

services will support the Exchange's Phase II pilot program. A description of the primary characteristics of the Phase II pilot programs follows.

1. *Scope of Phase II Pilot Programs.*

(a) *Functions of Pilot Programs.* For the purposes of the Phase II pilot programs, the Exchange proposes to permit members to use hand-held data devices for actual trading purposes. That is, a participating member may rely on the information it receives on the floor by means of the device to make trading decisions, without having to rely on such conventional trading tools as paper tickets and telephones.

(b) *Number of Pilot Programs.* In order to preserve the ability of the Exchange to satisfy its regulatory oversight responsibilities, the Exchange reserves the right to limit the number of private vendors that it will allow to provide those pilot programs. The Exchange will choose vendors in its sole discretion. In the absence of mitigating circumstances, the Exchange currently contemplates that it will accept vendor Phase II pilot programs on a "first-come, first-serve" basis.

(c) *Size of Pilot Programs.* Similarly, the Exchange will initially limit the number of members that may participate in any vendor's Phase II pilot program to 25. That is, at the commencement of Phase II, no vendor may provide its pilot program to more than 25 members. This limitation will facilitate the control, monitoring and evaluation of pilot program operations. Where more than 25 members wish to participate in a vendor's Phase II pilot program, the Exchange will require the vendor to describe its procedures for selecting which 25 members it will allow to participate. Those procedures must provide a fair and non-discriminatory environment and must otherwise comply with the Exchange's selection requirements. The Exchange will develop procedures for selecting its own pilot program participants on the same basis.

If the Exchange determines that circumstances so warrant (based on its actual experience with the Phase II pilot programs), it may permit increases, or require decreases, in the maximum allowable number of pilot programs or the number of participants in any or all Phase II pilot programs.

2. *Exchange Support of Vendor Systems.*

The Exchange will use reasonable efforts to accommodate the installation of a participating vendor's base stations, battery charging equipment, antennae and other such service facilities. However, the Exchange will do so only at the vendor's expense and only insofar as any such

installation does not necessitate any substantial modification to the Exchange's facilities and does not interfere with the Exchange's development and installation of its planned wireless data communications system infrastructure or other aspects of the Exchange's wireless data communications, or other Exchange technology upgrade initiatives.

The Exchange will have no other obligation to support any aspect of the vendor's communications system. This means, among other things, that the Exchange will have no obligation to install, maintain or support base stations, base antennae, battery charging equipment, user equipment, user training, or any other special facilities, services or features related to the vendor's system.

3. *Exchange Charges.* Except as described above in connection with vendor responsibility for installation costs, the Exchange does not currently plan to charge vendors for the privilege of providing a Phase II pilot program. However, the Exchange may impose charges on vendors that provide wireless data communications services during Phase IV. If the Exchange does determine to impose Phase IV charges or any other charges, it would first seek Commission approval of any such charge.

4. *Vendor Requirements.* (a) *Contract with the Exchange.* The Exchange will not permit a vendor to provide a Phase II pilot program until the vendor and the Exchange have entered into the Exchange's Phase II pilot program agreement.<sup>5</sup> That agreement codifies the terms and conditions that are described in the proposed rule change and pursuant to which the Exchange is willing to allow a vendor to provide its Phase II pilot program.

(b) *Contracts with Participating Members.* The Exchange will not permit a vendor to provide its Phase II pilot program to a particular member until the vendor and the member have entered into an agreement which (i) extends to the Exchange third-party beneficiary status and the right to enforce the agreement, (ii) codifies the Exchange's required provisions regarding the terms and conditions pertaining to members' receipt of a wireless data communications service that the proposed rule change describes ("Service Agreement Terms")<sup>6</sup> and (iii)

specifies the parties' obligations as to the following matters:

(A) The degree of responsibility and liability, if any, that the vendor agrees to assume in the event that data is lost or delayed through the system or losses otherwise occur as a result of the member's use of the system;

(B) the amount of training that the vendor will provide;

(C) the maintenance and system support that the vendor will provide;

(D) any technological limitations or other restrictions on the member's participation (e.g., restrictions on where the member may use the device or the types of orders or other messages that the member may receive or transmit by means of the device);

(E) the availability of equipment and spare parts; and

(F) any charges that the vendor may impose for the use of its system.

In addition, a vendor's agreements with members receiving its service must be non-discriminatory. That is, the vendor must agree to offer its system to members pursuant to fair and unbiased terms and conditions that do not unfairly discriminate against any Exchange member. The Exchange will require each vendor to submit each such agreement or any form of agreement to the Exchange for the Exchange's prior approval so as to allow the Exchange to monitor that it comports with the Exchange's Service Agreement Terms and does not give one or more of the vendor's subscribing members an unfair competitive advantage over other of the vendor's subscribing members.

(c) *Use of Radio Frequencies.* (i) *Pre-Infrastructure Frequencies.* During Phase II, the Exchange will test a prototype of its proposed wireless data communications infrastructure and will design and, perhaps during Phase II, install and test the infrastructure itself. The Exchange plans to use the 2.4 Ghz "unlicensed" radio band for both the prototype and the actual infrastructure.

Because the Exchange cannot yet assess whether, or the extent to which, vendor pilot programs will interfere with the infrastructure or with other Exchange uses of radio frequencies, the Exchange reserves the right to require a vendor to refrain from using a particular frequency if the Exchange determines that the use would interfere with any of the Exchange's wireless systems. In particular, the Exchange plans to preclude Phase II pilot program vendors from using the 2.4 Ghz radio band for part or all of the Phase II period.

<sup>5</sup> A copy of the Exchange's Phase II pilot program agreement is included in the Exchange's Form 19b-4 which may be examined at the places specified in Item IV below.

<sup>6</sup> The Exchange's Service Agreement Terms are set forth in Attachment B to Exhibit A in the

Exchange's Form 19b-4 which may be examined at the places specified in Item IV below.