

will be the day immediately preceding the last regularly-scheduled trading day.

#### Surveillance

The Exchange states that it will use the same surveillance procedures currently utilized for each of the Exchange's other index options to monitor trading in options on each volatility index. The Exchange represents that these surveillance procedures are adequate to monitor the trading of options on these volatility index. For surveillance purposes, the Exchange will have complete access to information regarding trading activity in the pertinent underlying securities.

#### Position Limits

The Exchange proposes to establish position limits for options on each volatility index—VIX, VXN and VXD—at 25,000 contracts on either side of the market and no more than 15,000 of such contracts may be in series in the nearest expiration month.<sup>8</sup> The Exchange states that this is consistent with Exchange Rule 24.4 (Position Limits for Broad-Based Index Options).

#### Exchange Rules Applicable

Except as modified herein, the Exchange Rules in Chapter XXIV will be applicable to the VIX, VXN, and VXD options. Each volatility index will be classified as a "broad-based index" and, under CBOE margin rules, specifically, Exchange Rule 12.3(c)(5)(A), the margin requirement for a short put or call on the respective volatility indexes shall be 100% of the current market value of the contract plus up to 15% of the respective underlying index value.

Additionally, CBOE affirms that it possesses the necessary systems capacity to support new series that would result from the introduction of VIX, VXN and VXD options. CBOE also has been informed that OPRA has the capacity to support such new series.<sup>9</sup>

#### 2. Statutory Basis

CBOE believes that the proposed rule change, as amended, is consistent with Section 6(b) of the Act<sup>10</sup> in general and furthers the objectives of Section 6(b)(5),<sup>11</sup> in particular, in that it will permit trading in options based VIX, VXN, and VXD on the volatility indices pursuant to rules designed to prevent fraudulent and manipulative acts and practices and to promote just and

equitable principles of trade, and thereby will provide investors with the ability to invest in options based on an additional index.

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

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

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

No written comments were solicited or received with respect to 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 CBOE 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 proposed rule change, as amended, 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 at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-CBOE-2003-40 and should be submitted by December 17, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48810; File No. SR-NASD-2003-161]

#### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Establish a Nasdaq Official Opening Price

November 19, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 28, 2003, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), 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 Nasdaq. 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

Nasdaq is filing a proposed rule change to establish a Nasdaq Official Opening Price that would be made available for wholly voluntary use by NASD members and the public. Nasdaq represents that it would calculate and disseminate the Nasdaq Official Opening Price using its proprietary systems, and that the Nasdaq Official Opening Price would not affect the dissemination of last sale information pursuant to the national market system plan governing trading of Nasdaq securities, the Nasdaq UTP Plan.

#### 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

<sup>8</sup> This is consistent with Exchange 24.4 (Position Limits for Broad-Based Index Options).

<sup>9</sup> See Exhibit E to the proposed rule change filed by CBOE, which set out the contract specifications for each product.

<sup>10</sup> 15 U.S.C. 78f(b).

<sup>11</sup> 15 U.S.C. 78f(b)(5).

<sup>12</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.

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

Nasdaq proposes to calculate and disseminate a Nasdaq Official Opening Price for Nasdaq-listed securities. Nasdaq would disseminate the Nasdaq Official Opening Price over the Nasdaq Index Dissemination Service data feed ("NIDS"), a proprietary data feed of Nasdaq. Because the Nasdaq Official Opening Price would be neither a quotation nor a last sale report, it would not be disseminated over either the UTP Quote data feed or the UTP Trade data feed. The Nasdaq Official Opening Price message would contain the prevailing inside quote and the Nasdaq Official Opening Price value. Nasdaq states that the fees for the NIDS feed have previously been filed with the Commission, and that it is not proposing to change those fees.

The Nasdaq Official Opening Price would be equal to the reported price of the first trade executed in the Nasdaq National Market Execution System ("SuperMontage"), which would be based upon orders that are in queue when SuperMontage begins trading at 9:30 a.m. ET ("SuperMontage Opening Match"). SuperMontage executions that are in queue when SuperMontage begins trading at 9:30 a.m. but that are not executed until after 9:30:05 (as a result of being delivered to an order delivery participant that has not responded) would not be eligible to be the SuperMontage Opening Match. SuperMontage executions that result from orders entered into the system after 9:30 also would not be eligible to be the SuperMontage Opening Match.

