

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-51292; File No. S7-24-89)

March 2, 2005

Joint Industry Plan; Order Extending for One Year the Operation of the Reporting Plan for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis, Submitted by the Pacific Exchange, Inc., the National Association of Securities Dealers, Inc., the American Stock Exchange LLC, the Boston Stock Exchange, Inc., the Chicago Stock Exchange, Inc., the Cincinnati Stock Exchange, Inc., and the Philadelphia Stock Exchange, Inc., and to Extend Certain Exemptive Relief

I. Introduction and Description

On December 14, 2004, the Pacific Exchange, Inc. ("PCX") on behalf of itself and the National Association of Securities Dealers, Inc. ("NASD"), the American Stock Exchange LLC ("Amex"), the Boston Stock Exchange, Inc. ("BSE"), the Chicago Stock Exchange, Inc. ("CHX"), the Cincinnati Stock Exchange, Inc. ("CSE"),¹ and the Philadelphia Stock Exchange, Inc. ("Phlx") (hereinafter referred to collectively as "Participants"),² as members of the operating committee ("Operating Committee" or "Committee") of the Plan submitted to the Securities and Exchange Commission ("Commission") a request to extend the operation of the Plan and also to extend certain exemptive relief as described below.³ On December 14, 2004, the Commission issued a notice for comment and simultaneously granted summary effectiveness to the request to

¹ The Commission notes that the CSE changed its name to the National Stock Exchange, Inc. See Securities Exchange Act Release No. 48774 (November 12, 2003), 68 FR 65332 (November 19, 2003) (File No. SR-CSE-2003-12).

² PCX and its subsidiary the Archipelago Exchange were elected co-chairs of the operating committee ("Operating Committee" or "Committee") for the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis ("Nasdaq UTP Plan" or "Plan") by the Participants.

³ See letter from Bridget M. Farrell, Co-Chairman, and Michael P. Rountree, Co-Chairman, Plan Operating Committee, to Jonathan G. Katz, Secretary, Commission, dated December 14, 2004.

extend the operation of the Plan and certain exemptive relief on a temporary basis not to exceed 120 days from December 21, 2004.⁴ No comments were received in response to the publication of this notice.

The Nasdaq UTP Plan governs the collection, processing, and dissemination on a consolidated basis of quotation and last sale information for each of its Participants. This consolidated information informs investors of the current quotation and recent trade prices of Nasdaq Stock Market, Inc. ("Nasdaq") securities. It enables investors to ascertain from one data source the current prices in all the markets trading Nasdaq securities. The Plan serves as the required transaction reporting plan for its Participants, which is a prerequisite for their trading Nasdaq securities. The Plan is operating subject to a temporary extension.

This order approves, pursuant to Rule 11Aa3-2(c)(2) under the Securities Exchange Act of 1934 ("Act"),⁵ the request to extend operation of the Plan, as modified by all changes previously approved, and the request to extend certain exemptive relief for a one-year period expiring on December 21, 2005.

II. Exemptive Relief

While both Nasdaq and the NASD operate under the umbrella of a single Plan Participant, the submission of two distinct best bids and offers ("BBOs") could be deemed inconsistent with Section VI.C.1 of the Plan.⁶ Pursuant to the 13th Amendment of the Plan and

⁴ See Securities Exchange Act Release No. 50855, 69 FR 76499 (December 21, 2004).

⁵ 17 CFR 240.11Aa3-2(c)(2).

⁶ Section VI.C.1. of the Plan, as approved in the 13th Amendment, states that "[t]he Processor shall disseminate on the UTP Quote Data Feed the best bid and offer information supplied by each Participant, including the NASD"

Rule 11Aa3-2(a),⁷ Nasdaq cannot be granted Plan Participant status until it is registered as a national securities exchange. While Nasdaq submits a distinct BBO from the NASD and until Nasdaq is registered as a national securities exchange, the NASD will submit quotes to the Plan's Securities Information Processor ("SIP") in a manner different than specified in Section VI.C.1. of the Plan and, thus, potentially in conflict with Rule 11Aa3-2(d) under the Act.⁸

As discussed at length in the notice of the 13th Amendment,⁹ the Commission determined to relieve the potential conflict among the SuperMontage approval order,¹⁰ Rule 11Aa3-2,¹¹ and the Plan, by granting the NASD an exemption under Rule 11Aa3-2(f)¹² from compliance with Section VI.C.1. of the Plan as required by Rule 11Aa3-2(d)¹³ until such time as Nasdaq is registered as a national securities exchange. The Plan Participants have requested an extension of the exemptive relief.

