

In order to assist issuers that are in the listing review process comply with Nasdaq's corporate governance requirements, such issuers may contact Nasdaq staff to request any necessary corporate governance interpretations or financial viability waivers.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,<sup>6</sup> in general and with section 15A(b)(6) of the Act,<sup>7</sup> in particular, in that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices and, in general, to protect investors and the public interest. In particular, Nasdaq believes the proposed rule change will provide greater clarity and transparency for investors, issuers, and their counsel.

### *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

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, 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, as amended, 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. 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-2003-23 and should be submitted by November 13, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>8</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48641; File No. SR-NASD-2003-148]

### **Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the NASD's Minor Rule Violation Plan and Late Fee Provision**

October 16, 2003.

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 October 3, 2003, the National Association of Securities Dealers, Inc. ("NASD" or "Association") 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 the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

<sup>8</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.

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

The NASD is proposing to amend Interpretative Material 9216 (IM-9216) and Schedule A of the NASD By-Laws ("Schedule A") to clarify that a failure to timely file Schedule I, pursuant to Rule 17a-10 of the Act,<sup>3</sup> is eligible for disposition under the NASD's Minor Rule Violation Plan ("MRVP" or "the Plan") and for assessment of a late fee. Below is the text of the proposed rule change. Proposed new language is *italicized*; proposed deletions are in brackets.

\* \* \* \* \*

### **Schedule A to the NASD By-Laws**

\* \* \* \* \*

#### **Section 4—Fees**

(a)–(k) No Change.

(l) (1) Unless a specific temporary extension of time has been granted, there shall be imposed upon each member required to file reports, as designated by this paragraph, a fee of \$100 for each day that such report is not timely filed. The fee will be assessed for a period not to exceed 10 business days. Requests for such extension of time must be submitted to NASD at least three business days prior to the due date; and

(2) Any report filed pursuant to this Rule containing material inaccuracies or filed incompletely shall be deemed not to have been filed until a corrected copy of the report has been resubmitted.

(3) List of Designated Reports:

(A) SEC Rule 17a-5—Monthly and quarterly FOCUS reports and annual audit reports[.]; and

(B) *SEC Rule 17a-10—Schedule I.*

\* \* \* \* \*

#### **9200. Disciplinary Proceedings**

\* \* \* \* \*

IM-9216. Violations Appropriate for Disposition Under Plan Pursuant to SEC Rule 19d-1(c)(2)

—Rules 2210(b) and (c) and Rules 2220(b) and (c)—Failure to have advertisements and sales literature approved by a principal prior to use, failure to maintain separate files of advertisements and sales literature containing required information, and failure to file communications with NASD within the required time limits.

—Rule 3360—Failure to timely file reports of short positions on Form NS-1.

—Rule 3110—Failure to keep and preserve books, accounts, records,

<sup>3</sup> 17 CFR 240.17a-10.

entitled to assume that listed securities meet its minimum listing requirements. See KLH Engineering Group, Inc., 52 S.E.C. 460 (1995); ORS Automation, Inc., 48 S.E.C. 490 (1986).

<sup>6</sup> 15 U.S.C. 78o-3.

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

memoranda, and correspondence in conformance with applicable laws, rules, regulations and statements of policy promulgated thereunder, and with NASD Rules.

—Rule 8211, Rule 8212, and Rule 8213—Failure to submit trading data as requested.

—Article IV—Failure to timely submit amendments to Form BD.

—Article V—Failure to timely submit amendments to Form U-4.

—Rule 1120—Failure to comply with continuing education requirements (Firm Element).

—Rule 3010(b)(2)(vii)—Failure to timely file reports pursuant to the Taping Rule.

—Rule 3070—Failure to timely file reports.

—Rule 4619(d)—Failure to timely file notifications pursuant to SEC Regulation M.

—Rules 4632, 4642, 4652, 6240, 6420, 6620, 6650, and 6720—Transaction reporting in equity, convertible debt, and high yield securities.

—Rules 6130 and 6170—Transaction reporting to ACT.

—Rules 6954 and 6955—Failure to submit data in accordance with OATS.

—Rule 11870—Failure to abide by customer account transfer contracts.

—SEC Rule 11Ac1-4—Failure to properly display limit orders.

—SEC Rule 11Ac1-1(c)(5)—Failure to properly update published quotes in certain ECNs.

—SEC Exchange Act Rule 17a-5—Failure to timely file FOCUS reports and annual audit reports.

