

acts and, in general, to protect investors and the public interest.

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

CBOE does not believe that the proposed rule change would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that disseminating options quotations with size would enhance competition. The proposed change does provide for limited joint participation among competing CBOE market-makers in a trading crowd in certain circumstances (e.g., to determine the size of the disseminated quote). The Exchange believes this limited joint participation is procompetitive, because it is necessary to provide for a fair and orderly market in the thousands of option series traded on the Exchange. Accordingly, the Exchange believes the limited joint activity described in this rule proposal is justified by and furthers the objectives of section 11A(a)(1)(C)(ii) of the Act by assuring fair competition among markets. The proposed rule also is consistent with and furthers the objectives of section 6(b)(5) of the Act in that it is designed to remove impediments to a free and open market, and to protect investors and the public interest.

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

No written comments were solicited or received with respect to the proposed rule change.

### **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, 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. 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 also will be available for inspection and copying at the principal office of the CBOE. All submissions should refer to File No. SR-CBOE-2001-70 and should be submitted by March 25, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>30</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-45493; File No. SR-NASD-2002-27]

### **Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and by the National Association of Securities Dealers, Inc. Amending NASD Rule 3070 Concerning the Reporting of Criminal Offenses by Members and Persons Associated With a Member to the NASD**

March 1, 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 February 21, 2002, the National Association of Securities Dealers, Inc. ("NASD" or "Association") through its wholly owned subsidiary NASD Regulation, Inc. ("NASD Regulation") 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 NASD Regulation. 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 Proposed Rule Change**

NASD Regulation proposes to amend NASD Conduct Rule 3070 to limit reporting under this category to any felony, certain types of misdemeanors, and substantially equivalent activity in a domestic or foreign court. According to NASD Regulation, this proposed rule change would conform NASD Rule 3070(a)(5) to a proposed rule change by the New York Stock Exchange ("NYSE") to amend NYSE Rule 351(a)(5).<sup>3</sup>

The text of the proposed rule change appears below. New text is in italics; deletions are in brackets.

#### **Rule 3070. Reporting Requirements**

(a) Each member shall promptly report to the Association whenever such member or person associated with the member:

(1) through (4) No change.  
 (5) is indicted, or convicted of, or pleads guilty to, or pleads no contest to, [any criminal offense (other than traffic violations)] *any felony; or any misdemeanor that involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds, or securities, or substantially equivalent activity in a domestic or foreign court.*

(6) through (10) No change.

(b) through (e) No change.<sup>4</sup>

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

In its filing with the Commission, NASD Regulation 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. NASD Regulation has prepared summaries, set forth in sections A, B,

<sup>3</sup> See Securities Exchange Act Release No. 45404 (February 6, 2002), 67 FR 6565 (February 12, 2002).

<sup>4</sup> The initial text of the proposed rule change stated "(a) through (e) No Change." In fact, NASD Regulation intended to state "(b) through (e) No Change." The Commission made this correction to the proposed rule text with the agreement of NASD Regulation. Telephone conversation between Shirley H. Weiss, Associate General Counsel, NASD Regulation, and Christopher Solgan, Law Clerk, Division, Commission, on February 28, 2002.

<sup>30</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.

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 Regulation proposes to amend NASD Rule 3070(a)(5) to limit reporting under this category to any felony, certain types of misdemeanors, and substantially equivalent activity in a domestic or foreign court. According to NASD Regulation, this proposed rule change would conform NASD Rule 3070(a)(5) to a proposed amendment by the NYSE to NYSE Rule 351(a)(5).

NASD Rule 3070, adopted in 1995,<sup>5</sup> requires members to promptly report to the NASD the occurrence of 10 specified events (including criminal indictments and convictions, securities law violations, securities or commodities-related litigation or arbitration resulting in an award or judgment exceeding \$15,000, customer claims settled for an amount exceeding \$15,000, association with a statutorily disqualified person, and certain disciplinary proceedings) and to file quarterly statistical information concerning customer complaints. According to NASD Regulation, NASD Rule 3070 assists the NASD in the timely identification and investigation of problem members, branch offices, and registered representatives that may pose heightened risks to public investors.

