

illness or injury. The collection obtains information from railroad employees and physicians needed to determine eligibility to and the amount of such benefits.

*Additional Information or Comments:* Copies of the forms and supporting documents can be obtained from Charles Mierzwa, the agency clearance officer at (312) 751-3363 or [Charles.Mierzwa@RRB.GOV](mailto:Charles.Mierzwa@RRB.GOV).

Comments regarding the information collection should be addressed to Ronald J. Hodapp, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois, 60611-2092 or [Ronald.Hodapp@RRB.GOV](mailto:Ronald.Hodapp@RRB.GOV) and to the OMB Desk Officer for the RRB, at the Office of Management and Budget, Room 10230, New Executive Office Building, Washington, DC 20503.

**Charles Mierzwa,**  
Clearance Officer.

[FR Doc. 04-2081 Filed 2-2-04; 8:45 am]

BILLING CODE 7905-01-P

## SECURITIES AND EXCHANGE COMMISSION

### Issuer Delisting; Notice of Application of Boardwalk Equities Inc. To Withdraw Its Common Stock, No Par Value, From Listing and Registration on the New York Stock Exchange, Inc. File No. 1-15162

January 27, 2004.

Boardwalk Equities Inc., an Alberta, Canada corporation ("Issuer"), has filed an application with the Securities and Exchange Commission ("Commission"), pursuant to section 12(d) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 12d2-2(d) thereunder,<sup>2</sup> to withdraw its Common Stock, no par value ("Security"), from listing and registration on the New York Stock Exchange, Inc. ("NYSE" or "Exchange").

The Issuer stated in its application that it has met the requirements of NYSE by complying with all applicable laws in effect in the Province of Alberta, in which it is incorporated, and with the NYSE's rules governing an issuer's voluntary withdrawal of a security from listing and registration. The Issuer's application relates solely to the Security's withdrawal from listing on the NYSE and from registration under section 12(b) of the Act<sup>3</sup> and shall not affect its obligation to be registered under section 12(g) of the Act.<sup>4</sup>

<sup>1</sup> 15 U.S.C. 78j(d).

<sup>2</sup> 17 CFR 240.12d2-2(d).

<sup>3</sup> 15 U.S.C. 78j(b).

<sup>4</sup> 15 U.S.C. 78j(g).

The Board of Directors ("Board") of the Issuer approved a resolution on January 8, 2004 to withdraw the Issuer's Security from listing on the NYSE. The Issuer states that the primary reason for the Board's decision to withdraw its Security from the NYSE is the increased regulatory burden and expense to the Issuer if the Security were to remain listed on the NYSE. The Board recognized that the holders of the Security would continue to enjoy liquidity in their investment since the Security is, and will continue to be, listed on the Toronto Stock Exchange.

Any interested person may, on or before February 18, 2004, submit by letter to the Secretary of the Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549-0609, facts bearing upon whether the application has been made in accordance with the rules of the NYSE and what terms, if any, should be imposed by the Commission for the protection of investors. All comment letters should refer to File No. 1-15162. The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>5</sup>

**Jonathan G. Katz,**  
Secretary.

[FR Doc. 04-2093 Filed 2-2-04; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49137; File No. S7-24-89]

### Joint Industry Plan; Notice of Filing of Amendment No.13A of the Reporting Plan for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis, Submitted by the National Association of Securities Dealers, Inc., the Boston Stock Exchange, Inc., the Chicago Stock Exchange, Inc., the Cincinnati Stock Exchange, Inc., the Pacific Exchange, Inc., the American Stock Exchange LLC, and the Philadelphia Stock Exchange, Inc.

January 28, 2004.

#### I. Introduction

Pursuant to Rule 11Aa3-2<sup>1</sup> and Rule 11Aa3-1<sup>2</sup> under the Securities

Exchange Act of 1934 ("Act" or "Exchange Act"), notice is hereby given that on October 31, 2003, the Cincinnati Stock Exchange, Inc. ("CSE") on behalf of itself and the National Association of Securities Dealers, Inc. ("NASD"), the American Stock Exchange LLC ("Amex"), the Boston Stock Exchange, Inc. ("BSE"), the Chicago Stock Exchange, Inc. ("CHX"), the Pacific Exchange, Inc. ("PCX"), and the Philadelphia Stock Exchange, Inc. ("PHLX") (hereinafter referred to as "Participants"), as members of the operating committee ("Operating Committee" or "Committee")<sup>3</sup> of the Plan submitted to the Securities and Exchange Commission ("SEC" or "Commission") a proposal to amend the Plan ("13A Amendment").<sup>4</sup> The proposal reflects several changes unanimously adopted by the Committee.<sup>5</sup> The Commission is publishing this notice to solicit comments from interested persons on the 13A Amendment generally.

#### II. Plan Background

The Plan governs the collection, consolidation, and dissemination of quotation and transaction information for The Nasdaq Stock Market, Inc. ("Nasdaq") National Market ("NNM") and Nasdaq SmallCap securities listed on Nasdaq or traded on an exchange pursuant to unlisted trading privileges ("UTP").<sup>6</sup> The Plan provides for the collection from Plan Participants and the consolidation and dissemination to vendors, subscribers, and others of quotation and transaction information

<sup>3</sup> The Committee is made up of all the Participants.

<sup>4</sup> The Commission notes that CSE recently changed its name to National Stock Exchange. However, a Plan amendment that would change the name of CSE to National Stock Exchange for Plan purposes has not been submitted to the Commission. See Securities Exchange Act Release No. 48774 (November 12, 2003), 68 FR 65332 (November 19, 2003) (File No. SR-CSE-2003-12).

<sup>5</sup> CSE was chair of the Operating Committee at the time the 13A Amendment was filed with the Commission. Subsequently, PCX and its subsidiary the Archipelago Exchange were elected co-chairs of the Operating Committee for the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis ("Nasdaq UTP Plan" or "Plan") by the Participants.

<sup>6</sup> Section 12 of the Act generally requires an exchange to trade only those securities that the exchange lists, except that Section 12(f) of the Act permits UTP under certain circumstances. For example, Section 12(f) of the Act, among other things, permits exchanges to trade certain securities that are traded over-the-counter ("OTC/UTP"), but only pursuant to a Commission order or rule. For a more complete discussion of the Section 12(f) requirement, see November 1995 Extension Order, *infra* note 9.

<sup>5</sup> 17 CFR 200.30-3(a)(1).

<sup>1</sup> 17 CFR 240.11Aa3-2.

<sup>2</sup> 17 CFR 240.11Aa3-1.

in "eligible securities."<sup>7</sup> The Plan contains various provisions concerning its operation, including the following: Implementation of the Plan; Manner of Collecting, Processing, Sequencing, Making Available and Disseminating Last Sale Information; Reporting Requirements (including hours of operation); Standards and Methods of Ensuring Promptness, Accuracy and Completeness of Transaction Reports; Terms and Conditions of Access; Description of Operation of Facility Contemplated by the Plan; Method and Frequency of Processor Evaluation; Written Understandings of Agreements Relating to Interpretation of, or Participation in, the Plan; Calculation of the Best Bid and Offer ("BBO"); Dispute Resolution; and Method of Determination and Imposition, and Amount of Fees and Charges.

The Commission originally approved the Plan on a pilot basis on June 26, 1990.<sup>8</sup> The parties did not begin trading until July 12, 1993, accordingly, the pilot period commenced on July 12, 1993. The Plan has since been in operation on an extended pilot basis.<sup>9</sup>

<sup>7</sup> The Plan defines "Eligible Securities" as any NNM or Nasdaq SmallCap listed security, as defined in Nasdaq Rule 4200: (i) As to which UTP have been granted to a national securities exchange pursuant to Section 12(f) of the Act; or (ii) which also is listed on a national securities exchange other than Nasdaq. Moreover, the definition states that "Eligible Securities" shall not include any security that is defined in an "Eligible Security" within Section VII of the Consolidated Tape Association Plan.

<sup>8</sup> See Securities Exchange Act Release No. 28146, 55 FR 27917 (July 6, 1990) ("1990 Plan Approval Order").

