

expected impact on the profitability of the Adviser.

10. The Adviser will provide general management services to each Fund, including overall supervisory responsibility for the general management and investment of the Fund's assets, and, subject to review and approval of the Board, will: (a) Set each Fund's overall investment strategies, (b) evaluate, select and recommend Subadvisers to manage all or a part of a Fund's assets, (c) when appropriate, allocate and reallocate a Fund's assets among multiple Subadvisers; (d) monitor and evaluate the performance of Subadvisers, and (e) implement procedures reasonably designed to ensure that the Subadvisers comply with each Fund's investment objective, policies and restrictions.

11. No director or officer of the Company, or director or officer of the Adviser, will own directly or indirectly (other than through a pooled investment vehicle that is not controlled by such person), any interest in a Subadviser, except for: (a) Ownership of interests in the Adviser or any entity that controls, is controlled by, or is under common control with the Adviser, or (b) ownership of less than 1% of the outstanding securities of any class of equity or debt of a publicly traded company that is either a Subadviser or an entity that controls, is controlled by, or is under common control with a Subadviser.

12. Each Fund will disclose in its registration statement the Aggregate Fee Disclosure.

13. The requested order will expire on the effective date of rule 15a-5 under the Act, if adopted.

For the Commission, by the Division of Investment Management, under delegated authority.

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50375; File No. S7-24-89]

### Joint Industry Plan; Order Granting Approval of Amendment No. 13C to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis; Submitted by the Pacific Exchange, Inc., the National Association of Securities Dealers, Inc., the American Stock Exchange LLC, the Boston Stock Exchange, Inc., the Chicago Stock Exchange, Inc., the Cincinnati Stock Exchange, Inc., and the Philadelphia Stock Exchange, Inc.

September 14, 2004.

#### I. Introduction

On April 22, 2004, the Pacific Exchange, Inc. ("PCX"), on behalf of itself and the National Association of Securities Dealers, Inc. ("NASD"), the American Stock Exchange LLC ("Amex"), the Boston Stock Exchange, Inc. ("BSE"), the Chicago Stock Exchange, Inc. ("CHX"), the Cincinnati Stock Exchange, Inc. ("CSE"),<sup>1</sup> and the Philadelphia Stock Exchange, Inc. ("PHLX") (hereinafter referred to as "Participants"),<sup>2</sup> as members of the Operating Committee<sup>3</sup> of the Plan submitted to the Securities and Exchange Commission ("Commission") a proposal to amend the Plan ("Amendment 13C") pursuant to Rule 11Aa3-2<sup>4</sup> and Rule 11Aa3-1<sup>5</sup> under the Securities Exchange Act of 1934 ("Act"). Amendment 13C<sup>6</sup> reflects

<sup>1</sup> The Commission notes that the CSE changed its name to the National Stock Exchange, Inc. See Securities Exchange Act Release No. 48774 (November 12, 2003), 68 FR 65332 (November 19, 2003) (File No. SR-CSE-2003-12).

<sup>2</sup> PCX and its subsidiary the Archipelago Exchange were elected co-chairs of the operating committee ("Operating Committee" or "Committee") for the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis ("Nasdaq UTP Plan" or "Plan") by the Participants.

<sup>3</sup> The Operating Committee is made up of all the Participants.

<sup>4</sup> 17 CFR 240.11Aa3-2.

<sup>5</sup> 17 CFR 240.11Aa3-1.

<sup>6</sup> At the time Amendment 13C was approved by the Committee, Amendment 13A had been published in the **Federal Register**. See Securities Exchange Act Release No. 49137 (January 28, 2004), 69 FR 5217 (February 3, 2004). Amendment 13A has since been approved by the Commission. See Securities Exchange Act Release No. 49711 (May 14, 2004), 69 FR 29339 (May 21, 2004). The Operating Committee adopted Amendment 13B, but agreed to hold the amendment pending resolution

several changes unanimously adopted by the Committee. On May 7, 2004, the Commission summarily put into effect Amendment 13C upon publication in the **Federal Register** on a temporary basis not to exceed 120 days.<sup>7</sup> Amendment 13C was published for comment in the **Federal Register** on May 18, 2004.<sup>8</sup> The Commission received no comment letters on Amendment 13C. This order approves the changes made in Amendment 13C on a permanent basis.

