

of these internal safeguards and procedures to the Commission.¹²

The proposed Capacity Guidelines also provide that, in allocating OPRA's capacity-related costs among the parties, the first \$5 million of costs in any year would be allocated as currently provided under the OPRA Plan, based on the relative trading volume of each of the parties. Costs above this amount would be allocated in a fair and equitable manner as determined by the ISCA. The \$5 million amount would be subject to adjustment on an annual basis, if approved by 75% of the parties.

A prospective new options exchange would have to inform the ISCA, at least 6 months prior to the time it proposes to commence trading, of the initial amount of system capacity it would need. The costs of providing initial system capacity to an applicant in accordance with its request, as determined by the ISCA, would be included in the applicant's Participation Fee payable under Section 1(b) of the OPRA Plan. Also, under Guideline No. 6 of the proposed Capacity Guidelines, if the new party has not received the capacity it has requested at the time it has commenced trading options, and to the extent there is any excess capacity available in the system that has not been provided to any of the parties, the ISCA would be able to allocate to the new party all or a portion of any such excess capacity in order to provide the new party with the amount of capacity determined by the ISCA to be sufficient to satisfy the reasonable needs of the new party until it has been provided with the capacity it initially requested.

The proposed Capacity Guidelines would permit the ISCA to provide less than all of the capacity requested by the parties if the ISCA determines that: (1) The capacity requests of one or more of the parties are unreasonable, or (2) it is not reasonable to develop or maintain a system that has capacity sufficient to satisfy the requests of the parties.¹³ The ISCA would be authorized to allocate system capacity among the parties under circumstances when available capacity is insufficient to provide each party with the capacity it has requested; however, the ISCA would not be authorized to require any party to give up any capacity previously provided to it at the party's request, other than in response to a major systems failure or other catastrophe.¹⁴ In addition, the ISCA's authority to modify the OPRA System and to obligate the parties to pay the costs of such modifications would

be limited as follows: (i) The ISCA could not authorize a modification to the OPRA System that, together with other capacity increases previously authorized by the ISCA, represents an increase in the total capacity of the System in excess of 15,000 messages per second over the immediately preceding twelve months unless at least 75% of the parties consent to such increase; (ii) the ISCA could not authorize a modification to the OPRA System if the Processor disagrees with any material aspect of the manner or scope of the modification unless at least 75% of the parties consent to such modification; and (iii) the ISCA could not authorize a modification to the OPRA System that makes major changes to the System, such as changing the types of servers used in the System or changing the communication protocols used in the network unless at least 75% of the parties consent to such modification.

As a limited exception to the allocation of System capacity in accordance with the parties' requests and the ISCA's determinations, a provision is made in proposed new Section III(h) of the Plan for a party, on an anonymous basis, to offer to acquire additional capacity from, or make excess capacity available to, another party. Furthermore, to promote the most efficient utilization of available capacity, OPRA proposes in Section III(g) of the Plan to provide for the continued utilization of a "dynamic throttle," so as to automatically make available to a party with an immediate need for additional capacity, on a short-term interruptible basis, any unused capacity that may then be available. A party receiving additional capacity by operation of the dynamic throttle would be required to pay for it at an above-cost rate, so as to discourage parties from submitting unrealistically low capacity requests in the belief that some unused capacity of other parties would always be available to them.

Furthermore, under the proposed amendment, future Plan amendments, including amendments to the proposed new provisions of the Plan pertaining to capacity planning and allocation, would continue to require the unanimous approval of the parties. However, decisions relating to the selection or termination of the ISCA, certain changes to the authority of the ISCA, and changes to the Capacity Guidelines may be authorized by a vote of 75% of the parties. In addition, the selection of the ISCA would be required to be filed with the Commission as an amendment to OPRA's national market system plan.

In accordance with this requirement, this filing reflects OPRA's selection of

the Options Clearing Corporation ("OCC") to act as the ISCA upon the effectiveness of the proposed amendment to the Plan. OCC is a registered clearing agency that, while nominally owned by the five options exchanges, is an independent entity that is not controlled by any exchange. Each of the five exchanges owns a 20% interest in OCC, so that, on the basis of stock ownership alone, no exchange has a controlling interest. However, OPRA believes that OCC's independence is assured in ways that go beyond stock ownership. Pursuant to the bylaws of OCC, its 16-person Board of Directors consists of one Director from each of the five exchanges, nine representatives of OCC clearing member firms, one Public Director, and one Management Director. The exchanges have no voice in the selection of Member Directors, the Public Director, or the Management Director. Thus each exchange has only a 6.25% representation on the OCC Board, and all of the exchanges together represent only 31.25% of the Board.

OPRA believes that OCC's independence has long been recognized by the exchanges and by the Commission. This is reflected not only in the selection of OCC to act as the ISCA by the unanimous vote of all five exchanges, but in OCC's other roles as the central issuer and clearing agency for options traded on five competing exchanges, as the developer and manager of the intermarket options linkage facility pursuant to the Options Intermarket Linkage Plan,¹⁵ and as the arbiter of the eligibility of underlying stocks for options trading pursuant to the Options Listing Procedures Plan.¹⁶ OCC serves in these capacities with the approval of all five exchanges and with the Commission's approval, which OPRA believes stands as an acknowledgement of OCC's independence.

The respondent exchanges must establish a system for gathering and disseminating business information from and to participants of OPRA such that all nonpublic information specific to a participant in OPRA shall remain segregated and confidential from other

¹⁵ Securities Exchange Act Release Nos. 43086 (July 28, 2000), 65 FR 48023 (August 4, 2000) (order approving the Linkage Plan submitted by Amex, CBOE, and ISE); 43574 (November 16, 2000), 65 FR 70850 (November 28, 2000) (order approving PCX as participant in the Options Intermarket Linkage Plan); and 43573 (November 16, 2000), 65 FR 70851 (November 28, 2000) (order approving Phlx as a participant in the Options Intermarket Linkage Plan).

¹⁶ See Securities Exchange Act Release No. 44521 (July 6, 2001), 66 FR 36809 (July 13, 2001) (order approving a proposed options listing procedures plan by Amex, CBOE, ISE, OCC, PCX, and Phlx).

¹² *Id.*

¹³ Guideline No. 1, Capacity Guidelines.

¹⁴ Guideline No. 6, Capacity Guidelines.