<sup>9</sup> See Securities Exchange Act Release Nos. 34371 (July 13, 1994), 59 FR 37103 (July 20, 1994); 35221 (January 11, 1995), 60 FR 3886 (January 19, 1995); 36102 (August 14, 1995), 60 FR 43626 (August 22, 1995); 36226 (September 13, 1995), 60 FR 49029 (September 21, 1995); 36368 (October 13, 1995), 60 FR 54091 (October 19, 1995); 36481 (November 13, 1995), 60 FR 58119 (November 24, 1995) ("November 1995 Extension Order"); 36589 (December 13, 1995), 60 FR 65696 (December 20, 1995); 36650 (December 28, 1995), 61 FR 358 (January 4, 1996); 36934 (March 6, 1996), 61 FR 10408 (March 13, 1996); 36985 (March 18, 1996), 61 FR 12122 (March 25, 1996); 37689 (September 16, 1996), 61 FR 50058 (September 24, 1996); 37772 (October 1, 1996), 61 FR 52980 (October 9, 1996); 38457 (March 31, 1997), 62 FR 16880 (April 8, 1997); 38794 (June 30, 1997); 62 FR 36586 (July 8, 1997); 39505 (December 31, 1997) 63 FR 1515 (January 9, 1998); 40151 (July 1, 1998) 63 FR 36979 (July 8, 1998); 40896 (December 31, 1998), 64 FR 1834 (January 12, 1999); 41392 (May 12, 1999) 64 FR 27839 (May 21, 1999) ("May 1999 Approval Order"); 42268 (December 23, 1999), 65 FR 1202 (January 6, 2000); 43005 (June 30, 2000), 65 FR 42411 (July 10, 2000); 44099 (March 23, 2001), 66 FR 17457 (March 30, 2001); 44348 (May 24, 2001), 66 FR 29610 (May 31, 2001); 44552 (July 13, 2001), 66 FR 37712 (July 19, 2001); 44694 (August 14, 2001), 66 FR 43598 (August 20, 2001); 44804 (September 17, 2001), 66 FR 48299 (September 19, 2001); 45081 (November 19, 2001), 66 FR 59273 (November 27, 2001); 44937 (October 15, 2001), 66 FR 53271 (October 19, 2001); 46139 (June 28, 2001),

By way of background, the Operating Committee submitted the Amendment No. 13 to the Nasdaq UTP Plan ("13th Amendment") to address amendments related to (1) The Nasdaq Stock Market, Inc.'s ("Nasdaq") separation from NASD and anticipated registration as a national securities exchange, and (2) the implementation of an Internal Securities Information Processor ("Internal SIP") designed to separate Nasdaq's functions as a securities market from its functions as the securities information processor ("SIP" or "Processor") for the Nasdaq UTP Plan. The Internal SIP began operating in July 2002. The Legacy securities information processing system application (the "Legacy SIP") operated in parallel with this new system until March 31, 2003. In addition, certain other changes raised during the Operating Committee deliberations were proposed as part of Amendment 13. The changes in the 13th Amendment were grouped in four categories:

Category 1: changes that would become effective upon Nasdaq's exchange registration;

Category 2: changes that would become effective upon the launch of the Internal SIP;

Category 3: changes that would become effective upon the end of the parallel period and the elimination of the Legacy SIP; and

Category 4: changes where timing was not an issue.

The changes detailed in Categories 2, 3 and 4 were approved by the Commission.<sup>10</sup> The changes detailed in Category 1 have not been approved because Nasdaq's exchange registration has not been approved.

The NASD, acting through its subsidiary, Nasdaq, proposed the 13A Amendment to address changes to the

67 FR 44888 (July 5, 2002); 46381 (August 19, 2002), 67 FR 54687 (August 23, 2002); 46729 (October 25, 2002), 67 FR 66685 (November 1, 2002); 48318 (August 12, 2003), 68 FR 49534 (August 18, 2003); and 48882 (December 4, 2003), 68 FR 69731 (December 15, 2003).

<sup>10</sup> See Securities Exchange Act Release Nos. 46139 (June 28, 2001 [sic]), 67 FR 44888 (July 5, 2002) (putting into effect summarily Category 2 of the 13th Amendment on a temporary basis not to exceed 120 days); and 46381 (August 19, 2002), 67 FR 54687 (August 23, 2002) (approving the extension of the Plan through August 19, 2003); and 46729 (October 25, 2002), 67 FR 66685 (November 1, 2002) (approving the amendments in Categories 2, 3 and 4 on a pilot basis through August 19, 2003, to be coterminous with the expiration of the Plan and continuing the exemption under Rule 11Aa3-2(f) under the Act, 17 CFR 240.11Aa3-2(f), from compliance with Section VI.C.1 of the Plan as required by Rule 11Aa3-2(d) under the Act, 17 CFR 240.11Aa3-2(d), see Securities Exchange Act Release No. 46139). See also Securities Exchange Act Release No. 48882 (December 4, 2003), 68 FR 69731 (December 15, 2003) (extending the Plan through December 15, 2004).

Plan related to the elimination of the Legacy SIP. As a condition to its decision to sunset the operation of the Legacy SIP on March 31, 2003, the Operating Committee determined to adopt the proposed changes contained in the 13A Amendment. As described below, the current proposed 13A Amendment also affects certain changes proposed in the 13th Amendment, Category 1 revisions currently pending approval with the Commission.<sup>11</sup>

### III. Description and Purpose of the Amendment

The proposed text of the Plan, as amended, is attached as Exhibit A. These proposed changes are intended to clarify the operation of the Internal SIP pending Nasdaq's exchange registration. The following is a summary of the changes to the Plan proposed in the 13A Amendment.

1. Section III.T. of the Plan,<sup>12</sup> which defines "Quotation Information," would be amended to reflect that both the NASD Alternative Display Facility and the Nasdaq markets send individual market participant information to the Processor.<sup>13</sup>

2. Section III.Z. of the Plan would redefine "NQDS."<sup>14</sup> "NQDS" will now be defined as "the data stream of information that provides the best quotations and sizes from each Nasdaq Participant." In addition, Section III.Z. would add a definition for "Nasdaq Participant," which is "an entity that is registered as a market maker or an electronic communications network in Nasdaq or otherwise utilizes the facilities of Nasdaq pursuant to

<sup>11</sup> See Securities Exchange Act Release No. 46139 (June 28, 2001), 67 FR 44888 (July 5, 2002).

<sup>12</sup> In the 13A Amendment, the Plan section number for "Quotation Information" is erroneously listed as III.R. This error was based on an anticipated renumbering of Section III, which would occur when Item 6 of the Category 1 changes to the 13th Amendment is approved.

<sup>13</sup> The Commission approved Nasdaq's Order Display Facility, Order Collector Facility, and Trading Platform (collectively, "SuperMontage") contingent upon the NASD offering a quote and trade reporting alternative thereto, subsequently named the Alternative Display Facility ("ADF"). See Securities Exchange Act Release No. 43863 (January 19, 2001), 66 FR 8020 (January 26, 2001) ("SuperMontage Order").

<sup>14</sup> NQDS had previously been defined in Section III.O. of the Plan as "the Nasdaq Quotation Dissemination Service, a data stream of information that provides Vendors and Subscribers with quotations and sizes from all Participants and Nasdaq market participants." The definition in Section III.O. and related references to NQDS in the Plan were proposed to be eliminated through Item 7 of the Category 1 amendments. NQDS would be redefined in proposed Section III.Z., therefore, the conflicting reference contained in Section III.O. would be deleted. In addition, Item 7 of the pending Amendment 13, Category 1 revisions would be revised to reference Section III.Z. instead of Section III.O.

applicable NASD rules but does not include an NASD Participant as defined in Section III.G. of this Plan.” A definition of NASD Participant would be added in Section III.G.<sup>15</sup> Sections III.G. through III.X. would be accordingly renumbered to Sections III.H. through III.Y.

3. Section VI.B. and VI.C.3. of the Plan would be amended to clarify who will act as the Processor for NQDS given the timing of Nasdaq’s exchange registration and the appointment of an independent processor. Specifically, so long as Nasdaq is not registered as a national securities exchange but is still the Plan’s Processor, these revisions would clarify that the Processor shall collect, consolidate, disseminate, and distribute the quotation information contained in NQDS. The revisions would also provide that, in the event a new Processor is selected for the Plan’s other data feeds while Nasdaq’s exchange registration is still pending, the Operating Committee would need to determine whether to allow Nasdaq or a third party to act as the Processor for NQDS.

4. Finally, the 13A Amendment would amend Plan Exhibit 1, which governs the distribution of revenue attributable to the sale of market data collected pursuant to the Plan. Paragraph 3 of Plan Exhibit 1 would be amended to clarify the NQDS continues to be one of the data feeds subject to Paragraph 3. It also would be amended to reflect the change in the name of the “Level 1 Service” to the “UTP Quote Data Feed” (Section III.I) and the “Nasdaq Last Sale Information Service” to “UTP Trade Data Feed” (Section M), as well as reflect the addition of the OTC Montage Data Feed (Section III.O).<sup>16</sup>

<sup>15</sup> The definition of “NASD Participant” in Section III.G. originally would have been added through Item 4 of the Category 1 amendments. However, because the term is necessary to distinguish between the NASD ADF and Nasdaq market participants (and is already used in various provisions of the Plan), this definition is included as part of the 13A Amendment. As a result, Item 4 of the Category 1 amendments would be removed from the list of the pending 13th Amendment changes. In addition, because NASD ADF and Nasdaq are now operating under two distinct marketplace identifiers (D and Q, respectively), Section VIII.C. of the Plan would be amended to reflect this. As a result, Item 10 of the Category 1 amendments would be removed from the list of the pending 13th Amendment changes.

<sup>16</sup> The change in definition of the UTP Quote, UTP Trade and OTC Montage Data Feeds was approved as part of the Category 2 amendments, but the cross-references were instead listed as part of Item 15 of the Category 1 changes). In drafting the Amendment 13A resolution, the Operating Committee assumed these changes were effective. The Processor continued to disseminate the Level 1, Level 2 and Nasdaq Last Sale Information Service for a parallel period to enable market data vendors

#### IV. Solicitation of Comments

The Commission seeks general comments on the 13A Amendment. Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. S7–24–89. This file number should be included on the subject line if e-mail is used. To help the Commission process and review comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposal that are filed with the Commission, and all written communications relating to the proposal 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. Amendment 13A is being published as Exhibit A to this proposal. Copies of the proposal will also be available for inspection and copying at the office of the Secretary of the Committee, currently located at Pacific Exchange, Inc. and Archipelago Exchange L.L.C., 100 South Wacker Drive, Suite 2000, Chicago, 60606. All submissions should be submitted by February 24, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>17</sup>

**J. Lynn Taylor,**  
*Assistant Secretary.*

#### Exhibit A

Additions are *underlined*, and deletions are in [brackets]

#### **Amendment No. 13A—Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis**

The undersigned registered national securities association and national securities

to have a smooth transition to the new feeds. To the extent there is Plan revenue attributable to the parallel operation of these feeds, that revenue is governed by Paragraph 3 as though those terms had not been deleted.