#### II. Plan Background

The Plan governs the collection, consolidation, and dissemination of quotation and transaction information for The Nasdaq Stock Market, Inc. ("Nasdaq") National Market ("NNM") and Nasdaq SmallCap securities listed on Nasdaq or traded on an exchange pursuant to unlisted trading privileges ("UTP").<sup>9</sup> The Plan provides for the collection from Plan Participants and the consolidation and dissemination to vendors, subscribers, and others of quotation and transaction information in "eligible securities."<sup>10</sup>

The Commission originally approved the Plan on a pilot basis on June 26, 1990.<sup>11</sup> The parties did not begin trading until July 12, 1993, accordingly, the pilot period commenced on July 12, 1993. The Plan has since been in operation on an extended pilot basis.<sup>12</sup>

of the current status of the SIP selection process. Amendment 13B has not been filed with the Commission. The Operating Committee had reserved Amendment 14 for significant future modifications to the Plan that would, among other things, reflect changes in preparation for implementation of the new SIP. Accordingly, this Amendment is numbered 13C.

<sup>7</sup> See Securities Exchange Act Release No. 49669 (May 7, 2004), 69 FR 28182 (May 18, 2004).

<sup>8</sup> *Id.*

<sup>9</sup> Section 12 of the Act generally requires an exchange to trade only those securities that the exchange lists, except that Section 12(f) of the Act permits UTP under certain circumstances. 15 U.S.C. 78l(f). For example, Section 12(f) of the Act, among other things, permits exchanges to trade certain securities that are traded over-the-counter pursuant to UTP, but only pursuant to a Commission order or rule. For a more complete discussion of the Section 12(f) requirement, see November 1995 Extension Order, *infra* note 11.

<sup>10</sup> Section III.B. of the Plan defines "Eligible Security" as any NNM or Nasdaq SmallCap security, as defined in NASD Rule 4200: (i) As to which UTP have been granted to a national securities exchange pursuant to Section 12(f) of the Act or which become eligible for such trading pursuant to order of the Commission; or (ii) which also is listed on a national securities exchange.

<sup>11</sup> See Securities Exchange Act Release No. 28146, 55 FR 27917 (July 6, 1990).

<sup>12</sup> See Securities Exchange Act Release Nos. 34371 (July 13, 1994), 59 FR 37103 (July 20, 1994); 35221 (January 11, 1995), 60 FR 3886 (January 19, 1995); 36102 (August 14, 1995), 60 FR 43626 (August 22, 1995); 36226 (September 13, 1995), 60 FR 49029 (September 21, 1995); 36368 (October 13, 1995), 60 FR 54091 (October 19, 1995); 36481

### III. Description and Purpose of the Amendment

As a result of aberrant pricing in trading of shares on December 5, 2003, the Division of Market Regulation ("Division") requested the Participants to provide better coordination among the self-regulatory organization ("SRO") trading markets concerning SRO trading halts.<sup>13</sup> The NASD, acting through its subsidiary, Nasdaq, proposed Amendment 13C to address changes to the Plan related to the coordination of instituting and lifting SRO trading halts. Amendment 13C to the Plan reflects changes to the regulatory halt section that were unanimously approved by the Operating Committee. The following is a summary of the changes to the Plan made in Amendment 13C.

1. Section III.T. of the Plan provides for the definition of Regulatory Halt. Amendment 13C added to the definition of Regulatory Halt an "Extraordinary Market Regulatory Halt," which is a trading halt due to extraordinary market activity as a result of system misuse or malfunction as further described in a Section X.E.1. of the Plan.

