

## 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 ISE 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 ISE 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 Exchange is proposing to amend its Schedule of Fees to remove (i) the surcharge fee previously adopted<sup>5</sup> for transactions in options on SPDRs®, and (ii) language relating to an expired fee waiver. The Exchange is proposing to remove the surcharge fee from its Schedule of Fees because it no longer pays a license fee to Standard & Poor's, the owner of the index on which SPDRs are based, in connection with transactions in options on SPDRs. Accordingly, there is no longer a need for this surcharge fee. The Exchange will, however, continue to charge an execution fee and a comparison fee for transactions in options on SPDRs.

Additionally, the Exchange previously adopted a waiver on the surcharge for options on the Russell 1000 Index.<sup>6</sup> That waiver expired on September 29, 2006. Therefore, the Exchange proposes to delete the reference to the waiver under the Notes section on its Schedule of Fees.

#### 2. Statutory Basis

The basis for the proposed rule change is the requirement under Section 6(b)(4) of the Act<sup>7</sup> that an exchange have an equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities.

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

The proposed rule change does not impose 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

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

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

Because the foregoing proposed rule change establishes or changes a due, fee, or other charged imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>8</sup> and Rule 19b-4(f)(2)<sup>9</sup> thereunder. At any time within 60 days of the filing of the proposed rule change the Commission may summarily abrogate such proposed 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](mailto:rule-comments@sec.gov). Please include File No. SR-ISE-2006-60 on the subject line.

#### Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549-1090. All submissions should refer to File No. SR-ISE-2006-60. 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. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. 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-ISE-2006-60 and should be submitted on or before November 8, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

J. Lynn Taylor,

Assistant Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-54591; File No. SR-NASD-2006-115]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of a Proposed Rule Change Relating to a New NASD Trade Reporting Facility Established in Conjunction With the Boston Stock Exchange

October 12, 2006.

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 September 29, 2006, the National Association of Securities Dealers, Inc. ("NASD") 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 NASD. The

<sup>5</sup> See Securities Exchange Act Release Nos. 51901 (June 22, 2005), 70 FR 37455 (June 29, 2005) (Adopting a \$0.10 per contract surcharge for certain transactions in options on SPDRs); and 52237 (August 10, 2005), 70 FR 48454 (August 17, 2005) (Applying the \$0.10 per contract surcharge retroactively to January 10, 2005).

<sup>6</sup> See Securities Exchange Act Release No. 53608 (April 6, 2006), 71 FR 19222 (April 13, 2006).

<sup>7</sup> 15 U.S.C. 78f(b)(4).

<sup>8</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>9</sup> 17 CFR 19b-4(f)(2).

<sup>10</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.

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 adopt rules relating to a new Trade Reporting Facility (the "NASD/BSE TRF") to be established by NASD, in conjunction with the Boston Stock Exchange ("BSE"), that would provide members with another mechanism for reporting trades in exchange-listed securities effected otherwise than on an exchange. The proposed NASD/BSE TRF structure and rules are substantially similar to the Trade Reporting Facility established by NASD and the Nasdaq Stock Market, Inc. (the "NASD/Nasdaq TRF") and the rules relating thereto, which the Commission approved.<sup>3</sup>

The text of the proposed rule change is available on NASD's Web site at (<http://www.nasd.com>), at the principal office of NASD, at the Commission's Public Reference Room, and on the Commission's Web site (<http://www.sec.gov>).

### **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**

Among other things, the NASD/Nasdaq TRF Approval Order<sup>4</sup> approved: (1) Amendments to the NASD Delegation Plan, NASD By-Laws and NASD rules to reflect a phased implementation strategy for the operation of the Nasdaq Stock Market LLC as a national securities exchange with respect to Nasdaq-listed securities during a transitional period; and (2) rules for reporting trades effected otherwise than on an exchange to the NASD/Nasdaq TRF, including the NASD Rule 4000 Series (The Trade Reporting Facility) and the NASD Rule 6100 Series (Clearing and Comparison Rules), which generally apply to trade reporting and clearing and comparison services via the NASD/Nasdaq TRF.

