

change was published for comment in the **Federal Register** on February 3, 2005.³ The Commission received one comment letter on the proposed rule change.⁴ For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description of the Proposed Rule Change

A. Description of the Proposal

NASD proposed to adopt a new IM-10308 to clarify that (1) fees for service as a mediator are not included in determining whether an attorney, accountant, or other professional derives 10% of his or her annual revenue from industry-related parties; and (2) service as a mediator is not included in determining whether an attorney, accountant, or other professional devotes 20% or more of his or her professional work to securities industry clients. Recent changes to NASD's arbitrator classification rules amended the definitions of "public" and "non-public" arbitrators (non-public arbitrators have some current or recent connection with the securities industry, but do not necessarily work in the industry).⁵ The changes led, among other things, to reclassifying some arbitrators from public to non-public or from non-public to public, and to dropping some arbitrators from the NASD's roster. One new part of the rule provided that arbitrators who were otherwise qualified as public could not continue to serve as public arbitrators if their firms derived more than 10% of their revenue from industry parties.⁶

Some arbitrators who also serve as mediators were of the opinion that the rule change encompassed income in the form of mediation fees paid by industry parties such that these individuals would no longer qualify as public arbitrators under the new rule. The NASD Dispute Resolution Board determined that the rule could be construed broadly enough to cover revenue derived from serving as a mediator but that such a broad interpretation was not intended. The proposed rule change would adopt a clarifying IM that would be printed in the Code following Rule 10308. The IM provides, in part, that mediation fees received by mediators who are also

arbitrators are not to be included in the definition of "revenue;" that mediation services performed by mediators who are also arbitrators are not to be included in the definition of "professional work;" and that arbitrators who also serve as mediators must disclose that information.

B. Comment Summary

The proposal was published for comment in the **Federal Register** on February 3, 2005.⁷ We received one comment on the proposal,⁸ which was supportive. Citing confusion arising from the implementation of the NASD's 2004 changes to the arbitrator classification rules, the commenter agreed with the NASD Dispute Resolution Board that the rules should not be construed to cover revenues or work deriving from service as a mediator. The commenter accordingly called the proposed rule change appropriate.

III. Discussion and Findings

The Commission finds the proposed rule change is consistent with the Act, and in particular with section 15A(b)(6) of the Act, which requires, among other things, that NASD's 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.⁹ The Commission believes that the proposed rule change is consistent with the provisions of the Act noted above because it provides clarity to the operation of the rules regarding arbitrator classification and addresses an ambiguity in the interpretation of the arbitrator classification rules. The Commission believes that this clarification of the arbitrator rules will increase efficiency in the operation of the arbitrator selection process, as well as provide additional useful disclosure to claimants regarding an arbitrator's service as a mediator.

IV. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act¹⁰ that the proposed rule change (SR-NASD-2005-007) be, and hereby is, approved.¹¹

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51323; File No. SR-NASD-2005-028]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Discontinuation of the Nasdaq PostData Pilot Program

March 4, 2005.

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 February 17, 2005, 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. Nasdaq has filed the proposal as a "non-controversial" rule change pursuant to section 19(b)(3)(A) of the Act,³ and Rule 19b-4(f)(6) thereunder,⁴ which renders the proposal effective upon filing with the Commission.⁵ 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 is filing the proposed rule change to terminate the PostData pilot program, as of March 31, 2005, the date that its current pilot approval expires. The text of the proposed rule change is below. Proposed new language is in

¹² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

⁵ Nasdaq asked the Commission to waive the five-day pre-filing notice requirement. See Rule 19b-4(f)(6)(iii). 17 CFR 240.19b-4(f)(6)(iii). The Commission granted Nasdaq's request.

³ Securities Exchange Act Release No. 51097 (Jan. 28, 2005), 70 FR 5715 (Feb. 3, 2005) (the "Notice").

⁴ See Letter to Jonathan Katz, Secretary, Commission, from George R. Kramer, Deputy General Counsel, Securities Industry Association ("SIA"), dated February 25, 2005 ("SIA Letter").

