common control with any of those entities.

3. Once an investment by a Trust Series in the securities of an Unaffiliated Underlying Fund exceeds the limits of section 12(d)(1)(A)(i) of the Act, the board of directors of the Unaffiliated Underlying Fund, including a majority of the disinterested directors, will determine that any consideratation paid by the Unaffiliated Underlying Fund to a Trust Series or a Trust Series Affiliate in connection with any services or transactions: (i) Is fair and reasonable in relation to the nature and quality of the services and benefits received by the Unaffiliated Underlying Fund; (ii) is within the range of consideration that the Unaffiliated Underlying Fund would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (iii) does not involve overreaching on the part of any person concerned.

4. No Trust Series or Trust Series Affiliate will cause an Unaffiliated Fund to purchase a security from any underwriting or selling syndicate in which a principal underwriter is the Sponsor or a person of which the Sponsor is an affiliated person (each an ''Underwriting Affiliate''). An offering during the existence of an underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate is considered an ''Affiliated Underwriting.''

5. The board of directors of an Unaffiliated Underlying Fund, including a majority of the disinterested directors, will adopt procedures reasonably designed to monitor any purchases by the Unaffiliated Underlying Fund of securities in Affiliated Underwritings once an investment by a Trust Series in the securities of the Unaffiliated Underlying Fund exceeds the limits of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The board of directors will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Trust Series in shares of the Unaffiliated Underlying Fund. The board of directors will consider, among other things, (i) whether the purchases were consistent with the investment objectives and policies of the Unaffiliated Underlying Fund; (ii) how the performance of securities purchased in an Affiliated Underwriting compares to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (iii) whether the amount of securities purchased by the Unaffiliated Underlying Fund in Affiliated Underwritings and the amount purchased directly from Underwriting Affiliates have changed significantly from prior years. The board of directors shall take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to assure that purchases of securities from Affiliated Underwritings are in the best interests of shareholders.

6. An Unaffiliated Underlying Fund shall maintain and preserve permanently in an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications, and shall maintain and preserve for a period not less than six years from the end of the fiscal year in which any purchase from an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase made once an investment by a Trust Series in the securities of an Unaffiliated Underlying Fund exceeded the limits of section 12(d)(1)(A)(i) of the Act, setting forth from whom the securities were acquired, the identity of the underwriting syndicate's members, the terms of the purchase, and the information or materials upon which the board's determinations were made.

7. Prior to an investment by a Trust Series in an Unaffiliated Underlying Fund in excess of the limit in section 12(d)(1)(A)(i), the Trust Series and the Unaffiliated Underlying Fund will execute an agreement stating, without limitation, that the board of directors of the Unaffiliated Underlying Fund and the investment adviser to the Unaffiliated Underlying Fund understand the terms and conditions of the order and agree to fulfill their responsibilities under the order. At the time of its investment in shares of an Unaffiliated Underlying Fund in excess of the limit in section 12(d)(1)(A)(i), a Trust Series will notify the Unaffiliated Underlying Fund of the investment. At such time, the Trust Series also will transmit to the Unaffiliated Underlying Fund a list of the names of each Trust Series Affiliate and Underwriting Affiliate. The Trust Series will notify the Unaffiliated Underlying Fund of any changes to the list as soon as reasonably practicable after a change occurs. The Unaffiliated Underlying Fund and the Trust Series will maintain and preserve a copy of the order, the agreement, and the list with any updated information for a period not less than 6 years from the end of the fiscal year in which any investment occurred, the first 2 years in an easily accessible place.

8. The Trustee will waive or offset fees otherwise payable by a Trust Series in amount at least equal to any compensation (including 12b-1 Fees) received by the Sponsor or Trustee, or an affiliated person of the Sponsor or Trustee, from an Unaffiliated Fund in connection with the investment by a Trust Series in the Unaffiliated Fund.

9. Any sales charges and/or service fees (as those terms are defined in rule 2830 of the NASD Conduct Rules) charged with respect to Units of a Trust Series will not exceed the limits applicable to a fund of funds as set forth in rule 2830 of the NASD Conduct Rules.

10. No Fund will acquire securities of any other investment company in excess of the limits contained in section 12(d)(1)(A) of the Act.

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

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48822; File No. SR–OPRA–2003–01]

Options Price Reporting Authority; Notice of Filing of and Order Approving on a Temporary Basis Not To Exceed 120 Days a Proposed Amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information and Amendments No. 1 and 2 Thereto To Revise the Manner in which the Options Price Reporting Authority Engages in Capacity Planning and Allocates Its Available System Capacity Among the Parties to the Plan

November 21, 2003.

I. Introduction

Pursuant to Section 11A of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 11Aa3–2 thereunder,[2] notice is hereby given that on April 15, 2003 the Options Price Reporting Authority (''OPRA'') submitted to the Securities and Exchange Commission (''Commission'') an amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information

[1] 15 U.S.C. 78k–1.

[2] 17 CFR 240.11Aa3–2.