2. Section X of the Plan previously provided that the Primary Market<sup>14</sup>

(November 13, 1995), 60 FR 58119 (November 24, 1995) ("November 1995 Extension Order"); 36589 (December 13, 1995), 60 FR 65696 (December 20, 1995); 36650 (December 28, 1995), 61 FR 358 (January 4, 1996); 36934 (March 6, 1996), 61 FR 10408 (March 13, 1996); 36985 (March 18, 1996), 61 FR 12122 (March 25, 1996); 37689 (September 16, 1996), 61 FR 50058 (September 24, 1996); 37772 (October 1, 1996), 61 FR 52980 (October 9, 1996); 38457 (March 31, 1997), 62 FR 16880 (April 8, 1997); 38794 (June 30, 1997) 62 FR 36586 (July 8, 1997); 39505 (December 31, 1997) 63 FR 1515 (January 9, 1998); 40151 (July 1, 1998) 63 FR 36979 (July 8, 1998); 40896 (December 31, 1998), 64 FR 1834 (January 12, 1999); 41392 (May 12, 1999), 64 FR 27839 (May 21, 1999); 42268 (December 23, 1999), 65 FR 1202 (January 6, 2000); 43005 (June 30, 2000), 65 FR 42411 (July 10, 2000); 44099 (March 23, 2001), 66 FR 17457 (March 30, 2001); 44348 (May 24, 2001), 66 FR 29610 (May 31, 2001); 44552 (July 13, 2001), 66 FR 37712 (July 19, 2001); 44694 (August 14, 2001), 66 FR 43598 (August 20, 2001); 44804 (September 17, 2001), 66 FR 48299 (September 19, 2001); 45081 (November 19, 2001), 66 FR 59273 (November 27, 2001); 44937 (October 15, 2001), 66 FR 53271 (October 19, 2001); 46139 (June 28, 2001), 67 FR 44888 (July 5, 2002); 46381 (August 19, 2002), 67 FR 54687 (August 23, 2002); 46729 (October 25, 2002), 67 FR 66685 (November 1, 2002); 48318 (August 12, 2003), 68 FR 49534 (August 18, 2003); 48882 (December 4, 2003), 68 FR 69731 (December 15, 2003); 49669 (May 7, 2004), 69 FR 28182 (May 18, 2004); and 49711 (May 14, 2004), 69 FR 29339 (May 21, 2004).

<sup>13</sup> See letter from Annette L. Nazareth, Director, Division, Commission, to Bridget Farrell and Michael Roundtree, Co-Chairpersons, Nasdaq UTP Operating Committee, dated December 9, 2003.

<sup>14</sup> The Plan defined "Primary Market" as Nasdaq, provided that if for any 12-month period the number of reported transactions and amount of reported share volume in any other Participant's market exceeded 50% of the aggregated reported transactions and share volume, then that Participant's market would have been the Primary Market for such Eligible Security.

declared Regulatory Halts. Amendment 13C replaced Primary Market with "Listing Market," which is defined as the Participant's Market on which a security is listed. In the case of dual listings, the Listing Market is the Participant's Market on which the Eligible Security is listed, which also has the highest number of the average of reported transactions and reported share volume for the preceding 12-month period as determined at the beginning of each calendar quarter.

3. Amendment 13C clarified that "Participant" for purposes of Section X includes Nasdaq despite the fact that Nasdaq is not currently a signatory to the Plan.

4. Amendment 13C added Section X.E., which established communication procedures to coordinate communication among Plan Participants in the instance of a trading halt. Specifically, Amendment 13C introduced the use of the "Hoot-n-Holler" for communicating real-time information among Participants. Furthermore, the Amendment requires continuous monitoring of the Hoot-n-Holler by all Participants during market hours. The procedures in the instance of a Participant(s) experiencing extraordinary market activity in an Eligible Security include:

a. Best efforts to provide immediate notification over the Hoot-n-Holler system;

b. Best efforts to determine the source of the extraordinary market activity;

c. Best efforts by the Participant(s) in determining whether to prevent, and actually preventing, quotes from a direct or indirect market participant from being transmitted to the Processor;

d. If the problem is not rectified, the Participant(s) will cease transmitting quotes to the Processor in the affected security; and

e. If within five minutes the problem is not rectified from the initial notification over the Hoot-n-Holler, or if decided earlier through unanimous approval from all Participants actively trading the affected security, the Listing Market based on facts and circumstances may declare over the Hoot-n-Holler an Extraordinary Market Regulatory Halt.

5. Amendment 13C amended the Plan to add Section X.F. to clarify procedures for the resumption of trading after a Regulatory Halt. This includes a requirement that all Participants will use best efforts to indicate their intentions with respect to canceling or modifying trades within fifteen minutes of the declaration of the halt.

Furthermore, the Amendment clarified that Participants will disseminate

information regarding canceled or modified trades as soon as possible before the resumption of trading. Lastly, the Listing Market will notify Participants over the Hoot-n-Holler when trading may resume.

