

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44822; File No. S7-24-89]

### Joint Industry Plan; Notice of Filing of Amendment No. 12 to the Reporting Plan for Nasdaq/National Market Securities Traded on an Exchange on an Unlisted or Listed Basis, Submitted by the National Association of Securities Dealers, Inc., the Pacific Exchange, Inc. and the Boston, Chicago, Philadelphia, and Cincinnati Stock Exchanges

September 20, 2001.

#### 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"), notice is hereby given that on August 29, 2001, the Cincinnati Stock Exchange Inc. ("CSE") on behalf of itself and the National Association of Securities Dealers, Inc. ("NASD"), 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"),<sup>3</sup> as members of the operating committee ("Operating Committee" or "Committee")<sup>4</sup> of the Nasdaq/UTP Plan submitted to the Securities and Exchange Commission ("SEC" or "Commission") a proposal to amend the Plan. The proposal represents the 12th amendment ("12th Amendment") made to the Plan and reflects several changes unanimously adopted by the Committee. On September 18, 2001, the Committee submitted an amendment to the proposed 12th Amendment.<sup>5</sup> The Commission is publishing this notice to solicit comments from interested persons on the 12th Amendment.

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

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

<sup>3</sup> The CSE was elected chair of the Operating Committee for the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation, and Dissemination of Quotation and Transaction Information for Exchange-Listed Nasdaq/National Market System Securities and for Nasdaq/National Market System Securities Traded on Exchanges on an Unlisted Trading Privileges Basis ("Nasdaq UTP Plan" or "Plan") by the Participants.

<sup>4</sup> Among other things, the 12th Amendment shall add the American Stock Exchange LLC ("Amex") as a Participant and shall remove the Chicago Board Options Exchange ("CBOE") from the Plan. The Committee is made up of all the Participants.

<sup>5</sup> See letter from Jeffrey T. Brown, Committee Chairman, CSE, to Jonathan G. Katz, Secretary, SEC, dated August 29, 2001. In the amendment, the Committee clarified a portion of the description of the 12th Amendment but did not change any of the proposed Plan text.

#### II. Background

The Plan governs the collection, consolidation, and dissemination of quotation and transaction information for Nasdaq/National Market ("Nasdaq/NM") securities listed on an exchange 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 in "eligible securities."<sup>7</sup> 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.

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>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>7</sup> Currently, the Plan defines "Eligible Securities" as any Nasdaq/NM security as to which UTP 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. The Participants propose to amend the definition of "eligible security" in this amendment to include Nasdaq SmallCap securities.

<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

#### III. Description and Purpose of the Amendment

The complete text of the Plan, as amended, is attached as Exhibit A. The following is a summary of the proposed changes to the Plan prepared by the Participants.

##### A. Rule 11Aa3-2<sup>10</sup>

1. The Participants propose to change the Plan name to 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."

2. Section I.A. of the Plan provides that a national securities exchange in whose market Eligible Securities<sup>11</sup> become traded, may become a Participant,<sup>12</sup> provided that said organization executes a copy of the Plan and pays its share of development costs as specified in Section XIV of the Plan. Accordingly, the BSE, previously a Limited Participant in the Plan, and the Amex have, consistent with Section I.B. of the Plan, executed a copy of the Plan, and have previously satisfied their respective shares of the development costs as specified in Section XIV of the Plan. The 12th Amendment is proposed to reflect both the Amex and the BSE as full Participants of the Plan.

3. The Participants propose to amend the Plan to reflect that the status of a

(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); and 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).

<sup>10</sup> 17 CFR 240.11Aa3-2.

<sup>11</sup> As proposed under the 12th Amendment, the Plan will define "Eligible Security" as "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."

<sup>12</sup> The Plan defines "Participant" as "a registered national securities exchange or national securities association that is a signatory to this Plan."

Limited Participant<sup>13</sup> is no longer recognized in the Plan and such terminology has been omitted where referenced throughout the Plan.