(''OPRA Plan'' or ''Plan'').[3] The proposed amendment would revise the manner in which OPRA engages in capacity planning and allocates capacity among the exchanges that are parties to the Plan. On July 16, 2003, OPRA submitted Amendment No. 1 to the proposal.[4] On October 12, 2003, OPRA submitted Amendment No. 2 to the proposal.[5] This order approves the proposal as modified by Amendments No. 1 and 2 for a temporary period not to exceed 120 days, and solicits comment on the proposal, as amended by Amendments No. 1 and 2.[6] The text of the proposed Plan amendment, as amended, is available at OPRA, the Commission's Public Reference Room, and on the Commission's Web site.

II. Description and Purpose of the Amendment

Under the proposed Plan amendment, OPRA proposes to revise the manner in which OPRA engages in capacity planning and allocates its available system capacity among the exchanges that are parties to the Plan. OPRA also proposes to amend Subsections I(a) and I(b) of the OPRA Plan to make it clear that participation in OPRA is limited to those self-regulatory organizations (''SROs'') that are engaged in the business of providing a market for the trading of securities options and other eligible securities under the OPRA Plan.

The principal purpose of the proposed amendment is to revise the OPRA Plan in response to the Commission's Order instituting public administrative proceedings against four of OPRA's participant exchanges (Amex, CBOE, PCX and Phlx, referred to collectively as the ''respondent exchanges'') pursuant to Section 19(h)(1) of the Act,[7] and specifically in response to Section IV.B.c. of the Order (the ''Undertaking''). The Undertaking requires each of the four respondent exchanges, acting jointly with all other options exchanges,[8] to modify the structure and operation of OPRA in various ways that would eliminate much of the need for joint and collective action in the capacity planning and allocation process. The three specific requirements of the Undertaking and the manner in which the proposed amendment is intended to satisfy these requirements are described below.

The respondent exchanges must establish a system for procuring and allocating options market data transmission capacity that eliminates joint action by the participants in OPRA in determining the amount of total capacity procured and the allocation thereof, and provides that each participant in OPRA would independently determine the amount of capacity it would obtain.

The proposed amendment to the OPRA Plan (reflected in proposed new Section III(g) and related definitions) would require each party to the Plan from time to time to independently project the capacity it would need and to privately submit requests for capacity based on its projections to an ISCA, which would maintain these individual capacity projections and requests in confidence. The proposed definition of the ISCA in Section II(m) of the Plan would require the ISCA to maintain the confidentiality of this information, consistent with the provisions of Section III(g) of the Plan.[9] Revised Section III(g) of the Plan would clarify that confidential capacity-related information obtained by the ISCA would not be used by the ISCA in any of its other business activities in a manner that may result in the information being made available to any of the parties to the Plan, or to use it in any manner that is otherwise inconsistent with the ISCA's obligation to hold the information in confidence.[10] The ISCA may share this information with the parties only in the form of aggregate capacity requests that do not identify the individual capacity requests of any of the parties. The ISCA would then determine how and when to modify the OPRA System in order to provide to each party the capacity it has requested and how the cost of such modifications is to be allocated among the parties all in accordance with and subject to the proposed Capacity Guidelines that are incorporated in the Plan as part of the proposed amendment. Under the proposed amendment, each party would be entitled to the capacity it has requested and would be obligated to authorize and fund the modifications of the OPRA System in accordance with the ISCA's determinations and the specific cost allocation provisions of the proposed Capacity Guidelines.

The proposed Capacity Guidelines describe the function and authority of the ISCA and its procedures in greater detail than in the Plan itself. Under the procedures specified in the proposed Capacity Guidelines, the ISCA would promptly review the capacity projections and requests it receives from the parties, would discuss proposed modifications with OPRA's Policy and Technical Committees and the OPRA Processor, and would discuss with each party that has requested additional capacity the ISCA's estimate of the cost to that party of providing the capacity it requested. In every case, the ISCA would report to OPRA concerning any modifications to the OPRA System that it believes are called for in response to the parties' aggregate projections and requests. In these discussions and reports, no information from any party would be disclosed to any other party except in the form of aggregate projections or requests. In addition, OPRA proposes in Guideline No. 1 of the Capacity Guidelines to require the ISCA to maintain internal safeguards and procedures adequate to assure that the requirements of the Plan pertaining to the confidentiality of information provided to the ISCA would be satisfied.[11] Under the proposed amendment to the Plan, the person designated to act as the ISCA, before it begins to act in that capacity, would be required to furnish a written description

[3] OPRA is a national market system plan approved by the Commission pursuant to Section 11A of the Act and Rule 11Aa3–2 thereunder. *See* Securities Exchange Act Release No. 17638 (March 18, 1981), 22 S.E.C. Docket 484 (March 31, 1981).

The OPRA Plan provides for the collection and dissemination of last sale and quotation information on options that are traded on the participant exchanges. The five participants to the OPRA Plan are the American Stock Exchange LLC (''Amex''), the Chicago Board Options Exchange, Inc. (''CBOE''), the International Securities Exchange, Inc. (''ISE''), the Pacific Exchange, Inc. (''PCX''), and the Philadelphia Stock Exchange, Inc. (''Phlx'').