<sup>17</sup> 17 CFR 200.30–3(a)(27).

exchanges (collectively referred to as the “Participants”), have jointly developed and hereby enter into this Nasdaq Unlisted Trading Privileges Plan (“Nasdaq UTP Plan” or “Plan”).

#### I. Participants

The Participants include the following:

##### A. Participants

1. American Stock Exchange, LLC, 86 Trinity Place, New York, New York 10006.
2. Boston Stock Exchange, 100 Franklin Street, Boston, Massachusetts 02110.
3. Chicago Stock Exchange, 440 South LaSalle Street, Chicago, Illinois 60605.
4. Cincinnati Stock Exchange, 440 South LaSalle Street, 26th Floor, Chicago, Illinois 60605.
5. National Association of Securities Dealers, Inc., 1735 K Street, NW., Washington, D.C. 20006.
6. Pacific Exchange, Inc., 301 Pine Street, San Francisco, CA 94104.
7. Philadelphia Stock Exchange, 1900 Market Street, Philadelphia, Pennsylvania 19103.

##### B. Additional Participants

Any other national securities association or national securities exchange, in whose market Eligible Securities become traded, may become a Participant, provided that said organization executes a copy of this Plan and pays its share of development costs as specified in Section XIII.

#### II. Purpose of Plan

The purpose of this Plan is to provide for the collection, consolidation and dissemination of Quotation Information and Transaction Reports in Eligible Securities from the Participants in a manner consistent with the Exchange Act.

It is expressly understood that each Participant shall be responsible for the collection of Quotation Information and Transaction Reports within its market and that nothing in this Plan shall be deemed to govern or apply to the manner in which each Participant does so.

#### III. Definitions

A. “Current” means, with respect to Transaction Reports or Quotation Information, such Transaction Reports or Quotation Information during the fifteen (15) minute period immediately following the initial transmission thereof by the Processor.

B. “Eligible Security” means any Nasdaq National Market or Nasdaq SmallCap security, as defined in NASD Rule 4200: (i) As to which unlisted trading privileges have been granted to a national securities exchange pursuant to Section 12(f) of the Exchange Act or which become eligible for such trading pursuant to order of the Securities and Exchange Commission; or (ii) which also is listed on a national securities exchange.

C. “Commission” and “SEC” shall mean the U.S. Securities and Exchange Commission.

D. “Exchange Act” means the Securities Exchange Act of 1934.

E. “Market” shall mean (i) when used with respect to Quotation Information, the NASD in the case of a Nasdaq market maker or a

Nasdaq-registered electronic communications network/alternative trading system (hereafter collectively referred to as "Nasdaq market participants") acting in such capacity, or the Participant on whose floor or through whose facilities the quotation was disseminated; and (ii) when used with respect to Transaction Reports, the Participant through whose facilities the transaction took place or was reported, or the Participant to whose facilities the order was sent for execution.

F. "NASD" means the National Association of Securities Dealers, Inc.

G. "NASD Participant" means a NASD member that is registered as a market maker or an electronic communications network or otherwise utilizes the facilities of the NASD pursuant to applicable NASD rules.

[G]H. "NASD Transaction Reporting System" means the System provided for in the NASD's Transaction Reporting Plan filed with and approved by the Commission pursuant to SEC Rule 11Aa3-1, governing the reporting of transactions in Nasdaq securities.

[H]I. "UTP Quote Data Feed" means the service that provides Subscribers with the National Best Bid and Offer quotations, size and market center identifier, as well as the Best Bid and Offer quotations, size and market center identifier from each individual Participant in Eligible Securities.

[I]J. "Nasdaq Level 2 Service" means the Nasdaq service that provides Subscribers with query capability with respect to quotations and sizes in securities included in the Nasdaq System, best bid and asked quotations, and Transaction Reports.

[J]K. "Nasdaq Level 3 Service" means the Nasdaq service that provides Nasdaq market participants with input and query capability with respect to quotations and sizes in securities included in the Nasdaq System, best bid and asked quotations, and Transaction Reports.

[K]L. "Nasdaq System" means the automated quotation system operated by Nasdaq.

[L]M. "UTP Trade Data Feed" means the service that provides Vendors and Subscribers with Transaction Reports.

[M]N. "Nasdaq Security" or "Nasdaq-listed Security" means any security listed on the Nasdaq National Market or Nasdaq SmallCap Market.

[N]O. "News Service" means a person that receives Transaction Reports or Quotation Information provided by the Systems or provided by a Vendor, on a Current basis, in connection with such person's business of furnishing such information to newspapers, radio and television stations and other news media, for publication at least fifteen (15) minutes following the time when the information first has been published by the Processor.

[O]P. ["NQDS" means the Nasdaq Quotation Dissemination Service, a data stream of information that provides Vendors and Subscribers with quotations and sizes from all Participants and Nasdaq market participants.] "OTC Montage Data Feed" means the data stream of information that provides Vendors and Subscribers with quotations and sizes from each Participant.

[P]Q. "Participant" means a registered national securities exchange or national

securities association that is a signatory to this Plan.

[Q]R. "Plan" means this Nasdaq UTP Plan, as from time to time amended according to its provisions, governing the collection, consolidation and dissemination of Quotation Information and Transaction Reports in Eligible Securities.

[R]S. "Processor" means the entity selected by the Participants to perform the processing functions set forth in the Plan.

[S]T. "Quotation Information" means all bids, offers, displayed quotation sizes, the market center identifiers and, in the case of NASD and Nasdaq, the NASD and Nasdaq market participant that entered the quotation, withdrawals and other information pertaining to quotations in Eligible Securities required to be collected and made available to the Processor pursuant to this Plan.

[T]U. "Regulatory Halt" means a trade suspension or halt called for the purpose of dissemination of material news, as described at Section X hereof or that is called for where there are regulatory problems relating to an Eligible Security that should be clarified before trading therein is permitted to continue.

[U]V. "Subscriber" means a person that receives Current Quotation Information or Transaction Reports provided by the Processor or provided by a Vendor for its own use or for distribution on a non-Current basis, other than in connection with its activities as a Vendor.

[V]W. "Transaction Reports" means reports required to be collected and made available pursuant to this Plan containing the stock symbol, price, and size of the transaction executed, the Market in which the transaction was executed, and related information, including a buy/sell/cross indicator and trade modifiers, reflecting completed transactions in Eligible Securities.

[W]X. "Upon Effectiveness of the Plan" means July 12, 1993, the date on which the Participants commenced publication of Quotation Information and Transaction Reports on Eligible Securities as contemplated by this Plan.

[X]Y. "Vendor" means a person that receives Current Quotation Information or Transaction Reports provided by the Processor or provided by a Vendor, in connection with such person's business of distributing, publishing, or otherwise furnishing such information on a Current basis to Subscribers, news Services or other Vendors.

Z. "NQDS" means the data stream of information that provides Vendors and Subscribers with the best quotations and sizes from each Nasdaq Participant. A Nasdaq Participant is an entity that is registered as a market maker or an electronic communications network in Nasdaq or otherwise utilizes the facilities of The Nasdaq Stock Market pursuant to applicable NASD rules but does not include an NASD Participant as defined in Section III.G. of this Plan.

#### IV. Administration of Plan

##### A. Operating Committee: Composition

The Plan shall be administered by the Participants through an operating committee

("Operating Committee"), which shall be composed of one representative designated by each Participant. Each Participant may designate an alternate representative or representatives who shall be authorized to act on behalf of the Participant in the absence of the designated representative. Within the areas of its responsibilities and authority, decisions made or action taken by the Operating Committee, directly or by duly delegated individuals, committees as may be established from time to time, or others, shall be binding upon each Participant, without prejudice to the rights of any Participant to seek redress from the SEC pursuant to Rule 11Aa3-2 under the Exchange Act or in any other appropriate forum.

An Electronic Communications Network, Alternative Trading System, Broker-Dealer or other securities organization ("Organization") which is not a Participant, but has an actively pending Form 1 Application on file with the Commission to become a national securities exchange, will be permitted to appoint one representative and one alternate representative to attend regularly scheduled Operating Committee meetings in the capacity of an observer/advisor. If the Organization's Form 1 petition is withdrawn, returned, or is otherwise not actively pending with the Commission for any reason, then the Organization will no longer be eligible to be represented in the Operating Committee meetings. The Operating Committee shall have the discretion, in limited instances, to deviate from this policy if, as indicated by majority vote, the Operating Committee agrees that circumstances so warrant.

Nothing in this section or elsewhere within the Plan shall authorize any person or organization other than Participants and their representatives to participate on the Operating Committee in any manner other than as an advisor or observer, or in any Executive Session of the Operating Committee.

##### B. Operating Committee: Authority

The Operating Committee shall be responsible for:

1. Overseeing the consolidation of Quotation Information and Transaction Reports in Eligible Securities from the Participants for dissemination to Vendors, Subscribers, News Services and others in accordance with the provisions of the Plan;
2. Periodically evaluating the Processor;
3. Setting the level of fees to be paid by Vendors, Subscribers, News Services or others for services relating to Quotation Information or Transaction Reports in Eligible Securities, and taking action in respect thereto in accordance with the provisions of the Plan;
4. Determining matters involving the interpretation of the provisions of the Plan;
5. Determining matters relating to the Plan's provisions for cost allocation and revenue-sharing; and
6. Carrying out such other specific responsibilities as provided under the Plan.

