

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 amend ISE Rule 810 by replacing the term "Chinese Wall" with the term, "Information Barrier;" and eliminating the requirement that a market maker maintain an Information Barrier in the limited circumstances where the sole extent to which such market maker or affiliated broker-dealer handles listed options orders as agent on behalf of Public Customers³ or broker-dealers consists of handling such orders pursuant to an exchange sponsored Directed Order Program. The proposal would also exempt a market maker from the Information Barrier requirements of ISE Rule 810 to the extent that the market maker or affiliated broker-dealer engages solely in proprietary trading and does not, under any circumstances, maintain customer accounts or solicit orders or funds from or on behalf of Public Customers or broker-dealers. The ISE also proposed a non-substantive clarification and certain non-substantive technical changes to ISE Rule 810(a). The ISE amended the proposal on August 6, 2004⁴ and August 13, 2004.⁵ The proposed rule change, as amended, was published for comment in the **Federal Register** on August 20, 2004.⁶ The Commission received no comments on the proposed rule change, as amended. This order approves the proposed rule change, as amended.

The Commission 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 exchange.⁷ In particular, the Commission believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,⁸ which requires, among other things, that the ISE's rules be designed to promote just and equitable principles of trade, to remove impediments to and perfect the

mechanism of a free and open market and a national market system. Specifically, the Commission believes that the ISE's proposal to provide two additional exceptions from the Information Barrier requirements of ISE Rule 810 is consistent with the Act.

One exception would eliminate the requirement that a market maker maintain an Information Barrier in the limited circumstances where a market maker or affiliated broker-dealer engages solely in proprietary trading.⁹ The Commission believes it is reasonable to remove this requirement, since the market maker, or its affiliated broker-dealer, is not engaged in activities that would inappropriately benefit other business activities within the firm. However, the Commission notes that if in the future these market makers, or their affiliated broker-dealers, engage in other business activities, such as investment banking or market making in the stocks underlying the options in which it makes markets, or maintain customer accounts, or solicit or accept Public Customer orders, the Commission expects that the ISE will require compliance with the Information Barrier requirements of ISE Rule 810.

The second exception from ISE Rule 810 would not require an Information Barrier between an ISE Member's ISE market making operations and options market making operations on other exchanges where that Member handles orders as agent only for the accounts of affiliated entities or solely in an eligible Directed Order Program. Eligible Directed Order Programs must contain rules designed to ensure that market makers do not gain an advantage in handling Directed Orders because the information they possess may be used inappropriately for the benefit of the market maker receiving the Directed Order. For example, a market maker that chooses to accept Directed Orders must accept all orders directed to it, may not accept orders directly, other than through an exchange system, and the market maker may not handle such orders on a disclosed or discretionary basis. Therefore, the Commission believes that it is reasonable to not require an Information Barrier in such cases, since the rules of such Directed Order Programs should provide safeguards that should limit the misuse of information with regard to the terms of orders that affiliates of ISE members are handling as agent.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,¹⁰ that the proposed rule change (SR-ISE-2004-18), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50434; File No. SR-NASD-2004-134]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc., Relating to Multiple Market Participant Identifiers

September 23, 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 September 1, 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, II, and III below, which Items have been prepared by Nasdaq. The proposed rule change has been filed by Nasdaq as a "non-controversial" rule change pursuant to Rule 19b-4(f)(6) under the Act.³ 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

Nasdaq proposes to continue two pilot programs that provide market participants who execute transactions in Nasdaq and exchange-listed securities through its systems the ability to display trading interests using up to 10 individual Market Participant Identifiers ("MPIDs"). The text of the proposed rule change is below. Proposed new

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ ISE Rule 100(a)(32) defines "Public Customer" as "a person that is not a broker-dealer in securities." ISE Rule 100(a)(33) defines "Public Customer Order" as "an order for the account of a Public Customer."

⁴ On August 6, 2004, the ISE filed a Form 19b-4, which replaced the original filing in its entirety ("Amendment No. 1").

⁵ On August 13, 2004, the ISE filed a Form 19b-4, which replaced the original filing and Amendment No. 1 in their entirety ("Amendment No. 2").

⁶ See Securities Exchange Act Release No. 50197 (August 13, 2004), 69 FR 51735.

⁷ In approving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁸ 15 U.S.C. 78f(b)(5).

⁹ The Commission notes that this section of the proposal is similar to Pacific Exchange, Inc. Rule 7.26. See Securities Exchange Act Release No. 49264 (February 17, 2004), 69 FR 8510 (February 24, 2004)(SR-PCX-2003-49).

¹⁰ 15 U.S.C. 78s(b)(2).

