

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

Nasdaq 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 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, 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 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 NASD. All submissions should refer to file number SR-NASD-2003-135 should be submitted by November 18, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁷

Margaret H. McFarland,

Deputy Secretary.

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⁷ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48627A; File No. SR-NASD-2003-130]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the National Association of Securities Dealers, Inc. Relating to Amendments to Its Recently Adopted Rules Regarding Shareholder Approval for Stock Option or Purchase Plans or Other Equity Compensation Arrangements

October 22, 2003.

Correction

In FR Document No. 03-26588, beginning on page 60426 in the issue for Wednesday, October 22, 2003, the proposed rule text for proposed NASD Rule 4350(i)(1)(A)(iv) did not accurately reflect the current rule text of the rule being amended. Proposed NASD Rule 4350(i)(1)(A)(iv) should read as follows:

(iv) issuances to a person not previously an employee or director of the company, or following a bonafide period of non-employment, as an inducement material to the individual's entering into employment with the company, provided such issuances are approved by either the issuer's *independent* compensation committee [comprised of a majority of independent directors] or a majority of the issuer's independent directors. *Promptly following an issuance of any 2 employment inducement grant in reliance on this exception, a company must disclose in a press release the material terms of the grant, including the recipient(s) of the grant and the number of shares involved.*

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹

Margaret H. McFarland,

Deputy Secretary.

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¹ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48659; File No. SR-NYSE-2002-40]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 by the New York Stock Exchange, Inc. To Establish Two New Crossing Sessions in the Exchange's Off-Hours Trading Facility

October 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 August 29, 2002, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On August 14, 2003, the NYSE filed Amendment No. 1 to the proposed rule change.³ On October 8, 2003, the NYSE filed Amendment No. 2 to the proposed rule change.⁴ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The New York Stock Exchange (the "Exchange") proposes to introduce into its rules "Crossing Session III," for the execution of guaranteed price coupled orders by member organizations to fill the balance of customer orders at a price that was guaranteed to a customer prior to the close of the Exchange's 9:30 a.m. to 4 p.m. trading session. In Amendment No. 1, the Exchange proposes to adopt a new Rule 907 to also add a "Crossing Session IV," whereby an unfilled balance of an order may be filled at a price such that the entire order is filled at no worse price than the Volume Weighted Average Price ("VWAP") for the subject security. Proposed Crossing Session III and

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Mary Yeager, Assistant Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, SEC, dated August 13, 2003, and enclosure ("Amendment No. 1"). Amendment No. 1 proposes to add "Crossing Session IV."

⁴ See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, SEC, dated October 7, 2003, and enclosure ("Amendment No. 2"). Amendment No. 2 deletes the reference to a volume-weighted average price ("VWAP") order from paragraph (c) of proposed Rule 907.

Crossing Session IV would operate as a one-year pilot.

The text of the proposed rule change is below. Proposed new language is in *italics*; proposed deletions are in brackets.

* * * * *

Rule 900

(a) Through (d)—No Change.

(e) As used in this 900 series of Rules and other Rules in their application to Off-Hours Trading, the following terms shall have the meanings specified below:

(i) The term “aggregate-price order” means an order to buy or sell a group of securities, which group includes no fewer than 15 Exchange-listed securities having a total market value of \$1 million or more.

(ii) The term “closing price” means the price established by the last “regular way” sale in a security prior to the official closing of the 9:30 a.m. to 4 p.m. trading session, as determined by the Exchange.

(iii) The term “closing-price order” means an order to buy or sell a security at its closing price.

(iv) *The term “guaranteed price coupled order” means an order to buy for a minimum of 10,000 shares coupled with an order to sell the same quantity of the same security. One side of the guaranteed price coupled order must be for the account of a member organization and the other side must be for the account of one of its customers. Such orders must be entered and priced in accordance with Rule 907.*

(v) [(iv)] The term “Off-Hours Trading Facility” means the Exchange facility that permits members and member organizations to effect securities transactions on the Exchange pursuant to this 900 series of Rules. The term “Off-Hours Trading” refers to trading through that facility.