##### **NASD/BSE Trade Reporting Facility**

The NASD proposes to establish a new NASD/BSE TRF on substantially the same terms as the NASD/Nasdaq TRF.<sup>5</sup> The NASD/BSE TRF will provide members with another mechanism, which has been developed by the BSE, for reporting transactions in exchange-listed securities executed otherwise than on an exchange. Members will match and/or execute orders internally or through proprietary systems and submit these trades to the NASD/BSE TRF with the appropriate information and modifiers. The NASD/BSE TRF will report the trades to the appropriate exclusive securities information processor ("SIP").<sup>6</sup> As with trades reported to the NASD/Nasdaq TRF, NASD/BSE TRF transactions disseminated to the media will include

a modifier indicating the source of such transactions that would distinguish them from transactions executed on or through the BSE. In addition, the NASD/BSE TRF will provide NASD with a real-time copy of each trade report for regulatory review purposes. At the option of the participant, the NASD/BSE TRF may also provide the necessary clearing information regarding transactions to the National Securities Clearing Corporation ("NSCC").

Like the NASD/Nasdaq TRF, the NASD/BSE TRF will be a facility of NASD, subject to regulation by NASD and NASD's registration as a national securities association. It will not be a service "for the purpose of effecting or reporting a transaction" on the BSE; rather, it will be a service for the purpose of reporting over-the-counter ("OTC") transactions in exchange-listed securities to NASD.<sup>7</sup> Thus, members that meet all applicable requirements will have the option of reporting transactions in exchange-listed securities executed otherwise than on an exchange to an NASD Trade Reporting Facility (the NASD/BSE TRF, the NASD/Nasdaq TRF, or the NASD/NX TRF<sup>8</sup>), NASD's Alternative Display Facility ("ADF"),<sup>9</sup> or NASD's Intermarket Trading System/Computer Assisted Execution System ("ITS/CAES") System.<sup>10</sup>

<sup>7</sup> See NASD/Nasdaq TRF Approval Order, *supra* note 3.

<sup>8</sup> NASD also has filed a proposed rule change to establish a Trade Reporting Facility in conjunction with the National Stock Exchange (the "NASD/NX TRF"). See Securities Exchange Act Release No. 54479 (September 21, 2006), 71 FR 56573 (September 27, 2006) (notice of filing of File No. SR-NASD-2006-108). If approved by the Commission, the NASD/NX TRF would provide members with another mechanism for reporting trades in Nasdaq-listed equity securities effected otherwise than on an exchange. NASD intends to submit a filing at a later date to expand reporting to the NASD/NX TRF to include all exchange-listed securities.

<sup>9</sup> NASD has filed a proposed rule change proposing to expand ADF functionality to all exchange-listed securities. See Securities Exchange Act Release No. 54277 (August 4, 2006), 71 FR 46527 (August 14, 2006) (notice of filing of File No. SR-NASD-2006-091).

<sup>10</sup> NASD has filed a proposed rule change to, among other things, provide for the operation of the ITS/CAES System, which includes the reporting of transactions in non-Nasdaq exchange-listed securities. See September 2006 Proposal, *supra* note 3. NASD represents that it will have an integrated audit trail of all TRF, ADF, and ITS/CAES System transactions, as applicable in a particular security, and will have integrated surveillance capabilities. NASD expects that comprehensive audit trail and surveillance integration on an automated basis will be completed by the end of the fourth quarter of 2006 for Nasdaq-listed securities and by the end of the first quarter of 2007 for non-Nasdaq exchange-listed securities. Prior to that time, NASD staff will be able to create an integrated audit trail on a manual basis as needed for regulatory purposes.

<sup>3</sup> See Securities Exchange Act Release No. 54084 (June 30, 2006), 71 FR 38935 (July 10, 2006) (order approving File No. SR-NASD-2005-087) ("NASD/Nasdaq TRF Approval Order"). The changes approved in the NASD/Nasdaq TRF Approval Order became effective on August 1, 2006, the date when The NASDAQ Stock Market LLC (the "Nasdaq Exchange") commenced operation as a national securities exchange for Nasdaq-listed securities. On September 5, 2006, NASD filed a proposal that, among other things, expands the scope of the NASD/Nasdaq TRF rules to include reporting in all exchange-listed securities. See Securities Exchange Act Release No. 54451 (September 15, 2006), 71 FR 55243 (September 21, 2006) (notice of filing of File No. SR-NASD-2006-104) ("September 2006 Proposal").