III. Discussion

The Commission finds that extending the operation of the Plan is consistent with the requirements of the Act and the rules and regulations thereunder, and, in particular, Section

⁷ 17 CFR 240.11Aa3-2(a).

⁸ 17 CFR 240.11Aa3-2(d). Rule 11Aa3-2(d) under the Act requires a self-regulatory organization participant of national market system plan to comply with the terms of that plan.

⁹ See Securities Exchange Act Release No. 46139 (June 28, 2001 [sic]), 67 FR 44888 (July 5, 2002).

¹⁰ See Securities Exchange Act Release No. 43863 (January 19, 2001), 66 FR 8020 (January 26, 2001).

¹¹ 17 CFR 240.11Aa3-2.

¹² 17 CFR 240.11Aa3-2(f).

¹³ 17 CFR 240.11Aa3-2(d).

12(f)¹⁴ and Section 11A(a)(1)¹⁵ of the Act and Rules 11Aa3-1 and 11Aa3-2 thereunder.¹⁶

Section 11A of the Act directs the Commission to facilitate the development of a national market system for securities, "having due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets," and cites as an objective of that system the "fair competition . . . between exchange markets and markets other than exchange markets."¹⁷ When the Commission first approved of the Plan on a pilot basis, it found that the Plan "should enhance market efficiency and fair competition, avoid investor confusion, and facilitate surveillance of concurrent exchange and OTC trading."¹⁸ The Plan has been in existence since 1990 and Participants have been trading Nasdaq securities under the Plan since 1993.

The Commission finds that extending the operation of the Plan for a year furthers the goals described above by preventing the lapsing of the sole effective transaction reporting plan for Nasdaq securities traded by exchanges pursuant to unlisted trading privileges. The Commission believes that the Plan is a critical component of the national market system and that the Plan's expiration would have a serious, detrimental impact on the further development of the national market system.

The Commission also finds that it is appropriate to extend the exemption under Rule

14 15 U.S.C. 78l(f). The Commission finds that extending the Plan is consistent with fair and orderly markets, the protection of investors and the public interest, and otherwise in furtherance of the purposes of the Act. The Commission has taken into account the public trading activity in securities traded pursuant to the Plan, the character of the trading, the impact of the trading of such securities on existing markets, and the desirability of removing impediments to, and the progress that has been made toward the development of a national market system.

15 15 U.S.C. 78k-1(a)(1).

16 17 CFR 240.11Aa3-1 and 17 CFR 240.11Aa3-2.

17 15 U.S.C. 78k-1(a).

18 See Securities Exchange Act Release No. 28146 (June 26, 1990), 55 FR 27917 (July 6, 1990).

11Aa3-2(f)¹⁹ from compliance with Section VI.C.1. of the Plan as required by Rule 11Aa3-2(d).²⁰ The Commission believes that the requested exemptive relief extension is consistent with the Act, the Rules thereunder, and, specifically, with the objectives set forth in Sections 12(f) and 11A of the Act²¹ and Rules 11Aa3-1 and 11Aa3-2 thereunder.²² The Commission believes that the Plan is a critical component of the national market system and that the requested exemptive relief is necessary to assure the effective operation of the Plan.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Sections 12(f) and 11A of the Act²³ and paragraph (c)(4) of Rule 11Aa3-2²⁴ thereunder, that the operation of the Plan be, and hereby is, extended and that certain exemptive relief also be extended until December 21, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁵

Margaret H. McFarland
Deputy Secretary

19 17 CFR 240.11Aa3-2(f).

20 17 CFR 240.11Aa3-2(d).

21 15 U.S.C. 78l(f) and 15 U.S.C. 78k-1.

22 17 CFR 240.11Aa3-1 and 11Aa3-2.

23 15 U.S.C. 78l(f) and 15 U.S.C. 78k-1.

24 17 CFR 240.11Aa3-2(c)(4).

25 17 CFR 200.30-3(a)(27).