

E. Petitioner's Assertion That the Commission Improperly Relied on the Letter of CBOE's Outside Counsel Is Without Merit

Petitioner further contends that the Commission's "reliance" on the opinion of CBOE's outside counsel is manifestly erroneous.³² Petitioner claims that the opinion letter of CBOE's outside counsel failed to cite any relevant authority or provide any rationale to support its characterization of the CBOE's action as an "interpretation" of Article Fifth(b) and accordingly should be given less weight.³³ Petitioner decried the opinion letter's elevation of "form over substance," its failure to "address the circumstances when an 'interpretation' must also be deemed in substance an amendment," and its failure to discuss "the CBOE Board's conflict of interest in making and enforcing the interpretation at issue here."³⁴

Petitioner's assertion that the opinion letter of CBOE's outside counsel failed to cite any relevant authority or provide any rationale is incorrect. Further, we did not solely rely on the opinion of CBOE's outside counsel. We found the opinion letter, along with the CBOE's Statement in Support of Approval, to be "persuasive," and we found that those materials provided a "sufficient basis" to support a finding that, "as a federal matter under the Exchange Act, the CBOE complied with its own Certificate of Incorporation in determining that the proposed rule change is an interpretation of, not an amendment to, Article Fifth(b)."³⁵ Further, and most importantly, we specifically noted that we did "not believe that Petitioner's argument refutes, to any degree, CBOE's analysis of why its proposed rule change is an interpretation of Article Fifth(b), not an amendment."³⁶ Accordingly, we find Petitioner's allegation of error based on the letter of CBOE's outside counsel to be without merit.

F. Petitioner's Allegation That the Commission Made a Finding Suggesting That Not Approving CBOE's Interpretation Would Paralyze the Exchange Is Factually Baseless

Petitioner concludes his brief by arguing that "[t]he Commission's Order finding (incorporated from page 6 of the

CBOE's Statement in Support of Approval) that failing to approve the CBOE Board's 'interpretation' would 'paralyze' the Exchange is without basis in fact."³⁷ As stated above, while we cited to the CBOE's Statement in Support of Approval, we did not incorporate by reference the substance of that document into our Order. Nor did we make any finding in our Order that failing to approve the CBOE's rule change would paralyze the CBOE. Accordingly, Petitioner's argument is unsupported and will not be considered as grounds for reconsideration.

III

In the alternative, Petitioner suggests that "the CBOT's recent formal actions to demutualize have the capacity to render the proposed rule change moot" since the proposed rule change, the Petitioner argues, is only relevant if the CBOT is structured as a member organization.³⁸ Accordingly, the Petitioner suggests that the Commission should consider holding final determination of the validity of the proposed rule change in abeyance until the CBOT members' vote on whether to demutualize is complete.³⁹ We disagree. Self-regulatory organizations are not required to delay making changes to their rules in order to account for future contingencies that may or may not impact such rule in the future. Rather, to the extent that changed circumstances warrant further revisions to the CBOE's rules, the CBOE would need to submit a subsequent rule change pursuant to Section 19(b)(1) of the Act⁴⁰ and Rule 19b-4 thereunder.⁴¹ Accordingly, we see no reason to hold final determination of this motion to reconsider in abeyance as suggested by Petitioner.

Accordingly, we find that Petitioner's motion does not present the exceptional circumstances required for us to reconsider our earlier Order.

It is therefore ordered, that the motion for reconsideration filed by Marshall Spiegel be, and it hereby is, *denied*.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5-1912 Filed 4-21-05; 8:45 am]

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³² Petitioner's Brief in Support of Motion to Reconsider, *supra* note 11, at 12. See also Statement of Chicago Board of Options Exchange in Support of Approval of Rule Under Delegated Authority, October 26, 2004.

³³ Petitioner's Brief in Support of Motion to Reconsider, *supra* note 11, at 12-13.

³⁴ *Id.* at 12.

³⁵ Order, *supra* note 2, at 10444.

³⁶ *Id.*

³⁷ *Id.* at 3.

³⁸ *Id.*

³⁹ 15 U.S.C. 78s(b)(1).

⁴⁰ 17 CFR 240.19b-4.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51522; File No. SR-NASD-2005-050]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding the Nasdaq Opening Process for Nasdaq-Listed Stocks

April 11, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on April 11, 2005, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I are II below, which Items have been prepared by Nasdaq. Nasdaq has designated the proposed rule change as "non-controversial" under Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6) thereunder,⁴ which renders the proposed rule change effective upon filing with the Commission. 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

Nasdaq is filing a proposed rule change to begin the pre-market trading session on a voluntary basis at 8 a.m. rather than 9:25 a.m. The text of the proposed rule change is set forth below. Proposed new language is in *italics*; proposed deletions are in [brackets].⁵

* * * * *

4701. Definitions

(a)—(rr) No Change.