<sup>4</sup> See note 3, *supra*.

<sup>5</sup> In response to comments submitted to the Commission in connection with its proposal to establish the NASD/Nasdaq TRF, NASD indicated that it was prepared to implement a Trade Reporting Facility with any exchange based on whatever technology the exchange has available to it. See letter from Robert Glauber, Chairman and Chief Executive Officer, NASD, to the Hon. Christopher Cox, Chairman, U.S. Securities and Exchange Commission, dated May 2, 2006. As the Commission noted in the NASD/Nasdaq TRF Approval Order, the Act does not prohibit NASD from establishing different facilities for purposes of fulfilling its regulatory obligations. See NASD/Nasdaq TRF Approval Order, *supra* note 3.

<sup>6</sup> NASD represents that the NASD/BSE TRF will have controls in place to ensure that transactions that are reported to the NASD/BSE TRF, but priced significantly away from the current market, will not be submitted to the SIP. The NASD notes that this is consistent with current practice in that neither NASD's Alternative Display Facility nor the NASD/Nasdaq TRF submits such trades to the SIP. According to the NASD, this practice is designed to preserve the integrity of the tape.

BSE has developed the system that participants will use to access the NASD/BSE TRF. Technical specifications to connect to the NASD/BSE TRF system are available upon request to NASD and will be accessible through the NASD's Web site at a later date.

#### NASD/BSE TRF Limited Liability Company Agreement

NASD and BSE propose to enter into a Limited Liability Company Agreement of NASD/BSE Trade Reporting Facility LLC ("the NASD/BSE LLC Agreement"). The terms of the NASD/BSE LLC Agreement are substantially similar to the terms of the LLC agreement that NASD entered with Nasdaq Stock Market Inc. ("Nasdaq").

NASD will have sole regulatory responsibility for the NASD/BSE TRF, while BSE agrees to pay the cost of regulation and will provide systems to enable members to report trades to the NASD/BSE TRF. BSE will be entitled to the profits and losses, if any, derived from the operation of the NASD/BSE TRF.

NASD, the "SRO Member" under the NASD/BSE LLC Agreement, will perform SRO Responsibilities including, but not limited to:

- (1) Adoption, amendment, and interpretation of policies arising out of and regarding any aspect of the operation of the facility considered material by the SRO Member, or regarding the meaning, administration, or enforcement of an existing rule of the SRO Member, including any generally applicable exemption from such a rule;
- (2) Approval of rule filings of the SRO Member prior to filing with the SEC;
- (3) Regulation of the NASD/BSE TRF's activities of or relating to SRO Responsibilities, including the right to review and approve, in the SRO Member's sole reasonable discretion, the regulatory budget for the NASD/BSE TRF;
- (4) Securities regulation and any other matter implicating SRO Responsibilities; and
- (5) Real-time market surveillance.<sup>11</sup>

BSE, the "Business Member" under the NASD/BSE LLC Agreement, will be primarily responsible for the management of the facility's business

affairs to the extent those activities are not inconsistent with the regulatory and oversight functions of NASD. Under Section 9(d) of the NASD/BSE LLC Agreement, each Member agrees to comply with the federal securities laws and the rules and regulations thereunder and to cooperate with the Commission pursuant to its regulatory authority.