Rule 907

Guaranteed Price Coupled Orders

(a) *A member organization may enter into the Off-Hours Trading Facility a guaranteed price coupled order or an order to be executed at the volume weighted average price (“VWAP”), subject to the following:*

(i) *The member organization has accepted from its customer prior to the close of trading of the Exchange’s 9:30 a.m. to 4 p.m. trading session an order for at least 10,000 shares, and has guaranteed its customer a specific price with respect to the entire order or the VWAP;*

(ii) *The member organization has recorded, along with all required details*

of the order, the guaranteed price or that the customer has elected the order be executed at the VWAP and has documented the basis upon which the VWAP is to be calculated;

(iii) The guaranteed price coupled order or an order to be executed at the VWAP is for that portion of the customer’s order that could not be executed prior to 4 p.m., but in any event must be at least 10,000 shares;

(iv) The guaranteed price coupled order or VWAP order is priced at a price that ensures that the entire order is executed at a price that is no worse than the guaranteed price or VWAP;

(v) The member organization designates the guaranteed price coupled order as Crossing Session III and the VWAP order as Crossing Session IV.

(b) A guaranteed price coupled order or VWAP order may be entered at any time following the close of the 9:30 a.m. to 4 p.m. trading session on the Exchange until the close of the Consolidated Tape.

(c) A guaranteed price coupled order may be priced at a price that is outside the range of prices for the subject security during the 9:30 a.m. to 4 p.m. trading session.

(d) A guaranteed price coupled order or VWAP order shall be immediately executed upon entry into the Off-Hours Trading Facility.

(e) Upon the close of the Consolidated Tape, the Exchange shall print each trade reported through the Off-Hours Trading Facility as guaranteed price coupled orders or VWAP orders. Guaranteed price coupled orders shall be designated as Crossing Session III. VWAP orders shall be designated as Crossing Session IV.

(f) Member organizations shall not enter a guaranteed price coupled order or VWAP order pursuant to paragraph (a) of this Rule if the order is for a security that was subject to a trading halt at the time the Exchange’s 9:30 a.m. to 4 p.m. trading session ended.

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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, the Exchange 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 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

The purpose of the proposed rule change, as amended, is to add two additional “Crossing Sessions” to the Exchange’s Off-Hours Trading Facility (“OHTF”). Currently, the OHTF consists of “Crossing Session I,” which permits the execution, at the Exchange’s closing price, of single stock, single sided closing price orders and crosses of single-stock, closing price buy and sell orders. The OHTF also consists of “Crossing Session II,” which permits the execution of crosses of multiple-stock (“basket”) aggregate price buy and sell orders. For Crossing Session II, trade reporting is accomplished by reporting to the Consolidated Tape the total number of shares and the total market value of the aggregate-price trades. There is no indication of the individual component stocks involved in the aggregate-price transactions.

As described below, the Exchange is proposing to add a new “Crossing Session III,” which would allow for the execution on the NYSE of “guaranteed price coupled orders” whereby member organizations could fill the unfilled balance of a customer order at a price which was guaranteed to the customer prior to the close of the Exchange’s 9:30 a.m. to 4 p.m. trading session. Crossing Session III would be implemented initially as a one-year pilot program.

The Granting of “Upstairs Stops”. In serving their institutional customers, member firms may offer them a guarantee that a large size order will receive no worse than a particular price. Such a practice is usually referred to as an “upstairs stop” meaning that the firm guarantees that its customer’s order will be executed at no worse price than the agreed-upon, guaranteed price, with the member firm trading for its own account, if necessary, to effectuate the guarantee.

Typically, a member firm will seek to execute as much of the order as possible during the trading day at or below the “stop” price (in the case of a buy order) or at or above the “stop” price (in the case of a sell order). Any portion of the order not filled during the trading day will be completed after hours, with the firm either buying from, or selling to, its customer at a price which ensures that the entire order is executed at a price which is no worse than the “stop” price.