[4] *See* letter from Michael L. Meyer, Counsel to OPRA, Schiff, Hardin & Waite, to Deborah Flynn, Assistant Director, Division of Market Regulation (''Division''), Commission, dated July 15, 2003, replacing in its entirety the initial proposal filed on April 15, 2003 (''Amendment No. 1''). In Amendment No. 1, OPRA provides additional discussion of the proposed Capacity Guidelines that describe the function, authority, and procedures of the Independent System Capacity Advisor (''ISCA'') and clarified in the proposed Plan's language and corresponding discussion that the selection of the ISCA is subject to being filed with the Commission as an amendment to the Plan, to be put into effect upon filing.

[5] *See* letter from Michael L. Meyer, Counsel to OPRA, Schiff, Hardin & Waite, to Deborah Flynn, Assistant Director, Division, Commission, dated October 15, 2003 (''Amendment No. 2''). In Amendment No. 2, OPRA specifies in the proposed Plan's language and the proposed Capacity Guidelines the ISCA's obligation to maintain the confidentiality of the information entrusted to it by OPRA's participants in the capacity planning process.

[6] 17 CFR 240.11Aa3–2(c)(4).

[7] Order Instituting Public Administrative Proceedings Pursuant to Section 19(h)(1) of the Act, Making Findings and Imposing Remedial Sanctions. Securities Exchange Act Release No. 43268, dated September 11, 2000 and Administrative Proceeding File 3–10282 (''Order'').

[8] ISE is not a respondent exchange subject to the Order. Nevertheless, as a party to the OPRA Plan, ISE participated fully in all of the discussions that led to the approval of the proposed amendment, and it joined with the other parties in approving the proposed amendment and authorizing its filing with the Commission.

[9] *See* Amendment No. 2, *supra* note .

[10] *Id.*

[11] *Id.*

of these internal safeguards and procedures to the Commission.[12]

The proposed Capacity Guidelines also provide that, in allocating OPRA's capacity-related costs among the parties, the first $5 million of costs in any year would be allocated as currently provided under the OPRA Plan, based on the relative trading volume of each of the parties. Costs above this amount would be allocated in a fair and equitable manner as determined by the ISCA. The $5 million amount would be subject to adjustment on an annual basis, if approved by 75% of the parties.

A prospective new options exchange would have to inform the ISCA, at least 6 months prior to the time it proposes to commence trading, of the initial amount of system capacity it would need. The costs of providing initial system capacity to an applicant in accordance with its request, as determined by the ISCA, would be included in the applicant's Participation Fee payable under Section 1(b) of the OPRA Plan. Also, under Guideline No. 6 of the proposed Capacity Guidelines, if the new party has not received the capacity it has requested at the time it has commenced trading options, and to the extent there is any excess capacity available in the system that has not been provided to any of the parties, the ISCA would be able to allocate to the new party all or a portion of any such excess capacity in order to provide the new party with the amount of capacity determined by the ISCA to be sufficient to satisfy the reasonable needs of the new party until it has been provided with the capacity it initially requested.

The proposed Capacity Guidelines would permit the ISCA to provide less than all of the capacity requested by the parties if the ISCA determines that: (1) The capacity requests of one or more of the parties are unreasonable, or (2) it is not reasonable to develop or maintain a system that has capacity sufficient to satisfy the requests of the parties.[13] The ISCA would be authorized to allocate system capacity among the parties under circumstances when available capacity is insufficient to provide each party with the capacity it has requested; however, the ISCA would not be authorized to require any party to give up any capacity previously provided to it at the party's request, other than in response to a major systems failure or other catastrophe.[14] In addition, the ISCA's authority to modify the OPRA System and to obligate the parties to pay the costs of such modifications would be limited as follows: (i) The ISCA could not authorize a modification to the OPRA System that, together with other capacity increases previously authorized by the ISCA, represents an increase in the total capacity of the System in excess of 15,000 messages per second over the immediately preceding twelve months unless at least 75% of the parties consent to such increase; (ii) the ISCA could not authorize a modification to the OPRA System if the Processor disagrees with any material aspect of the manner or scope of the modification unless at least 75% of the parties consent to such modification; and (iii) the ISCA could not authorize a modification to the OPRA System that makes major changes to the System, such as changing the types of servers used in the System or changing the communication protocols used in the network unless at least 75% of the parties consent to such modification.

As a limited exception to the allocation of System capacity in accordance with the parties' requests and the ISCA's determinations, a provision is made in proposed new Section III(h) of the Plan for a party, on an anonymous basis, to offer to acquire additional capacity from, or make excess capacity available to, another party. Furthermore, to promote the most efficient utilization of available capacity, OPRA proposes in Section III(g) of the Plan to provide for the continued utilization of a ''dynamic throttle,'' so as to automatically make available to a party with an immediate need for additional capacity, on a short-term interruptible basis, any unused capacity that may then be available. A party receiving additional capacity by operation of the dynamic throttle would be required to pay for it at an above-cost rate, so as to discourage parties from submitting unrealistically low capacity requests in the belief that some unused capacity of other parties would always be available to them.

