

timely request to participate an opportunity to be heard.

Participants wishing to submit a written statement for the record must submit a copy of such statement to OPIC's Corporate Secretary no later than 5 p.m., Monday, October 25, 2004. Such statements must be typewritten, double-spaced, and may not exceed twenty-five (25) pages.

Upon receipts of the required notice, OPIC will prepare an agenda for the hearing identifying speakers, setting forth the subject on which each participant will speak, and the time allotted for each presentation. The agenda will be available at the hearing.

A written summary of the hearing will be compiled, and such summary will be made available, upon written request to OPIC's Corporate Secretary, at the cost of reproduction.

**CONTACT PERSON FOR INFORMATION:**

Information on the hearing may be obtained from Connie M. Downs at (202) 336-8438, via facsimile at (202) 218-0136, or via e-mail at [cdown@opic.gov](mailto:cdown@opic.gov).

Dated: October 4, 2004.

**Connie M. Downs,**

*OPIC Corporate Secretary.*

[FR Doc. 04-22648 Filed 10-4-04; 4:49 pm]

**BILLING CODE 3210-01-M**

## PRESIDIO TRUST

### Notice of Extension of Public Comment Period for the Public Health Service Hospital Draft Supplemental Environmental Impact Statement

**AGENCY:** The Presidio Trust.

**ACTION:** Extension of comment period.

**SUMMARY:** The Presidio Trust is extending the comment period from October 12, 2004 to November 12, 2004 to enhance opportunities for public and agency participation in the National Environmental Policy Act process for the Public Health Service Hospital (PHSH) Draft Supplemental Environmental Impact Statement (Draft SEIS).

Oral comments may be made at the public meeting of the Presidio Trust Board of Directors commencing 6:30 p.m. on November 4, 2004, at the Officers' Club, 50 Moraga Avenue, Presidio of San Francisco, California. Written comments may be sent to the Presidio Trust via fax ((415) 561-2790), e-mail ([phsh@presidiotrust.gov](mailto:phsh@presidiotrust.gov)), or U.S. Mail (NEPA Compliance Coordinator, The Presidio Trust, 34 Graham Street, PO Box 29052, San Francisco, CA 94129-0052). All comments must be postmarked by November 12, 2004.

Please be aware that all written comments and information submitted to the Presidio Trust will be made available to the public, including, without limitation, any postal address, e-mail address, phone number or other information contained in each submission. The Draft SEIS may be viewed or downloaded from the Trust's Web site at <http://www.presidio.gov>, following the link from the Home page. A printed copy may be requested at no charge at (415) 561-5414 or [phsh@presidiotrust.gov](mailto:phsh@presidiotrust.gov).

**FOR FURTHER INFORMATION CONTACT:** For more information regarding this and other planning efforts in the Presidio, visit <http://www.presidio.gov>. Specific questions about this notice may be directed to John Pelka, NEPA Compliance Coordinator for the Presidio Trust, at (415) 561-5365.

Dated: October 1, 2004.

**Karen A. Cook,**

*General Counsel.*

[FR Doc. 04-22559 Filed 10-6-04; 8:45 am]

**BILLING CODE 4310-4R-P**

## PRESIDIO TRUST

### Notice of Public Meeting

**AGENCY:** The Presidio Trust.

**ACTION:** Notice of public meeting.

**SUMMARY:** In accordance with § (c)(6) of the Presidio Trust Act, 16 U.S.C. 460bb note, Title I of Pub. L. 104-333, 110 Stat. 4097, as amended, and in accordance with the Presidio Trust's bylaws, notice is hereby given that a public meeting of the Presidio Trust Board of Directors will be held commencing 6:30 p.m. on Thursday, November 4, 2004, at the Officers' Club, 50 Moraga Avenue, Presidio of San Francisco, California. The Presidio Trust was created by Congress in 1996 to manage approximately eighty percent of the former U.S. Army base known as the Presidio, in San Francisco, California.

The purposes of this meeting are to provide the Executive Director's report and to receive public comment regarding the Draft Supplemental Environmental Impact Statement for the Public Health Service Hospital project.

**Accommodation:** Individuals requiring special accommodation at this meeting, such as needing a sign language interpreter, should contact Mollie Matull at (415) 561-5300 prior to October 25, 2004.