If there were to be no SuperMontage Opening Match within five seconds after the system opens at 9:30, the Nasdaq Official Opening Price for that security would be based upon the first, last sale eligible trade ("Predicate Trade")<sup>3</sup> that is reported to Nasdaq's Automated Confirmation Transaction System ("ACT"). The Predicate Trade could be an internalized execution

reported to ACT or a SuperMontage execution resulting from an order entered into the system after 9:30, and also reported to ACT. The Predicate Trade could also be a SuperMontage execution based on an order that was in queue in SuperMontage at 9:30 but not executed until after 9:30:05 as a result of being sent to an order delivery participant.

If the Nasdaq Official Opening Price were to be based upon a Predicate Trade rather than a SuperMontage Opening Match, Nasdaq would be able to use the same normalization process that currently applies to the Nasdaq Official Closing Price.<sup>4</sup> Specifically, if the price of the Predicate Trade were to be within the best bid and offer quote entered in the SuperMontage system at the time the trade is reported, the Nasdaq Official Opening Price would equal the reported price of the Predicate Trade. If the price of the Predicate Trade were to be lower than the Nasdaq inside bid, the Nasdaq Official Opening Price would equal the Nasdaq inside bid. Likewise, if the price of the Predicate Trade were to be higher than the Nasdaq inside ask, the Nasdaq Official Opening Price would be the Nasdaq inside ask.

Nasdaq believes that bounding the first ACT trade report by the Nasdaq inside would reduce the extent to which market participants could deliberately affect the Nasdaq Official Opening Price, since firms would need to affect not only the inside quotes but also the Predicate Trade. On the other hand, SuperMontage executions occur only at the prevailing inside bid or ask; therefore, such executions would not need to be bound by a SuperMontage quotation. To be consistent in the delivery of the opening message to market data vendors, the prevailing Nasdaq inside bid and ask would be disseminated with the Nasdaq Official Opening Price whether a SuperMontage trade or an ACT trade sets it.<sup>5</sup>

To illustrate the bounding of an ACT trade report, consider the following example. There is no SuperMontage Opening Match. However, at 9:30:10 a.m., the first, last sale eligible ACT trade is reported with a price of 19.98. The Nasdaq inside bid and ask at 9:30:10 is 20.00 to 20.02. Under the proposal, the Nasdaq Official Opening

Price would be equal to the Nasdaq inside bid, in this case 20.00. If the first, last sale eligible ACT trade price were 20.04 instead of 19.98, the Nasdaq Official Opening Price would equal the Nasdaq inside ask at the time of the trade report, in this case 20.02.

The Nasdaq Official Opening Price value would be disseminated as soon as it is calculated, and changes to the underlying trade report would not affect the Nasdaq Official Opening Price.<sup>6</sup>

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,<sup>7</sup> in general, and with section 15A(b)(6) of the Act,<sup>8</sup> in particular, which requires the NASD's rules to be designed, among other things, to protect investors and the public interest. Nasdaq believes that its current proposal is consistent with the NASD's obligations under these provisions of the Act because Nasdaq believes the proposal would result in the public dissemination of information that more accurately reflects the trading in a particular security at the open. Furthermore, to the extent a security is a component of an index, Nasdaq believes the index would more accurately reflect the value of the market, or segment of the market, the index is designed to measure. Nasdaq believes that the corresponding result should be trades, or other actions, executed at prices more reflective of the current market when the price of an execution, or other action, is based on the last sale, the high price or low price of a security, or the value of an index.

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

Nasdaq does not believe that the proposed rule change will 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.

<sup>6</sup>Nasdaq represents that it will make an effort to inform users of Nasdaq of when the Nasdaq Official Opening Price is based upon a trade executed in SuperMontage or a Predicate Trade that may have been normalized. Telephone conversation among Jeffrey S. Davis, Associate Vice President and Associate General Counsel, Nasdaq, Alton S. Harvey, Office Head, Office of Market Watch, Division of Market Regulation ("Division"), Commission, and Cyndi Rodriguez, Special Counsel, Division, Commission on November 13, 2003.

