

the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BSE-2005-28 and should be submitted on or before August 24, 2005.

#### IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

After careful consideration, 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 exchange,<sup>7</sup> and, in particular, the requirements of Section 6(b) of the Act<sup>8</sup> and the rules and regulations thereunder. The Commission finds that the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>9</sup> which requires that the rules of the Exchange provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. The Commission believes that the extension of the Linkage fee pilot until July 31, 2006 will give the Exchange and the Commission further opportunity to evaluate whether such fees are appropriate.

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>10</sup> for approving the proposed rule change prior to the thirtieth day after publication of notice thereof in the **Federal Register**. The Commission believes that granting accelerated approval of the proposed rule change will preserve the Exchange's existing pilot program for Linkage fees without interruption as the Exchange and the Commission further consider the appropriateness of Linkage fees.

#### V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>11</sup> that the proposed rule change (SR-BSE-2005-28) is hereby approved on an accelerated basis for a pilot period to expire on July 31, 2006.

<sup>7</sup> In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>8</sup> 15 U.S.C. 78f(b).

<sup>9</sup> 15 U.S.C. 78f(b)(4).

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</sup> *Id.*

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-52131; File No. SR-NASD-2005-093]

#### Self-Regulatory Organizations; National Association of Securities Dealers, Inc; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to NASD Rule 3370

July 27, 2005.

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 July 20, 2005, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by NASD. NASD has designated the proposed rule change as constituting a "non-controversial" rule change under paragraph (f)(6) of Rule 19b-4 under the Act,<sup>3</sup> which renders the proposal effective upon receipt of this filing by the Commission. 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 is proposing to amend Rule 3370 to clarify that members must make certain affirmative determinations when effecting long sales and document compliance with those affirmative determination requirements. Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

\* \* \* \* \*

3370. [Purchases]*Prompt Receipt and Delivery of Securities*

##### (a) Purchases

No member or person associated with a member may accept a customer's purchase order for any security unless it

<sup>12</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> 17 CFR 240.19b-4.

has first ascertained that the customer placing the order or its agent agrees to receive securities against payment in an amount equal to any execution, even though such an execution may represent the purchase of only a part of a larger order.

##### (b) Long Sales

*No member or person associated with a member shall accept a long sale order from any customer in any equity security unless the order meets the requirements applicable to long sales set forth in Regulation SHO. To the extent a member or person associated with a member does not have physical possession or control of the securities, the member or person associated with a member must document, at the time the order is taken, the communication with the customer as to the present location of the securities in question, whether they are in good deliverable form and the customer's ability to deliver them to the member by settlement date. For purposes of this rule, the term "customer" includes a non-member broker-dealer.*

\* \* \* \* \*

#### 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

On June 23, 2004, the SEC adopted certain provisions of a new short sale regulation, designated Regulation SHO.<sup>4</sup> Regulation SHO consists of, among other provisions, SEC Rule 200(g), requirements for marking sell order of equity securities, and SEC Rule 203(a), delivery requirements for long sales.<sup>5</sup> Specifically, SEC Rule 200(g) of Regulation SHO requires that sell orders in all equity securities be marked either "long," "short," or "short exempt."

<sup>4</sup> See Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (August 6, 2004).

<sup>5</sup> The compliance date for SEC Rule 200(g) and SEC Rule 203(a) was January 3, 2005.

Pursuant to SEC Rule 200(g), an order can be marked "long" only when the seller owns the security being sold and the security either is in the physical possession or control of the broker-dealer or it is reasonably expected that the security will be in the physical possession or control of the broker-dealer no later than settlement. Subject to certain exceptions, SEC Rule 203(a) requires that a broker-dealer selling an equity security marked long will be able to deliver the security on settlement date without borrowing the security. Regulation SHO's long sale delivery requirements, together with the long sale order marking requirements, require broker-dealers, prior to executing the order, to confirm the customer's ownership of the security and its ability to deliver the security by settlement date.

