pertaining to municipal securities dealers.

Direct general comments to Gary Waxman at the address below. Direct any comments concerning the accuracy of the estimated average burden hours for compliance with Securities and Exchange Commission rules and forms to Kenneth A. Fogash, Deputy Executive Director, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549 and Gary Waxman, Clearance Officer, Office of Management and Budget, room 3208, New Executive Office Building, Washington, DC 20503.

May 22, 1991.

Jonathan G. Katz,

Secretary.

[FR Doc. 91-12950 Filed 5-30-91; 8:45 am]

BILLING CODE 8010-01-M

[Securities Exchange Act of 1934 Release No. 29236/May 24, 1991]

Order Granting Temporary Approval of Registration Until May 31, 1993

In the Matter of: The Registration as a Clearing Agency of the Government Securities Clearing Corp.

(File No. 600-23)

On March 15, 1991, the Government Securities Clearing Corporation ("GSCC") filed with the Securities and Exchange Commission ("Commission") pursuant to section 19(a) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(a), an amended form CA-1.[1] GSCC requested that the Commission grant GSCC full registration as a clearing agency, or, in the alternative, extend GSCC's temporary registration as a clearing agency until such time as the Commission is able to grant GSCC permanent registration. Notice of GSCC's request for extension of temporary registration appeared in the **Federal Register** on April 17, 1991.[2] No comments were received. This order approves GSCC's request by extending GSCC's registration as a clearing agency until May 31, 1993. The Commission has determined that it is appropriate under the Act to continue GSCC's exemption from the participation standards in sections 17A(b)(3)(B) and 17A(b)(4)(B) and the fair representation standards in sections 17A(b)(3)(C) of the Act. This order extending GSCC's temporary registration continues those exemptions.

On May 24, 1988, the Commission granted GSCC's application for registration as a clearing agency, pursuant to sections 17A and 19(a) of the Act, and rule 17Ab2-1 thereunder, for a period of 36 months.[3] One of the primary reasons for GSCC's registration was to provide comparison services for transactions in securities issued or guaranteed by the United States, U.S. government agencies and instrumentalities, and U.S. government-sponsored corporations ("Government Securities").[4]

At the time temporary registration was granted, the Commission noted that GSCC would need to address certain issues relating to GSCC's operations and procedures during the temporary registration period. In addition, GSCC has undertaken to satisfy other requirements in connection with GSCC's clearing fund formula.[5]

In this connection, over the last three years GSCC has, among other things, established admission criteria for its three categories of membership.[6] GSCC is taking affirmative steps to encourage nonprimary Government Securities dealers who are comparison-only members to become full netting members of GSCC. GSCC expects that certain of these comparison-only members will become full netting members in the near future.

GSCC's services include clearance and settlement services for members in processing transactions in Government Securities. Initially GSCC offered a trade comparison service. GSCC has expanded its services and GSCC now offers its members netting and comparison services for trades in Government Securities including forward-settling trades [7] and zero-coupon Government Securities.[8] In connection with GSCC's clearance and settlement services GSCC provides a centralized loss allocation procedure and GSCC maintains margin to offset netting and settlement risks.

The Commission believes that GSCC continues to meet the determinations enumerated in section 17A(b) of the Act. Because GSCC continues to refine its operations and work toward meeting certain undertakings in GSCC's initial temporary registration order and subsequent orders relating to GSCC's netting system, the Commission believes GSCC's temporary registration should be extended for a period of 24 months to allow GSCC time to complete these undertakings.[9]

It is therefore ordered, That GSCC's temporary registration as a clearing agency be, and hereby is, extended until May 31, 1993, subject to the terms, undertakings, and conditions as set forth above.

By the Commission.

Jonathan G. Katz,

Secretary.

[FR Doc. 91-12951 Filed 5-30-91; 8:45 am]

BILLING CODE 8010-01-M

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[1] Letter from Charles A. Moran, President, GSCC, to Brandon Becker, Associate Director, Division of Market Regulation, Commission, dated March 15, 1991.

[2] Securities Exchange Act Release No. 29067 (April 11, 1991), 56 FR 15652.

[3] Securities Exchange Act Release No. 25740 (May 24, 1988), 53 FR 19839.

[4] *Id.*

[5] Those undertakings include: (1) The development of an automated system for the assessment, based on maturity ranges, of price volatility; (2) monitoring the adequacy of its margin levels and increasing its confidence level to 99% for all maturity ranges, and evaluating the cost of such a change to GSCC and to its membership; (3) the development of participation standards listing in its rules all the statutory enumerated entities and the provision of standards to accommodate such entities when those entities seek membership with GSCC; (4) re-examining GSCC's Board selection criteria to ensure fair representation among GSCC's membership; and (5) conferring with the Commission regarding GSCC's standard of care in performing non-custodial clearing agency services.

[6] GSCC rules enumerate three categories of membership: government securities brokers, dealers and clearing agent banks. GSCC Rules and Procedures, rule 2.

[7] Securities Exchange Act Release No. 27902 (April 12, 1990), 55 FR 15066.

[8] Securities Exchange Act Release No. 28842 (January 31, 1991), 56 FR 5032.

[9] See Securities Exchange Act Release Nos. 25740 (May 24, 1988), 53 FR 19839 ("Temporary Registration Order"); 27006 (July 7, 1989), 54 FR 29798 and 29701 (April 12, 1990), 55 FR 15055 ("Netting Orders"); and 28842 (January 31, 1991), 56 FR 5032 (Netting of zero-coupon securities).

[Release No. 34-29229; File No. SR-NYSE-91-05]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Approving Proposed Rule Change Relating To Listing Criteria for Securities Other Than Common Stocks and Bonds

On January 24, 1991, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") submitted to the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities and Exchange Act of 1934 ("Act") [1] and rule 19b-4 thereunder,[2] a proposed rule change to standardize certain listing requirements for securities other than common stocks and bonds.

The proposed rule change was published in Securities Exchange Act Release No. 28944 (March 5, 1991), 56 FR 10935. No comments were received on the proposed rule change.

[1] 15 U.S.C. 78s(b)(1) (1982).

[2] 17 CFR 240.19b-4 (1989).

Specifically, the Exchange proposes to amend §§ 703.12 Warrant Listing Process, 703.15 Foreign Currency Warrants, 703.17 Index Warrants Listing Standards, 703.18 Contingent Value Rights, and 703.19 Other Securities of the Exchange's Listed Company Manual to standardize certain hybrid product listing requirements.[3] The minimum proposed standardized requirements for these financial products referenced above are: (1) 1 million securities outstanding; (2) 400 holders; (3) a one year life; and (4) $4 million in market value.

Over the years, the NYSE has developed separate listing standards for a variety of innovative securities which are not traditional common stocks or bonds that are traded on the Exchange. These securities include: common stock warrants, foreign currency warrants, index warrants, and special purpose securities not readily categorized as equity or debt.

The Exchange originally developed these security-related listing standards separately in anticipation of the unique characteristics of each of these different securities. However, experience gained in bringing these issues to market has shown that varying listing requirements among these products is unnecessary. In particular, issuers and underwriters are confused by different requirements for seemingly similar instruments. Accordingly, the Exchange proposes to consolidate the listing standards for certain hybrid products traded on the NYSE.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, the requirements of section 6(b)(5).[4] Specifically, the Commission believes that it will be less confusing for issuers and investors alike and beneficial to the mechanism of a free and open market, if the listing standards for certain hybrid products traded on the NYSE are standardized. Moreover, the listing standards chosen by the Exchange are designed to ensure that there is a sufficient float and shareholder base for a hybrid security so that a fair and orderly market can be maintained. The standards basically are culled from the standards that currently apply to various hybrid products listed on the Exchange.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[5] that the proposed rule change (SR-NYSE-91-05) to standardize listing requirements for certain securities other than common stock and bonds, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[6]

Jonathan G. Katz,

Secretary.

Dated: May 23, 1991.

[FR Doc. 91-12841 Filed 5-30-91; 8:45 am]

BILLING CODE 8010-01-M

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[3] In its filing, the Exchange proposed to modify Section 703.20 governing the listing standards applicable to Units, Component Securities and Similar Securities which is contained in pending filing SR-NYSE-90-32. In order to consolidate all proposed rule changes dealing with proposed § 703.20, the Exchange considered the proposed changes to § 703.20 contained in file SR-NYSE-91-05 as an amendment to file SR-NYSE-90-32. *See* letter from Linda Simplicio, Vice-President, Division Counsel, Listed Company Compliance, NYSE, to Thomas Gira, Branch Chief, Options Regulation, Division of Market Regulation, SEC, dated February 4, 1991.

[4] 15 U.S.C. 78f(b)(5) (1982).

[5] 15 U.S.C. 78s(b)(2) (1982).

[6] 17 CFR 200.30-3(a)(12) (1989).

[Release No. 34-29237; International Series Release No. 275; Files No. SR-NYSE-90-52 and SR-NYSE-90-53]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Granting Temporary Approval to Proposed Rule Changes Relating to the New York Stock Exchange's Off-Hours Trading Facility

I. Introduction

On November 1, 1990, the New York Stock Exchange ("NYSE" or "Exchange") submitted to the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and rule 19b-4 thereunder, [2] two proposed rule changes that would extend the Exchange's trading hours beyond the close of the 9:30 a.m. to 4 p.m. trading session and would establish an "Off-Hours Trading" ("OHT") facility. The OHT facility would consist of two trading sessions: "Crossing Session I," which would permit the execution of single-stock, single-sided closing-price orders and crosses of single-stock, closing-price buy and sell orders; [3] and "Crossing Session II," which would allow the execution of crosses of multiple-stock aggregate-price buy and sell orders. [4] The proposed rule changes consist of changes to existing NYSE rules and the adoption of a new "900 series" of rules that would apply solely to the OHT facility ("Rules for Off-Hours Trading Facility")

Files No. SR-NYSE-90-52 and SR-NYSE-90-53 were published for comment in Securities Exchange Act Release No. 28639 (November 21, 1990), 55 FR 49736 (November 30, 1990), and Securities Exchange Act Release No. 28640 (November 21, 1990), 55 FR 49739 (November 30, 1990), respectively. The Commission received seven comment letters, all of which opposed the proposed rule changes. [5]

II. Description of the Proposal

The NYSE's proposed OHT facility, consisting of Crossing Sessions I and II, represents the second phase of the Exchange's four-part plan to respond to the evolving demand among NYSE members and member organizations ("members") and customers for trading opportunities beyond those offered by the Exchange's 9:30 a.m. to 4 p.m. trading session. [6] The plan also responds, in part, to a continuing concern that the Exchange consider developing an after-hours trading session as a means to attract back to the United States the order flow currently being executed overseas. The final parts of the NYSE plan likely would consist of a third phase taking the form of discontinuous auction pricing sessions between the close of the OHT sessions and the 9:30 a.m. opening of the regular trading session, and a final phase consisting of off-hours continuous trading. [7]

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[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b-4 (1990).

[3] See File No. SR-NYSE-90-52.

[4] See File No. SR-NYSE-90-53.

[5] The Commission received comment letters from the Boston, Pacific, Philadelphia, and Midwest Stock Exchanges and the National Association of Securities Dealers, Inc. regarding the proposed rule changes. Some commenters raised concerns with respect to both Crossing Sessions I and II, while other commenters limited their comments specifically to Crossing Session I. See infra notes 30-40 and accompanying text for a discussion of the comments received.