The NASD/BSE TRF will be managed by or under the direction of a Board of Directors to be established by the parties. NASD will have the right to designate at least one Director, the SRO Member Director, who may be a member of NASD's Board of Governors or an officer or employee of NASD designated by the NASD's Board of Governors. The SRO Member Director will have veto power over all major actions of the NASD/BSE LLC Board. Section 10(e) of the NASD/BSE LLC Agreement defines "Major Actions" to include:

- (1) Approving pricing decisions that are subject to the SEC filing process;
- (2) Approving contracts between the NASD/BSE TRF and the Business Member, any of its affiliates, directors, officers, or employees;
- (3) Approving Director compensation;
- (4) Selling, licensing, leasing, or otherwise transferring material assets used in the operation of the NASD/BSE TRF's business outside of the ordinary course of business with an aggregate value in excess of \$3 million;
- (5) Approving or undertaking a merger, consolidation, or reorganization of the NASD/BSE TRF with any other entity;
- (6) Entering into any partnership, joint venture, or other similar joint business undertaking;
- (7) Making any fundamental change in the market structure of the NASD/BSE TRF from that contemplated by the Members as of the date of the NASD/BSE LLC Agreement;
- (8) To the fullest extent permitted by law, taking any action to effect the voluntary, or which would precipitate an involuntary, dissolution or winding up of the Company, other than as contemplated by Section 21 of the NASD/BSE LLC Agreement;
- (9) Conversion of the NASD/BSE TRF from a Delaware limited liability company into any other type of entity;
- (10) Expansion of or modification to the business which results in the NASD/BSE TRF engaging in material business unrelated to the business of Non-System Trading;<sup>12</sup>

<sup>12</sup> Pursuant to the NASD/BSE LLC Agreement, "Non-System Trading" means trading otherwise than on an exchange of securities for which the SEC has approved a transaction reporting plan pursuant to Rule 601 of Regulation NMS under the Act.

(11) Changing the number of Directors on or composition of the NASD/BSE LLC Board; and

(12) Adopting or amending policies regarding access and credit matters affecting the NASD/BSE TRF.

In addition, each Director agrees to comply with the federal securities laws and the rules and regulations thereunder and to cooperate with the Commission and the SRO Member pursuant to their regulatory authority.

The principal difference between the NASD/BSE LLC Agreement and the LLC Agreement NASD entered with Nasdaq relates to termination. The initial term of the agreement is three years. During that time, until the NASD/BSE TRF reaches "Substantial Trade Volume" (defined as 250,000 trades or more per day for three consecutive months), BSE may terminate the arrangement for convenience. After the NASD/BSE TRF reaches Substantial Trade Volume, either Member may terminate the NASD/BSE Trade Reporting Facility LLC by providing to the other Member prior written notice of at least one year (as in the case with Nasdaq). Neither Member may deliver such notice before the second anniversary of the effective date of the NASD/BSE LLC Agreement. In addition, at any time, NASD may terminate in the event its status or reputation as a preeminent SRO is called into jeopardy by the actions of BSE or the NASD/BSE TRF. In the event of termination of the NASD/BSE TRF arrangement, NASD will be able to fulfill all of its regulatory obligations with respect to OTC trade reporting through its other facilities, including the NASD/Nasdaq TRF, ADF, and the ITS/CAES System.

#### NASD/BSE Trade Reporting Facility Rules

Members will report trades in exchange-listed securities effected otherwise than on an exchange to the NASD/BSE TRF pursuant to NASD rules. As such, NASD is proposing rules relating to the use and operation of the NASD/BSE TRF that are substantially similar to the rules approved by the Commission relating to the NASD/Nasdaq TRF. Specifically, NASD is proposing the new NASD Rule 4000D and NASD Rule 6100D Series, which largely track the NASD Rule 4000 and NASD Rule 6100 Series that the Commission approved in the NASD/Nasdaq TRF Approval Order.<sup>13</sup>

Similar to the NASD/Nasdaq TRF rules, to become a participant in the NASD/BSE TRF, an NASD member must meet minimum requirements as

<sup>13</sup> See note 3, *supra*.

<sup>11</sup> The SRO Member will perform real-time market surveillance related to trades reported to the NASD/BSE TRF. However, because the NASD/BSE TRF via the Business Member will submit transaction information directly to the SIP, the NASD/BSE TRF via the Business Member also will establish and implement controls to ensure that transactions that are reported to the NASD/BSE TRF, but are priced significantly away from the current market, will not be submitted to the SIP. See *supra* note 6.

outlined in NASD Rule 6120D. These include execution of, and continuing compliance with, a Participant Application Agreement; membership in, or maintenance of an effective clearing arrangement with a participant of a clearing agency registered pursuant to the Act; and the acceptance and settlement of each trade that the NASD/BSE TRF identifies as having been effected by the participant.

