

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-38793; File No. S7-24-89]

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

June 30, 1997.

On June 30, 1997, the National Association of Securities Dealers, Inc., on behalf of itself and the Boston, Chicago, and Philadelphia Stock Exchanges (collectively, "Participants")¹ submitted to the Commission a proposal² to extend the operation of a joint transaction reporting plan ("Plan") for Nasdaq/National Market ("Nasdaq/NM") securities traded on an exchange on an unlisted or listed basis.³ The proposal would extend the effectiveness of the Plan, as amended by revised Amendment No. 9,⁴ through

¹ The signatories to the Plan, *i.e.*, the National Association of Securities Dealers, Inc. ("NASD"), and the Chicago Stock Exchange, Inc. ("Chx") (previously, the Midwest Stock Exchange, Inc.), Philadelphia Stock Exchange, Inc. ("Phlx"), and the Boston Stock Exchange, Inc. ("BSE"), are the "Participants." The BSE, however, joined the Plan as a "Limited Participant," and reports quotation information and transaction reports only in Nasdaq/NM (previously referred to as "Nasdaq/NMS") securities listed on the BSE. Originally, the American Stock Exchange, Inc. ("Amex"), was a Participant to the Plan, and withdrew from participation in the Plan in August 1994.

² See letter from Robert E. Aber, Nasdaq, to Jonathan G. Katz, Secretary, Commission, dated June 27, 1997 ("June 1997 Extension Request"). The June 27, 1997 Extension Request also requests the Commission to continue to provide exemptive relief, previously granted in connection with the Plan on a temporary basis, from Rules 11Ac1-2 and 11Aa3-1 under the Securities Exchange Act of 1934 ("Act"). *Id.*

³ Section 12 of the Act generally requires an exchange to trade only those securities that the exchange lists, except that Section 12(f) of the Act permits unlisted trading privileges ("UTP") under certain circumstances. For example, Section 12(f), among other things, permits exchanges to trade certain securities that are traded over-the-counter ("OTC/UTP"), but only pursuant to a Commission order or rule. The present order fulfills this Section 12(f) requirement. For a more complete discussion of this Section 12(f) requirement, see November 1995 Extension Order, *infra* note 9, at n. 2.

⁴ On March 18, 1996, the Commission solicited comment on a revenue sharing agreement among the Participants. See March 18, 1996 Extension Order, *infra* note 9. Thereafter, the Participants submitted certain technical revisions to the revenue sharing agreement ("revised Amendment No. 9"). See letter from Robert E. Aber, Vice President and General Counsel, Nasdaq, to Jonathan Katz, Secretary, SEC, dated September 13, 1996. See also September 16, 1996 Extension Order, *infra* note 9 (notice and order recognizing receipt of revised Amendment No. 9).

December 31, 1997. The Commission also is extending certain exemptive relief as discussed below. The June 1997 Extension Request also requests that the Commission approve the Plan, as amended, on a permanent basis on or before December 31, 1997.⁵ The Commission is approving the proposed amendment to the Plan insofar as the proposal requests an extension of the effectiveness of the Plan. During the six-month extension of the Plan, the Commission will determine whether to approve the proposed Plan, as amended, on a permanent basis.

I. Background

The Commission originally approved the Plan on June 26, 1990.⁶ The Plan governs the collection, consolidation and dissemination of quotation and transaction information for Nasdaq/NM securities listed on an exchange or traded on an exchange pursuant to a grant of UTP.⁷ The Commission approved trading pursuant to the Plan on a one-year pilot basis, with the pilot period to commence when transaction reporting pursuant to the Plan commenced. Accordingly, the pilot period commenced on July 12, 1993, and was scheduled to expire on July 12, 1994.⁸ The Plan has since been in operation on a pilot basis.⁹

⁵ The Chx and Phlx also request that, commensurate with permanent approval of the Plan, the number of Nasdaq/NM securities eligible for trading pursuant to the Plan be expanded to include all Nasdaq/NM securities. See June 27, 1997 Extension Request, *supra* note 2. See also letter from Robert E. Aber, Vice President and General Counsel, Nasdaq, to Jonathan G. Katz, Secretary, Commission, dated March 27, 1997 ("March 1997 Extension Request"). The NASD states that, while it recognizes the benefits from such an expansion in terms of the promotion of competition and protection of investors, it believes a wholesale expansion of Nasdaq/UTP-eligible securities to include all Nasdaq/NM securities is inseparable from an expansion of Nasdaq's Intermarket Trading System ("ITS")/Computer Assisted Execution Service ("CAES") linkage to include all exchange-listed securities. *Id.*

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

⁷ See Section 12(f)(2) of the Act, *supra* note 3.

