

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>9</sup> and Rule 19b-4(f)(2) thereunder<sup>10</sup> because it establishes or changes a due, fee or other charge. At any time within 60 days after filing of this proposed rule change, the Commission may summarily abrogate the 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 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. Comments should be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. SR-NASD-2003-174. 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 hard copy 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 number SR-NASD-2003-174 should be submitted by January 5, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48880; File No. SR-NASD-2003-145]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto To Give Authority to a 3-Member Subcommittee of NASD's Market Regulation Committee to Review Alternative Display Facility System Outage and Denial of Excused Withdrawal Determinations

December 4, 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 September 25, 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 NASD. On November 24, 2003, and December 2, 2003, NASD filed Amendment Nos. 1<sup>3</sup> and 2<sup>4</sup> to the proposed rule change, respectively. 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

NASD is proposing to amend NASD Rules 4300A and 4619A(g) to give jurisdiction to a 3-member subcommittee of NASD's Market Regulation Committee ("MRC") to review system outage determinations

<sup>11</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> NASD filed a new Form 19b-4, which replaces and supersedes the original filing in its entirety.

<sup>4</sup> Letter from Philip A. Shaikun, Office of General Counsel, Regulatory Policy and Oversight, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated December 2, 2003 ("Amendment No. 2"). Amendment No. 2 deletes the following sentence from Exhibit 1 to the Form 19b-4: "NASD has designated the proposed rule change as concerned solely with administration of the self-regulatory organization under Section 19(b)(3)(A)(iii) of the Act and Rule 19b-4(f)(3) thereunder, which renders the proposal effective upon receipt of this filing by the Commission."

under Rule 4300A(f) and excused withdrawal denials under Rule 4619A, respectively.

The proposed rule change would apply during the time that the NASD Alternative Display Facility operates on a pilot basis. The Commission previously approved the ADF as a nine-month pilot to quote and trade only Nasdaq-listed securities.<sup>5</sup> The Commission subsequently approved an extension of the pilot until January 26, 2004.<sup>6</sup> The text of the proposed rule is set forth below. Proposed new language is italicized; proposed deletions are in brackets.

\* \* \* \* \*

4300A. Quote and Order Access Requirements.

(a) through (e) No change.

(f) Procedures for Reviewing System Outages

(1) through (4) No change.

(5) A Market Participant may appeal a determination made under paragraph (e)(3) to a *three-member subcommittee comprised of current or former industry members of NASD's Market Regulation [Alternative Display Facility Market Operations Review] Committee* in writing, via facsimile or otherwise, by the close of business on the day a determination is rendered pursuant to paragraph (e)(3). An appeal to the *subcommittee [Committee]* shall operate as a stay of the determination made pursuant paragraph (e)(3). Once a written appeal has been received, the Market Participant may submit any additional supporting written documentation, via facsimile or otherwise, up until the time the appeal is considered by the *subcommittee [Committee]*. The *subcommittee [Committee]* shall render a determination by the close of business following the day a notice of appeal is received. The *subcommittee's [Committee's]* determination shall be final and binding.

\* \* \* \* \*

4619A. Withdrawal of Quotations and Passive Market Making

(a) through (f) No Change.

(g) *A three-member subcommittee comprised of current or former industry members of NASD's [Alternative Display Facility Operations Review] Market Regulation Committee* shall have jurisdiction over proceedings brought by market makers seeking review of a denial of an excused withdrawal

<sup>5</sup> Securities Exchange Act Release No. 46249 (July 24, 2002), 67 FR 49822 (July 31, 2002).

<sup>6</sup> Securities Exchange Act Release No. 47633 (April 10, 2003), 68 FR 19043 (April 17, 2003).

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>10</sup> 17 CFR 240.19b-4(f)(2).

pursuant to this Rule, or the conditions imposed on their reentry.