Furthermore, under the proposed amendment, future Plan amendments, including amendments to the proposed new provisions of the Plan pertaining to capacity planning and allocation, would continue to require the unanimous approval of the parties. However, decisions relating to the selection or termination of the ISCA, certain changes to the authority of the ISCA, and changes to the Capacity Guidelines may be authorized by a vote of 75% of the parties. In addition, the selection of the ISCA would be required to be filed with the Commission as an amendment to OPRA's national market system plan.

In accordance with this requirement, this filing reflects OPRA's selection of the Options Clearing Corporation (''OCC'') to act as the ISCA upon the effectiveness of the proposed amendment to the Plan. OCC is a registered clearing agency that, while nominally owned by the five options exchanges, is an independent entity that is not controlled by any exchange. Each of the five exchanges owns a 20% interest in OCC, so that, on the basis of stock ownership alone, no exchange has a controlling interest. However, OPRA believes that OCC's independence is assured in ways that go beyond stock ownership. Pursuant to the bylaws of OCC, its 16-person Board of Directors consists of one Director from each of the five exchanges, nine representatives of OCC clearing member firms, one Public Director, and one Management Director. The exchanges have no voice in the selection of Member Directors, the Public Director, or the Management Director. Thus each exchange has only a 6.25% representation on the OCC Board, and all of the exchanges together represent only 31.25% of the Board.

OPRA believes that OCC's independence has long been recognized by the exchanges and by the Commission. This is reflected not only in the selection of OCC to act as the ISCA by the unanimous vote of all five exchanges, but in OCC's other roles as the central issuer and clearing agency for options traded on five competing exchanges, as the developer and manager of the intermarket options linkage facility pursuant to the Options Intermarket Linkage Plan,[15] and as the arbiter of the eligibility of underlying stocks for options trading pursuant to the Options Listing Procedures Plan.[16] OCC serves in these capacities with the approval of all five exchanges and with the Commission's approval, which OPRA believes stands as an acknowledgement of OCC's independence.

The respondent exchanges must establish a system for gathering and disseminating business information from and to participants of OPRA such that all nonpublic information specific to a participant in OPRA shall remain segregated and confidential from other

[12] *Id.*

[13] Guideline No. 1, Capacity Guidelines.

[14] Guideline No. 6, Capacity Guidelines.

[15] Securities Exchange Act Release Nos. 43086 (July 28, 2000), 65 FR 48023 (August 4, 2000) (order approving the Linkage Plan submitted by Amex, CBOE, and ISE); 43574 (November 16, 2000), 65 FR 70850 (November 28, 2000) (order approving PCX as participant in the Options Intermarket Linkage Plan); and 43573 (November 16, 2000), 65 FR 70851 (November 28, 2000) (order approving Phlx as a participant in the Options Intermarket Linkage Plan).

[16] *See* Securities Exchange Act Release No. 44521 (July 6, 2001), 66 FR 36809 (July 13, 2001) (order approving a proposed options listing procedures plan by Amex, CBOE, ISE, OCC, PCX, and Phlx).

participants (except for information that may be shared in connection with joint activities permitted as necessary to fulfill the functions and objectives of OPRA as stated in the Plan).

As noted in the discussion above, the proposed amendment would require each party's individual capacity projections and requests to be submitted to the ISCA in confidence, and the ISCA would be expressly prohibited from sharing this information with any of the other parties, except in the form of aggregate information that does not identify the individual capacity requests of any of the other parties. The ISCA would be required under Section II(m) of the Plan to maintain the confidentiality of this information, consistent with the provisions of Section III(g) of the Plan, which would specify that confidential capacity-related information obtained by the ISCA would not be used by the ISCA in any of its other business activities in a manner that may result in the information being made available to any of the parties to the Plan, or to use it in any manner that is otherwise inconsistent with the ISCA's obligation to hold the information in confidence.[17] Furthermore, Guideline No. 1 of the proposed Capacity Guidelines would require the ISCA to maintain internal safeguards and procedures adequate to assure that the requirements of the Plan pertaining to the confidentiality of information provided to the ISCA would be satisfied.[18] A written description of these internal safeguards and procedures would have to be furnished to the Commission before the ISCA begins to act in that capacity.[19]

In addition, OPRA proposes to amend Section III(b) of the Plan to make explicit the requirement that each person who performs administrative functions for OPRA, including its Executive Director and other officials and its processor, shall agree that any nonpublic business information pertaining to any party shall be held in confidence and not be shared with the other parties, except for information that may be shared in connection with permitted joint activities. Finally, OPRA proposes to make explicit in the preamble to the Plan that the parties themselves are each obligated to take reasonable steps to insure that their nonpublic business information remains segregated and confidential from the other parties, except for information that may be shared in connection with permitted joint activities.

[17] *See* Amendment No. 2, *supra* note 5.

[18] *Id.*

[19] *Id.*

The respondent exchanges must set forth a statement of OPRA's functions and objectives as permitted under the Exchange Act, and provide for rules and procedures that limit any joint action with respect to OPRA by the participants in OPRA to circumstances in which such joint action is necessary in order to fulfill the stated functions and objectives.

