

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

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

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

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

No written comments were either solicited or 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 (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change, as amended, or

B. Institute proceedings to determine whether the proposed rule change, as amended, 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. 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-CHX-2004-04. 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 Exchange. All submissions should refer to File No. SR-CHX-2004-04 and should be submitted by May 4, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>6</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04-8326 Filed 4-12-04; 8:45 am]

BILLING CODE 8010-01-P

### **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-49534; File No. SR-NASD-2004-060]

#### **Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc., Regarding the Nasdaq Closing Cross**

April 7, 2004.

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 April 5, 2004, 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 and II below, which Items have been prepared by Nasdaq. Nasdaq has designated the proposed rule change as "non-controversial" under Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders the proposed rule change effective upon filing with 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**

The proposed rule change would make two amendments to NASD Rule 4709 governing the Nasdaq Closing Cross. Specifically, the proposed rule change would: (1) Change Rule 4709(a)(2) to change the order entry time for Imbalance Only Orders ("IOs")

to start at 3:30 p.m. e.s.t., rather than 9:30 a.m., and (2) amend Rule 4709(b) to change the frequency with which Nasdaq would disseminate the Nasdaq Order Imbalance Indicator ("NOII").

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

\* \* \* \* \*

#### **4709. Nasdaq Closing Cross**

(a) Definitions. For the purposes of this rule the term:

(1) No Change.

(2) "Imbalance Only Order" or "IO" shall mean an order to buy or sell at a specified price or better that may be executed only during the Nasdaq Closing Cross and only against MOC or LOC orders. IO orders can be entered between [9:30:01 a.m.] *3:30 p.m.* and 3:59:59 p.m., but they cannot be cancelled or modified after 3:50:00 except to increase the number of shares or to increase (decrease) the buy (sell) limit price. IO sell (buy) orders will only execute at or above (below) the 4:00:00 SuperMontage offer (bid). All IO orders must be available for automatic execution.

(3) "Limit On Close Order" or "LOC" shall mean an order to buy or sell at a specified price or better that is to be executed only during the Nasdaq Closing Cross. LOC orders can be entered, cancelled, and corrected between 9:30:01 a.m. and 3:50:00 p.m. [and] *LOC Orders* will execute only at the price determined by the Nasdaq Closing Cross. All LOC orders must be available for automatic execution.

(4) "Market on Close Order" shall mean an order to buy or sell at the market that is to be executed only during the Nasdaq Closing Cross. MOC orders can be entered, cancelled, and corrected between 9:30:01 a.m. and 3:50:00 p.m. [and] *MOC orders* will execute only at the price determined by the Nasdaq Closing Cross. All MOC orders must be available for automatic execution.

(5) No Change.

(6) No Change.

(b) Order Imbalance Indicator.

Beginning at 3:50 p.m., Nasdaq shall disseminate by electronic means an Order Imbalance Indicator every 30 seconds until 3:55, and then *beginning at 3:55*, every 15 seconds until [3:58] *3:59*, and then *beginning at 3:59*, every 5 seconds until [3:59, and then every second until] market close. The Order Imbalance Indicator shall contain the following real time information:

(1)-(4) No Change.

(c) No Change.

\* \* \* \* \*

<sup>6</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> 15 U.S.C. 78s(b)(3)(A).

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

## *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 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 proposing two amendments to NASD Rule 4709 governing the Nasdaq Closing Cross. Specifically, Nasdaq proposes to modify subsection (a)(2) which defines an IO and currently permits market participants to enter such orders beginning at 9:30:01 a.m. E.S.T. Nasdaq has determined that it is inefficient to accept and retain such orders early in the trading day because IOs do not impact the market or the Closing Cross until 3:50 p.m. and market participants derive little benefit from entering them that early. Accordingly, Nasdaq proposes to change the order entry time for IOs to start at 3:30 p.m. E.S.T. in order to better allocate order processing resources.

