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

In its filing with the Commission, Nasdaq 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. Nasdaq has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

#### 1. Purpose

The proposed rule change seeks to revise and update the fee schedule for the OTCBB historical trading activity reports to bring the fees and types of reports in line with those charged for similar reports available for Nasdaq listed securities on NasdaqTrader.com. The proposed revised fee schedule seeks to ensure that the costs of providing such reports are allocated equitably among the users of such reports. Nasdaq believes that the proposed fee schedule is reasonable and that the per-field pricing structure for OTCBB.com reports is similar to the per-field pricing structure for NasdaqTrader.com reports.

#### 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,<sup>3</sup> in general, and with section 15A(b)(5) of the Act,<sup>4</sup> in particular, in that the revised proposed fee schedule would provide for the equitable allocation of reasonable charges among the persons ordering historical trading activity reports from NasdaqTrader.com and OTCBB.com.

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

Nasdaq does not believe that the proposed rule change would result in 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

Written comments were neither solicited nor received.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the NASD consents, the Commission will:

(A) By order approve such proposed rule change; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Comments may also be submitted electronically at the following e-mail address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-NASD-2004-036. The file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the 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 Room. Copies of such filing will also be available for inspection and copying at the principal office of the Nasdaq. All submissions should refer to the File No. SR-NASD-2004-036 and should be submitted by April 22, 2004.

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

Jill M. Peterson,

Assistant Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49476; File No. SR-NYSE-2004-09]

### Self-Regulatory Organizations; Notice of Filing of a Proposed Rule Change by the New York Stock Exchange, Inc. to Amend NYSE Rule 123C Relating to Market-on-Close Policy and Expiration Procedures

March 25, 2004.

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 February 19, 2004, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") 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 by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Rule 123C to change the procedures for entry and publication of imbalances in market-on-close and limit-on-close orders. The text of the proposed rule change is available at the NYSE and at the Commission.

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

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

<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> 15 U.S.C. 78o-3.

<sup>4</sup> 15 U.S.C. 78o-3(b)(5).

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

1. Purpose

NYSE Rule 123C (Market-on-the-Close Policy and Expiration Procedures)<sup>3</sup> defines market-on-close ("MOC") and limit-on-close ("LOC") orders. An MOC order is a market order that is to be executed in its entirety at the closing price. If not executed due to a trading halt or because of its terms, (e.g., buy minus or sell plus), this type of order will be cancelled. Furthermore, NYSE Rule 123C defines an LOC order as one that is entered for execution at the closing price, provided that the closing price is at or within the limit specified. LOC orders are prioritized on the specialist's book by time of entry and go behind all other orders on the specialist book at that price regardless of when such other orders are received. LOC orders with prices that are better than the closing price in the subject security are guaranteed an execution unless there is a trading halt in the security. LOC orders limited at the closing price are not guaranteed an execution.

Current Procedures

NYSE Rule 123C requires that all MOC and LOC orders be entered by 3:40 p.m. in any stock on any trading day, unless entered to offset a published imbalance, or on either side of the market if a regulatory halt is in effect at 3:40 p.m. or occurs after that time. Floor brokers representing MOC/LOC orders in any stock must communicate their irrevocable MOC/LOC interest to the specialist by 3:40 p.m. In addition, NYSE Rule 123C prohibits the cancellation of MOCs and LOCs after 3:40 p.m., except in the case of legitimate error (e.g., side, size, symbol, price, or duplication of an order), when a regulatory trading halt is in effect at, or occurs after, 3:40 p.m., or to comply with the provisions of NYSE Rule 80A.<sup>4</sup>

<sup>3</sup> The Exchange's Market-On-Close/Limit-On-Close Policy has been codified as NYSE Rule 123C. See Securities Exchange Act Release No. 46579 (October 1, 2002), 67 FR 63004 (October 9, 2002) (SR-NYSE-2003-31).

<sup>4</sup> NYSE Rule 80A requires index arbitrage orders in any stock in the Standard & Poor's 500 Stock Price Index entered on the Exchange to be stabilizing (*i.e.*, buy minus or sell plus) when the Dow Jones Industrial Average ("DJIA") declines below/advances above its closing value on the previous trading day by at least 2.0% rounded down to the nearest 10 points, of the average closing value of the DJIA for the last month of the previous quarter. When these Rule provisions are triggered, an MOC index arbitrage order without the appropriate tick restriction must be cancelled by 3:50 p.m. unless it is related to an expiring derivative index product.

Between 3:40 and 3:50 p.m., MOC/LOC orders are irrevocable, except to correct a legitimate error, when a regulatory trading halt is in effect at or occurs after 3:40 p.m., or to comply with the provisions of NYSE Rule 80A.

In the case of a regulatory halt, MOC orders may be entered until 3:50 p.m. or until the stock reopens, whichever occurs first, even if an imbalance publication occurred prior to the regulatory halt. Cancellation or reductions in size of MOC/LOC orders after 3:50 p.m. are not permitted for any reason, including in case of legitimate error or to comply with the provisions of NYSE Rule 80A.

Proposed Rule Amendments

The Exchange is proposing to amend NYSE Rule 123C to provide that all MOC orders, including those entered by brokers in the crowd, must be entered electronically by 3:50 p.m. rather than by 3:40 p.m. As under the current rule, no orders may be cancelled after 3:50 p.m.

The Exchange believes that requiring MOC interest to be electronically entered will increase the efficiency at the point of sale. Publications will be systemically generated, allowing for greater control in active trading crowds and providing accurate information immediately to all participants. Furthermore, the Exchange believes that moving the MOC cut-off from 3:40 p.m. to 3:50 p.m. will allow traders and floor brokers greater control of the execution of their customer's orders and greater participation in active markets. As a result of the proposed change, market participants will be able to use SuperDot to guarantee the closing price for the balance of their orders by allowing such participants an additional ten minutes to interact in active markets.

