2003-01]

Options Price Reporting Authority; Order Granting Permanent Approval to an Amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information and Amendments No. 1 and 2 Thereto To Revise the Manner in Which the Options Price Reporting Authority Engages in Capacity Planning and Allocates Its Available System Capacity Among the Parties to the Plan

February 26, 2004.

On April 15, 2003, the Options Price Reporting Authority ("OPRA") submitted to the Securities and Exchange Commission ("Commission"), pursuant to section 11A of the Securities Exchange Act of 1934 ("Act")¹ and Rule 11Aa3-2 thereunder,² an amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information ("OPRA Plan" or "Plan").³ The proposed amendment would revise the manner in which OPRA engages in capacity planning and allocates capacity among the exchanges that are parties to the Plan. On July 16, 2003 and October 12, 2003, respectively, OPRA submitted Amendments No. 1 and 2 to the

proposal.⁴ On November 21, 2003, the Commission issued notice of and approved the proposal, as amended, on a temporary basis not to exceed 120 days, and solicited comment on the proposal.⁵ The Commission received no comments on the proposal, as amended. This order approves the OPRA Plan amendment, as amended, on a permanent basis.

The proposed Plan amendment would revise the manner in which OPRA engages in capacity planning and allocates its available system capacity among the exchanges that are parties to the Plan. In addition, proposed amendments to the OPRA Plan would make it clear that participation in OPRA is limited to those self-regulatory organizations ("SROs") that are engaged in the business of providing a market for the trading of securities options and other eligible securities under the OPRA Plan.⁶ Furthermore, the functions and objectives of OPRA would be specifically set forth in the OPRA Plan, most particularly in the preamble to the Plan and in Section III(b) thereof. The proposed amendment would make explicit in the preamble to the Plan that joint action by the parties to the Plan is limited to those matters as to which they share authority under the Plan, and then only to circumstances where such joint action is necessary in order to fulfill the functions and objectives of OPRA as stated in the Plan.

Under the proposed amendment to the OPRA Plan, OPRA would require each party to the Plan from time to time to independently project the capacity it would need and to privately submit requests for capacity based on its projections to an Independent System Capacity Advisor ("ISCA"), which

would maintain these individual capacity projections and requests in confidence. The Plan would require the ISCA to maintain the confidentiality of this information, consistent with the provisions of section III(g) of the Plan.⁷ Furthermore, confidential capacity-related information obtained by the ISCA would not be used by the ISCA in any of its other business activities in a manner that may result in the information being made available to any of the parties to the Plan, or to use it in any manner that is otherwise inconsistent with the ISCA's obligation to hold the information in confidence.⁸ The ISCA would then determine how and when to modify the OPRA System in order to provide to each party the capacity it has requested and how the cost of such modifications is to be allocated among the parties, all in accordance with, and subject to, the proposed Capacity Guidelines that are incorporated in the Plan as part of the proposed amendment.

Moreover, future Plan amendments, including amendments to the proposed provisions of the Plan pertaining to capacity planning and allocation, would continue to require the unanimous approval of the parties. However, decisions relating to the selection or termination of the ISCA, certain changes to the authority of the ISCA, and changes to the Capacity Guidelines may be authorized by a vote of 75% of the parties. In addition, the selection of the ISCA would be required to be filed with the Commission as an amendment to OPRA's national market system plan. In accordance with this requirement, OPRA selected the Options Clearing Corporation ("OCC") to act as the ISCA.

After careful review, the Commission finds that the proposed OPRA Plan amendment, as amended by Amendments No. 1 and 2, is consistent

⁴ See letters from Michael L. Meyer, Counsel to OPRA, Schiff, Hardin & Waite, to Deborah Flynn, Assistant Director, Division of Market Regulation, Commission, dated July 15, 2003 ("Amendment No. 1") and October 15, 2003 ("Amendment No. 2").

⁵ See Securities Exchange Act Release No. 48822 (November 21, 2003), 68 FR 66892 (November 28, 2003).