Nasdaq is also proposing to amend subsection (b) of Rule 4709 to change the frequency with which Nasdaq will disseminate the NOII. Currently, the rule provides for the following dissemination: beginning at 3:50 p.m., Nasdaq will disseminate the NOII every 30 seconds until 3:55, and then every 15 seconds until 3:58, and then every 5 seconds until 3:59, and then every second until market close. Nasdaq has determined that this dissemination would be an unnecessary drain on system resources. Nasdaq proposes to change that dissemination to the following: beginning at 3:50 p.m., Nasdaq would disseminate the NOII every 30 seconds until 3:55, then beginning at 3:55 every 15 seconds until 3:59, and then beginning at 3:59 every 5 seconds until market close.

#### 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,<sup>5</sup> in general, and with Section 15A(b)(6) of

the Act,<sup>6</sup> in particular, in that Section 15A(b)(6) requires, among other things, that a national securities association's rules be designed to protect investors and the public interest. Nasdaq believes that the proposed rule change is consistent with the obligations under these provisions of the Act because it would result in the public dissemination of information that more accurately reflects the trading in a particular security at the close. Furthermore, to the extent a security is a component of an index, Nasdaq believes the index would more accurately reflect the value of the market, or segment of the market, the index is designed to measure. Nasdaq believes the corresponding result should be trades, or other actions, executed at prices more reflective of the current market when the price of an execution, or other action, is based on the last sale, the high price or low price of a security, or the value of an index.

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

Nasdaq 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*

Written comments were neither solicited nor received.

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

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, if consistent with the protection of investors and the public interest,<sup>7</sup> it has become effective pursuant to Section 19(b)(3)(A) of the

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

<sup>7</sup> The Commission revised this section to reflect that the proposed rule change does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate. Telephone conversation between Jeffrey S. Davis, Associate Vice President and Associate General Counsel, Nasdaq, and Ann E. Leddy, Special Counsel, Division of Market Regulation ("Division"), Commission (April 6, 2004).

Act<sup>8</sup> and Rule 19b-4(f)(6) thereunder.<sup>9</sup> 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.

Nasdaq has requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow Nasdaq to effect the proposed amendments to the Nasdaq Closing Cross prior to the launch of the Nasdaq Closing Cross scheduled for Wednesday, April 7, 2004.<sup>10</sup> For these reasons, the Commission designates the proposal to be effective and operative upon filing with the Commission.<sup>11</sup>

## **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 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-2004-060. 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

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

<sup>9</sup> 17 CFR 240.19b-4(f)(6). The Commission notes that Nasdaq provided written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change at least five business days prior to the date of filing of the proposed rule change.

<sup>10</sup> The Commission revised this sentence to clarify that the launch date of the Nasdaq Closing Cross is Wednesday, April 7, 2004. Telephone conversation between Jeffrey S. Davis, Associate Vice President and Associate General Counsel, Nasdaq, and Ann E. Leddy, Special Counsel, Division, Commission (April 6, 2004).

<sup>11</sup> For purposes only of waiving the 30-day operative delay of the proposed rule change, the Commission 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.

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. SR-NASD-2004-060 and should be submitted by May 4, 2004.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04-8266 Filed 4-12-04; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49537; File Nos. SR-NASD-2002-108 and SR-NYSE-2002-35]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc. and New York Stock Exchange, Inc.; Order Approving Proposed Rule Changes Relating to Business Continuity Planning of Members and Notice of Filing and Order Granting Accelerated Approval of NASD Amendment Nos. 6, 7, and 8

April 7, 2004.

