

assists in the prevention of fraudulent and manipulative acts and practices by providing investors with information necessary to make an informed decision when purchasing securities. Moreover, by requiring the associated persons to identify the firm for which he or she works and the telephone number or address at which the caller may be contacted, the Rule encourages responsible use of the telephone to market securities.

The Commission further believes that the addition of paragraph (c), which creates exemptions from the time-of-day disclosure requirements for telephone calls by associated persons, or other associated persons acting at the direction of such persons, to certain categories of "existing customer" is appropriate. The Commission believes it is appropriate to create an exemption for calls to customers with whom there are existing relationships in order to accommodate personal and timely contact with a broker who can be presumed to know when it is convenient for a customer to respond to telephone calls. Moreover, such an exemption also may be necessary to accommodate trading with customers in multiple time zones across the United States. The Commission, however, believes that the exemption from the time-of-day and disclosure requirements should be limited to calls to persons with whom the broker has a minimally active relationship. In this regard, the Commission believes that paragraph (c) achieves an appropriate balance between providing protection for the public and the members' interests in competing for customers.

Moreover, the Commission believes that the addition of paragraph (e) to Rule 9.24, requiring that a member or associated person obtain from a customer, and maintain for three years, express written authorization when submitting for payment a check, draft, or other form of negotiable paper drawn on a customer's checking, savings, share or similar account, is appropriate. The Commission notes that requiring a member or associated person to obtain express written authorization from a customer in the above-mentioned circumstances assists in the prevention of fraudulent and manipulative acts in that it reduces the opportunity for a member, or associated person to misappropriate customers' funds. In addition, the Commission believes that by requiring a member or associated person to retain the authorization for three years, subparagraph (e) protects investors and the public interest in that it provides interested parties with the ability to acquire information necessary

to ensure that valid authorization was obtained for the transfer of a customer's funds for the purchase of a security.

The Commission believes that the amendment to paragraph (e) of Rule 9.21, adding telemarketing scripts to the definition of sales literature thereby requiring the retention of telemarketing scripts for a period of three years is appropriate. By requiring the retention of telemarketing scripts for three years, the Rule assists in the prevention of fraudulent and manipulative acts and practices and provides for the protection of the public in that interested parties will have the ability to acquire copies of the scripts used to solicit the purchase of securities to ensure that members and associated persons are not engaged in unacceptable telemarketing practices. Finally, the Commission believes that the proposed rule achieves a reasonable balance between the Commission's interest in preventing members from engaging in deceptive and abusive telemarketing acts and the members' interests in conducting legitimate telemarketing practices.

The Commission finds good cause for approving the proposed rule change, prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. The proposal is identical to the NASD and MSRB rules, which were published for comment and, subsequently, approved by the Commission. The approval of the CBOE's rules provides a consistent standard across the industry. In that regard, the Commission believes that granting accelerated approval to the proposed rule change is appropriate and consistent with Section 6 of the Act.¹²

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹³ that the proposed rule change (SR-CBOE-97-39) is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97-23954 Filed 9-9-97; 8:45 am]

BILLING CODE 8010-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-39009; File No. SR-NYSE-96-16]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Granting Approval to Proposed Rule Change Relating to Amendments to Percentage Order Rules 13 and 123A.30

September 3, 1997.

I. Introduction

On June 28, 1996, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") submitted to the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend its rules relating to percentage orders.

The proposed rule change was published for comment in Securities Exchange Act Release No. 37495 (July 30, 1996), 61 FR 40699 (August 5, 1996). No comments were received on the proposal. This order approves the proposed rule change.

II. Description

NYSE Rule 13 defines a percentage order as "a limited price order to buy (or sell) fifty percent of the volume of a specified stock after its entry." A percentage order is essentially a memorandum entry left with a specialist, specifying the total number of shares to be bought or sold and the limit price, which becomes a "live" order capable of execution in one of two ways: (i) all or part of the order can be "elected" as a limit order on the specialist's book based on trades in the market; or (ii) all or part of the order can be "converted" into a limit order to make a bid or offer or to participate directly in a trade.

A. The Election Process

1. Current Practice

Under the election process, as trades occur at the percentage order's limit price or better, an equal number of shares of the percentage order are "elected" and become a limit order on the specialist's book. This limit order takes its place behind other limit orders on the specialist's book at the same price. The percentage order then is reduced by the number of elected shares until the entire order has been satisfied.