¹¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 17 CFR 240.19b-4(f)(6).

language is in *italics*; proposed deletions are in brackets.⁴

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4613. Character of Quotations

(a) Quotation Requirements and Obligations

(1) No Change.

(2) The first MPID issued to a member pursuant to subparagraph (1) of this rule, or Rule 4623, shall be referred to as the member's "Primary MPID." For a six-month pilot period beginning [March 1,] *September 1, 2004*, market makers and ECNs may request the use of additional MPIDs that shall be referred to as "Supplemental MPIDs." Market makers and ECNs may be issued up to nine Supplemental MPIDs. A market maker may request the use of Supplemental MPIDs for displaying Attributable Quotes/Orders in the Nasdaq Quotation Montage for any security in which it is registered and meets the obligations set forth in subparagraph (1) of this rule. An ECN may request the use of Supplemental MPIDs for displaying Attributable Quotes/Orders in the Nasdaq Quotation Montage for any security in which it meets the obligations set forth in Rule 4623. A market maker or ECN that ceases to meet the obligations appurtenant to its Primary MPID in any security shall not be permitted to use a Supplemental MPID for any purpose in that security.

(3) No Change.

(b)–(e) No Change

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5266. Market Participant Identifiers

(a) No Change.

(b) For a *six-month* pilot period commencing [June 24, 2004 and terminating September 31, 2004,] *September 1, 2004*,⁵ ITS/CAES market makers may request the use of additional MPIDs that shall be referred to as "Supplemental MPIDs." ITS/CAES market makers may be issued up to nine Supplemental MPIDs. An ITS/CAES market maker may request the use of Supplemental MPIDs for displaying two-sided Attributable Quotes/Orders in Nasdaq for any security in which it is

registered and meets the obligations set forth in Rule 5220; an ITS/CAES market maker may not use a Supplemental MPID for displaying one-sided Attributable Quotes/Orders. An ITS/CAES market maker that fails to meet the obligations appurtenant to its Primary MPID in any security shall not be permitted to use a Supplemental MPID for any purpose in that security.

(c) No Change.

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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, 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 to extend through March 1, 2005, its current pilot programs that enable market makers and electronic communication networks ("ECNs") in Nasdaq stocks and ITS/CAS Market Makers in exchange-listed stocks to use Supplemental MPIDs for displaying Attributable Quotes/Orders in the Nasdaq Market Center. On March 1, 2004, Nasdaq submitted to the Commission File No. SR-NASD-2004-037⁶ which established the ability of ECNs and market makers in Nasdaq securities to use up to 10 individual MPIDs to display attributable quotes and orders in the Nasdaq Quotation Montage. On July 29, 2004, Nasdaq submitted to the Commission File No. SR-NASD-2004-097,⁷ which created the same capability for ECNs and market makers using Nasdaq systems to quote and trade exchange-listed securities. Pursuant to these programs, which will be extended under the proposed rule change, MPIDs for Nasdaq and exchange-listed securities are allocated and, when Nasdaq is reaching technological limits for displayed, attributable MPIDs, re-allocated using

the same procedures.⁸ Additional MPIDs are known as "Supplemental MPIDs" with a market maker's or ECN's first MPID being known as the "Primary MPID."

The purpose of providing Supplemental MPIDs is to provide quoting market participants a better ability to organize and manage diverse order flows from their customers and to route orders and quotes to Nasdaq's listed trading facilities from different units/desks. Nasdaq believes that to the extent that this flexibility provides increased incentives to provide liquidity to Nasdaq systems, all market participants can be expected to benefit.⁹

The restrictions on the use of any Supplemental MPID are the same as those applicable to a Primary MPID. Regardless of the number of MPIDs used, NASD members will trade exchange-listed securities using Nasdaq systems in compliance with all pre-existing NASD and Commission rules governing the trading of these securities. There are only two exceptions to this general principle. First, the continuous quote requirement and the need to obtain an excused withdrawal, or functional excused withdrawal, as described in Rule 4613(a) and Rule 5220(e), as well as the procedures described in Rule 4710(b)(2)(B) and (b)(5), do not apply to Supplemental MPIDs. Second, only one MPID, its Primary MPID,¹⁰ may be used to engage in passive market making or to enter stabilizing bids pursuant to NASD Rules 4614 and 4619. In all other respects, market makers and ECNs will continue to have the same rights and obligations in using a Supplemental MPID to enter quotes and orders and to display

⁸ Under those procedures, rankings used to allocate display privileges are based only on the volume associated with a member's Supplemental MPID. Primary MPIDs will be excluded from the calculation. The member with lowest volume using a Supplemental MPID will continue to be the first to lose the display privilege, but only with respect to the Supplemental MPID that caused them to have the lowest ranking; the member will not lose its authority to use the Supplemental MPID in that security to submit quotes and orders to SIZE or the display privileges associated with that Supplemental MPID with respect to other securities in which it is permitted to use the identifier. When re-allocating the display privileges, requests for Primary MPIDs will continue to receive precedence over requests for Supplemental MPIDs.

