

including whether the amended proposal 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. All comment letters should refer to File No. SR-ISE-2003-26. 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 hard copy 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 ISE. All submissions should refer to File No. SR-ISE-2003-26 and should be submitted by April 7, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 04-5950 Filed 3-16-04; 8:45 am]

BILLING CODE 8010-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49404; File No. SR-NASD-2003-159]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 by the National Association of Securities Dealers, Inc. to Permit Nasdaq to Append a New Modifier to Trade Reports of Pre-Open and After-Hours Trades Not Submitted to Nasdaq's Automated Confirmation Transaction Service, and Other Changes Regarding Trade Reporting

March 11, 2004.

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 October 16, 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") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. On February 5, 2004, Nasdaq amended the proposal.³ The Commission is publishing this notice 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

Nasdaq proposes changes to permit it to append a new modifier to trade reports of pre-open and after-hours trades not submitted to Nasdaq's Automated Confirmation Transaction Service ("ACT") within 90 seconds after execution, and to require members to: (1) Include the time of execution on all reports submitted to ACT; (2) append the .W modifier to reports of "stop stock transactions;" (3) append the .W modifier, as appropriate, to reports submitted to ACT after 5:15 p.m.,⁴ and (4) append the .PRP modifier to reports of transactions in listed securities that are executed at a price that is based on a prior point in time.

The proposal to implement a new trade report modifier for pre-open and after hours trades that are reported late must be approved by the respective members of the Consolidated Tape Association and the Nasdaq Unlisted Trading Privilege Plan. In addition, the proposal to require members to append the .PRP modifier, as appropriate, to reports of listed securities must be approved by the members of the Consolidated Tape Association.

The amendments contained in this filing will be implemented as soon as practical, should the Commission approve the filing, taking into consideration the system changes required to be made by members and

vendors.⁵ If the Commission approves the proposed rule change, Nasdaq will announce an implementation schedule soon after Commission approval, but in no case would the changes be implemented in less than 90 days after approval.

The text of the proposed rule change is available at Nasdaq and at the Commission.

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

Market participants make trading and investment decisions based, in part, on information disseminated by Nasdaq about trades executed in its market. Nasdaq is proposing several changes that are designed to improve the quality of the information disseminated. The proposed changes will permit Nasdaq to append a new modifier to trade reports of pre-open and after-hours trades not submitted to ACT within 90 seconds after execution, and to require members to: (1) Include the time of execution on all reports submitted to ACT; (2) append the .W modifier to reports of "stop stock transactions;" (3) append the .W modifier, as appropriate, to reports submitted after 5:15 p.m.; and (4) append the .PRP modifier to reports of transactions in listed securities that are executed at a price that is based on a prior point in time.

Late Pre-Open and After-Hours Trade Reports

To provide market participants with more accurate information about the prices at which a security is trading outside normal market hours, Nasdaq is proposing to create a new trade

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See February 4, 2004 letter from Peter R. Geraghty, Associate Vice President and Associate General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission and attachments ("Amendment No. 1"). Amendment No. 1 completely replaced and superseded the original proposed rule change.

⁴ Nasdaq also is proposing to clarify that members must append the .W modifier to a trade report if a trade can be properly reported with both a .T modifier and a .W modifier. This clarification is necessary because ACT can accept only one modifier per trade report. See *infra* note 14.

⁵ The NASD Small Firm Advisory Board ("SFAB") requested that the change to require the time of execution on all trade reports be implemented one year from the date of Commission approval so that small members would have sufficient time to make the necessary system modifications.

¹² 17 CFR 200.30-3(a)(12).

reporting modifier (the .ST modifier) to identify pre-open and after-hours trades that are reported late. Today, members generally are required to submit trade reports to ACT within 90 seconds of the time of execution. However, if during normal market hours a trade is not reported within 90 seconds, the member must include a modifier (the .SLD modifier) on the submission to ACT to indicate that the trade report is late. The modifier prevents the trade report from affecting the last sale calculation of the security and informs the market that the price is "stale" because it is associated with a trade executed at least a minute and a half earlier. In contrast, for trades executed and reported in the pre-open and after-hours sessions, there is no modifier equivalent to the .SLD modifier that can inform market participants that a price may be stale. Nasdaq is proposing to create the .ST modifier to identify stale prices in the pre-open and after-hours sessions.

