SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51391; File No. SR-CTA/CQ-2004-01)

March 17, 2005

Consolidated Tape Association; Order Approving the Seventh Substantive Amendment to the Second Restatement of the Consolidated Tape Association Plan and the Fifth Substantive Amendment to the Restated Consolidated Quotation Plan

I. Introduction

On December 3, 2004, the Consolidated Tape Association ("CTA") Plan and Consolidated Quotation ("CQ") Plan participants ("Participants")[1] submitted to the Securities and Exchange Commission ("Commission") a proposal to amend the CTA and CQ Plans (collectively, the "Plans"),[2] pursuant to Rule 11Aa3-2 under the Act.[3] The proposal represents the 7th substantive amendment made to the Second Restatement of the CTA Plan ("7th Amendment") and the 5th substantive amendment to the Restated CQ Plan ("5th Amendment"), and reflects changes unanimously adopted by the Participants. The proposed amendments would

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1 Each Participant executed the proposed amendments. The current Participants are the American Stock Exchange LLC ("Amex"); Boston Stock Exchange, Inc. ("BSE"); Chicago Board Options Exchange, Inc. ("CBOE"); Chicago Stock Exchange, Inc. ("CHX"); Cincinnati Stock Exchange, Inc. (now known as the National Stock Exchange) ("NSX"); National Association of Securities Dealers, Inc. ("NASD"); New York Stock Exchange, Inc. ("NYSE"); Pacific Exchange, Inc. ("PCX"); and Philadelphia Stock Exchange, Inc. ("Phlx").

2 See Securities Exchange Act Release Nos. 10787 (May 10, 1974), 39 FR 17799 (order approving CTA Plan); 15009 (July 28, 1978), 43 FR 34851 (August 7, 1978) (order temporarily approving CQ Plan); and 16518 (January 22, 1980), 45 FR 6521 (order permanently approving CQ Plan). The most recent restatement of both Plans was in 1995. The CTA Plan, pursuant to which markets collect and disseminate last sale price information for listed securities, is a "transaction reporting plan" under Rule 11Aa3-1 of the Securities Exchange Act of 1934 ("Act"), 17 CFR 240.11Aa3-1 and a "national market system plan" under Rule 11Aa3-2 of the Act, 17 CFR 240.11Aa3-2. The CQ Plan, pursuant to which markets collect and disseminate bid/ask quotation information for listed securities, is also a "national market system plan" under Rule 11Aa3-2 of the Act, 17 CFR 240.11Aa3-2.

3 17 CFR 240.11Aa3-2.

modify the procedures for joining the Plans as a new Participant. In addition, the proposed amendments would perform a "housekeeping" function of incorporating into the text of the Plans changes to the corporate names and addresses of some Participants. Notice of the proposed amendments was published in the Federal Register on January 19, 2005.[4]

The Commission received no comments on the proposed amendments. This order approves the 7th Amendment to the CTA Plan and the 5th Amendment to the CQ Plan.

II. Description of the Proposed Amendments

The proposed amendments would modify the procedures pursuant to which a national securities exchange or a national securities association may join the Plans as a new Participant. More specifically, the proposed amendments would modify the process for determining the fee that a national securities exchange or a national securities association must pay in order to join the Plans.

Currently, both Plans require a new entrant to pay the current Participants an amount that "attributes an appropriate value to the assets, both tangible and intangible, that CTA has created and will make available to such new Participant."[5] The Plans allow for the Participants to consider one or more of six factors in assessing the appropriate value.[6] The Commission approved the addition of these entry-fee criteria to both Plans in 1993.[7] However, since the criteria were adopted, no entity has joined the Plans. CBOE was the last Participant to join the Plans, having done so in 1991.

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4 See Securities Exchange Act Release No. 51012 (January 10, 2005), 70 FR 3075 ("Notice").

5 Section III(c) of the Plans.

6 See id.

7 See Securities Exchange Act Release No. 33319 (December 10, 1993), 58 FR 66040 (December 17, 1993) (File No. S7-27-93).

In 1999, the Options Price Reporting Authority ("OPRA") Plan participants sought to adopt the same criteria adopted by the CTA to determine the appropriate entrance fee to join the OPRA Plan.[8] The Commission received negative comments regarding the previously approved factors OPRA proposed to consider in determining the amount of its participation fee. The commenters asserted that the proposed OPRA Plan criteria could create a barrier to entry into the options industry that could harm competition. In response, OPRA modified and adopted new, more objective factors to be considered in determining the appropriate new entrant participation fee.[9] Consequently, in light of the comments received on the current CTA Plan and CQ Plan criteria that OPRA was proposing to adopt, at the October 2001 CTA meeting, a representative of the Division of Market Regulation ("Division") suggested that the CTA consider amending its Plan criteria for determining new entrant fees to conform to the criteria that had been adopted by OPRA.

