

with a Reporting Agent to provide the information on the member's behalf.

Second, Pink Sheets expressed concern that quotation information provided to the NASD pursuant to the proposed rule could be used to compete against Pink Sheets. Pink Sheets also suggested that the NASD might use the quotation information in some way to advantage its OTC Bulletin Board, to the detriment of EQS. The Commission notes that NASD Regulation specifically represented that it requires access to this quotation data for regulatory purposes and intends to use the data only for this purpose²⁷ and that quotation data submitted to the NASD or NASD Regulation under the proposed rule change will not be provided to The Nasdaq Stock Market by the NASD or NASD Regulation.²⁸ Also, in Amendment No. 3, the NASD represented that to the extent the member's Reporting Agent calculates an inside bid and/or offer and submits that inside bid and/or offer to the NASD, the NASD will not use this inside bid and/or offer for any commercial purposes.²⁹

V. Accelerated Approval of Amendment Nos. 1, 2, and 3

The Commission finds good cause for approving Amendment No. 1 to the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. Under Amendment No. 1, the NASD clarified when a member must withdraw its quotes from an inter-dealer quotation system under the rule.

The Commission also finds good cause for approving Amendment No. 2 to the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. By expressly excluding from application of the proposed rule quotations entered into inter-dealer quotation systems that are operated by a registered national securities association or national securities exchange, Amendment No. 2 clarifies the proposed rule's scope. In addition, the Commission finds good cause for approving Amendment No. 3 to the proposed rule change prior to the thirtieth day after the date of publication of filing thereof in the **Federal Register**. By clarifying that the terms "prevailing inside bid" and "prevailing inside offer" refer to the prevailing inside bid and offer of the system under which the participant has

a responsibility to provide quotation activity under the proposed rule, Amendment No. 3 makes it clear that it is not necessary for a member to consolidate quotation information from other systems or markets that are quoting the same security. Amendment No. 3 also clarifies that the NASD will not use the inside bid/offer quotations collected and submitted by the Reporting Agent for any commercial purposes.

For these reasons, the Commission finds good cause, consistent with sections 15A(b)(2), 15A(b)(6) and 19(b)(2) of the Act, to accelerate approval of Amendment Nos. 1, 2, and 3 to the proposed rule change.

VI. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment Nos. 1, 2, and 3, including whether Amendment Nos. 1, 2, and 3 are 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. 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-2000-42 and should be submitted by April 24, 2003.

VII. Conclusion

It is therefore Ordered, pursuant to section 19(b)(2) of the Act,³⁰ that the proposed rule change (SR-NASD-00-42) be and hereby is, approved, and Amendment Nos. 1, 2, and 3 are approved on an accelerated basis.³¹

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.³²

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47592; File No. SR-NASD-2003-03]

Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Waive Fees Assessed Under NASD Rule 7010(s) for New Subscribers to Nasdaq PostData

March 28, 2003.

I. Introduction

On January 9, 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"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to waive for two months the fees assessed under NASD Rule 7010(s) for each new subscriber to Nasdaq PostData. The proposed rule change was published for notice and comment in the **Federal Register** on January 27, 2003.³ The Commission received one comment on the proposal.⁴ On March 20, 2003, Nasdaq responded to the comment letter.⁵ This order approves the proposed rule change.

³² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 47209 (January 17, 2003), 68 FR 3911.

⁴ See February 7, 2003 letter from Joseph L. Magill, Managing Director AutEx, Thomson Financial Banking and Brokerage ("Thomson"), to Jonathan G. Katz, Secretary, Commission, and attachments ("Thomson Letter"). The Thomson Letter includes as an attachment a January 10, 2003 letter, also from Joseph L. Magill to Jonathan G. Katz, commenting on SR-NASD-2002-184, a proposed rule change the NASD filed and later withdrew. Because the issues Thomson raised in its January 10, 2003 letter are also raised in the instant proposed rule change, Thomson submitted its January 10, 2003 letter as an attachment to its February 7, 2003 letter as a comment to SR-NASD-2003-03. When citing to page numbers of the Thomson Letter in this order, the Commission is referencing the page numbers of Thomson's January 10, 2003 letter.

⁵ See March 19, 2003 letter from Jeffrey S. Davis, Nasdaq, to Alden S. Adkins, Associate Director, Division of Market Regulation, Commission ("Nasdaq Letter").

²⁷ See NASD Response to Comments and Amendment No. 1, *supra* note 3.

²⁸ See NASD Letter, *supra* note 6.

²⁹ See Amendment No. 3, *supra* note 8.

³⁰ 15 U.S.C. 78s(b)(2).

³¹ In approving the proposed rule change, the Commission has considered the rule's impact on efficiency, competition, and capital formation.

II. Summary of Comments

While the instant proposed rule change is limited to the question of a two-month waiver of fees associated with PostData for new subscribers, the commenter's concerns are broader in scope. The following is an overview of the concerns the commenter raised.