##### C. Operating Committee: Voting

Each Participant shall have one vote on all matters considered by the Operating Committee.

1. The affirmative and unanimous vote of all Participants entitled to vote shall be necessary to constitute the action of the Operating Committee with respect to:

- a. Amendments to the Plan;
- b. Amendments to contracts between the Processor and Vendors, Subscribers, News Services and other receiving Quotation Information and Transaction Reports in Eligible Securities;
- c. Replacement of the Processor, except for termination for cause, which shall be governed by Section V(B) hereof;
- d. Reductions in existing fees relating to Quotation Information and Transaction Reports in Eligible Securities; and
- e. Except as provided under Section IV(C)(3) hereof, requests for system changes; and
- f. All other matters not specifically addressed by the Plan.

2. With respect to the establishment of new fees or increases in existing fees relating to Quotation Information and Transaction Reports in Eligible Securities, the affirmative vote of two-thirds of the Participants entitled to vote shall be necessary to constitute the action of the Operating Committee.

3. The affirmative vote of a majority of the Participants entitled to vote shall be necessary to constitute the action of the Operating Committee with respect to:

- a. Requests for system changes reasonably related to the function of the Processor as defined under the Plan. All other requests for system changes shall be governed by Section IV(C)(1)(e) hereof.
- b. Interpretive matters and decisions of the Operating Committee arising under, or specifically required to be taken by, the provisions of the Plan as written;
- c. Interpretive matters arising under Exchange Act Rules 11Aa3-1 and 11Ac1-1; and

d. Denials of access (other than for breach of contract, which shall be handled by the Processor).

4. It is expressly agreed and understood that neither this Plan nor the Operating Committee shall have authority in any respect over any Participant's proprietary systems. Nor shall the Plan or the Operating Committee have any authority over the collection and dissemination of quotation or transaction information in Eligible Securities in any Participant's marketplace or, in the case of NASD, from NASD Participants.

#### *D. Operating Committee: Meetings*

Regular meetings of the Operating Committee may be attended by each Participant's designated representative and/or its alternate representative(s), and may be attended by one or more other representatives of the parties. Meetings shall be held at such times and locations as shall from time to time be determined by the Operating Committee.

Quorum: Any action requiring a vote only can be taken at a meeting in which a quorum of all Participants is present. For actions requiring a simple majority vote of all Participants, a quorum of greater than 50% of all Participants entitled to vote must be present at the meeting before such a vote may be taken. For actions requiring a  $\frac{2}{3}$  majority

vote of all Participants, a quorum of at least  $\frac{2}{3}$  of all Participants entitled to vote must be present at the meeting before such a vote may be taken. For actions requiring a unanimous vote of all Participants, a quorum of all Participants entitled to vote must be present at the meeting before such a vote may be taken.

A Participant is considered present at a meeting only if a Participant's designated representative or alternate representative(s) is either in physical attendance at the meeting or is participating by conference telephone, or other acceptable electronic means.

Any action sought to be resolved at a meeting must be sent to each Participant entitled to vote on such matter at least one week prior to the meeting via electronic mail, regular U.S. or private mail, or facsimile transmission, provided however that this requirement may be waived by the vote of the percentage of the Committee required to vote on any particular matter, under Section C above.

Any action may be taken without a meeting if consent in writing, setting forth the action so taken, is sent to and signed by all Participant representatives entitled to vote with respect to the subject matter thereof. All the approvals evidencing the consent shall be delivered to the Chairman of the Operating Committee to be filed in the Operating Committee records. The action taken shall be effective when the minimum number of Participants entitled to vote have approved the action, unless the consent specifies a different effective date.

The Chairman of the Operating Committee shall be elected annually by and from among the Participants by a majority vote of all Participants entitled to vote. The Chairman shall designate a person to act as Secretary to record the minutes of each meeting. The location of meetings shall be rotated among the locations of the principal offices of the Participants, or such other locations as may from time to time be determined by the Operating Committee. Meetings may be held by conference telephone and action may be taken without a meeting if the representatives of all Participants entitled to vote consent thereto in writing or other means the Operating Committee deems acceptable.

#### *E. Advisory Committee*

##### *1. Composition:*

a. Each Plan Participant may designate three representatives to participate in the Advisory Committee. The representatives shall each be an employee of a member of that Participant, a professor or other academic involved in the scholarly study of the securities industry, or an expert in one or more areas of the securities industry.

b. Each representative shall serve a one-year term on the Advisory Committee.

##### *2. Authority:*

The Advisory Committee shall have the opportunity to:

a. Meeting twice yearly, each meeting to occur one day prior to a meeting of the Operating Committee.

b. Discuss any matter related to the operation of the Plan.

c. Present written comments or inquiries to the Operating Committee regarding matters related to the operation of the Plan.

d. Respond to written inquiries from the Operating Committee seeking comment from the Advisory Committee on matters related to the operation of the Plan.

#### *V. Selection and Evaluation of the Processor*

##### *A. Generally*

The Processor's performance of its functions under the Plan shall be subject to review by the Operating Committee at least every two years, or from time to time upon the request of any two Participants but not more frequently than once each year. Based on this review, the Operating Committee may choose to make a recommendation to the Participants with respect to the continuing operation of the Processor. The Operating Committee shall notify the SEC of any recommendations the Operating Committee shall make pursuant to the Operating Committee's review of the Processor and shall supply the Commission with a copy of any reports that may be prepared in connection therewith.

##### *B. Termination of the Processor for Cause*

If the Operating Committee determines that the Processor has failed to perform its functions in a reasonably acceptable manner in accordance with the provisions of the Plan or that its reimbursable expenses have become excessive and are not justified on a cost basis, the Processor may be terminated at such time as may be determined by a majority vote of the Operating Committee.

##### *C. Factors To Be Considered in Termination for Cause*

Among the factors to be considered in evaluating whether the Processor has performed its functions in a reasonably acceptable manner in accordance with the provisions of the Plan shall be the reasonableness of its response to requests from Participants for technological changes or enhancements pursuant to Section IV(C)(3) hereof. The reasonableness of the Processor's response to such requests shall be evaluated by the Operating Committee in terms of the cost to the Processor of purchasing the same service from a third party and integrating such service into the Processor's existing systems and operations as well as the extent to which the requested change would adversely impact the then current technical (as opposed to business or competitive) operations of the Processor.

##### *D. Processors Right To Appeal Termination for Cause*

The Processor shall have the right to appeal to the SEC a determination of the Operating Committee terminating the Processor for cause and no action shall become final until the SEC has ruled on the matter and all legal appeals of right therefrom have been exhausted.

##### *E. Process for Selecting New Processor*

At any time following effectiveness of the Plan, but no later than upon the termination of the Processor, whether for cause pursuant to Section IV(C)(1)(c) or V(B) of the Plan or upon the Processor's resignation, the Operating Committee shall establish procedures for selecting a new Processor (the

“Selection Procedures”). The Operating Committee, as part of the process of establishing Selection Procedures, may solicit and consider the timely comment of any entity affected by the operation of this Plan. The Selection Procedures shall be established by a two-thirds majority vote of the Plan Participants, and shall set forth, at a minimum:

1. The entity that will:
  - a. Draft the Operating Committee's request for proposal for bids on a new processor;
  - b. Assist the Operating Committee in evaluating bids for the new processor; and
  - c. Otherwise provide assistance and guidance to the Operating Committee in the selection process.
2. The minimum technical and operational requirements to be fulfilled by the Processor;
3. The criteria to be considered in selecting the Processor; and
4. The entities (other than Plan Participants) that are eligible to comment on the selection of the Processor.

Nothing in this provision shall be interpreted as limiting Participants' rights under Section IV or Section V of the Plan or other Commission order.

#### VI. Functions of the Processor

##### A. Generally

The Processor shall collect from the Participants, and consolidate and disseminate to Vendors, Subscribers and News Services, Quotation Information and Transaction Reports in Eligible Securities in a manner designed to assure the prompt, accurate and reliable collection, processing and dissemination of information with respect to all Eligible Securities in a fair and non-discriminatory manner. The Processor shall commence operations upon the Processor's notification to the Participants that it is ready and able to commence such operations.

##### B. Collection and Consolidation of Information

For as long as Nasdaq is the Processor, the Processor shall be capable of receiving Quotation Information and Transaction Reports in Eligible Securities from Participants by the Plan-approved, Processor sponsored interface, and shall consolidate and disseminate such information via the UTP Quote Data Feed, the UTP Trade Data Feed, and the OTC Montage Data Feed to Vendors, Subscribers and News Services. *For so long as Nasdaq is not registered as a national securities exchange and for so long as Nasdaq is the Processor, the Processor shall also collect, consolidate, and disseminate the quotation information contained in NQDS.* For so long as Nasdaq is not registered as a national securities exchange and after Nasdaq is no longer the Processor for other SIP datafeeds, either Nasdaq or a third party will act as the Processor to collect, consolidate, and disseminate the quotation information contained in NQDS.