⁶ The proposed amendment would revise the OPRA Plan in response to the Commission's Order instituting public administrative proceedings against four of OPRA's participant exchanges (Amex, CBOE, PCX and Phlx, referred to collectively as the "respondent exchanges") pursuant to Section 19(h)(1) of the Act, and specifically in response to Section IV.B.c. of the Order (the "Undertaking"). The Undertaking requires each of the four respondent exchanges, acting jointly with all other options exchanges, to modify the structure and operation of OPRA in various ways that would eliminate undesirable joint and collective action in the capacity planning and allocation process. See Order Instituting Public Administrative Proceedings Pursuant to Section 19(h)(1) of the Act, Making Findings and Imposing Remedial Sanctions, Securities Exchange Act Release No. 43268, dated September 11, 2000 and Administrative Proceeding File 3-10282 ("Order").

⁷ See Amendment No. 2, *supra* note 4.

⁸ Guideline No. 1 of the Capacity Guidelines would require the ISCA to maintain internal safeguards and procedures adequate to assure that the requirements of the Plan pertaining to the confidentiality of information provided to the ISCA would be satisfied. In addition to the confidentiality requirements imposed on the ISCA, the proposal would amend Section III(b) of the Plan to make explicit the requirement that each person who performs administrative functions for OPRA, including its Executive Director and other officials and its processor, shall agree that any nonpublic business information pertaining to any party shall be held in confidence and not be shared with the other parties, except for information that may be shared in connection with permitted joint activities. The proposal would also make explicit in the preamble to the Plan that the parties themselves are each obligated to take reasonable steps to insure that their nonpublic business information remains segregated and confidential from the other parties, except for information that may be shared in connection with permitted joint activities.

¹ 15 U.S.C. 78k-1.

² 17 CFR 240.11Aa3-2.

³ OPRA is a national market system plan approved by the Commission pursuant to Section 11A of the Act and Rule 11Aa3-2 thereunder. See Securities Exchange Act Release No. 17638 (March 18, 1981), 22 S.E.C. Docket 484 (March 31, 1981).

The OPRA Plan provides for the collection and dissemination of last sale and quotation information on options that are traded on the participant exchanges. The six participants to the OPRA Plan are the American Stock Exchange LLC ("Amex"), the Boston Stock Exchange, Inc. ("BSE"), the Chicago Board Options Exchange, Inc. ("CBOE"), the International Securities Exchange, Inc., the Pacific Exchange, Inc. ("PCX"), and the Philadelphia Stock Exchange, Inc. ("Phlx").

with the requirements of the Act and the rules and regulations thereunder.⁹ Specifically, the Commission believes that the proposed OPRA Plan amendment, which would revise the manner in which OPRA engages in capacity planning and the allocation of system capacity among the exchanges that are parties to the Plan, is consistent with section 11A of the Act¹⁰ and Rule 11Aa3-2 thereunder,¹¹ in that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities.

Specifically, the Commission believes that OPRA's proposal to require each party to the Plan to independently project the capacity it would need and to confidentially submit to the ISCA requests for capacity based on such projections is designed to eliminate joint action by the OPRA participants in determining the amount of total capacity to be procured and the allocation of such capacity. The Commission notes that the proposal requires that the ISCA maintain these individual capacity projections and requests in confidence, and not use such confidential, capacity-related information in any of its business activities that may result in the information being made available to any of the parties of the Plan, or in any manner that is inconsistent with its obligation to hold the information in confidence. The Commission believes that these requirements provide additional assurances that each exchange's non-public business information would remain segregated and would not be made available to its competitors. Furthermore, the Commission emphasizes that neither the Plan nor the Capacity Guidelines should be construed in any manner that would permit individual exchange capacity projections or requests or other confidential, capacity-related information to be shared with the other parties to the Plan.