**FOR FURTHER INFORMATION CONTACT:**

Karen Cook, General Counsel, the Presidio Trust, 34 Graham Street, PO Box 29052, San Francisco, California

94129-0052, Telephone: (415) 561-5300.

Dated: October 1, 2004.

**Karen A. Cook,**

*General Counsel.*

[FR Doc. 04-22560 Filed 10-6-04; 8:45 am]

**BILLING CODE 4310-4R-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50481; File No. SR-CHX-2004-12]

### Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment No. 1 Thereto and Notice of Filing and Order Granting Accelerated Approval of Amendments No. 2 and 3 to the Proposed Rule Change by the Chicago Stock Exchange, Inc. Relating to the Implementation of a Fully-Automated Functionality for the Handling of Particular Orders Called CHXpress

September 30, 2004.

#### I. Introduction

On February 20, 2004, the Chicago Stock Exchange, Inc. ("CHX" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change to amend CHX Article XX, Rule 37 to implement a new automated functionality for handling particular orders called CHXpress. On April 8, 2004, the Exchange amended the proposed rule change.<sup>3</sup> The proposed rule change, as amended by Amendment No. 1, was published for comment in the *Federal Register* on April 21, 2004.<sup>4</sup> The Commission received no comments on the proposed rule change, as amended. On May 11, 2004 and August 23, 2004, the Exchange filed Amendments No. 2 and 3 to the proposed rule change, respectively.<sup>5</sup>

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

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

<sup>3</sup> See letter from Ellen J. Neely, Senior Vice President and General Counsel, CHX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated April 7, 2004, and the attached Form 19b-4, which replaced the original filing in its entirety ("Amendment No. 1").

<sup>4</sup> See Securities Exchange Act Release No. 49567 (April 15, 2004), 69 FR 21591.

<sup>5</sup> See letters from Ellen J. Neely, Senior Vice President and General Counsel, CHX, to Nancy J. Sanow, Assistant Director, Division, Commission, dated May 10, 2004 ("Amendment No. 2") and August 20, 2004 ("Amendment No. 3"). In Amendment No. 2, the Exchange made technical

This order approves the proposed rule change, as amended, grants accelerated approval to Amendments No. 2 and 3, and solicits comments from interested persons on Amendments No. 2 and 3.

## II. Description of the Proposed Rule Change

The Exchange proposes to implement a new automated functionality built into the Exchange's MAX<sup>®</sup> system called CHXpress for certain orders.<sup>6</sup> Under the proposal, only unconditional, round-lot limit orders could be designated as CHXpress orders.<sup>7</sup> CHXpress orders could be submitted in an issue only after an order has been executed on the primary market in that issue and would be automatically cancelled at the end of each trading day, if they remain unexecuted.<sup>8</sup>

CHXpress orders could be routed into the MAX system by the Exchange's order-sending firms or by CHX floor brokers. All orders would be required to be specifically designated as CHXpress orders to ensure appropriate handling in the Exchange's automated systems.<sup>9</sup> Under the proposal, CHXpress orders would be executed immediately and automatically against same or better-priced orders in the specialist's book, or against the specialist, unless those executions would trade through another ITS market or unless trading in the issue has been halted.<sup>10</sup>

If a CHXpress order could not be immediately executed, it would be placed in the specialist's book for instantaneous display or later

corrections to the text of the proposed rule change. In Amendment No. 3, the Exchange changed the designator that would identify CHXpress orders in the Exchange's MAX system from "E" to "XPR," provided additional detail regarding the handling of CHXpress orders during a trading halt, and confirmed that the Exchange would automatically cancel both inbound orders and orders already in the book, if the execution of the order would improperly trade through another Intermarket Trading System ("ITS") market or if the display of the order would improperly lock or cross another ITS market.

<sup>6</sup> The MAX system provides automated display and execution for orders sent to the Exchange's specialists for execution.

<sup>7</sup> See CHX Article XX, Rule 37(b), proposed section 11(A).

<sup>8</sup> *Id.*

<sup>9</sup> See CHX Article XX, Rule 37(b), proposed section 11(A), and Amendment No. 3, *supra* note 5.