¹² 15 U.S.C. 78f.

¹³ 15 U.S.C. 78s(b)(2).

¹⁴ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Currently, there are three types of percentage orders: last sale percentage orders, straight limit percentage orders,³ and buy minus-sell plus percentage orders.⁴ The Exchange has indicated that most percentage orders are entered as last sale percentage orders, meaning that they are elected to the book at the price of the electing sale and may be executed at such price, or at a better price.⁵ These orders may not, however, be executed at an inferior price to the electing sale even if that inferior price is still within the limit price on the order.

For example, assume that the specialist receives a last sale percentage order to purchase 5,000 shares with a limit price of 30. If a trade of 500 shares takes place at 29½, 500 shares of the percentage order would be placed on the specialist's book as a limit order at 29½. This order could be executed at a price of 29½ or lower, but could not be executed at a higher price, even though the limit price on the percentage order was 30.

2. Proposed Amendment to the Election Process

The Exchange is proposing to amend the definition of last sale percentage order in Rule 13 to provide that if the order is marked with the instruction "last sale-cumulative volume," such orders may be re-entered on the specialist's book after their initial election at the price of subsequent transactions, as long as the price is within the limit price on the percentage order. Thus, in the example noted above, if there was a subsequent trade of 500 shares at 29⅝, 500 shares of a percentage order marked last sale-cumulative volume would be elected on to the specialist's book at 29⅝, and the 500 shares previously entered on to the book at 29½ would be cancelled and reentered at 29⅝, for a total of 1,000 shares of the percentage order on the book at 29⅝.⁶ If the order were simply

marked "last sale," it would be handled as today under the current rule.

B. The Conversion Process

1. Current Practice

The second way that a percentage order can be activated into a limit order is through the conversion process. Most percentage orders contain the additional instruction "CAP-D." "CAP" is an acronym meaning "convert and parity," which instructs the specialist that he or she may convert all or a portion of the order into a limit order, and allows the specialist to be on parity with the converted percentage order, either to participate directly in a trade or to make a bid or offer ("bettering the market"). The "D" notation instructs the specialist that the order may be converted to participate in destabilizing transactions as well as stabilizing transactions.

The Exchange has stated that, as a practical matter, it views CAP-D orders as a necessary adjunct to the standard election procedures because they allow the specialist greater flexibility to match the order with other buying and selling interest in the market. CAP-D orders are subject to a number of restrictions intended to minimize the specialist's discretion in handling such orders.⁷

One such restriction codified in Rule 123A.30 provides that a percentage order may be converted into a limit order to make a bid (offer), but if a higher bid (lower offer) is subsequently made, the converted percentage order bid (offer) is treated as cancelled, and reverts to a memorandum entry with the specialist, which is subject to further conversion. This means that the bid or offer loses whatever priority it has with respect to other limit orders on the specialist's book.

For example, assume that the market is quoted 20–20¼, 10,000 shares bid and offered, with the bid at 20 representing 10,000 shares of a converted percentage order. Under the current rule, if the specialist then receives an order to buy 5,000 shares at 20, and an order to buy 200 shares at 20⅛, when the specialist changes the quotation to 20⅛–20¼, 200 shares bid and 10,000 offered, the converted percentage order bid of 20 for 10,000 is cancelled, and the 5,000 share order now has priority on the specialist's book at 20. If a transaction took place at 20⅛,

and the quotation reverted to 20–20¼, the percentage order, although it can be re-converted to add to a bid at 20, would have lost its priority on the book.

2. Proposed Amendments to the Conversion Process

The Exchange is proposing to amend Rule 123A.30 to allow the converted percentage order to retain its priority on the book when a higher bid (lower offer) is made. However, if a transaction is effected at that higher bid (lower offer), and a bid or offer is made that is higher (lower) than the price of such transaction, the converted percentage order would be cancelled, subject to re-conversion. The order would not be cancelled, however, regardless of subsequent trades in the market, if it was converted at its maximum limit price.

In addition, the Exchange is proposing to amend Rule 123A.30 to include a provision that a specialist must document the status of a converted percentage order on the specialist's book as a limit order at the price it was converted.