[6] Phase one consists of the NYSE's revisions to its market-on-close ("MOC") execution process to ensure that MOC orders receive the closing price in a stock, and to enable members to enter matched MOC buy and sell orders prior to 4 p.m. to achieve guaranteed executions as part of the closing trade. See Securities Exchange Act Release No. 28167 (June 29, 1990), 55 FR 28117 (Approving File No. SR-NYSE-89-10).

[7] See letter from Catherine R. Kinney, Senior Vice President, NYSE, to Brandon Becker, Associate Director, Division of Market Regulation, SEC, dated September 18, 1990. See also U.S. Congress, Office of Technology Assessment, Trading Around the Clock: Global Securities Markets and Information Technology—Background Paper, OTA-BP-CIT-66 (Update) (July 1990); Power, New York Stock Exchange Sets Its First Limited Off-Hours Trades, Wall St. J., Sept. 12, 1990, at C1, col. 3; Eichenwald, Big Board Approves Late Trades, N.Y. Times, Sept. 12, 1990, at D1, col. 1.

A. Description of Crossing Session I

Crossing Session I would accept orders in a particular stock for execution at the last price at which the stock traded on the NYSE during the 9:30 to 4 session. Two different types of closing-price orders could be entered into, and executed in, Crossing Session I: (1) Single-stock, single-sided orders ("closing-price single-sided orders") in round lots of up to 99,900 shares only, including certain limit orders from the regular 9:30 a.m. to 4 p.m. trading session; and (2) coupled single-stock orders (odd lots and partial round lots permitted), so long as both sides of such an order are not proprietary to members ("closing-price coupled orders").

Crossing Session I, which would operate on each day that the Exchange is open, would commence following the close of the 9:30 a.m. to 4 p.m. session and would end at 5 p.m. Closing-price single-sided and coupled orders can be entered into the OHT facility only through the NYSE's Designated Order Turnaround System ("SuperDOT"), the Exchange's network of electronic order processing and post-trade systems.[8] In addition, only NYSE-listed equity securities that have been designated by the Exchange and are not subject to a trading halt as of the close of the regular trading session may be entered into Crossing Session I.[9]

In addition to closing-price single-sided and coupled orders that are entered into the OHT facility after 4 p.m., certain limit orders that have migrated from the 9:30 a.m. to 4 p.m. session would be able to participate in Crossing Session I. Members may designate unconditioned round-lot and partial round-lot limit orders entered during the 9:30 a.m. to 4 p.m. session as "GTX" ("good 'til cancelled,[10] executable through crossing session") to enable the orders to be executed against closing-price single-sided orders during Crossing Session I.[11] When the NYSE closing price of a security is known, SuperDOT would "sweep" the specialists' limit order books for GTX orders that are at or better than the closing price and would enter those orders into the OHT facility.[12]

"Migrated" GTX orders would retain the same priority among themselves as existed on the specialist's book, and would have priority over all closing-price single-sided orders. Closing-price single-sided orders would have priority based on the time of entry into the OHT facility. Traditional rules of priority or precedence based on price or size would not apply to transactions effected in Session I.[13] Closing-price coupled orders would be executed without regard to the priority of other orders entered into the OHT facility and would not interact with the single-sided orders.

Trading halts occurring during the 9:30 a.m. to 4 p.m. session would affect trading in Crossing Session I. For instance, if a particular security is the subject of a trading halt at the end of the 9:30 a.m. to 4 p.m. session, then Crossing Session I would not be available for that security that day. In addition, during the operation of Crossing Session I, the Exchange may announce that, as the result of news of a corporate development with respect to a particular security, it has determined to: (i) Return unexecuted GTX orders to the specialist's book, maintaining their priority; (ii) cancel all unexecuted single-sided or coupled orders in that stock; and (iii) preclude the entry of new closing-price orders into the OHT facility. Similarly, trading in Crossing Session I would not commence if market activity during the 9:30 a.m. to 4 p.m. trading session were to trigger a market wide trading halt pursuant to NYSE rule 80B, the "circuit breaker" rule,[14] and the trading halt was in effect at the close of the 9:30 a.m. to 4 p.m. session.[15]

At 5 p.m., both closing-price single-sided orders (including GTX orders) and closing-price coupled orders would be executed. Members may enter and cancel closing-price orders and GTX orders up until this time. Any closing-price single-sided orders not executed during Crossing Session I would expire; they would have to be re-entered to participate in the next day's opening. Unexecuted GTX orders would be returned to the book, maintaining their priority; therefore, they would participate in the next day's opening, unless cancelled prior to the opening by the entering broker. Closing-price coupled orders, which would be entered without the possibility of break-up, would be executed in full.

The NYSE proposes to implement trade reporting for Crossing Session I by reporting executions of closing-price single-sided orders and closing-price coupled orders at 5 p.m. over the high speed facility of the Consolidated Tape Association ("CTA") Plan [16] and the low speed line as two transactions per stock—one for closing-price single-sided orders (and GTX orders) and one for closing-price coupled orders. Each print would include the closing price and aggregate volume for each stock. Closing-price coupled orders would be printed as "sold" sales.[17]

B. Description of Crossing Session II

Crossing Session II, which would occur from 4 p.m. to 5:15 p.m., differs substantially from Crossing Session I.

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[8] The NYSE states that the Exchange will use its existing systems to operate the OHT sessions. The NYSE represents that system capacity and operation with respect to the 9:30 a.m. to 4 p.m. trading session will not be affected adversely by implementation of the OHT sessions. Similarly, the NYSE represents that OHT system capacity is sufficient to meet expected demand. The NYSE further represents that security and contingency plans for existing trading systems would be unaffected by the new sessions. Finally, the NYSE represents that it has tested the system changes necessary to support the new sessions.

[9] The Exchange has stated that any SuperDOT-eligible 'ssue, including rights, warrants, and American Depository Receipts, may be entered into the OHT facility.

[10] NYSE rule 13 states that a good 'til cancelled (or "GTC") order to buy or sell remains in effect until it is either executed or cancelled.

[11] Orders for an account in which the specialist, the specialist's member organization, or any associated party has an interest may not migrate to the OHT facility. If GTX is appended to (i) any market, stop, or stop limit order; (ii) any odd-lot order; or (iii) any order entered during the Off-Hours Trading session, the system would reject it. Under the proposal, NYSE members would not have access to the closing-price order file nor would NYSE systems indicate to specialists whether limit orders would be eligible for Crossing Session I.

[12] Although the system would begin as soon as possible after the NYSE close by sweeping the limit order book for eligible GTX orders, as a practical matter, closing-price single-sided and coupled orders cannot be entered into the OHT facility until 4:15 p.m. in order to allow Exchange computer systems sufficient time to perform the mechanics necessary for commencement of the OHT facility.

[13] See NYSE rule 72.

[14] NYSE rule 80B, the Exchange's "circuit breaker" rule, provides procedures for a one-hour trading halt in the trading of all securities after a 250-point decline in the Dow Jones Industrial Average ("DJIA") and a two-hour trading halt after a 400-point decline. See Securities Exchange Act Release No. 26198 (October 19, 1988), 53 FR 41637 (order approving NYSE, American Stock Exchange, Chicago Board Options Exchange, and National Association of Securities Dealers, Inc. circuit breaker proposals). See also Securities Exchange Act Release No. 28580 (October 25, 1990), 55 FR 45898 (latest revisions to NYSE circuit breaker rules).

[15] NYSE rule 80B would operate the same way with respect to Crossing Session II.

[16] The Consolidated Tape, operated by the CTA, compiles current last sale reports in certain listed securities from all exchanges and market makers trading such securities and disseminates these reports to vendors on a consolidated basis.

[17] *See* letter from Catherine R. Kinney, Senior Vice President, NYSE, to Mary Revell, Branch Chief, Division of Market Regulation, SEC, dated February 25, 1991. The NYSE states that, because some closing-price coupled orders will seek the 4 closing price at 5 p.m. with little regard for whether it remains the equilibrium price, a 5 p.m. execution involving solely two-sided closing-price coupled orders might not represent a price-validating trade. Therefore, the NYSE proposes to print closing-price coupled orders as "sold" sales, thereby eliminating those prints from selection as the day's consolidated closing price and from use as the basis for the next morning's Intermarket Trading System pre-opening application.

Crossing Session II is an aggregate-price session that would enable members to enter crosses of buy and sell program orders that includes at least 15 NYSE-listed stocks having a total market value of $1,000,000 or more ("aggregate-price coupled orders"), and to effect their execution at an aggregate price.

Like closing-price single-sided orders and closing-price coupled orders, aggregate-price coupled orders could not be entered until after the close of the 9:30 a.m. to 4 p.m. trading session. To participate in Crossing Session II, members would transmit data regarding aggregate-price coupled orders to the Exchange via facsimile. Each side of the aggregate-price order entered on a coupled basis would be executed against the other side without regard to the priority of other orders entered into the OHT facility. The facsimiles would be time-stamped immediately and confirmed back to the entering brokers, thereby effecting continuous executions of aggregate-price coupled orders upon entry into the OHT facility.[18]

The NYSE propose to implement trade reporting for the aggregate-price session by reporting the total number of shares and the total market value of the aggregate-price trades. After 5:15 p.m., the NYSE would transmit the report over the high speed line as an administrative message.

A trading halt occurring during the regular 9:30 a.m. to 4 p.m. trading session in one or more individual stocks would not affect the execution of aggregate-price coupled orders. Moreover, the unavailability of the OHT facility to one or more individual stocks due to post-4 p.m. corporate news would not affect the execution of aggregate-price coupled orders. NYSE rule 80B, however, would have the same effect on Crossing Session II as it would have on Crossing Session I: A market-wide halt pursuant to rule 80B that is still in effect at 4 p.m. would halt aggregate-price crossing.

C. Exemptive and Interpretive Relief

In connection with transactions in Crossing Session I, the NYSE seeks exemptive or interpretive relief from section 31 [19] of the Act and from rules 10a-1, [20] 10b-18, [21] and 11Aa3-1 [22] thereunder. For Crossing Session II, the NYSE seeks exemptive or other relief from section 31 of the Act and from rules 10a-1, 10b-6, [23] 10b-7, [24] 10b-8, [25] 10b-18, 11Aa3-1, 15c1-5, [26] and 15c1-6 [27] thereunder.[28]

Rule 10a-1 provides that short sales [29] of exchange-listed securities may not be effected at a price less than the price at which the immediately preceding sale was effected ("minus tick") or at a price equal to the last sale if the last preceding transaction at a different price was at a higher price ("zero minus tick"). The Exchange has requested an exemption from rule 10a-1 as it would apply to transactions in Crossing Sessions I and II.

Rule 10b-6 limits the ability of underwriters, issuers, or certain other persons to bid for or purchase a security being distributed, or a related security, during the distribution of that security. Rule 10b-7 regulates stabilizing transactions in connection with an offering of securities. Rule 10b-8 restricts bids and purchases of rights, and offers and sales of the underlying stock, by persons participating in a rights offering. Rule 15c1-5 requires a broker-dealer to disclose that it has a control relationship with an issuer before executing a transaction in that issuer's securities. Rule 15c1-6 requires a broker-dealer to disclose any participation or financial interest in the distribution of a security, at or before the completion of a transaction in such security for the account of a customer. The NYSE has requested that the Commission grant relief from these rules for transactions in Crossing Session II.

Rule 10b-18 generally provides that an issuer (and its affiliated purchasers) will not incur liability under the antimanipulation provisions of sections 9(a)(2) or 10(b) of the Act and rule 10b-5 thereunder if purchases of the issuer's common stock are effected in compliance with the conditions contained in that rule. The NYSE has requested interpretive advice concerning the applicability of rule 10b-18's timing conditions in OHT, including the timing of purchases. Generally, under rule 10b-18, an issuer may not purchase its common stock during the one-half hour before the scheduled close of trading in the security.