4. *Section III.B.* The Participants propose to amend the definition of "Eligible Security" to include Nasdaq SmallCap Market security.<sup>14</sup> The Participants propose this amendment in a response to the PCX's petition to the Commission to expand the Plan's definition of Eligible Security.<sup>15</sup>

The Committee, in agreeing with PCX's position and also in the event that the Commission approves Nasdaq's application for registration as a national securities exchange, voted to make SmallCap securities eligible for trading under the Plan. The Committee believes that requirements under the Act notwithstanding, the decision to include SmallCap securities within the Plan also eliminates confusion to potential users as to which Nasdaq securities are eligible for trading pursuant to UTP.

5. *Section IV.D. Operating Committees: Meetings.* The Participants propose to establish the voting and quorum requirements for Committee meetings and the manner in which formal actions may be taken on behalf of the Committee.

6. *Section V.E.* The Committee proposes to establish a process for selecting a new Securities Information Processor ("SIP") for Nasdaq listed

securities traded on exchanges on an UTP basis.<sup>16</sup>

7. The Committee proposes to re-title Section VI to "Functions of the Processor."

8. *Section VI.C.1. Best Bid and Offer.* The Participants propose to clarify the priority rules. Specifically, the Participants propose that if an Exchange Participant or Nasdaq market participant changes its quote, it will lose ranking within the price/time priority. However, a change to only bid size and/or ask size will not change the time priority of the quote.

The Participants propose that Section VI.C.1. also provide for rules governing the carrying over of Participant quotes from one trading day to the next, including the use of previous day quotes in the calculation of the consolidated BBO.

Finally, the Participants propose, in Section VI.C.1., to establish procedures for the Processor to follow when the BBO results in a locked or crossed market and that the Processor shall cease calculation of the BBO at 6:30 p.m. Eastern Standard Time ("EST").

9. *Section VI.C.2 Eligible Securities.* The Participants propose to include in the Plan a suggestion to the Commission of a "phase-in" schedule, which was agreed to by all Plan Participants, for the addition of Nasdaq securities that will be eligible for trading pursuant to UTP by Plan Participants. The purpose of phasing-in the number of eligible securities over a period of time, as opposed to granting immediate eligibility to all Nasdaq securities, is to minimize the threat to available SIP capacity that may arise as Participants trade additional Eligible Securities pursuant to UTP. The Committee has agreed that the phase-in period will allow the SIP to monitor the effects, if any, that the increased quote traffic and trading have upon SIP capacity. It should be noted that the phase-in schedule does not apply to Nasdaq, Nasdaq market participants acting in that capacity, or to any Participant that does not engage in auto-quoting as described below.<sup>17</sup>

The proposal contemplates that all Eligible Securities will be phased-in by the end of the fifth calendar quarter following the phase-in commencement date of September 30, 2001, or such date established by the Commission. However, in no case shall the number of Eligible Securities exceed the number of securities the Commission deems eligible for trading under the Plan. The Participants propose the phase-in schedule to minimize any threats to the SIP's capacity, and as such, the proposal provides that Nasdaq, acting as the SIP, can suspend the phase-in schedule and delay the expansion of the number of Eligible Securities that may be traded under the Plan in the event that system capacity and operational concerns arise.

Specifically, the Committee's primary concern is that members of the various Participant exchanges who partake in the practice of auto-quoting—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, with certain exceptions<sup>18</sup>—will create undue capacity strains upon Nasdaq, both as the SIP and as a market Participant.

The Committee, therefore, proposes to establish certain limitations upon the practice of auto-quoting to which Participants must adhere. In the event that a Participant should exceed the auto-quoting limitations, the SIP shall have the ability to initiate proceedings, before the entire Committee, which will put the Participant on notice of the violation and afford ample time and procedure to rectify the situation.<sup>19</sup>

Finally, in Section VI.C.2., the Participants also propose to include a provision for the termination of the auto-quoting limitations upon the implementation of a new Processor by the Committee, as well as a proposed "grandfather clause" exempting from the auto-quoting limitations and the

<sup>13</sup> Section III had defined a Limited Participant to mean a registered national securities exchange whose participation in the Plan is restricted to reporting to the Processor Quotation Information and Transaction Reports in NASDAQ/NMS securities listed on that exchange Upon Effectiveness of the Plan.