Unlike the rules governing the .SLD modifier, members will not be required to append the .ST modifier to late reports of pre-open and after-hours trades. Members will continue to be required to append the .T modifier and include the time of execution on late reports of pre-open and after-hours trades; Nasdaq will convert the .T modifier to .ST, as appropriate, after comparing the time of execution to the time of submission to ACT.

Reporting Time of Execution

To improve the accuracy of the information disseminated to market participants and to enhance its automated surveillance, Nasdaq is proposing to require members to include the time of execution on all reports submitted to ACT.⁶ For example, when a report contains the time of execution, Nasdaq's systems can determine whether the trade was submitted timely or late. If the trade is submitted late and does not include the late trade report modifier (the .SLD modifier), Nasdaq can automatically

append the modifier. Automatically appending the .SLD modifier improves the accuracy of the information disseminated, because when a trade is reported late without the modifier it appears on the tape as a current trade, which can cause confusion if the price of the late reported trade is different from the current prices at which the security is trading. Appending the .SLD modifier eliminates the opportunity for this confusion.

Including the time of execution on a report also assists the NASD in enforcing certain NASD rules, including determining whether a trade is consistent with a member's duty of best execution. When NASD possesses the execution time of a trade they can compare the trade price to, among other things, the bids and offers for the security at and around the time the trade was executed to determine whether the price is consistent with those prices. Again, without the time of execution, NASD's ability to perform this surveillance is complicated.

Today, approximately 99% of trade reports submitted to ACT contain the time of execution, which means NASD can conduct its automated surveillance and Nasdaq can append the modifiers automatically, for nearly all of the trades submitted to ACT. However, Nasdaq can improve both the quality of information it disseminates and the surveillance of its market if all reports submitted to ACT contain the time of execution. With this current proposal, Nasdaq will eliminate the few instances in which late trades are inappropriately disseminated as current trades and the full benefits of the NASD's automated surveillance systems can be achieved.

Reporting Stop Stock Transactions

Nasdaq is proposing that members use the .W modifier to report the trade execution scenario known as "stop stock" transactions.⁷ Using the .W

⁷ Presently, the .W modifier must be appended to reports of trades whose prices are determined based upon an average price or other special pricing formulae.

Members have been given guidance that the .W modifier is appropriate to report the equity trade component of an "exchange for physical" transaction. An exchange for physical transaction involves two parties simultaneously executing a futures contract transaction and an equity transaction (for the securities covered by the futures contract), typically involving baskets (or exchange traded funds "ETFs") that replicate common indices. For example, party A will sell a basket of stocks (or ETF) to party B, and party B simultaneously will sell to party A a futures contract covering the basket (or ETF).

Members also have been told that the equity leg of an exchange for physical transaction can be reported on an "as of" basis on the day following the date of execution. Either approach is acceptable because both ensure that the equity leg trades do

modifier to identify stop stock transactions will ensure that the "stop stock prices" are not disseminated to market participants as trades reflective of the current market for the security.⁸

Members and customers today often have an understanding or explicitly agree as to how a customer's order will be executed, especially if the order is for a large number of shares. For example, upon receiving a market order from a customer, the member and the customer agree that the member will execute the order in pieces throughout the day, with the expectation that this "working" of the order will result in a price to the customer that is superior to the price at which the stock is trading at the time the member receives the order. However, the member also may promise to "stop" the customer at or near the current market price to ensure that the customer does not receive an inferior price if the market moves against the customer's interest (e.g., the price of the stock rises throughout the day when the member is seeking to buy the security). In such situations, when the customer's order is executed, the trade must be reported at whichever price the member used to fill the order, either the "stop stock price" or the better price.

Currently, if the member fills the customer's order at a price that is the average of several different execution prices, the trade must be reported with the .W modifier, which informs market participants that the price is not based on current trading.⁹ However, today

not get disseminated as normal trades, and thus do not affect the high, low, and last sale calculations. Excluding the equity leg trades from these calculations is important because the equity leg transaction prices often include factors and adjustments that are not based on contemporaneous trading in the securities.

