

trades are not reported in real time. The purpose of this is simply to minimize the possibility that other market participants may ascertain the firm's, or the customer's inventory position, and possibly trade in the subject security to the detriment of the firm that granted the upstairs stop.

The Exchange is proposing to adopt a new post 4 p.m. "Crossing Session" to accommodate member firms that are trading to complete an "upstairs stop" and thereby obviate any perceived need to execute these transactions in London or elsewhere.

In Amendment No. 1, the Exchange is proposing to adopt a new Rule 907 to add, as "Crossing Session IV," a facility whereby member organizations may fill the unfilled balance of a customer's order at a price such that the overall order is filled at a price that is no worse than the volume weighted average price ("VWAP") for the subject security on that trading day. The member organization would be required to document its VWAP agreement with the customer and the basis upon which the VWAP price would be determined. Crossing Session IV would be implemented initially as a one-year pilot program.

*The Operation of Crossing Session III and Crossing Session IV.* Proposed Crossing Session III and Crossing Session IV would operate as follows:

(i) The original order as to which an "upstairs stop" or "VWAP" has been granted must be for at least 10,000 shares;

(ii) The customer must have received a "stop" (guaranteed price) or VWAP for the entire order;

(iii) The member firm must record all details of the order, including the price it has guaranteed its customer or that the entire order will be filled at no worse than the VWAP;

(iv) The unfilled balance of the order that would be executed in Crossing Session III or Crossing Session IV must be at least 10,000 shares;

(v) The customer's order must be executed in Crossing Session III or Crossing Session IV at a price that ensures that the entire order is executed at a price that is no worse than the guaranteed price or the VWAP;

(vi) Orders may be entered in Crossing Session III or Crossing Session IV between 4 p.m. and 6:30 p.m., and must be identified as either a Crossing Session III or Crossing Session IV order;

(vii) Member firms will receive an immediate report of execution upon entering an order into Crossing Session III or Crossing Session IV;

(viii) Orders may be entered into Crossing Session III for execution at

prices outside the trading range in the subject security during the 9:30 a.m. to 4 p.m. trading session;

(ix) Orders may not be entered into Crossing Session III or Crossing Session IV in a security that is subject to a trading halt at the close of the regular 9:30 a.m. to 4 p.m. trading session; and

(x) At 6:30 p.m., the Exchange will print trades reported through Crossing Session III as guaranteed price coupled orders or in Crossing Session IV as VWAP executions.

A proposed amendment to Rule 900 provides a definition of "guaranteed price coupled orders." Proposed new Rule 907 prescribes the operation of Crossing Session III and Crossing Session IV as described above.

*Relief from Commission Rules.* In approving Crossing Session I and Crossing Session II, the Commission granted exemptive relief from its Rule 10a-1<sup>5</sup> under the Securities Exchange Act of 1934 (the "Act") (short sale rule) for transactions effected therein, finding that such transactions did not raise all of the same regulatory concerns that are raised by similar transactions during the 9:30 a.m. to 4:00 p.m. trading session. In its filing, the Exchange requests that the Commission extend the exemptive relief from Rule 10a-1 currently available for transactions effected in Crossing Sessions I and II to transactions effected in Crossing Session III as well. However, the NYSE has withdrawn its request for exemptive relief with respect to Crossing Session III.<sup>6</sup> In Amendment No. 1, the Exchange did not request short sale relief with respect to Crossing Session IV.

## 2. Statutory Basis

The NYSE believes that the basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)<sup>7</sup> that an Exchange have rules that are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

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

The Exchange does not believe that the proposed rule change will impose 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*

The Exchange has neither solicited nor received written comments on the proposed rule change.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. 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 will also be available for inspection and copying at the principal office of the NYSE. All submissions should refer to file number SR-NYSE-2002-40 and should be submitted by November 18, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority<sup>8</sup>.

**Margaret H. McFarland,**  
*Deputy Secretary.*

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<sup>5</sup> 17 CFR 240.10a-1.

<sup>6</sup> Telephone conversation between Robert J. McSweeney, Senior Vice President, Competitive Position, NYSE, and Mary N. Simpkins, Special Counsel, Division of Market Regulation, Commission, on August 19, 2003.

<sup>7</sup> 15 U.S.C. 78f(b)(5).

<sup>8</sup> 17 CFR 200.30-3(a)(12).