

## SECURITIES AND EXCHANGE COMMISSION

[Extension: Rule 20a-1, SEC File No. 270-132, OMB Control No. 3235-0158]

### Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

The title of the collection of information is "Rule 20a-1 under the Investment Company Act of 1940, Solicitation of Proxies, Consents and Authorizations." Rule 20a-1(a) requires that the solicitation of a proxy, consent or authorization with respect to a security issued by a registered fund be in compliance with Regulation 14A (17 CFR 240.14a-1 to 14a-104), Schedule 14A (17 CFR 240.14a-101), and all other rules and regulations adopted under section 14(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78n(a)). Rule 20a-1(b) requires a fund's investment adviser, or a prospective adviser, to transmit to the person making a proxy solicitation the information necessary to enable that person to comply with the rules and regulations applicable to the solicitation.

Regulation 14A and Schedule 14A establish the disclosure requirements applicable to the solicitation of proxies, consents and authorizations. In particular, Item 22 of Schedule 14A contains extensive disclosure requirements for registered investment company proxy statements. Among other things, it requires the disclosure of information about fund fee or expense increases, the election of directors, the approval of an investment advisory contract and the approval of a distribution plan.

The Commission requires the dissemination of this information to assist investors in understanding their fund investments and the choices they may be asked to make regarding fund operations. The Commission does not use the information in proxies directly, but reviews proxy statement filings for compliance with applicable rules.

It is estimated that approximately 1,000 registered investment companies are required to file one proxy statement annually. The total annual reporting and

recordkeeping burden of the collection of information is estimated to be approximately 106,200 hours (1,000 responses  $\times$  106.2 hours per response).

Rule 20a-1 does not involve any recordkeeping requirements. Providing the information required by the rule is mandatory and information provided under the rule will not be kept confidential.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Written comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10202, New Executive Office Building, Washington, DC 20503; and (ii) Kenneth A. Fogash, Acting Associate Executive Director/CIO, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: November 13, 2002.

**J. Lynn Taylor,**

*Assistant Secretary.*

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**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46822; File No. SR-NASD-2002-152]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the National Association of Securities Dealers, Inc. Regarding Trade Throughs and Locked Markets in the Nasdaq InterMarket

November 13, 2002.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 25, 2002, 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" or "SEC") the proposed rule change as described in Items I and II below, which Items

have been prepared by Nasdaq. On November 6, 2002, Nasdaq filed an amendment to the proposed rule change.<sup>3</sup> On November 12, 2002, Nasdaq filed another amendment to the proposed rule change.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

Nasdaq is proposing to change NASD Rule 5262 ("Trade-Throughs") to conform its rule to the Commission order of August 28, 2002,<sup>5</sup> which establishes a limited exemption from the trade through provisions of the ITS Plan. In addition, Nasdaq is proposing to change NASD Rule 5263 ("Locked or Crossed Markets"), which addresses locked and crossed markets in exchange-listed securities, to conform its rule more closely with the locked markets rule contained in the ITS Plan. Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

\* \* \* \* \*

#### Rule 5262. Trade Throughs

(a) A member registered as an ITS/CAES Market Maker in an ITS/CAES security, shall avoid purchasing or selling such security, whether as principal or agent, at a price which is lower than the bid or higher than the offer displayed from an ITS Participant Exchange or ITS/CAES Market Maker ("trade-through"), unless the following conditions apply:

(1)-(8) No Change.

(9) *The transaction involves QQQs, DIAMONDS, and SPDRs, and the execution occurs at a price that is no more than three cents lower than the highest bid displayed in CQS and no more than three cents higher than the lowest offer displayed in CQS. This*

<sup>3</sup> See letter from Jeffrey S. Davis, Associate General Counsel, Nasdaq, to Lisa N. Jones, Attorney, Division of Market Regulation ("Division"), Commission ("Amendment No. 1"). Amendment No. 1 makes a technical amendment to the rule text of the proposal.

<sup>4</sup> See letter from Jeffrey S. Davis, Associate General Counsel, Nasdaq, to Lisa N. Jones, Attorney, Division, Commission ("Amendment No. 2"). Amendment No. 2 makes a further technical amendment to the rule text of the proposal. For purposes of calculating the 60-day abrogation period, the Commission considers the period to begin the date of the original proposed rule change, October 25, 2002.

<sup>5</sup> See Securities Exchange Act Release No. 46428 (August 28, 2002), 67 FR 56607 (September 4, 2002) (granting a *de minimis* exemption for transactions in certain exchange-traded funds from the trade through provisions of the Intermarket Trading System ("ITS") Plan) ("Exemptive Order").