### IV. Discussion and Commission Findings

The Commission previously determined, pursuant to Rule 11Aa3-2(c)(4) under the Act,<sup>15</sup> to summarily put into effect the amendments detailed above in Amendment 13C on a temporary basis not to exceed 120 days beyond May 18, 2004. After careful consideration of Amendment 13C to the Plan, the Commission finds that approving Amendment 13C on a permanent basis is consistent with the requirements of the Act and the rules and regulations thereunder, and, in particular, Section 11A(a)(1)<sup>16</sup> of the Act and Rules 11Aa3-1 and 11Aa3-2(c)(2) thereunder.<sup>17</sup> Section 11A of the Act directs the Commission to facilitate the development of a national market system for securities, "having due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets," and cites as an objective of that system the "fair competition \* \* \* between exchange markets and markets other than exchange markets."<sup>18</sup> Rule 11Aa3-2(c)(2) requires the Commission to approve a plan or amendment "if it finds that such plan or amendment is necessary or appropriate in the public interest, for the protection of investors, and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act."<sup>19</sup>

The Commission finds that approving Amendment 13C is appropriate in the public interest and otherwise in furtherance of the purposes of the Act. The Commission believes that the changes made in Amendment 13C enhance investor protection, further the maintenance of fair and orderly markets, and remove impediments to, and perfect the mechanisms of, a national market system by: (1) Improving the coordination among SROs when instituting and lifting trading halts; (2) making necessary changes to the terms and definitions contained within the Plan related to trading halts; (3)

<sup>15</sup> 17 CFR 240.11Aa3-2(c)(4).

<sup>16</sup> 15 U.S.C. 78k-1(a)(1).

<sup>17</sup> 17 CFR 240.11Aa3-1 and 17 CFR 240.11Aa3-2(c)(2).

<sup>18</sup> 15 U.S.C. 78k-1(a).

<sup>19</sup> 17 CFR 240.11Aa3-2(c)(2).

establishing clear procedures to coordinate communication among Plan Participants before and during the instance of a trading halt; and (4) clarifying procedures for the resumption of trading after a trading halt.

## V. Conclusion

*It is therefore ordered*, pursuant to Section 11A of the Act<sup>20</sup> and paragraph (c)(2) of Rule 11Aa3-2<sup>21</sup> thereunder, that Amendment 13C to the Plan be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>22</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50376]

### Order Granting Exemption to National Association of Securities Dealers, Inc. From Certain Reporting Requirements Under Section 31 of the Exchange Act

September 14, 2004.

#### I. Introduction

Section 36 of the Securities Exchange Act of 1934 ("Exchange Act")<sup>1</sup> authorizes the Securities and Exchange Commission ("Commission")—by rule, regulation, or order—to conditionally or unconditionally exempt any person, security, transaction (or any class or classes of persons, securities, or transactions) from any provision or provisions of the Exchange Act or any rule or regulation thereunder, to the extent such exemption is necessary or appropriate in the public interest and is consistent with the protection of investors. By this Order, the Commission is exempting the National Association of Securities Dealers, Inc. ("NASD") from certain reporting requirements, described below, that are imposed by Rules 31 and 31T and Form R31,<sup>2</sup> which implement Section 31 of the Exchange Act.<sup>3</sup>

## II. Background

Section 31, among other things, requires NASD to pay the Commission fees based on the aggregate dollar amount of certain sales of securities. Rules 31 and 31T and Form R31 established a procedure for the calculation and collection of Section 31 fees on the "covered sales" of NASD and the national securities exchanges.<sup>4</sup> Paragraph (b)(1) of Rule 31 requires NASD to submit a completed Form R31 for each month by the tenth business day of the following month. NASD must provide on Form R31 the aggregate dollar amount of its covered sales having a "charge date"<sup>5</sup> in the month of the report. The first Form R31 required by Rule 31 covers the month of July 2004 and was due on August 13, 2004. Paragraph (b) of temporary Rule 31T requires NASD to submit a completed Form R31 for each of the months September 2003 to June 2004, inclusive; these forms also were due on August 13, 2004. Based on the data provided by NASD, the Commission will calculate the amount of Section 31 fees owed and send a bill to NASD.

For NASD, the charge date for most covered sales is the trade date (rather than the settlement date).<sup>6</sup> NASD has requested, however, that it be permitted to use a charge date other than the trade date for certain covered sales that are reported on an "as-of" basis.<sup>7</sup> NASD rules generally require its members, during normal market hours, to report securities transactions within 90 seconds after execution. There are situations in which a member fails to report a transaction on the trade date during normal market hours, although NASD trade reporting systems were open, and the member was obligated to do so within 90 seconds. These trades are reported as "as-of" trades.<sup>8</sup> NASD

<sup>4</sup> For NASD, a covered sale is the sale of a security (other than an exempt sale or a sale of a security future) that occurs by or through any NASD member otherwise than on a national securities exchange, if the security is registered on a national securities exchange or is subject to prompt last sale reporting pursuant to NASD rules. See 15 U.S.C. 78ee(c); 17 CFR 240.31(a)(6).