#### I. Introduction

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> the National Association of Securities Dealers, Inc. ("NASD") on August 7, 2002, and the New York Stock Exchange, Inc. ("NYSE") on August 16, 2002, filed with the Securities and Exchange Commission ("SEC" or "Commission") proposed rule changes that would require every member to establish and maintain a business continuity plan ("BCP") and to provide either NASD or NYSE, as appropriate, with certain emergency contact information. On September 9, 2002, the Commission published notice of both proposals in the **Federal Register** ("Original Notices").<sup>3</sup> The Commission received four comments in response to

the Original Notices.<sup>4</sup> Thereafter, NASD and NYSE submitted amendments to their respective proposals, which contained their responses to the comment letters.<sup>5</sup> The Commission published notice of the amended proposals in the **Federal Register** ("Second Notices").<sup>6</sup> The Commission received four comment letters in response to the Second Notices.<sup>7</sup> Subsequently, NYSE submitted a fourth amendment<sup>8</sup> and NASD submitted its fourth and fifth amendments, which amended the proposals as published in the Second Notices and responded to the comments received in response to

<sup>4</sup> One commenter submitted a single letter that addressed both Original Notices. See letter from Melvyn Musson, Business Continuity Planning Manager, Edward D. Jones & Co., to Jonathan G. Katz, Secretary, SEC, dated September 30, 2002 ("Edward Jones 1"). A second commenter submitted two letters that addressed each proposal separately. See letters from Jerry W. Klawitter, Securities Industry Association ("SIA") Business Continuity Planning Committee and Bond Market Association ("BMA") Business Continuity Management Council, to Margaret H. McFarland, Deputy Secretary, SEC, dated September 30, 2002 (collectively, "SIA/BMA 1"). A third commenter submitted a letter that addressed only the NASD Original Notice. See letter from Frances M. Stadler, Deputy Senior Counsel, Investment Company Institute, to Jonathan G. Katz, Secretary, SEC, dated September 30, 2002 ("ICI").

<sup>5</sup> See letters from Brian J. Woldow, Office of General Counsel, NASD, to Katherine A. England, Division of Market Regulation ("Division"), SEC, dated December 11, 2002 ("NASD Amendment No. 1"); January 8, 2003 ("NASD Amendment No. 2"); and February 19, 2003 ("NASD Amendment No. 3"). See also letters from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy Sanow, Division, SEC, dated January 10, 2003 ("NYSE Amendment No. 1"); March 6, 2003 ("NYSE Amendment No. 2"); and March 26, 2003 ("NYSE Amendment No. 3"). NYSE Amendment No. 3 incorporated and superceded NYSE Amendments No. 1 and 2.

<sup>6</sup> See Securities Exchange Act Release Nos. 47441 (March 4, 2003), 68 FR 11432 (March 10, 2003) (noticing Amendments No. 1, 2, and 3 of NASD proposal); and 48502 (March 27, 2003), 68 FR 16334 (April 3, 2003) (noticing Amendment No. 3 of NYSE proposal).

<sup>7</sup> Two commenters addressed only the NASD Second Notice. See letters from Melvyn Musson, Business Continuity Planning Manager, Edward D. Jones & Co., to Jonathan G. Katz, Secretary, SEC, dated March 28, 2003 ("Edward Jones 2"); Thomas K. Heard, Associate Vice President & Director of Contingency Planning, A.G. Edwards & Sons, Inc., to Jonathan G. Katz, Secretary, SEC, dated March 31, 2003 ("A.G. Edwards"). One commenter submitted separate letters to each of the NASD and NYSE Second Notices. See letters from Jerry W. Klawitter, SIA Business Continuity Planning Committee and BMA Business Continuity Management Council, to Jonathan G. Katz, Secretary, SEC, dated March 31, 2003 (responding to NASD Second Notice); Jerry W. Klawitter, SIA Business Continuity Planning Committee and BMA Business Continuity Management Council, to Jonathan G. Katz, Secretary, SEC, dated April 24, 2003 (responding to NYSE Second Notice) (collectively, "SIA/BMA 2").