<sup>10</sup> If the execution of a CHXpress order would cause an improper trade-through of another ITS market, the CHXpress order would be automatically cancelled. See CHX Article XX, Rule 37(b), proposed section 11(C), and Amendment No. 3, *supra* note 5. If trading in an issue has been halted, all CHXpress orders in that issue would be automatically cancelled. The Exchange would not accept any CHXpress orders in an issue during a trading halt and would not resume accepting such orders until an execution has occurred in the primary market. *Id.*

execution.<sup>11</sup> However, CHXpress orders, like all other orders at the Exchange, would not be eligible for automated display if that display would improperly lock or cross another ITS market.<sup>12</sup> In such instances, the CHXpress order would be automatically cancelled.

Finally, under the proposed rules, CHXpress orders would be primarily designed to match against orders in the specialist's book.<sup>13</sup> As a result, CHX specialists would not provide CHXpress orders with the execution guarantees that might otherwise be available to agency limit orders.<sup>14</sup> Specifically, these orders would not be eligible for automated price improvement, or execution based on quotes in the national market system or prints in the primary market for a security.<sup>15</sup> CHX specialists also would not act as agent for the orders in other markets. CHX specialists, however, would be required to integrate their handling of CHXpress orders with any executions that occur at the post with floor brokers or market makers.<sup>16</sup>

## III. Discussion

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>17</sup> In

<sup>11</sup> A CHXpress order would be instantaneously and automatically displayed when it constitutes the best bid or offer in the CHX book. See CHX Article XX, Rule 37(b), proposed section 11(D).

<sup>12</sup> The Exchange's MAX system does not permit the automatic display of any order greater than 100 shares where that order would lock or cross another ITS market.

<sup>13</sup> A specialist could participate in filling a CHXpress order, but could not do so if that execution would cause the specialist to trade ahead of any other order in the book.

<sup>14</sup> See CHX Article XX, Rule 37(b), proposed sections 11(E) and (F).

<sup>15</sup> Under the Exchange's existing rules, a specialist can engage an automated functionality in the MAX system to provide price improvement to eligible agency orders and can use automated functionalities to provide agency orders with protection against trades in the primary market for both listed and Nasdaq/NM securities. See CHX Article XX, Rule 37(d) (describing the SuperMAX price improvement functionality) and Rule 37(a)(3) (setting out the limit order protections otherwise guaranteed to limit orders, such as protections against primary market trades at or through a limit order's price).

<sup>16</sup> For example, if the specialist is in the process of manually executing an order on the floor at the displayed bid, and a CHXpress order automatically executes against that bid before the specialist is able to complete the transaction on the floor, the specialist would still be required to honor the trade on the floor at the displayed bid price, even if that displayed interest is no longer available. See CHX Article XX, Rule 37(b), proposed section 11(G).

<sup>17</sup> In approving this proposal, the Commission has considered the proposed rule's impact on

particular, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Act<sup>18</sup> in that it is 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, and, in general, to protect investors and the public interest.

As noted by the Exchange, CHXpress orders will automatically and immediately execute against orders in the specialist's book or against the specialist unless the execution would cause a trade through of another ITS market or trading has been halted in the particular security. The Commission believes that this new automatic execution system should provide investors with an efficient mechanism by which to immediately interact with the Exchange's quote and allow investors to immediately access liquidity on the Exchange.

Moreover, the Commission believes that the proposal, as amended, will provide investors with additional order routing capabilities that may enhance the execution of their orders. The proposal provides a new execution facility in addition to the current execution facilities on the CHX. Investors will be able to choose a more immediate execution that will not provide them with price improvement opportunities on CHXpress or choose to direct their order to the current CHX BEST or MAX system for price improvement opportunities. The Commission finds that allowing the automatic execution of CHXpress orders against orders in the specialist's book will help to perfect the mechanism of a free and open market by providing an execution vehicle for investors who value immediate and automatic access to available liquidity at the Exchange more than the opportunity for price improvement.<sup>19</sup>

Furthermore, the Commission believes that the Exchange's proposal to automatically cancel and not accept any CHXpress orders in an issue during a trading halt, and cancel both inbound

efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>18</sup> 15 U.S.C. 78f(b)(5).