Members that report trades to the NASD/BSE TRF must include the details of the trade, as required by the proposed rules. Participants must also include the unique order identifier assigned for purposes of reporting to the Order Audit Trail System pursuant to the NASD Rule 6950 Series, thus enabling NASD to match the order against the trade that was reported to the tape by the NASD/BSE TRF.

As with the NASD/Nasdaq TRF, participants may enter into "give up" arrangements whereby one member reports to the NASD/BSE TRF on behalf of another member. Participants must complete and submit to the NASD/BSE TRF the appropriate documentation reflecting the arrangement. Proposed NASD Rule 4632D(h) provides that the member with the reporting obligation remains responsible for the transaction submitted on its behalf. Further, both the member with the reporting obligation and the member submitting the trade to the NASD/BSE TRF are responsible for ensuring that the information submitted is in compliance with all applicable rules and regulations.<sup>14</sup>

In addition, participants will be able to submit "riskless principal" transactions<sup>15</sup> to the NASD/BSE TRF. Similar to the NASD/Nasdaq TRF, the non-media portion of a riskless principal transaction will not be reported to the tape, but will be submitted real-time to NASD for regulatory purposes and, at the option of the user, to NSCC. Proposed NASD Rule 4632D(e)(3)(B)<sup>16</sup> would clarify that

<sup>14</sup> As noted above, NASD/Nasdaq TRF participants may enter into "give up" arrangements; however, the NASD/Nasdaq TRF rules currently do not speak to such arrangements. NASD has submitted a proposed rule change to amend the NASD/Nasdaq TRF rules to include a provision that is substantially similar to proposed NASD Rule 4632D(h). See September 2006 Proposal, *supra* note 3.

<sup>15</sup> A riskless principal transaction is a transaction in which a member, after having received a customer order, executes an offsetting transaction, as principal, with another customer or broker-dealer to fill that customer order and both transactions are executed at the same price.

<sup>16</sup> Proposed NASD Rule 4632D(e)(3)(B) mirrors recently proposed amendments to NASD Rule 4632D(j)(3)(B) of the NASD/Nasdaq TRF rules. See September 2006 Proposal, *supra* note 3.

where the media leg of the riskless principal transaction is reported to the NASD/BSE TRF, the second, non-media leg must also be reported to the NASD/BSE TRF. However, where the media leg of the riskless principal transaction was previously reported by an exchange, the member would be permitted, but not required, to report the second, non-media leg to the NASD/BSE TRF. Members that choose to report such transactions to the NASD/BSE TRF must include all data elements required under the rules. Members should note, however, that transactions reported by an exchange should not be reported to NASD/BSE TRF for media purposes, as that would result in double reporting of the same transaction.<sup>17</sup>

Finally, NASD will have the authority to halt trading otherwise than on an exchange reported to the NASD/BSE TRF. The scope of NASD's authority under proposed NASD Rule 4633D is identical to its authority to halt trading reported to the NASD/Nasdaq TRF and the ADF.

As described below, the proposed rules differ from the current NASD/Nasdaq TRF rules in certain respects. Proposed NASD Rules 4100D and 4200D(a)(2) define "designated securities" for purposes of reporting trades to the NASD/BSE TRF as "all NMS stocks as defined in Rule 600(b)(47) of Regulation NMS under the Act." Currently, NASD Rules 4100 and 4200(a)(2) define "designated securities" for purposes of reporting trades to the NASD/Nasdaq TRF as all Nasdaq National Market (now Nasdaq Global Market) and Nasdaq Capital Market securities and convertible bonds listed on Nasdaq. NASD has filed a proposed rule change to expand reporting to the NASD/Nasdaq TRF to include all exchange-listed securities and to include a definition of "designated securities" in NASD Rules 4100 and 4200(a)(2) that is identical to the definition proposed herein.<sup>18</sup>

Pursuant to proposed NASD Rule 6120D, only members of NASD may use the NASD/BSE TRF. Non-members will not be permitted to submit trade reports to the NASD/BSE TRF. Under very limited circumstances, certain Non-