The functions and objectives of OPRA are specifically set forth in the OPRA Plan as it is proposed to be amended, most particularly in the preamble to the Plan and in Section III(b) thereof. These functions and objectives include: (1) Determining the manner in which last sale reports, quotation information, and other market information will be collected, consolidated, and disseminated in satisfaction of the requirements of the Act and establishing the formats for such consolidated information; (2) contracting for and maintaining facilities to support these activities, prescribing forms of contracts to be entered into by vendors, subscribers, and other persons, and making policy determinations pertaining to such contracts; (3) establishing standards concerning the qualifications of different categories of recipients of consolidated information; (4) determining fees to be paid for access to consolidated information as permitted under the Act; (5) determining policy questions pertaining to OPRA's budgetary and other financial matters; (6) managing the capacity of the OPRA System in accordance with determinations made by the ISCA as described above; and (7) otherwise making all policy decisions necessary in furtherance of the objectives of the Act. The proposed amendment makes explicit in the preamble to the Plan that joint action by the parties to the Plan is limited to those matters as to which they share authority under the Plan, and then only to circumstances where such joint action is necessary in order to fulfill the functions and objectives of OPRA as stated in the Plan.

In addition to the above described amendments pertaining directly to OPRA's capacity planning and allocation functions and conforming definitional and editorial modifications, OPRA also proposes to amend subsections I(a) and I(b) of the OPRA Plan to make it clear that a party to the OPRA Plan ceases to be a party at such time as it ceases to maintain a market for the trading of standardized options. This aspect of the amendment is directed at the anomalous situation that recently confronted OPRA when the New York Stock Exchange, Inc. (''NYSE''), after it disposed of its entire options trading program and thereby ceased to have any interest in the activities of OPRA, nevertheless remained a party to the OPRA Plan with the same voting rights and other rights of participation in OPRA as every other party to the Plan.

Although the situation pertaining to the status of the NYSE as a party to the OPRA Plan was recently resolved when the NYSE voluntarily withdrew from OPRA, the current parties to the Plan believe it is necessary to amend the Plan to clarify the status under the Plan of exchanges that continue to have rules governing the trading of options even though they no longer are involved in options trading. The parties believe it is especially important to clarify the matter of eligibility to be a party to the Plan in light of the other amendments to the OPRA Plan that are proposed herein dealing with capacity planning and capacity allocation. The parties believe that only those exchanges that actually maintain a market for the trading of standardized options should have a voice in these critical capacity-related issues.

The parties to the OPRA Plan believe it is consistent with Section 11A of the Act[20] and Rule 11Aa3–2 thereunder[21] to limit participation in OPRA to those SROs that provide a market in the types of securities that are covered by the OPRA Plan. OPRA believes that subparagraph (a)(3)(B) of Section 11A[22] authorizes the Commission, ''in furtherance of the directive in paragraph (2) of this subsection [which includes the directive to assure the availability to brokers, dealers and investors of information with respect to quotations for and transactions in securities] * * * to authorize or require [SROs] to act jointly with respect to *matters as to which they share authority under this title* in planning, developing, operating, or regulating a national market system (or a subsystem thereof) or one of more facilities thereof.'' [Emphasis supplied.] Similarly, OPRA believes that paragraph (b)(3) of Rule 11Aa3–2 under the Act[23] authorizes SROs ''to act jointly in (i) planning, developing, and operating any national market subsystem or facility contemplated by a national market system plan * * * or (iii) implementing or administrating an effective national market system plan.'' OPRA believes that if an SRO does not share authority for national market system activities in respect of a particular type of security

[20] 15 U.S.C. 78k–1.

[21] 17 CFR 240.11Aa3–2.

[22] 15 U.S.C. 78k–1(a)(3)(B).

[23] 17 CFR 240.11Aa3–2(b)(3).

because it does not provide a market for trading that type of security, then there appears to be no basis in the Act for authorizing or requiring that SRO to participate in that national market system.

