

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48120; File No. SR-NASD-2003-83]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 by the National Association of Securities Dealers, Inc. Relating to an Amendment to the Automated Confirmation Transaction Service Concerning Late Trade Reports

July 2, 2003.

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 May 13, 2003, 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") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. On June 26, 2003, Nasdaq amended the proposal.<sup>3</sup> Nasdaq filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act,<sup>4</sup> and Rule 19b-4(f)(1) thereunder,<sup>5</sup> as one constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule, which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposal

Nasdaq proposes to modify the Automated Confirmation Transaction Service ("ACT") to append the .SLD modifier, as appropriate, to trade reports submitted to ACT. There is no proposed rule language.

#### 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 basis for its proposal and discussed any comments it received regarding the proposal. 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

The NASD trade reporting rules are designed to ensure timely and accurate reports of executed trades. Timely and accurate trade reporting is essential to the maintenance of a fair and orderly market. Therefore, NASD rules require members to identify reports of transactions that are not indicative of the current market for the security.<sup>6</sup> For example, the .SLD trade report modifier must be appended to trade reports that are submitted to ACT more than 90 seconds after the trade was executed. Trade reports that do not include the .SLD modifier are included in the last sale, high price, and low price calculations for a security because Nasdaq's systems assume that trades without this modifier, or any other modifier, are normal trades indicative of the current market. Therefore, when trades are reported late and erroneously do not include the proper modifier (and are therefore included in these calculations), the market can be distorted because the price being reported may be significantly different from the contemporaneous market. The potential misinformation could cause confusion for members, issuers, and investors and could lead to investment decisions being made based upon inaccurate information.

Today, ACT does not automatically append the .SLD modifier to late trade reports. Therefore, the integrity of the information disseminated relies on members complying with their obligation to report trades accurately. NASD conducts surveillance of its members for compliance with the trade reporting rules and does bring disciplinary actions against members that fail to include the .SLD modifier on late trade reports. Nevertheless,

members occasionally fail to include the .SLD modifier on late trade reports and the immediate result is that potentially misleading information is disseminated.<sup>7</sup> Therefore, to prevent this result, Nasdaq is proposing to modify ACT to append the .SLD modifier automatically for trades executed during normal market hours that are reported late. The .SLD modifier is not used for trades executed in the pre-market and after-hours trading sessions.

To append the modifiers automatically, ACT must be reprogrammed to include a validation parameter that compares the time of execution and trade report time to the modifier field. Once the validation parameter is operative, if a trade report is submitted more than 90 seconds after the time of execution, and the time of execution was during normal market hours, ACT will append the .SLD modifier automatically.

The validation parameter relies on the time of execution to identify improperly reported trades and append the .SLD modifier. Today, nearly all trades reported to Nasdaq include the time of execution, but some are still reported without this information.<sup>8</sup> Therefore, a small number of improperly reported trades will not be corrected and thus will continue to be included automatically in the last sale, high price, and low price calculations. However, Nasdaq staff will continue to conduct surveillance for these instances and manually correct the calculations, as appropriate, when such errors are discovered. To eliminate the small number of incidences in which ACT cannot identify and correct improperly reported trades, Nasdaq soon will file a proposal to require the time of execution on all trade reports.

###### 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>9</sup> in that the proposed rule change will prevent nearly all late trade reports from being included in the calculations designed to inform investors of the current market for a security. As a

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

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

<sup>3</sup> See June 25, 2003 letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, and attachments ("Amendment No. 1"). Amendment No. 1 completely replaces and supersedes the original proposed rule change.

<sup>4</sup> 15 U.S.C. 78s(b)(3)(A). For purposes of calculating the 60-day abrogation period, the Commission considers the period to have commenced on June 26, 2003, the date Nasdaq filed Amendment No. 1.

<sup>5</sup> 17 CFR 240.19b-4(f)(1).

<sup>6</sup> See, e.g., NASD Rule 5430(a).

<sup>7</sup> There are few incidences in which trades are reported without the .SLD modifier. In fact, only .03% of trades are reported more than 90 seconds after execution and only a small number of these late reports do not contain the .SLD modifier. However, while this is not a widespread problem, the quality of information disseminated can be improved by eliminating even the small number of incidences in which late trade reports are erroneously included in the last sale calculation.

<sup>8</sup> Today, over 99% of the trades submitted to ACT include the time of execution.

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

result, members and the public will possess more accurate information when making investment decisions.

#### *B. Self-Regulatory Organization's Statement of 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

The foregoing proposal has become effective pursuant to section 19(b)(3)(A)(i) of the Act,<sup>10</sup> and Rule 19b-4(f)(1)<sup>11</sup> thereunder, in that it constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such 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.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal 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 number SR-NASD-2003-83 and should be submitted by July 30, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48118; File No. SR-NYSE-2003-18]

### Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Fingerprint-Based Background Checks of Exchange Employees and Others

July 1, 2003.

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 May 15, 2003, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. On May 30, 2003, the NYSE filed an amendment to the proposed rule change.<sup>3</sup> On June 27, 2003, the NYSE filed a second 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 and to grant accelerated approval of the proposed rule change.

<sup>12</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>3</sup> See letter to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, from Darla C. Stuckey, Corporate Secretary, NYSE (May 28, 2003) ("Amendment No. 1"). In Amendment No. 1, the NYSE eliminated all references related to the possible application of the proposed rule to members of the media.

<sup>4</sup> See letter to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, from Mary Yeager, Assistant Secretary, NYSE (June 27, 2003) ("Amendment No. 2"). In Amendment No. 2, the NYSE eliminated the following proposed rule text: "or other circumstances in which the Exchange concludes that the person's access to facilities and records does not place the security thereof at risk." The Exchange opted to delete the rule text due to the Commission's concern that such language was overbroad.

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

The NYSE proposes to adopt a new rule pursuant to which the Exchange would obtain fingerprints from prospective and current employees, temporary personnel, independent contractors, and service providers of each of the Exchange and its principal subsidiaries; submit those fingerprints to the Attorney General of the United States or his or her designee for identification and processing; and receive criminal history record information from the Attorney General of the United States or his or her designee for evaluation and use, in accordance with applicable law, in enhancing the security of the facilities, systems, data, and/or records of the Exchange or its principal subsidiaries (collectively, "facilities and records"). The text of the proposed rule change is below. Proposed new language is in italics.

\* \* \* \* \*

#### *NYSE Rule 28—Fingerprint-Based Background Checks of Exchange Employees and Others*

*(a) In order to enhance the security of the respective facilities, systems, data, and/or records of the New York Stock Exchange, Inc. ("the Exchange") and its principal subsidiaries (collectively, "facilities and records"), the Exchange shall obtain fingerprints from, and conduct a fingerprint-based background check of, all prospective and current employees, temporary personnel, independent contractors, and service providers of each of the Exchange and its principal subsidiaries. However, the Exchange may determine not to obtain fingerprints from, or to seek fingerprint-based background information with respect to, a person due to that person's limited, supervised, or restricted access to facilities and records, or the nature or location of his or her work or services. The Exchange shall apply this rule in all circumstances where permitted by applicable law.*

*(b) The Exchange shall submit fingerprints obtained pursuant to this rule to the Attorney General of the United States or his or her designee for identification and processing. The Exchange shall at all times maintain the security of all fingerprints provided to, and all criminal history record information received from, the Attorney General or his or her designee. The Exchange, however, may provide a subsidiary with access to information from background checks based on fingerprints obtained from that*

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

<sup>11</sup> 17 CFR 240.19b-4(f)(1).