

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49413; File No. SR-NASD-2003-175]

### Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change by the National Association of Securities Dealers, Inc., To Repeal Rule 4613A(e)(1) Requiring Same-Priced Quotations on Multiple Markets

March 12, 2004.

#### I. Introduction

On November 26, 2003, the National Association of Securities Dealers, Inc. ("NASD"), filed with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change 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> to repeal NASD Rule 4613A(e)(1), which requires NASD members that display priced quotations for a Nasdaq security in two or more market centers to display the same priced quotations for that security in each market center. The proposed rule change was published for comment in the *Federal Register* on February 5, 2004.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

#### II. Description

Currently, NASD Rule 4613A(e)(1) requires NASD members that display priced quotations for a Nasdaq security in two or more market centers to display the same priced quotations for that security in each market center. In the instant proposal, the NASD proposes to repeal NASD Rule 4613A(e)(1), so that NASD members that choose to display quotations for a Nasdaq security in multiple market centers are permitted to display different priced quotations for a particular security in two or more market centers.

#### III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.<sup>4</sup> Specifically, the Commission believes that the proposed rule change is consistent with the

provisions of sections 15A(b)(6) and 15A(b)(9) of the Act.<sup>5</sup> Section 15A(b)(6) requires, among other things, that rules of a national securities association be designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to remove impediments to and perfect the mechanism of a free and open market; and, in general, to protect investors and the public interest. Section 15A(b)(9) requires that the rules of the association not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The NASD originally proposed NASD Rule 4613A(e)(1) as part of the Alternative Display Facility ("ADF") pilot rules,<sup>6</sup> in order to prevent the fragmentation of quotations by an NASD member (which might serve to undermine the transparency of the best quotes in the market), given the increased potential that NASD members might choose to dual quote on several market centers, including ADF.

The Commission notes that NASD Rule 4613A(e)(1) is the only ADF rule that applies to all markets.<sup>7</sup> The Commission believes that, as an intra-market rule, NASD Rule 4613A(e)(1) may make sense because displaying different priced quotations for the same security in the same market may be confusing and misleading to other market participants and public investors. However, as an inter-market rule, NASD Rule 4613A(e)(1) may have undesirable or unintended consequences given recent market structure developments. For example, an NASD member now may have several completely distinct business units, such as a market making unit and an electronic communications network ("ECN"), which are used by different types of clients and, therefore, represent separate pools of liquidity. An NASD member may choose to display quotations relating to its market-making unit on Nasdaq and its ECN on ADF. Under such circumstances, compliance with NASD Rule 4613A(e)(1) may, in effect, require the NASD member to consolidate these distinct business units for purposes of displaying quotations on each market, which may be contrary to the business model of the firm since these quotes represent separate liquidity

pools. According to the NASD, an NASD member could establish separate broker/dealers for each business unit in order to comply with NASD Rule 4613A(e)(1), but this may be burdensome and may interfere with competition. After analyzing NASD Rule 4613A(e)(1) and its effects, including the difficulty of enforcing the rule across market centers, the Commission agrees that repealing NASD Rule 4613A(e)(1) is consistent with the Act.

The Commission also notes that the NASD has represented that it will continue to monitor and surveil for any potentially collusive or manipulative conduct relating to quotation activity on markets under its regulatory authority. Nothing in this rule change would modify any other responsibility of a broker or dealer under the Act, including Rule 11Ac1-1 under the Act<sup>8</sup> and all other rules and regulations of the NASD.

#### IV. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,<sup>9</sup> that the proposed rule change (SR-NASD-2003-175) is approved.

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. 34-49399; File No. SR-NASD-2003-199]

### Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Listing Fee Waivers

March 11, 2004.

On December 29, 2003, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its subsidiary, the Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change relating to retroactive listing fee

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

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

<sup>3</sup> See Securities Exchange Act Release No. 49152 (January 29, 2004); 69 FR 5632.

<sup>4</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>5</sup> 15 U.S.C. 78o-3(b)(6) and (b)(9).

<sup>6</sup> Securities Exchange Act Release No. 46249 (July 24, 2002), 67 FR 49822 (July 31, 2002). Subsequent to the initial approval of the ADF rules, the Commission approved an extension of the pilot until January 26, 2004. Securities Exchange Act Release No. 47633 (April 10, 2003), 68 FR 19043 (April 17, 2003).

<sup>7</sup> See *id.*

<sup>8</sup> 17 CFR 240.11Ac1-1.

<sup>9</sup> 15 U.S.C. 78s(b)(2).

<sup>10</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.