<sup>7</sup> 15 U.S.C. 78o-3.

<sup>8</sup> 15 U.S.C. 78o-3(b)(6).

<sup>4</sup> See Securities Exchange Act Release No. 47517 (March 18, 2003), 68 FR 14446 (March 25, 2003) (SR-NASD-2002-158).

<sup>5</sup> In the event that a security is in a trading halt prior to market open and that halt continues past 9:30, the Nasdaq Official Opening Price for that security would equal the reported trade price of the first last sale eligible trade reported after the trading halt is lifted and the inside market for the security is uncrossed.

<sup>3</sup> Four types of trade reports are not last sale eligible and, thus, would not be eligible to affect the Nasdaq Official Opening Price: cash sales (which include the "C" trade report modifier), next day sales (.ND), seller trades (.S), and after hours trades (.T).

### 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 self-regulatory organization 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 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 Room. Copies of the filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR-NASD-2003-161 and should be submitted by December 17, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48808; File No. SR-NYSE-2003-35]

#### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc. to Extend the 30-Day Free Trial Period for Broker Volume

November 19, 2003.

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 November 14, 2003, 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 Exchange filed the proposal pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>3</sup> and Rule 19b-4(f)(2) thereunder<sup>4</sup> as one establishing or changing a due, fee or other charge imposed by the self-regulatory organization, which renders the proposal effective upon filing with the Commission. 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 extend the free 30-day trial period for its NYSE Broker Volume Report service, a service that permits subscribers to view Broker Volume Reports of broker share volume information that the NYSE produces from the NYSE Broker Volume Database. 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 its proposal and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The Exchange 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

By order dated June 13, 2003, the Commission approved a proposed rule change (the "Web Service Fee Filing") by which the NYSE established a monthly \$300 fee for a subscriber's receipt of access to NYSE Broker Volume information that the NYSE makes available via a web-based service (the "NYSE Broker Volume Web Service").<sup>5</sup> That service enables subscribers to log-on to the NYSE Web site (<http://www.nysedata.com>) and to receive formatted displays containing aggregate broker-dealer volume rankings in NYSE-traded securities.

In the Web Service Fee Filing, NYSE agreed to waive the NYSE Broker Volume Web Service fee for 30 days (the "Free Trial Period") for any individual that first subscribed to the NYSE Broker Volume Web Service on or prior to October 1, 2003.

The NYSE has found the Free Trial Period to constitute a successful marketing tool. More than half of all subscribers that subscribe to the NYSE Broker Volume Web Service for the 30-day Free Trial Period continue to subscribe after the Free Trial Period ends. For that reason, the NYSE proposes to extend the application of the 30-day Free Trial Period to subscribers that first subscribe to the NYSE Free Trial Period on or prior to April 1, 2004. To avoid a lapse in the application of the Free Trial Period, the Exchange is making the proposed rule change effective retroactively to October 1, 2003.<sup>6</sup>

The NYSE proposes to continue to apply the Free Trial Period on a rolling basis, determined by the date on which the NYSE first entitles a new individual subscriber or potential individual subscriber to receive the NYSE Broker

<sup>5</sup> See Securities Exchange Act Release No. 48060 (June 19, 2003), 68 FR 37889 (June 25, 2003)(SR-NYSE-2003-11)(approval order).

<sup>6</sup> The Commission notes that the NYSE should have filed the instant proposed rule change before the expiration of the original period approved for the 30-day free trial period in SR-NYSE-2003-11. To ensure uniformity in the fees paid by subscribers to the NYSE's Broker Volume Report service, the Commission has, in this isolated case, allowed the NYSE to file the instant proposed rule change pursuant to Section 19(b)(3)(A)(ii) and Rule 19b-4(f)(2) thereunder, and to apply it retroactively to October 1, 2003. The Commission expects that, in the future, the NYSE will monitor its proposed rule changes to ensure that there are no lapses that would require the application of a proposed rule change retroactively.

<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. 78s(b)(3)(A)(ii).

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

<sup>9</sup> 17 CFR 200.30-3(a)(12).