<sup>14</sup> NASD Rule 4200 defines Nasdaq SmallCap Market security as "any authorized security in The Nasdaq SmallCap Market which (1) satisfies all applicable requirements of the Rule 4300 Series other than a Nasdaq National Market security; (2) is a right to purchase such security; or (3) is a warrant to subscribe to such security."

<sup>15</sup> See letter to Mr. Robert L.D. Colby, Deputy Director, Division of Market Regulation, SEC and Mr. Robert E. Aber, Nasdaq from Thomas E. Connaghan, PCX, dated October 16, 2000. In its October 16, 2000 letter, the PCX requested that the Commission issue a directive that would expand the number of Eligible Securities traded under the Plan from 1,000 to "all" Nasdaq/NM securities. Among other reasons, PCX argued that such an expansion would "help improve competition and increase transparency and order interaction in the market for those additional securities by increasing the number of market centers in which they may be traded."

In a subsequent letter to Messrs. Colby and Aber from Mr. Connaghan, dated November 20, 2000, the PCX amended its October 16, 2000 petition with a request to include all Nasdaq SmallCap Market Securities in the definition of Eligible Securities for the same reasons expressed in the October 16, 2000 letter. PCX also noted that an inclusion of the Nasdaq SmallCap stocks could lead to better executions in those securities for investors.

As of the date of this filing, the Commission has not formally responded to PCX's petition.

<sup>16</sup> The Committee included this section to the Plan pursuant to a Commission mandate set forth in the order approving the proposed rule change by the NASD relating to the establishment of the Nasdaq Order Display Facility and Order Collector Facility and modifications of the Nasdaq Trading Platform ("SuperMontage Order"). See Securities Exchange Act Release No. 43863 (January 19, 2001), 66 FR 8020 (January 26, 2001). In the SuperMontage Order, the Commission required that the Plan Participants negotiate a revised Plan that provides for either a fully viable alternative exclusive SIP for all Nasdaq securities, or a fully viable alternative non-exclusive SIP.

<sup>17</sup> See proposed Section VI.C.2(a)(v) and proposed Section VI.C.2(b).

<sup>18</sup> The limitations on the practice of auto-quoting would not apply to situations in which: (a) an update is in response to an execution in the security by that auto-quoting Participant; (b) an update requires a physical entry; (c) an update reflects the receipt, execution, or cancellation of a customer order; or (d) the practice of automatically generating quote changes is at a rate less than 35% of all price changes to the national best bid or ask quotation. See proposed Section VI.C.2.b (i-iv). Also, the limitations would not apply to any Participant whose aggregated quoting activity in Eligible Securities does not exceed 1% of the total quotation traffic across all Nasdaq securities.

<sup>19</sup> The Participants propose a notice and cure period in which a Participant may rectify the situation on its own accord, as well as providing for formal proceedings to be held before the Committee before any remedial action may be taken against a violating Participant. See proposed Section VI.C.2(e).

phase-in schedule any Participant for the number of securities in which the Participant posted quotes as of May 1, 2001.<sup>20</sup>

10. Section VIII.C. is proposed to be amended to reflect the inclusion of the BSE and the Amex into the Plan, as well as reflecting the official removal of the CBOE from the Plan.

11. *Section X Regulatory Halts.* The Participants propose to amend this section to provide procedures that the Processor must follow to notify Participants when regulatory halts occur.

12. *Section XI. Hours of Operation.* The Participants propose to establish reporting procedures for Participants who execute transactions in Eligible Securities outside of the normal trading hours of 9:30 a.m. EST to 4:01:30 p.m. EST.

13. *Section XIX. Operational Issues.* The Participants propose this new section to establish Participant responsibilities in the collection, validation, and transmission of data to the Processor. In addition, Section XIX would establish operational procedures that the Processor must follow in the collection of data from Participants; such as performing gross validation processing for quotes and last sale messages and consolidation and dissemination of trade and quote information from each Participant.