In 2002, The Nasdaq Stock Market, Inc. ("Nasdaq") and Island ECN expressed interest in joining the Plans and inquired as to the amount of the entry fee. In response, the Participants engaged Deloitte & Touche, asking it to assign a value to each of the six current Plan criteria for determining a new entrant's fee. The Division expressed concerns to the Participants regarding the methodology contemplated by the CTA because it believed that the methodology contained factors that should not be considered in determining a proper entrance fee for new entrants.[10]

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8 See Securities Exchange Act Release No. 42002 (October 13, 1999), 64 FR 56543 (October 20, 1999) (notice of File No. SR-OPRA-99-01).

9 See Securities Exchange Act Release No. 43697 (December 8, 2000), 65 FR 78518 (December 15, 2000) (order approving File No. SR-OPRA-00-08); see also Securities Exchange Act Release Nos. 43347 (September 26, 2000), 65 FR 59035 (October 3, 2000) (notice of File No. SR-OPRA-00-08); and 42817 (May 24, 2000), 65 FR 35147 (June 1, 2000) (notice of filing and order granting accelerated effectiveness to File No. SR-OPRA-99-01).

10 See letters to William J. Brodsky, Chairman and Chief Executive Officer, CBOE; David

The Division further noted that the entrance fee amount the Participants were considering at the time might have an anti-competitive effect on potential new entrants.[11]

In light of the Division's concerns that the current Plan standards do not provide an objective basis for determining entrance fees for new Participants and that the fees should be based solely on objective criteria and costs that could be easily calculated and readily discernable (similar to the methodology currently used for determining such fees in the OPRA Plan),[12] the Participants proposed new standards for determining a new Participant's entry fee based on the OPRA Plan criteria. The proposed amendments would allow the Participants to consider one or both of the following in determining a new entrant's fee: (1) the portion of costs previously paid by the CTA for the development, expansion and maintenance of CTA's facilities which, under generally accepted accounting principles ("GAAP"), could have been treated as capital expenditures and, if so treated, would have been amortized over the five years preceding the admission of the new Participant (and for this purpose all such capital expenditures shall be deemed to have a five-year amortizable life); and (2) previous amounts paid by other Participants when they joined the Plans. In addition, the proposed amendments would require the new Participant to reimburse the Plan Processor for the costs that the Processor incurs in modifying CTS and CQS systems to accommodate the new Participant and for any additional capacity

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Colker, President and Chief Executive Officer, NSX; Philip D. DeFeo, Chairman and Chief Executive Officer, PCX; Meyer S. Frucher, Chairman and Chief Executive Officer, Phlx; Richard Grasso, Chairman and Chief Executive Officer, NYSE; David A. Herron, Chief Executive Officer, CHX; Richard Ketchum, President and Deputy Chairman, Nasdaq; Kenneth L. Leibler, Chairman and Chief Executive Officer, BSE; and Salvatore F. Sadano, Chairman and Chief Executive Officer, Amex, from Annette L. Nazareth, Director, dated March 13, 2003.

11 See id.

12 See letters to Thomas E. Haley, Chairman, CTA, from Annette L. Nazareth, Director, Division, Commission, dated August 3, and November 3, 2004.

costs. Any disagreement regarding the fee calculation would be subject to Commission review pursuant to Section 11A(b)(5) of the Act.[13]

Finally, the proposed amendments would perform the "housekeeping" function of updating the names and addresses of the Plans' Participants. In the last few years, the "Pacific Stock Exchange, Inc." has become the "Pacific Exchange, Inc.," the "American Stock Exchange, Inc." has become the "American Stock Exchange LLC," and the Cincinnati Stock Exchange, Inc." has become the "National Stock Exchange."

III. Discussion

After careful review, the Commission finds that the proposed amendments to the Plans are consistent with the requirements of the Act and the rules and regulations thereunder,[14] and, in particular, Section 11A(a)(1) of the Act[15] and Rule 11Aa3-2 thereunder.[16]

The Commission notes that the Plans currently provide procedures pursuant to which a national securities exchange or a national securities association may join the Plans as a new Participant, including payment of a participation/new entrant fee. The Commission further notes that the current six criteria in the Plans that may be considered by Participants in determining a new Participant's entrance fee were questioned when OPRA participants sought to incorporate them into the OPRA Plan in 1999.[17] The Commission believes that some of these current criteria are inappropriate, overly broad, and subjective, and believes that they could potentially have an

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13 15 U.S.C. 78k-1(b)(5).

14 In approving the proposed Plan amendments, the Commission has considered the proposed amendments' impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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

16 17 CFR 240.11Aa3-2.