As noted in the adopting release for Regulation SHO, the SEC has indicated its expectation that self-regulatory organization ("SRO") rules that overlapped with the provisions of Regulation SHO would be repealed. Accordingly, NASD repealed, among other rules, NASD Rule 3370(b) that, in part, required members to undertake the following obligations in connection with a long sale: (1) To make an affirmative determination as to the location of the securities, (2) to determine whether the securities are in deliverable form and in fact can be delivered within 3 business days; and (3) to document such information in writing (collectively, the "affirmative determination requirements"). NASD staff has received inquiries as to whether the affirmative determination requirements continue to apply, given that these requirements are not explicitly provided in Regulation SHO.

As a result, NASD is proposing to amend Rule 3370 to re-adopt expressly the affirmative determination requirements as they now relate to member obligations with respect to long sales under Regulation SHO.<sup>6</sup> NASD believes that this proposed amendment will clarify a member's obligations in connection with sale transactions that are marked long. Specifically, the member must comply with the requirements applicable to long sales in Regulation SHO and, to the extent the member or person associated with the member does not have physical possession or control of the securities, make and document, at the time the order is taken, an affirmative determination as to the location of the

security, that they are in good deliverable form, and the customer's ability to deliver such securities on settlement date. As with Regulation SHO, absent countervailing circumstances, it may not be reasonable to rely on the representation of a customer that an order is "long" if the customer has had prior failures to deliver in a security.

NASD proposes to make the proposed rule change operative on the date of filing.

## 2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6)<sup>7</sup> of the Act, which requires, among other things, that NASD 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 believes that the proposed rule change will more clearly state a member's obligations in connection with sale transactions that are marked long, and is consistent with the Act.

### 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, as amended.

### 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

The proposed rule change is filed pursuant to paragraph (A) of Section 19(b)(3)<sup>8</sup> and Rule 19b-4(f)(6).<sup>9</sup> Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6) thereunder.

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative prior to the thirty

days after the date of filing. However, pursuant to Rule 19b-4(f)(6)(iii), the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. NASD has requested that the Commission waive the thirty day operative delay requirement to re-adopt expressly the affirmative determination requirements as they now relate to member obligations with respect to long sales under Regulation SHO.

The Commission, consistent with the protection of investors and the public interest, has determined to make the proposed rule change effective as of the date of this order.<sup>10</sup> The Commission notes that the affirmative determination requirements with respect to member long sales were unintentionally deleted when NASD repealed rules that overlapped with the provisions of Regulation SHO.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such 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. Comments may be submitted by any of the following methods:

### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2005-093 on the subject line.

### Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-9303.

All submissions should refer to File Number SR-NASD-2005-093. 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, please use only one method. The Commission will

<sup>10</sup> For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>6</sup> Note: The deletion of the affirmative determination requirements in connection with the adoption of Regulation SHO was unintentional.

<sup>7</sup> 15 U.S.C. 78o-3(b)(6).

<sup>8</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>9</sup> 17 CFR 240.19b-4(f)(6).

post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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, 100 F Street, NE., Washington, DC 20549-9303. Copies of such filing also will be available for inspection and copying at the principal office of NASD.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to the File Number SR-NASD-2005-093 and should be submitted on or before August 23, 2005.

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. 34-52141; File No. SR-NASD-2004-009]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Granting Approval of Proposed Rule Change and Amendment Nos. 1, 2, 3, 4, and 5 Thereto To Modify Nasdaq's Clearly Erroneous Rule

July 27, 2005.