14. In the 12th Amendment to the Plan, the Participants also propose to amend Exhibit 1 to the Plan. Currently, Exhibit 1 contains, in part, the provisions for distributing revenue generated by the dissemination of trade data to participating Vendors. The Participants propose to amend Exhibit 1 to delete Sections B and C, which related to the making of fixed payments to the CHX (Section B) and the payment to all other Exchange Participants of operating income based upon certain "minimum-maximum" payment formulae. The "minimum-maximum" provisions established a means for distributing revenue, as well as reimbursing the original Plan Participants for start-up costs incurred in the original formulation of the SIP and the Plan (Section C).

The amendments to Exhibit 1 include new formulae for determining Participants' total trades, total share volume, operating expenses, and operating income for the purposes of distribution of gross operating revenue to the Participants, as well as a provision for reimbursing the Processor in the event that operating expenses exceed operating revenues.

In addition, the amendments to Exhibit 1 include eligibility criteria and schedules for determining Participant eligibility for receiving distributions of gross operating revenue. Finally, the amendments to Exhibit 1 establish procedures and cost allocations for retaining an independent auditor for the purpose of auditing the Processor's costs or other calculations used in the determination of operating expenses, operating revenues, and distribution shares, among other calculations.

15. Within the body of the 12th Amendment, the Participants propose numerous "house-keeping" corrections, such as changing the term "NASDAQ" to "Nasdaq" and ensuring that references to amended sections are consistent with the amendments discussed above.

*B. Governing or Constituent Documents*  
Not applicable.

#### *C. Implementation of Amendment*

The changes proposed in the Amendment are intended to be implemented immediately upon approval by the Commission. All Participants have executed a copy of the 12th Amendment and there are no contingencies that shall delay the effectiveness of the Amendment other than the proposed phase-in schedule of Eligible Securities.<sup>21</sup>

#### *D. Development and Implementation Phase*

As noted *supra*, Section VI.C.2, Eligible Securities, would establish a schedule in which all Nasdaq securities will become eligible for trading pursuant to UTP. The proposed phase-in will commence by September 30, 2001, or on such date as determined by the Commission, with the suggested inclusion of 1,000 Nasdaq securities, in addition to the securities currently eligible for trading pursuant to UTP. The proposal then would permit Participants to trade an additional 500 securities at the end of each of the following four calendar quarters. At the end of the fifth calendar quarter following September 30, 2001, all remaining Nasdaq securities shall become eligible for trading under the Plan.

#### *E. Analysis of Impact on Competition*

The signatories to the Plan believe that the amendment will impose no burden on competition. On the contrary, the Participants believe that the proposed Amendment stems much from

mandates and recommendations made by the Commission and serves to (1) Remove provisions that previously served to differentiate Participants from each other; (2) provide for the inclusion of all Nasdaq securities in the Plan; (3) provide for a unified system of revenue sharing for all Participants; and (4) lessen the burden to entry for new Participants joining the Plan.

The proposed Amendment removes all previous distinctions that the Plan made between "Limited Participants" and "Participants."<sup>22</sup> Under the proposed Amendment, once a party becomes a Participant, it immediately shares all rights and obligations equally with all other Participants, including the sharing of eligible Plan revenues. The only requirement is that the new Participant contribute an equal share of the original development costs previously paid by the current Participants.<sup>23</sup>

The proposed Amendment eliminates the "minimum" and "maximum" limitations on revenue distributions to the Participants and implements a program that the Participants believe is consistent with the fair competition requirements of Section 11A of the Act.<sup>24</sup> Section B to Exhibit 1 of the Plan previously limited the amount of eligible revenue that some Participants were entitled to receive, as well as established a minimum amount that Participants would receive. Although the "minimum-maximum" provisions were originally included to provide a mechanism to compensate certain original Plan Participants for development costs incurred in the implementation of the Plan, the Committee believes that a more equitable method than the "minimum-maximum" formula should be employed. Therefore, the Amendment now provides for the distribution of Plan revenue pro rata to each Participant based on each Participant's respective contribution to total Plan revenues.

The proposed Amendment also extends the definition of Eligible Security to include Nasdaq SmallCap<sup>25</sup> securities. In the event the Commission approves Nasdaq's registration as a national securities exchange, pursuant to the Act, all Nasdaq SmallCap

<sup>22</sup> "Limited Participant" referred to a registered national securities exchange whose participation in the Plan was restricted to reporting to the Processor quotation information and transaction reports in Nasdaq/NM securities listed on that exchange upon effectiveness of the Plan. See Previous Section III(E) of the Plan.