##### C. Dissemination of Information

The Processor shall disseminate consolidated Quotation Information and Transaction Reports in Eligible Securities via

the UTP Quote Data Feed, the UTP Trade Data Feed, and the OTC Montage Data Feed to authorized Vendors, Subscribers and News Services in a fair and non-discriminatory manner. The Processor shall specifically be permitted to enter into agreements with Vendors, Subscribers and News Services for the dissemination of quotation or transaction information on Eligible Securities to foreign (non-U.S.) marketplaces or in foreign countries.

The Processor shall, in such instance, disseminate consolidated quotation or transaction information on Eligible Securities from all Participants.

Nothing herein shall be construed so as to prohibit or restrict in any way the right of any Participant to distribute quotation, transaction or other information with respect to Eligible Securities quoted on or traded in its marketplace to a marketplace outside the United States solely for the purpose of supporting an intermarket linkage, or to distribute information within its own marketplace concerning Eligible Securities in accordance with its own format. If a Participant requests, the Processor shall make information about Eligible Securities in the Participant's marketplace available to a foreign marketplace on behalf of the requesting Participant, in which event the cost shall be borne by that Participant.

##### 1. Best Bid and Offer

The Processor shall disseminate on the UTP Quote Data Feed the best bid and offer information supplied by each Participant, including the NASD, and shall also calculate and disseminate on the UTP Quote Data Feed a national best bid and asked quotation with size based upon Quotation Information for Eligible Securities received from Participants. The Processor shall not calculate the best bid and offer for any individual Participant, including the NASD.

The Participant responsible for each side of the best bid and asked quotation making up the national best bid and offer shall be identified by an appropriate symbol. If the quotations of more than one Participant shall be the same best price, the largest displayed size among those shall be deemed to be the best. If the quotations of more than one Participant are the same best price and best displayed size, the earliest among those measured by the time reported shall be deemed to be the best. A reduction of only bid size and/or ask size will not change the time priority of a Participant's quote for the purposes of determining time reported, whereas an increase of the bid size and/or ask size will result in a new time reported. The consolidated size shall be the size of the Participant that is at the best.

If the best bid/best offer results in a locked or crossed quotation, the Processor shall forward that locked or crossed quote on the appropriate output lines (*i.e.*, a crossed quote of bid 12, ask 11.87 shall be disseminated). The Processor shall normally cease the calculation of the best bid/best offer after 6:30 p.m., Eastern Time.

##### 2. Eligible Securities

a. Number of Eligible Securities—If the Commission by order expands the number of Eligible Securities beyond 1,000, the number

of Eligible Securities that Participants may trade shall be phased in (added) according to the schedule set out below:

(i) At the end of the first calendar quarter following the Commission's order expanding the number of Eligible Securities beyond 1,000 but in no case before September 30, 2001, Participants may commence trading 500 additional securities;

(ii) At the end of each of the four calendar quarters following the date established under provision VI.C(2)(a)(i) of the Plan, Participants may commence trading an additional 500 securities, and at the end of the fifth calendar quarter following the date established under provision VI.C(a)(i) of the Plan, Participants shall be permitted to trade all Eligible Securities.

(iii) In no case shall the number of Eligible Securities exceed the number of securities that the Commission deems are eligible for trading pursuant to this Plan.

(iv) After each of the aforementioned phase in periods (*i.e.*, calendar quarters), the Processor shall evaluate its performance to determine whether it is prudent, in light of system capacity and any other operational factors, to continue to add additional securities pursuant to the phase in schedule. If the Processor determines, in light of system capacity and any other operational factors, that it is not prudent to continue to expand the number of Eligible Securities, the Processor upon notice to the Participants immediately may suspend the phase-in schedule and delay the expansion of the number of Eligible Securities that may be traded under the Plan. The Processor shall commence adding securities pursuant to a revised phase-in schedule, when the Processor determines it is prudent to do so, in light of system capacity and any other operational factors.

(v) This provision shall not apply to The Nasdaq Stock Market, Inc., or Nasdaq market participants acting in such capacity, nor shall it apply to any Participant that does not engage in auto-quoting, as described in paragraph VI.C(a)(b) below.

b. Limitation on Auto-Quoting—Except as provided in subparagraph VI.C(2)(c) of this Plan, Participants shall be prohibited from the practice of “Auto-quoting” means the practice of tracking, by automated means, the changes to the best bid or best ask quotation and responding by generating another quote change to keep that Participant away from the best bid or ask quotation, but for purposes of this Plan, shall not include:

(i) An update that is in response to an execution in the security by that Participant;

(ii) An update that requires a physical entry;

(iii) An update that is to reflect the receipt, execution, or cancellation of a customer limit order; or

(iv) The practice of automatically generating quote changes at a rate of less than 35 percent of all price changes to the national best bid or ask quotation. The Processor shall calculate this rate using quoting activity during the preceding calendar month.

c. Applicability of Auto-Quoting Limitation—The Limitation on Auto-Quoting contained in subparagraph VI.C(2)(b) of this Plan shall only apply if the Processor deems

it necessary to maintain adequate capacity for the normal and efficient operation of the Processor and the Processor provides at least 30 calendar days' notice to the Participants and the basis thereof of such determination. The Processor shall lift the limitation on auto-quoting when the Processor determines it is prudent to do so, in light of system capacity and any other operational factors. Additionally, the Limitation on Auto-Quoting set forth in subparagraph VI.C(2)(b) of this Plan will not apply to a Participant whose aggregated quoting activity in eligible Nasdaq securities does not exceed 1% of the total quotation traffic across all Nasdaq securities by all Nasdaq market participants and Exchange Participants. The Processor shall calculate this rate using quoting activity during the preceding calendar month.

d. **Obligations of Participants Regarding Capacity**—Each Participant shall exercise due diligence to promote quotation generation practices that mitigate quotation traffic so as to ensure prudential excess capacity within the Processor. The Operating Committee shall periodically review the performance of Participants and take such action as necessary to maintain prudential excess capacity.

e. **Procedures for Ensuring Acceptable Quote Generation Practices**—The following procedures shall apply if, in accordance with Section VI.C.2(c) of the Plan, the Processor determines that a capacity concern exists.

(i) On a monthly basis, each Participant shall provide the Processor with a good faith estimate of the Participant's previous month's daily average number of aggregate quote updates to permit the Processor to determine compliance with the auto-quoting limitation referenced in Section VI.C.2.(b) of the Plan.

(ii) If the Processor determines, from the Participant's data or otherwise, that the Participant has not complied with the limitations of Section VI.C.2.(b), the Processor shall give the Participant written notice of such condition. The Participant shall have 30 calendar days after receipt of the written notice to remedy the condition.

(iii) If, after the aforementioned 30-day period has expired, the condition has not been remedied to the reasonable satisfaction of the Processor, then the Processor shall submit to the Operating Committee a written request for relief together with supporting documentation evidencing the alleged condition (*i.e.*, failure to comply with the limitations of Section VI.C.2.(b)) and quantifying the impact of the violation on overall capacity of the Processor. The Processor's request for relief shall be limited to such remedial action (including but not limited to the termination of service to the subject Participant) as is necessary to modify the subject Participant's quote generation practices on a prospective basis, for such period as is necessary to resolve the condition that gave rise to the Processor's request for relief. The Participant shall have 15 calendar days to respond in writing to the Processor's request for relief.

(iv) The Operating Committee, following written notice to the Participant and the Processor, shall conduct a hearing within five (5) business days after expiration of the 15-

day response period to determine whether to grant or deny the Processor's claim for remedial action. At the hearing, the Operating Committee may consider, among other information, the request of the Processor, the response (if any) of the Participant and any other evidence (written or oral) that is presented at the hearing. At the conclusion of the hearing, the Operating Committee shall grant or deny the Processor's request. An affirmative vote of two-thirds of the Operating Committee members entitled to vote (excluding the subject Participant) shall be required for any decision of the Operating Committee. The decision of the Operating Committee shall be final and therefore reviewable by the Commission; provided, however, that any decision of the Operating Committee shall not become effective until five business days after the date of the decision.

f. **Limitation on Applicability of Rule**—the phase-in schedule contained in VI.C(2)(a) and the Limitation on Auto-Quoting contained in VI.C(2)(c) shall not apply:

(i) To any Participant upon the designation and the operation of a new Processor; and

(ii) To a Participant for the number of securities that the Participant quoted as of May 1, 2001; provided, however, the exemption contained herein shall expire a year from the end-date of the phase-in schedule contained in VI.C(2)(a).

### 3. Quotation Data Streams

The Processor shall disseminate on the UTP Quote Data Feed a data stream of all Quotation Information regarding Eligible Securities received from Participants. Each quotation shall be designated with a symbol identifying the Participant from which the quotation emanates. Quotation Information from individual NASD Participants will not be disseminated on the UTP Quote Data Feed. The Processor shall separately distribute on the OTC Montage Data Feed the Quotation Information regarding Eligible Securities from all NASD Participants from which quotations emanate. *The Processor shall separately distribute NQDS for so long as Nasdaq is not registered as a national securities exchange and for so long as Nasdaq is the Processor. For so long as Nasdaq is not registered as a national securities exchange and after Nasdaq is no longer the Processor for other SIP data feeds, either Nasdaq or a third party will act as the Processor to collect, consolidate, and disseminate the quotation information contained in NQDS.*

### 4. Transaction Reports

The Processor shall disseminate on the UTP Trade Data Feed a data stream of all Transaction Reports in Eligible Securities received from Participants. Each transaction report shall be designated with a symbol identifying the Participant in whose Market the transaction took place.

