SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51012; File No. SR–CTA/CQ–2004–01]

Consolidated Tape Association; Notice of Filing of the Seventh Substantive Amendment to the Second Restatement of the Consolidated Tape Association Plan and the Fifth Substantive Amendment to the Restated Consolidated Quotation Plan

January 10, 2005.

Pursuant to Rule 11Aa3–2 [1] under the Securities Exchange Act of 1934 (''Act''), notice is hereby given that on December 3, 2004, the Consolidated Tape Association (''CTA'') Plan and Consolidated Quotation (''CQ'') Plan Participants (''Participants'') [2] filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') a proposal to amend the CTA and CQ Plans (collectively, the ''Plans''). The proposal represents the 7th substantive amendment made to the Second Restatement of the CTA Plan and the 5th substantive amendment to the Restated CQ Plan, and reflects changes unanimously adopted by the Participants. The proposed amendments would modify the procedures for joining the Plans as a new Participant. In addition, the proposed amendments would perform the ''housekeeping'' function of incorporating into the text of the Plans changes to the corporate names and addresses of some Participants. The Commission is publishing this notice to solicit comments from interested persons on the proposed amendments to the Plans.

I. Description and Purpose of the Amendments

A. Rule 11Aa3–2 [3]

The proposed amendments would modify the procedures pursuant to which a new national securities exchange or new national securities association may join the Plans as a new Participant. More specifically, the proposed amendments would modify the process for determining the fees that a new national securities exchange or a new national securities association must pay in order to join the Plans.

Currently, both Plans require a new entrant to pay the Participants an amount that ''attributes an appropriate value to the assets, both tangible and intangible, that CTA has created and will make available to such new Participant.'' [4] The Plans allow for the Participants to consider one or more of six factors in assessing the appropriate value.[5] The Commission approved the addition of these entry-fee criteria to both Plans in 1993.[6] However, since the criteria were adopted, no entity has joined the Plans. CBOE was the last Participant to join the Plans, having done so in 1991.

In 1999, the Options Price Reporting Authority (''OPRA'') Plan Participants sought to adopt the same criteria adopted by the CTA to determine the appropriate participation fee to join the OPRA Plan.[7] The Commission received negative comments regarding the previously approved factors OPRA proposed to consider in determining the amount of its participation fee. The commenters asserted that the proposed OPRA Plan criteria could create a barrier to entry into the options industry that could harm competition. In response, OPRA modified and adopted new, more objective factors to be considered in determining the appropriate new entrant participation fee.[8] Consequently, in light of the comments received on the current CTA/CQ Plan criteria that OPRA was proposing to adopt, at the October 2001 CTA meeting, a Division of Market Regulation (''Division'') staff member suggested that the CTA consider amending its Plan criteria for determining new entrant fees to conform to the criteria that was more recently adopted by OPRA.

In 2002, The Nasdaq Stock Market, Inc. (''Nasdaq'') and Island ECN expressed interest in joining the Plans and inquired as to the amount of the entry fee. In response, the Participants engaged Deloitte & Touche, asking it to assign a value to each of the six current Plan criteria for determining a new entrant's fee. The Division expressed concerns to the Participants regarding the methodology contemplated by the CTA and Deloitte & Touche because it believed that the methodology contained factors that should not be considered in determining a proper entrance fee for new entrants.[9] The Division further noted that the entrance fee amount the Committee was considering at the time might have an anti-competitive effect on potential new entrants.[10]

In light of the Division's concerns that the current Plan standards do not provide an objective basis for determining entrance fees for new Participants and that the fees should be based solely on objective criteria and costs that could be easily calculated and that could be readily discernable (similar to the methodology currently used for determining such fees in the OPRA Plan),[11] the Participants are proposing new standards for determining a new Participant's entry fee based on the OPRA Plan criteria. The proposed amendments would allow the Participants to consider one or both of the following in determining a new entrant's fee: (1) The portion of costs previously paid by the CTA for the development, expansion and maintenance of CTA's facilities which, under generally accepted accounting principles (''GAAP''), could have been treated as capital expenditures and, if so treated, would have been amortized over the five years preceding the admission of the new Participant (and for this purpose all such capital expenditures shall be deemed to have a five-year amortizable life) [12]; and (2) previous amounts paid by other new

[1] 17 CFR 240.11Aa3–2.