\* \* \* \* \*

## 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 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 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

*Background.* On July 24, 2002, the Commission approved SR-NASD 2002-97, which authorizes NASD to operate the ADF on a pilot basis in Nasdaq securities for nine months, pending the anticipated approval of SR-NASD-2001-90, which proposes to operate the ADF on a permanent basis.<sup>7</sup> On April 10, 2003, the Commission approved SR-NASD-2003-53, authorizing extension of the ADF pilot period until January 26, 2004.<sup>8</sup> As described in detail in SR-NASD-2001-90, the ADF is a quotation collection, trade comparison, and trade reporting facility developed by NASD in accordance with the Commission's SuperMontage Approval Order<sup>9</sup> and in conjunction with Nasdaq's anticipated registration as a national securities exchange.<sup>10</sup>

For the duration of the pilot period, ADF will provide ADF market participants (market makers and ECNs) the ability to post quotations in Nasdaq securities and will provide all members that participate in the ADF the ability to view quotations and report transactions in Nasdaq securities to the Exclusive Securities Information Processor ("SIP") for Nasdaq-listed issues<sup>11</sup> for consolidation and dissemination of data

to vendors and ADF market participants. The facility also will provide for trade comparison through the Trade Reporting and Comparison Service ("TRACS"). The facility further will provide for real-time data delivery to NASD for regulatory purposes, including enforcement of firm quote and related rules. It is anticipated that the ADF will operate on a pilot basis until the effective date of SR-NASD-2001-90, the approval of which would provide for the operation of the ADF on a permanent basis and an expansion of ADF-eligible securities to include all exchange-listed securities.

*Order Access Rule.* The ADF does not provide an order routing capability. Instead, NASD pilot Rule 4300A requires market participants to provide direct electronic access to other market participants and to provide to all other NASD members direct electronic access or allow for indirect electronic access to the individual market participant's quote. This rule provides the means for ADF market participants and other broker/dealers to access ADF quotes and, among other things, to meet the firm quote and locked and crossed quotation requirements.

*System Outage Determinations.* Pursuant to NASD Rule 4300A(e)(2), NASD may suspend a market participant from quoting for 20 business days if the market participant experiences three unexcused, confirmed system outages during any period of five business days. The Rule defines system outages as (1) an inability to quote or (2) an inability to respond to orders. The Rule gives officers of NASD authority to review an outage and determine whether the outage should be excused. An officer may deem a system outage excused based on the specific facts and circumstances surrounding the outage. Most significant consideration is given to whether the system outage resulted from circumstances beyond the market participant's control and whether the market participant voluntarily brought the matter to the attention of NASD before it otherwise learned of the outage. Other factors that may be considered include, but are not limited to, the extent and duration of the system problem.

Rule 4300A provides for a review and appeal process of a determination of whether an outage is excused or unexcused. Currently, Rule 4300A(f)(5) gives authority for such reviews to NASD's Alternative Display Facility Market Operations Review Committee. The proposed rule change would amend that provision to give review authority to a three-member subcommittee comprised of current or former industry

members of NASD's MRC to take advantage of that committee's expertise. It would be NASD's intention to draw first from current MRC members and resort to former members only when conflicts or availability problems exist with current members.

*Denial of Excused Withdrawals.* NASD Rule 4619A generally provides that NASD Alternative Display Facility Operations may, under certain circumstances, grant excused withdrawal status to an ADF Market Maker that withdraws its quotations from a security. Rule 4619A(g) provides for review of a denial of an excused withdrawal and gives authority for such reviews to NASD's Alternative Display Facility Market Operations Review Committee. The proposed rule change would amend that provision to give review authority to a three-member subcommittee comprised of current or former industry members of the MRC, as would be the case for system outage proceedings described above.

#### 2. Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>12</sup> which requires, among other things, that NASD rules 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 believes that the MRC is the appropriate committee to review ADF system outage and excused withdrawal determinations.

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

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

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

<sup>7</sup> Securities Exchange Act Release No. 46249 (July 24, 2002), 67 FR 49822 (July 31, 2002).

<sup>8</sup> Securities Exchange Act Release No. 47633 (April 10, 2003), 68 FR 19043 (April 17, 2003).