### d. Closing Reports

At the conclusion of each trading day, the Processor shall disseminate a "closing price" for each eligible Security. Such "closing price" shall be the price of the last Transaction Report in such security received prior to dissemination. The Processor shall

also tabulate and disseminate at the conclusion of each trading day the aggregate volume reflected by all Transaction Reports in Eligible Securities reported by the Participants.

### E. Statistics

The Processor shall maintain quarterly, semi-annual and annual transaction and volume statistical counts. The Processor shall, at cost to the user Participant(s), make such statistics available in a form agreed upon by the Operating Committee, such as a secure website.

### VII. Administrative Functions of the Processor

Subject to the general direction of the Operating Committee, the Processor shall be responsible for carrying out all administrative functions necessary to the operation and maintenance of the consolidated information collection and dissemination system provided for in this Plan, including, but not limited to, record keeping, billing, contract administration, and the preparation of financial reports.

### VIII. Transmission of Information to Processor by Participants

#### A. Quotation Information

Each Participant shall, during the time it is open for trading be responsible promptly to collect and transmit to the Processor accurate Quotation information in Eligible Securities through any means prescribed herein.

Quotation Information shall include:

1. Identification of the Eligible Security, using the Nasdaq Symbol;
2. The priced bid and offer, together with size;
3. The Nasdaq market participant or Participant from which the quotation emanates;
4. Identification of quotations that are not firm; and
5. Through appropriate codes and messages, withdrawals and similar matters.

#### B. Transaction Reports

Each Participant shall, during the time it is open for trading, be responsible promptly to collect and transmit to the Processor Transaction Reports in Eligible Securities executed in its Market by means prescribed herein. With respect to orders sent by one Participant Market to another Participant Market for execution, each Participant shall adopt procedures governing the reporting of transactions in Eligible Securities specifying that the transaction will be reported by the Participant whose member sold the security. This provision shall apply only to transactions between Plan Participants.

Transaction Reports shall include:

1. Identification of the Eligible Security, using the Nasdaq Symbol;
2. The number of shares in the transaction;
3. The price at which the shares were purchased or sold;
4. The buy/sell/cross indicator;
5. The Market of execution; and
6. Through appropriate codes and messages, late or out-of-sequence trades, corrections and similar matters.

All such Transaction Reports shall be transmitted to the Processor within 90

seconds after the time of execution of the transaction. Transaction Reports transmitted beyond the 90-second period shall be designated as "late" by the appropriate code or message.

The following types of transactions are not required to be reported to the Processor pursuant to the Plan:

1. Transactions that are part of a primary distribution by an issuer or of a registered secondary distribution or of an unregistered secondary distribution;
2. Transactions made in reliance on Section 4(2) of the Securities Act of 1933;
3. Transactions in which the buyer and the seller have agreed to trade at a price unrelated to the Current Market for the security, *e.g.*, to enable the seller to make a gift;
4. Odd-lot transactions;
5. The acquisition of securities by a broker-dealer as principal in anticipation of making an immediate exchange distribution or exchange offering on an exchange;
6. Purchases of securities pursuant to a tender offer; and
7. Purchases or sales of securities effected upon the exercise of an option pursuant to the terms thereof or the exercise of any other right to acquire securities at a preestablished consideration unrelated to the Current Market.

C. Symbols for Market Identification for Quotation Information and Transaction Reports

The following symbols shall be used to denote the [Participant] marketplaces:

Code Participant

- A American Stock Exchange
- B Boston Stock Exchange
- C Cincinnati Stock Exchange
- M Chicago Stock Exchange
- [Q]D NASD
- Q *Nasdaq*
- P Pacific Exchange
- X Philadelphia Stock Exchange

D. Whenever a Participant determines that a level of trading activity or other unusual market conditions prevent it from collecting and transmitting Quotation Information or Transaction Reports to the Processor, or where a trading halt or suspension in an Eligible Security is in effect in its Market, the Participant shall promptly notify the Processor of such condition or event and shall resume collecting and transmitting Quotation Information and Transaction Reports to it as soon as the condition or event is terminated. In the event of a system malfunction resulting in the inability of a Participant or its members to transmit Quotation Information or Transaction Reports to the Processor, the Participant shall promptly notify the Processor of such event or condition. Upon receiving such notification, the Processor shall take appropriate action, including either closing the quotation or purging the system of the affected quotations.

#### IX. Market Access

A. Each Participant shall permit each Nasdaq market participant, acting in its capacity as such, direct telephone access to the specialist, trading post, and supervisory

center in each Eligible Security in which such Nasdaq market participant is registered as a market maker or electronic communications network/alternative trading system with Nasdaq. Such access shall include appropriate procedures or requirements by each Participant or employee to assure the timely response to communications received through telephonic access. No Participant shall permit the imposition of any access or execution fee, or any other fee or charge, with respect to transactions in Eligible Securities effected with Nasdaq market participants which are communicated to the floor by telephone pursuant to the provisions of this Plan. A Participant shall be free to charge for other types of access to its floor or facilities.

B. The NASD shall assure that each Participant, and its members shall have direct telephone access to the trading desk of each Nasdaq market participant in each Eligible Security in which the Participant displays quotations, and to the Nasdaq Supervisory Center. Such access shall include appropriate procedures or requirements to assure the timely response of each Nasdaq market participant to communications received through telephone access. Neither the NASD nor any Nasdaq market participant shall impose any access or execution fee, or any other fee or charge, with respect to transactions in Eligible Security effected with a member of a Participant which are communicated by telephone pursuant to the provisions of this Plan.

#### X. Regulatory Halts

A. Whenever, in the exercise of its regulatory functions, the Primary Market for an Eligible Security determines that a Regulatory Halt is appropriate, all other Participants shall also halt or suspend trading in that security until notification that the halt or suspension is no longer in effect. The Primary Market shall immediately notify the Processor of such Regulatory Halt as well as notice of the lifting of a Regulatory Halt. The Processor, in turn, shall disseminate to Participants notice of the Regulatory Halt (as well as notice of the lifting of a regulatory halt) through the UTP Quote Data Feed. This notice shall serve as official notice of a regulatory halt for purposes of the Plan only, and shall not substitute or otherwise supplant notice that a Participant may recognize or require under its own rules. Nothing in this provision shall be read so as to supplant or be inconsistent with a Participant's own rules on trade halts, which rules apply to the Participant's own members. The Processor will reject any quotation information and monitor for transaction reports received from any Participant on an Eligible Security that has a Regulatory Halt in effect.

B. Whenever the Primary Market determines that an adequate publication or dissemination of information has occurred or the regulatory problem has been addressed so as to permit the termination of the Regulatory Halt then in effect, the Primary Market shall promptly notify the Processor and each of the other Participants that conducts trading in such security. Except in extraordinary circumstances, adequate publication or

dissemination shall be presumed by the Primary Market to have occurred upon the expiration of one hour after initial publication in a national news dissemination service of the information that gave rise to the Regulatory Halt.

C. Except in the case of a Regulatory Halt, the Processor shall not cease the dissemination of quotation or transaction information regarding any Eligible Security. In particular, it shall not cease dissemination of such information because of a delayed opening, imbalance or orders or other market-related problems involving such security. During a regulatory halt, the Processor shall collect and disseminate Transaction Information but shall cease collection and dissemination of all Quotation Information.

D. For purposes of this Section X, "Primary Market" for an Eligible Security means Nasdaq; provided, however, that if for any 12-month period the number of reported transactions and the reported share volume in an Eligible Security in any other Participant's Market exceeds 50% of the aggregate reported transactions and reported share volume of all Participants in such security, then that Participant's Market shall be the Primary Market for such Eligible Security.

#### XI. Hours of Operation

A. Quotation Information may be entered by Participants as to all Eligible Securities in which they make a market between 9:30 a.m. and 4 p.m. Eastern Time ("ET") on all days the Processor is in operation. Transaction Reports shall be entered between 9:30 a.m. and 4:01:30 p.m. ET by Participants as to all Eligible Securities in which they execute transactions between 9:30 a.m. and 4 p.m. ET on all days the Processor is in operation.

B. Participants that execute transactions in Eligible Securities outside the hours of 9:30 a.m. ET and 4 p.m., ET, shall be reported as follows:

(i) Transactions in Eligible Securities executed between 8 a.m. and 9:29:59 a.m., ET and between 4:00:01 and 6:30 p.m. ET, shall be designated as ".T" trades to denote their execution outside normal market hours;

(ii) Transactions in Eligible Securities executed after 6:30 p.m. and before 12 a.m. (midnight) shall be reported to the Processor between the hours of 8 a.m. and 6:30 p.m. ET on the next business day (T+1), and shall be designated "as/of" trades to denote their execution on a prior day, and be accompanied by the time of execution;

(iii) Transactions in Eligible Securities executed between 12 a.m. (midnight) and 8 a.m. ET shall be transmitted to the Processor between 8 a.m. and 9:30 a.m. ET, on trade date, shall be designated as ".T" trades to denote their execution outside normal market hours, and shall be accompanied by the time of execution;

(iv) Transactions reported pursuant to this provision of the Plan shall be included in the calculation of total trade volume for purposes of determining net distributable operating revenue, but shall not be included in the calculation of the daily high, low, on last sale.

C. Late trades shall be reported in accordance with the rules of the Participant

in whose Market the transaction occurred and can be reported between the hours of 8 a.m. and 6:30 p.m.

