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

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40019; File No. SR–Amex–97–40]

Self-Regulatory Organizations; American Stock Exchange, Inc.; Order Granting Approval to Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 to Proposed Rule Change Relating to Proposed Revisions to the Exchange's Policy Regarding the Use of Wireless Data Communications Devices

May 21, 1998.

I. Introduction

On October 29, 1997, the American Stock Exchange, Inc. (''Amex'' or ''Exchange'') submitted to the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend its policy regarding the use of wireless data communications devices on the trading floor.

Notice of the proposed rule change, together with the substance of the proposal, was published for comment in Securities Exchange Act Release No. 39411 (December 8, 1997), 62 FR 65727 (December 15, 1997). No comments were received on the proposal. The Exchange subsequently filed Amendment No. 1 on March 17, 1998.[3] The order approves the proposed rule filing, as amended.

II. Description

The Exchange has undertaken to build an infrastructure (''Infrastructure'') to support wireless data communications on the trading floor by members and Exchange staff. On September 26, 1996, the Commission approved various rule changes and a policy regarding the use of wireless data communications devices on the trading floor (the ''Wireless Communications Policy'' or ''Policy'').[4] The Wireless Communications Policy was originally based upon a design for the Infrastructure that called for all wireless data transmissions to pass through an application residing between the member firms and the Exchange's wireless infrastructure (the ''Gateway''). The Gateway would have monitored data that was being transmitted to and from the Infrastructure and would have repackaged it to conform to a standard format for all members to use. The Gateway would have permitted the Exchange to make a record of all wireless communications and to unilaterally ''throttle'' all, or selected, member communications in the event that such transmissions used a disproportionate amount of the available radio frequency or threatened to exceed available radio frequency capacity. The Exchange is now proposing to eliminate the Gateway.

As noted above, the Gateway would have maintained a record of all wireless communications. The Exchange states that the records obtained through the Gateway would have been duplicative of records already maintained by member firms pursuant to Commission and Exchange rules and that the proposed rule change will eliminate this duplicative data base. Under the revised Wireless Communications Policy, members will still be required to maintain books and records pursuant to Exchange rules and policies and federal securities laws. According to the Exchange, the relevant Exchange rules require members to prepare and maintain records of orders and transactions containing the information specified in Exchange Rule 111, Commentary .04; Exchange Rule 114, Commentary .09; and Exchange Rules 153, 180, 181, and Exchange Rule 950(a), (c) and (d), Commentary .03. The Exchange's audit trail policies also require members to records the time of trade, executing broker badge number and contra broker badge number with respect to all trades. In addition, the Exchange states that Rules 17a–3(a) (6) and (7) under the Act require registered brokers and dealers to prepare records of brokerage orders and dealer transactions meeting the requirements of these rules, and that these records must be maintained for the period stated in Rule 17a–4(b)(1) under the Act.[5]

In addition, the Exchange states that the elimination of the record keeping capabilities of the Gateway will not cause any diminution of the Exchange's surveillance capabilities because the Exchange will retain the same access to member books and records that it currently possesses. The Exchange currently has the ability to obtain records from its members for investigative purposes pursuant to its authority to require members to produce their books and records and to discipline members (and their employees) that fail to comply with such requests.[6] In the Absence of a Gateway, the Exchange would continue to employ its current procedures for obtaining information from its members and their employees.[7]

With respect to monitoring radio frequency capacity and usage, the revised Wireless Communications Policy will state that the Exchange's staff may request members to reduce radio traffic if and when required because a particular user is using more than its fair share to radio frequency capacity of overall usage is reaching its maximum. Members will be obligated to comply immediately with any such request and their ability to send wireless communications may be immediately terminated for failure to comply.

The Exchange also proposes some further changes to the Wireless Communications Policy to include a requirement that members using wireless technology maintain a record of orders and quotes initiated on the Floor and transmitted to other markets, a statement that members do not acquire a property interest in their assigned band width, a requirement that affiliates be treated as a single entity for purposes of band width assignment and a reduction in the number of handheld terminals that the system is able to support in view of anticipated demand for this capacity.

III. Discussion

The Commission finds that the proposed rule change is consistent with

[7] 17 CFR 200.30–3(a)(12)(1994).

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

[2] 17 CFR 240.19b–4.

[3] See Letter from William Floyd-Jones, Assistant General Counsel, Amex, to Heather Seidel, Attorney, Market Regulation, Commission, dated March 16, 1998 (''Amendment No. 1''). Amendment No. 1 explains in further detail why the Exchange is eliminating the Gateway; which records members are required to keep pursuant to Exchange and Commission rules that the Gateway would have separately maintained; how the Exchange will obtain records from its members for surveillance purposes without the Gateway; and how the Exchange will monitor overall radio frequency usage and individual firm usage in the absence of the a Gateway in order to determine that the wireless infrastructure is approaching its capacity, and which firm(s) is using a disproportionate amount of the radio frequently capacity.

[4] See Securities Exchange Act Release No. 37728 (September 26, 1996), 61 FR 51476 (October 2, 1996).