The Commission believes that the proposed Capacity Guidelines adequately provide for the allocation of capacity to new parties to OPRA. Under Guideline No. 2 of the proposed Capacity Guidelines, a prospective new options exchange would have to inform the ISCA, at least 6 months prior to the

time it proposes to commence trading, of the initial amount of system capacity it would need. The ISCA would then aggregate this request for capacity with the requests received from the existing exchanges. Also, under Guideline No. 6 of the proposed Capacity Guidelines, if the new party has not received the capacity it has requested at the time it has commenced trading options, and to the extent there is any excess capacity available in the system that has not been provided to any of the parties, the ISCA would be able to allocate to the new party all or a portion of any such excess capacity to provide the new party with the amount of capacity determined by the ISCA to be sufficient to satisfy the reasonable needs of the new party until it has been provided with the capacity it initially requested. These provisions in the proposed Capacity Guidelines, which specifically contemplate new entrants and provide a mechanism for them to acquire capacity, together with the prohibitions imposed on the ISCA from using confidential capacity-related information in any of its other business activities that may result in the information being made available to any of the parties to the Plan or in any manner inconsistent with the ISCA's obligations to hold such information in confidence, are designed to ensure that the existing exchanges would not be able to restrain new entrants from joining OPRA and acquiring the capacity that they require.¹²

Accordingly, to permit the exchanges to commence capacity planning without the need for joint action, as required by the Order, the Commission believes it is necessary or appropriate in the public interest, for the protection of investors or the maintenance of fair and orderly markets, to remove impediments to, and perfect mechanisms of, a national market system to approve the proposed amendment to the OPRA Plan on a permanent basis.

It is therefore ordered, pursuant to section 11A of the Act,¹³ and Rule 11Aa3-2 thereunder,¹⁴ that the proposed OPRA Plan amendment, as modified by Amendments No. 1 and 2, (SR-OPRA-2003-01) is hereby approved on a permanent basis.

¹² The Commission notes that the BSE recently joined OPRA and began operation of a fully electronic options exchange ("Boston Options Exchange" or "BOX"). See Securities Exchange Act Release No. 49068 (January 13, 2004), 69 FR 2775 (January 20, 2004) (SR-BSE-2002-15).

¹³ 15 U.S.C. 78k-1.

¹⁴ 17 CFR 240.11Aa3-2.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁵

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49319; File No. SR-Amex-2003-39]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1, 2, 3 and 4 Thereto by the American Stock Exchange LLC To Adopt an Obvious Error Rule and Half-Point Error Guarantee for Trades on the Exchange in Nasdaq National Market Securities

February 25, 2004.

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 April 30, 2003, the American Stock Exchange LLC ("Amex" 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 Exchange. The Amex submitted Amendment No. 1 to the proposed rule change on October 15, 2003.³ The Amex submitted Amendment No. 2 to the proposed rule change on November 21, 2003.⁴ The Amex submitted Amendment No. 3 to the proposed rule change on December 10, 2003.⁵ The Amex submitted Amendment No. 4 to the proposed rule

¹⁵ 17 CFR 200.30-3(a)(29).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Letter from Bill Floyd Jones, Associate General Counsel, Amex, to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated October 14, 2003 ("Amendment No. 1"). Amendment No. 1 replaced the original proposed rule change in its entirety.

⁴ See Letter from Bill Floyd Jones, Associate General Counsel, Amex, to Nancy J. Sanow, Assistant Director, Division, Commission, dated November 20, 2003 ("Amendment No. 2"). Amendment No. 2 replaced the original proposed rule change and Amendment No. 1 in their entirety.

⁵ See Letter from Bill Floyd Jones, Associate General Counsel, Amex, to Nancy J. Sanow, Assistant Director, Division, Commission, dated December 9, 2003 ("Amendment No. 3"). Amendment No. 3 replaced the original proposed rule change and Amendment Nos. 1 and 2 in their entirety. In Amendment No. 3, Amex also represented that Exchange Staff plans to propose the adoption of an obvious error rule similar to proposed Amex Rule 118(l) for Amex listed securities similar to that contained in the proposed rule change, at the next regularly scheduled Amex board meeting.

⁹ In approving this proposed OPRA Plan amendment, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁰ 15 U.S.C. 78k-1.

¹¹ 17 CFR 240.11Aa3-2.