<sup>23</sup> See proposed Section XIV.A. of the Plan.

<sup>24</sup> 15 U.S.C. 78k-1.

<sup>25</sup> As defined by NASD Rule 4200.

<sup>20</sup> See proposed Section VI.C.2(f).

<sup>21</sup> See Section D of this filing for an explanation of the proposed "phase-in" schedule.

securities will be eligible for trading pursuant to UTP. This inclusion anticipates compliance with the securities laws and, concurrently, gives access to the trading of Nasdaq SmallCap securities to all Participants equally.

*F. Written Understandings or Agreements Relating to Interpretation of, or Participation in, the Plan*

Not applicable.

*G. Approval by Sponsors in Accordance with the Plan*

Under Section XVII, Modifications to Plan, any amendment to the Plan requires the unanimous execution of the Plan by each Plan Participant. Each Voting Participant has executed a copy of this Amendment and copies of such documents will be maintained by the Secretary of the Committee.

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

Not applicable.

*I. Terms and Conditions of Access*

Not applicable.

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

The proposed Amendment does not effect a change to the determination, imposition, or amount of fees and charges.

*K. Method and Frequency of Processor Evaluation*

Not applicable.

*L. Dispute Resolution*

Not applicable.

**IV. Rule 11Aa3-1<sup>26</sup>**

*A. Nasdaq Securities for Which Transactions Reports Shall Be Required by the Plan*

The Plan will govern trading in both Nasdaq/NM securities and, is proposed to govern transaction reporting of all Nasdaq SmallCap securities.

*B. Reporting Requirements With Respect to Transactions in Nasdaq Securities for any Broker or Dealer Subject to the Plan*

Not applicable.

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

Not applicable.

*D. Manner of Consolidation*

Not applicable.

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

Not applicable.

*F. Rules and Procedures Addressed to Fraudulent or Manipulative Dissemination*

Not applicable.

*G. Terms of Access to Transaction Reports*

Not applicable.

*H. Identification of Marketplace of Execution*

Not applicable.

**V. Date of Effectiveness of the Proposed Amendment**

The Commission has determined that the addition of Amex and BSE as full Participants under the Plan is technical in nature, and thus has become effective upon filing with the Commission.<sup>27</sup> In addition, the Commission has decided, pursuant to Rule 11Aa3-2(c)(4) under the Act to put Exhibit 1 to the 12th Amendment, which, among other things, governs the calculation and distribution of revenues generated under the Plan, into effect summarily upon publication of this notice of amendment in the **Federal Register** on a temporary basis not to exceed 120 days. The Commission believes that it is appropriate to put Exhibit 1 to the 12th Amendment into effect summarily because it contains more equitable formulas for the calculation and allocation of revenues than are currently used, which the Commission believes should remove impediments to and, perfect the mechanism of, a national market system.

The Commission, as described further below, requests comment on the remaining provisions of 12th Amendment.

**VI. Solicitation of Comments**

In addition to general comments on 12th Amendment, the Commission specifically requests comment on whether SmallCap securities should be considered Eligible Securities under the Plan. Further, the Commission continues to request comment on whether the Commission should expand the number of securities considered eligible under the Plan, pursuant to Section 12 of the Act,<sup>28</sup> and if so, by how many.<sup>29</sup> In addition, the Commission requests comment on

whether the phase-in proposal is appropriate.

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. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed amendment 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. The 12th Amendment is being published as Exhibit A to this proposal. Copies of the amendment will also be available for inspection and copying at the office of the Secretary of the Committee, currently located at the CSE, One Financial Place, 440 South LaSalle St., Suite 2600, Chicago, IL 60126. All submissions should refer to File No S7-24-89 and be submitted by October 23, 2001.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>30</sup>

**Margaret H. McFarland,**  
*Deputy Secretary.*

**Exhibit A**

**Amendment No. 12: 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 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, Inc., 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

<sup>30</sup> 17 CFR 200.30-3(a)(27).