Finally, the proposed amendment expands the types of persons to whom a party may disseminate proprietary information pertaining to quotations and transactions in its market as an exception to the requirement of the Plan that makes OPRA the exclusive channel for the dissemination of this information. Under Section V(c)(iii) of the current Plan, a party may disseminate its proprietary information outside of the OPRA System to its members for display on terminals used to enter or transmit orders or quotes to the party's market and to other parties, provided that those members who have access to a party's proprietary information must also have equivalent access to consolidated information provided by OPRA, and provided further that a party may not disseminate proprietary information outside of OPRA on any more timely basis than the same information is provided to OPRA. The proposed amendment to the Plan would allow a party to disseminate its proprietary information outside of the OPRA System to any person, provided that the requirements of the current Plan pertaining to equivalent access to consolidated data provided by OPRA and to the timeliness of providing data to OPRA would continue to apply. This proposed change reflects past experience with the electronic trading system of the ISE and the anticipated expanded use of electronic trading systems by other parties, all of which necessarily involve the dissemination of proprietary information over systems that are separate from the OPRA System. OPRA has come to recognize that persons in addition to members of a party who enter quotes or orders into a party's electronic market may benefit from having access to the party's electronic network. The proposed amendment is intended to facilitate this, while at the same time assuring that all persons who have access to a party's proprietary information would also have equivalent access to consolidated market information provided by OPRA.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the proposed Plan amendment, as modified by Amendments No. 1 and 2, including whether the proposal and Amendments No. 1 and 2 are consistent with the Act. Specifically, the Commission requests comment on OPRA's proposal that the first $5 million of OPRA's capacity-related costs in any year would be allocated based on the relative trading volume of each of the parties, while OPRA's costs above $5 million, as proposed in Capacity Guideline No. 7, would be allocated by the ISCA, and, in particular, whether $5 million appears to be an appropriate ceiling before the ISCA may begin allocating OPRA's capacity-related costs. Furthermore, as part the of the ISCA's limitations on authority in proposed Capacity Guideline No. 5, the ISCA may not authorize a modification to the OPRA System that, together with other capacity increases previously authorized by the ISCA, represents an increase in the total capacity of the System in excess of 15,000 messages per second over the immediately preceding twelve months unless at least 75% of the parties consent to such an increase. The Commission seeks comment on whether such a limitation is appropriate, and, if so, whether the 15,000 mps limitation imposed on the ISCA is reasonable, whether OPRA should use a higher threshold, and whether commenters recommend using a threshold percentage based on OPRA's capacity of the previous year instead of a specified amount.

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, and all written statements with respect to the proposal and Amendments No. 1 and 2 that are filed with the Commission, and all written communications relating to the proposal and Amendments No. 1 and 2 between the Commission and any person, other than those 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 the filing will also be available at the principal offices of OPRA. All submissions should refer to File No. SR–OPRA–2003–01 and should be submitted by December 19, 2003.

IV. Discussion

After careful review, the Commission finds that the proposed OPRA Plan amendment, as amended by Amendments No. 1 and 2, is sufficient under the Act and the rules and regulations thereunder for temporary approval of not more than 120 days.[24] Specifically, the Commission believes that the proposed OPRA Plan amendment, which would revise the manner in which OPRA engages in capacity planning and the allocation of system capacity among the exchanges that are parties to the Plan, is sufficient under Section 11A of the Act[25] and Rule 11Aa3–2 thereunder[26] for temporary approval not to exceed 120 days in that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities.

Specifically, the Commission believes that OPRA's proposal to require each party to the Plan to independently project the capacity it would need and to confidentially submit requests for capacity based on such projections to the ISCA is designed to eliminate joint action by the OPRA participants in determining the amount of total capacity procured and the allocation of such capacity. The Commission notes that the proposal would require that the ISCA maintain these individual capacity projections and requests in confidence, and not use such confidential, capacity-related information in any of its business activities that may result in the information being made available to any of the parties of the Plan, or to use such information in any manner that is inconsistent with its obligation to hold the information in confidence. Furthermore, the proposed Capacity Guidelines would require the ISCA to provide the Commission with a written description of its internal safeguards and procedures to ensure compliance with the Plan's confidentiality requirements prior to the time the ISCA first exercises its authority under the Plan. The Commission believes that these requirements provide additional assurance that each exchange's non-public business information would remain segregated would not be made available to its competitors. Furthermore, the Commission emphasizes that neither the Plan nor the Capacity Guidelines should be construed in any manner that would permit individual exchange capacity projections or requests or other confidential, capacity-related information to be shared with the other parties to the Plan.

[24] In approving this proposed OPRA Plan amendment, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[25] 15 U.S.C. 78k–1.

[26] 17 CFR 240.11Aa3–2.

The Commission also believes that the proposed grant to the ISCA of the responsibility to allocate capacity-related costs above a $5 million ceiling would allow the exchanges to avoid the difficult task of having to differentiate the costs and expenses attributable to capacity expansion from the costs and expenses attributable to maintaining and operating the OPRA system. However, as discussed above, the Commission specifically requests comment on whether $5 million would be an appropriate limit before the ISCA may begin allocating the capacity-related costs among the parties.

The Capacity Guidelines provide that the ISCA is ordinarily expected to provide the parties with the systems capacity they have requested. However, the ISCA has some discretion to provide less than all the capacity requested if it determines that the capacity requests of one or more of the parties are unreasonable. A party's request may be found by the ISCA to be unreasonable if it concludes that a party does not have a reasonable need for all the capacity it has requested within the timeframe to which the request applies.

In 1999, the Commission ordered the exchanges to discuss the feasibility of strategies to avoid quote traffic congestion, including quote mitigation strategies.[27] In that Order the Commission recognized that increases in quote message traffic have implications not only for the options exchanges, but all users of options market data. Moreover, the increase in quote message traffic has accelerated since the Commission issued that order. As of September 2003, the exchanges' peak dissemination of messages per second was 15,000 messages per second. As the options exchanges modify their trading rules to permit competing market makers to independently quote, it is anticipated that each exchange's demands on capacity will increase substantially. In addition, the Boston Stock Exchange (''BSE'') has proposed to operate a fully electronic options exchange, which would, if approved by the Commission, place further demands on capacity. For these reasons, the Commission believes that the ISCA may consider whether a party has made reasonable efforts to mitigate the amount of systems capacity that its market data requires of OPRA and other market participants in determining whether a party does not have a reasonable need for all the capacity it has requested.