⁸ See letter from David T. Rusoff, Foley & Lardner, to Betsy Prout, SEC, dated May 9, 1994.

⁹ See Securities Exchange Act Release No. 34371 (July 13, 1994), 59 FR 37103 ("July 1994 Extension Order"), Securities Exchange Act Release No. 35221 (January 11, 1995), 60 FR 3886 ("January 1995 Extension Order"), Securities Exchange Act Release No. 36102 (August 14, 1995), 60 FR 43626 ("August 1995 Extension Order"), Securities Exchange Act Release No. 36226 (September 13, 1995), 60 FR 49029 ("September 1995 Extension Order"), Securities Exchange Act Release No. 36368 (October 13, 1995), 60 FR 54091 ("October 1995 Extension Order"), Securities Exchange Act Release No. 36481 (November 13, 1995), 60 FR 58119 ("November 1995 Extension Order"), Securities Exchange Act Release No. 36589 (December 13, 1995), 60 FR 65696 ("December 13, 1995 Extension

II. Description of the Plan

The Joint Industry 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."¹⁰ The Plan contains various provisions concerning the operation of the Plan, which include: 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 BBO; Dispute Resolution; Method of Determination and Imposition, and Amount of, Fees and Charges.¹¹

III. Exemptive Relief

In conjunction with the Plan, on a temporary basis scheduled to expire on June 30, 1997, the Commission granted an exemption to vendors from Rule 11Ac1-2 under the Act regarding the calculation of the Best Bid and Offer ("BBO"), and granted the BSE an exemption from the provision of Rule 11Aa3-1 under the Act that requires transaction reporting plans to include market identifiers for transaction reports and last sale data. In the June 1997 Extension Request, the Participants request that the Commission grant an extension of the exemptive relief described above to vendors until such time as the calculation methodology for the BBO is based on a price/size/time

Order"), Securities Exchange Act Release No. 36650 (December 28, 1995), 61 FR 358 ("December 28, 1995 Extension Order"), Securities Exchange Act Release No. 36934 (March 6, 1996), 61 FR 10408 ("March 6, 1996 Extension Order"), Securities Exchange Act Release No. 36985 (March 18, 1996), 61 FR 12122 ("March 18, 1996 Extension Order"), Securities Exchange Act Release No. 37689 (September 16, 1996), 61 FR 50058 ("September 16, 1996 Extension Order"), Securities Exchange Act Release No. 37772 (October 1, 1996), 61 FR 52980 ("October 1, 1996 Extension Order"), and Securities Exchange Act Release No. 38457 (March 31, 1997), 62 FR 16880 ("March 31, 1997 Extension Order").

¹⁰ The Plan defines "eligible security" as any Nasdaq/NM security (i) as to which unlisted trading privileges have been granted to a national securities exchange pursuant to Section 12(f) of the Act, or (ii) which is listed on a national securities exchange.

¹¹ The full text of the Plan, as well as a "Concept Paper" describing the requirements of the Plan, are contained in the original filing which is available for inspection and copying in the Commission's Public Reference Room.

algorithm. In the June 1997 Extension Request, the Participants also request that the Commission grant an extension of the exemptive relief described above to the BSE for so long as the BSE is a Limited Participant under the Plan.

IV. Summary of Comments

In response to the Commission's request for comment on the aforementioned issues, the Board of Directors of The Nasdaq Stock Market, Inc. ("Nasdaq") approved two recommendations at its meeting on March 25, 1997 as set forth below.¹² These recommendations were subsequently ratified by the Board of Governors of the NASD at its meeting on April 10, 1997.¹³ With respect to the BBO calculation issue, the Nasdaq Board approved a recommendation to modify the methodology for calculating the BBO on Nasdaq to prioritize quotes based on a price/size/time algorithm instead of the current price/time/size algorithm, provided that Nasdaq market makers are subject to a minimum quote size requirement of 100 shares for at least 1,000 Nasdaq securities.¹⁴ With respect to the intermarket linkage issue, the Nasdaq Board approved a recommendation to provide specialists on an exchange trading Nasdaq securities on an UTP basis access to Nasdaq's Small Order Execution System ("SOES"), or its successor system, to the same extent that registered Nasdaq market makers have access to SOES, provided that (1) Nasdaq market makers are afforded virtually identical access to the automated execution system operated by such UTP exchange, and (2) the order execution algorithms of the exchange's automated execution system are virtually identical to SOES's or its successor system.¹⁵

¹² See June 1997 Extension Request, *supra* note 2. See also March 1997 Extension Request, *supra* note 5.