LOC Orders

The Exchange is proposing to amend NYSE Rule 123C to provide that LOC orders must also be entered electronically by 3:50 p.m., except for orders entered to offset final MOC imbalance publications. LOC orders entered to offset final MOC imbalances must also be entered electronically and priced using the last sale at time of such publication as the order's best limit (e.g., sell LOC must be limited to the last sale or higher). The Exchange believes that the same rationale that justifies the proposed amendments to MOC orders (as described above) also applies here. Furthermore, the Exchange believes that by encouraging the use of LOC orders to add liquidity to the close, the Exchange

expects to achieve minimal price dislocations.

In addition, the Exchange proposes to disseminate LOC interest through various Exchange venues including NYSE OPENBOOK ("Openbook"). In order to implement this initiative, the Exchange will include LOC interest information in its OpenBook information dissemination.<sup>5</sup>

Publication of MOC Imbalances

Currently, NYSE Rule 123C provides that the last sale price at 3:40 p.m. is used for the first imbalance publication, and 3:50 p.m. for the second imbalance publication. The Exchange is proposing to amend NYSE Rule 123C to provide that the last sale price at 3:50 p.m. be used for the only imbalance publication, as this would conform the rule with the proposal to move the MOC cut-off time from 3:40 p.m. to 3:50 p.m.

In addition, NYSE Rule 123C requires that if an imbalance or "no imbalance" notice is published at 3:40 p.m., a significant imbalance or one of 50,000 shares or more (or, in their absence, a no imbalance notice) must be published as soon as possible after 3:50 p.m.

The Exchange is proposing to amend NYSE Rule 123C to provide that orders to offset published imbalances must be entered electronically and will be accepted in time priority only to the extent of the published imbalance. Paper orders will not be accepted. In addition, the Exchange is proposing that any offset order or unexecuted portion will be cancelled electronically.

The Exchange is also proposing that if an imbalance pairs-off prior to 3:55 p.m., the specialist shall publish that fact. As soon as practicable after 3:55 p.m., the specialist shall publish the then-existing imbalance, if it is greater than 50,000 shares (or such other size as approved by a Floor Official), or shall publish a "no imbalance" message.

These proposed changes to NYSE Rule 123C will require technology upgrades to the Exchange systems utilized for MOC/LOC order processing, the schedule for which is being determined. The Exchange will notify its membership and the Commission of the timing of implementation of the proposed changes to NYSE Rule 123C. Additionally, after the Commission has approved these proposed rule changes, the Exchange intends to issue an

<sup>5</sup> The dissemination of LOC interest information in the Exchange's OpenBook is the current change proposed by the NYSE in order to implement its electronic LOC order entry initiative. See, March 24, 2004 telephone conversation between Donald Siemer, Director, Market Surveillance, NYSE, and A. Michael Pierson, Attorney, Division of Market Regulation, Commission.

Information Memo to inform its members of the revised procedures.

## 2. Statutory Basis

The NYSE believes the basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)<sup>6</sup> that an Exchange have rules that are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange 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*

The Exchange has neither solicited nor received written comments on the proposed rule change.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve the proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Comments may also be submitted electronically at the following e-mail address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-NYSE-2004-09. This file number should be included on the subject line if e-mail is used. To help the

Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the 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 Room. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE.

All submissions should refer to File No. SR-NYSE-2004-09 and should be submitted by April 22, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>7</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04-7275 Filed 3-31-04; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49477; File No. SR-OCC-2003-12]

### **Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to a Clearing Agreement**

March 25, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on October 31, 2003, The Options Clearing Corporation ("OCC") 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 OCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### **I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The proposed rule change consists of the Futures Agreement for Clearing and Settlement Services ("PBOT Agreement"), dated October 23, 2003,

between OCC and the Philadelphia Board of Trade ("PBOT").

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

In its filing with the Commission, OCC 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. OCC 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*

PBOT intends to commence trading in cash-settled foreign currency futures. PBOT and OCC have entered into the PBOT Agreement pursuant to which OCC will provide clearing and settlement services for such contracts.<sup>3</sup> The PBOT Agreement is substantially similar to other futures related clearing agreements that were previously filed with the Commission, but it provides only for the clearance and settlement of cash-settled foreign currency futures.<sup>4</sup> To the extent that any terms of the PBOT Agreement are not traceable to one of OCC's other futures related clearing agreements, those terms are immaterial.

OCC believes that the proposed rule change is consistent with the purposes and requirements of section 17A of the Act because it will foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions.

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

OCC does not believe that the proposed rule change will impose any burden on competition.

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

<sup>3</sup> OCC already changed its by-laws and rules to accommodate the introduction of cash-settled foreign currency futures. Securities Exchange Act No. 49126 (January 25, 2004), 69 FR 04552 (January 30, 2004) [File No. SR-2003-07].

<sup>4</sup> Securities Exchange Act Release Nos. 46722 (October 25, 2002), 67 FR 67230 (November 4, 2002) File No. [SR-OCC-2002-13] (amended and restated clearing agreement with NQLX), 46058 (June 10, 2002), 67 FR 41287 (June 17, 2002) File No. [SR-OCC-2002-08] (security futures clearing agreement with IFX), and 46653 (October 11, 2002), 67 FR 64689 (October 21, 2002) File No. [SR-OCC-2002-07] (security futures clearing agreement with ONE).

<sup>6</sup> 15 U.S.C. 78f(b)(5).

<sup>7</sup> 17 CFR 200.30-3(a)(12).

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