<sup>17</sup> Proposed NASD Rule 4632D(f)(6) provides that transactions reported on or through an exchange shall not be reported to the NASD/BSE TRF for purposes of publication. This proposed rule mirrors NASD Rule 4632(e)(6) of the NASD/Nasdaq TRF rules. See NASD/Nasdaq TRF Approval Order, *supra* note 3; Securities Exchange Act Release Nos. 53977 (June 12, 2006), 71 FR 34976 (June 16, 2006) (order approving File No. SR-NASD-2006-055); and 54318 (August 15, 2006), 71 FR 48959 (August 22, 2006) (notice of filing and immediate effectiveness of File No. SR-NASD-2006-098).

<sup>18</sup> See September 2006 Proposal, *supra* note 3.

Member Clearing Organizations are granted access to and participation in the NASD/Nasdaq TRF.

Pursuant to proposed NASD Rule 6140D, all trades submitted to the NASD/BSE TRF must be locked-in prior to entry into the System. The NASD/BSE TRF will have no trade comparison functionality. Thus, there are no proposed rules relating to trade matching, trade acceptance, or aggregate volume matching. Similarly, there will be no "Browse" function, meaning that participants will not be able to review or query for trades in the NASD/BSE TRF identifying the participant as a party to the transaction.

The NASD/BSE TRF will not be able to support trade reporting for certain transactions. Specifically, transactions executed outside of normal market hours cannot be reported to the NASD/BSE TRF on an "as of" or next day (T+1) basis, pursuant to NASD Rule 4632D(a)(2). In addition, the NASD/BSE TRF will not support the .W or .PRP modifiers and, therefore, proposed NASD Rule 4632D(a)(7) provides that Stop Stock Transactions (as defined in NASD Rule 4200D), transactions at prices based on average-weighting or other special pricing formulae, and transactions that reflect a price different from the current market when the execution price is based on a prior reference point in time cannot be reported to the NASD/BSE TRF. Thus, proposed NASD Rules 4632D(a)(2) and (7) expressly require members to report such trades to NASD via an alternative electronic mechanism.

Similarly, proposed NASD Rule 4632D(a)(3) provides that participants must use an alternative electronic mechanism, and comply with all rules applicable to such alternative mechanism, to report transactions to NASD for which electronic submission to the NASD/BSE TRF is not possible. Where last sale reports of transactions in designated securities cannot be submitted to NASD via an alternative electronic mechanism, such as the ADF or another Trade Reporting Facility (for example, where the ticker symbol for the security is no longer available or a market participant identifier is no longer active), members shall report such transactions as soon as practicable to the NASD Market Regulation Department on Form T. Members are not to use Form T to report transactions that can be reported to NASD electronically, whether on trade date or on a subsequent date on an "as of" basis (T+N).

Unlike the NASD/Nasdaq TRF, participants will be able to use three-party reports for reporting trades to the

NASD/BSE TRF. A three-party trade report is a single last sale trade report that denotes one Reporting Member (*i.e.*, the member with the obligation to report the trade under proposed NASD Rule 4632D(b)) and two contra parties. Registered ECNs may submit three-party trade reports. In addition, riskless principal trades may be submitted by Reporting Members as three-party trade reports. Proposed NASD Rule 4632D(c) sets forth the information requirements for two-party reports, while proposed NASD Rule 4632D(d) sets forth the information requirements for three-party reports. Members currently can use three-party reports for purposes of reporting trades to the ADF. Proposed NASD Rules 4632D(c) and (d) mirror the existing ADF reporting requirements relating to two- and three-party trade reports (*see* NASD Rules 4632A(c) and (d)).