—SEC Exchange Act Rule 17a-10—Failure to timely file Schedule I.

—MSRB Rule A-14—Failure to pay annual fee.

—MSRB Rule G-12—Failure to abide by uniform practice rules.

—MSRB Rule G-14—Failure to submit reports.

—MSRB Rule G-36—Failure to timely submit reports.

—MSRB Rule G-37—Failure to timely submit reports for political contributions.

—MSRB Rule G-38—Failure to timely submit reports detailing consultant activities.

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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, the 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. The 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

The purpose of this proposed rule change is to clarify that a member's failure to timely file Schedule I, pursuant to Rule 17a-10 of the Act,<sup>4</sup> is appropriate for disposition under the NASD's MRVP and that such member may be assessed a late fee under Schedule A. As described in more detail herein, the NASD believes that the current rule language in IM-9216 and Schedule A referring to Rule 17a-5 of the Act—FOCUS Report, does not clearly reflect that a failure to timely file Schedule I is included in the NASD's MRVP and late fee provision.

#### NASD's Minor Rule Violation Plan

In 1984, the Commission adopted amendments to Rule 19d-1(c) of the Act<sup>5</sup> to allow self-regulatory organizations to adopt, with Commission approval, plans for the disposition of minor violations of rules.<sup>6</sup> In 1993, pursuant to Rule 19d-1(c) of the Act,<sup>7</sup> the NASD established a MRVP.<sup>8</sup> See NASD Rule 9216(b). In 2001, the Commission approved amendments to the NASD's MRVP.<sup>9</sup>

NASD Rule 9216(b) authorizes the NASD to impose a fine of \$2,500 or less on any member or associated person of a member for a violation of any of the rules specified in NASD IM-9216. NASD staff reviews the number and seriousness of the violations, as well as the previous disciplinary history of the respondent to determine if a matter is appropriate for disposition under the Plan and to determine the amount of the fine. Once the NASD has brought a minor violation of a rule against an individual or member firm, the NASD may, at its discretion, issue progressively higher fines for all

subsequent minor violations of rules within the next 24-month period or initiate more formal disciplinary proceedings.

The purpose of the MRVP is to provide for a meaningful sanction for the minor or technical violation of a rule when the initiation of a disciplinary proceeding through the formal complaint process would be more costly and time-consuming than would be warranted. Inclusion of a rule in the NASD's MRVP does not mean it is an unimportant rule; rather, a minor or technical violation of the rule may be appropriate for disposition under the MRVP. The NASD retains the discretion to bring full disciplinary proceedings.

One violation eligible for disposition under the MRVP is listed in IM-9216 as "SEC Exchange Act Rule 17a-5—failure to timely file FOCUS reports and annual audit reports." Even though Schedule I is part of the FOCUS report, it is technically filed pursuant to Rule 17a-10 of the Act,<sup>10</sup> not Rule 17a-5 of the Act.<sup>11</sup> As a result, some members may conclude that the failure to file Schedule I does not qualify for the NASD's MRVP. This is incorrect. The NASD believes that there is ample evidence to suggest that Schedule I, which is part of the FOCUS report, ought to be included in the MRVP.<sup>12</sup> In its 2001 rule filing expanding the MRVP (and late fee provision) to include late FOCUS reports, the NASD did not intend to exempt portions of the FOCUS report, such as Schedule I. To hold otherwise would allow the NASD to impose minor rule violations for only parts of the FOCUS report. Nevertheless, for purposes of clarity, the proposed rule change amends IM-9216 to make clear that a failure to timely file Schedule I is eligible for disposition under the MRVP.

#### Late Fees

In 2001, the Commission also approved amendments to Schedule A of the NASD By-laws that provide for the

<sup>10</sup> 17 CFR 240.17a-10.

<sup>11</sup> 17 CFR 240.17a-5.

<sup>12</sup> The rule text of Rule 17a-10 under the Act specifically refers to Schedule I as being part of Form X-17A-5, the FOCUS Report. See, e.g., Rule 17a-10(a)(1) of the Act ("Every broker or dealer exempted from the filing requirements of paragraph (a) of Rule 17a-5 shall, not later than 17 business days after the close of each calendar year, file \* \* \* Schedule I of Form X-17A-5 for such calendar year."); see also Rule 17a-10(a)(2) under the Act. In addition, the Commission characterizes Schedule I as being a supplement to the FOCUS report. See FOCUS Reporting System, Securities Exchange Act Release No. 13462 (Apr. 22, 1977), 12 S.E.C. Docket 156; Securities Exchange Act Release No. 13100 (Dec. 22, 1976), 42 FR 782 (January 4, 1977) (approving proposed Commission rule amendments).