[2] Each Participant executed the proposed amendments. The Participants are the American Stock Exchange LLC (''Amex''); Boston Stock Exchange, Inc. (''BSE''); Chicago Board Options Exchange, Inc. (''CBOE''); Chicago Stock Exchange (''CHX''), Inc.; National Association of Securities Dealers, Inc. (''NASD''); National Stock Exchange (''NSX''); New York Stock Exchange, Inc. (''NYSE''); Pacific Exchange, Inc. (''PCX''); and Philadelphia Stock Exchange, Inc. (''Phlx'').

[3] 17 CFR 240.11Aa3–2.

[4] Section III(c) of the Plans.

[5] *Id.*

[6] *See* Securities Exchange Act Release No. 33319 (December 10, 1993), 58 FR 66040 (December 17, 1993) (File No. S7–27–93).

[7] *See* Securities Exchange Act Release No. 42002 (October 13, 1999), 64 FR 56543 (October 20, 1999) (notice of File No. SR–OPRA–99–01).

[8] *See* Securities Exchange Act Release No. 43697 (December 8, 2000), 65 FR 78518 (December 15, 2000) (order approving File No. SR–OPRA–00–08); see also Securities Exchange Act Release Nos. 43347 (September 26, 2000), 65 FR 59035 (October 3, 2000) (notice of File No. SR–OPRA–00–08); and 42817 (May 24, 2000), 65 FR 35147 (June 1, 2000) (notice of filing and order granting accelerated effectiveness to File No. SR–OPRA–99–01).

[9] *See* letters to William J. Brodsky, Chairman and Chief Executive Officer, CBOE; David Colker, President and Chief Executive Officer, NSX; Philip D. DeFeo, Chairman and Chief Executive Officer, PCX; Meyer S. Frucher, Chairman and Chief Executive Officer, Phlx; Richard Grasso, Chairman and Chief Executive Officer, NYSE; David A. Herron, Chief Executive Officer, CHX; Richard Ketchum, President and Deputy Chairman, Nasdaq; Kenneth L. Leibler, Chairman and Chief Executive Officer, BSE; and Salvatore F. Sadano, Chairman and Chief Executive Officer, Amex, from Annette L. Nazareth, Director, dated March 13, 2003.

[10] *Id.*

[11] *See* letters to Thomas E. Haley, Chairman, CTA, from Annette L. Nazareth, Director, Division, Commission, dated August 3, and November 3, 2004.

[12] The Commission notes that the Participants should only consider tangible assets that are capital expenditures under GAAP in the fee calculation. In addition, the Commission notes that the Participants should not to consider any historical costs of operating the systems prior to the time the new Participant joins the Plans.

Participants to joined the Plans.[13] In addition, the proposed amendments would require the new Participant to reimburse the Plan Processor for the costs that the Processor incurs in modifying CTS and CQS systems to accommodate the new Participant and for an additional capacity costs.[14] Any disagreement among the Participants regarding the fee calculation would be subject to Commission review pursuant to Section 11A(b)(5) of the Act.[15]

Finally, the proposed amendments would perform the ''housekeeping'' function of updating the names and addresses of the Plans'' Participants. In the last few years, the ''Pacific Stock Exchange, Inc.'' has become the ''Pacific Exchange, Inc.,'' the ''American Stock Exchange, Inc.'' has become the ''American Stock Exchange, LLC,'' and the Cincinnati Stock Exchange, Inc.'' has become the ''National Stock Exchange.''

B. Governing or Constituent Documents

Not applicable.

C. Implementation of Amendment

The Participants have manifested their approval of the proposed amendments to the Plans by means of their execution of the proposed amendments. The proposed amendments would become effective upon Commission approval of the amendments.