<sup>19</sup> The Commission notes, however, that while it believes that the proposed rule change, as amended, is consistent with the requirements of the Act, the Commission is not making a determination that the CHX's automatic execution capabilities would satisfy the "automated order execution facility" definition in Rule 600(b)(3) of proposed Regulation NMS. See Securities Exchange Act Release No. 49325 (February 26, 2004), 69 FR 11126 at 11203 (March 9, 2004). See also Securities Exchange Act Release No. 49749 (May 20, 2004), 69 FR 30142 (May 26, 2004).

orders and orders already in the book if the execution of the order would improperly trade through another ITS market will protect investors and promote the fair and orderly operation of the markets. Specifically, the Commission believes these proposed rules will increase the efficiency of the Exchange's order routing and execution system and enable market participants to make informed order entry decisions based on current, disseminated information regarding the issue.

*Application of "Effect v. Execute"  
Exemption From Section 11(a) of the Act*

Section 11(a) of the Act<sup>20</sup> prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person, or an account over which it or its associated person exercises discretion (collectively, "covered accounts") unless an exception applies. In addition to the exceptions set forth in the statute, Rule 11a2-2(T)<sup>21</sup> provides exchange members with an exemption from this prohibition. Known as the "effect versus execute" rule, Rule 11a2-2(T) permits an exchange member, subject to certain conditions, to effect transactions for covered accounts by arranging for an unaffiliated member to execute the transactions on the exchange. To comply with the rule's conditions, a member: (i) Must transmit the order from off the exchange floor; (ii) may not participate in the execution of the transaction once it has been transmitted to the member performing the execution;<sup>22</sup> (iii) may not be affiliated with the executing member; and (iv) with respect to an account over which the member has investment discretion, neither the member nor its associated person may retain any compensation in the connection with effecting the transaction except as provided in the Rule.

In a letter dated July 6, 2004,<sup>23</sup> the CHX represents that transactions effected using the CHXpress functionality satisfy the conditions of Rule 11a2-2(T). Based on these representations, the Commission finds that the CHXpress functionality complies with the requirements of

Section 11(a) of the Exchange Act and Rule 11a2-2(T) thereunder.<sup>24</sup>

First, according to the CHX, all CHXpress orders would be electronically submitted either by members from locations off the exchange floor or by floor brokers located on the Exchange floor for the accounts of off-floor members. Specifically, floor brokers may receive an order, by telephone, from an off-floor member not affiliated with the floor broker. Thereafter, the floor broker may decide that it would be best to execute all or a portion of the off-floor member's order in CHXpress. Accordingly, because the off-floor member submitted its order to an unaffiliated floor broker on the floor from off the Exchange floor, the Commission believes that it has satisfied the off-floor transmission requirement. Second, because a member would relinquish control of its order after it is submitted to CHXpress and would not be able to influence or guide the execution of its order, the member would not be participating in the execution of its order. Third, although the rule contemplates having an order executed by an exchange member who is not affiliated with the member initiating the order, the Commission recognizes that this requirement is satisfied when automated exchange facilities are used.<sup>25</sup> Fourth, the CHX

<sup>24</sup> The Commission and its staff, on numerous occasions, have considered the application of Rule 11a2-2(T) to electronic trading and order routing systems. See, e.g., Securities Exchange Act Release Nos. 49068 (January 13, 2004) (Order approving the Boston Options Exchange as an options trading facility of the Boston Stock Exchange); 44983 (October 25, 2001) (Order approving the Archipelago Exchange as the equities trading facility of PCX Equities Inc.); 29237 (May 31, 1991) (regarding NYSE's Off-Hours Trading Facility); 15533 (January 29, 1979) (regarding the Amex Post Execution Reporting System, the Amex Switching System, the Intermarket Trading System, the Multiple Dealer Trading Facility of the Cincinnati Stock Exchange, the PCX's Communications and Execution System, and the Phlx's Automated Communications and Execution System); and 14563 (March 14, 1978) (regarding the NYSE's Designated Order Turnaround System). See also letter from Larry E. Bergmann, Senior Associate Director, Division, Commission, to Edith Hallahan, Associate General Counsel, Phlx (March 24, 1999) (regarding Phlx's VWAP Trading System); letter from Catherine McGuire, Chief Counsel, Division, Commission, to David E. Rosedahl, PCX (November 30, 1998) (regarding Optimark); and letter from Brandon Becker, Director, Division, Commission, to George T. Simon, Foley & Lardner (November 30, 1994) (regarding Chicago Match).