Rule 11Aa3-1 generally requires that an exchange collect and disseminate last sale information with respect to transactions through its facilities in certain listed and unlisted securities pursuant to a transaction reporting plan approved by the Commission. Members must execute transactions in any such security in compliance with an effective transaction reporting plan that is in effect with respect to the security. The NYSE has requested that the Commission provide exemptive relief from the requirements of rule 11Aa3-1 to the extent, if any, that the Commission views the NYSE's proposed reporting procedures for Crossing Sessions I and II as inconsistent with the requirements of this rule.

Section 31 of the Act imposes a fee on each national securities exchange based on a percentage of the dollar amount of the sales of securities (other than bonds and other debt) transacted on that exchange. The fee applies to all NYSE equity securities transactions, including those that would be effected through the OHT facility. The NYSE has requested the Commission to adopt a rule that would exempt transactions effected in Crossing Sessions I and II from section 31 fees.

III. Comments Received

A. Comments

The Boston, ("BSE"), Pacific ("PSE"), Philadelphia ("Phlx"), and Midwest ("MSE") Stock Exchanges submitted comment letters in opposition to various aspects of the NYSE's OHT facility.[30]

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[18] By contrast, the order executions in Crossing Session I take place only at 5 p.m.

[19] 15 U.S.C. 78ee (1988).

[20] 17 CFR 240.10a-1 (1990).

[21] 17 CFR 240.10b-18 (1990).

[22] 17 CFR 240.11Aa3-1 (1990).

[23] 17 CFR 240.10b-6 (1990).

[24] 17 CFR 240.10b-7 (1990).

[25] 17 CFR 240.10b-8 (1990).

[26] 17 CFR 240.15c1-5 (1990).

[27] 17 CFR 240.15c1-6 (1990).

[28] See letters from Catherine R. Kinney, Senior Vice President NYSE, to Brandon Becker, Associate Director, Division of Market Regulation, SEC, dated September 18, 1990 (request for exemptive relief regarding Crossing Session I and II); from Catherine R. Kinney, Senior Vice President, NYSE, to Brandon Becker and Larry Bergmann, Associate Directors, Division of Market Regulation, SEC, dated January 9, 1991 (request for exemptive relief regarding Crossing Session I); from Catherine R. Kinney, Senior Vice President, NYSE, to Brandon Becker and Larry Bergmann, Associate Directors, Division of Market Regulation, SEC, dated January 9, 1991 (request for exemptive relief regarding Crossing Session II); from Catherine R. Kinney, Senior Vice President, NYSE, to Larry Bergmann, Associate Director, Division of Market Regulation, SEC, dated January 10, 1991 (request for interpretive advice under rule 10b-18); from Catherine R. Kinney, Senior Vice President, NYSE, to Howard Kramer, Assistant Director, Division of Market Regulation, SEC, dated April 18, 1991.

[29] A short sale is defined in rule 3b-3 under the Act, 17 CFR 240.3b-3, as any sale of a security that the seller does not own or any sale that is consummated by delivery of a security borrowed by, or for the account of, the seller. Rule 3b-3 provides further that a person shall be deemed to own a security only to the extent that the person has a net long position in that security.

[30] See letters from Brian L. Riddell, Executive Vice President, Trading Services, BSE, to Jonathan G. Katz, Secretary, SEC, dated January 27, 1991 and to Richard G. Ketchum, Director, Division of Market Regulation, dated October 16, 1990 (commenting on File No. SR-NYSE-90-42, which was withdrawn and replaced with Files No. SR-NYSE-90-52 and NYSE-90-53), and supplemental letter from Brian Riddell to Jonathan G. Katz, Secretary, SEC, dated April 5, 1991 (rebutting several points in the NYSE

Continued

The issues raised by the exchanges focused primarily on Crossing Session I and concerns that the session: (1) May be inconsistent with the principles underlying the national market system; (2) does not involve an open auction market for securities trading; (3) prevents regional specialists from participating in the OHT facility; (4) will result in the potential loss of business and exposure of regional specialists to increased risks and costs; (5) could result in price manipulation by professionals; and (6) uses the NYSE closing price, rather than the consolidated closing price. The National Association of Securities Dealers, Inc. ("NASD") also submitted a comment letter which raised a concern regarding the extension of the NYSE's off-board trading restrictions to the OHT facility.[31] A discussion of the concerns raised by the commenters is presented below.[32]

1. Effect on National Market System

The BSE, PSE, Phlx, and MSE all state that the OHT proposal is inconsistent with the goals and objectives of a national market system ("NMS").[33] The objectives of the NMS, as set forth in Section 11A(a)(1) of the Act, include assuring fair competition among exchange markets, the economically efficient execution of securities transactions, and the practicability of brokers executing investors' orders in the best market. Section 11A(a)(1) also states that competition and the best execution of investors' orders would be enhanced by the linking of all securities markets through communication and data processing facilities.[34]

a. Fair Competition. The BSE, PSE, Phlx, and MSE state that the NYSE proposal contravenes one of the stated objectives of the NMS, which is to assure fair competition among exchange markets. For example, these commenters assert that, because only NYSE members and their public customers can participate in the OHT facility by entering orders into Session I through SuperDOT, this Session impedes fair competition among exchange markets by making it virtually impossible for members of the regional stock exchanges who are not NYSE members to compete with the NYSE in trading NYSE-listed securities.[35]

In addition, several commenters believe that the OHT proposal is anti-competitive because the availability of OHT will result in the movement of GTC orders from the regional exchanges to the NYSE.[36] According to the commenters, this will occur because broker-dealers will want to ensure that customer orders receive an opportunity to participate in Session I and to provide customer orders with primary market price protection. The commenters believe that, once limit orders are diverted from the regional exchanges to the NYSE, market orders will follow because the cost benefits associated with sending market orders to the regional exchanges for execution will then be lost. The commenters believe that, as a result, the NYSE will have an unfair competitive advantage.

b. Best Execution of Transactions. The BSE states that the implementation of Session I would reduce the BSE's ability to compete with other exchange markets because it will result in increased costs and risks to regional specialists. The BSE explains that, because regional specialists are obligated to obtain the best execution for their customers' orders, they would likely have to place duplicate orders with the NYSE through SuperDOT immediately upon receipt of GTC orders throughout the day, or at least before 4 p.m., or alternatively, they would have to execute all eligible GTC orders for their own accounts and carry the long or short positions overnight, thereby exposing themselves to market risk. The BSE states that this practice would become necessary in order to protect the time and price position of GTC orders in the marketplace and to instill confidence in the member firms that their customers' orders were being properly represented in the NMS. The BSE emphasizes that either of these scenarios would increase costs to regional specialists and subject them to substantial market risk.

In addition, the BSE and MSE assert that, because many GTC limit orders now are placed on regional exchanges because of lower transaction costs and improved executions, the movement of GTC limit orders away from regional exchanges will result in more expensive transaction costs for NYSE member firms, which costs will eventually be passed on to the public customer. In addition, the PSE states that single-sided and GTX orders effected in Crossing Session I may be disadvantaged because a superior price may be reached on the PSE during its additional one-half hour of trading (4 p.m. to 4:30 p.m. e.s.t.), but orders in Crossing Session I would not be exposed to that superior price. Finally, the Phlx suggests that, in order to allow the OHT facility to interact with trading interest on competing marketplaces, a central order repository where all GTX orders, regardless of origin, can be assigned priority based on time of entry, should be developed.

c. Linking of Markets. The commenters also state that, by excluding non-NYSE members and thereby eliminating competition among the exchange markets, the OHT facility, particularly Crossing Session I, is inconsistent with another objective of the NMS, the linking of all markets. The commenters conclude that, by not providing a mechanism for orders from all markets to participate, the OHT sessions decrease inter-market participation and diminish competition among orders. In addition, the PSE argues that the NYSE's OHT proposal should not be implemented until the other exchanges are prepared to participate.

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response letter and reiterating various concerns raised in its prior comment letters); letters from David P. Semak, Vice President, Regulation, PSE, to Jonathan G. Katz, Secretary, SEC, dated December 21, 1990 and January 21, 1991; letter from Nicholas A. Giordano, President and Chief Executive Officer, Phlx, to Jonathan G. Katz, Secretary, SEC, dated January 23, 1991; and letter from J. Craig Long, Vice President and General Counsel, MSE, to Jonathan G. Katz, Secretary, SEC, dated February 7, 1991 and supplemental letter from Daniel J. Liberti, Associate Counsel, MSE, to Mary Revell, Branch Chief, Division of Market Regulation, dated April 23, 1991 (rebutting various points in the NYSE response letter and reiterating concerns raised in its prior comment letter). Although the issues raised by the various stock exchanges referred generally to both Crossing Session I and Crossing Session II of the OHT facility, the majority of the concerns raised were applicable specifically to the operation of Crossing Session I, the closing-price session.

[31] See letter from Joseph R. Hardiman, President, NASD, to Jonathan G. Katz, Secretary, SEC, dated January 16, 1991.

[32] The Commission also received letters from the BSE, MSE, and NASD seeking an extension of the comment period. See letters from George W. Mann, Jr., Senior Vice President and General Counsel, BSE, to Richard G. Ketchum, Director, Division of Market Regulation, dated December 19, 1990; J. Craig Long, Vice President and General Counsel, MSE, to Howard Kramer, Assistant Director, Division of Market Regulation, SEC, dated December 20, 1990; Robert E. Aber, Vice President and Deputy General Counsel, NASD, to Mary Revell, Branch Chief, Division of Market Regulation, SEC, dated December 21, 1990.

[33] Although the letters submitted by the exchanges state generally that the OHT proposal is inconsistent with the objectives underlying a national market system, most of the concerns raised are applicable specifically to Crossing Session I.

[34] 15 U.S.C. 78k–1(a)(1) (1988).

[35] The BSE, PSE, Phlx, and MSE all cite to the Securities Acts Amendments of 1975 ("1975 Amendments") (Pub. L. No. 94–29 (June 4, 1975)), which mandated the development of a national market system for securities, and state that proposed Session I contravenes Congress' intent in calling for a national market system by excluding the participation of other marketplaces.

[36] NYSE rule 13 states that a GTC order to buy or sell remains in effect until it is either executed or cancelled. See supra note 10.

The PSE is particularly concerned about trading on the PSE during its additional half hour of trading—4 p.m. to 4:30 p.m. The PSE states that, because the NYSE is extending its trading hours beyond 4 p.m., the Intermarket Trading System ("ITS") Plan may require that the PSE and NYSE OHT session be linked.[37]

2. Auction Market

The BSE, Phlx, and MSE also state that the OHT facility, particularly Crossing Session I, is contrary to the goals and objectives of a NMS because it would deprive investors of the protections and benefits of an open auction market for securities, including continuous price discovery and competition among all available bids and offers. In particular, the MSE states that the execution of GTX and single-sided orders in Crossing Session I would decrease the number of available orders which otherwise would have participated in the auction market environment operating during the 9:30 a.m. to 4 p.m. trading session, and which would have contributed to the depth and liquidity of the market. In addition, several commenters state that, because all orders executed in Session I would be executed at the closing price for that security and without the price discovery inherent in the auction process, there is no possibility for price betterment.

