

advertisements. Commenters said that the non-securities business exception, which limits securities activities to no more than 25 securities transactions annually, is vague and that the threshold number is too low.⁴⁰ Commenters asked that the number of securities transactions allowed in any one-year be increased, or that certain systematic (automatic) payments not count towards the 25 securities transactions limit.⁴¹ In this regard, NASD intends to provide interpretive guidance to members on a case-by-case basis regarding specific application of the exception.

Commenters also stated that the proposed rule is not in step with the prevalent use of modern communications technology to effect transactions from remote locations because it continues to use a "bricks and mortar" approach to the definition.⁴² Commenters stated that modern communications technology, such as mobile telephones, laptop computers, and personal digital assistants (PDAs), is diminishing the need for branch offices to be in a physical location. With such technology, registered representative can effect transactions anywhere. These commenters asserted that consumers and investors now accept such means of conducting business and the proposed definition is outdated.⁴³ Several commenters also stated that the proposal, which would require the listing of branch office locations, including primary residences, might invade the privacy of registered representatives. The commenters stated that addresses of primary residence offices should not be made publicly available.⁴⁴

Based on the comments to NtM 02-52, NASD is proposing changes to the original proposal as described above. NASD believes that these modifications would address a majority of concerns raised by commenters to the original proposal. Overall, NASD believes that the proposed definition would establish

a broader national standard for classifying such locations and would provide administrative and cost efficiencies to members through the creation of a centralized registration system on CRD®. In addition, NASD believes that the proposed rule change would allow regulators to effectively monitor and audit locations and the activities conducted there without compromising investor protection. Each exception to the proposed branch office definition contains important safeguards and limitations. In particular, the primary residence exception contains the same safeguards provided in the Commission's Books and Records Rules exception for private residences (which also does not contain any restrictions on the number of business days an associated person may operate from his or her residence). NASD determined to remove the 50-business day requirement from the primary residence exception because NASD believes it does not serve any added regulatory benefit and, instead, imposes substantial costs and burdens to the industry. Based on the extensive comments from the industry, NASD, on balance, does not believe that the costs of such provision outweigh the benefits.

NASD would announce the effective date of the proposed definition of the term "branch office" in a Notice to Members. NASD expects the effective date of the proposed rule change would correspond with the commencement date of the centralized branch office registration system on CRD®.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change, as amended, or

B. Institute proceedings to determine whether the proposed rule change, as amended, should be disapproved.

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. In particular, the Commission seeks commenters' specific views on the primary residence exception and the

divergent proposals by NASD and the NYSE with respect to the NYSE's proposed annual 50-business day limitation on engaging in securities activities from a primary residence.

Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Comments may also be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. SR-NASD-2003-104. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. 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-2003-104 and should be submitted by January 6, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁴⁵

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48887; File No. SR-NASD-2003-110]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 by the National Association of Securities Dealers, Inc. Relating to Uniform Hearing Procedures for and Consolidation of Rules Applicable to Expedited Proceedings

December 5, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934

⁴⁵ 17 CFR 200.30-3(a)(12).

⁴⁰ See, e.g., Northwestern Mutual Investment Services, LLC comment letter, dated September 20, 2002; and Carillon Investments, Inc. comment letter, dated September 16, 2002.

⁴¹ See, e.g., Equity Services, Inc. comment letter, dated September 19, 2002.

⁴² See, e.g., Associated Securities Corporation comment letter, dated September 13, 2002.

⁴³ See, e.g., Lincoln Financial Advisors comment letter, dated October 17, 2002; and Source Capital Group comment letter, dated September 19, 2002.

⁴⁴ See, e.g., Keystone Capital Corporation comment letter, dated September 7, 2002; Mission Securities Corporation comment letter, dated September 17, 2002; and West America Securities Corp. comment letter, dated September 17, 2002; and National Planning Holdings, Inc. comment letter, dated September 3, 2002.