<sup>25</sup> In considering the operation of automated execution systems operated by an exchange, the Commission noted that while there is no independent executing exchange member, the execution of an order is automatic once it has been transmitted into the systems. Because the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange, the Commission has stated that

states that members that rely on Rule 11a2-2(T) for a managed account transaction would be required to comply with the limitations on compensation set forth in the rule.

*Accelerated Approval of Amendments  
No. 2 and 3*

The Commission finds good cause to approve Amendments No. 2 and 3 to the proposed rule change prior to the thirtieth day after the amendments are published for comment in the **Federal Register** pursuant to Section 19(b)(2) of the Act.<sup>26</sup> Amendment No. 2 made technical corrections to the proposed rule text. Amendment No. 3 also made technical corrections to the proposed rule text and addressed concerns raised by the Commission staff by clarifying in the proposed rule text how CHXpress orders would be handled during a trading halt, and confirming that, if an execution of a CHXpress order in the book would cause an improper trade-through of another ITS market or if the display of the order would improperly lock or cross another market, the Exchange would automatically cancel both inbound orders and orders already in the book. The Commission believes that the proposed changes in Amendments No. 2 and 3 provide a clearer understanding of the operation of the CHXpress functionality and raise no new issues of regulatory concern and, therefore, believes good cause exists to accelerate approval of Amendments No. 2 and 3.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning Amendments No. 2 and 3, including whether Amendments No. 2 and 3 are 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](mailto:rule-comments@sec.gov). Please include File Number SR-CHX-2004-12 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission,

executions obtained through these systems satisfy the independent execution requirement of Rule 11a2-2(T). See Securities Exchange Act Release No. 15533 (January 29, 1979).

<sup>26</sup> 15 U.S.C. 78s(b)(2).

<sup>20</sup> 15 U.S.C. 78k(a).

<sup>21</sup> 17 CFR 240.11a2-2(T).

<sup>22</sup> The member, however, may participate in clearing and settling the transaction.

<sup>23</sup> See letter from Ellen J. Neely, Senior Vice President and General Counsel, CHX, to Katherine England, Assistant Director, Division, Commission, dated July 6, 2004.

450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number SR-CHX-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, 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 Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the CHX. 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 Number SR-CHX-2004-12 and should be submitted on or before October 28, 2004.

## V. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change, as amended, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with Section 6(b)(5) of the Act.<sup>27</sup>

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>28</sup> that the proposed rule change (SR-CHX-2004-12) and Amendment No. 1 thereto are approved, and that Amendments No. 2 and 3 thereto are approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>29</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E4-2527 Filed 10-6-04; 8:45 am]

**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50463; File No. SR-NASD-2003-13]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Granting Approval of Proposed Rule Change and Amendment No. 1 Thereto, and Notice of Filing and Order Granting Accelerated Approval of Amendment Nos. 2 and 3 to Adopt New Interpretive Material to NASD Rule 2210(d)(2)(N) to Allow NASD Member Firms to Use Certain Investment Analysis Tools

September 28, 2004.

## I. Introduction

On February 3, 2003, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("Commission" or "SEC"), 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> a proposed rule change to adopt a new Interpretive Material ("IM") to NASD Rule 2210(d)(2)(N) that would allow NASD member firms to use investment analysis tools that show the probability that investing in specific securities or mutual funds may produce a desired result. On February 27, 2003, the NASD amended the proposed rule change.<sup>3</sup> The proposed rule change, as amended, was published for notice and comment in the **Federal Register** on April 3, 2003.<sup>4</sup> The Commission received seven comment letters on the proposal.<sup>5</sup> On December 2, 2003, the NASD responded to the comment letters and amended the proposed rule change.<sup>6</sup> The NASD filed another amendment to make minor changes to the proposed rule change on February 27, 2004.<sup>7</sup> This order approves

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

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

<sup>3</sup> See February 27, 2003, letter from Barbara Z. Sweeney, Senior Vice President and Corporate Secretary, to Katherine A. England, Assistant Director, Division of Market Regulation, SEC, and attachments ("Amendment No. 1"). The original proposed rule change was inadvertently filed without page 5. In Amendment No. 1, NASD removed pages 1-25 of the original filing and replaced them with new pages 1-25. The Commission did not require the NASD to re-file pages 26-230.