(ss) The term "Total Day" or "X Order" shall mean, (a) For orders in *ITS Securities* so designated, that if after entry into the Nasdaq Market Center, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential display between 7:30 a.m. and 6:30 p.m. and for potential execution between market open (9:30 a.m.) and 6:30 p.m., after

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

⁵ The proposed rule change is marked to show changes from the rule text appearing in the NASD Manual available at <http://www.nasdaq.com>.

which it shall be returned to the entering party.

(b) For orders in Nasdaq-listed securities so designated, that if after entry into the Nasdaq Market Center, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential display between 7:30 a.m. and 4 p.m. and for execution between [9:25] 8 a.m. and 4 p.m., after which it shall be returned to the entering party. [X Orders entered prior to 9:25 a.m. will be rejected back to the entering party.]

(tt) No Change.

(uu) The term "Total Immediate or Cancel" or "IOX Order" shall mean,

(a) For limit orders in *ITS Securities* so designated, that if after entry into the Nasdaq Market Center a marketable limit order (or unexecuted portion thereof) becomes non-marketable, the order (or unexecuted portion thereof) shall be canceled and returned to the entering participant. Such orders are available for potential execution between 9:30 a.m. and 6:30 p.m.

(b) For limit orders in Nasdaq-listed securities so designated, that if after entry into the Nasdaq Market Center a marketable limit order (or unexecuted portion thereof) becomes non-marketable, the order (or unexecuted portion thereof) shall be canceled and returned to the entering participant. Such orders may be entered and are available for potential execution between [9:25] 8 a.m. and 4 p.m.

* * * * *

4704. Opening Process for Nasdaq-Listed Securities

(a) No Change.

(b) Trading Prior To Normal Market Hours. The system shall [open] process all eligible Quotes/Orders in Nasdaq-listed securities at [9:25] 8 a.m. in the following manner to prevent the creation of locked/crossed markets.

(1) At [9:25] 8 a.m., the system shall open in time priority all eligible Quotes as stated in paragraph (5) below and all eligible Orders in accordance with Rule 4701(ss) and (uu) [in time priority]. Quotes/Orders whose limit price [does] would not lock or cross the book shall be added to the book in strict time priority. Quotes/Orders whose limit price would lock or cross the book shall be placed in an "In Queue" state except as provided in paragraph (4).

(2) Next, the system shall begin processing the In Queue Quotes/Orders in strict time priority against the best bid (ask) if the In Queue Quote/Order is a sell (buy) order. If an In Queue Quote/Order is not executable when it is next in time for execution, the system

shall automatically add that Quote/Order to the book.

(3) Once the process set forth in subparagraphs (1)–(2) is complete, the system shall begin processing Quotes and X and IOX Orders in accordance with their entry parameters.

(4) Between 8 a.m. and 9:25 a.m., the system shall open Quotes in accordance with the entry parameters set by each Nasdaq Quoting Market Participant provided that Quotes that would lock/cross the market will be rejected or executed in accordance with the Nasdaq Quoting Market Participant's instructions. At 9:25 a.m., the system shall open all remaining unopened Quotes in accordance with each firm's instructions.

(5) Nasdaq Quoting Market Participants may instruct Nasdaq to open their Quotes as follows:

(A) At the last price and size entered by the participant during the previous trading day, either including or excluding reserve size;

(B) At a price and size entered by the participant between 7:30 a.m. and 9:24:59 a.m.; or

(C) At the quotation limits for Nasdaq systems, currently \$.01 (bid) and \$2,000 (ask).

[[4]6] All trades executed prior to 9:30 shall be automatically appended with the ".T" modifier.

[[5]7] Notwithstanding subparagraphs (1) through (5), if a Nasdaq Quoting Market Participant has entered a Locking/Crossing Quote/Order into the system that would become subject to the automated processing described above, the system shall, before sending the order to any other Quoting Market Participant or Order Entry Firm, first attempt to match off the order against the locking/crossing Nasdaq Quoting Market Participant's own Quote/Order if that participant's Quote/Order is at the highest bid or lowest offer, as appropriate. A Nasdaq Quoting Market Participant may avoid this automatic matching through the use of anti-internalization qualifier as set forth in Rule 4710(b)(1)(B)(ii)(a). Order Entry Firms that enter locking/crossing Quotes/Orders shall have those Quotes/Orders processed as set forth in subparagraphs (1) through [[4]3], unless they voluntarily select a "Y" AIQ Value as provided for in Rule 4710(b)(1)(B)(ii)(a).