Nasdaq will be seeking a proposed rule change in the future to provide specific, standard guidance as to the appropriate method for reporting exchange for physical transactions. At this time, Nasdaq has not determined the manner that will be prescribed, but until such time, members can continue to report these trades on an "as of" basis on the day following execution, or on the same day using the .W modifier.

⁸ Until such time that the .W modifier is approved and implemented for stop stock transactions, Nasdaq believes it is appropriate for members to use the .SLD modifier. Using the .SLD modifier in these circumstances is not desirable as a permanent solution, however, because the modifier can be used only during normal market hours. In contrast, the .W modifier can be used between 9:30 a.m. and 5:15 p.m., and Nasdaq is proposing to extend the use of the .W modifier until 6:30 p.m. Appending the .SLD modifier for stop stock situations is satisfactory as a temporary solution because it will prevent these trades from being included in the last sale calculation and market participants will be informed that the price in [sic] not current.

⁹ In some instances, however, a trade may not be required to be reported to Nasdaq if that the trade qualifies as the riskless leg of a riskless principal transaction. See e.g., NASD Rule 4632(d)(3)(B). See

⁶ Because of the SFAB's comments concerning the proposal to require the time of execution on all reports submitted to ACT, Nasdaq will delay implementation of this requirement for a year after Commission approval. To provide members with notice of the effective date of the requirement, Nasdaq is proposing to add Interpretive Materials to the trade reporting rules stating the exact date when the obligation becomes effective. Until such time, members will remain obligated to provide the time of execution only in those circumstances articulated in the NASD's rules. To prevent confusion, the rule language modifications in this filing do not contain the changes required to mandate the time of execution on all reports submitted to ACT. These language changes will be made at a time closer to the effective date of the requirement.

there is no modifier designated to identify a trade executed at a stop stock price. As a result, trades executed at stop stock prices appear as current market trades, when in fact the price may be based on the market several hours earlier. For example, a member fills a customer's order at the end of the day (which it received in the morning) at a stop stock price of \$50, when the current market is trading at \$52. When reported without a modifier, there is nothing to distinguish the trade at \$50 from other trades occurring at that time at \$52. Therefore, market participants can be led to believe that the market is falling, especially if the stop stock transaction is for a large number of shares. Requiring members to use the .W modifier to identify these trades will improve the information disseminated about the prices at which stocks are trading on Nasdaq.

To prevent confusion with the terms "stop order"¹⁰ and "stop-limit order,"¹¹ and to provide guidance as to the exact circumstances in which use of the .W modifier will be required, Nasdaq will define the terms "Stop Stock Price" and "Stop Stock Transaction" in its rules. Nasdaq is proposing to define the term "Stop Stock Price" as the specified price at which a member and another party agree a Stop Stock Transaction will be executed, and which price is based upon the prices at which the security is trading at the time the order is received by the member, taking into consideration that the specified price may deviate from the current market prices to factor in the size of the order and the number of shares available at those prices.

Nasdaq is proposing to define a "Stop Stock Transaction" as any transaction that is the result of an order in which a member and another party agree that the order will be executed at a Stop Stock Price or better, and the order is executed at the Stop Stock Price. An order that is not executed at the Stop Stock Price does not comply with the definition of a Stop Stock Transaction, but nevertheless may need to be reported with the .W modifier if the

price is based on average weighting or some other special pricing formula.¹²

To enable the NASD to conduct surveillance for proper use of the .W modifier for Stop Stock Transactions, members will be required to record the time at which the member and the other party agreed to the Stop Stock Price.¹³ Specifically, members must populate the time of execution field on the ACT report with the time the member and the other party agreed to the Stop Stock Price; members will not be required to include on the ACT report the actual time the trade was executed.