("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on July 15, 2003, the National Association of Securities Dealers, Inc. ("NASD") 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 the NASD. On September 2, 2003, the NASD filed an amendment to the proposed rule change.³ On November 18, 2003, the NASD again amended the proposed rule change.⁴ 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 Substance of the Proposed Rule Change

The NASD is proposing to create a new rule series, the proposed NASD Rule 9550 Series, to consolidate, clarify and streamline those existing procedural rules that have an expedited proceeding component. The text of the proposed rule change is available at the NASD and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NASD included statements concerning the purpose of, and 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. The NASD 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The NASD proposes to modify certain NASD rules that have an expedited proceeding component to make them more understandable and uniform, and

to make the overall process for actions covered by such rules more efficient. Existing NASD rules recognize that expedited treatment is needed for certain types of actions. These actions fall into two general categories: (i) Those that involve misconduct capable of causing further harm to the investing public, other members or the integrity of the markets; and (ii) those that can be appropriately expedited for administrative ease. Unlike disciplinary actions that may concern complex sales-practice violations, the expedited actions that are affected by this proposal generally involve straightforward issues unrelated to complicated securities transactions (e.g., whether the respondent paid an arbitration award or NASD fee, provided information requested by NASD staff, or complied with the net capital requirements).⁵

However, the present NASD rules that have provisions for fast-track procedures vary considerably in some respects and overlap in others, at times without any clear rationale. The proposed rule change, discussed in detail below, streamlines and clarifies the existing expedited rules and makes them more uniform. At the same time, the modifications, which do not abrogate any substantive rights held by

⁵ In most instances, the issues raised by these types of proceedings are uncomplicated and the defenses are limited. For example, in a case involving a respondent's failure to pay an arbitration award, the issue presented is whether the member or person has paid the award. A respondent cannot collaterally attack the actual arbitration award. See *John G. Pearce*, 52 S.E.C. 796, 798, 1996 SEC LEXIS 1329, at *5 (1996) ("To permit a party dissatisfied with an arbitral award to attack it collaterally for legal flaws in a subsequent disciplinary proceeding would subvert the salutary objective that the NASD's [arbitration] resolution seeks to promote."); see also *James Anthony Morrill*, 51 S.E.C. 1162, 1164 n.6, 1994 SEC LEXIS 1766, at *6 (1994) (same). Similarly, in an action for failure to provide information, the issue presented is whether the respondent provided information requested by the NASD. It is well settled that respondents must fully and promptly cooperate with the NASD, see *Mark Allen Elliott*, 51 S.E.C. 1148, 1150, 1994 SEC LEXIS 1765, at *5-6 (1994), and respondents cannot second guess NASD information requests or impose conditions on responding. See *Joseph Patrick Hannan*, 53 S.E.C. 854, 859, 1998 SEC LEXIS 1955, at *11 (1998) ("[A]n NASD member may not 'second guess' or 'impose conditions on' the NASD's request for information."); *Michael David Borth*, 51 S.E.C. 178, 181, 1992 SEC LEXIS 3248, at *7 (1992) ("The Rules do not permit second guessing the NASD's requests" or permit a respondent "to shift his responsibility to others * * *"). The issues also are very narrow in a net capital case. Indeed, "[t]he gravamen of the charge is the conduct of business by the firm while its net capital is deficient. The cause of the deficiency does not bear on this issue." *Charters & Co. of Miami*, 43 S.E.C. 175, 177, 1966 SEC LEXIS 189, at *6 (1966). See also *Litwin Securities, Inc.*, 52 S.E.C. 1339, 1344-45, 1997 SEC LEXIS 1146, at *16 (1997) (holding that intent is irrelevant to whether a respondent violated the net capital requirements).

members or associated persons, continue to ensure that expedited actions are fair to all parties. The current rules that have been renumbered and otherwise affected by the proposed rule change are as follows:

- NASD Rule 8220 Series (Suspension for Obstructing Investigations);⁶
- NASD Rule 9410 Series (Procedures for Regulating Activities of a Member Experiencing Financial or Operational Difficulties);⁷
- NASD Rule 9510 Series (Summary and Non-Summary Proceedings);⁸
- NASD Rule 9530 Series (Suspension or Cancellation for Failure to Pay Dues, Fees and Other Charges);⁹ and

⁶ The current NASD Rule 8220 Series (Suspension for Obstructing Investigations) is now located at proposed NASD Rule 9552 (Failure to Provide Information or Keep Information Current).