[5] The Commission notes that in general members, brokers, and dealers are subject to the Commission's recordkeeping and record retention rules, Rule 17a–3, and 17a–4 under the Act (17 CFR 240.17a–3 and 240.17a–4).

[6] See, *e.g.*, Article II, Section 3(a) of the Exchange Constitution, Article V, Section 4(k) of the Exchange Constitution, and Exchange Rule 31.

[7] The Exchange also states that to the best of its knowledge, the Exchange's current procedures for obtaining member books and records are consistent with existing practice at all other exchanges.

the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b).[8] Specifically, the Commission believes the proposal is consistent with the Section 6(b)(5) requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, and, in general, to protect investors and the public.[9]

The Commission continues to believe that the Wireless Communication Policy should help remove impediments to and perfect the mechanism of a free and open market, and protect investors and the public interest, by expediting and making more efficient the process by which members receive and execute orders on the floor of the Exchange. In particular, the Commission believes that the removal of the Gateway should increase efficiency by eliminating any time delay that the requirement that all orders pass through the Gateway subsystem may have caused. The Commission finds, based upon the Exchange's representations concerning the lack of need for a Gateway[10] and the excessive cost and difficulty of designing and implementing the Gateway,[11] that it is consistent with the Act for the Exchange to eliminate the Gateway.

The Commission believes that it is reasonable for the Exchange to conclude that the Gateway is not necessary because the selected radio frequency should be able to support all foreseeable wireless communications and because the Exchange will have the ability to monitor radio frequency capacity and usage and require member firms to cut down on their usage to ensure that the system does not become overloaded. The Exchange states that the Wireless Network Management System (''WNMS'') is a monitoring tool that will enable it to monitor radio frequency usage by (1) all wireless users collectively, (2) a particular firm, and (3) an individual using a handheld terminal within a particular firm. The WNMS combines some of the capabilities of the Gateway and Wireless Control Subsystem which existed in the former design of the wireless infrastructure. The next version of the WNMS will allow the Exchange's personnel to see all, or a selected number, of users sorted according to their use of the system. Each firm (or group of affiliated firms) that has been approved to use wireless technology currently may use up to 1/30th of total radio frequency capacity, and the Exchange would consider a member's use of more than 1/30th of total system capacity to be a disproportionate usage of its radio frequency capacity.[12]

The Commission also believes that the Exchange and member firms should be able to adequately maintain records of all wireless transactions, because of the already existing recordkeeping and surveillance procedures, in the absence of the Gateway. Member firms currently are, and will still be, subject to Exchange and Commission recordkeeping and record retention rules.[13] In addition, the elimination of the recordkeeping capabilities of the Gateway should not cause undue diminution of the Exchange's surveillance capabilities because the Exchange has the ability to obtain those records from members for investigative purposes, with the authority to discipline members who do not comply with such requests.[14]

The Commission finds good cause to approve Amendment No. 1 to the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. Amendment No. 1 clarifies and strengthens the proposed rule change by more fully explaining why the Exchange is amending the Wireless Communications Policy to eliminate the Gateway, and how the Exchange will still have adequate ability to monitor and surveille wireless usage and wireless transactions without the Gateway. Amendment No. 1 does not make any substantive changes to the proposed rule change. Also, the proposed rule change was noticed for the full statutory notice and comment period and no comment letters were received. Accordingly, the Commission believes that it is consistent with Section 6(b)(5) of the Act to approve Amendment No. 1 to the proposal on an accelerated basis.

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 1 to the rule proposal, including whether Amendment No. 1 is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. 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 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 also will be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR–Annex–97–40 and should be submitted by June 18, 1998.

IV. Conculsion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[15] that the proposed rule change (SR–Amex–97–40), as amended, is approved.

For the Commission, by the Division of Market Regulations, pursuant to delegated authority.[16]

[8] 15 U.S.C. 78f(b).

[9] In approving this rule, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[10] In late 1996, the Exchange reviewed the design of the Infrastructure. The Exchange determined that there was no immediate need for throttling because the amount of radio frequency capacity available in the 2.4 GHz frequency could support all foreseeable wireless communications, and that it was unclear when it might become necessary. The Exchange also noted that it could control excessive radio frequency use by denying requests to use wireless applications that required excessive capacity. Also, the Exchange noted there are other radio frequencies and emerging technologies that could be employed in the unlikely event that the capacity of the 2.4 GHz frequency is exhausted. The Exchange concluded that since there was no need for throttling, there was no need for a Gateway and that, if and when necessary, throttling could be accomplished by the member firms without a Gateway.

[11] Also during this 1996 review, the Exchange estimated that the use of a Gateway instead of a router would have more than doubled its costs to develop and install the infrastructure and would have also necessitated a high degree of customized programming which raised reliability issues. In addition to concerns with the Exchange's costs and system reliability, members using the infrastructure with a gateway would have had to conform their message formats to the gateway's requirements, which would have required members that already had developed wireless communications capabilities to incur significant costs to reprogram their existing systems to comply with the Exchange's unique requirements. Potentially, these members would have had to operate different wireless systems on different exchanges.