III. Discussion

The Commission has considered carefully whether the NYSE's proposal is consistent with the Act. Specifically, the Commission has considered whether the proposal is consistent with the requirements set forth in Sections 6(b) and 11(b) of the Act.⁸ In reviewing previous proposals involving percentage orders, the Commission has been concerned whether such orders provide the specialist with "discretion" in violation of Section 11(b) of the Act. Section 11(b) was designed, in part, to address potential conflicts of interest that may arise as a result of a specialist's dual role as agent and principal in executing stock transactions. In particular, Congress intended to prevent specialists from unduly influencing market trends through their knowledge of market interest from the specialist book and their handling of discretionary agency orders.⁹ The Commission has interpreted this section to mean that all orders other than market or limit orders are discretionary and therefore cannot be accepted by a specialist.¹⁰

The Commission previously has determined that it is appropriate to treat

³ A straight limit percentage order carries a limit price equal to the percentage order limit price.

⁴ A buy minus-sell plus percentage order operates in the same fashion as a straight limit percentage order, except that it places the additional requirement that elected portions of buy (sell) percentage orders be elected at a price on minus or zero-minus ticks (plus or zero plus ticks) from the previous sale.

⁵ The various types of percentage orders differ only in terms of execution, and not the process by which they are elected. See *supra* notes 3 and 4.

⁶ In the event that a portion of a percentage order is elected at the same price as a previously elected, but still unexecuted, portion of the same percentage order, the previously-elected portion will neither be cancelled nor lose its priority on the limit order book. In such situations, however, the subsequently-elected portion will not gain priority over previously-entered orders on the book at that

price. Telephone conversation between Donald Siemer, Director of Market Surveillance, NYSE, Mel Hanton, Senior Counsel, NYSE, and Jon Kroeper, Attorney, SEC, on August 30, 1996.

⁷ See NYSE Rule 123A.30; Securities Exchange Act Release No. 24505 (May 22, 1987), 52 FR 20484 (June 1, 1987) (order approving amendment to Rule 123A.30 permitting conversion of percentage orders on destabilizing ticks under certain restrictions).

⁸ 15 U.S.C. 78f(b) and 78k(b).

⁹ See H. Rep. No. 1383, 73d Cong., 2d Sess. 22; S. Rep. 792, 73d Cong., 2d Sess. 18 (1934).

¹⁰ See e.g., SEC, Special Study of the Securities Markets, H.R. Doc. No. 95, 88th Cong., 1st Sess., Part 2, 72 (1963) ("Special Study") (nothing that "Section 11(b)* * * prohibits, without exception, a specialist's effecting any transaction except upon a market or limit order").

percentage orders as equivalent to limit orders.¹¹ With regard to the conversion process in particular, while acknowledging that it permits specialists to employ their judgment to a certain extent, the Commission believed that the requirements imposed on the specialist when converting a percentage order for execution or quotation purposes provided sufficiently stringent guidelines to ensure that the specialist only will implement the conversion provisions in a manner consistent with his or her market making duties and Section 11(b).

Furthermore, the Commission previously has determined that the NYSE's percentage order rules are consistent with the standards set forth under Section 6(b)(5) of the Act. This section requires that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices. The Commission determined that the NYSE's percentage order rules contain various limiting and protective provisions, to ensure that such rules will not increase the possibility of specialist abuse of the market.

As discussed in greater detail below, the Commission finds that the proposed rule change, in adding a last sale-cumulative volume instruction to the election process and making a minor modification to the conversion process, does not adversely impact the protective scheme that has been incorporated into the percentage order rules. Accordingly, the Commission finds that the proposed rule change is consistent with Sections 6(b)(5) and 11(b) of the Act in that it neither increases specialists' ability to engage in fraudulent and manipulative practices nor allots discretion to specialists in their handling of percentage orders.

A. Adoption of the Last Sale-Cumulative Volume Instruction

Currently, portions of last sale percentage orders only may be elected to the specialist's book as limit orders at the price of the electing transaction. If the market subsequently moves away from this place, such orders will remain on the book without receiving an execution.¹² To address this situation, the Exchange has proposed to add a last sale-cumulative volume percentage order instruction option to the definition of last sale percentage order in NYSE Rule 13. If a percentage order

entered with the specialist is marked "last sale-cumulative volume," a previously-elected portion of a percentage order will be cancelled and re-entered at the price of subsequent transactions that are within the limit price of the percentage order.