NASD Regulation represents that the reporting requirements under NASD Rule 3070 significantly parallel comparable provisions of NYSE Rule 351 as well as the disclosure requirements of the Uniform Application for Securities Industry Registration or Transfer ("Form U-4"). In this regard, any member subject to substantially similar reporting requirements of another self-regulatory organization of which it is a member is exempt from the provisions of NASD Rule 3070.

With respect to criminal offenses, NASD Regulation states that both NASD Rule 3070(a)(5) and NYSE Rule 351(a)(5) currently require members to promptly report to the NASD and NYSE, respectively, when such member or person associated with the member is indicted, convicted of, pleads guilty to, or pleads no contest to any criminal offense other than traffic violations. NASD Regulation believes that this requirement is overly broad, in that it

requires members and persons associated with members to report information that is not material to NASD Regulation's regulatory program. NASD Regulation states that the proposed rule change would continue to require members and associated persons to report "any felony," consistent with Question 23A(1) of the Form U-4,<sup>6</sup> but it would limit the scope of reportable misdemeanor criminal events to the type of business-related offenses that are required to be reported in response to Question 23B(1) of the Form U-4.<sup>7</sup> NASD Regulation also believes that the proposed rule change would be consistent with a proposed rule change submitted by the NYSE to amend NYSE Rule 351(a)(5), which would limit the reporting of criminal offenses to: "any felony or any misdemeanor that involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion or misappropriation of funds or securities, or substantially equivalent activity in a domestic or foreign court."<sup>8</sup>

(2) Statutory Basis

NASD Regulation believes that the proposed rule change is consistent with the provisions of sections 15A(b)(6)<sup>9</sup> of the Act, which requires, among other things, that the Association'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. NASD Regulation believes that the proposed rule change is designed to accomplish these ends by conforming NASD Rule 3070(a)(5) to a proposed rule change to NYSE Rule 351(a)(5) and making NASD

Rule 3070(a)(5) more consistent with the reporting requirements of Form U-4.

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

NASD Regulation 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*

NASD Regulation neither solicited nor received written comments.

**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 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 filings will also be available for inspection and copying at the principal office of the Association. All submissions should refer to File No. SR-NASD-2002-27 and should be submitted by March 29, 2002.

<sup>6</sup> Question 23A(1) reads as follows:

Have you ever:

(a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign, or military court to any felony?

(b) been charged with any felony?

<sup>7</sup> Question 23B(1) reads as follows:

Have you ever:

(a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic or foreign court to a misdemeanor involving: investments or an investment-related business, fraud, false statements or omissions, wrongful taking of property, or bribery, forgery, counterfeiting or extortion, or a conspiracy to commit any of these offenses?

(b) been charged with a misdemeanor specified in 23(B)(1)(a)?

<sup>8</sup> See Securities Exchange Act Release No. 45404 (February 6, 2002), 67 FR 6565 (February 12, 2002).

<sup>9</sup> 15 U.S.C. 78o-3(b)(5).

<sup>5</sup> See Securities Exchange Act Release No. 36211 (September 8, 1995), 60 FR 48182 (September 18, 1995).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

Jill M. Peterson,

Assistant Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45496; File No. SR-NASD-2002-31]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend a Pilot That Permits SuperSOES To Trade Through the Quotations of UTP Exchanges That Do Not Participate in the Nasdaq National Market Execution Service

March 1, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on March 1, 2002, the National Association of Securities Dealers, Inc. ("NASD"), acting through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. The NASD filed the proposal pursuant to section 19(b)(3)(A)<sup>1</sup> of the Act, and Rule 19b-4(f)(6) thereunder,<sup>2</sup> which renders the proposal effective on filing with the Commission.<sup>3</sup> 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 Proposed Rule Change

There is no new language. The pilot rule language is as follows:

##### 4710. Participant Obligations in NNMS

- (a)-(e) No Change.
- (f) UTP Exchanges.

(i) A UTP Exchange may voluntarily participate in the NNMS System according to the approved rules for the NNMS System if it executes a Nasdaq Workstation Subscriber Agreement, as amended, for UTP Exchanges.

(ii) If a UTP Exchange does not participate in the NNMS System, the UTP Exchange's

quote will not be accessed through the NNMS, and the NNMS will not include the UTP Exchange's quotation for order processing and execution purposes.