⁷ The current NASD Rule 9410 Series (Procedures for Regulating Activities of a Member Experiencing Financial or Operational Difficulties) is now located at proposed NASD Rule 9557 (Procedures for Regulating Activities Under NASD Rules 3130 and 3131 Regarding a Member Experiencing Financial or Operational Difficulties). As noted above, on September 4, 2003, the Commission approved certain NASD proposed changes to NASD Rules 3130 and 3131 and the NASD Rule 9410 Series. See Securities Exchange Act Release No. 48438 (September 4, 2003), 68 FR 53766 (September 12, 2003) (SR-NASD-2003-74) (Commission Approval Order of NASD Proposed Rule Change Regarding the Regulation of Activities of Members Experiencing Financial and/or Operational Difficulties).

⁸ The current NASD Rule 9510 Series (Summary and Non-Summary Proceedings) has been separated into a number of individual proposed rules. Summary proceedings under NASD Rule 9511(a)(1) for actions authorized under section 15A(h)(3) of the Act are now located at proposed NASD Rule 9558 (Summary Proceedings for Actions Authorized by section 15A(h)(3) of the Act). Non-summary proceedings under NASD Rule 9511(a)(2)(A) for failure to comply with an arbitration award or related settlement agreement are now located at proposed NASD Rule 9554 (Failure to Comply with an Arbitration Award or Related Settlement). Non-summary proceedings under NASD Rule 9511(a)(2)(B) for failure to meet the qualification requirements or other prerequisites for access to the NASD or member services is now located at proposed NASD Rule 9555 (Failure to Meet the Eligibility or Qualification Standards or Prerequisites for Access to Services). Non-summary proceedings under NASD Rule 9511(a)(2)(C) for failure to adhere to certain public communication standards are now located at proposed NASD Rule 9551 (Failure to Comply with the Public Communication Standards). Finally, non-summary proceedings under NASD Rule 9511(a)(2)(D) for failure to comply with a temporary or permanent cease and desist order are now located at proposed NASD Rule 9556 (Failure to Comply with a Temporary or Permanent Cease and Desist Order). It should be noted that proposed NASD Rule 9556, along with the NASD Rule 9800 Series and related amendments adopted by SR-NASD-98-80, will expire on June 23, 2005, unless extended or permanently adopted by the NASD pursuant to Commission approval at or before such date.

⁹ The current NASD Rule 9530 Series (Suspension or Cancellation for Failure to Pay Dues, Fees and Other Charges) is now located at proposed NASD Rule 9553 (Suspension or Cancellation for Failure to Pay Dues, Fees and Other Charges).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Barbara Z. Sweeney, Senior Vice President and Corporate Secretary, NASD, to Kathy England, Assistant Director, Division of Market Regulation ("Division"), Commission dated August 29, 2003 ("Amendment No. 1"). Amendment No. 1 amended and superseded the proposed rule change in its entirety.

⁴ See letter from Barbara Z. Sweeney, Senior Vice President and Corporate Secretary, NASD, to Kathy England, Assistant Director, Division, Commission dated November 17, 2003 ("Amendment No. 2"). Amendment No. 2 amended and superseded the proposed rule change in its entirety.

- NASD Rule 9540 Series (Failure to Provide Information or Meet the Eligibility and Qualification Standards),¹⁰

With this proposed rule change, the NASD believes that the first major improvement to the expedited proceedings provisions is that they are reorganized into a single rule series, the proposed NASD Rule 9550 Series, and each type of action is clearly labeled. At present, the various types of expedited proceedings are scattered throughout the NASD's rules, in many instances without clear headings,¹¹ increasing the likelihood of confusion for interested parties and adjudicators. Going forward, interested parties will simply need to review the NASD Rule 9550 Series, with its clearly marked subheadings, to ascertain their rights and obligations with regard to expedited actions.

The proposed amendments also consolidate some current expedited rules that have similar or overlapping provisions. For instance, current NASD Rules 8221(a) and (b) and 9541(a) and (b) have identical provisions that allow NASD staff to issue a notice of suspension if a member or associated person "fails to provide any information, report, material, data, or testimony." These provisions are consolidated into a single rule, proposed NASD Rule 9552, under the proposed amendments. Similarly, current NASD Rules 9511(a)(2)(B) and 9541(c) both cover situations where a member or associated person fails to meet eligibility or qualification standards. Under the proposal, these provisions are now consolidated and clarified under the amendments as proposed NASD Rule 9555. The NASD believes that the consolidation of these various rules will alleviate the current confusion over which rule to use in a particular situation.