<sup>5</sup> The charge date is the date on which a covered sale occurs for purposes of determining the liability of a national securities exchange or national securities association pursuant to Section 31 of the Exchange Act. See 17 CFR 240.31(a)(3).

<sup>6</sup> The only covered sales for which NASD does not incur liability based on the trade date are those resulting from the exercise of options that are not listed or registered on a national securities exchange, in which case the charge date is the exercise date. See 17 CFR 240.31(a)(3)(ii).

<sup>7</sup> See letter from Marc Menchel, Executive Vice President and General Counsel, NASD, to Margaret McFarland, Deputy Secretary, Commission, dated August 11, 2004.

<sup>8</sup> An "as-of" trade is a trade that is reported to NASD after the date that the actual trade occurred.

considers such "as-of" trades to be late and in violation of NASD rules.<sup>9</sup> An "as-of" report also could result when a trade is executed when NASD trade reporting systems are not open. The trade, therefore, must be reported on the next business day when NASD systems re-open. NASD trade reporting rules allow for the next-day reporting of these transactions; NASD does not consider these trades to be reported late or in violation of NASD rules. NASD reviewed the "as-of" trades reported by its members over a selected period and found that, during the review period, the percentage of trades reported "as-of" was relatively consistent on a month-to-month basis, and the vast majority of "as-of" trades were reported to NASD in the same month that the trades occurred.<sup>10</sup>

NASD has stated that it considered making adjustments to its internal systems to track "as-of" covered sales by trade date but determined that it could not do so prior to August 13, 2004. Even if NASD could make these changes, another problem would arise: a previously submitted Form R31 would be rendered inaccurate if an "as-of" trade were reported in a month different from the month in which the trade was actually effected.<sup>11</sup> Therefore, NASD has requested relief to be permitted to report "as-of" covered sales based on the report date rather than the trade date, as would otherwise be required.

NASD also has requested relief from the requirement, for the months September 2003 to June 2004, to report on Form R31 covered sales with a price substantially unrelated to the current market price.<sup>12</sup> Rules 31 and 31T and Form R31 require NASD to include the aggregate dollar amount of such "away-from-the-market" covered sales in Part III of its Form R31. NASD's rules<sup>13</sup> currently do not require members to report such trades to the Automated Confirmation Transaction Service

<sup>9</sup> See NASD Rules 4632, 4642, 5430, 6420, 6550, 6620, and related interpretive material.

<sup>10</sup> See letter from Patrice M. Gliniecki, Senior Vice President and Deputy General Counsel, NASD, to Margaret McFarland, Deputy Secretary, Commission, dated August 18, 2004. NASD also found that, during the review period, the number of "as-of" trades represented a *de minimus* percentage of the total number of trades.

<sup>11</sup> For instance, assume that an "as-of" covered sale is effected in July 2004 but not reported to NASD until December 2004. In the absence of this Section 36 exemption, the July 2004 Form R31 would no longer contain an accurate tabulation of NASD's aggregate dollar amount of covered sales for that month.

<sup>12</sup> See letter from Marc Menchel, Executive Vice President and General Counsel, NASD, to Annette L. Nazareth, Director, Division of Market Regulation, Commission, dated August 5, 2004.

<sup>13</sup> See NASD Rules 4632(e)(5), 4642(e)(4), 6420(e)(5), and 6920(e)(2).

<sup>20</sup> 15 U.S.C. 78k-1.

<sup>21</sup> 17 CFR 240.11Aa3-2(c)(2).

<sup>22</sup> 17 CFR 200.30-3(a)(27).

<sup>1</sup> 15 U.S.C. 78mm.

<sup>2</sup> 17 CFR 240.31, 240.31T, and 249.11. The Commission established Rules 31 and 31T and Form R31 in June 2004. See Securities Exchange Act Release No. 49928 (June 28, 2004), 69 FR 41060 (July 7, 2004) ("Rule 31 Adopting Release").

<sup>3</sup> 15 U.S.C. 78ee.