D. Development and Implementation Phases

Not applicable.

E. Analysis of Impact on Competition

The Participants believe that the proposed amendments do not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Participants do not believe that the proposed Plan amendments introduce terms that are unreasonably discriminatory for the purposes of Section 11A(c)(1)(D)[16] of the Act.

F. Written Understanding or Agreements Relating to Interpretation of, or Participation in, Plan

Not applicable.

G. Approval by Sponsors in Accordance With Plan

Upon the Commission's receipt of executed versions of the proposed amendments by each of the Plans' Participants, each of the Participants shall have approved the proposed amendments in accordance with Section IV(b) of the CTA Plan and Section IV(c) of the CQ Plan.

H. Description of Operation of Facility Contemplated by the Proposed Amendment

Not applicable.

I. Terms and Conditions of Access

See Item I(A) above.

J. Method of Determination and Imposition, and Amount of, Fees and Charges

See Item I(A) above.

K. Method and Frequency of Processor Evaluation

Not applicable.

L. Dispute Resolution

Not applicable.

II. Rule 11Aa3–1[17]

A. Reporting Requirements

Not applicable.

B. Manner of Collecting, Processing, Sequencing, Making Available and Disseminating Last Sale Information

Not applicable.

C. Manner of Consolidation

Not applicable.

D. Standards and Methods Ensuring Promptness, Accuracy and Completeness of Transaction Reports

Not applicable.

E. Rules and Procedures Addressed to Fraudulent or Manipulative Dissemination

Not applicable.

F. Terms of Access to Transaction Reports

Not applicable.

G. Identification of Marketplace of Execution

Not applicable.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed Plan amendment is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CTA/CQ–2004–01 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–CTA/CQ–2004–01. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the CTA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CTA/CQ–2004–01 and should be submitted on or before February 9, 2005.

[13] The Commission notes that in considering the amounts that have been paid by other Participants to join the Plans, the Participants should only consider such fees on a ''going forward'' basis, which are determined by the proposed methodology. The Commission further notes that the fee that CBOE paid to join the Plans in 1991 should not be considered because it was not based on the proposed factors and therefore does not constitute a relevant fee for comparison purposes.

[14] The Commission notes that in utilizing this criteria, the Participants should not consider any criteria that would result in a ''double counting'' of costs because the new entrant and other Plan participants are required to individually pay their own costs (*e.g.*, capacity needs).

[15] 15 U.S.C. 78k–1(b)(5).

[16] 15 U.S.C. 78k–1(c)(1)(D).

[17] 17 CFR 240.11Aa3–1.

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

Jill M. Petersen,

Assistant Secretary.

[FR Doc. E5–172 Filed 1–18–05; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–26723; 812–13135]

Wachovia Corporation, et al.; Notice of Application and Temporary Order

January 12, 2005.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Temporary order and notice of application for a permanent order under section 9(c) of the Investment Company Act of 1940 (''Act'').

SUMMARY OF APPLICATION: Applicants have received a temporary order exempting them from section 9(a) of the Act, with respect to an injunction entered against Wachovia Corporation (''Wachovia'')[1] on or about November 12, 2004 by the United States District Court for the District of Columbia (the ''Injunction''), from January 12, 2005 until the Commission takes final action on an application for a permanent order. Applicants also have requested a permanent order.

APPLICANTS: Wachovia, Evergreen Investment Management Co, LLC (''EIMCO''), Evergreen Investment Services, Inc. (''EIS''), First International Advisors, LLC (d/b/a Evergreen International Advisors) (''FIA''), JL Kaplan Associates, LLC (''Kaplan''), SouthTrust Investment Advisors, A Division of SouthTrust Bank (''STIA''), and Tattersall Advisory Group, Inc. (''TAG'') (EIMCO, FIA, Kaplan, STIA and TAG are collectively referred to as the ''Advisers''), and Evergreen Investment Services, Inc. (''EIS'') (the ''Underwriter'' and, together with the Advisers and Wachovia, the ''Applicants'').[2]

FILING DATES: The application was filed on November 5, 2004, and amended on January 5, 2005.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing or further extends the temporary exemption. Interested persons may request a hearing by writing to the Commission's Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on February 7, 2005, and should be accompanied by proof of service on Applicants, in the form of an affidavit, or for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Applicants, c/o Mark C. Treanor, Esq., Wachovia Corporation, 301 South College Street, Suite 4000, One Wachovia Center, Charlotte, NC 28288–0013.