(iii) For purposes of this rule the term "UTP Exchange" shall mean any registered national securities exchange that has unlisted trading privileges in Nasdaq-listed securities pursuant to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination Of Quotation and Transaction Information For Exchange-Listed Nasdaq/National Market System Securities Traded On Exchanges On An Unlisted Trading Privilege Basis ("Nasdaq UTP Plan").

#### 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. 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

Nasdaq is filing to extend until May 31, 2002, a pilot pertaining to a change to NASD Rule 4710 which specifies that if a UTP Exchange elects not to participate in SuperSOES, SuperSOES will not include the UTP Exchange's quotation for order processing and execution purposes.<sup>4</sup>

The pilot is consistent with Nasdaq's long-standing goal to improve the quality of its market. Establishing SuperSOES as the primary platform for trading Nasdaq-listed securities is a critical step in that respect. Nasdaq's successful implementation of SuperSOES has significantly improved The Nasdaq Stock Market. In particular, our initial assessment based on preliminary data shows that SuperSOES orders are processed quickly, enjoy high fill rates, and execute at the current market price. Moreover, neither SuperSOES nor the pilot has had a significant negative impact on spreads, depth or volatility. The ease with which the market reopened on September 17, 2001, appears to be directly connected

to the efficiency of SuperSOES. In addition, the Chicago Stock Exchange ("CHX") and the Boston Stock Exchange, which currently represent the vast majority of the trading volume in Nasdaq-listed stocks by UTP Exchanges, have adopted SuperSOES.<sup>5</sup>

While SuperSOES is improving the operation of The Nasdaq Stock Market, we have identified an area of concern that we believe must be addressed immediately to ensure the smooth functioning of the Nasdaq system.<sup>6</sup> Specifically, if a UTP Exchange chooses to access Nasdaq but does not accept automatic executions through SuperSOES, there is a potential for queuing in the system that could disrupt and slow the market, when that exchange is alone at the best quote in The Nasdaq Stock Market. To improve the trading environment for all of Nasdaq's valued market participants, and to avoid potential significant market disruptions, we are proposing to modify SuperSOES to remove non-automatic execution UTP Exchanges from the SuperSOES execution and order processing function.

#### Background

On January 14, 2000, the Commission approved a rule change to establish the NNMS and to modify Nasdaq's SelectNet Service with respect to Nasdaq National Market Securities ("NMS").<sup>7</sup> On July 30, 2001, NNMS and the changes to SelectNet were implemented for all NMS issues. As approved and implemented, Nasdaq market participants can use two systems to trade NMS issues: A reconfigured Small Order Execution System ("SOES")—the NNMS—and a reconfigured SelectNet system. SuperSOES is an automated execution system that allows the entry of orders for up to 999,999 shares.<sup>8</sup> By removing the size and capacity restrictions from

<sup>5</sup> In July 2001, the Commission approved a rule change to permit UTP Exchanges to participate on a voluntary basis in SuperSOES. See Exchange Act Release No. 44526 (July 6, 2001), 66 FR 36814 (July 13, 2001).

<sup>6</sup> In SR-NASD-2001-69, filed October 4, 2001, Nasdaq identified and attempted to address the above concern, as well as a second concern. Specifically, permitting UTP Exchanges to participate in Nasdaq without automatic execution functionality perpetuates the potential for "dual liability" that Nasdaq designed SuperSOES to eliminate. The potential for dual liability exists when market participants, such as UTP Exchanges, send SelectNet liability messages to Nasdaq market makers that simultaneously receive executions through SuperSOES. Simultaneous with this filing, Nasdaq will amend SR-NASD-2001-69 to remove the material contained in this filing.

<sup>7</sup> See Exchange Act Release No. 42344 (January 14, 2000), 65 FR 3987 (January 25, 2000).

<sup>8</sup> SOES was limited to small agency orders for customers.

<sup>10</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>2</sup> 17 CFR 240.19b-4(f)(6).

<sup>3</sup> Nasdaq asked the Commission to waive the 30-day operative delay. See Rule 19b-4(f)(6)(iii). 17 CFR 240.19b-4(f)(6)(iii).

<sup>4</sup> The temporary approval of the pilot expired February 28, 2002. See Exchange Act Release No. 45047 (November 8, 2001), 66 FR 57496 (November 15, 2001).