<sup>4</sup> 17 CFR 240.17a-10.

<sup>5</sup> 17 CFR 240.19d-1(c).

<sup>6</sup> See Securities Exchange Act Release No. 21013 (June 1, 1984), 49 FR 23833 (June 8, 1994).

<sup>7</sup> 17 CFR 240.19d-1(c).

<sup>8</sup> See Securities Exchange Act Release No. 32076 (March 31, 1993), 58 FR 18291 (April 8, 1993)(SR-NASD-93-6); see also Notice to Members 93-42 (July 1993).

<sup>9</sup> See Securities Exchange Act Release No. 44512 (July 3, 2001), 68 FR 36812 (July 13, 2001)(SR-NASD-00-39).

mandatory assessment of late fees for a failure to timely file certain documents.<sup>13</sup> The late fees are automatically imposed and assessed on a per-day basis for a period of not more than 10 business days. Late fees are administrative rather than disciplinary in nature. NASD staff, however, may institute disciplinary proceedings concerning late filings if the circumstances so warrant. Currently, Schedule A, Section 4, Paragraph (l)(3) designates FOCUS reports and annual audit reports as documents that are eligible for the late fee provision.<sup>14</sup> Specifically, this late fee provision applies to "SEC Rule 17a-5—monthly and quarterly FOCUS reports and annual audit reports." For the same reasons stated above, the NASD proposes to amend Schedule A to make clear that a member may be assessed a late fee for failing to timely file Schedule I of the FOCUS report.

## 2. Statutory Basis

The NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>15</sup> which requires, among other things, that the NASD's 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. The NASD believes that this proposed rule change is necessary to clarify that a failure to timely file Schedule I is included in the NASD's MRVP and late fee provision under Schedule A.

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

The 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.

### **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.

<sup>13</sup> See Securities Exchange Act Release No. 44512 (July 3, 2001), 68 FR 36812 (July 13, 2001).

<sup>14</sup> Schedule A, Section 4, Paragraph (b)(2) contains a separate late fee provision for late filings of the Uniform Termination Notice for Security Industry Registration ("Form U-5"). Unlike the late fee provision in paragraph (l), the Form U-5 late fee provision provides for a one-time assessment of a late fee.

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

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

The proposed rule change is effective pursuant to Section 19(b)(3)(A)(i) of the Act<sup>16</sup> and subparagraph (f)(1) of Rule 19b-4 thereunder,<sup>17</sup> in that the foregoing proposed rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization. At any time within 60 days of the filing of such 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. 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-2003-148 and should be submitted by November 13, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>18</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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<sup>16</sup> 15 U.S.C. 78s(b)(3)(A)(i).

<sup>17</sup> 17 CFR 240.19b-4(f)(1).

<sup>18</sup> 17 CFR 200.30-3(a)(12).

### **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-48651; File No. SR-NASD-2003-07]

### **Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Amend Rules 1011, 1014 and 1017**

October 17, 2003.

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 January 17, 2003, 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, II, and III below, which Items have been prepared by NASD.<sup>3</sup> On September 17, 2003, NASD filed Amendment No. 1 to the proposed rule change.<sup>4</sup> On October 16, 2003, NASD filed Amendment No. 2 to the proposed rule change.<sup>5</sup> 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**

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

\* \* \* \* \*

### **1010. Membership Proceedings**

#### **1011. Definitions**

- (a) No Change.
- (b) "Associated Person"

[The term "Associated Person" means: (1) A natural person registered under the Rules of the Association; or (2) a sole proprietor, partner, officer, director, branch manager, or other natural person occupying a similar status or performing similar functions who will be or is anticipated to be

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

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

<sup>3</sup> Commission staff made certain typographical changes to this Notice with the consent of NASD. Telephone conversation between Kosha K. Dalal, Assistant General Counsel, NASD, and Andrew Shipe, Special Counsel, Division of Market Regulation ("Division"), Commission, September 23, 2003.

<sup>4</sup> See letter from Kosha K. Dalal, Assistant General Counsel, NASD, to Katherine England, Assistant Director, Division of Market Regulation, Commission, dated September 16, 2003.

<sup>5</sup> See letter from Kosha K. Dalal, Assistant General Counsel, NASD, to Katherine England, Assistant Director, Division of Market Regulation, Commission, dated October 15, 2003.