FOR FURTHER INFORMATION CONTACT: Janis F. Kerns, Senior Counsel, or Todd F. Kuehl, Branch Chief, at 202–942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a temporary order and a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549–0102 (telephone 202–942–8090).

Applicants' Representations

1. Wachovia is a holding company that, through its subsidiaries and affiliates, provides banking, investment, financing, advisory, and related products and services on a global basis. Wachovia is the ultimate parent company of the Advisers and Underwriter. Each Adviser is an investment adviser registered under the Investment Advisers Act of 1940 and serves as investment adviser or sub-adviser to certain registered investment companies (''Funds''). The Underwriter is a broker-dealer registered under the Securities Exchange Act of 1934 (''Exchange Act'') that acts as a principal underwriter for certain Funds.

2. On or about November 12, 2004, the United States District Court for the District of Columbia entered the Injunction against Wachovia in a matter brought by the Commission.[3] The Commission alleged in its complaint (''Complaint'') that Legacy Wachovia and First Union Corporation (''First Union'') violated sections 13(a) and 14(a) of the Exchange Act and rules 12b–20, 13a–3 and 14a–9 thereunder.[4] The alleged violations occurred in connection with material factual omissions in a joint proxy statement/prospectus and quarterly reports filed by Legacy Wachovia and First Union in May and June 2001 during the pendency of First Union's offer to purchase Legacy Wachovia. Without admitting or denying any of the allegations in the Complaint, except as to jurisdiction, Wachovia consented to the entry of the Injunction and the payment of a civil penalty.

Applicants' Legal Analysis

1. Section 9(a)(2) of the Act, in relevant part, prohibits a person who has been enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of a security from acting, among other things, as an investment adviser or depositor of any registered investment company or a principal underwriter for any registered open-end investment company, registered unit investment trust or registered face-amount certificate company. Section 9(a)(3) of the Act makes the prohibition in section 9(a)(2) applicable to a company, any affiliated person of which has been disqualified under the provisions of section 9(a)(2). Section 2(a)(3) of the Act defines ''affiliated person'' to include any person directly or indirectly controlling, controlled by, or under common control with, the other person. Applicants state that Wachovia is an affiliated person of each of the other Applicants within the meaning of section 2(a)(3) of the Act. Applicants state that, as a result of the Injunction, they became subject to the prohibitions of Section 9(a).

2. Section 9(c) of the Act provides that the Commission shall grant an application for exemption from the disqualification provisions of section 9(a) if it is established that these provisions, as applied to Applicants, are unduly or disproportionately severe or that Applicants' conduct has been such as not to make it against the public interest or the protection of investors to grant the application. Applicants have filed an application pursuant to section 9(c) seeking temporary and permanent orders exempting them from the disqualification provisions of section

[18] 17 CFR 200.30–3(a)(27).

[1] Wachovia is the surviving entity of the merger between First Union Corporation and the company known as Wachovia Corporation (''Legacy Wachovia'') on September 1, 2001.

[2] Applicants request that any relief granted pursuant to the application also apply to any other company of which Wachovia is or hereafter becomes an affiliated person in the future (included in the term ''Applicants'').

[3] *Securities and Exchange Commission* v. *Wachovia Corporation, et al.*, Civil Action No. 04–1911 (D.D.C. filed Nov. 12, 2004).

[4] *Securities and Exchange Commission* v. *Wachovia Corporation, et al.*, Civil Action No. 04–1910 (D.D.C. filed Nov. 4, 2004).