The Capacity Guidelines also provide that the ISCA may provide less than all the capacity requested if it determines that it is not reasonable to develop or maintain a system that has capacity sufficient to satisfy the request of the parties. In this regard, the Capacity Guidelines provide that the ISCA may determine that it is not reasonable to develop or maintain a system with all of the capacity that has been requested if it concludes that it is not technically feasible to do so, or that a significant number of OPRA vendors cannot or will not carry the amount of message traffic disseminated by such a system. Because of the implications that increases in message traffic have on all users of options market data, the Commission believes it is important that the ISCA consider the technical feasibility for all users of options market data, including vendors, brokers-dealers, and customers, to develop or maintain a system with all of the capacity that has been requested.

In addition, the Commission notes that, under the proposed Capacity Guidelines, the ISCA would not be permitted to increase systems capacity in excess of 15,000 mps during a twelve-month period without the approval of 75% of the parties to the Plan. The Commission believes that some restriction on the ISCA's authority is important to prevent large increases in systems capacity, which could have a significant impact on down-stream users of OPRA data, such as vendors and broker-dealers.

Furthermore, the Plan amendment would require OPRA to file its selection of the ISCA with the Commission as an amendment to the Plan, which would become effective upon filing.[28] This requirement would provide the Commission with the opportunity to review OPRA's choice of the ISCA. Under this Plan amendment, OPRA has proposed to select OCC to function as the ISCA. Because of OCC's status as an SRO, the Commission will be able to monitor its obligations under the Plan to maintain the exchanges' individual capacity projections and requests confidentially.

The Commission believes that the proposed Capacity Guidelines adequately provide for the allocation of capacity to new parties to OPRA. Under Guideline No. 2 of the proposed Capacity Guidelines, a prospective new options exchange would have to inform the ISCA, at least 6 months prior to the time it proposes to commence trading, of the initial amount of system capacity it would need. The ISCA would then aggregate this request for capacity with the requests received from the existing exchanges. Also, under Guideline No. 6 of the proposed Capacity Guidelines, if the new party has not received the capacity it has requested at the time it has commenced trading options, and to the extent there is any excess capacity available in the system that has not been provided to any of the parties, the ISCA would be able to allocate to the new party all or a portion of any such excess capacity in order to provide the new party with the amount of capacity determined by the ISCA to be sufficient to satisfy the reasonable needs of the new party until it has been provided with the capacity it initially requested. These provisions in the proposed Capacity Guidelines, which specifically contemplate new entrants and provide a mechanism for them to acquire capacity, together with the prohibitions imposed on the ISCA from using confidential capacity-related information in any of its other business activities that may result in the information being made available to any of the parties to the Plan or in any manner inconsistent with the ISCA's obligations to hold such information in confidence, are designed to ensure that the existing exchanges would not be able to restrain new entrants from joining OPRA and acquiring the capacity that they require.

Finally, the Commission finds that it is appropriate to put the proposed OPRA Plan amendment, as modified by Amendments No. 1 and 2, into effect summarily upon publication of notice on a temporary basis not to exceed 120 days to permit OPRA to implement the capacity planning process at the soonest practicable time. Since September 2000, when the respondent exchanges entered into the Settlement Order with the

[27] *See* Securities Exchange Act Release No. 41843 (September 8, 1999), 64 FR 50126 (September 15, 1999). In addition, the Commission staff sent a letter to each of the options exchanges stating that the exchanges should continue to work together to, among other things, implement strategies to mitigate quote message traffic. *See* letters from Annette L. Nazareth, Director, Division, Commission to Salvatore F. Sodano, Chairman and Chief Executive Officer, Amex; William J. Brodsky, Chairman and Chief Executive Officer, CBOE; David Krell, President and Chief Executive Officer, ISE; Philip D. DeFeo, Chairman and Chief Executive Officer, PCX; and Meyer S. Frucher, Chairman and Chief Executive Officer, Phlx, dated September 13, 2000.

[28] Although filed effective upon filing, the Commission may, at any time within 60 days of the filing of the amendment, summarily abrogate the amendment and require that such amendment be refiled in accordance with paragraph (b)(1) to Rule 11Aa3–2 under the Act and reviewed in accordance with paragraph (c)(2) of the Rule, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors or the maintenance of fair and orderly markets, to remove impediments to, and perfect mechanisms of a national market system or otherwise in furtherance of the purposes of the Act. 17 CFR 240.11Aa3–2(c)(3).