⁹ Nasdaq assesses no fees for the issuance or use of a Supplemental MPID other than the Commission-approved transaction fees set forth in NASD Rule 7010.

¹⁰ Clarification made pursuant to telephone conversation between Jeffrey Davis, Associate Vice President and Associate General Counsel, Nasdaq, and Marc McKayle, Special Counsel, and Ted Venuti, Law Clerk, Division of Market Regulation, Commission, on September 13, 2004.

⁴ The proposed rule change is marked to show changes from the rule as it appears in the electronic NASD Manual available at <http://www.nasdr.com>, as amended by File No. SR-NASD-2004-097. See Securities Exchange Act Release No. 50140 (August 3, 2004), 69 FR 48535 (August 10, 2004).

⁵ The Commission corrected the proposed rule text to italicize the comma after "September 1, 2004." Voicemail message from Jeffrey Davis, Associate Vice President and Associate General Counsel, Nasdaq, to Marc McKayle, Special Counsel, Division of Market Regulation, Commission, on September 17, 2004.

⁶ See Securities Exchange Act Release No. 49471 (March 25, 2004), 69 FR 17006 (March 31, 2004).

⁷ See Securities Exchange Act Release No. 50140 (August 3, 2004), 69 FR 48535 (August 10, 2004).

quotations, as they have using their Primary MPIDs.¹¹

The granting of Supplemental MPIDs is secondary to the integrity of the Nasdaq system trading those issues. As such, ECNs and market makers may not use a Supplemental MPID(s) to accomplish indirectly what they would be prohibited from doing directly through a single MPID. For example, members will not be permitted to use a Supplemental MPID to avoid their Manning or best execution obligations or their obligations under the Commission's Order Handling Rules, the firm quote rule, the OATS rules, and the Commission's order routing and execution quality disclosure rules. To the extent that the allocation of Supplemental MPIDs creates regulatory confusion or ambiguity, every inference will be drawn against the use of Supplemental MPIDs in a manner that would diminish the quality or rigor of the regulation of the Nasdaq market. Accordingly, if it is determined that a Supplemental MPID is being used improperly, Nasdaq will withdraw its grant of the Supplemental MPID for all purposes for all securities.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,¹² in general and with Section 15A(b)(6) of the Act,¹³ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, remove impediments to a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, the use of multiple MPIDs in listed securities can be expected to provide greater flexibility in the processing of diverse order flows, thereby improving overall system liquidity for the benefit of all market participants.

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

Nasdaq does not believe that the proposed rule change will impose 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 on the proposed rule change were neither solicited nor received.

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

The proposed rule change has been designated by Nasdaq as a "non-controversial" rule change pursuant to Section 19(b)(3)(A) of the Act¹⁴ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹⁵

The foregoing rule change: (1) Does not significantly affect the protection of investors or the public interest, (2) does not impose any significant burden on competition, and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, and the NASD gave the Commission 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. Consequently, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁶ and Rule 19b-4(f)(6) thereunder.¹⁷

Pursuant to Rule 19b-4(f)(6)(iii),¹⁸ a proposed "non-controversial" rule change does not become operative for 30 days after the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. Nasdaq has requested that the Commission waive the 30-day operative delay. The Commission has determined that good cause exists to waive the 30-day period to permit the pilot program to continue on an uninterrupted basis.¹⁹

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.

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. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-NASD-2004-134 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File No. SR-NASD-2004-134. 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, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File No. SR-NASD-2004-134 and should be submitted on or before October 21, 2004.

¹¹ Telephone conversation between Jeffrey Davis, Associate Vice President and Associate General Counsel, Nasdaq, and Ira Brandriss, Assistant Director, and Ted Venuti, Law Clerk, Division of Market Regulation, Commission, on September 21, 2004.

¹² 15 U.S.C. 78s(b)(3)(A).

¹³ 15 U.S.C. 78o-3(b)(6).

¹⁴ 15 U.S.C. 78s(b)(1).

¹⁵ 17 CFR 240.19b-4(f)(6).

¹⁶ 15 U.S.C. 78s(b)(1).

¹⁷ 17 CFR 240.19b-4(f)(6).

¹⁸ 17 CFR 240.19b-4(f)(6)(iii).