Member firms typically execute the unfilled balance of the order, after the U.S. Consolidated Tape is closed, in the London over-the-counter market, where

trades are not reported in real time. The purpose of this is simply to minimize the possibility that other market participants may ascertain the firm's, or the customer's inventory position, and possibly trade in the subject security to the detriment of the firm that granted the upstairs stop.

The Exchange is proposing to adopt a new post 4 p.m. "Crossing Session" to accommodate member firms that are trading to complete an "upstairs stop" and thereby obviate any perceived need to execute these transactions in London or elsewhere.

In Amendment No. 1, the Exchange is proposing to adopt a new Rule 907 to add, as "Crossing Session IV," a facility whereby member organizations may fill the unfilled balance of a customer's order at a price such that the overall order is filled at a price that is no worse than the volume weighted average price ("VWAP") for the subject security on that trading day. The member organization would be required to document its VWAP agreement with the customer and the basis upon which the VWAP price would be determined. Crossing Session IV would be implemented initially as a one-year pilot program.

The Operation of Crossing Session III and Crossing Session IV. Proposed Crossing Session III and Crossing Session IV would operate as follows:

- (i) The original order as to which an "upstairs stop" or "VWAP" has been granted must be for at least 10,000 shares;
- (ii) The customer must have received a "stop" (guaranteed price) or VWAP for the entire order;
- (iii) The member firm must record all details of the order, including the price it has guaranteed its customer or that the entire order will be filled at no worse than the VWAP;
- (iv) The unfilled balance of the order that would be executed in Crossing Session III or Crossing Session IV must be at least 10,000 shares;
- (v) The customer's order must be executed in Crossing Session III or Crossing Session IV at a price that ensures that the entire order is executed at a price that is no worse than the guaranteed price or the VWAP;
- (vi) Orders may be entered in Crossing Session III or Crossing Session IV between 4 p.m. and 6:30 p.m., and must be identified as either a Crossing Session III or Crossing Session IV order;
- (vii) Member firms will receive an immediate report of execution upon entering an order into Crossing Session III or Crossing Session IV;
- (viii) Orders may be entered into Crossing Session III for execution at

prices outside the trading range in the subject security during the 9:30 a.m. to 4 p.m. trading session;

(ix) Orders may not be entered into Crossing Session III or Crossing Session IV in a security that is subject to a trading halt at the close of the regular 9:30 a.m. to 4 p.m. trading session; and

(x) At 6:30 p.m., the Exchange will print trades reported through Crossing Session III as guaranteed price coupled orders or in Crossing Session IV as VWAP executions.

A proposed amendment to Rule 900 provides a definition of "guaranteed price coupled orders." Proposed new Rule 907 prescribes the operation of Crossing Session III and Crossing Session IV as described above.

Relief from Commission Rules. In approving Crossing Session I and Crossing Session II, the Commission granted exemptive relief from its Rule 10a-1⁵ under the Securities Exchange Act of 1934 (the "Act") (short sale rule) for transactions effected therein, finding that such transactions did not raise all of the same regulatory concerns that are raised by similar transactions during the 9:30 a.m. to 4:00 p.m. trading session. In its filing, the Exchange requests that the Commission extend the exemptive relief from Rule 10a-1 currently available for transactions effected in Crossing Sessions I and II to transactions effected in Crossing Session III as well. However, the NYSE has withdrawn its request for exemptive relief with respect to Crossing Session III.⁶ In Amendment No. 1, the Exchange did not request short sale relief with respect to Crossing Session IV.

2. Statutory Basis

The NYSE believes that the basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)⁷ 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

⁵ 17 CFR 240.10a-1.

⁶ Telephone conversation between Robert J. McSweeney, Senior Vice President, Competitive Position, NYSE, and Mary N. Simpkins, Special Counsel, Division of Market Regulation, Commission, on August 19, 2003.

⁷ 15 U.S.C. 78f(b)(5).

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.

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

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

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For the Commission, by the Division of Market Regulation, pursuant to delegated authority⁸.

Margaret H. McFarland,

Deputy Secretary.

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⁸ 17 CFR 200.30-3(a)(12).