

contend that an owner's interest in his or her contract value or in the Account would always be offered under the Contracts at a price determined on the basis of net asset value. Applicants assert that recaptures of bonus credits result in a redemption of Golden American's interest in an owner's contract value or in the Account at a price determined on the basis of the Account's current net asset value and not at an inflated price. Moreover, the amount recaptured will always equal the amount that Golden American paid from its general account for the credits. Similarly, although owners are entitled to retain any investment gains attributable to the bonus credits, the amount of such gains would always be computed at a price determined on the basis of net asset value.

11. Applicants contend that Rule 22c-1 should have no application to the bonus credit because neither of the harms that it was intended to address arise in connection with the proposed bonus credit provisions. Nonetheless, in order to avoid any uncertainty as to full compliance with the Act, Applicants seek an exemption from Rule 22c-1.

12. Applicants also submit that even if the proposed bonus credit provisions would conflict with sections 2(a)(32) or 27(i)(2)(A) of the Act or Rule 22c-1 thereunder, the Commission should grant the exemptions that they request because the bonus credit provisions are generally favorable and beneficial for owners. The recapture provisions of the Contracts temper this benefit somewhat, but owners, unless they (or, in certain circumstances, annuitants) die, retain the ability to avoid the recapture. Although there is a downside in declining markets to bonus credits if the owner (or annuitant) dies or if the owner exercises his or her cancellation right during the "free look" period or if the owner surrenders the Contract or withdraws Contract value where the surrender charge is waived due to a "waiver event", the bonus credit provisions (including their dynamic elements) are fully disclosed in the prospectuses for the Contracts. Applicants argue that the recapture provisions do not, on balance, diminish the overall value of the bonus credit provisions.

13. Applicants state that the Commission's authority under section 6(c) of the Act to grant exemptions from various provisions of the Act and rules thereunder is broad enough to permit orders of exemption thereunder that cover classes of unidentified persons. Applicants request an order of the Commission that would exempt them, Golden American's successors in

interest, Future Accounts and Future Underwriters from the provisions of sections 2(a)(32) and 27(i)(2)(A) of the Act and Rule 22c-1 thereunder.

Applicants submit that the exemption of these classes of persons is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act because all of the potential members of the class could obtain the foregoing exemptions for themselves on the same basis as the Applicants, but only at a cost to each of them that is not justified by any public policy purpose. As discussed, the requested exemptions would only extend to persons that in all material respects are the same as the Applicants. The Commission has previously granted exemptions to classes of similarly situated persons in various contexts and in a wide variety of circumstances, including class exemptions for recapturing bonus credits under variable annuity contracts.

14. Applicants represent that Future Contracts will be substantially similar in all material respects to the Contracts and that each factual statement and representation about the bonus credit provisions of the Contracts will be equally true of Future Contracts. Applicants also represent that each material representation made by them about the Account and DSI will be equally true of Future Accounts and Future Underwriters, to the extent that such representations relate to the issues discussed in the application. In particular, each Future Underwriter will be registered as a broker-dealer under the Securities Exchange Act of 1934 and be a NASD member.

Conclusion

Applicants represent that the requested exemptions are necessary and appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44099; File No. S7-24-89]

Joint Industry Plan; Solicitation of Comments and Order Approving Request To Extend Temporary Effectiveness of Reporting Plan for Nasdaq/National Market Securities Traded on an Exchange on an Unlisted or Listed Basis, Submitted by the National Association of Securities Dealer, Inc., the Pacific Exchange and the Boston, Chicago, Philadelphia, and Cincinnati Stock Exchanges

March 23, 2001.