The Commission believes that the adoption of the last sale-cumulative volume instruction is appropriate in that it comports with the underlying rationale for the percentage order rule; namely, to allow larger-sized orders to trade along with the trend of the market without requiring a floor broker to remain in the trading crowd to work the order. By cancelling and re-entering previously-elected portions of a last sale percentage order at the current market price, the proposed instruction will increase the likelihood that such orders will be executed in accordance with the trend of the market, instead of remaining on the specialist's book at an elected price from which the market has moved away. In the same regard, the Commission notes that the proposed instruction should facilitate the use of last sale percentage orders by floor brokers, as a floor broker will no longer have to take the active step of cancelling such orders from the specialist's book when the market moves away from the price of the electing transaction.¹³ Further, the Commission believes that the proposed instruction is appropriate in that it should have the beneficial effect of increasing the possibility of interaction between last sale percentage orders and contrasided market interest.

In addition, the Commission finds that the proposed instruction is consistent with the Act in that it does not provide discretion to specialists in the handling of last sale percentage orders or increase the ability of specialists to engage in fraudulent or manipulative activity on the Exchange. In this regard, the process whereby last sale-cumulative volume percentage orders are elected and may be cancelled from the book and re-entered at the price of subsequent transactions is a purely mechanical one, determined solely by the application of the proposed instruction to the price of subsequent trades on the Exchange. The specialist is not provided with any discretion over the process of cancelling or re-entering elected orders.

Finally, the Commission believes that the proposed instruction adequately addresses the issue of the priority of pre-existing orders on the specialist's

book to subsequently-elected portions of percentage orders. For example, assume that the market is quoted at 20-20½, 1000 shares bid and offered, the bid composed of (in order of priority) a 500 share customer order and 500 shares of an elected portion of a last sale-cumulative volume percentage order for 5000 shares with a limit price of 20½. The specialist then receives a customer limit order to buy 1000 shares at 20 and changes his or her quote to 20-20¼, 2000 shares bid and 1000 offered. If a market order to sell 500 shares then enters the market and is executed against the customer order to buy 500 shares at 20, an additional 500 shares of the percentage order will be elected to the specialist's book. However, this subsequently-elected portion of the percentage order will not be combined with the previously-elected portion (as would be the case if the transaction had occurred at a higher price than 20) and thereby gain priority over the customer limit order for 1000 shares at 20. Instead, the subsequently-elected portion will be placed at the bottom of the book, behind both the previously-elected portion and the customer order for 1000 shares in priority. As a result, pre-existing customer interest will maintain its priority over subsequently-elected percentage orders at the same price.

B. Amendments to the Conversion Process

Presently, a percentage order to buy (sell) that has been converted for purposes of bettering the existing quote must be cancelled and revert to a percentage order if a higher bid (lower offer) subsequently is made. As the Exchange has noted, while the converted percentage order would be subject to re-conversion at the same price, it would lose its priority on the specialist's book to other orders at that price. The proposed rule change would address this situation by requiring that such converted percentage orders remain in the specialist's book at their converted price unless a higher bid (lower offer) is made, a transaction is effected at that price, and a bid (offer) is made at a price higher (lower) than the price of the transaction. In such an instance, the converted percentage order would be cancelled, subject to reconversion.

The Commission believes that the proposed change to the conversion process is appropriate in that it adequately balances the interest of permitting converted percentage orders to retain their priority on the specialist's book over subsequently-arriving orders at the same price with that of removing

¹¹ See Securities Exchange Act Release No. 24505 (May 22, 1987), 52 FR 20484 (June 1, 1987) (File No. SR-NYSE-85-1).

¹² The Commission notes that the floor broker who entered the percentage order may instruct the specialist to cancel the elected order from the book at any time.

¹³ The Commission notes, however, that a floor broker maintains his or her best execution obligations with regard to any percentage order that he or she may leave with a specialist.

such converted percentage orders from the book when conditions strongly indicate that the market has moved away from the conversion price.¹⁴ Moreover, the Commission finds that the proposal may have the additional beneficial effect of increasing the transparency of the market. Specifically, the proposal will allow percentage orders to buy (sell) to remain on the book in the event of the entry of what may be a short-lived higher bid (lower offer) instead of reverting directly to a memorandum entry that the specialist may or may not decide to re-convert for quotation purposes.