As with the NASD/Nasdaq TRF, the NASD/BSE TRF will only accept non-media or clearing-only trade reports for certain transactions; members cannot submit reports for these transactions for publication. Proposed NASD Rule 4632D(f) sets forth the types of transactions that cannot be reported for purposes of publication to the NASD/BSE TRF. Proposed NASD Rule 4632D(f) mirrors current NASD Rule 4632(e) of the NASD/Nasdaq TRF rules and includes two additional categories of trades: (1) The acquisition of securities by a member as principal in anticipation of making an immediate exchange distribution or exchange offering on an exchange; and (2) purchases of securities off the floor of an exchange pursuant to a tender offer. NASD's proposed rule change to expand reporting to the NASD/Nasdaq TRF for all exchange-listed securities proposes to amend NASD Rule 4632(e) to include these two additional categories of transactions.<sup>19</sup> Thus, proposed NASD Rule 4632D(f) of the NASD/BSE TRF will be identical to NASD Rule 4632(e) of the NASD/Nasdaq TRF rules.

Cancellation of any trade that has been submitted to the NASD/BSE TRF must be reported in accordance with proposed NASD Rule 4632D(g). Unlike the NASD/Nasdaq TRF, members cannot electronically report trade cancellations to the NASD/BSE TRF. Members must contact NASD/BSE Trade Reporting Facility Operations, within the prescribed time periods, to report the cancellation of any trade previously submitted to the NASD/BSE TRF.

Finally, members will not be permitted to aggregate individual

executions of orders in a security at the same price into a single transaction report submitted to the NASD/BSE TRF. Thus, the proposed rule change does not contain a counterpart to NASD Rule 4632(f) or NASD Rule 6130(e) permitting "bunched" trades to be reported to the NASD/Nasdaq TRF.

NASD notes that the proposed rule change does not include any proposed rules relating to fees, assessments, and credits specifically related to the NASD/BSE TRF. Fees, assessments, and credits, if any, with respect to the NASD/BSE TRF will be the subject of a future rule filing with the Commission.

#### Proposed Implementation

In light of the systems changes that are necessary for NASD to implement the NASD/BSE TRF for non-Nasdaq exchange-listed securities, NASD is proposing to implement the proposed rule change in two phases. Specifically, NASD proposes to implement the proposed rule change with respect to Nasdaq-listed equity securities and convertible debt on the first day of operation of the NASD/BSE TRF. NASD proposes to implement the proposed rule change with respect to non-Nasdaq exchange-listed securities at a later date.

NASD will announce the implementation date of the first phase of the proposed rule change no later than 30 days following Commission approval and the second phase no later than 90 days following Commission approval.

#### 2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>20</sup> which requires, among other things, that NASD rules 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. NASD believes that establishment of the NASD/BSE TRF is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets because it will provide members another mechanism to report transactions in exchange-listed securities effected otherwise than on an exchange.

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

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.

#### 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 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](mailto:rule-comments@sec.gov). Please include File No. SR-NASD-2006-115 on the subject line.

##### Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASD-2006-115. 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

<sup>19</sup> See September 2006 Proposal, *supra* note 3.

<sup>20</sup> 15 U.S.C. 78o-3(b)(6).

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 also will be available for inspection and copying at the principal office of 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 Number SR-NASD-2006-115 and should be submitted on or before November 8, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>21</sup>

**J. Lynn Taylor,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-54592; File No. SR-NYSE-2006-04]

### Self-Regulatory Organizations; New York Stock Exchange, Inc. (n/k/a New York Stock Exchange LLC); Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto Relating to NYSE Rule 116 ("Stop" Constitutes Guarantee) and NYSE Rule 123B (Exchange Automated Order Routing Systems)

October 12, 2006.

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 February 9, 2006, the New York Stock Exchange, Inc. (n/k/a New York Stock Exchange LLC) ("NYSE" or "Exchange") 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 NYSE.<sup>3</sup> The

NYSE filed Amendment Nos. 1 and 2 to the proposed rule change on April 5, 2006<sup>4</sup> and September 8, 2006,<sup>5</sup> respectively. 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

In the proposed rule change, the Exchange seeks to amend NYSE Rule 116 ("Stop" Constitutes Guarantee) and NYSE Rule 123B (Exchange Automated Order Routing Systems) regarding a specialist's ability to "stop" stock and report such a transaction. The text of the proposed rule change is available on the NYSE's Web site ([www.nyse.com](http://www.nyse.com)), at the NYSE's Office of the Secretary, and at the Commission's Public Reference Room.