I. Introduction

On March 19, 2001, the National Association of Securities Dealers, Inc. ("NASD"), on behalf of itself and the Boston Stock Exchange, Inc. ("BSE"), the Chicago Stock Exchange, Inc. ("CHX"), the Cincinnati Stock Exchange, Inc. ("CSE"), Pacific Exchange, Inc. ("PCX"), and the Philadelphia Stock Exchange, Inc. ("Phlx") (hereinafter referred to as the "Participants") submitted to the Securities and Exchange Commission ("Commission" or "SEC") a proposal to extend the operation of a joint transaction reporting plan ("Plan")¹ for Nasdaq/National Market ("Nasdaq/NM") securities traded on an exchange on an unlisted or listed basis.² The proposal would extend the effectiveness of the Plan through May 31, 2001. The Commission also is extending certain exemptive relief as described below. The March 2001 Extension Request does not seek permanent approval of the Plan

¹ See Letter from Jeffrey T. Brown, Vice President Regulation and General Counsel, CSE, to Jonathan G. Katz, Secretary, Commission, dated March 16, 2001 ("March 2001 Extension Request"). The March 2001 Extension Request also request that the Commission continue to provide exemptive relief, previously granted in connection with the Plan on a temporary basis, from Rules 11Ac1-2 and 11Aa3-1 under the Securities Exchange Act of 1934, as amended ("Act"). 15 U.S.C. 78a *et seq.* The signatories to the Plan are the Participants for purposes of this release; however, the BSE joined the Plan as a "limited participant" and reports quotation information and transaction reports only in Nasdaq/NM securities listed on the BSE. Originally, the American Stock Exchange Inc. ("Amex") was a Participant but withdrew its participation from the Plan in August 1994.

² 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 unlisted trading privileges ("UTP") under certain circumstances. For example, Section 12(f), 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. The present order fulfills this Section 12(f) requirement. For a more complete discussion of the Section 12(f) requirement, see November 1995 Extension Order, *infra* note 7.

because the Participants currently are negotiating certain amendments to the Plan for which they will seek approval in the future.³

II. Background

The Plan governs the collection, consolidation, and dissemination of quotation and transaction information for Nasdaq/NM securities listed on an exchange or traded on an exchange pursuant to a grant of UTP.⁴ The Commission originally approved the Plan on a pilot basis on June 26, 1990.⁵ 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.⁶

³In accordance with the Commission's statements in its order approving the establishment of the Nasdaq Order Display Facility and Order Collector Facility ("SuperMontage"), the Participants represent that they are revising the Plan. (See Securities Exchange Act Release No. 43863 (January 19, 2001) 66 FR 8020 (January 26, 2001).) Using a two-pronged approach, the Participants are negotiating certain amendments to be included in an interim plan, which will be effective until July 19, 2001. The Participants also are considering issues regarding a new permanent plan that could include a full viable alternative exclusive or non-exclusive securities information processor. Accordingly, at this time, the Participants only are requesting an extension of the current Plan until May 31, 2001. See *supra* note 1.

⁴See Section 12(f)(2) of the Act.

⁵See Securities Exchange Act Release No. 28146 (June 26, 1990), 55 FR 27917 (July 6, 1990) ("1990 Plan Approval Order").

⁶See Securities Exchange Act Release No. 34371 (July 13, 1994), 59 FR 37103 (July 20, 1994); Securities Exchange Act Release No. 35221 (January 11, 1995), 60 FR 3886 (January 19, 1995); Securities Exchange Act Release No. 36102 (August 14, 1995), 60 FR 43626 (August 22, 1995); Securities Exchange Act Release No. 36226 (September 13, 1995), 60 FR 49029 (September 21, 1995); Securities Exchange Act Release No. 36368 (October 13, 1995), 60 FR 54091 (October 19, 1995); Securities Exchange Act Release No. 36481 (November 13, 1995), 60 FR 58119 (November 24, 1995) ("November 1995 Extension Order"); Securities Exchange Act Release No. 36589 (December 13, 1995), 60 FR 65696 (December 20, 1995); Securities Exchange Act Release No. 36650 (December 28, 1995), 61 FR 358 (January 4, 1996); Securities Exchange Act Release No. 36934 (March 6, 1996), 61 FR 10408 (March 13, 1996); Securities Exchange Act Release No. 36985 (March 18, 1996), 61 FR 12122 (March 25, 1996); Securities Exchange Act Release No. 37689 (September 16, 1996), 61 FR 50058 (September 24, 1996); Securities Exchange Act Release No. 37772 (October 1, 1996), 61 FR 52980 (October 9, 1996); Securities Exchange Act Release No. 38457 (March 31, 1997), 62 FR 16880 (April 8, 1997); Securities Exchange Act Release No. 38794 (June 30, 1997) 62 FR 36586 (July 8, 1997); Securities Exchange Act Release No. 39505 (December 31, 1997) 63 FR 1515 (January 9, 1998); Securities Exchange Act Release No. 40151 (July 1, 1998) 63 FR 36979 (July 8, 1998); Securities Exchange Act Release No. 40896 (December 31, 1998), 64 FR 1834 (January 12, 1999); Securities Exchange Act Release No. 41392 (May 12, 1999), 64 FR 27839 (May 21, 1999); Securities Exchange Act Release No. 42268 (December 23, 1999), 65 FR 1202 (January 6, 2000); and Securities Exchange Act Release No. 43005 (June 30, 2000), 65 FR 42411 (July 10, 2000).

