

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49131; File No. SR-NASD-2004-12]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Extend Operation of NASD's Alternative Display Facility on a Pilot Basis

January 27, 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 January 27, 2004, the National Association of Securities Dealers, Inc. ("NASD" or "Association") submitted to the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by NASD. NASD filed the proposal pursuant to Section 19(b)(3) of the Act,³ and Rule 19b-4(f)(6) thereunder,⁴ which renders the proposal 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

NASD proposes to extend for nine months the operation of NASD's Alternative Display Facility ("ADF") on a pilot basis. The current ADF pilot program, which the Commission approved on July 24, 2002, will expire on January 26, 2004. The pilot permits members to quote and trade only Nasdaq-listed securities on or through the ADF.

New text is italicized. Deleted text is in brackets.

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4000A. NASD Alternative Display Facility

4100A. General

NASD Alternative Display Facility ("ADF") is the facility to be operated by NASD on a pilot basis for members that choose to quote or effect trades in Nasdaq securities ("ADF-eligible securities") otherwise than on Nasdaq or on an exchange. The ADF will collect and disseminate quotations, compare trades, and collect and disseminate trade reports. Those NASD members

that utilize ADF systems for quotation or trading activities must comply with the Rule 4000A, Rule 5400 and Rule 6000A Series, as well as all other applicable NASD Rules. The ADF pilot will expire on [January 26, 2004] *October 26, 2004.*

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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 July 24, 2002, the Commission approved SR-NASD-2002-97,⁵ which authorized NASD to operate the ADF on a pilot basis for nine months, pending the anticipated approval of SR-NASD-2001-90, which proposed to operate the ADF on a permanent basis. The ADF pilot was extended until January 26, 2004 in SR-NASD-2003-67.⁶ As described in detail in SR-NASD-2001-90, the ADF is a quotation collection, trade comparison, and trade reporting facility developed by NASD in accordance with the Commission's SuperMontage Approval Order⁷ and in conjunction with Nasdaq's anticipated registration as a national securities exchange.⁸ In addition, since the Commission gave its initial approval to the ADF pilot, NASD has filed with the Commission several other proposed rule changes to amend the ADF's rules, some of which have become effective and been incorporated into the operation and administration of the ADF pilot.⁹

⁵ See Securities Exchange Act Release No. 46249 (July 24, 2002), 67 FR 49822 (July 31, 2002) (Order approving SR-NASD-2002-97 on a pilot basis).

⁶ See Securities Exchange Act Release No. 47633 (April 10, 2003), 68 FR 19043 (April 17, 2003) (Notice of Filing and Immediate Effectiveness of SR-NASD-2003-67).

⁷ See Securities Exchange Act Release No. 43863 (January 19, 2001), 66 FR 8020 (January 26, 2001) (File No. SR-NASD-99-53).

⁸ See Securities Exchange Act Release No. 44396 (June 7, 2001), 66 FR 31952 (June 13, 2001) (File No. 10-131).

⁹ On January 30, 2003, NASD filed a proposed rule change with the Commission to revise the

As proposed in SR-NASD-2001-90, the ADF would provide market participants the ability to quote and trade Nasdaq and exchange-listed securities. The current ADF pilot program, however, permits operation of the ADF with respect to Nasdaq securities only. This is because several regulatory issues relating to the trading of exchange-listed securities on the ADF have not been resolved.

According to NASD, the ADF has been operating successfully during the pilot period. NASD believes that the Commission, in approving the launch of SuperMontage, stated that the ADF met the conditions set forth in its SuperMontage Approval Order to provide an alternative quotation collection, trade comparison and trade reporting facility. The ADF has since continued to honor those conditions. NASD also notes that the issues related to trading exchange-listed securities—and by extension, approval of the operation of ADF on a permanent basis—remain unresolved. Accordingly, NASD believes it is appropriate to extend the pilot period for ADF trading in Nasdaq securities—until October 26,