(c)–(d) No Change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq proposes to make available on a voluntary basis a pre-market trading session of the execution service of the Nasdaq Market Center at 8 a.m. rather than at 9:25 a.m. As described below, Nasdaq would open the trading session at 8 a.m. using the unlocking/uncrossing process that it currently uses at 9:25 a.m. All extended hours orders and all quotations so designated by a Quoting Market Participant would be eligible for execution during the pre-market trading session and quotations and orders would participate precisely as they do today. Trades that occur before 9:30 a.m. would continue to receive a trade report modifier denoting execution during extended trading hours, as they do today.

As it does today, Nasdaq would begin the voluntary pre-market trading session at 7:30 a.m. by making the system available for displaying quotations and orders but not for execution. As they do today, firms would continue to have three options for determining the price at which their carryover quotes would be opened at 9:25: (1) The last quotation price entered during the previous day; (2) the last quotation price the firm enters after 7:30 a.m. and before 9:25 a.m.; or (3) the quote limits for Nasdaq, currently \$.01 (bid) and \$2,000 (ask).

Beginning at 7:30 a.m. until 8 a.m., Nasdaq would display all quotations and eligible orders remaining in the system from the previous night. Market participants would have the ability to update their quotes beginning at 7:30 a.m. and to instruct Nasdaq regarding the display of that updated quote. For example, a market participant would be able, at any time after 7:30 a.m., to enter a quote update and to instruct Nasdaq to open that quote immediately. If the update were to be received before 8 a.m., the quotation would be opened

and executable when the execution functionality became available at 8 a.m. If the quote open update were to be received between 8 a.m. and 9:25 a.m. the quote would be opened upon the receipt of the quote update. At 9:25 a.m. all quotations would be made available for automatic executions.

Also at 7:30 a.m., market participants would be able to begin voluntarily submitting extended and regular hours orders. To facilitate orderly trading beginning at 8 a.m., Nasdaq would make Total Day Orders ("X Orders"), as described in Rule 4701(ss), and Total Immediate or Cancel ("IOX Orders"), as described in Rule 4701(uu), available for execution at 8 a.m. rather than at 9:25 a.m. Extended hours orders would receive a time stamp for purposes of determining time priority and would be displayed but not executed.

At 8 a.m., Nasdaq would open the execution functionality of the Nasdaq Market Center. In preparation for that opening, Nasdaq would construct an unlocked inside in each security by applying the unlocking/uncrossing process described in Rule 4704(b), which it currently applies at 9:25 a.m. In that process, Nasdaq would clear the existing quotation display and "wake up" the quotations of market participants that have instructed Nasdaq to open their quotations between 7:30 a.m. and 8 a.m. Quotations that have not been opened between 7:30 a.m. and 8 a.m. would not be displayed and would not participate in the 8 a.m. opening process. Participating quotations would be processed in order of time priority and placed on the Nasdaq book, provided, however, that quotations that would lock or cross the market would be rejected. Immediately upon completion of the 8 a.m. unlocking/uncrossing process, all quotations that have been opened voluntarily and all eligible orders that have been submitted voluntarily would be subject to automatic execution.

At 9:25 a.m., Nasdaq would "wake up" all remaining un-opened quotations and introduce them to the Nasdaq book as it does today. A quotation might remain unopened at 9:25 a.m. in two circumstances: If a market participant has entered a quotation update but has not instructed Nasdaq to open the quotation or if the participant has entered no update at all. In the first case, at 9:25 a.m., Nasdaq would open the quotation at the price and size specified by the participant. In the second case, Nasdaq would open the quotation based on the participant's instructions. Quotations that would lock or cross the inside would automatically be rejected.

It is important to note that the parameters governing the entry of Market-on-Open and Opening Imbalance Only Orders, as well as all parameters governing the Nasdaq Opening Cross would remain the same as today, including dissemination of Opening Cross information and the processing of the Opening Cross itself.

Nasdaq believes that these changes are consistent with the Act and would improve the fairness and orderliness of Nasdaq's pre-open trading environment. Having quotes opened voluntarily and executable upon entry would improve the accuracy of Nasdaq's pre-market trading data. Today, because quotations are not executable, the market can appear locked or crossed during the pre-market session. In addition, Nasdaq believes that making quotations and orders available for execution would improve both the transparency and price discovery provided by those quotations and orders. Nasdaq further notes that several other market centers are open for pre-market trading at this time and therefore Nasdaq's proposal would enhance competition for quotation and execution services.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,⁶ in general, and with Section 15A(b)(6) of the Act,⁷ in particular, in that Section 15A(b)(6) requires that the NASD's rules be designed to protect investors and the public interest. Nasdaq believes that its current proposal is consistent with the NASD's obligations under these provisions of the Act because it would extend fair and orderly trading of Nasdaq stocks on Nasdaq during an increasingly active period of the trading day, prevent the occurrence of locked and crossed markets before the start of normal market hours, and preserve price discovery and transparency that is vital to an effective opening of trading.