<sup>4</sup> See Securities Exchange Act Release No. 47590 (March 28, 2003), 68 FR 16325.

<sup>5</sup> See *infra* note 8 (citing comment letters).

<sup>6</sup> See December 2, 2003, letter from James S. Wrona, Associate General Counsel, NASD, to Katherine A. England, and attachments ("NASD Response Letter" or "Amendment No. 2"). See also *infra* Section III (discussing the NASD's response to comments and amendments to the proposed IM).

<sup>7</sup> See February 26, 2004, letter from James S. Wrona to Katherine A. England, and attachments ("Amendment No. 3"). In Amendment No. 3, the

the proposed rule change as modified by Amendment No. 1. Simultaneously, the Commission provides notice of filing of Amendment Nos. 2 and 3 and grants accelerated approval of Amendment Nos. 2 and 3. The complete text of the proposed rule change, as approved, is attached as Exhibit A.

## II. Summary of Comments

The Commission received seven comment letters on the NASD's proposed rule change as modified by Amendment No. 1.<sup>8</sup> One comment letter supported the NASD's rule change as originally proposed, five supported the proposed rule change but suggested certain modifications, and one opposed the proposed rule change.<sup>9</sup> The following summary of comments provides an overview of the commenters' concerns:

### • NASD Should Revise the Definition of Investment Analysis Tools

Several commenters suggested that the NASD revise its definition of investment analysis tools.<sup>10</sup> One commenter expressed concern that the proposed definition of investment analysis tools does not clearly reflect the "distinction between tools that show a probability that investing in *specific* securities or mutual funds will produce

NASD made changes to the format of the proposed rule language, and added specific references to NASD and Commission rules and requirements.

<sup>8</sup> See the following letters to Jonathan G. Katz, Secretary, SEC: April 24, 2003, letter from Alexander C. Gavis, Associate General Counsel, Fidelity Investments ("Fidelity Letter"); April 24, 2003, letter from Tamara K. Salmon, Senior Associate Counsel, Investment Company Institute ("ICI Letter"); April 24, 2003, letter from Michael J. Hogan, Harris Investor Services LLC ("Harris Letter"); April 29, 2003, letter from Christopher P. Gilkerson, Vice President and Associate General Counsel, Office of Corporate Counsel, Charles Schwab & Co. ("Schwab Letter"); May 1, 2003, letter from Scott W. Campbell, Executive Vice President and General Counsel, Financial Engines, Inc. ("FE Letter"); May 7, 2003, letter from Eliot Wagner, Chair, Technology & Regulation Committee, and Hardy Calcott, Chair, Online Brokerage Legal Committee, Securities Industry Association ("SIA Letter"); and May 9, 2003, letter from John M. Ramsay, Senior Vice President and Regulatory Counsel, The Bond Market Association ("BMA Letter").

<sup>9</sup> The FE Letter expressed approval of the proposed rule change (asserting the proposed rule change "will benefit investors and enhance competition in the securities industry"). FE Letter at 1. The Fidelity, ICI, Schwab, SIA, and BMA Letters expressed approval of the proposed rule change with modifications. The Harris Letter opposed the proposed rule change.

<sup>10</sup> Fidelity Letter at 3; Schwab Letter at 2-4; SIA Letter at 4; BMA Letter at 2-4, 6; Harris Letter at 13. Amendment No. 1 defined an investment analysis tool as "an interactive technological tool that produces simulations and statistical analyses that present a range of probabilities that various investment outcomes might occur, thereby serving as an additional resource to investors in the evaluation of the potential risks of and returns on particular investments." Amendment No. 1 at 3.

<sup>27</sup> 15 U.S.C. 78f(b)(5).

<sup>28</sup> 15 U.S.C. 78s(b)(2).

<sup>29</sup> 17 CFR 200.30-3(a)(12).