3. Use of NYSE Closing Price

The PSE and Phlx raise concerns that, in Crossing Session I, orders of public customers may be disadvantaged because orders in that Session would be executed based upon the NYSE closing price, rather than on the consolidated closing price, which may reflect a superior price to a customer. The commenters also state that use of a Crossing Session I price as the consolidated closing price would have a negative effect on the next morning's ITS pre-opening application.

4. Short Sale Rule

The BSE, Phlx, PSE, and MSE objected to the NYSE's request that the Commission provide exemptive relief from, or take a no-action position with respect to, the application of rule 10a–1, the short sale rule. The commenters state that waiver of the short sale rule during the OHT sessions would magnify the potential for manipulation because a professional would be able to effect a transaction in the OHT session that he or she was prohibited from effecting during regular trading hours by the restrictions of the short sale rule. This could result in the movement of order flow away from the auction pricing session held during the day and impact the following day's opening (e.g., causing the stock to open lower), resulting in possible manipulative abuse by the professional trader and reduced opportunities for other orders market-wide, particularly those of retail investors. The commenters further state that the NYSE has not provided sufficient justification for waiver of the short sale rule during the OHT sessions.

5. Recapturing Order Flow

The BSE, Phlx, and MSE challenge one of the NYSE's stated purposes in proposing the OHT sessions, which is to recapture order flow from overseas. These commenters state that the NYSE has demonstrated no nexus between Crossing Session I and attracting overseas orders back to the United States. In fact, the MSE asserts that implementation of Session I would induce trading away from the NYSE.

6. NYSE Rule 390

In its comment letter, the NASD asserts that application of NYSE rule 390[38] to the OHT sessions would constitute a burden on competition that is neither necessary nor appropriate under the Act. The NASD believes that the anti-competitive effects of extending off-board trading restrictions beyond normal operating hours would be antithetical to the development of new trading systems within the rubric of a NMS. The Phlx also states that the application of NYSE rule 390 to the OHT sessions directly contradicts the NYSE's traditional arguments against the abolition of off-board trading restrictions.

7. Miscellaneous Issues

a. Market Manipulation. The BSE, PSE, Phlx, and MSE suggest that several forms of market manipulation may arise if the OHT sessions, particularly Session I, are established. The commenters conclude that these potential types of manipulation would give professionals a significant advantage over retail orders, thereby undermining public confidence in fair and orderly markets.

The BSE believes that single-sided orders would be initiated primarily by professionals anxious to take advantage of market opportunities to the detriment of retail customers. The BSE also states that specialists, because they are privy to market information that is unavailable to others, would have a special advantage in knowing when it would be in their interests to enter single-sided orders to trade with limit orders from their own books. The BSE concludes that it would be a conflict of the specialist's fiduciary responsibilities to trade against orders on their book during Crossing Session I.

The BSE also is concerned with possible market manipulation arising from the fact that the futures markets remain open for trading for 15 minutes beyond the close of the NYSE 9:30 a.m. to 4 p.m. trading session. The BSE suggets that a professional could watch the futures market until its 4:15 p.m. close and, based on this information, participate as a seller (buyer) in the OHT sessions and then profit as a buyer (seller) in the next day's stock market.

b. Trade Reporting. The MSE states that proposed Crossing Session II should have the same disclosure requirements as those that were required for the MSE's Portfolio Crossing Session.[39] The MSE states that the NYSE should require disclosure of individual stocks comprising a portfolio and the number of shares of each stock traded. Further, the MSE states that more complete disclosure of after-hours portfolio trading enhances the quality of the U.S. markets from a regulatory perspective and promotes economically efficient executions of trades in the underlying stocks because investors are made aware of after-hours trading in individual stocks comprising a portfolio.

c. Section 31 Fees. The MSE and PSE objected to the NYSE's request that the Commission adopt a rule, pursuant to section 31 of the Act, exempting transactions in Crossing Session I from section 31 transaction fees,[40] stating

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[37] Section 10, subparagraph (c) of the Plan For the Purpose of Creating and Operating an Intermarket Communications Linkage Pursuant to Section 11A(a)(3)(B) of the Securities Exchange Act of 1934 ("ITS Plan") states that any period outside of the normal 9 a.m. to 4 p.m. operating hours of the ITS System constitutes an "additional period" for the purposes of the ITS Plan. This subparagraph further states that the System shall be operable during any "additional period" requested in writing by any two or more participants.

[38] In general, NYSE rule 390 prohibits a member from effecting a transaction otherwise than on an exchange as principal or as an in-house agency cross in a security listed on the exchange before April 26, 1979. The rule does not apply to transactions on a foreign stock exchange, or after regular NYSE trading hours in a foreign over-the-counter market.

[39] *See* Securities Exchange Act Release No. 27384 (October 26, 1989), 54 FR 24779, which approved a proposed rule change by the MSE to establish a Secondary Trading Session for the execution of transactions in portfolios of securities through the MSE's automated Portfolio Trading System ("PTS"). As discussed supra, for portfolio transactions effected in Crossing Session II, the NYSE proposes to transmit a report at 5:15 p.m. over the high speed line containing the total number of shares and the total market value of the aggregate-price trades.

[40] See supra for a discussion of section 34 under the Act.

that the NYSE is attempting to provide incentives to trade away from the auction pricing session held during the day.

B. NYSE Response

The NYSE responded to the specific issues raised by the commenters in a letter dated February 25, 1991 ("NYSE response letter").[41] The NYSE's responses are discussed below.

1. Effect on NMS

a. Fair Competition. In response to concerns by commenters that the OHT facility is inconsistent with the goals and objectives of a NMS as set forth in section 11A of the Act, the NYSE responds that its proposal is a competitive initiative designed to improve its marketplace for the benefit of the investing public. In addition, the NYSE states that neither the Act nor its legislative history contains a directive to redistribute order flow from the NYSE to the regional exchanges or to prevent the NYSE from recapturing lost order flow through innovation.

b. Best Execution of Transactions. In response to concerns that introduction of the OHT facility in general, and the GTX order in particular, would reduce competition between exchange markets, the NYSE emphasizes that its OHT facility is a competitive initiative and a means of competing with the regional exchanges. In addition, the NYSE notes that the regional exchanges are free to introduce competitive after-hours trading markets, including a closing price session comparable to Crossing Session I. The NYSE further states that any shift or order flow from one competing market to another always enhances the liquidity of the successful market at the expense of the unsuccessful one. The NYSE notes that this outcome is inherent in the structure of competing markets that Congress fostered. In addition, the NYSE states that it disagrees with concerns by commenters that the introudction of GTX orders will result in the demise of trading in NYSE-listed securities on regional exchanges.

Only NYSE members and member organizations may use, and have access to, NYSE facilities and systems. The NYSE states that the regional exchanges similarly restrict the use of, and access to, their facilitis and systems. In addressing concerns that only NYSE members would be permitted to enter orders into the OHT facility, the NYSE responds that this is true of all NYSE orders, even during its regular 9:30 a.m. to 4 p.m. trading session.

In response to specific comments that Session I would result in increased costs and risks to regional specialists, thereby reducing their ability to compete, the NYSE suggests that the regional exchanges are free, as they do now, to use proprietary executions to protect orders brought to their markets. For example, the NYSE states that, with respect to GTX orders, the regional exchanges could presumably retain their usual order flow by guaranteeing the NYSE closing price for limit orders whose price has been reached at the NYSE close.

c. Linking of Markets. The NYSE responds to the PSE's concern that Crossing Session I does not provide for price protection of single-sided orders that are entered after 4 p.m., particularly during PSE's additional one-half hour of trading (4 p.m. to 4:30 p.m.), by stating that the ITS Plan permits, but does not require, two or more markets that are open after 4 p.m. to extend the operating hours of ITS.[42] The NYSE also states that it is prepared to discuss the issue of a linkage, through ITS or otherwise, when another exchange introduces an after-hours session comparable to its own.

2. Auction Market

The NYSE also responds to concerns that the OHT facility, particularly Crossing Session I, deprives investors of the protections and benefits of an open auction market for securities. The NYSE does not dispute the merits and validity of an open auction market for trading securities and the benefits of price discovery inherent in an auction market. Instead, the NYSE states that the commenters fail to recognize that Crossing Session I is a modified auction, which, while using the closing prices for executions, confirms closing prices as valid at 5 p.m., retains the rules regarding the strict priority of orders, and functions as a centralized location at which the forces of supply and demand can interact.

The NYSE responds specifically to concerns that constraining the price during Crossing Session I would have the effect of precluding price improvement. The NYSE states that no price improvement opportunity will be available elsewhere in the NMS at 5 p.m. and unlike trading during the 9:30 a.m. to 4 p.m. session (where holding an order for exposure and price improvement carries an acceptable risk of missing the market), holding an order overnight for next-day execution in order to give it an opportunity for price improvement carries a much greater risk of no execution because of an adverse change in market direction over 17½ hours. In addition, the NYSE notes that the decision of whether to enter any particualr order into Crossing Session I or to hold it overnight is a matter of judgment to be left to the entering broker and his or her customer.

The NYSE response letter further states that the Exchange agrees with the commenters that the auction market is harmed whenever the securities industry fragments that market by taking orders away from the auction market to internalize them or to send them to another market, either domestic or overseas. The NYSE argues that its OHT proposal was designed to avoid diversion of orders from the 9:30 a.m. to 4 p.m. trading session by establishing a trading session that would attract orders that are currently being executed overseas. The NYSE also emphasizes that the OHT facility was designed to provide customers with an additional forum for executing certain orders, e.g., orders that may not have been executed during the 9:30 a.m. to 4 p.m. trading session or certain aggregate-price portfolio orders, rather than to take order flow away from the 9:30 a.m. to 4 p.m. trading session.

3. Use of NYSE Closing Price

The NYSE response letter also addresses commenters' concerns that Crossing Session I disadvantages public customers because it uses the NYSE's closing price, rather than the consolidated closing price. The NYSE states that it has decided to use the NYSE closing price because it reflects industry references and because it is known earlier. The NYSE also states that it is unlikely that members representing Crossing Session I orders would ignore post-4 p.m. prices on other markets. If the NYSE closing price does not remain a valid equilibrium price at 5, the Exchange states that it would expect to find a dearth of single-sided orders on the one side of the market, in which case no executions would occur. The NYSE

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[41] See letter from Catherine R. Kinney, Executive Vice President, Equities/Audit, NYSE, to Mary Revell, Branch Chief, Branch of Exchange Regulation, Division of Market Regulation, SEC, dated February 25, 1991. This letter responds to issues raised by commenters with respect to both Files No. SR-NYSE-90-52 (Crossing Session I) and SR-NYSE-90-53 (Crossing Session II). See also supplemental letters from Brian L. Riddell, Executive Vice President, Trading Services, BSE, to Jonathan G. Katz, Secretary, SEC, dated April 5, 1991 and from Daniel J. Liberti, Associate Counsel, MSE, to Mary Revell, Branch Chief, Division of Market Regulation, dated April 23, 1991, which rebut several points in the NYSE response letter and reiterate the concerns raised by the exchanges in their prior comment letters.

[42] See supra note 37.

further emphasizes that a party may cancel a Crossing Session I order at any time prior to 5, including after evaluating the 4:30 p.m. PSE closing price.

4. Short Sale Rule

The NYSE responds to concerns that waiver of the short sale rule in the OHT sessions would promote price manipulation and harm liquidity at the opening of the next regular trading session. The NYSE states that it would be extremely difficult for a market participant to depress stock prices by engaging in short selling during Crossing Session I because those short sales do not generate the price effects necessary for the type of manipulation that the short sale rule seeks to address. Because the trade price is constrained, Crossing Session I allows only for the verification of the continued legitimacy of the 4 p.m. closing price at 5 p.m. and does not allow manipulation of the price. Closing-price single-sided orders would not create an imbalance that would exacerbate or create downward pressure because constraining these orders' execution to the closing price prevents the normal price response. Furthermore, any unexecuted closing-price orders that are re-entered the next morning which may contribute to a sell imbalance at the opening or later in the day will be subject to the short sale rule.