III. Description of the Plan

The Plan provides for the collection from Plan Participants, and the consolidation and dissemination to vendors, subscribers and others, of quotation and transaction information in "eligible securities."⁷ The Plan contains various provisions concerning its operation, including: 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.⁸

IV. Exemptive Relief

In conjunction with the Plan, on a temporary basis, the Commission granted an exemption to vendors from Rule 11Ac1-2 under the Act regarding the calculation of the BBO⁹ and granted the BSE an exemption from the provision of Rule 11Aa3-1 under the Act that requires transaction reporting plans to include market identifiers for transaction reports and last sale data. In

⁷The Plan defines "eligible security" as any Nasdaq/NM security as to which unlisted trading privileges have been granted to a national securities exchange pursuant to section 12(f) of the Act or that is listed on a national securities exchange. On May 12, 1999, in response to a request from the CHX, the Commission expanded the number of eligible Nasdaq/NM securities that may be traded by the CHX pursuant to the Plan from 500 to 1000. See May 1999 Approval Order, *supra* note 7. On November 17, 2000, the Commission noticed and requested comment on a proposal by the PCX to expand the maximum number of securities eligible to trade to include all Nasdaq/NM securities. See Securities Exchange Act Release No. 43545 (November 9, 2000), 65 FR 69581 (November 17, 2000).

⁸The full text of the Plan, as well as a "Concept Paper" describing the requirements of the Plan, are contained in the original filing, which is available for inspection and copying in the Commission's public reference room.

⁹Rule 11Ac1-2 under the Act requires that the best bid or best offer be computed on a price/size/time algorithm in certain circumstances. Specifically, Rule 11Ac1-2 under the Act provides that "in the event two or more reporting market centers make available identical bids or offers for a reported security, the best bid or offer * * * shall be computed by ranking all such identical bids or offers * * * first by size * * * then by time." The exemption permits vendors to display the BBO for Nasdaq securities subject to the Plan on a price/time/size basis.

the March 2001 Extension Request, the Participants ask that the Commission grant an extension of the exemptive relief described above to vendors until the BBO calculation issue is fully resolved. In addition, in the March 2001 Extension Request, the Participants request that the Commission grant an extension of the exemptive relief described above to the BSE until May 31, 2001.

V. Solicitation of Comment

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether it is consistent with the Act. The Commission continues to solicit comment regarding the BBO calculation, the trade through rule and any issues presented by changes occurring in the market place. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the 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 at the Commission's Public Reference Room. All submissions should refer to File No. S7-24-89 and should be submitted by April 20, 2001.

VI. Discussion

The Commission finds that an extension of temporary approval of the operation of the Plan, as amended, through May 31, 2001, is appropriate and in furtherance of Section 11A of the Act.¹⁰ The Commission has previously stated that a revised Plan must be filed with the Commission by July 19, 2001, or the Commission will amend the Plan directly.¹¹ The Participants represent in their proposal that they are negotiating certain amendments to be included in an interim plan, which would be effective from the date of Commission approval, and no later than the expiration of this extension on May 31, 2001, until July 19, 2001. The Participants also represent that they are considering a permanent plan (that would include a fully viable alternative exclusive or non-exclusive securities

¹⁰In approving this extension, the Commission has considered the extension's impact on efficiency, competition, and capital formation. 15 U.S.C. 78(c)(f).