⁵ See Exchange Act Release No. 49573 (Apr. 16, 2004), 69 FR 21871 (Apr. 22, 2004) (SR-NASD-2003-095).

⁶ For further detail, see the Notice, note 3, *supra*.

⁷ See note 3, *supra*.

⁸ See note 4, *supra*.

⁹ 15 U.S.C. 78o-3(b)(6).

¹⁰ 15 U.S.C. 78s(b)(2).

¹¹ In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

italics; proposed deletions are in brackets.⁶

7010. System Services

(a)–(r) No change.

(s) *Reserved* [NasdaqTrader.com Volume and Issue Data Package Fee

The charge to be paid by the subscriber for each entitled user receiving the Nasdaq Volume and Issue Data Package via NasdaqTrader.com shall be \$70 per month. The charge to be paid by market data distributors for this information shall be \$35 per month for each end user receiving the information through the data vendor. The availability of this service through NasdaqTrader.com shall be limited to NASD members, Qualified Institutional Buyers (as defined in Rule 144A of the Securities Act of 1933) and data vendors. The Volume and Issue Data package includes:

- (1) Daily Share Volume Reports
- (2) Daily Issue Data
- (3) Monthly Volume Summaries
- (4) Buy Volume Report
- (5) Sell Volume Report
- (6) Crossed Volume Report
- (7) Consolidated Activity Volume Report

All fees assessed under this subsection will be waived for a period of up to two months for all new subscribers and potential new subscribers. This fee waiver period would be applied on a rolling basis, determined by the date on which a new subscriber or potential subscriber contacts Nasdaq to receive access to PostData.]

(t)–(v) No change.

* * * * *

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.

⁶ The proposed rule change is marked to show changes from the rule text appearing in the NASD Manual available at <http://www.nasd.com>.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq is proposing to terminate the PostData pilot program, as of March 31, 2005, the date that its current pilot approval expires, because Nasdaq would like to reassess the demand for and the composition of data in this product. On January 11, 2002, the Commission first approved Nasdaq PostData, a voluntary trading data distribution facility, accessible to NASD members, buy-side institutions and market data vendors through the NasdaqTrader.com Web site.⁷ Nasdaq periodically expanded the content of Nasdaq PostData and extended this pilot on a number of occasions, most recently through March 31, 2005.⁸

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with section 15A(b)(5)⁹ and section 15A(b)(6)¹⁰ of the Act. Section 15A(b)(5) requires the equitable allocation of reasonable fees and charges among members and other users of facilities operated or controlled by a national securities association. Nasdaq believes that it is not possible to offer Nasdaq PostData at a reasonable fee that equitably allocates fees and charges among its members and users.

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 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

Nasdaq has neither solicited nor received comments on the proposed rule change.

⁷ See Securities Exchange Act Release No. 45270 (Jan. 11, 2002), 67 FR 2712 (Jan. 18, 2002) (SR–NASD–99–12).

⁸ See Securities Exchange Act Release Nos. 49376 (Mar. 9, 2004), 69 FR 12188 (Mar. 15, 2004) (SR–NASD–2004–038) (extending pilot through March 31, 2005); 48576 (Sept. 30, 2003), 68 FR 57946 (Oct. 7, 2003) (SR–NASD–2003–142) (extending pilot through March 2004); 47634 (April 4, 2003), 68 FR 17714 (April 10, 2003) (SR–NASD–2003–60) (extending pilot through September 2003); 47503 (March 14, 2003), 68 FR 13745 (March 20, 2003) (SR–NASD–2003–35) (extending pilot through March 2003); and 47210 (Jan. 17, 2003), 68 FR 3912 (Jan. 27, 2003) (SR–NASD–2003–02) (extending pilot through February 2003).

⁹ 15 U.S.C. 78o–3(b)(5).

¹⁰ 15 U.S.C. 78o–3(b)(6).