In addition, the NYSE states that manipulation stemming from waiver of the short sale rule would be unlikely in Crossing Session II becuase it would be expensive and inefficient for a market participant to use aggregate-price coupled orders to attempt to manipulate the price of a component stock.

5. Recapturing Order Flow

The NYSE also responds to comments that the OHT sessions, particularly Crossing Session I, would not recapture U.S. trading activity that has gone overseas, but rather would usurp orders that would otherwise participate in the traditional U.S. auction market. The NYSE states that the OHT sessions must be viewed in the context of the Exchange's multi-phase plan to eventually begin 24-hour continuous trading. The NYSE, while conceding that implementation of the GTX order in Crossing Session I is not the key to recapturing overseas trading activity, states that the closing-price session, in general, and the GTX order in particular, represents the first initiative by any market—on or off exchanges—to bring the retail investor into off-hours trading.

6. NYSE Rule 390

The NYSE does not respond specifically to the NASD's concerns that application of NYSE rule 390 to the OHT sessions would constitute a burden on competition. Instead, the NYSE states that application of rule 390 to the OHT sessions would not extend the rule domestically (it already applies 24 hours a day domestically), but would extend rule 390's application overseas. The NYSE states that, pursuant to rule 390.10, overseas over-the-counter ("OTC") trading would be reduced by 75 minutes because of the extension of the NYSE's trading hours by 75 minutes. In addition, the NYSE states that, when the Exchange moved its opening up from 10 a.m. to 9:30 a.m. several years ago, rule 390 was not viewed as a burden on competition. Similarly, the NYSE states that application of rule 390 to the OHT sessions would impose no unnecessary or inappropriate regulatory burden.

7. Miscellaneous Issues

a. Market Manipulation. In response to concerns that Crossing Session I may provide professionals with opportunities to take advantage of retail customers, the NYSE states that members representing retail orders would have discretion in determining whether an order should be represented in Crossing Session I. The NYSE emphasizes, however, that its members representing customer orders in the 9:30 a.m. to 4 p.m. trading session similarly have to exercise judgment and diligence on behalf of their customer's orders. The NYSE also states that it plans to monitor closely trading during Crossing Session I in order to detect any such trading abuses.

The NYSE further states that, under the OHT proposal, NYSE specialists would have not more access to information than they currently have. Under the OHT proposal, NYSE members would not have access to the closing-price order file and the systems would not disclose to specialists whether limit orders are eligible for the closing-price session.

In addition, with regard to concern over possible manipulation based upon prices in the futures markets, the NYSE notes that a professional's ability to use the OHT sessions to take advantage of retail customers based upon information gained from the 4:15 p.m. close of the futures markets would apply to any after-hours session, including 4:15 p.m. to 4:30 p.m. trading on the PSE.

b. Trade Reporting. In response to comments that Crossing Session II should have the same disclosure requirements as those that were required for the MSE's Portfolio Crossing Session,[43] the NYSE states that, in designing its proposed reporting procedures, it was cognizant of the fact that investors may take orders overseas for execution to avoid U.S. trade reporting requirements. The NYSE states that its proposed trade reporting requirements for Crossing Session II have struck an appropriate balance between the disclosure necessary to meet market regulatory needs and the anti-disclosure pressures attendant to the recapture of overseas order flow and the competition presented by domestic off-exchange markets.

IV. Discussion

A. Introduction

After careful consideration of the comments received and applicable statutory provisions, the Commission believes that the NYSE's proposed OHT facility, comprised of Crossing Sessions I and II, is reasonably designed to promote just and equitable principles of trade, prevent fraudulent and manipulative acts and practices, and remove impediments to and perfect the mechanism of a free and open market and a national market system. For these reasons and for the additional reasons set forth below, the Commission finds that approval, for a two year period, of the Exchange's proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with the requirements of sections 6(b)(5) and 11A.[44]

B. Benefits of Off-Hours Trading

In recent years, both the Commission and other Federal agencies, along with private sector committees, have observed the trend toward the internationalization of the securities markets and toward the development of 24-hour markets in which world-class securities would be traded around the clock and around the globe. The Division of Market Regulation's ("Division") Report on the October 1987 Market Break ("Staff Report") and the Report of the Presidential Task Force on Market Mechansims ("Brady Report") highlight the interdependency of the

[43] The MSE agreed to make available to vendors, on a real time basis, the aggregate price of the portfolio and the symbol and quantity for each security comprising the portfolio. At the end of each Secondary Trading Session a report would be provided containing the aggregate number of shares of each of the securities purchased and sold, as well as aggregate system volume. See Securities Exchange Act Release No. 27384 (October 26, 1989), 54 FR 24779.

[44] 15 U.S.C. 78f(b)(5) and 78k-1 (1988).

world's markets and note that these markets have become increasingly linked, both psychologically and through improved communications technology that has made possible both trading and information sharing arrangements.[45] This has been accompanied by an increased desire among institutional investors to be able to trade U.S. stocks outside of regular trading hours. The Commission believes that the OHT sessions proposed by NYSE are intended to attract the order flow currently being executed overseas back to the United States, with the attendant benefits of Commission and Exchange oversight pursuant to the Act, trade reporting, and consolidated surveillance, and are reasonably designed to provide a limited mechanism for after-hours trading.

In approving the NYSE's OHT sessions, the Commission notes that the proposal should be considered as one part of a multi-step plan to respond to the evolving demand among NYSE member organizations and customers for trading opportunities beyond those offered by the Exchange's 9:30 a.m. to 4 p.m. trading session. At the same time, the proposal is the only part of that plan currently before the Commission, and thus must be reviewed as a separate and distinct proposal to extend the Exchange's trading hours beyond the 9:30 a.m. to 4 p.m. trading session. The Commission believes that, in both respects, the NYSE OHT proposal is consistent with the requirements of the Act and will offer significant benefits to investors.

Crossing Session I would provide investors whose orders were not executed during the 9:30 a.m. to 4 p.m. session with another opportunity to have their orders executed at the NYSE closing price. Crossing Session I also would provide investors the flexibility to decide whether they want a particular order to participate in this Session. With respect to GTC orders entered for execution during the 9:30 a.m. to 4 p.m. trading session, a customer would have the option of deciding whether to designate that order as a GTX order, thus allowing the order to migrate to Crossing Session I for possible execution. In addition, a customer would have the option of cancelling any order entered into Crossing Session I at any time prior to its execution at 5 p.m.[46] These benenfits would accrue to both individual and institutional investors. In addition, the Commission agrees with the NYSE's conclusions that Crossing Session I may help recapture overseas order flow by enabling firms to facilitate a number of portfolio trading strategies involving small programs of stocks to achieve executions at the NYSE closing price.

Similarly, the Commission believes that Crossing Session II will benefit the investing public by offering members the opportunity to enter crossing portfolio orders with their customers after-hours to be executed against each other. The Commission agrees with the NYSE that the establishment of Crossing Session II could help to recapture overseas trades of U.S. stocks by providing a mechanism by which portfolio trades arranged off the floor can be effected in an exchange trading system. While the Commission recognizes that Crossing Session II does not provide an auction market for portfolio trades, the reality of the marketplace, however, is that these portfolio trades currently are being effected off-exchange and, frequently, overseas. Bringing institutional trades that currently are being exported overseas for execution within the purview of U.S. regulatory bodies and subject to transaction reporting will benefit the marketplace overall, as well as help to protect the investing public.

Accordingly, for these reasons and the reasons discussed below, the Commission believes that the OHT facility is consistent with the requirements of section 6(b)(5) of the Act in that it is reasonably designed to promote just and equitable principles of trade, prevent fraudulent and manipulative acts and practices, and remove impediments to and perfect the mechanism of a free and open market and a national market system.

C. Effect on NMS

After careful consideration of the applicable statutory provisions and the comments received, the Commission believes that the OHT proposal is consistent with section 11A of the Act and the principles underlying the NMS.

1. Fair Competition and Best Execution of Transactions

After the careful review of the comments by several exchanges that the OHT proposal is anti-competitive to the regional exchanges because it will result in increased costs and loss of order flow, as well as a review of the Exchange's response to the comments, the Commission does not believe that the OHT facility as proposed imposes an unnecessary or inappropriate burden on competition or provides the NYSE with an unfair competitive advantage. In fact, the Commission believes that the OHT sessions should enhance competition by providing a service to customers that other exchanges currently are not providing.[47] Mere innovation that provides marketplace benefits to attract order flow to the Exchange does not result in unfair competition if the other markets are free to compete in the same manner. In this regard, the Commission believes that, if the regional exchanges or the NASD desire to compete with the OHT facility, they could provide a similar service.

The Commission understands the concern of the regional exchanges regarding loss of business and increased risks and costs that could result from implementation of the NYSE's OHT facility, and acknowledges that, as a practical matter, it may not be economically realistic for the regional exchanges to use proprietary executions to protect orders brought to their markets. The Commission believes, however, that any reduction of regional

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[45] See SEC, Division of Market Regulation, The October 1987 Market Break, at 11–1 to 11–2 (February 1988); Report of the Presidential Task Force on Market Mechanisms, at I–1 (January 1988). See also U.S. Congress, Office of Technology Assessment ("OTA"), Trading Around the Clock: Global Securities Markets and Information Technology—Background Paper, OTA–BP–CIT–66 (July 1990); and U.S. Congress, OTA, Electronic Bulls and Bears: U.S. Securities Markets and Information Technology, OTA–CIT–469 (September 1990).

[46] In this regard, the Commission emphasizes the importance of having brokers available to effect cancellations of customer orders between 4 p.m. and 5 p.m. The Commission realizes the while some firms may be fully staffed during this time period, other firms may not. The Exchange should monitor the ability of customers to cancel orders entered into the OHT facility and should provide this information to the Commission as part of its report on the operation of the OHT facility. The Commission believes that if the system becomes a success, customer demand should make it cost-effective for firms to be adequately staffed during the operational hours of the OHT facility and should ensure, as a result, that customers would be able to cancel any orders entered with their brokers prior to the 5 p.m. execution.

[47] The Commission notes that, although the PSE is open for one half hour beyond the traditional 9:30 a.m. to 4 p.m. trading session on the NYSE (from 4 p.m. to 4:30 p.m.), this "after-hours" session differs substantially from the NYSE's OHT facility. While the OHT facility is a limited system designed solely for the purpose of executing orders based on the NYSE closing price and certain portfolio orders based on an aggregate price, the PSE post-4 p.m. session is an auction market with continuous price discovery. These two markets are designed for different types of order execution. More importantly, these two systems would not be operating contemporaneously. Although both markets would accept orders between 4 p.m. and 4:30 p.m., the PSE market would not be open at 5 p.m., which is the time that all closing-price orders would be executed in Crossing Session I. Moreover, although the Commission approved an after-hours Secondary Trading Session for the execution of transactions in portfolios of securities on the MSE, we understand that, to date, this system has never been operational.

exchange market share resulting from the NYSE's OHT system would be due to the enhanced competition such a system provides, and not a result of any anti-competitive aspects of the OHT facility. To determine otherwise would be to thwart the spirit of competition and innovation and deny investors the benefits resulting from marketplace initiatives. In this regard, the Commission notes that service competition among the various exchanges has benefited the entire marketplace. For instance, the regional exchanges were pioneers in the development of small order routing and execution systems. Such systems were approved by the Commission because of the benefits they provide to investors and the marketplace as a whole, even though loss of order flow to the primary marketplace may have been a side effect. In response, the primary markets substantially automated their order routing capabilities. The Commission sees no reason why this process can not originate with a primary exchange.