<sup>27</sup> 17 CFR 240.11Aa3-2(c)(3)(iii).

<sup>28</sup> 15 U.S.C. 78l.

<sup>29</sup> See Securities Exchange Act Release No. 43545 (November 9, 2000), 65 FR 69581 (November 17, 2000).

<sup>26</sup> 17 CFR 240.11Aa3-1.

5. National Association of Securities Dealers, Inc., 1735 K Street, NW., Washington, DC 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 XIV.

## 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 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. "Nasdaq Level 1 Service" means the service that provides Subscribers with the best bid and asked quotations and size in Eligible Securities from all Participants.

I. "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. "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. "Nasdaq System" means the automated quotation system operated by Nasdaq.

L. "Nasdaq Last Sale Information Service" means the service of Nasdaq that provides Vendors and Subscribers with Transaction Reports.

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

N. "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. "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.

P. "Participant" means a registered national securities exchange or national securities association that is a signatory to this Plan.

Q. "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. "Processor" means the entity selected by the Participants to perform the processing functions set forth in the Plan.

S. "Quotation Information" means all bids, offers, quotation sizes, the Market and, in the case of Nasdaq, the 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. "Regulatory Halt" means a trade suspension or halt called for the purpose of dissemination of material news, as described at Section X hereof.

U. "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. "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. "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. "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.

## 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 actions 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.

### 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. With respect to:
  - a. amendments to the Plan;
  - b. amendments to contracts between the Processor and Vendors, Subscribers, News Services and others 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 submitted after the expiration of 12 months from the beginning of the Plan's operation; and
  - f. all other matters not specifically addressed by the Plan, the affirmative and unanimous vote of all Participants entitled to vote shall be necessary to constitute the action of the Operating Committee.

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. With respect to requests for system changes reasonably related to the function of the Processor as defined under the Plan and submitted after the expiration of 12 months from the beginning of the Plan's operation, the affirmative vote of a majority of the Participants entitled to vote shall be necessary to constitute the action of the Operating Committee. All other requests for system changes shall be governed by Section IV(C)(1)(e) hereof. It is expressly agreed and understood that no system changes shall be made during the first 12 months after the beginning of the Plan's operation.

4. With respect to:
  - a. interpretive matters and decisions of the Operating Committee arising under, or specifically required to be taken by, the provisions of the Plan as written;

- b. interpretive matters arising under Exchange Act Rules 11Aa3-1 and 11Ac1-1; and

- c. denials of access (other than for breach of contract, which shall be handled by the Processor).

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

5. It is expressly agreed and understood that the Operating Committee shall have no authority in any respect over the collection and dissemination of quotation or transaction information in Eligible Securities from and to Nasdaq market participants within, or to, the Nasdaq marketplace, e.g., the fees to be charged therefore or the format in which displays shall be made. Nor shall the Operating Committee have any authority over the collection and dissemination of quotation or transaction information in Eligible Securities in any other Participant's marketplace.

**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 2/3rd majority vote of all Participants, a quorum of at least 2/3rd 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.

Any action may be taken without a meeting if a 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.

**V. Selection and Evaluation of the Processor****A. Generally**

Subject to the provisions of paragraph (V)(B) hereof, Nasdaq shall be the Processor under the Plan and shall function as such for an initial term of five (5) years, such term Commencing Upon the Effectiveness of the Plan. The Processor's performance of its

functions under the Plan shall be subject to review by the Operating Committee during the fifth year of the initial five (5) year term and periodically (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) thereafter. 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. Processor's 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

The Processor shall be capable of receiving Quotation Information and Transaction Reports in Eligible Securities from Participants by computer-to-computer interface, and from Nasdaq market participants by Nasdaq-approved devices, and shall consolidate and disseminate such information to Vendors, Subscribers and News Services.

##### C. Dissemination of Information

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

Nothing herein shall be construed to affect in any way the existing agreements between the NASD and the London Stock Exchange (now the International Stock Exchange of the United Kingdom and the Republic of Ireland) entered into on April 22, 1986, and between the Singapore Stock Exchange and the NASD executed on June 26, 1987, or the right to amend, modify, or change these agreements in such a manner as is mutually agreed to by them, or to enter into other agreements mutually agreeable to them; provided that such agreements shall not permit the International or Singapore Exchanges to enter into any agreement with a Vendor not affiliated with any such Exchange to redistribute information with respect to Eligible Securities to persons not otherwise receiving such information pursuant to the agreement with such Exchange, except on terms and conditions approved by the Processor.