Commission [29] and simultaneously, consented to the entry of a Final Judgment with the Department of Justice,[30] the options exchanges have interpreted those actions to preclude them from engaging in joint capacity planning under the current OPRA Plan. Since that time, the exchanges' peak dissemination of OPRA data has increased from approximately 3,500 messages per second to more than 15,000 messages per second, as of September 30, 2003. As the existing options exchanges modify their trading rules to permit competing market makers to independently quote, it is anticipated that each exchange's demands on capacity will increase substantially. In addition, the BSE has proposed to operate a fully electronic options exchange, which would, if approved by the Commission, place further demands on capacity. Accordingly, to permit the exchanges to commence capacity planning without the need for joint action, as required by the Settlement Order, the Commission believes it is necessary or appropriate in the public interest, for the protection of investors or the maintenance of fair and orderly markets, to remove impediments to, and perfect mechanisms of, a national market system to approve the proposed amendment to the OPRA Plan on a temporary basis not to exceed 120 days so that options market data can continue to be disseminated on a timely basis.[31]

V. Conclusion

It Is Therefore Ordered, pursuant to Section 11A of the Act,[32] and Rule 11Aa3–2(c)(4) thereunder,[33] that the proposed OPRA Plan amendment, as modified by Amendments No. 1 and 2, (SR–OPRA–2003–01) is approved on a temporary basis not to exceed 120 days.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[34]

Margaret H. McFarland,

Deputy Secretary.

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[29] *See* Order, *supra* note 7.

[30] *United States* v. *American Stock Exchange, LLC et al.* (December 6, 2000), Civ. No. 00–CV–02174 (EGS).

[31] 17 CFR 240.11Aa3–2(c)(4).

[32] 15 U.S.C. 78k–1.

[33] 17 CFR 240.11Aa3–2(c)(4).

[34] 17 CFR 200.30–3(a)(29).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48813; File No. SR–Amex–2003–21]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendments 1, 2, and 3 thereto by the American Stock Exchange LLC Relating to At-the-Close Orders and Auxiliary Opening Procedures

November 20, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 27, 2003, the American Stock Exchange LLC (''Amex'' 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 Amex. On September 10, 2003, the Amex amended the proposed rule change.[3] On October 20, 2003, the Amex amended the proposed rule change.[4] On November 14, 2003, the Amex amended the proposed rule change.[5] 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 Amex proposes (1) to adopt new Rule 131A to set forth Exchange rules and procedures regarding ''at the close'' orders; (2) to amend Amex Rules 131 and 156 relating to on-close orders (also known as ''at-the-close'' orders); (3) to implement additional procedures, relating to daily on-close procedures and expiration day auxiliary opening procedures; and (4) to adopt new Rule 118(m) to reflect procedures applicable to ''at the close'' orders in Nasdaq securities traded on the Exchange pursuant to unlisted trading privileges (''UTP''). The text of the proposed rule change is set forth below. Proposed new language is in *italics*; proposed deletions are in [brackets].

* * * * *

Types of Orders

Rule #131

(a) through (d) No change.

(e) [An at the close order is a market order which is to be executed at or as near to the close as practicable. The term ''at the close order'' shall also include a limit order that is entered for execution at the closing price, on the Exchange, of the stock named in the order pursuant to such procedures as the Exchange may from time to time establish.] *A market at the close (MOC) order is an order to buy or sell a stated amount of a security at the Exchange's closing price. If the MOC order cannot be so executed in its entirety at the Exchange closing price it will be cancelled. A limit at the close (LOC) order is an order to buy or sell a stated amount of a security at the Exchange's closing price if that closing price is at the order's limit price, or better. If the LOC order can not be so executed, in whole or in part, the amount of the order not so executed is to be cancelled. Cancellation of MOC and LOC orders will only occur in certain circumstances such as (1) when trading has been halted in the security and does not reopen prior to the close of the market; (2) for tick sensitive orders whose execution will violate customer instructions (i.e., to buy only on a minus or zero minus tick or to sell only on a plus or zero plus tick) or Exchange Rule 7; (3) for LOC orders, when the Amex closing price is not at the limit price or better, or (4) for tick sensitive MOC/LOC orders and LOC orders, all of which are limited to the closing price, the limited quantity of shares to be traded and the rules of priority as to which orders would trade first left these orders unexecuted in whole or in part.*

(f) through (t) No change.

* * * * *

Market on Close Policy and Expiration Procedures

Rule 131A. The following procedures apply to stocks and do not apply to options or to any security the pricing of which is based on another security or an index (e.g., Exchange Traded Funds or Trust Issued Receipts, securities listed under Section 107 of the Exchange Company Guide, warrants and convertible securities).

(a) In an attempt to minimize price volatility on the close, all market-on-close (MOC) and limit-on-close (LOC)

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation (''Division''), Commission, dated September 9, 2003 (''Amendment No. 1''). In Amendment No. 1, the Amex restated the proposed rule change in its entirety.

[4] *See* letter from Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, to Nancy Sanow, Assistant Director, Division, Commission, dated October 17, 2003 (''Amendment No. 2''). In Amendment No. 2, the Amex restated the proposed rule change in its entirety.

[5] *See* letter from Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, to Nancy Sanow, Assistant Director, Division, Commission, dated November 13, 2003 (''Amendment No. 3''). In Amendment No. 3, the Amex restated the proposed rule change in its entirety.