2. Linking of Markets

In response to the concern raised by the commenters that the OHT sessions are inconsistent with another objective of the NMS, the linking of all securities markets through communication and data processing facilities, the Exchange noted that there currently is no other after-hours session comparable to the NYSE's proposed OHT facility, but that if one were implemented the question of linkage through an ITS application or otherwise would arise. While it is true that section 11A of the Act contemplates an integrated system for trading securities, this section also envisions competition between markets, and we do not believe it requires that a new trading system developed by one market immediately must caontain provisions to facilitate trading by its competitors. In connection with the OHT proposal, no other U.S. securities exchange or the NASD's Automated Quotation ("NASDAQ") system currenty offers a system that is the same as, or substantially similar to, the NYSE OHT facility. The Commission only recently received proposals from three regional stock exchanges responding to the NYSE's OHT facility. On May 16, 1991, the Phlx submitted a proposed rule change that virtually copied the NYSE proposal and proposed to establish an after-hours session to compete with the NYSE OHT facility.[48] In addition, the MSE and BSE have submitted much narrower proposals that do not propose separate after-hours trading sessions, but instead seek to protect limit orders on the regional specialists' books.[49] The Commission staff is currently reviewing these proposals.[50]

In addition, the Commission notes that, although the PSE currently is open for one half hour beyond the traditional 9:30 a.m. to 4 p.m. trading session on the NYSE (from p.m. to 4:30 p.m.), the PSE's "after-hours" session differs from the NYSE's OHT facility in that it would not operate contemporaneously with the OHT system and is designed for different types of transactions.[51] Furthermore, the Commission notes that, at the present time, the PSE is open from 4 p.m. to 4:30 p.m. and that no other marketplace is linked to the PSE. Accordingly, the Commission does not believe that the lack of a linkage of the OHT facility is inconsistent with section 11A, at the present time. Of course, depending upon how trading develops, the Commission may wish to revisit this issue.

In addition to these market structure issues, the commenters on the NYSE's proposed rule raised a number of other concerns which may be termed as "intermarket" issues. The questions raised include: (i) Whether ITS should be operational during any time period when both the NYSE Crossing Sessions and another ITS market are accepting orders; (ii) whether the NYSE should be required to permit orders entered "GTX" on the books of regional specialists to "migrate" automatically at the close(s) of such regional exchanges to the NYSE Crossing Session I order book; (iii) if so, with what priority, if any; and (iv) who should bear the cost of developing a working mechanism for such transmittal.

In considering these intermarket, or NMS, issues, the Commission believes that the NYSE's OHT facility is not inconsistent with the Act. The effect of the OHT system on similar systems that the regional exchanges or the NASD may propose, as well as its effect on orders on the limit order books of both NYSE and regional specialists, is unclear and speculative at this time. The Commission believes that the two year approval period will provide the Commission and the NYSE, as well as competing markets, the opportunity to observe and evaluate the workings of the OHT facility. In its order today approving the NYSE OHT facility, the Commission wishes to emphasize that the NMS issues remain open. The Commission intends to consider them actively during the operation of the OHT facility and to impose such requirements, if any, as it determines are appropriate to provide intermarket protections and to further the goal of a NMS. The Commission will, in this regard, monitor, and be influenced by, the actual operation of the Crossing Sessions.

In addition, the Commission realizes that, because at least one other exchange has proposed a trading session similar or identical to the NYSE's OHT facility, significant NMS issues may need to be resolved by the NYSE and the competing market, in conjunction with the SEC. Accordingly, for all these reasons, the Commission believes that the NYSE's OHT sessions should be approved for a two year temporary period. This two year period will provide an opportunity for the Commission and market participants to observe the actual operation of the OHT facility. Based on these observations the Commission, NYSE, and other market participants will be in a better position to evaluate whether further steps to link the OHT facility with other markets are necessary or appropriate to protect investors or promote fair competition. In this regard, 18 months from the date of approval of the instant proposal, the NYSE should submit a new filing pursuant to rule 19b–4 under the Act requesting permanent approval of the OHT facility, as well as a report describing the NYSE's experience with the OHT facility during that 18-month period, including information regarding the ability of customers to cancel orders entered into the OHT facility (see note 46, supra). The report also should include, but not be limited to, the following information (broken down by month) for the 18-month period:

• Trading volume (trade, share and dollar value) in both Crossing Session I and Crossing Section II.

• The number, if any, of: (1) Single-stock single-sided orders; (2) single-

[48] See File No. SR–Phlx–91–25. For the session that is equivalent to the NYSE's Crossing Session I, the Phlx proposes to report the closing price and aggregate volume for each security in the same manner as the NYSE. In addition, for the session that is comparable to the NYSE's Crossing Session II, the Phlx proposes to disseminate only one report that will provide the total volume for all the aggregate-price orders executed during the crossing session. Like the NYSE, the Phlx does not propose to report prices for the individual stocks that comprise the aggregate-price orders.

[49] See Files No. SR–MSE–91–11 (filed May 7, 1991) and SR–BSE–91–4 (filed May 13, 1991).

[50] The MSE proposal has been reviewed by Commission staff and has been sent to the Federal Register to be published for public comment.

[51] See supra note 47. Similarly, the Commission recognizes that an after-hours Secondary Trading Session for the execution of transactions in portfolios of securities was approved for the MSE. We understand, however, that, to date, this system has never been operational. Moreover, both the MSE system and Crossing Session II are systems for crossing customized portfolios of stocks, and may not raise the same type of NMS issues as Crossing Session I.

stock, paired buy and sell orders; and (3) GTX orders executed in Crossing Session I.

- The number, if any, of: (1) Single-sided orders; and (2) single-sided GTX orders that remained unexecuted at the end of Crossing Session I.
- The number and percentage of GTC orders on the book that were designated "GTX"; and thus migrated to Crossing Session I.
- The number of member firms participating in Crossing Session I and those participating in Crossing Session II.
- Whether the NYSE marketplace has experienced any increased volatility during the last hour of the 9:30 a.m. to 4 p.m. trading session after the initiation of the OHT facility.
- Whether there were greater (wider) quote spreads during the last hour of the 9:30 a.m. to 4 p.m. trading session after the initiation of the OHT facility.
- Whether there was a diminution in the number of block transactions during the last hour after the initiation of the OHT facility.
- The degree to which transactions were entered in Crossing Session II to avoid the restrictions of the short sale rule in the 9:30 a.m. to 4 p.m. trading session.

The Commission notes that, because at least one other marketplace has proposed a system comparable to the NYSE's OHT facility, the NYSE's report should also indicate: (1) How its OHT facility could link with any other systems approved during the 18-month period; (2) how orders entered on other marketplaces could interact with orders in the OHT; and (3) how the intermarket issues discussed in this order would be addressed. In this connection, however, the Commission would underscore its strong belief that resolution of intermarket issues would not be solely a responsibility of the NYSE, and would fall equally upon the regional exchanges (or the NASD) proposing an after-hours system and the NYSE.

In addition to the above information, the Commission further expects the NYSE to monitor carefully the composition of aggregate-price orders in Crossing Session II to ensure that firms do not enter aggregate-price orders where one stock dominates the basket. In addition, the Commission expects that the NYSE, through use of its surveillance procedures, will monitor for, and report to the Commission, any patterns of manipulation on trading abuses or unusual trading activity in the two crossing sessions. Finally, the Commission expects the NYSE to keep the Commission apprised of any technical problems which may arise regarding the operation of the OHT, such as difficulties in order execution or order cancellation.

D. Auction Market

In response to concerns that the OHT facility, particularly Crossing Session I, is contrary to the goals underlying the NMS because it would deprive investors of the protections and benefits of an open auction market for securities, including continuous price discovery and competition among all available bids and offers, the Exchange responded that Crossing Session I is a modified auction. While the Commission believes that the OHT facility is not a full auction market, the Commission also believes that the OHT proposal is consistent with the maintenance of fair and orderly markets because it is a limited purpose facility that is designed to bring buyers and sellers together with the benefits associated with exchange trading.

Crossing Session I is a limited trading system that was designed as an alternative forum for order execution after the close of the Exchange based on NYSE closing prices. While it is not an auction market in terms of price discovery, the Commission notes that the NYSE closing price would not represent an artificial price, but rather a price that has been determined by auction market trading during the 9:30 a.m. to 4 p.m. trading session. Investors participating in Crossing Section I would be indicating their desire to have the potential for an execution at that price after regular trading hours. Crossing Session I also retains other characteristics of auction market trading in that it functions as a centralized location where buyers and sellers can interact under auction priority rules.

Crossing Session II is a facility of the exchange that will allow members to effect crosses of portfolios of securities at an aggregate price. While the "auction" under Crossing Session II occurs "upstairs," Crossing Session II transactions will enable these transactions to take place domestically, rather than overseas, with the benefits of Commission oversight, Exchange surveillance, and trade reporting.

E. Use of NYSE Closing Price

In response to concerns that orders of public customers in Crossing Session I may be disadvantaged because they would be executed based upon the NYSE closing price, rather than the consolidated closing price,[52] which may reflect a superior price to a customer, the Exchange stated that the NYSE closing price reflects industry preferences. In addition, in response to concerns that use of a Crossing Session I price as the consolidated closing price would have a negative effect on the next morning's ITS pre-opening application,[53] the Exchange notes that if participants are willing to submit single-sided orders to be executed at 5 p.m. at the NYSE closing price, then those executions, in essence, are an accurate reflection of the market price for the security. The Exchange notes that if participants believe that some other price is more reflective of the current market for a security, for example, where the closing price is different from the price at which transactions have been effected elsewhere after the NYSE close, then they will not participate in Crossing Session I, and no trades will be effected at the "invalid" price.

In addition, because the NYSE believes that participants who submit two-sided closing price orders will do so with little regard to whether the NYSE closing price has remained the currrent market price, those transactions will be reported as "sold sales." [54] The term "sold sale" generally is used to report transactions that are out of sequence and thus may not be reflective of the current market for a security. Sold sales have no effect on the determination of the consolidated closing price for purposes of the pre-opening procedures in ITS. Thus, only those trades that market participants are willing to execute at 5 p.m. because they believe the NYSE closing price accurately reflects the current market price for the security will affect the pre-opening application.

The Commission believes that the use of the NYSE closing price in Crossing

[52] The consolidated closing price is the last price at which a transaction in a security was reported by the consolidated last sale reporting system on the last previous day on which transactions in the security were reported by the system, and includes prices for transactions occurring on the PSE or in the OTC market in the time period beginning after the NYSE close and ending at 4:30 p.m.

[53] In ITS, special procedures, called the pre-opening application, apply at the opening. A pre-opening application must be sent through ITS whenever a market maker anticipates that the opening transaction will be at a price that represents a change of more than the "applicable price change" from the stock's "previous day's consolidated closing price," which is the last price at which a transaction in the stock was reported through CTA on the previous trading day. Applicable price changes vary between an ⅛ and ¼ point depending on the price of the stock. For example, if a stock's consolidated closing price was 34 and the market maker anticipates the opening price to be 34⅜, that market maker will have to send a pre-opening notification because the price change of ⅜ is more than the applicable price change of ¼ for a stock of such value, as provided in the ITS Plan.