##### 1. Best Bid and Offer

The Processor shall disseminate on Level 1 a consolidated best bid and asked quotation with size based upon Quotation Information for Eligible Securities received from Participants and Nasdaq market participants. The Market responsible for each side of the best bid and asked quotation making up the consolidated quotation shall be identified by an appropriate symbol. If the quotations of more than one Participant are the same, the earliest measured by the time reported shall be deemed to be the best. The consolidated size shall be the size of the Participant that is at the best. If a Nasdaq market participant is at the best, the consolidated size for NASD shall be the largest size among those Nasdaq participants whose quotations are earlier in time than the first Participant at that price. If an Exchange or individual Nasdaq market participant changes its quote (i.e. bid quote and/or ask quote), it will lose its ranking within the price/time priority. A change to only bid size and/or ask size will not change the time priority of an Exchange's or Nasdaq market participant's quote. The Processor will carry over Participant quotes from the previous day to alleviate the need for each Participant to re-enter a quote when there is no change from its previous day's quote. The Processor shall also retain the quotations of all Participants (Exchange Participants and Nasdaq market participants) from the previous day. These previous day quotes shall be used in the calculation of the consolidated best bid/best offer until an updated quote is received by the Processor. 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 $\frac{7}{8}$  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(2)(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(2)(b) below.

b. Limitation on Auto-Quoting—Except as provided in sub-paragraph VI.C(2)(c) of this Plan, Participants shall be prohibited from the practice of "auto-quoting." "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% 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 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 of 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. Full Quotation Data Stream

The Processor shall disseminate on NQDS a data stream of all Quotation Information regarding Eligible Securities received from Participants. Each quotation shall be designated with a symbol identifying the Participant or Nasdaq market participant from which the quotation emanates.

#### 4. Transaction Reports

The Processor shall disseminate on the Nasdaq Last Sale Information Service 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. Immediate Hard-Copy Confirmations

At the expense of any requesting Participant(s), the Processor will provide Participants with the ability to obtain immediate hard-copy confirmations of transactions in Eligible Securities.

#### E. 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.

#### F. 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 price bid and offered, 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 a 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.

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. If a shared computer-to-computer interface line is used, each transaction report shall include an appropriate exchange identifier that is acceptable for processing by the Processor.

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 pre-established 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 and Participant

A: American Stock Exchange

B: Boston Stock Exchange

C: Cincinnati Stock Exchange

M: Chicago Stock Exchange

Q: NASD

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 Securities 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 Level 1 data vendor 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 or 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 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 of orders or other market-related problems involving such security.

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 4:00 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 4:00 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 4:01:30 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 as ".T" trades between the hours of 8 a.m. and 6:30 p.m. ET on the next business day on an "as/of" basis;

(iii) transactions in Eligible Securities executed between 12:00 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, or last sale.

C. Late trades shall be reported in accordance with the rules of the Participant in whose Market the transaction occurred.

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.

E. The NASD shall have the right to modify its hours of operation upon notification to

other Participants and approval by the SEC, in which event the hours of operation of the Processor shall be changed to conform to the hours of operation of the NASD.

#### *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. Undertaking by NASD*

The NASD shall maintain a database of consolidated quotation, last sale and clearing data in Eligible Securities as part of its normal surveillance function with respect to the Nasdaq Market. Such information as is maintained and appropriate for the foregoing purposes will be made available to Participants upon request for investigatory and surveillance purposes. It is anticipated that a formalized procedure will be developed for the monitoring of information and sharing of surveillance information analogous to those procedures applicable to the Intermarket Surveillance Group for listed securities. Pending such agreement, the Participants shall cooperate to the fullest extent possible to facilitate joint utilization of available information for market surveillance and regulatory purposes.

The NASD shall also make available to the Participants, upon request, nonproprietary information pertaining to Eligible Securities on a cost basis.