transaction and quotation-related fees applicable to ADF activity during the pilot program. This proposed rule change became effective upon filing, with an implementation date of February 17, 2003. See Securities Exchange Act Release No. 47331 (February 10, 2003), 68 FR 7635 (February 14, 2003) (Notice of Filing and Immediate Effectiveness of SR-NASD-2003-09). On January 6, 2004, the Commission approved on an accelerated basis a proposal to amend NASD's ADF pilot rules to give jurisdiction to a three-member subcommittee of NASD's Market Regulation Committee ("MRC") to review system outage determinations under NASD Rule 4300A(f) and excused withdrawal denials under NASD Rule 4619A. This proposed rule change became effective contemporaneous with the Commission's approval. See Securities Exchange Act Release No. 49029 (January 6, 2004), 69 FR 2167 (January 14, 2004) (Order granting accelerated approval to SR-NASD-2003-145). On December 4, 2003, NASD filed for immediate effectiveness a proposed rule change to amend NASD Rule 4613A(c) to clarify that NASD may suspend quotations in ADF displayed by any market participant, including an ECN, that are no longer reasonably related to the prevailing market. See Securities Exchange Act Release No. 49075 (January 14, 2004) (Notice of Filing and Immediate Effectiveness of SR-NASD-2003-181). Additionally, NASD has two other rule changes that propose to amend ADF rules pending with the Commission. One proposed rule change would repeal NASD Rule 4613A(e)(1), which requires members that display priced quotations for a Nasdaq security in two or more market centers to display the same priced quotations for that security in each market center. See SR-NASD-2003-175. The second rule change proposes to amend NASD Rule 4300A to require an ADF Market Participant to provide advance written notice to NASD's ADF Market Operations before denying electronic access to its ADF quote to any NASD member in the limited circumstances where a broker-dealer fails to pay contractually obligated costs for access to the Market Participant's quotations. See SR-NASD-2004-002.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

2004 or until approval of SR-NASD-2001-90.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with Section 15A(b)(6) of the Act¹⁰ which requires that the NASD have rules that prevent fraudulent and manipulative acts, promote just and equitable principles of trade, foster cooperation and coordination among persons engaged in regulating, clearing, settling, processing information and facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. NASD further believes the proposed rule change is consistent with Section 15A(b)(6)¹¹ because it does not permit unfair discrimination between customers, issuers, brokers, or dealers, fix minimum profits, impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by members, or regulate matters not related to the purposes of the Act or the administration of NASD.

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. Written comments, however, were solicited on proposed rule changes SR-NASD-2001-90 and SR-NASD-2002-28, the underlying rule filings to SR-NASD-2002-97 and SR-NASD-2003-67, and SR-2003-09, respectively. NASD responded to the comments received in response to SR-NASD-2001-90 in its Amendment No. 2 to that filing submitted to the Commission on May 24, 2002. NASD responded to the comments received in response to SR-NASD-2002-28 in its Amendment No. 1 to that filing submitted to the Commission on May 14, 2002.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)

of the Act¹² and subparagraph (f)(6) of Rule 19b-4¹³ thereunder because it does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate. 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.

NASD has requested that the Commission waive the 30-day operative delay to prevent the current ADF pilot program from lapsing. Under Rule 19-4(f)(6) of the Act, a proposed rule change does not become operative for 30 days after the date of filing, unless the Commission designates a shorter time. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Acceleration of the operative date will ensure the uninterrupted operation of the ADF pilot until October 26, 2004. For this reason, the Commission waives the 30-day operative delay and designates the proposal to be immediately effective and operative upon filing with the Commission.¹⁴

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. All comment letters should refer to File No. SR-NASD-2004-12. 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 the filing will also be available for inspection and copying at the principal office of the Association. All submissions should refer to File No. SR-NASD-2004-12 and should be submitted by February 24, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁵

Jill M. Peterson,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49122; File No. SR-NSCC-2003-23]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Fees

January 23, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ notice is hereby given that on January 2, 2004, the National Securities Clearing Corporation ("NSCC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change described in Items I, II, and III below, which items have been prepared primarily by NSCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The purpose of the proposed rule change is to (i) adjust the fees NSCC charges for trade recording, (ii) establish fees for the Cost Basis Reporting Service, and (iii) eliminate Archival Microfiche fees.

¹² 15 U.S.C. 78s(b)(3)(A).

¹³ 17 CFR 240.19b-4(f)(6).

¹⁴ 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).

¹⁵ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

¹⁰ 15 U.S.C. 78o-3.

¹¹ 15 U.S.C. 78o-3.