#### I. Introduction

On January 21, 2004, 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") 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

modify the Nasdaq's clearly erroneous rule. On August 23, 2004, Nasdaq submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> On May 5, 2005, Nasdaq submitted Amendment No. 2 to the proposed rule change.<sup>4</sup> On May 11, 2005, Nasdaq submitted Amendment No. 3 to the proposed rule change.<sup>5</sup> On May 16, 2005, Nasdaq submitted Amendment No. 4 to the proposed rule change.<sup>6</sup> The proposed rule change, as amended by Amendment Nos. 1, 2, 3, and 4, was published for comment in the **Federal Register** on May 26, 2005.<sup>7</sup> On June 16, 2005, Nasdaq submitted Amendment No. 5 to the proposed rule change.<sup>8</sup> The Commission received no comments on the proposal. This order approves the proposed rule change, as amended.<sup>9</sup>

#### II. Description of the Proposed Rule Change

NASD Rule 11890 governs the review and resolution of clearly erroneous transactions. The NASD Rule permits Nasdaq to review, at the request of a market participant, any transaction arising out of the use or operation of any execution or communication system owned or operated by Nasdaq to determine if such transaction is clearly erroneous. NASD Rule 11890 also permits Nasdaq to review transactions on Nasdaq's own motion under specific circumstances. The NASD Rule provides Nasdaq officials with the authority to nullify a transaction or modify one or more terms of the transaction. In addition, NASD Rule 11890 sets forth the procedures for review of a transaction to determine whether it is clearly erroneous and for

<sup>3</sup> See letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated August 20, 2004 ("Amendment No. 1"). Amendment No. 1 replaced the original rule filing in its entirety.

<sup>4</sup> Amendment No. 2 replaced Amendment No. 1 in its entirety.

<sup>5</sup> Amendment No. 3 revised incorrect cross-references in the rule text.

<sup>6</sup> Amendment No. 4 revised an incorrect paragraph designation in the rule text.

<sup>7</sup> See Securities Exchange Act Release No. 51722 (May 20, 2005), 70 FR 30508.

<sup>8</sup> See Amendment No. 5, which made technical corrections to the rule text, is a technical amendment that is not subject to notice and comment. The amended rule text proposed in Amendment No. 5 is available on the NASD's Web site (<http://www.nasd.com>), at the NASD's Office of the Secretary, and at the Commission's Public Reference Room.

<sup>9</sup> Nasdaq has represented that the proposed rule change would take effect on a date specified in a Head Trader Alert to its members, which date would be no later than three weeks after Commission approval of the proposal. Telephone call on July 27, 2005, between John Yetter, Senior Associate General Counsel, Nasdaq, and Terri Evans, Special Counsel, Division, Commission.

appeal of a determination to the Market Operations Review Committee ("MORC").

The NASD proposes to amend NASD Rule 11890 to: (1) Specify the supporting information that must be submitted in connection with a complaint requesting review of a transaction to determine whether it is clearly erroneous; (2) establish minimum price deviation thresholds that would provide a "bright line" standard for determining whether a transaction is eligible for review; (3) provide that complaints failing to meet minimum price deviation thresholds or documentation requirements would be rejected, and limit the grounds for review of such rejections by the MORC; and (4) make several clarifying changes to the rule text. These changes are described in more detail below.

#### *Specify the Supporting Information To Be Submitted by a Complainant*

The proposed rule change would amend NASD Rule 11890 to require that a complaint, to be eligible for review, must include the following information: approximate time of transaction(s), security symbol, number of shares, price(s), contra broker(s) if transactions are not anonymous, the Nasdaq system used to execute the transactions, and the reason that the review is being sought.

#### *Establish Minimum Price Deviation Thresholds*

The proposed rule change also would establish minimum price deviation thresholds that would provide a standard for determining whether transactions are considered eligible for review. A transaction price that meets the minimum price threshold would not automatically trigger a clearly erroneous determination; however, if the transaction price does not meet the minimum price threshold, the transaction would not be considered as a clearly erroneous transaction. Thus, there would be a conclusive presumption that a transaction to buy (sell) is not clearly erroneous unless its price is greater than (less than) the best offer (best bid) by an amount that equals or exceeds the minimum threshold set forth below:

Inside price	Minimum threshold
\$0-\$0.99 .....	\$0.02 + (0.10 × Inside Price).
\$1.00-\$4.99 ...	\$0.12 + (0.07 × (Inside Price-\$1.00)).
\$5.00-\$14.99	\$0.40 + (0.06 × (Inside Price-\$5.00)).
\$15 or more ...	\$1.00.

<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.