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

exemption shall apply for a pilot period ending June 4, 2003, or for such other period specified by the SEC.

(b) No Change.

(c) No Change.

\* \* \* \* \*

#### NASD Rule 5263. Locked or Crossed Markets

(a) No Change.

(b) No Change.

(c)(1)

(A) Unless excused by operation of paragraphs (c)(1)(B) or (d) below [A]an ITS/CAES Market Maker that [who] makes a bid or offer and in so doing creates a locked or crossed market with an[other] ITS Participant Exchange [or ITS/CAES Market Maker] and that receives a complaint through ITS/CAES from the party whose bid (offer) was locked or crossed (the "aggrieved party"), the ITS/CAES Market Maker responsible for the locking or crossing offer (bid) shall, as specified in the complaint, either promptly "ship" (i.e., satisfy through ITS/CAES the locked or crossed bid (offer) up to the size of his locking or crossing offer (bid)) or "unlock" (i.e., adjust his locking or crossing offer (bid) so as not to cause a locked or crossed market). If the complaint specifies "unlock", it may nevertheless ship instead. [shall promptly send to such other ITS Participant Exchange or ITS/CAES Market Maker a commitment to trade seeking either the bid or offer which was locked or crossed, unless excused by operation of paragraph (d) below. Such commitment shall be for either the number of shares he has bid for (offered) or the number of shares offered (bid for) on the ITS Participant Exchange or by the ITS/CAES Market Maker, whichever is less.]

(B) If there is an error in a locking or crossing bid or offer that relieves the locking or crossing ITS/CAES Market Maker from its obligations under paragraph (c)(2) of Rule 11Ac1-1 and if the ITS/CAES Market Maker receives a "ship" complaint through ITS/CAES from the aggrieved party, the locking or crossing ITS/CAES Market Maker shall promptly cause the quotation to be corrected and, except as provided in paragraph (d) below, it shall notify the aggrieved party through ITS/CAES of the error within two minutes of receipt of the complaint. If the locking or crossing ITS/CAES Market Maker fails to so notify the aggrieved party, he shall promptly ship.

(2) An ITS/CAES Market Maker that makes a bid or offer and in so doing creates a locked or crossed market with another ITS/CAES Market Maker shall promptly send to such other ITS/CAES

Market Maker an order seeking either the bid or offer which was locked or crossed, unless excused by operation of paragraph (d) below. Such order shall be for either the number of shares he has bid for (offered) or the number of shares offered (bid for) by the ITS/CAES Market Maker, whichever is less.

(d) The provisions of paragraph (c) above shall not apply when:

1. No Change.

2. The issuance of the commitment to trade or order referred to above would be prohibited by an NASD rule or by SEC Rule 10a-1 under the Act.

3.-6. No Change.

7. The locking bid or offer no longer prevails at the time the complaint is received by the ITS/CAES Market Maker.

\* \* \* \* \*

## 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 statutory 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

NASD Rule 5262—Trade Throughs. The ITS Plan requires that each of the national securities exchanges and the NASD adopt a similar rule governing the practice of "trading through" the quote of another ITS participant that trades ITS-eligible securities. The trade through rule prohibits market participants from purchasing or selling such securities at prices that are lower than the bid or higher than the offer displayed by another ITS Participant. NASD Rule 5262, the NASD's trade through rule, governs the conduct of NASD members that have registered as market makers in ITS-eligible securities.

On August 28, 2002, the Commission issued an order granting a *de minimis* exemption ("Exemption") for transactions in certain exchange-traded funds ("ETFs") from the trade through provisions of the ITS Plan.<sup>6</sup> At present,

<sup>6</sup> See note 4, *supra*.

the exemption extends to transactions in three designated ETFs—the Nasdaq-100 Index ("QQQ"), the Dow Jones Industrial Average ("DIAMONDS"), and the Standard & Poor's 500 Index ("SPDRs"). Pursuant to the Exemption, transactions in these ETFs may be "executed at a price that is no more than three cents lower than the highest bid displayed in CQS and no more than three cents higher than the lowest offer displayed in CQS" ("Exempted Trade-Through"). The Exemption is effective from September 4, 2002 through June 4, 2003.

According to Nasdaq, the Exemption was proposed by the Commission to permit the rapid execution of orders in ETFs at prices that may trade through the quotations of other markets, including the NBBO price. Because Exempted Trade-Throughs will, by definition, be exempt from ITS restrictions, a market participant that reports execution of an Exempted Trade-Through will not be required to satisfy an administrative request from any ITS participant for satisfaction following the Exempted Trade-Through.<sup>7</sup> The SEC will measure the impact of the Exemption on the trading of those securities during the pilot period.