Nasdaq also is seeking to extend the hours during which the .W modifier can be submitted to ACT. Presently, the .W modifier is accepted from 9:30 a.m. until 5:15 p.m., while ACT remains open until 6:30 p.m. Eastern Time. Nasdaq is proposing to modify ACT to accept the .W modifier from 5:15 p.m. until 6:30 p.m. With this change, members will be required to use the .W modifier, as appropriate, for trades executed between 9:30 a.m. and 6:30 p.m.¹⁴ However, for Stop Stock Transactions, the .W modifier is not required if the trade is executed and reported within 90 seconds of the time the member and the party agreed to the Stop Stock Price.¹⁵

¹² Because members will be required to include the .W modifier and the time of execution on reports of Stop Stock Transactions, ACT is being programmed to reject any report submitted with the .W modifier that does not include the time of execution. However, the time of execution is not presently required when reporting .W trades based on average weighting or any other special pricing formula, unless the trade is reported late. Because ACT will not be able to distinguish between Stop Stock Transactions and other trades being reported with the .W, Nasdaq is proposing to require members to include the time of execution on all trades reported with the .W modifier, including those based on average weighting or other special pricing formulae.

¹³ In contrast, members will be required to include the actual time a trade is executed when using the .W modifier to identify a trade whose price is based on average weighting or some other special pricing formulae.

¹⁴ ACT can accept only one modifier per trade report. In some instances, however, a trade can be executed in a manner in which the .T modifier and the .W modifier would be appropriate. For example, an average price trade that is executed between 4 p.m. and 6:30 p.m. Because the trade is executed and reported outside normal market hours, the .T modifier is appropriate. However, the .W modifier also would be appropriate because the trade price is based on an average price. Whenever a trade is executed in a manner that implicates both the .T modifier and the .W modifier, Nasdaq is proposing that members must utilize the .W modifier. Using the .W modifier in these situations will ensure that market participants are informed that the price is not based on current trading of the security.

¹⁵ Because members have 90 seconds to report a trade, the presumption is that any prices reported in that time period are informative to the market as an indication of current trading. Therefore, when a Stop Stock Transaction is executed and reported within 90 seconds of the time the member and the

Prior Reference Price Trades—Listed Securities

Presently, members are required to append the .PRP modifier to reports of transactions in Nasdaq securities when the price of a trade is based on prior point in time.¹⁶ For example, a member is required to append the .PRP modifier to a market on open order for a Nasdaq-listed stock executed more than 90 seconds after the market opens. The .PRP modifier, however, is not required when reporting such transactions in listed securities.¹⁷ Requiring members to append the .PRP modifier to a trade whose price is based on a prior point in time improves the quality of information disseminated because market participants are informed that the price is not based on current market trading. Therefore, to improve the quality of information disseminated concerning trading in listed securities, Nasdaq is proposing to require members to append the .PRP modifier, as appropriate, to reports of transaction in listed securities.¹⁸

Members will be required to use the .PRP modifier in the same manner as required today for Nasdaq securities. Specifically, the price must be based on prior point in time and the member must include that prior time on the report to ACT. That is, the price must have existed at the time identified on the ACT report. In addition, the .PRP modifier is not required if the trade is executed and reported within 90 seconds from the prior reference time.¹⁹

other party agreed to the Stop Stock Price, the Stop Stock Price is presumed to be informative to market participants because it is based on current market prices within the last 90 seconds.

¹⁶ The .PRP modifier also is required when reporting transactions in OTC Bulletin Board and OTC Equity Securities.

¹⁷ For example, securities listed on the NYSE and reported to Nasdaq pursuant to Rule 6420.

¹⁸ Until such time that the .PRP modifier is approved and implemented, Nasdaq believes it is appropriate for members to use the .SLD modifier in circumstances in which the .PRP modifier would be appropriate. Using the .SLD modifier in these circumstances is not desirable as a permanent solution, however, because the .SLD modifier identifies trades that are *executed timely*, but the report of the trade is late. Whereas the .PRP modifier identifies *trades that are executed late*, when measured against the reference time, but that are reported within 90 seconds of the time the trade is actually executed. Appending the .SLD modifier in the ".PRP" circumstances is satisfactory as a temporary solution because it will prevent the trade from being included in the last sale calculation and market participants will be informed that the price in [sic] not current.