The proposed amendments, moreover, separate into individual rules some provisions, the consolidation of which has caused confusion. The proposed

amendments, for example, separate the four "non-summary" actions currently located in NASD Rule 9511(a)(2) for failure to pay an arbitration award, failure to meet eligibility or qualification standards, failure to comply with certain public communication standards and failure to comply with a cease and desist order. The NASD believes that these provisions were not logically connected to one another; they are separated into individual rules under the proposed amendments.¹² The substance of the four provisions remains intact, however. The NASD proposes to separate these four provisions into individual rules so that the rule headings clearly denote the substance of the actions. The NASD believes that the previous heading of "non-summary" proceedings was confusing because there are a number of rules that have an expedited component that could be viewed as "non-summary" in nature.

In addition, the proposed rule change modifies the authorization provision for initiating certain summary proceedings. Pursuant to section 15A(h)(3) of the Act,¹³ existing NASD Rule 9512 allows the summary suspension or limitation of activities of a member or associated person when, for example, another self-regulatory organization has expelled, barred or suspended the member or associated person, or when the member is in such financial or operating difficulty that it cannot be permitted to continue to do business as a member with safety to investors, creditors, other members or the NASD. Currently, the NASD may only invoke NASD Rule 9512 with NASD Board authorization.¹⁴ The proposed rule change would allow the President of NASD Regulatory Policy and Oversight or the Executive Vice President for NASD Regulatory Policy and Programs (rather than the Board) to authorize the issuance of summary proceeding notices, which begin the summary proceeding process. The NASD would only initiate a summary proceeding under circumstances demanding quick action.

This modification to the authorization provision would avoid the logistical difficulties of having to obtain the necessary authorization from the Board on short notice, while at the same time ensuring that such decisions are made at the highest NASD staff levels.¹⁵ Unlike the current summary provision, moreover, the modified provision provides that a respondent's request for a hearing generally will result in a stay of the action.¹⁶

The proposed amendments also reorganize the hearing provisions of these various rules into a single rule within the new NASD Rule 9550 Series. The NASD believes that the new hearing rule, proposed NASD Rule 9559, creates a uniform, efficient and manageable expedited procedure consistent with the NASD's obligations to the investing public, the securities markets and NASD members. Under the proposal, a respondent may request a hearing at any time prior to the effective date of the action contained in the notice issued pursuant to the new NASD Rule 9550 Series. Under the present scheme, some rules have five-day periods while others have seven-day periods to request hearings,¹⁷ even though the notices often do not become effective for much longer periods of time.¹⁸ This new provision ties the periods together, giving respondents more time to request a hearing without altering the expedited nature of the proceedings.

The NASD believes that the proposed NASD Rule 9550 Series also simplifies the actual hearing process in a number of ways. First, the rule series channels all requests for hearings to the Office of Hearing Officers ("OHO"). At present, various expedited proceedings are held before different adjudicative bodies—e.g., NASD Board hearing panels, National Adjudicatory Council ("NAC") hearing panels, OHO hearing panels,

Fees and Other Charges) is now located at proposed NASD Rule 9553 (Failure to Pay NASD Dues, Fees and Other Charges).

¹⁰ The current NASD Rule 9540 Series (Failure to Provide Information or Meet the Eligibility and Qualification Standards) has been combined with two proposed rules. NASD Rules 9541(a) and (b) regarding failure to provide information is now located at proposed NASD Rule 9552 (Failure to Provide Information or Keep Information Current). NASD Rule 9541(c) regarding failure to meet the eligibility and qualification standards is now located at proposed NASD Rule 9555 (Failure to Meet the Eligibility or Qualification Standards or Prerequisites for Access to Services).

¹¹ For instance, NASD Rule 9511(a)(2) covers three distinct and unrelated types of conduct without any description in the title beyond "non-summary proceedings."

¹² As discussed above, current NASD Rule 9511(a)(2)(A) (Failure to Comply with an Arbitration Award) is now located at proposed NASD Rule 9554. Current NASD Rule 9511(a)(2)(B) (Failure to Meet Eligibility or Qualification Standards) is now located at proposed NASD Rule 9555. Current NASD Rule 9511(a)(2)(C) (Failure to Comply with Certain Public Communication Standards) is now located at proposed NASD Rule 9551. Finally, current NASD Rule 9511(a)(2)(D) (Failure to Comply with a Temporary or Permanent Cease and Desist Order) is now located at proposed NASD Rule 9556.