[54] See supra note 17.

Session I is consistent with the Act. The NYSE's closing prices would be known in advance to any investor that may choose to participate in Crossing Session I. Because the closing price on the NYSE would be know, investors have the option of not participating in Crossing Session I if they did not want the primary market closing price or if, after evaluating the 4:30 p.m. PSE closing price, they decided to cancel their OHT orders. In addition, the Commission does not believe it is required that the NYSE use the PSE 4:30 p.m. closing price. Both the PSE 4:30 p.m. closing price and the NYSE closing price occur well before the Crossing Session I execution. The NYSE price, however, represents the liquid trading environment on the primary market, while the PSE closing price represents trading when the primary market is closed. Consequently, it is reasonable for the NYSE price to be used in Crossing Session I. In addition, the Commission agrees with the NYSE that if its closing price does not remain a valid price at 5 p.m., then the Exchange would find a dearth of one-sided orders on one side of the market, in which case no executions would occur. The Commission also agrees that a Crossing Session I price, if "validated" by a 5 p.m. trade resulting from separate buy and sell orders (and not from "clean" crosses), should constitute the consolidated closing price and be utilized in the next day's ITS pre-opening application.

F. Recapturing Order Flow

The Commission does not agree with the commenters that the OHT sessions are not reasonably designed to result in the purposes described by the NYSE, namely to recapture order flow that currently is being exported for execution overseas. The Commission agrees with the NYSE that Crossing Session II should serve as a means of execution for institutional investor orders that currently are being sent overseas. The Commission believes that bringing order flow being executed overseas back to the NYSE, with the attendant benefits of Commission and Exchange oversight pursuant to the Act, consolidated surveillance, and trade reporting, will serve to protect the marketplace and the investing public.

The Commission further recognizes that Crossing Sesssion I was not designated specifically to recapture overseas order flow. As stated above, however, the Commission believes that Crossing Session I offers investors other benefits, such as having their orders executed after the close of the 9:30 a.m. to 4 p.m. trading session at the NYSE closing price and the flexibility of determining whether they wish to participate in this Session. Moreover, the Commission believes that both Crossing Sessions I and II must be viewed as parts of NYSE's multi-phase plan for after-hours trading that is designed to respond to an increasingly global marketplace.

G. NYSE Rule 390

The NASD, in its comment letter, stated that it believed that the application of NYSE rule 390 [55] to the OHT sessions would constitute a burden on competition and would have a chilling effect on the development of new trading systems. In response, the Exchange stated that the domestic application of rule 390 would not be extended by the OHT proposal because the rule currently applies 24 hours each day.

The application of rule 390 in a domestic, after hours context, is an open question that the Commission does not need to address in this order because the NASD has not proposed to operate a similar after-hours facility in the domestic OTC market. The Commission would revisit this issue, however, if such a system were proposed, and would require the NYSE to respond to serious competitive questions regarding the effect of the application of rule 390 on the NASD's ability to operate such a system.[56]

H. Market Manipulation

The Commission does not believe that Crossing Section I would provide professionals with enhanced opportunities to take advantage of retail customers who have entered closing-price single-sided orders and GTX orders into Crossing Session I. The Commission agrees with the NYSE that retail orders that would be entered into Crossing Session I, or GTX orders that migrate to this Session, would have the same "professional" representation in the OHT facility as they have in today's markets, e.g. members represent retail orders and, acting as brokers, must exercise judgment in determining whether orders should be represented in Crossing Session I. In addition, the Commission notes that there are certain safeguards built into the OHT facility that should decrease the opportunities for manipulation. For instance, NYSE members would not have access to the closing-price order file and NYSE systems would not disclose to specialists whether limit orders are eligible for the closing-price session.

In addition, the ability to see how the stock index futures market closes after 4 p.m. does not provide professionals with any non-public information. The closing futures price is public and is known well in advance of 5 p.m. Moreover, the PSE's current post-4 p.m. session runs past the stock index futures close, and the Commission has not received complaints about customers in the PSE being "picked off" by professionals reacting to the futures close. The Commission sess no reason why the OHT facility should be treated differently.

Finally, the NYSE has submitted to the Commission surveillance procedures for the OHT sessions. The Commission believes that these surveillance procedures, combined with the NYSE's existing surveillance program, should further provide the safeguards necessary to prevent trading abuses or market manipulation.

I. Priority Rules

During Crossing Session I, orders would be executed accoridng to a strict time priority system. Closing-price single-sided orders would have priority based on the time of entry into the OHT facility. Any GTX orders that migrate to Crossing Session I would retain their priority as among themselves, and would have priority over all closing-price single-sided orders. Under this strict time priority rule, there is no requirement that firm proprietary orders yield to customer orders. In addition, traditional rules of priority or precedence based on price or size would not apply to transactions effected in Crossing Session I. In the public notice and request for comments on Crossing Session I that was published in the **Federal Register**,[57] the Commission requested specifically public comment on whether the lack of customer preference was necessary or appropriate for the closing-price session. None of the commenters addressed this issue.

The Commission believes that the NYSE's proposed time priority system is appropriate for trading in the closing-price session and would facilitate a fair

[55] As stated above, NYSE rule 390 prohibits a member from effecting a transaction otherwise than on an exchange as principal or as an in-house agency cross in a security listed on the exchange before April 26, 1979. The rule does not apply to transactions on a foreign stock exchange, or after regular NYSE trading hours in a foreign OTC market.

[56] The Commission is approving the NYSE's proposed OHT facility even though it is not a true auction market. In addition, the Commission previously approved the MSE's Secondary Trading Session which has some, but not all, attributes of an auction market. See note 39, supra. The Commission sees no reason why the NASD should not be able to offer a system similar to the NYSE proposed OHT facility.

[57] See Securities Exchange Act Release No. 28639 (November 21, 1990), 55 FR 49736.

market for trading in this Session. In reaching this conclusion, the Commission emphasizes the unique nature and trading environment of Crossing Session I; it is a limited trading system and is not intended to be a price discovery system. All trades in Crossing Session I would be based on the NYSE closing price, which price is disseminated shortly after 4 p.m. Because (1) the trading price of any security would be known and no price discovery would exist in this system, (2) the existence of GTX orders is not disclosed to members, and (3) proprietary orders for members only can be entered from off the floor after the close of trading, there are no time and place advantages to NYSE members entering proprietary orders.[58]

J. Trading Halts

In addition, the Commission notes that NYSE rule 80B, the circuit breaker rule, may affect trading in the OHT sessions. As discussed above, if market activity during the 9:30 a.m. to 4 p.m. trading session were to trigger a market-wide trading halt pursuant to rule 80B, and the trading halt was in effect at the close of the 9:30 a.m. to 4 p.m. trading session, no trading would occur in either Crossing Sessions I or II. In effect, the sessions would not operate that day.[59]

The Commission believes that NYSE rule 80B plays an important role in dealing with potential strains on securities prices during periods of extreme downward volatility; it acts as a coordinated means to address potentially destabilizing market volatility and help promote stability and the equity and equity-related markets by providing for increased information flows and enhanced opportunity to assess information during times of extreme market movements. For these reasons, the Commission believes that the applicability of rule 80B to the OHT sessions should help provide participants in both Crossing Sessions I and II with the opportunity to re-establish an equilibrium between buying and selling interest in periods of extreme market volatility. In addition, the applicability of these rules to the OHT sessions should help ensure that market participants have a reasonable opportunity to become aware of, and respond to, significant price movements.

K. NYSE Rule 92

NYSE rule 92 protects against conflicts of interest when a member holds a customer order and trades for a proprietary account by imposing specific requirements on how the member must price and handle customer orders in these circumstances. Under proposed rule 900(d)(ii), however, a member who holds or has knowledge of a customer's unexecuted order in a stock still may initiate a proprietary order in that stock as part of an aggregate-price portfolio order in Crossing Session II, despite the otherwise contrary application of rule 92.

The Commission believes that the limitations to rule 92 proposed for the trading of aggregate-price portfolio orders in Crossing Session II are appropriate given the special attributes of this Session. To be eligible for entry onto the OHT facility for Crossing Session II, an aggregate-price order must include at least 15 NYSE-listed securities having a total market value of at least $1,000,000. It is very unlikely that members would use portfolio trades in Crossing Session II to disadvantage or "frontrun" customer single stock orders. Indeed, firms currently are executing these portfolio trades today overseas free from the constraints of NYSE rule 92. All Crossing Session II is doing is capturing these trades in the OHT system. It does not seem necessary at this time to subject these trades to rule 92, especially as they do not present the potential for abuse that the rule was designed to address.[60]

L. Exemptive and Other Relief

As discussed above, for Crossing Session I, the NYSE requests exemptive relief from, and interpretive advice under, section 31 of the Act and rules 10a–1, 10b–18, and 11Aa3–1 thereunder. In connection with Crossing Session II, the NYSE requests exemptive and other relief from section 31 of the Act and from rules 10a–1, 10b–18, and 11Aa3–1.[61]

1. Rules 10a–1 and 10b–18

The Commission believes that certain transactions in the OHT facility do not raise all of the same regulatory concerns that are raised by similar transactions during the 9:30 a.m. to 4 p.m. trading session and that exemptive relief from rule 10a–1 and interpretive advice under rule 10b–18 are appropriate.

Accordingly, the Commission's staff will issue a letter that grants exemptions and provides interpretive advice with respect to the treatment of transactions in the OHT facility under rules 10a–1 and 10b–18, respectively.

2. Rule 11Aa3–1

The NYSE has requested exemptive relief from the requirements of rule 11Aa3–1 [62] to the extent the Commission views the NYSE's proposed transaction reporting procedures for Crossing Sessions I and II as inconsistent with the requirements of the rule. Specifically, the NYSE will not disseminate last sale reports in the individual stocks that comprise the aggregate-price executions in Crossing Session II and the NYSE will not consolidate the volume attributable to Crossing Session II with the volume in those securities from the 9:30 to 4 session. Accordingly, the Commission grants the NYSE appropriate exemptions from the requirements in rule 11Aa3–1(b)(2)(iv) in light of these practices and the Commission's staff will issue a letter granting these exemptions.

In its comment letter, the MSE expressed concern that the NYSE should be required to disclose individual stocks comprising a portfolio and the number of shares of each stock traded in Crossing Session II. The MSE stated that it believes that more complete disclosure of after-hours portfolio trading enhances the quality of the U.S. markets from a regulatory perspective and promotes economically efficient executions of trades in the underlying stocks when investors are made aware of the extent of trading after hours in

[58] In light of factors that ensure that a NYSE member effecting a transaction for its own account, the account of an associated person, or an account managed by either the member or an associated person of the member has no time and place advantages, i.e., lack of price discovery; nondisclosure of the existence of GTX orders to members; the fact that proprietary orders for members only can be entered from off the floor after the close of trading; and the fact that orders entered into the OHT facility must be entered through and executed by SuperDOT, the Commission believes that executions obtained through the OHT facility should be regarded as satisfying paragraphs (a)(2)(i), (a)(2)(ii), and (a)(2)(iii) of rule 11a2–2(T) under the Act ("effect versus execute rule").

[59] The Commission further notes that a Commission-ordered suspension of trading in an individual security pursuant to section 12(k) of the Act, 15 U.S.C. 78l(k), would prohibit transactions in such security in either Crossing Session I or Crossing Session II until the suspension of trading was lifted.

[60] The Commission allowed a similar limitation of rule 92 in its order approving basket trading. See Securities Exchange Act Release No. 27382 (October 26, 1989), 54 FR 45834 (Approving File No. SR-NYSE-89-5).