<sup>9</sup> Securities Exchange Act Release No. 43863 (January 19, 2001), 66 FR 8020 (January 26, 2001).

<sup>10</sup> Securities Exchange Act Release No. 44396 (June 7, 2001), 66 FR 31952 (June 13, 2001).

<sup>11</sup> Nasdaq initially will be the designated SIP for all transactions and quotations in Nasdaq securities. During the pilot period, the SIP will distribute individual quotations for both ADF and Nasdaq market makers and ECNs.

<sup>12</sup> 15 U.S.C. 78o-3(b)(6).

(ii) as to which 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 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. Comments may also be submitted electronically at the following e-mail address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-NASD-2003-145. 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. NASD-2003-145 and should be submitted by January 5, 2004.

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

**Margaret H. McFarland,**  
*Deputy Secretary.*

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**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48889; File No. SR-NASD-2003-178]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Modify Certain Listing Fees for Foreign Issuers and To Make a Technical Change to the Rule Pertaining to Recordkeeping Fees for Issuers Listed on The Nasdaq SmallCap Market

December 5, 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 December 3, 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. 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 the Substance of the Proposed Rule Change

Nasdaq has filed with the Commission a proposed rule change to modify certain listing fees for foreign issuers and to make a technical change to the rule pertaining to recordkeeping fees for issuers listed on The Nasdaq SmallCap Market.

The text of the proposed rule change is below. Proposed new language is in *italics*; proposed deletions are in brackets.

\* \* \* \* \*

#### 4500. ISSUER LISTING FEES

##### 4510. The Nasdaq National Market

(a) Entry Fee.

(1) An [domestic] issuer[, or foreign issuer raising capital in conjunction with its Nasdaq listing,] that submits an application for inclusion of any class of its securities (not otherwise identified in this Rule 4500 series) in The Nasdaq National Market, shall pay to The Nasdaq Stock Market, Inc. a fee calculated on total shares outstanding, according to the following schedule. This fee will be assessed on the date of entry in The Nasdaq National Market, except for \$5,000, which represents a

non-refundable, application fee, and which must be submitted with the issuer's application.

Up to 30 million shares—\$100,000  
30+ to 50 million shares—\$125,000  
Over 50 million shares—\$150,000

[(2) A foreign issuer not raising capital in conjunction with its Nasdaq listing, including American Depositary Receipts (ADRs), that submits an application for inclusion of any class of its securities (not otherwise identified in this Rule 4500 series) in The Nasdaq National Market, shall pay to The Nasdaq Stock Market, Inc. a fee calculated on total shares outstanding, according to the following schedule. This fee will be assessed on the date of entry in The Nasdaq National Market, except for \$5,000, which represents a non-refundable, application fee, and which must be submitted with the issuer's application.

Up to 3 million shares—\$50,000  
3+ to 5 million shares—\$75,000  
5+ to 30 million shares—\$100,000  
30+ to 50 million shares—\$125,000  
Over 50 million shares—\$150,000]

Current (3)–(6) Renumbered as (2)–(5).  
(b)–(c) No change.

(d) Annual Fee—American Depositary Receipts (ADRs).

(1) The issuer of each class of securities that is an ADR listed in The Nasdaq National Market shall pay to The Nasdaq Stock Market, Inc. an annual fee calculated on ADRs outstanding according to the following schedule not to exceed \$30,000 per issuer:

Up to 10 million ADRs—\$21,225  
[\$10,000]  
10+ to 25 million ADRs—\$26,500  
[\$15,000]  
25+ to 50 million ADRs—\$29,820  
[\$20,000]  
[50+ to 75 million ADRs—\$22,500  
75+ to 100 million ADRs—\$25,000]  
Over 50 [100] million ADRs—\$30,000

(2)–(4) No change.

##### 4520. The Nasdaq SmallCap Market

(a)–(c) No change.  
[(e)](d) Recordkeeping Fee.

An issuer that makes a change such as a change to its name, the par value or title of its security, or its symbol shall pay a fee of \$2,500 to The Nasdaq Stock Market, Inc.

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#### 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

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

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

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