D. The Processor shall collect, process and disseminate Quotation Information in Eligible Securities at other times between 8 a.m. and 9:30 a.m. ET, and after 4 p.m. ET, when any Participant or Nasdaq market participant is open for trading, until 6:30 p.m. ET (the "Additional Period"); provided, however, that the best bid and offer quotation will not be disseminated before 9:30 a.m. or after 6:30 p.m. ET. Participants that enter Quotation Information or Transaction Reports to the Processor during the Additional Period shall do so for all Eligible Securities in which they enter quotations.

#### *XII. Undertaking by All Participants*

The filing with and approval by the Commission of this Plan shall obligate each Participant to enforce compliance by its members with the provisions thereof. In all other respects not inconsistent herewith, the rules of each Participant shall apply to the actions of its members in effecting, reporting, honoring and settling transactions executed through its facilities, and the entry, maintenance and firmness of quotations to ensure that such occurs in a manner consistent with just and equitable principles of trade.

#### *XIII. Financial Matters*

##### *A. Development Costs*

Any Participant becoming a signatory to this Plan after June 26, 1990, shall, as a condition to becoming a Participant, pay to the other Plan Participants a proportionate share of the aggregate development costs previously paid by Plan Participants to the Processor, which aggregate development costs totaled \$439,530, with the result that each Participant's share of all development costs is the same.

Each Participant shall bear the cost of implementation of any technical enhancements to the Processor system made at its request and solely for its use, subject to reapportionment should any other Participant subsequently make use of the enhancement, or the development thereof.

##### *B. Cost Allocation and Revenue Sharing*

The provision governing cost allocation and revenue sharing among the Participants are set forth in Exhibit 1 to the Plan.

##### *C. Maintenance of Financial Records*

The Processor shall maintain records of revenues generated and development and operating expenditures incurred in connection with the Plan. In addition, the Processor shall provide the Participants with: (a) A statement of financial and operational condition on a quarterly basis; and (b) an audited statement of financial and operational condition on an annual basis.

#### *XIV. Indemnification*

Each Participant agrees, severally and not jointly, to indemnify and hold harmless each other Participant, Nasdaq, and each of its directors, officers, employees and agents (including the Operating Committee and its employees and agents) from and against any

and all loss, liability, claim, damage and expense whatsoever incurred or threatened against such persons as a result of any Transaction Reports, Quotation Information or other information reported to the Processor by such Participant and disseminated by the Processor to Vendors. This indemnity agreement shall be in addition to any liability that the indemnifying Participant may otherwise have.

Promptly after receipt by an indemnified Participant of notice of the commencement of any action, such indemnified Participant will, if a claim in respect thereof is to be made against an indemnifying Participant, notify the indemnifying Participant in writing of the commencement thereof; but the omission to so notify the indemnifying Participant will not relieve the indemnifying Participant from any liability which it may have to any indemnified Participant. In case any such action is brought against any indemnified Participant and it promptly notifies an indemnifying Participant of the commencement thereof, the indemnifying Participant will be entitled to participate in, and, to the extent that it may wish, jointly with any other indemnifying Participant similarly notified, to assume and control the defense thereof with counsel chosen by it. After notice from the indemnifying Participant of its election to assume the defense thereof, the indemnifying Participant will not be liable to such indemnified Participant for any legal or other expenses subsequently incurred by such indemnified Participant in connection with the defense thereof but the indemnified Participant may, at its own expense, participate in such defense by counsel chosen by it without, however, impairing the indemnifying Participant's control of the defense. The indemnifying Participant may negotiate a compromise or settlement of any such action, provided that such compromise or settlement does not require a contribution by the indemnified Participant.

#### *XV. Withdrawal*

Any Participant may withdraw from the Plan at any time on not less than 30 days prior written notice to each of the other Participants. Any Participant withdrawing from the Plan shall remain liable for, and shall pay upon demand, any fees for equipment or services being provided to such Participant pursuant to the contract executed by it or an agreement or schedule of fees covering such then in effect.

A withdrawing Participant shall also remain liable for its proportionate share, without any right of recovery, of administrative and operating expenses, including start-up costs and other sums for which it may be responsible pursuant to Section XIII hereof. Except as aforesaid, a withdrawing Participant shall have no further obligation under the Plan or to any of the other Participants with respect to the period following the effectiveness of its withdrawal.

#### *XVI. Modifications to Plan*

The Plan may be modified from time to time when authorized by the agreement of all

of the Participants, subject to the approval of the SEC.

#### *XVII. Applicability of Securities Exchange Act of 1934*

The rights and obligations of the Participants and of Vendors, News Services, Subscribers and other persons contracting with Participants in respect of the matters covered by the Plan shall at all times be subject to any applicable provisions of the Act, as amended, and any rules and regulations promulgated thereunder.

#### *XVIII. Operational Issues*

A. Each Exchange Participant shall be responsible for collecting and validating quotes and last sale reports within their own system prior to transmitting this data to the Processor.

B. Each Exchange Participant may utilize a dedicated Participant line into the Processor to transmit trade and quote information in Eligible Securities to the Processor. The Processor shall accept from Exchange Participants input for only those issues that are deemed Eligible Securities.

C. The Processor shall consolidate trade and quote information from each Participant and disseminate this information on the Nasdaq existing vendor lines.

D. The Processor shall perform gross validation processing for quotes and last sale messages in addition to the collection and dissemination functions, as follows:

##### *1. Basic Message Validation:*

(a) The Processor may validate format for each type of message, and reject non-conforming messages.

(b) Input must be for an Eligible Security.

2. Logging Function—The Processor shall return all Participant input messages that do not pass the validation checks (described above) to the inputting Participant, on the entering Participant line, with an appropriate reject notation. For all accepted Participant input messages (*i.e.*, those that pass the validation check), the information shall be retained for immediate processing in the Processor system.

#### *XIX. Headings*

The section and other headings contained in this Plan are for reference purposes only and shall not be deemed to be a part of this Plan or to affect the meaning or interpretation of any provisions of this Plan.

#### *XX. Counterparts*

This Plan may be executed by the Participants in any number of counterparts, no one of which need contain the signature of all Participants. As many such counterparts as shall together contain all such signatures shall constitute one and the same instrument.

#### *XXI. Depth of Book Display*

The Operating Committee has determined that the entity that succeeds Nasdaq as the Processor should have the ability to collect, consolidate, and disseminate quotations at multiple price levels beyond the best bid and best offer from any Participant that voluntarily chooses to submit such quotations while determining that no Participant shall be required to submit such

information. The Operating Committee has further determined that the costs of developing, collecting, processing, and disseminating such depth of book data shall be borne exclusively by those Participants that choose to submit this information to the Processor, by whatever allocations those Participants may choose among themselves. The Operating Committee has determined further that the primary purpose of the Processor is the collection, processing and dissemination of best bid, best offer and last sale information ("core data"), and as such, the Participants will adopt procedures to ensure that such functionality in no way hinders the collecting, processing and dissemination of this core data.

Therefore, implementing the depth of book display functionality will require a plan amendment that addresses all pertinent issues, including:

(1) Procedures for ensuring that the fully-loaded cost of the collection, processing, and dissemination of depth-of-book information will be tracked and invoiced directly to those Plan Participants that voluntarily choose to send that data, voluntarily, to the Processor allocating in whatever manner those Participants might agree; and

(2) Necessary safeguards the Processor will take to ensure that its processing of depth-of-book data will not impede or hamper, in any way, its core Processor functionality of collecting, consolidating, and disseminating National Best Bid and Offer data, exchange best bid and offer data, and consolidated last sale data.

Upon approval of a Plan amendment implementing depth of book display, this article of the Plan shall be automatically deleted.

In witness whereof, this Plan has been executed as of the \_\_\_\_ day of \* \* \*, 2002, by each of the Signatories hereto.

American Stock Exchange, Inc.

By: \_\_\_\_\_

Boston Stock Exchange, Inc.

By: \_\_\_\_\_

Cincinnati Stock Exchange, Inc.

By: \_\_\_\_\_

Pacific Exchange, Inc.

By: \_\_\_\_\_

Chicago Stock Exchange, Inc.

By: \_\_\_\_\_

National Association of Securities Dealers, Inc.

By: \_\_\_\_\_

Philadelphia Stock Exchange

By: \_\_\_\_\_

### Exhibit 1

1. Each Participant eligible to receive revenue under the Plan will receive an annual payment for each calendar year to be determined by multiplying (i) that Participant's percentage of total volume in Nasdaq securities reported to the Processor and disseminated to Vendors for that calendar year by (ii) the total distributable net operating income (as defined below) for that calendar year, provided, however, that for the implementation year (as defined in Paragraph 4 below), a Participant's payment shall be multiplied by the number of months

during the implementation year the interface was in operation divided by twelve. In the event that total distributable net operating income is negative, each Participant eligible to receive revenue under the Plan will receive an annual bill for each calendar year to be determined according to the same formula (described in this paragraph) for determining annual payments to eligible Participants.

2. A Participant's percentage of total volume in Nasdaq securities will be calculated by taking the average of (i) the Participant's percentage of total trades in Nasdaq securities reported to the Processor and disseminated to Vendors for the year and (ii) the Participant's percentage of total share volume in Nasdaq securities reported to the Processor and disseminated to Vendors for the year (trade/volume average). For any given year, a Participant's percentage of total trades shall be calculated by dividing the total number of trades that that Participant reports to the Processor as the selling party for that year by the total number of trades in Nasdaq securities reported to the Processor and disseminated to Vendors for the year. A Participant's total share volume shall be calculated by multiplying the total number of trades in Nasdaq securities in that year that that Participant reports to the Processor as the selling party multiplied by the number of shares for each such trade. Unless otherwise stated in this agreement, a year shall run from January 1 to December 31.