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

Because 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) does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to section 19(b)(3)(A) of the Act¹¹ and Rule 19b–4(f)(6) thereunder.¹²

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. 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 Number SR–NASD–2005–028 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 Number SR–NASD–2005–028. 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

¹¹ 15 U.S.C. 78s(b)(3)(A).

¹² 17 CFR 240.19b–4(f)(6).

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 offices of Nasdaq. 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-2005-028 and should be submitted on or before April 4, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹³

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51319; File No. SR-NYSE-2004-61]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Approving Proposed Rule Change and Amendment Nos. 1 and 2 Thereto To Rescind a Type of Order Known as an Institutional XPress® Order Through Amendments to Exchange Rules 13, 60 and 72

March 4, 2005.

On October 28, 2004, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant 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 rescind a type of order known as an Institutional XPress® Order ("XPress Order") by amending NYSE Rules 13 (Definitions of Orders), 60 (Dissemination of Quotation) and 72 (Priority and Precedence of Bids and Offers). On December 3, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.³ The proposed

rule change, as amended by Amendment No. 1, was published for notice and comment in the **Federal Register** on December 29, 2004.⁴ The Commission received no comment letters on the proposal, as amended. On January 25, 2005, the Exchange filed Amendment No. 2 to the proposed rule change.⁵ This order approves the proposed rule change, as amended.

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,⁶ and, in particular, the requirements of section 6 of the Act⁷ and the rules and regulations thereunder. The Commission finds specifically that the proposed rule change, as amended, is consistent with section 6(b)(5) of the Act⁸ 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.

According to the Exchange, the XPress Order has not been widely used⁹ and if the Hybrid Market initiative¹⁰ is approved and implemented, the need for XPress Orders will be further diminished. Therefore, the Commission believes that it is consistent with the Act to eliminate this type of order.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,¹¹ that the proposed rule change (SR-NYSE-2004-61), as amended, be, and hereby is, approved.

proposed rule change was filed from Section 19(b)(3)(A) of the Act to Section 19(b)(2) of the Act.

⁴ See Securities Exchange Act Release No. 50912 (December 22, 2004), 69 FR 78084.

⁵ See Partial Amendment dated January 25, 2005 ("Amendment No. 2"). In Amendment No. 2, the Exchange made minor, technical corrections to the proposed rule text. Accordingly, this Amendment is not subject to notice and comment.

⁶ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁷ 15 U.S.C. 78f.

⁸ 15 U.S.C. 78f(b)(5).

⁹ Telephone conversation between Cyndi N. Rodriguez, Special Counsel, Division of Market Regulation, Commission, and Jeffrey S. Rosenstock, Special Counsel, Market Surveillance, NYSE, on March 1, 2005. The NYSE also represented that the proposed rule change would be implemented on or about April 1, 2005. *Id.*

¹⁰ See Securities Exchange Act Release Nos. 50173 (August 10, 2004), 69 FR 50407 (August 16, 2004) and 50667 (November 15, 2004), 69 FR 67980 (November 22, 2004) (SR-NYSE-2004-05).

¹¹ 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51331; File No. SR-OCC-2002-16]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of a Proposed Rule Change Relating to Unsegregation of Long Option Positions

March 8, 2005.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ notice is hereby given that on July 9, 2002, the Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") and on December 12, 2002, and January 11, 2005, amended, the proposed rule change as described in items I, II, and III below, which items have been prepared primarily by OCC. 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

OCC Rule 611 permits a clearing member to issue instructions to OCC to release from segregation a long option position carried in a customers' account or firm non-lien account provided that the clearing member is simultaneously carrying in such account for such customer a short position in option contracts and the margin requirement of the customer has been reduced as a result of carrying the long option position. The proposed rule change would amend Rule 611 to permit a clearing member to issue such spread instructions where one leg of the spread is a long option position and the other is a position in a security futures contract.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the

¹² 17 CFR 200.30-3(a)(12).

¹³ 15 U.S.C. 78s(b)(1).

¹³ CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Partial Amendment dated December 3, 2004 ("Amendment No. 1"). In Amendment No. 1, the Exchange changed the basis under which the