<sup>8</sup> See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Katherine A. England, Division, SEC, dated September 11, 2003 ("NYSE Amendment No. 4").

the Second Notices.<sup>9</sup> The Commission published notice of these amendments on September 26, 2003 ("Third Notices").<sup>10</sup> The Commission received 14 comments in response to the Third Notices.<sup>11</sup> On February 10, 2004, NASD submitted a sixth amendment, which responded to the issues raised by the commenters in response to the Third Notice.<sup>12</sup> NASD submitted its seventh and eight amendments on March 23, 2004, and April 5, 2004, respectively, which made minor changes to its proposal.<sup>13</sup> Finally, on March 24, 2004,

<sup>9</sup> See letters from Brian J. Woldow, Office of General Counsel, NASD, to Katherine A. England, Division, SEC, dated September 3, 2003 ("NASD Amendment No. 4") and September 16, 2003 ("NASD Amendment No. 5").

<sup>10</sup> See Securities Exchange Act Release Nos. 48502 (September 17, 2003), 68 FR 55691 (NYSE); and 48503 (September 17, 2003), 68 FR 55686 (NASD).

<sup>11</sup> One comment letter addressed the Third Notices of both the NASD and the NYSE. See letter from Jerry W. Klawitter, SIA Business Continuity Planning Committee, to Jonathan G. Katz, Secretary, SEC, dated October 16, 2003 ("SIA 3"). Eight comment letters were nearly identical and addressed only the NASD Third Notice. See letters from Jack R. Handy, Jr., President & CEO, Financial Network Investment Corporation, dated October 14, 2003; Patrick H. McEvoy, President/CEO, IFG Network Securities, Inc., undated but received by the Commission on October 15, 2003; Patrick H. McEvoy, President/CEO, Multi-Financial Securities Corporation, undated but received by the Commission on October 15, 2003; Patrick H. McEvoy, President/CEO, Vestax Securities Corporation, undated but received by the Commission on October 15, 2003; Ronald R. Barhorst, President, ING Financial Advisers, LLC, undated but received by the Commission on October 16, 2003; Karl Lindberg, President, Locust Street Securities Inc., undated but received by the Commission on October 16, 2003; Kevin P. Maas, Chief Compliance Officer, PrimeVest Financial Services, undated but received by the Commission on October 15, 2003; Barbara Stewart, President, Washington Square Securities, Inc., undated but received by the Commission on October 15, 2003, to Secretary, SEC (collectively, "Joint Commenters"). Three additional comment letters addressed only the NASD Third Notice. See letters from Henry H. Hopkins, Vice President and Chief Legal Counsel, and John R. Gilner, Vice President & Associate Legal Counsel, T. Rowe Price Investment Services, Inc., to Jonathan G. Katz, Secretary, SEC, dated October 16, 2003 ("T. Rowe Price"); Joseph H. Moglia, CEO, Ameritrade Holding Corporation, to Margaret H. McFarland, Deputy Secretary, SEC, dated October 17, 2003 ("Ameritrade"); W. Thomas Boulter, Vice President & Chief Compliance Officer, Jefferson Pilot Securities Corporation, to Jonathan G. Katz, Secretary, SEC, dated October 17, 2003 ("Jefferson Pilot"). One commenter submitted separate but nearly identical letters to both the NASD Third Notice and the NYSE Third Notice. See letters from Barry S. Augenbraun, Senior Vice President and Corporate Secretary, Raymond James Financial, Inc., to Jonathan G. Katz, Secretary, SEC, dated October 16, 2003 (collectively, "Raymond James").

<sup>12</sup> See letter from Brian J. Woldow, Office of General Counsel, NASD, to Katherine A. England, Division, SEC, dated February 10, 2004 ("NASD Amendment No. 6").

<sup>13</sup> See letters from Shirley H. Weiss, Associate General Counsel, NASD, to Katherine A. England, Division, SEC, dated March 23, 2004 ("NASD Amendment No. 7"), and April 5, 2004 ("NASD Amendment No. 8").

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

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

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

<sup>3</sup> See Securities Exchange Act Release Nos. 46443 (August 30, 2002), 67 FR 57264 (File No. SR-NYSE-2002-35); and 46444 (August 30, 2002), 67 FR 57257 (File No. SR-NASD-2002-108).