• *Nasdaq Has Failed To Evaluate Its Fee Structure*

The commenter believes that Nasdaq is able to effectively present an analysis of the PostData fees, despite Nasdaq's assertion to the contrary, by calculating the cost of operating, enhancing, and marketing the product.⁶ Additionally, the commenter notes that the fees for PostData are imposed on a per-user basis, which may provide relevant price data, as well as some basis for estimating the anticipated average number of paying users per firm.⁷

• *Cost of Enhancements to PostData*

The commenter disagrees with Nasdaq's position that enhancements to PostData do not entail any additional fees.⁸ The commenter believes that Nasdaq, by adding material enhancements to PostData "whose costs are not defrayed by the fees charged for the service" may be a burden on competition.⁹ The commenter raises the question of whether such a revenue shortfall is being offset by fees generated by the self-regulatory organization's regulatory activities.¹⁰

• *PostData Wholesale Fees Are Improper*

The commenter believes that Nasdaq's wholesale fees must "reflect only those costs that the SRO would incur if it just collected information and passed it on to private vendors."¹¹ Citing *NASD v. SEC*,¹² the commenter believes that Nasdaq's fee structure cannot mandate that vendors pay costs related to Nasdaq's own commercial service, such as costs relating to formatting PostData reports and any operating and overhead costs attributed to the retail version of PostData.¹³

III. Nasdaq's Response to Comments

Nasdaq says that the commenter has not alleged that Nasdaq's PostData product is an undue burden on competition, and that the inference that

one should draw from the commenter's failure to allege such harm is that PostData has been neither a burden on competition, nor a burden on the commenter's business.¹⁴

In response to the commenter's claim that Nasdaq should evaluate its fee structure, Nasdaq states that its fee structure is proper, and that the proposal "clearly identifies the costs attributable to market data vendors and the separate, incremental costs that are attributable to direct subscribers."¹⁵ Regarding the fees themselves, Nasdaq believes that the fees at their current levels "equitably allocate Nasdaq's costs for offering PostData to members and non-members."¹⁶

Nasdaq acknowledges that it has expanded the amount of market data available through PostData since approval of its original pilot program. However, Nasdaq does not believe that raising the PostData fees is proper because the new data "does not materially affect the costs that Nasdaq is permitted to include in the PostData fees, such as the maintenance, operation or marketing of PostData, or the operation of the web security infrastructure."¹⁷

Finally, Nasdaq asks the Commission to reject the commenter's argument that the wholesale fees associated with PostData are improper, because the Commission found in its approval order for the original PostData pilot program that the fees "are equitably allocated among members and non-members, and that the price differential between retail and wholesale fees offer market data vendors the opportunity to compete effectively" with Nasdaq.¹⁸

IV. Discussion and Commission Findings

The Commission has reviewed carefully the proposed rule change, the comment letter, and Nasdaq's response to the comment letter, and 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 association¹⁹ and, in particular, the

requirements of sections 15A(b)(5) and (6) of the Act.²⁰ Section 15A(b)(5)²¹ requires the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that a national securities association operates or controls. Section 15A(b)(6)²² requires that the rules of a national securities association be designed to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and are not designed to permit unfair discrimination between customers, issuers, brokers or dealers. The Commission finds that the proposal is consistent with both of these sections of the Act.

Specifically, the Commission, in its original approval of the PostData pilot,²³ found that the fees that Nasdaq would charge for both the retail and the wholesale distribution of PostData are equitably allocated among members and non-members. In the instant proposed rule change, Nasdaq has not changed the differential between the retail and wholesale fees permanently—instead, Nasdaq seeks only to offer a waiver of those fees for two months for new subscribers to encourage such persons to use the service. The waiver will apply to subscribers that deal directly with Nasdaq (retail subscribers), as well as subscribers who are vendors (wholesale subscribers). If subscribers do take on this opportunity and like the service, they will pay for the service at the approved rates. The Commission believes, therefore, that such a waiver is reasonable.

Furthermore, the Commission believes the information contained in PostData may help to foster cooperation and coordination with persons engaged in facilitating transactions in securities, by providing consistent, reliable, and verified market data to market participants who choose to subscribe to the service or purchase the information from market data vendors. The Commission believes that investors will benefit by the timely dissemination of this reliable market data.²⁴ The Commission believes that the two month fee waiver places no undue burden on competition, and in fact, may

⁶ Thomson Letter at 8.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 9.

¹⁰ *Id.*

¹¹ *Id.*

¹² 801 F.2d at 1419.

¹³ Thomson Letter at 9–10.

¹⁴ Nasdaq Letter at 1–2. The Commission notes, however, that the commenter, in arguing that Nasdaq could not have materially enhanced PostData without incurring any additional fees, states that adding enhancements without charging additional fees to defray the costs "can place a significant burden on competition. * * *

Thomson Letter at 8–9.

¹⁵ *Id.* at 2.

¹⁶ *Id.*

¹⁷ *Id.* at 3.

¹⁸ *Id.*

¹⁹ 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).

²⁰ 15 U.S.C. 78o–3(b)(5) and (6).

²¹ 15 U.S.C. 78o–3(b)(5).

²² 15 U.S.C. 78o–3(b)(6).