#### *XIV. 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 Nasdaq 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 provisions 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.

#### *XV. 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.

#### *XVI. 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 XIV 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.

#### *XVII. 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.

#### *XVIII. 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 the NASD or its subsidiaries (including Nasdaq) 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.

#### *XIX. 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 in the Processor system.

3. Price Checks—Once the quotes and trades are accepted and disseminated by the Processor, the Processor shall perform gross price checks to ensure that:

(a) Participant quotes are within the established range of the current market; and

(b) Participant last sale reports are within the established range of the current market.

#### *XX. 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.

**XXI. 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.

In Witness Whereof, this Plan has been executed as of the \_\_ day of \_\_, 200 \_\_, 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, INC.

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, 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, and disseminating the Data Feeds. These costs include, but are not limited to, the following:

a. The Processor costs directly attributable to creating NQDS, including:

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

2. cost of processing quotes and creating NQDS messages within the Processor's quote engine;

3. cost of the Processor's communication management subsystem that distributes NQDS to the market data vendor network for further distribution.

b. The costs directly attributable to creating the Level 1 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 Data Feed message within the Processor's quote engine;

3. cost of the Processor's communication management subsystem that distributes the Level 1 Data Feed to the market data vendors' networks for further distribution.

c. The costs directly attributable to creating the Nasdaq Last Sale Information Service 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 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 Operations 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. costs associated with surveillance activities to validate data on a real-time basis and to ensure a high level of integrity of Data Feeds, provided however that costs associated with monitoring for trade halts in Eligible Securities shall not be included herein;

6. overhead costs, including 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.

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 Participant 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. 34-44843; File No. SR-DTC-2001-06]

### Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Revising the Fee Schedule for Services of The Depository Trust Company

September 25, 2001.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on April 25, 2001, The Depository Trust Company ("DTC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which items have been prepared primarily by DTC. 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

DTC is filing a revised fee schedule for DTC services associated with the processing of registered securities.

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

In its filing with the Commission, DTC 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. DTC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.<sup>2</sup>

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

The purpose of the proposed rule change is to adjust the fees DTC charges for various services and to initiate several new fees for existing services so that DTC's fees may be aligned with the

respective estimated service costs for 2001. The revised fees and new fees will be effective with respect to services provided on and after May 1, 2001.

The revised 2001 fee schedule includes five new fees for existing services, which are being employed to recover processing costs with regard to reorganizations and underwritings. The revised and new fees are set forth in Exhibit 1 to the proposed rule change.

DTC believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to DTC because fees will be allocated more equitably among DTC participants based on respective estimated 2001 unit service costs.

##### (B) Self-Regulatory Organization's Statement on Burden on Competition

DTC does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

##### (C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments from participants or others have been solicited or received in respect of this proposed rule change.

#### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

DTC has designated the proposed rule change as a fee change in accordance with Section 19(b)(3)(A)(ii) of the Act<sup>3</sup> and Rule 19b-4(f)(2)<sup>4</sup> thereunder. Accordingly, the proposal will take effect upon filing with the Commission. At any time within sixty days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change 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. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street NW, Washington, DC 20549. Copies of such filings will also be available for inspection and copying at the principal office of DTC. All submissions should refer to the File No. SR-DTC-2001-06 and should be submitted by October 23, 2001.

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

**Margaret H. McFarland,**  
Deputy Secretary.

[FR Doc. 01-24578 Filed 10-1-01; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44847; File No. SR-PCX-2001-05]

### Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendments No. 1 and No. 2 Thereto by the Pacific Exchange, Inc. Relating to Its Auto-Ex Incentive Program for Market Makers

September 25, 2001.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 11, 2001, the Pacific Exchange, Inc. ("PCX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. On March 20, 2001, the PCX submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> On May 17, 2001, the PCX

<sup>5</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> See letter from Cindy Sink, Senior Attorney, Regulatory Policy, PCX, to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, dated March 19, 2001. In Amendment No. 1, the PCX deleted from its proposed rule text the provision permitting guaranteed participation

Continued

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

<sup>2</sup> The Commission has modified parts of these statements.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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