Moreover, in approving the adoption of the CAP-D instruction, the Commission stated that it "views as important the cancellation provision of the proposed bettering the market rule."¹⁵ The significance of such a provision is to provide a cancellation mechanism that does not grant any discretion to the specialist when superior-priced same-sided interest enters the market. Accordingly, the Commission believes that the proposed procedure is an appropriate replacement for the existing cancellation provision in that it serves this same purpose.

Finally, the Exchange proposes to add to Rule 123A.30 a provision that a specialist must document the status of a converted percentage order on his or her book as a limit order at the price it was converted. The Commission finds that this provision is appropriate in that it provides specialists with a clearer statement of their existing responsibility to book converted percentage orders.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁶ that the proposed rule change (SR-NYSE-96-16) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁷

Margaret H. McFarland,

Secretary.

[FR Doc. 97-23955 Filed 9-9-97; 8:45 am]

BILLING CODE 8010-01-M

¹⁴ At the same time, it should be noted that the Commission has previously stated that a specialist can utilize the conversion process to enable the percentage order and the specialist trading for his or her own account to receive an execution while bypassing pre-existing trading crowd and limit order book interest. See SEC, Report on the Practice of Preferencing (April 11, 1997) at Part II.B.6.

¹⁵ See Securities Exchange Act Release No. 24505, *supra* note 11.

¹⁶ 15 U.S.C. 78s(b)(2).

¹⁷ 17 CFR 200.30-3(a)(12).

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Reports, Forms and Recordkeeping Requirements Agency Information Collection Activity Under OMB Review

AGENCY: Office of the Secretary, DOT.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICRs describes the nature of the information collection and their expected burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on March 17, 1997 [62 FR 12577-12678].

DATES: Comments must be submitted on or before October 10, 1997.

FOR FURTHER INFORMATION CONTACT: Judith Street, ABC-100; Federal Aviation Administration; 800 Independence Avenue SW., Washington, DC 20591, telephone number (202) 267-9895.

SUPPLEMENTARY INFORMATION:

Federal Aviation Administration (FAA)

Title: Pilot Records Improvement Act of 1996.

OMB Control Number: 2120-0607.

Type of Request: Extension of a currently approved collection.

Affected Public: Air Carriers gathering data on perspective pilots and the airmen/pilots applying for positions with the air carriers.

Abstract: Section 502 of the Pilot Records Improvement Act of 1996, Public Law 104-264, requires that an air carrier (as defined in 49 U.S.C. 40102(a)(2)), before hiring an individual as a pilot, request and receive FAA Records, Air Carrier and other records, and National Driver Register Records concerning that individual. The Administrator was directed to promulgate standard forms for use by air carriers in requesting those Pilot Records. Upon receipt of any requested records, an air carrier may use such records only to assess the qualifications of the individual in deciding whether or not to hire the individual as a pilot. A (Section 502(f)(11) of the Pilot Records Improvement Act of 1996, Pub. L. 104-264.)

Need: An air carrier may use the FAA forms (numbers TBD) to request the

records of all applicants for the position of pilot. The information collected on the forms will be used to facilitate search and retrieval of the requested records. Air carriers then may use the records to assess the qualifications of the individual in deciding whether or not to hire the individual as a pilot.

Estimated Annual Burden Hours: 5,899 hours.

Addressee: Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725-17th Street, NW., Washington, DC 20503, Attention DOT Desk Officer.

Comments are Invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued in Washington, DC on September 4, 1997.

Vanester M. Williams,

Clearance Officer, United States Department of Transportation.

[FR Doc. 97-23945 Filed 9-9-97; 8:45 am]

BILLING CODE 4910-62-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petitions for Waivers of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) received requests for waivers of compliance with certain requirements of its safety standards. The individual petitions are described below, including the parties seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

Long Island Rail Road (Waiver Petition Docket Number LI-97-2)

The Long Island Rail Road (LIRR) seeks a waiver of compliance from certain provisions of the Railroad Locomotive Safety Standards, 49 CFR 229.29, for its M-1 and M-3 type MU locomotives. Specifically, LIRR wants to extend the required time intervals for cleaning, repairing, and testing of MU