Nasdaq has decided to add the same exemption to its own trade-through rule, in Nasdaq's case, NASD Rule 5262. This measure will ensure that ITS/CAES Market Makers are aware that they must operate under equivalent terms of the ITS Plan as other ITS Plan participants.

NASD Rule 5263—Locked or Crossed Markets. The ITS Plan requires each of the national securities exchanges and the NASD to adopt a similar lock/cross rule governing trading in ITS-eligible securities. The current wording of the NASD rule is more stringent than required by the ITS Plan. Nasdaq believes that the more stringent wording of the rule is burdensome and places the NASD at a competitive disadvantage with other ITS participant exchanges that have adopted the lock/cross language prescribed by the ITS Plan.

NASD Rule 5263 currently requires ITS/CAES Market Makers that create locked or crossed markets with another ITS Participant or ITS/CAES Market Maker promptly to send that other party a commitment to trade seeking either the bid or offer which was locked or

<sup>7</sup> Pursuant to the ITS Plan, if an ITS participant trades through the quotation of another ITS participant, thereby violating the ITS trade through prohibition, the non-violating participant is entitled to send an administrative message noting the trade-through and the violating participant is required to respond with a commitment to trade at the price and size quoted by the non-violating participant.

crossed. Nasdaq believes that the requirement to promptly send a commitment contrasts with the current procedure expressed in the ITS Plan, which requires that a locking participant respond only after a locked market complaint has been properly registered. Nasdaq believes that the more stringent NASD requirement could cause ITS/CAES Market Makers to prematurely send a commitment to trade without having the input or an understanding of the locked or crossed party's intentions to trade. To eliminate this disparity and competitive disadvantage with other markets, Nasdaq will mirror the language of the ITS Plan and remove the more restrictive language with respect to locks or crosses that occur between ITS/CAES Market Makers and the exchange participants of the ITS Plan.

Nasdaq will, however, maintain its current, stricter standard of conduct with respect to locked and crossed markets that occur between ITS/CAES Market Makers within the Nasdaq InterMarket, which are not addressed by the ITS Plan. Specifically, Nasdaq believes that the requirement that ITS/CAES Market Makers promptly send orders whenever they lock or cross other ITS/CAES Market Makers, reduces the number and duration of locks and crosses that do, inevitably, occur within a competing dealer market. Nasdaq also believes that locking and crossing behavior can provide valuable price discovery information to market participants. Nasdaq believes, however, that economic and regulatory incentives help minimize the extent to which such locks and crosses interfere with the smooth operation of the InterMarket and with ITS/CAES Market Makers' internal systems. This is particularly important because CAES and ITS/CAES Market Makers operate on an automatic execution basis.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,<sup>8</sup> in general and with Section 15A(b)(6) of the Act,<sup>9</sup> in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster competition and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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*

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

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

Written comments were neither solicited nor received.

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

Because the foregoing rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for 30 days from the date on which it was filed, provided that Nasdaq has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the filing date of the proposed rule change or such shorter time as designated by the Commission, it has become effective pursuant to Section 19(b)(3)(A) of the Act,<sup>10</sup> and Rule 19b-4(f)(6) thereunder.<sup>11</sup> At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the proposed 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.

Nasdaq has requested that the Commission waive the 5-day pre-filing notification requirement and the 30-day operative delay. The Commission believes that waiving the 5-day pre-filing notification requirement and the 30-day operative delay is consistent with the protection of investors and the public interest.<sup>12</sup> In particular, the proposed rule changes bring Nasdaq rules into conformity with the approved ITS Plan and the August 28, 2002 Commission's Exemptive Order. For this reason, the Commission waives both the

<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>11</sup> 17 CFR 240.19b-4(f)(6).

<sup>12</sup> For purposes only of accelerating the operative date of this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

5-day pre-filing notification requirement and the 30-day operative waiting period.

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

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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 NASD.

All submissions should refer to File No. SR-NASD-2002-152 should be submitted by December 11, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

**J. Lynn Taylor,**

*Assistant Secretary.*

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### **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-46824; File No. SR-NYSE-2002-43]**

### **Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change Relating to Arbitration**

November 13, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 3, 2002, the New York Stock Exchange, Inc. filed with the Securities and Exchange Commission the proposed rule change as described in items I, II and III below, which items have been prepared by the Exchange. The Commission is publishing this notice to

<sup>13</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>8</sup> 15 U.S.C. 78o-3.

<sup>9</sup> 15 U.S.C. 78o-3(b)(6).