¹³ See June 1997 Extension Request, *supra* note 2.

¹⁴ See June 1997 Extension Request, *supra* note 2. See also March 1997 Extension Request, *supra* note 5. In the event that Nasdaq develops the technological capability to afford market makers simultaneous electronic access to all market maker quotes at the same price level, the Nasdaq Board believes that the methodology used to determine the quoted size of the Nasdaq market must be reconsidered to accommodate reflection of the fully accessible size displayed on Nasdaq. *Id.*

NASD Rule 4613(a)(1)(C) allows market makers to reduce their minimum quotation size from 1000 to 100 shares in the first fifty Nasdaq securities subject to the Commission's Limit Order Display Rule. See Securities Exchange Act Release No. 38512 (April 15, 1997), 62 FR 38512 (April 21, 1997). The NASD has proposed that the Rule be expanded to apply to 100 additional Nasdaq securities. See Securities Exchange Act Release No. 38513 (April 15, 1997), 62 FR 19369 (April 21, 1997).

¹⁵ *Id.*

The Commission continues to solicit comment on (1) whether the BBO calculation for securities traded pursuant to the Plan should be based on a price/time/size methodology or a price/size/time methodology; (2) whether there is a need for an intermarket linkage for order routing and execution; and (3) whether there is a need for a trade-through rule.¹⁶

V. Solicitation of Comment

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. 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 at the Commission's Public Reference Room. All submissions should refer to File No. S7-24-89 and should be submitted by July 29, 1997.

VI. Discussion

The Commission finds that an extension of temporary approval of the operation of the Plan, as amended, through December 31, 1997, is appropriate and in furtherance of Section 11A of the Act as it will provide the Participants with additional time to make reasonable proposals concerning the BBO calculation and whether there is a need for an intermarket linkage for order routing and execution and an accompanying trade through rule to facilitate the trading of OTC securities pursuant to UTP. While the Commission continues to solicit comment on these matters, the Commission believes that these matters should be addressed directly by the Participants on or before October 3, 1997 so that the Commission may have ample time to determine whether to approve the Plan on a permanent basis by December 31, 1997.

The Commission further finds that it is appropriate to extend the exemptive relief from Rule 11Ac1-2 under the Act

¹⁶ The Commission requests that all comments be submitted no later than October 3, 1997 so that the Commission may have adequate time to consider all comments prior to December 31, 1997, the date by which the Commission intends to determine whether to approve the Plan on a permanent basis.

until the earlier of December 31, 1997 or until such time as the calculation methodology for the BBO is based on a price/size/time algorithm pursuant to the 1997 Extension Request or other mutual agreement among the Participants approved by the Commission. The Commission further finds that it is appropriate to extend the exemptive relief from Rule 11Aa3-1 under the Act, that requires transaction reporting plans to include market identifiers for transaction reports and last sale data, to the BSE through December 31, 1997. The Commission believes that the extensions of the exemptive relief provided to vendors and the BSE, respectively are consistent with the Act, the Rules thereunder, and specifically with the objectives set forth in Sections 12(f) and 11A of the Act and in Rules 11Aa3-1 and 11Aa3-2 thereunder.

VII. Conclusion

It is therefore ordered, pursuant to Sections 12(f) and 11A of the Act and (c)(2) of Rule 11Aa3-2 thereunder, that the Participants' request to extend the effectiveness of the Joint Transaction Reporting Plan, as amended, for Nasdaq/National Market securities traded on an exchange on an unlisted or listed basis through December 31, 1997, and certain exemptive relief until such time as the calculation method for the BBO is based on a price/size/time algorithm, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(29).

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-38784; File No. 600-22]

Self-Regulatory Organizations; MBS Clearing Corporation; Notice of Filing and Order Granting Approval of Extension of Temporary Registration as a Clearing Agency

June 27, 1997.

On February 28, 1997, the MBS Clearing Corporation ("MBSCC") filed with the Securities and Exchange Commission ("Commission") an application pursuant to Section 19(a) ¹ of the Securities Exchange Act of 1934 ("Act") requesting that the Commission grant MBSCC permanent registration as

¹ 15 U.S.C. 78s(a).