¹⁹ For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁰

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50447; File No. SR-NASD-2004-126]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Regarding Waiver of California Arbitrator Disclosure Standards

September 24, 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 August 19, 2004, the National Association of Securities Dealers, Inc. ("NASD"), through its wholly-owned subsidiary, NASD Dispute Resolution, Inc. ("NASD Dispute Resolution"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III, below, which NASD has prepared. NASD has designated the proposed rule change as constituting a "non-controversial" rule change under paragraph (f)(6) of Rule 19b-4 under the Act,³ which renders the proposal effective upon receipt of this filing by 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 is proposing to extend the pilot rule in IM-10100(f) of the NASD Code of Arbitration Procedure ("Code"), relating to the California waiver program, until March 31, 2005. NASD is not proposing any textual changes to the By-Laws or Rules of NASD.

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

Effective July 1, 2002, the California Judicial Council adopted a set of rules, "Ethics Standards for Neutral Arbitrators in Contractual Arbitration" ("California Standards"),⁴ which contain extensive disclosure requirements for arbitrators. According to NASD, the rules were designed to address conflicts of interest in private arbitration forums that are not part of a federal regulatory system overseen on a uniform, national basis by the SEC. NASD states that the California Standards impose disclosure requirements on arbitrators that conflict with the disclosure rules of NASD and the New York Stock Exchange ("NYSE"). Because NASD could not both administer its arbitration program in accordance with its own rules and comply with the new California Standards at the same time, NASD initially suspended the appointment of arbitrators in cases in California, but offered parties several options for pursuing their cases.⁵

NASD and NYSE filed a lawsuit in federal district court seeking a declaratory judgment that the California Standards are inapplicable to arbitration forums sponsored by self-regulatory organizations ("SROs").⁶ That litigation is currently pending on appeal. Since then, other lawsuits relating to the application of the California Standards to SRO-sponsored arbitration have been filed, some of which are still pending.

⁴ California Rules of Court, Division VI of the Appendix.

⁵ These measures included providing venue changes for arbitration cases, using non-California arbitrators when appropriate, and waiving administrative fees for NASD-sponsored mediations.

⁶ See Motion for Declaratory Judgment, *NASD Dispute Resolution, Inc. and New York Stock Exchange, Inc. v. Judicial Council of California*, filed in the United States District Court for the Northern District of California, No. C 02 3486 SBA (July 22, 2002), available on the NASD Web site at: http://www.nasdadr.com/pdf-text/072202_ca_complaint.pdf. The Commission notes that a more thorough discussion of the litigation history of this issue can be found in SR-NYSE-2004-50.

To allow arbitrations to proceed in California while the litigation is pending, NASD implemented a pilot rule to require all industry parties (member firms and associated persons) to waive application of the California Standards to the case, if all the parties in the case who are customers, associated persons with claims against industry parties, member firms with claims against other member firms, or member firms with claims against associated persons that relate exclusively to promissory notes, have done so.⁷ In such cases, the arbitration proceeds under the NASD Code of Arbitration Procedure, which already contains extensive disclosure requirements and provisions for challenging arbitrators with potential conflicts of interest.⁸

The pilot rule, which was originally approved for six months on September 26, 2002,⁹ has been extended and is now due to expire on September 30, 2004.¹⁰ Because NASD believes the pending litigation regarding the California Standards is unlikely to be resolved by September 30, 2004, NASD requests that the effectiveness of the pilot rule be extended through March 31, 2005, in order to prevent NASD from having to suspend administration of cases covered by the pilot rule.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions

⁷ Originally, the pilot rule applied only to claims by customers, or by associated persons asserting a statutory employment discrimination claim against a member, and required a written waiver by the industry respondents. In July 2003, NASD expanded the scope of the pilot rule to include all claims by associated persons against another associated person or a member. At the same time, the rule was amended to provide that when a customer, or an associated person with a claim against a member or another associated person, agrees to waive the application of the California Standards, all respondents that are members or associated persons will be deemed to have waived the application of the standards as well. The July 2003 amendment also clarified that the pilot rule applies to terminated members and associated persons. See Securities Exchange Act Release No. 48187 (July 16, 2003), 68 FR 43553 (July 23, 2003) (SR-NASD-2003-106). In October 2003, NASD again expanded the scope of the pilot rule to include claims filed by members against other members and to claims filed by members against associated persons that relate exclusively to promissory notes. See Securities Exchange Act Release No. 48711 (October 29, 2003), 68 FR 62490 (November 4, 2003) (SR-NASD-2003-153).

⁸ NASD states that the NYSE has a similar rule, NYSE Rule 600(g).

⁹ See Securities Exchange Act Release No. 46562 (September 26, 2002), 67 FR 62085 (October 3, 2002) (SR-NASD-2002-126).

¹⁰ See Securities Exchange Act Release No. 49452 (March 19, 2004), 69 FR 17010 (March 31, 2004) (SR-NASD-2004-040).

²⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 17 CFR 240.19b-4.