¹³ 15 U.S.C. 78o-3(h)(3).

¹⁴ The present requirement that the NASD Board must authorize such actions is set forth in NASD's rule and not in the Act.

¹⁵ This proposed change makes the authorization provision for summary proceedings consistent with the authorization provision for temporary cease and desist orders under NASD Rule 9810(a).

¹⁶ As mentioned *supra*, the summary proceedings provisions have been renumbered and will be located at proposed NASD Rule 9558.

¹⁷ Compare NASD Rules 8222(a) (a respondent must request a hearing within five days of the service of the notice); 9413(a) (same); 9532(a) (same); 9542(a) (same) with NASD Rule 9514(a)(1) (a respondent must request a hearing within seven days of the service of the notice).

¹⁸ See, e.g., NASD Rules 8221-22 (respondent must request hearing within five days of service of notice but the notice of suspension does not become effective for 20 days); NASD Rules 9531-32 (respondent must request hearing within five days of the notice but the notice of suspension or cancellation does not become effective until 15 days after service of the notice); NASD Rule 9541-42 (respondent must request hearing within five days of service of notice but the notice of suspension does not become effective for 20 days).

Hearing Officers—with little justification. This practice has proven to be cumbersome. Under the proposed amendments, respondents file a written request for a hearing with OHO. For actions involving a failure to pay an arbitration award or NASD fees, a Hearing Officer from OHO will act as the sole adjudicator, as is the current practice. For all other matters involving expedited proceedings, an OHO-appointed hearing panel, consisting of a hearing officer and two hearing panelists, will act as the adjudicative body.¹⁹ Second, the amendments allow adjudicators to conduct hearings by telephone. Third, the proposed rule series will allow various expedited actions to be consolidated, eliminating the need for parties to litigate related matters in separate venues.²⁰ In brief, the NASD believes that the fairness of the process will not be impaired—and the efficiency will be improved—by these changes.

Furthermore, the NASD believes that the proposed NASD Rule 9550 Series provides respondents with greater protection by mandating that the action be stayed while the matter is pending, save for limited circumstances. The current rules with expedited components take different approaches as to whether a request for a hearing stays the action.²¹ In general, under the proposed NASD Rule 9550 Series, a request for a hearing automatically stays the action, unless the Hearing Officer orders otherwise (e.g., where there is a threat of harm to the public or other members if the suspension or limitation is not immediately effective). In the ordinary case, this provision will allow respondents to be heard before the suspension, bar or expulsion takes effect. However, the streamlined procedures for final NASD action, discussed below, ensure that the action will not be stayed for a prolonged period (as can now happen due, in part, to the infrequency of NAC and NASD

Board meetings and the difficulty of using special mailing ballots). The NASD believes that the rule change strikes an appropriate balance between the need to ensure fairness to respondents and the need for swift action in appropriate cases.

As indicated above, the NASD believes that the proposed NASD Rule 9550 Series streamlines the procedures for final NASD action. In general, hearings must be conducted and matters resolved within a specified, shortened timeframe once a respondent requests a hearing.²² The NASD believes that the use of such deadlines is consistent with the Commission's recent adoption of amendments to its Rules of Practice that impose binding completion dates in certain Commission administrative proceedings.²³ The NASD believes that the deadlines also are consistent with both the Commission's and the NASD's emphasis on "real-time enforcement."

Once the hearing panel or Hearing Officer issues the initial decision, the NAC's Review Subcommittee has the ability to call the matter for review in a condensed timeframe. As is currently the case with most expedited rules, respondents will not have the right to

appeal the matter to the NAC,²⁴ and the NASD Board will not have the ability to call the matter for review. Thus, the hearing panel or Hearing Officer decision, if not called for review by the NAC, is the NASD's final action. However, the respondent would have the ability to appeal a hearing panel or Hearing Officer decision to the Commission.²⁵ The NASD believes that these provisions ensure that respondents have a right to a full and fair hearing before OHO and that the NAC has the ability to call matters for review when appropriate, while eliminating time-consuming review that can significantly delay the effectiveness of the subject action without necessarily adding benefit to the decision-making process in these uncomplicated matters.²⁶