17 See supra notes 8-11 and accompanying text.

anti-competitive impact on and/or pose a barrier to entry for an entity that wants to join the Plans.[18] In fact, over the last few years, the Commission has repeatedly urged the Participants to amend the Plans to adopt more objective standards for ascertaining a new party's entrant fee, similar to the more recently approved standards in the OPRA Plan.[19] The Commission believes that a more transparent process for determining a proper new entrant fee should help to ensure fairness to new parties and address any potential anti-competitive concerns.

The Commission believes that the main purpose of a participation fee is to require each new party to the Plans to pay a fair share of the costs previously paid by the CTA for the development, expansion, and maintenance of CTA's facilities. Consistent with this purpose, the standards now proposed to be embodied in the Plans for the determination of the participation fee are concerned with these categories of costs. In particular, the Commission notes that the Participants should only consider the costs of tangible assets that could have been treated as capital expenditures under GAAP in the fee calculation,[20] and if so treated, would have been amortized for a five-year period preceding the new party's admission to the Plans.[21] In addition, the Commission notes that the Participants must not consider any historical costs of operating the

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18 The Commission notes that while the current standards in the Plans were approved in 1993, they were never employed by the Participants. The last Participant to join the Plans was CBOE in 1991.

19 See supra notes 8-12 and accompanying text.

20 The Commission understands from the Participants and the Plan Processor that, based on how the Processor bills the CTA and because the Processor does its accounting based on leases rather than ownership of CTA facilities, unless such costs were deemed to be capitalized costs under GAAP, they could not otherwise be considered in calculating the participation fee. Footnote 12 of the Notice provided, in part, that the Participants should only consider tangible assets that "are capital expenditures under GAAP" in the participation fee calculation. The footnote should have instead provided that the costs to be included in the calculation should be those that "could have been treated as capital expenses under GAAP."

21 For this purpose, all such capital expenditures would be deemed to have a five-year amortizable life.

systems prior to the time a new party joins the Plans, or any subjective or intangible costs such as "good will" or any future benefits to the new party.

Another factor proposed to be considered in determining a new Participant's entrance fee is any previous fees paid by other Participants when they joined the Plans. The Commission notes that in considering the amounts that have been paid by other Participants who joined the Plans, the Participants should only consider such fees on a "going forward" basis, i.e., only fees that have been determined by the proposed methodology.[22] The Commission believes that, in the interest of fairness and consistency, the closer in time that any such prior fees were paid in relation to when the new party wants to join the Plans, the greater should be the weight given to this factor.

Finally, the Commission notes that the Participants propose that a new Participant would be required to reimburse the Plan Processor for the costs that the Processor incurs in connection with any modifications to the CTS and CQS systems necessary to accommodate the new Participant, unless these costs have otherwise been paid or reimbursed by the new Participant. The Commission stresses that when utilizing the proposed new standards, the Participants should not consider any costs that would result in a "double counting" of costs because the new entrant and other Participants are required to individually pay the Processor for their own costs (e.g., capacity needs).

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[22] The Commission further notes that the fee that CBOE paid to join the Plans in 1991 should not be considered because it was not based on the proposed new factors and therefore does not constitute a relevant fee for comparison purposes.

In sum, the Commission believes that it is reasonable for the Plans to provide for an initial participation fee to be paid by new parties to the Plans. The Commission further believes that the proposed amendments to the Plans would establish specific, objective factors for determining the amount of the fee payable by new Participants based on costs that could easily be calculated and that are readily discernable. The Commission also believes that the proposed new standards, if appropriately employed by the Participants, should foster a fair and reasonable method for determining the amount of a new Participant's entrance fee to be paid to the Plans.[23] Accordingly, the Commission finds the proposed standards for determining the amount of the participation fee to be appropriate and consistent with the Act.

Furthermore, the Commission believes that updating the names and addresses of the Plans' Participants is important with respect to the accuracy of the Plans, and therefore finds such changes to be consistent with the Act.

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[23] The Commission notes that amount of the new entrant fee would be determined in discussions between the Participants and each new party in light of the standards embodied in the Plans, and under the general oversight of the Commission. Discussions between the Participants and any new party should not take place without Commission staff present. The Commission further notes that any disagreement among the Participants and a new party regarding the fee calculation would be subject to Commission review pursuant to Section 11A(b)(5) of the Act. See 15 U.S.C. 78k-1(b)(5).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 11A of the Act[24] and paragraph (c)(2) of Rule 11Aa3-2 thereunder,[25] that the proposed 7th Amendment to the CTA Plan and the proposed 5th Amendment to the CQ Plan are approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[26]

Margaret H. McFarland
Deputy Secretary

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24 15 U.S.C. 78k-1.

25 17 CFR 240.11Aa3-2(c)(2).

26 17 CFR 200.30-3(a)(27).