²³ See Securities Exchange Act Release No. 45270 (January 11, 2002), 67 FR 2712 (January 18, 2002) (SR–NASD–99–12).

²⁴ In this regard, the Commission reminds Nasdaq of its representation that Nasdaq generally will provide the PostData information to vendors approximately five minutes before it posts the information on the web site for direct end-users.

foster competition, as market data vendors obtain verified data from PostData, provide enhancements to the data, and in turn, sell the enhanced data to retail customers.²⁵

The Commission expects that Nasdaq will continue to examine the fees and fee structure of PostData, and will take whatever steps are necessary to ensure that the fees remain consistent with the mandate established in section 15A(b)(5) of the Act,²⁶ so that the fees associated with PostData remain equitable. The Commission also expects that Nasdaq will provide the Commission with the information the Commission requested in its original approval order of the PostData pilot²⁷ as soon as practicable.

V. Conclusion

It is therefore Ordered, pursuant to section 19(b)(2) of the Act²⁸, that the proposed rule change (SR-NASD-2003-03) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁹

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47584; File No. SR-NYSE-2002-35]

Self-Regulatory Organizations; Notice of Filing of Amendment No. 3 to a Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Business Continuity and Contingency Planning

March 27, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on March 27, 2003, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") Amendment No. 3³ to

the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The NYSE submitted the proposed rule change to the Commission on August 16, 2002, and it was published in the **Federal Register** on September 9, 2002 ("Original Notice").⁴ The NYSE subsequently submitted amendments to the proposed rule change on January 13, 2003,⁵ and March 7, 2003.⁶ Amendment No. 3 incorporates and replaces Amendments Nos. 1 and 2 in their entirety. The Commission is publishing Amendment No. 3 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

The Exchange is proposing to clarify that proposed new NYSE Rule 446 ("Business Continuity and Contingency Plans")—which would require members and member organizations to develop, maintain, review, and update business continuity and contingency plans that establish procedures to be followed in the event of an emergency or significant business disruption—also would require such plans to be reasonably designed to enable members and member organizations to continue their businesses in the event of a significant business disruption.

Below is the text of the proposed rule change, as amended. The base text is that provided in the Original Notice. Language added by Amendment No. 3 is in *italics*; language deleted by Amendment No. 3 is in brackets:

* * * * *

Business Continuity and Contingency Plans

New Rule 446

(a) Members and member organizations must develop and maintain a written business continuity and contingency plan establishing procedures [to be followed in the event of] *relating to* an emergency or significant business disruption. *Such procedures must be reasonably designed to enable members and member organizations to continue their businesses in the event of a future significant business disruption.*

⁴ Securities Exchange Act Release No. 46443 (August 30, 2002), 67 FR 57264.

⁵ See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy Sanow, Division of Market Regulation, Commission, dated January 10, 2003 ("Amendment No. 1").

⁶ See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Katherine A. England, Division of Market Regulation, Commission, dated March 6, 2003 ("Amendment No. 2").

Members and member organizations must make such plan available to the Exchange upon request.

(b) Members and member organizations must conduct, *at a minimum*, a yearly review of their business continuity and contingency plan to determine whether any modifications are necessary in light of changes to the member's or member organization's operations, structure, business or location. *In the event of a material change to a member's or member organization's operations, structure, business or location, the member or member organization must promptly update its business continuity and contingency plan.*

(c) The [requirements of] *elements that comprise* a business continuity and contingency plan shall be tailored to the size and needs of a member or member organization *so as to enable the member or member organization to continue its business in the event of a future significant business disruption.* Each plan, however, must, at a minimum, address, if applicable:

- (1) books and records back-up and recovery (hard copy and electronic);
- (2) identification of all mission critical systems and back-up for such systems;
- (3) financial and operational risk assessments;
- (4) alternate communications between customers and the firm;
- (5) alternate communications between the firm and its employees;
- (6) alternate physical location of employees;
- (7) business constituent, bank and counter-party impact;
- (8) regulatory reporting; and
- (9) communications with regulators.

To the extent that any of the above items is not applicable, the member's or member organization's business continuity and contingency plan must specify the item(s) and state the rationale for not including each such item(s) in its plan. If a member or member organization relies on another entity for any of the above-listed categories or any mission critical system, the member's or member organization's business continuity and contingency plan must address this relationship.

(d) The term "mission critical system," for purposes of this Rule, means any system that is necessary, depending on the nature of a member's or member organization's business, to ensure prompt and accurate processing of securities transactions, including order taking, entry, execution, comparison, allocation, clearance and settlement of securities transactions, the

²⁵ The Commission notes that PostData relates to enhanced data that is not integral to the ability of a broker-dealer or customer to trade. *Cf. NASD v. SEC*, footnote 12, *supra*.

²⁶ 15 U.S.C. 78o-3(b)(5).

²⁷ See footnote 23, *supra*.

²⁸ 15 U.S.C. 78s(b)(2).

²⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Katherine A. England, Division of Market Regulation, Commission, dated March 26, 2003 ("Amendment No. 3").