3. For purposes of this Exhibit 1, net distributable operating income for any particular calendar year shall be calculated by adding all revenues from [Level 1, Level 2 (non-market maker revenues only), Nasdaq Last Sale Information Service, and NQDS], the *UTP Quote Data Feed*, the *UTP Trade Data Feed*, the *OTC Montage Data Feed*, and *NQDS*, including revenues from the dissemination of information among Eligible Securities to foreign marketplaces (collectively, "the Data Feeds"), and subtracting from such revenues the costs incurred by the Processor, set forth below, in collecting, consolidating, validating, generating, and disseminating the Data Feeds. These costs include, but are not limited to, the following:

a. The Processor costs directly attributable to creating [NQDS] *OTC Montage Data Feed* and *NQDS*, including:

1. Cost of collecting Participant quotes into the Processor's quote engine;

2. Cost of processing quotes and creating [NQDS] *OTC Montage Data Feed* and *NQDS* messages within the Processor's quote engine;

3. Cost of the Processor's communication management subsystem that distributes [NQDS] *OTC Montage Data Feed* and *NQDS* to the market data vendor network for further distribution.

b. The costs directly attributable to creating the [Level 1] *UTP Quote Data Feed*, including:

1. Cost of calculating the national best bid and offer price within the Processor's quote engine;

2. Cost of creating the [Level 1] *UTP Quote Data Feed* message within the Processor's quote engine;

3. Cost of the Processor's communication management subsystem that distributes the

[Level 1] *UTP Quote Data Feed* to the market data vendors' networks for further distribution.

c. The costs directly attributable to creating the [Nasdaq Last Sale Information Service] *UTP Trade Data Feed*, including:

1. Cost of determining the appropriate last sale price and volume amount within the Processor's trade engine;

2. Cost of utilizing the Processor's trade engine to distribute the [Nasdaq Last Sale Information Service] *UTP Trade Data Feed* for distribution to the market data vendors.

d. The additional costs that are shared across all Data Feeds, including:

1. Telecommunication Operations costs of supporting the Participant lines into the Processor's facilities;

2. Telecommunications Operation costs of supporting the external market data vendor network;

3. Data Products account management and auditing function with the market data vendors;

4. Market Operations costs to support symbol maintenance, and other data integrity issues;

5. Overhead costs, including a management support of the Processor, Human Resources, Finance, Legal, and Administrative Services.

e. Processor costs excluded from the calculation of net distributable operating income include trade execution costs for transactions executed using a Nasdaq service and trade report collection costs reported through a Nasdaq service, as such services are market functions for which Participants electing to use such services pay market rate.

f. For the purposes of this provision, the following definitions shall apply:

1. "Quote engine" shall mean the Nasdaq's UNISYS system that is operated by Nasdaq to collect quotation information for Eligible Securities;

2. "Trade engine" shall mean the Nasdaq Tandem system that is operated by Nasdaq for the purpose of collecting last sale information in Eligible Securities.

4. At the time a Participant implements a computer-to-computer-interface or other Processor-approved electronic interface with the Processor, the Participant will become eligible to receive revenue for the year in which the interface is implemented (implementation year).

5. From the date a Participant is eligible to receive revenue (implementation date) until December 31 of the implementation year, Nasdaq shall pay the Participant a pro rata amount of its payment or bill the Participant for a pro rata amount of its losses for the implementation year (as calculated in Paragraph 1 above). This calculation and resultant payment (or bill) will be made (or due) within ninety (90) days after the twelfth month following the implementation date.

6. For the calendar year subsequent to the implementation year, and continuing thereafter, the calculation of the Participant's annual payment or loss will be performed and the payment made or bill delivered by March 31 of the following year. Estimated quarterly payments or billings shall be made to each eligible Participants within 45 days following the end of each calendar quarter in which the Participant is eligible to receive

revenue, provided that the total of such estimated payments or billings shall be reconciled at the end of each calendar year and, if necessary, adjusted by March 31st of the following year. Interest shall be included in quarterly payments and in adjusted payments made on March 31st of the following year. Such interest shall accrue monthly during the period in which revenue was earned and not yet paid and will be based on the 90-day Treasury bill rate in effect at the end of the quarter in which the payment is made. Interest shall not accrue during the period of up to 45 days between the end of each calendar quarter and the date on which an estimated quarterly payment or billing is made.

In conjunction with calculating estimated quarterly and reconciled annual payments under this Exhibit 1, the Processor shall submit to the Participants an itemized statement setting forth the basis upon which net operating income was calculated, including an itemized statement of the Processor costs set forth in Paragraph 3 of this Exhibit. Such Processor costs shall be reconciled annually based solely on the Processor's audited annual financial information. By majority vote of the Operating Committee, the Processor shall engage an independent auditor to audit the Processor's costs or other calculation(s), the cost of which audit shall be shared equally by all Participants. The Processor agrees to cooperate fully in providing the information necessary to complete such audit.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49130; File No. SR-CHX-2003-27]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Stock Exchange, Incorporated Relating to Execution of Limit Orders Following Exempted ITS Trade-Through

January 27, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on August 7, 2003, the Chicago Stock Exchange, Incorporated ("CHX" or "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. On January 20, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>3</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

The Exchange proposes to amend certain provisions of CHX Article XX, Rule 37, which governs, among other things, execution of limit orders, in listed securities, in a CHX specialist's book following a trade-through in the primary market. Specifically, the CHX seeks to render voluntary a CHX specialist's obligation to fill limit orders in the specialist's book when the primary market is trading at the limit price, if the issue traded constitutes an Exempt ETF (as defined below). The text of the proposed rule change is available at the Commission and at the CHX.

#### 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 CHX included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The CHX 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

On August 28, 2002, the Commission issued an order granting a *de minimis* exemption (the "Exemption") for transactions in certain exchange-traded funds (the "Exempt ETFs") from the trade-through provisions of the Intermarket Trading System ("ITS") Plan.<sup>4</sup> On May 30, 2003, the

Commission issued an order extending effectiveness of the Exemption, through March 4, 2004.<sup>5</sup> In its orders relating to the Exemption, the Commission clearly outlined its belief that the nature of the ETF market is so dynamic and rapidly-changing that the trade-through provisions of the ITS Plan are inadequate and unduly restrictive.<sup>6</sup>

Article XX, Rule 37(a)(3) of the CHX Rules, which governs execution of limit orders in a CHX specialist's book, provides for execution of such orders at the limit price, *i.e.*, it requires the CHX specialist to provide "limit order protection," when certain conditions occur in the primary market. Among other things, these provisions generally obligate a CHX specialist to fill limit orders in his book if the primary market is trading at or through the limit price.

Following issuance of its Exemption order, the Commission approved a rule change proposed by the CHX, removing the requirement that CHX specialists guarantee limit order protection in the case of an Exempt Trade-Through in the primary market.<sup>7</sup> CHX specialists are permitted to provide this protection on a voluntary basis.

The Exchange believes that it is appropriate to extend the effect of this rule change by removing the remaining limit order protection requirements for orders in any of the Exempt ETFs. Specifically, the CHX believes that in instances where the primary market in an Exempt ETF is trading at the limit price, the CHX specialist should not be required to execute resting limit orders in his book under CHX Article XX, Rule 37(a)(3)(a) and 37(a)(3)(c).

Accordingly, the proposed rule change would permit, but would not require, a CHX specialist to fill limit orders in his book when the primary market in an Exempt ETF is trading at the limit price.<sup>8</sup> The CHX asserts that rationale for this proposal is similar to that articulated by the Commission in the Exemption order—it is difficult, if

<sup>5</sup> See Securities Exchange Act Release No. 47950 (May 30, 2003), 68 FR 33748 (June 5, 2003).

<sup>6</sup> See *supra* note 3, 67 FR at 56607-56608.

<sup>7</sup> See Securities Exchange Act Release No. 46760 (November 1, 2002), 67 FR 68219 (November 8, 2002). The CHX rule language approved by the Commission is currently in effect until March 4, 2004, the expiration date of the Exemption order. See Securities Exchange Act Release No. 48202 (July 21, 2003), 68 FR 44370 (July 28, 2003).

<sup>8</sup> The CHX believes that the proposed rule change, which broadens the scope of Interpretation and Policy .10 to CHX Article XX, Rule 37, contemplates the proposal outlined above. To the extent that the CHX Board of Governors designates subject issues other than or in addition to the Exempt ETFs, the Exchange will file those changes with the Commission as an interpretation of an existing rule pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(1).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Amendment No. 1 replaces and supercedes the original filing in its entirety.

<sup>4</sup> See Securities Exchange Act Release No. 46428 (August 28, 2002), 67 FR 56607 (September 4, 2002). At present, the exemption extends to transactions in three designated Exempt ETFs—the Nasdaq-100 Index ("QQQ"), the Dow Jones Industrial Average ("DIAMONDS") and the Standard & Poor's 500 Index ("SPDRs")—when the transactions are "executed at a price that is no more than three cents lower than the highest bid displayed in CQS and no more than three cents higher than the lowest offer displayed in CQS" (each, an "Exempted Trade-Through"). The exemption was effective as of September 4, 2002. The Exchange notes that the Commission's exemption extended to the subject *transactions* rather than the three subject *issues*. For purposes of this submission, however, the Exchange will refer to such issues at the "Exempt ETFs."