

ensures that at some objective level, members will be cited for violating Exchange Rule 6.51.²⁶ In connection with as-of-add submissions, the Commission believes that the prospect of being fined for a rule infraction, particularly where the as-of-adds reflect a significant pattern of abuse in violation of the requirements of Rule 6.51, will act as a further incentive for encouraging exchange members to reduce their as-of-add submissions.

Furthermore, the Commission does not believe that the fact that the proposed monthly cap as-of-add fees is higher for clearing members (\$1000) than for individual members (\$500) raises significant regulatory concerns. In its present form, the Pilot Program distinguishes between clearing members and individual members in two respects. First, the monthly allowable percentage of as-of-adds is higher for individual members than for clearing members.²⁷ Second, the per-trade fee amount assessed against individual members (\$10) is higher than that assessed against clearing members (\$3). Because the average fee assessed against clearing members during the period between October 1, 1993, and September 30, 1994, (\$307.51) was higher than the average fee assessed against individual members (\$104.50),²⁸ the Commission does not disagree with the Exchange's determination that it is reasonable for the monthly cap applicable to clearing members to be higher than the cap applicable to individual members. Moreover, even though the Exchange represents that most as-of-adds are the result of late submission by individual members rather than by clearing members, the Commission believes that clearing members have some ability to encourage individual members to reduce their number of as-of-adds, for example, by charging fees to individual members who regularly submit as-of-adds to the clearing member for processing. Additionally, assuming that the portion of the proposal to incorporate violations of Rule 2.26 into the Minor Rule Plan is ultimately approved,²⁹ the Commission notes that it will be possible for individual members who submit a significant number of as-of-adds in

relation to their total number of monthly trades to be fined for violating the Minor Rule Plan without reaching the cap on fees pursuant to Rule 2.26. Finally, the fines proposed for violating the Minor Rule Plan for as-of-add submissions are the same for individual members and for clearing members. Even with the lower monthly cap on fees, therefore, the Commission believes that the proposal provides significant incentives for individual members to reduce their as-of-add submissions. As a result, the Commission believes that the difference between the cap levels for individual members and clearing members is reasonable and consistent with the Act.

The Commission also notes that in prior extensions of the Pilot Program, the Commission expressed concern over the Exchange's inability to determine, without examining each individual trade, whether particular as-of-adds are submitted due to the fault of an individual member or that member's clearing firm.³⁰ As a result, in determining whether a member has exceeded its stated monthly percentage of allowable as-of-adds, each as-of-add processed by a clearing member is counted against both the clearing member and the individual member who executed the transaction. For several reasons, however, the Commission now believes that this does not prevent a finding that the Pilot Program is consistent with the Act. First, data gathered by the Exchange from the first year of operation of the Pilot Program support the Exchange's representation that most as-of-adds are the result of late submissions by individual members, not clearing firms. From October 1, 1993, through September 31, 1994, there were 463 assessments of fees against individual members pursuant to the Pilot Program but only 13 such assessments against clearing members.³¹ Second, during that same period, only one individual member requested verification of the fee assessed by the Exchange and that member did not appeal the assessment upon receipt of verification from the Exchange.³² Finally, the Commission has not received any comment concerning the Pilot Program, in general, or this aspect of the Pilot Program, in particular. As a result, the Commission does not believe that individual members are being damaged as a result of the CBOE's inability to efficiently identify the party actually responsible for each as-of-add, especially given that members may

request verification of, and may appeal, any as-of-add fee assessed by the Exchange.

Finally, the Commission believes that the proposal to add paragraph (d) to Rule 2.26 concerning waivers of the as-of-add fees in unusual circumstances is also consistent with the Act. Proposed paragraph (d) substantively mirrors paragraph (g) of Rule 2.30, which was previously approved by the Commission. Rule 2.30 is similar to Rule 2.26 in that both rules are concerned with the late submission of trade data.³³ As a result, the Commission believes that if Rule 2.30 can be waived in the event of exigent circumstances, a similar provision should also apply to Rule 2.26. The Commission believes that when unusual circumstances exist that affect the ability of a significant number of members to submit trade information to the Exchange in a timely manner it may not be appropriate to assess fees, and possibly fines (assuming the amendment to the Minor Rule Plan discussed herein is ultimately approved as adopted), against individual members and clearing members. The Commission expects the CBOE to use its power to waive as-of-add fees only in highly unusual circumstances. In addition, while the CBOE has indicated that the power to waive as-of-add fees will usually be used in conjunction with the similar power in Rule 2.30, the Commission expects the CBOE to examine each situation on its merits to determine whether just Rule 2.30 or both Rules 2.26 and 2.30 should be waived in a particular situation.³⁴

The Commission finds good cause for approving the following portions of the proposed rule change and Amendment No. 1 thereto prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**: (1) The request for permanent approval of the Pilot Program; (2) the proposal to impose caps on the monthly fee that can be assessed against members; and (3) the portion adopting paragraph (d) to Rule 2.26 to allow the Exchange to waive application of the rule in unusual circumstances.

First, granting permanent approval of the Pilot Program will permit the Pilot Program to remain in effect without

Minor Rule Plan is consistent with the Commission's prior suggestions regarding the Pilot Program, for the reasons discussed below, this portion of the proposed rule change is being published for comment and is not being approved by the Commission on an accelerated basis herein with the remainder of the proposal.

²⁶ See *supra* note 4.

²⁷ See *supra* notes 6 and 7.

²⁸ See Pilot Report, *supra* note 10.

²⁹ See *supra* note 25.

³⁰ See *supra* note 5.

³¹ See Pilot Report, *supra* note 10.

³² *Id.*

³³ See *supra* note 12.

³⁴ For example, situations could arise for which it may be appropriate for the Exchange to waive Rule 2.30, but if the unusual circumstances last only a few hours, it may be inappropriate to conclude that trade data could not be submitted by most members on the same day that the trades occur. In such a situation, the Commission believes that it would not be appropriate for the Exchange to also waive Rule 2.26.