¹¹See *supra* note 4.

information processor) to be filed with the Commission on July 19, 2001. In light of the current negotiations regarding the existing Plan and the representations of the Participants in their request to the Commission, the Commission approves the requested extension of the Plan until May 31, 2001.

The Commission notes that the revised Plan, which must be filed with the Commission by July 19, 2001, must provide for either (1) a fully viable alternative exclusive securities information processor ("SIP") for all Nasdaq securities, or (2) a fully viable alternative nonexclusive SIP in the event that the Plan does not provide for an exclusive SIP. If the revised Plan provides for an exclusive consolidating SIP, a function currently performed by Nasdaq, the Commission believes that, to avoid conflicts of interest, there should be a presumption that a Plan participant, and in particular Nasdaq, should not operate such exclusive consolidating SIP. The presumption may be overcome if: (1) the Plan processor is chosen on the basis of bona fide competitive bidding and the participant submits the successful bid; and (2) any decision to award a contract to a Plan Participant, and any ensuing review or renewal of such contract, is made without that Plan Participant's direct or indirect voting participation. If a Plan Participant is chosen to operate such exclusive SIP, the Commission believes there should be a further presumption that the Participant-operated exclusive SIP should operate completely separate from any order matching facility operated by that Participant and that any order matching facility operated by the Participant must interact with the plan-operated SIP on the same terms and conditions as any other market center trading Nasdaq listed securities. Further, the Commission will expect the NASD to provide direct or indirect access to the alternative SIP, whether exclusive or non-exclusive, by any of its members that qualifies, and to disseminate transaction information and individually identified quotation information for these members through the SIP.

In addition, the revised Plan should resolve the issues, which have been pending since the implementation of the Plan, of whether there is a need for an intermarket linkage for order routing and execution, whether there is a need for a trade-through rule to facilitate the trading of OTC securities pursuant to UTP, and how the BBO calculation should be determined for securities traded pursuant to the Plan.

Furthermore, the revised Plan should be open to all SROs, and the Plan should share governance of all matters subject to the Plan equitably among the SRO Participants. The Plan also should provide for sharing of market data revenues among SRO Participants. Finally, the Plan should provide a role for participation in decision making to non-SROs that have direct or indirect access to the alternative SIP provided by the NASD. The Commission expects the parties to continue to negotiate in good faith on the above matters¹² as well as any other issues that arise during Plan negotiations.

The Commission also finds that it is appropriate to extend the exemptive relief from Rule 11Ac1-2 under the Act until the earlier of May 31, 2001, or until such time as the calculation methodology of the BBO is based on a mutual agreement among the Participants approved by the Commission. The Commission further finds that it is appropriate to extend the exemptive relief from Rule 11Aa3-1 under the Act to the BSE through May 31, 2001. The Commission believes that the temporary extensions of the exemptive relief provided to vendors and the BSE, respectively, are consistent with the Act, the Rules thereunder, and specifically with the objectives set forth in sections 12(f) and 11A of the Act and in Rules 11Aa3-1 and 11Aa3-2 thereunder.

VII. Conclusion

It is Therefore Ordered, pursuant to sections 12(f) and 11A of the Act and paragraph (c)(2) of Rule 11Aa3-2 thereunder, that the Participants' request to extend the effectiveness of the Joint Transaction Reporting Plan, as amended, for Nasdaq/National Market securities traded on an exchange on an unlisted or listed basis through May 31, 2001, and certain exemptive relief through May 31, 2001, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹³

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44095; File No. SR-CBOE-01-09]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Chicago Board Options Exchange, Incorporated Relating to Exchange Marketing Fees

March 23, 2001.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on February 28, 2001, the Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. 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 CBOE proposes to make a change to its Marketing Fee, under its Fee Schedule, to exempt call/put "combo" transactions from the Marketing Fee. The text of the proposed rule change is available at the Office of the Secretary, CBOE and at the Commission.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

Last year, the Exchange imposed a \$0.40 per contract marketing fee to collect funds to be used by the appropriate Designated Primary Market

¹² See also discussion in the SuperMontage order, *supra* note 4.

¹³ 17 CFR 200.30-3(a)(29).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.