¹⁹ For example, a member is not required to append the .PRP modifier to a market on open order executed and reported prior to 9:31:30 a.m. Eastern Time. Members have up to 90 seconds from time of execution to report a trade. As such, reports received within the 90-second period are considered current. In this example, the market on

Continued

also, *Nasdaq General News—Riskless Principal Negative Consent Letters and .W Modifier* (January 31, 2001), which is available at <http://www.nasdaqtrader.com/Trader/News/2001/generalnews/01312001.stm>.

¹⁰ *Barron's Dictionary of Finance and Investment Terms* (4th ed. 1995) defines the term "stop order" as an "order to a securities broker to buy or sell at the market price once the security has traded at a specified price called the *stop price*."

¹¹ *Barron's Dictionary of Finance and Investment Terms* (4th ed. 1995) defines the term "stop-limit order" as an "order to a securities broker with instructions to buy or sell at a specified price or better (called the *stop-limit price*) but only after a given *stop price* has been reached or passed."

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,²⁰ in general, and section 15A(b)(6) of the Act,²¹ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and to protect investors and the public interest. Nasdaq believes the proposed rule change will improve the quality of information disseminated by Nasdaq about the prices at which stocks are trading in its market and will improve the regulation of the Nasdaq market by increasing the number of trades monitored using the NASD's automated surveillance systems.

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, 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

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 NASD consents, the Commission will:

A. by order approve such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change 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.

open order was executed and reported within 90 seconds from the time that the market opened at 9:30 a.m. Therefore, the price would be considered current and does not need to be identified with a modifier.

²⁰ 15 U.S.C. 78o-3.

²¹ 15 U.S.C. 78o-3(b)(6).

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. All comment letters should refer to File No. SR-NASD-2003-159. 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 NASD. All submissions should refer to file number SR-NASD-2003-159 and should be submitted by April 7, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²²

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 04-5980 Filed 3-16-04; 8:45 am]

BILLING CODE 8010-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Advisory Circular; Initial Maintenance Inspection (IMI) Test for Turbine Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of issuance of advisory circular.

SUMMARY: The Federal Aviation Administration (FAA) announces the issuance of Advisory Circular (AC) Number 33.90-1, Initial Maintenance Inspection (IMI) Test for Turbine Engines. This AC sets forth acceptable methods of compliance with the test requirements of § 33.90 of title 14 of the Code of Federal Regulations, Initial maintenance inspection. The

information provided in this AC replaces the guidance in paragraph 61, § 33.90 IMI of AC 33-2B, Aircraft Engine Type Certification Handbook.

DATES: The Engine and Propeller Directorate, Aircraft Certification Service, issued AC 33.90-1 on March 5, 2004.

FOR FURTHER INFORMATION CONTACT:

Marc Bouthillier, Engine and Propeller Standards Staff, ANE-110, 12 New England Executive Park, Burlington, MA 01803-5299; telephone: (781) 238-7120; fax (781) 238-7199; e-mail: Marc.Bouthillier@faa.gov.

We have filed in the docket all comments we received, as well as a report summarizing each substantive public contact with FAA personnel concerning this advisory circular. If you wish to review the docket in person, go to the above address between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

How to Obtain Copies: A paper copy of AC 33.90-1 may be obtained by writing to the U.S. Department of Transportation, Subsequent Distribution Office, DOT Warehouse, SVC-121.23, Ardmore East Business Center, 3341Q 75th Ave., Landover, MD 20785, telephone 301-322-5377, or by faxing your request to the warehouse at 301-386-5394. The AC will also be available on the Internet at "<http://www.faa.gov/>", select "Regulations and Policies" and the link title "Advisory Circulars".

SUPPLEMENTARY INFORMATION: The FAA published a notice in the **Federal Register** on June 4, 2003 (68 FR 33563) to announce the availability of the proposed AC and invite interested parties to comment.

(Authority: 49 U.S.C. 106(g), 40113, 44701-44702, 44704.)

Issued in Burlington, Massachusetts, on March 5, 2004.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 04-6046 Filed 3-16-04; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement; Washington, DC

AGENCIES: Federal Highway Administration, District of Columbia Division; District of Columbia, Department of Transportation.

ACTION: Notice of Intent (NOI) to prepare an Environmental Impact Statement.

²² 17 CFR 200.30-3(a)(12).