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

Nasdaq does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

Nasdaq neither solicited nor received written comments with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

(i) Significantly affect the protection of investors or the public interest;

(ii) Impose any significant burden on competition; and

(iii) Become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act⁸ and Rule 19b-4(f)(6) thereunder.⁹ Nasdaq has requested that the Commission waive the 30-day operative delay for "non-controversial" proposals, based upon a representation that the proposal is of the utmost importance to the fair and orderly operation of The Nasdaq Stock Market during the pre-opening trading period. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because it would allow Nasdaq immediately to implement the proposed rule change which should improve transparency in the pre-opening trading period. For this reason, the Commission designates the proposal to be effective and operative upon filing with the Commission.¹⁰

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing,

⁸ 15 U.S.C. 78s(b)(3)(A).

⁹ 17 CFR 240.19b-4(f)(6). The Commission notes that Nasdaq provided written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change at least five business days prior to the date of filing of the proposed rule change.

¹⁰ For purposes only of waiving the 30-day operative delay of the proposed rule change, the Commission considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁶ 15 U.S.C. 78o-3.

⁷ 15 U.S.C. 78o-3(b)(6).

including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASD-2005-050 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-NASD-2005-050. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASD-2005-050 and should be submitted on or before May 13, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5-1913 Filed 4-21-05; 8:45 am]

BILLING CODE 8010-01-P

DEPARTMENT OF STATE

[Public Notice 5048]

Fine Arts Committee Notice of Meeting

The Fine Arts Committee of the Department of State will meet on May 21, 2005, at 10:30 a.m. in the Henry Clay Room of the Harry S. Truman Building, 2201 C Street NW., Washington, DC. The meeting will last until approximately 12 noon and is open to the public.

The agenda for the committee meeting will include a summary of the work of the Fine Arts Office since its last meeting on September 17, 2004 and the announcement of gifts and loans of furnishings as well as financial contributions from January 1, 2004 through December 31, 2004.

Public access to the Department of State is strictly controlled and space is limited. Members of the public wishing to take part in the meeting should telephone the Fine Arts Office at (202) 647-1990 or send an e-mail to Craighillmf@state.gov by May 17 to make arrangements to enter the building. The public may take part in the discussion as long as time permits and at the discretion of the chairman.

Dated: April 5, 2005.

Gail F. Serfaty,

Secretary, Fine Arts Committee, Department of State.

[FR Doc. 05-8124 Filed 4-21-05; 8:45 am]

BILLING CODE 4710-38-P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements Filed the Week Ending April 8, 2005

The following Agreements were filed with the Department of Transportation under the provisions of 49 U.S.C. 412 and 414. Answers may be filed within 21 days after the filing of the application.

Docket Number: OST-2005-20893.

Date Filed: April 4, 2005.

Parties: Members of the International Air Transport Association.

Subject:

PTC2 AFR 0157 dated 8 March 2005, TC2 Within Africa Resolutions r1-r23.

Minutes: PTC2 AFR 0158 dated 4 April 2005.

Tables: PTC2 AFR Fares 0055 dated 18 March 2005.

Intended effective date: 1 May 2005.

Docket Number: OST-2005-20950.

Date Filed: April 8, 2005.

Parties: Members of the International Air Transport Association.

Subject:

PTC12 NMS-AFR 0215 dated 11 March 2005, TC12 North Atlantic-Africa (except USA-Reunion) Resolutions.

PTC12 NMS-AFR 0218 dated 18 March 2005, TC12 North Atlantic-Africa (except USA-Reunion) Resolutions—Technical Correction.

PTC12 NMS-AFR 0219 dated 26 March 2005, TC12 North Atlantic-Africa (except USA-Reunion) Resolutions.

PTC12 NMS-AFR 0216 dated 11 March 2005, TC12 North Atlantic USA-Reunion Resolutions.

PTC12 NMS-AFR 0217 dated 11 March 2005, TC12 Mid Atlantic-Africa Resolutions r1-r33.

Minutes: PTC12 NMS-AFR 0220 dated 8 April 2005.

Tables: PTC12 NMS-AFR Fares 0105 dated 18 March 2005, TC12 North Atlantic-Africa Specified Fares Tables.

PTC12 NMS-AFR Fares 0104 dated 18 March 2005, TC12 Mid Atlantic-Africa Specified Fares Tables.

Intended effective date: 1 May 2005.

Renee V. Wright,

Acting Program Manager, Docket Operations, Alternate Federal Register Liaison.

[FR Doc. 05-8086 Filed 4-21-05; 8:45 am]

BILLING CODE 4910-62-P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending April 8, 2005

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 *et seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: OST-2005-20889.

Date Filed: April 4, 2005.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: April 25, 2005.

Description: Application of Continental Airlines, Inc., requesting a

¹¹ 17 CFR 200.30-3(a)(12).