[61] The Exchange also has requested exemptions from rules 10b–6, 10b–7, and 10b–8, and no-action positions under rules 15c1–5 and 15c1–6, for aggregate-price coupled orders entered during Crossing Session II. The Division of Market Regulation has under review a comprehensive approach to the application of the anti-manipulation rules to index-related transactions, which will accommodate in part the Exchange's request. Relief from these rules was requested on behalf of participants in the OHT facility, and is not necessary to implementation of the facility itself.

[62] 17 CFR 240.11Aa3–1 (1990).

individual stocks comprising a portfolio. The Commission agrees that consolidation of volume in individual securities with volume in those individual securities from the 9:30 a.m. to 4 p.m. trading session and dissemination of that volume is important. The Commission does not believe that the NYSE has yet presented convincing evidence that the Commission and the industry should retreat from the long-standing policy encouraging the dissemination of consolidated market data. The Commission has consistently stated that it believes that real-time reporting of program trading data is important.[63] The Commission also believes, however, that there may be significant timing and implementation difficulties involved in establishing the systems necessary to accomplish this goal. Thus, the Commission has determined to grant the NYSE a temporary exemption from the requirement in rule 11Aa3–1(b)(2)(iv) that volume from the Crossing Sessions be consolidated with volume from the 9:30 a.m. to 4 p.m. session for one year, commencing on [the first day of the month following the date of this order] and the Commission's staff will issue a letter granting this exemption.

Because the Commission continues to believe in the importance of having this data reported, however, the Commission requests that the NYSE consider how to disseminate data on the volume of the individual stocks in the aggregate-price orders executed in Crossing Session II at least before the next trading session begins. The Commission believes that, at a minimum, a facility must be developed to disseminate this data before the next day's opening and requests that the NYSE report to the Commission within four months on how it will accomplish these objectives.

3. Section 31 Fees

The Exchange has requested the Commission to adopt a rule that would exempt transactions effected in Crossing Sessions I and II from section 31 fees. The Commission preliminarily believes that granting this relief for transactions in Session II is consistent with the Act and not anti-competitive. Accordingly, the Commission will issue a release soliciting comment on a proposal to exempt transactions which are executed otherwise than during regular trading hours in a system that provides execution for orders of 15 securities or more at one aggregate price. In addition, while the Commission at this time, does not believe that it is appropriate to solicit comment on a proposal to grant such relief for transactions in Crossing Session I for the reasons stated in the proposing release, the Commission's release also solicits comment on whether to extend the exemption to individual stock transactions executed in Crossing Session I.

V. Conclusion

Based on the foregoing factors, the Commission finds that the NYSE's proposed rule change establishing an OHT facility is consistent with the requirements of sections 6(b)(5) and 11A of the Act and the rules and regulations thereunder. Accordingly, the proposed rule changes are approved for a two year temporary period.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[64] that the proposed rule changes are approved for a two year period ending on May 24, 1993.

Dated: May 24, 1991.

By the Commission.

Jonathan G. Katz,

Secretary.

Dissenting Statement of Commissioner Fleischman

I dissent from the foregoing Order, although I do not disagree with the objectives of the NYSE's proposals, because I cannot conclude that "Crossing Session II" satisfies the requirements of section 6(b)(5) of the Securities Exchange Act.[65]

Crossing Session I

For the second time within a year,[66] the NYSE—the historic champion of the auction market—is forsaking its normal auction market procedures to provide for execution of matched single-stock orders without any opportunity for order exposure or interaction and thus without any opportunity for price discovery or price improvement. The NYSE's stated purpose for Crossing Session I is to respond to the significant increase in overseas trading of listed stocks while minimizing the effect on its auction pricing mechanism.[67] The NYSE's application to the Commission for approval of Crossing Session I does not, however, otherwise justify permitting crossed orders (as was the case last year, for example, when the NYSE explained the need to meet the requirements of the Commodity Exchange Act and the regulations thereunder for "Exchange for Physical" (EFP) transactions).[68] Nor does the application make any reference to the Commission's expressed belief that the development of an after-hours trading system permitting order exposure and order interaction (for purposes of price discovery and of order book and trading crowd protection, respectively), or an amendment to NYSE rule 390 for after-hours trading, could better achieve the NYSE's stated purpose.[69]

In these circumstances, just as with the NYSE's MOC proposal last year, I do not believe that the purpose enunciated by the NYSE justifies the extensive departure from its normal market procedures. I note, particularly, that Crossing Session I relinquishes auction price discovery, permits single-stock matched orders to trade free from interaction with unmatched customer orders regardless of time of order entry,[70] and compromises customary transparency requirements. Nevertheless, because I believe innovations originated by the "primary" market need not be viewed automatically as anti-competitive but may in fact reflect the healthy competition of the marketplace (whether such competition is occurring on an international or domestic basis), because I believe that any potential for abuse in this situation is appropriately addressed by other NYSE rules [71] and by other applicable law [72] and market forces, because I believe that the officials and governors of the securities exchanges and the NASD understand their markets more thoroughly than any government regulatory agency (not to speak of any single individual acting in a regulatory role) and will be quick to respond to market reaction labelling their prior initiatives "wrong," and because I believe that, so long as they

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[63] See, e.g., October 1987 Market Break Report, Division of Market Regulation, at 3–27 to 3–28 (February 1988). See also letters from Richard G. Ketchum, Director, Division of Market Regulation, SEC, to Thomas E. Haley, Chairman, CTA, dated May 10 and June 10, 1988.

[64] 15 U.S.C. 78s(b)(2) (1988).

[65] 15 U.S.C. 78f(b)(5) (1991).

[66] *See* Exchange Act Rel. No. 28167, 46 SEC Docket (CCH) 832 (June 29, 1990) (approving one year pilot rule changes to permit matched and unmatched market-on-close (MOC) orders).

[67] File No. SR–NYSE–90–52, form 19b–4 at 3.

[68] Exchange Act Rel. No. 28167, 46 SEC Docket (CCH) 832, text at n.9.

[69] Exchange Act Rel. No. 28167, 46 SEC Docket (CCH) 832, 833–4, text at n. 16–17.

[70] See File No. SR–NYSE–90–52, Letter from Boston Stock Exchange to Jonathan G. Katz, Secretary, SEC (January 27, 1991) (commenting that the investor benefit arising from the sequencing requirement of the auction market will not be present in the NYSE's Crossing Session I).

[71] E.g., NYSE rule 92.

[72] E.g., In the Matter of E.F. Hutton & Co., Inc., n/k/a Shearson Lehman Hutton Inc., 41 SEC Docket (CCH) 413 (1988).

meet the statutory requirements, those officials and governors are properly entrusted under the Exchange Act to take market initiatives even though I and other regulators would act otherwise,[73] I would have concurred in the Commission's Order approving the NYSE's rules governing Crossing Session I [74] had the Order not also encompassed Crossing Session II.

Crossing Session II

The NYSE's stated purpose for Crossing Session II is again to respond to the significant increase in overseas trading of listed stocks.[75] Crossing Session II will permit nonstandardized baskets of listed securities to be crossed under the auspices of the NYSE, free from what its application to the Commission describes as "structural and regulatory factors" [76] that have tended to drive such trades to overseas markets. To translate, Crossing Session II transactions will occur without exposure to the auction market or to any open orders for the securities that comprise the basket, without the safeguard of certain normal NYSE and Commission trading rules, and, most important, without any meaningful disclosure of the trades to the market. In short, the trades will have the seal of approval of a primary American equities market although a central element of what in my view earns that seal—transparency—is lacking.

To me the primary reason to promote the return to domestic markets of trades in domestic stocks currently being executed overseas is to reveal them to the marketplace so that their significance may be known and assessed by other market participants pursuing trading strategies that presume awareness of all transactions in the public markets. To report Crossing Session II transactions, for each day's session, solely as a total amount of dollars and as an aggregate number of undifferentiated shares, without disclosure of the identities of the stocks included in the baskets traded or of price or volume of individual stocks or of separate baskets, may present the facile advantage of shielding those directly involved on the long side of the traded baskets from the normal market risk that accompanies market awareness, but the parallel and obverse effect is clear: undifferentiated reporting, solely in gross, deprives all market participants, other than those directly involved, of crucial market information and mocks what has become one of the fundamental tenets of American market regulation. More detailed information regarding Crossing Session II trades will be supplied to the NYSE, and thereby will be available to the Commission, for regulatory monitoring purposes, but the quality of that information will not be significantly different from what has been supplied to the NYSE and the Commission with respect to recent overseas basket trading by NYSE member firms—and in any event supplying information for surveillance, as important as it may be, is a distant second in importance to disclosing information to the marketplace.

I cannot agree that the NYSE's Crossing Session II should receive the Commission's approval, even on a pilot basis, when every trade will be non-transparent behind an NYSE curtain. Just last month the Commission stated, in testimony before a Subcommittee of the House of Representatives, that the issue of market transparency directly affects American investors and American markets, and that this Commission has been working to promote the availability of data concerning trading volume and prices so that American investors, analysts and all other participants in the American securities markets can have a full picture of total trading activity. Chairman Breeden phrased the issue quite succinctly at the public Commission meeting at which the Commission's Order was approved: The rules governing Crossing Session II permit what he called the "virus of opacity" to enter the American primary equity markets. To whatever extent one accepts the theories of capital market efficiency and the regulatory policy consequences flowing from those theories, there can be no doubt that efficiency is adversely impacted by the deliberate withholding of market information.

The American securities markets, in my view, do and will compete with foreign markets for trades on the basis of the unrivalled fundamental strengths of the American markets: Liquidity, transparency, ease of entry, and breadth of participation. To sacrifice one of those strengths—transparency—and thereby to diminish the others is for me too high a price to pay to accomplish the laudable purpose of furthering the domestic markets' role in international market competition. That sacrifice prevents me from concluding, as section 6(b)(5) of the Exchange Act mandates that I must, that these new Exchange rules, taken all together as a package governing both Crossing Sessions I and II, would "remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, (would) protect investors and the public interest".

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[73] See Fleischman, The "Unique Partnership" Between the SEC and the Self-Regulatory Organizations, Address to the Legal Advisory Committee to the New York Stock Exchange Board of Directors (July 29, 1988).

[74] I am pleased that, even in circumstances where the Commission is uncertain of the appropriate evaluative criteria, the Commission has detailed for the NYSE the categories of minimum data (including data as to the changes, if any, in spreads, volatility, and number of block transactions, during the last hour of the regular trading session) for evaluation of the after-hours sessions.

[75] File No. SR-NYSE-90-53, form 19b-4 at 3.

[76] *Id.*

[Release No. 34-29225; File No. SR-PHLX-91-23]

Self-Regulatory Organizations; Filing of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to Cross-Rate Currency Options Margin

Pursuant to section 19(b)(1) of the Securities Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on May 6, 1991, the Philadelphia Stock Exchange, Inc. ("PHLX" 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 self-regulatory organization. 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 PHLX, pursuant to rule 19b-4, proposes to amend PHLX Rule 722 regarding Margins with respect to Cross-Rate Currency Options. Specifically, the PHLX proposes to amend Exchange Rule 722(c)(2)(J) to provide that any of the forms of margin deposit specified in the Regulations of the Board of Governors of the Federal Reserve System will suffice as an appropriate margin deposit for cross-rate currency options.

The text of the proposed rule change is available at the Office of the Secretary, PHLX, and 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 self-regulatory organization included statements concerning the purpose of, and statutory basis for, the proposed