[12] According to Amex, the Infrastructure has been designed to support 4 million megabits per second; thus, overall usage that approaches the four million megabit level would be considered to be approaching system capacity.

[13] See Description Section *supra.*

[14] The Commission also believes that the miscellaneous amendments to the Wireless Communications policy are reasonable under the Act because the changes are designed to enhance the Policy in light of the Exchange's experience with wireless technology since the Policy was first adopted.

[15] 15 U.S.C. 78s(b)(2).

[16] 17 CFR 200.30–3(a)(12).

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40015; File No. SR–CBOE–98–11]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 to the Proposed Rule Change by the Chicago Board Options Exchange, Inc., Relating to Adjustments in Market Maker Equity

May 20, 1998.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on March 31, 1998, the Chicago Board Options Exchange, Inc. (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the CBOE.[2] 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 CBOE proposes to amend CBOE Rule 12.3, ''Margin Requirements'' by adopting Interpretation and Policy .06, which will allow clearing firms to adjust a market maker's equity under certain limited circumstances so that the clearing firm may extend credit for opening trades. Specifically, proposed Interpretation and Policy .06 will allow a clearing firm to adjust the equity in a market maker's account when the underlying stock price is disseminated after the options close at 3.02 p.m.[3] at a price that is inconsistent with the options closing price.

Copies of the proposed rule change are available at the Office of the Secretary, CBOE, 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 CBOE 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 CBOE 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

CBOE Rule 12.3(f)(3) (C)(3)[4] prohibits clearing firms from extending credit to a market maker for opening transactions when the market maker's account is in deficit. The CBOE proposes to add Interpretation and Policy .06 to CBOE Rule 12.3 to permit a clearing firm to adjust the equity in a market maker's account under certain limited circumstances in order to allow the clearing firm to extend credit for opening trades. Specifically, proposed Interpretation and Policy .06 will permit a clearing firm to adjust the equity in market maker's account when the underlying stock price is disseminated after the options close at 3:02 p.m. at a price that is inconsistent with the options closing price.

In 1997, the CBOE and the other options exchanges changed the closing time for trading equity options and certain narrow-based index options from 3:10 p.m. to 3.02 p.m.[5] Since then, the CBOE has discovered that the equity of market maker's account at a clearing firm can be severely affected when news of a stock underlying a CBOE option is disseminated near the close, resulting in heavy trading and a late trade tape. In these situations, the last sale of the underlying stock could be disseminated well after the overlying options stop trading at 3:02 p.m.,[6] and closing price of the underlying stock may be out of line with the closing quotes and the last sale of the options series. The CBOE notes that while this situation would almost assuredly realign itself at the opening of trading on the next day, the discrepancy in closing prices may cause a market maker's account to have deficit equity. This is true even though from a market risk standpoint the market maker may be hedged.

Proposed Interpretation and Policy .06 would allow a clearing firm to appropriately adjust a market maker's account equity to eliminate a pricing disparity for a trader whose account is in deficit as a result of such a situation. The clearing firm will be required to provide documentation to the CBOE for such adjustments before the opening of trading the next day (or before the firm may extend credit for opening transactions). These adjustments will be made on a case-by-case basis. In situations where the deficit is eliminated by the adjustment and the adjustment is approved by the CBOE's Department of Financial and Sales Practice Compliance, the trader would be permitted to continue trading the next business day.

2. Statutory Basis

The CBOE believes that the proposed rule change is consistent with Section 6(b) of the Act, in general, and furthers the objectives of Section 6(b)(5), in particular, in that, by allowing for an adjustment in a market maker's account equity in situations where the stock and the overlying options close at anomalous prices, the proposal is designed to promote just and equitable principles of trade and to protect investors and the public interest.

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

The 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**

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

[2] On May 7, 1998, the CBOE filed Amendment No. 1 to the proposal. See Letter from Timothy H. Thompson, Director, Regulatory Affairs, Legal Department, CBOE, to Yvonne Fraticelli, Division of Market Regulation, Commission, dated May 6, 1998 (''Amendment No. 1'') In Amendment No. 1, the CBOE revised its proposal to: (1) indicate that CBOE Rule 12.3(f)(3)(C)(3), rather than Regulation X of the Board of Governors of the Federal Reserve System, prohibits a clearing firm from extending credit to a market maker when the market maker's account is in deficit; (2) replace a reference in proposed Interpretation and Policy .06 to CBOE Rule 12.3(b)(1)(D) with a reference to CBOE Rule 12.3(f)(1)(F) to define net liquidating equity; and (3) revise proposed Interpretation and Policy .06 to indicate that clearing firms will be allowed to extend credit for opening trades, rather than to permit opening trades.

[3] All time references are in Central Time.

[4] See Amendment No. 1, *supra* note 2.

[5] See *e.g.*, Securities Exchange Act Release No. 38543 (May 14, 1997), 62 FR 28082 (May 22, 1997) (order approving File No. SR–CBOE–96–71).

[6] When the options markets closed at 3:10 p.m., this situation would rarely arise because the final stock prices were almost always disseminated by the time the options markets closed, thereby allowing options market makers to adjust their quotes accordingly.