Finally, NASD no longer refers to itself or its subsidiary, NASD Regulation, Inc., using its full corporate name, "the Association," "the NASD"

²⁴ Under many of the existing rules with expedited components, respondents may not appeal the matter to an NASD appellate body, such as the NAC. For example, the NAC appoints the original, "trial level" hearing panel in actions under the NASD Rule 8220 Series (failure to provide information). The NASD Board appoints the hearing panel in actions under the NASD Rule 9510 Series (summary and non-summary proceedings). Under neither rule series does a respondent have any right of appeal to an internal, NASD appellate body. Similarly, an OHO appointed hearing panel's decision in actions under the NASD Rule 9410 Series (member experiencing financial or operational difficulties) and NASD Rule 9530 (failure to pay fees) is not appealable to the NAC or any other internal, NASD appellate body under the existing system.

²⁵ As is currently the case, a respondent's appeal of an expedited action to the Commission would be governed by Section 19(f) of the Act. See *William J. Gallagher*, Securities Exchange Act Release No. 47501, 2003 SEC LEXIS 599, at *5 (March 14, 2003) (reviewing appeal involving failure to pay arbitration award under Section 19(f) of the Act and explaining that the Commission need only to find that "the 'specific grounds' on which the SRO based its action 'exist in fact'"). Of course, an adjudicator's determination regarding a request for extraordinary relief (e.g., a motion for leave to file a late request for a hearing) is not appealable to the Commission. See *Warren B. Minton, Jr.*, Securities Exchange Act Release No. 46709, 2002 SEC LEXIS 2712, at *9–10 (October 23, 2002) ("[W]e do not have jurisdiction to review the NASD's denial of Minton's motion to vacate the default. * * * [T]he NASD merely rejected Minton's collateral attack on the NASD's [previous] action. * * * [E]ven if an applicant is adversely affected by the NASD's denial of a motion to set aside a default, that fact 'does not transform the denial into a reviewable NASD order.'"); *Gary A. Fox*, Securities Exchange Act Release No. 46511, 2002 SEC LEXIS 2381, at *3–5 (September 18, 2002) ("[W]e are precluded from considering an applicant's application for review if that applicant failed to follow the NASD's procedures. * * * Fox failed to respond to NASD requests for information, failed to respond to the * * * notice of his suspension, and failed to apply for reinstatement within the time required". [W]e are [thus] precluded from considering Fox's application for review.").

²⁶ See *supra* note 5 and accompanying text.

¹⁹ The Chief Hearing Officer will select as Panelists persons who meet the qualifications delineated in NASD Rule 9231(b).

²⁰ It is not uncommon for a firm to experience multiple, related problems, for example, a financial crisis, issues about the qualifications of the Financial Operations Principal, and a failure to provide information in response to NASD staff's queries about the problems. Under the current rules, NASD staff would be required to initiate multiple proceedings to address the issues.

²¹ Compare NASD Rule 8220 Series (request for a hearing does not stay the action); NASD Rule 9514(c)(1) (request for a hearing does not stay the action); with NASD Rule 9413(c) (request for a hearing does stay the action); NASD Rule 9514(c)(2) (request for a hearing does stay action as to certain alleged violations but does not as to others); NASD Rule 9532(a) (request for a hearing does stay the action); NASD Rule 9542(a) (request for a hearing does stay the action).

²² For instance, proposed NASD Rule 9559(f) requires that hearings for failure to comply with cease and desist orders, summary proceedings and members experiencing financial or operational difficulties be held within 14 days, and hearings for all other actions be held within 60 days of a request for a hearing. In addition, under proposed NASD Rule 9559(o), OHO must issue a decision in cases involving a failure to comply with cease and desist orders, a summary proceeding or a member experiencing financial or operational difficulty within 21 days and in all other cases within 60 days of the date of the close of the hearing. However, the Hearing Officer or, if applicable, hearing panel is given flexibility to manage the progress of the case. In some instances, parties legitimately may need more time to explore the issues in the case, gather and provide detailed documentation, make preparations for witnesses, draft and file motions, etc. For good cause shown, or with the consent of all of the parties to a proceeding, the Hearing Officer or, if applicable, the hearing panel may extend or shorten any time limits prescribed by the rule. The proposed rule change thus gives adjudicators the discretion to adapt to the circumstances of each case.