#### 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 NYSE 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 Exchange 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 practice of stopping stock by specialists on the Exchange refers to a guarantee by the specialist that an order he or she receives will be executed at no worse a price than the contra side price in the market at the time the order was stopped, with the understanding that the order may in fact receive a better price. For example, the Exchange market in a stock is quoted at 20.00 bid, offered at 20.10, and the specialist receives a market order to buy. If the specialist "stops" the buy order, the specialist is guaranteeing that the order will receive no worse a price than 20.10,

the then-prevailing offer price. The specialist would then make a bid on behalf of the market order to buy at a price above the prevailing bid, for example, at 20.05. If a sell order trades with this bid, the stopped order has received price improvement (as has the sell order trading with it). If, however, another buy order enters the market and executes at the offer price of 20.10, the stopped buy order will be executed at that same price pursuant to the specialist's guarantee as evidenced by the "stop."

The current Hybrid Market<sup>SM</sup> is the result of a series of initiatives, approved by the Commission, to implement changes to the operation of the Exchange's market to expand access to automated trading while preserving the advantages of the agency auction market.<sup>6</sup> Customers and other market participants will have greater opportunities for speed and certainty of execution through the enhanced electronic trading. Opportunities for price improvement will continue to be available.

NYSE Rule 116 generally provides for the ability of a member to stop stock. Paragraph .30 in the Rule's Supplementary Material provides three circumstances in which a specialist may stop stock, including at the opening or reopening of trading in a stock, when a broker in the trading crowd is representing another order at the stop price or when requested to by another member. In the latter circumstance, the provisions of NYSE Rule 116.30 require that the quotation spread be not less than twice the minimum variation (currently one cent), or, if the quotation spread is the minimum variation, that the quote conditions (*i.e.*, an imbalance in the amount of shares bid for or offered) suggest the likelihood of price improvement, and that the order be under 2,000 shares. The rule further provides a limitation of a total of 5,000 shares for all stopped orders. A specialist may seek approval of a Floor Official to override these conditions. In

<sup>6</sup> See The Hybrid Market initiative proposed in SR-NYSE-2004-05 and Amendments Nos. 1, 2, 3, 5, 6, 7 and 8 thereto approved on March 22, 2006. See Securities Exchange Act Release No. 53539 (March 22, 2006), 71 FR 16353 (March 31, 2006) ("Hybrid Market Release"). See also Securities Exchange Act Release Nos. 52362 (August 30, 2005), 70 FR 53701 (September 9, 2005) (SR-NYSE-2005-57); 52954 (December 14, 2005), 70 FR 75519 (December 20, 2005) (SR-NYSE-2005-87); 53014 (December 22, 2005), 70 FR 77228 (December 29, 2005) (SR-NYSE-2005-89); 53359 (February 24, 2006), 71 FR 10736 (March 2, 2006) (SR-NYSE-2006-09); 53487 (March 15, 2006), 71 FR 14278 (March 21, 2006) (SR-NYSE-2006-21); 53780 (May 10, 2006), 71 FR 28398 (May 16, 2006) (SR-NYSE-2006-24); and 53791 (May 11, 2006), 71 FR 28732 (May 17, 2006) (SR-NYSE-2006-33).

<sup>21</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.

<sup>3</sup> The Commission notes that the rule text submitted by the Exchange contained minor, technical errors. Exchange staff has committed to address these errors following publication of this notice. In addition, certain technical corrections and clarifications were made throughout the discussion of the proposed rule change pursuant to a conversation with NYSE staff. Telephone conversation between Gillian Rowe, Principal Rule Counsel, Office of the General Counsel, NYSE Group, Inc., and Jennifer Colihan, Special Counsel, and Kate Robbins, Attorney, Division of Market Regulation, Commission, on October 2, 2006.

<sup>4</sup> In Amendment No. 1, the Exchange made technical and clarifying changes to the rule text and purpose section.

<sup>5</sup> In Amendment No. 2, which replaced the original filing in its entirety and incorporated Amendment No. 1, the Exchange proposed additional changes to NYSE Rule 116 regarding a specialist's ability to stop stock in the NYSE's Hybrid Market.