²³ See Release Nos. 33–8240, 34–48018, 35–27686, 39–2408 (June 11, 2003), 68 FR 35787 (June 17, 2003) (Commission Adoption of Amendments to Rules of Practice). In the release, the Commission stated, "Based upon [our] experience with non-binding completion dates, the Commission has determined that timely completion of proceedings can be achieved more successfully through the adoption of mandatory deadlines and procedures designed to meet these deadlines." *Id.* The Commission also stated, "Any and all deadlines and timelines established by these amendments to the Commission's Rules of Practice confer no substantive rights on respondents." *Id.* at 35788. As with the Commission's amendments, the deadlines and timelines established by the NASD's proposed amendments for hearing panels and the NAC to hold hearings and issue decisions confer no substantive rights on respondents.

or "NASD Regulation, Inc." Instead, the NASD uses "NASD" unless otherwise appropriate for corporate or regulatory reasons. Accordingly, the proposed rule change replaces several references to "the Association" and "the NASD" in the text of the proposed rule change with the name "NASD" and deletes several references to "NASD Regulation, Inc." Although the proposal would delete the name "NASD Regulation, Inc." NASD Regulation, Inc. will continue to perform the functions described in the rule.

2. Statutory Basis

The NASD believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act,²⁷ which requires, among other things, that the NASD's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The NASD believes that the proposed rule change is consistent with the provisions of section 15A(b)(7) of the Act,²⁸ which provides that NASD members, or persons associated with its members, are appropriately disciplined for violations of any provisions of the Act or the NASD's rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

The NASD 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.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the NASD consents, the Commission will:

A. By order approve such proposed rule change; or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

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. Comments may also be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. SR-NASD-2003-110. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. 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 at 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 the File No. SR-NASD-2003-110 and should be submitted by January 6, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁹

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48893; File No. SR-PCX-2003-38]

Self-Regulatory Organizations; Order Granting Approval to Proposed Rule Change and Amendment No. 1 Thereto by the Pacific Exchange, Inc. Relating to the Establishment of a Cross-and-Post Order Type

December 8, 2003.

I. Introduction

On July 23, 2003, the Pacific Exchange, Inc. ("PCX") filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934¹ and Rule 19b-4 thereunder,² a proposed rule change to implement a new order type, the "Cross-and-Post Order," for use on the Archipelago Exchange ("ArcaEx"). On September 25, 2003, the PCX submitted Amendment No. 1 to the proposed rule change.³ Notice of the proposed rule change, as amended, was published for comment in the **Federal Register** on October 29, 2003.⁴ The Commission received no comments in response to the proposal. This order approves the PCX's proposed rule change.

II. Description

The PCX, through its wholly owned subsidiary, PCX Equities, Inc. ("PCXE") proposed to adopt a new order type called a "Cross-and-Post Order." The Cross-and-Post Order would be an order that is executed pursuant to the existing "Cross Order" rules⁵ while allowing for any residual portion of the Cross Order to be displayed in the Arca Book. Further, the ArcaEx trading system would cancel a Cross-and-Post Order at the time of order entry if: (i) The cross price would cause an execution at a price that trades through the NBBO; or (ii) the cross price is between the BBO and does not improve the BBO by the minimum price improvement increment ("MPII") pursuant to PCXE Rule 7.6(a), Commentary .06.⁶

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 replaced the original filing in its entirety.

⁴ See Securities Exchange Act Release No. 48676 (October 21, 2003), 68 FR 61711 (SR-PCX-2003-38).

⁵ A "Cross Order" is a two-sided order with instructions to match the identified buy-side with the identified sell-side at a specified price (the "cross price"). See PCXE Rule 7.31(s).

⁶ The MPII on ArcaEx is equal to \$0.01 or 10% of the NBBO spread, whichever is greater. See PCXE Rule 7.6(a), Commentary .06. Under current PCXE rules, the MPII requirements must be satisfied in

²⁷ 15 U.S.C. 78o-3(b)(6).

²⁸ 15 U.S.C. 78o-3(b)(7).

²⁹ 17 CFR 200.30-3(a)(12).