

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. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASD-2005-013 and should be submitted on or before May 23, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51611; File No. SR-NASD-2005-026]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change Relating to TRACE Market Data Fees

April 26, 2005.

#### I. Introduction

On February 11, 2005, the National Association of Securities Dealers, Inc. ("NASD") 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 relating to Transaction Reporting and Compliance Engine ("TRACE") market data fees. The

Commission published the proposed rule change for comment in the **Federal Register** on March 16, 2005.<sup>3</sup> The Commission received one comment letter on the proposal.<sup>4</sup> On April 25, 2005, NASD filed a response to the comment letter.<sup>5</sup> This order approves the proposed rule change.

#### II. Description of the Proposed Rule Change

The proposed rule change would amend NASD Rule 7010(k) relating to TRACE transaction data to: (i) Terminate the Bond Trade Dissemination Service ("BTDS") Internal Usage Authorization Fee and the BTDS External Usage Authorization Fee and, in lieu of both fees, establish a Vendor Real-Time Data Feed Fee; (ii) define the term "Tax Exempt Organization," and amend the defined term "Non-Professional" for purposes of NASD Rule 7010(k)(3); and (iii) make other minor, technical amendments. The proposal is discussed in greater detail in the Commission's notice soliciting public comment.<sup>6</sup>

#### III. Summary of Comments Received and NASD Response

The Commission received one comment letter on the proposal.<sup>7</sup> The SIA Letter supports NASD's proposed rule change. However, the commenter requests that NASD clarify whether "market data subscribers who are natural persons using a brokerage account established in the name of an entity name they or their family control" are considered "Non-Professional" within the meaning of the rule.<sup>8</sup> In addition, the commenter states, with regard to a reduced fee for Tax Exempt Organizations, that further review "may be warranted to determine the justifiable basis for a reduced fee, including a better description of the tax exempt organizations that would benefit from a reduced price structure, a better explanation as to why the reduced fee is necessary, and an analysis of the potential impact such a proposal may have on competition."<sup>9</sup>

<sup>3</sup> Securities Exchange Act Release No. 51336 (March 9, 2005), 70 FR 12921 (March 16, 2005) ("Notice").

<sup>4</sup> See letter from Andrew C. Wels, Chairman, Technology & Regulation Market Data Subcommittee, Securities Industry Association ("SIA"), to Jonathan G. Katz, Secretary, Commission, received April 8, 2005 (undated) ("SIA Letter").

<sup>5</sup> See letter from Sharon K. Zackula, Associate General Counsel, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated April 25, 2005 ("NASD Letter").

<sup>6</sup> See Notice, *supra* note 3.

<sup>7</sup> SIA Letter, *supra* note 4.

<sup>8</sup> *Id.* at 3.

<sup>9</sup> *Id.* at 4.

In response to the SIA Letter, NASD states that it "will consider identifying certain non-natural persons as 'Non-Professionals' as part of its continuing review and interpretation of TRACE data fees and access."<sup>10</sup> In addition, NASD states that "[t]he proposed definition of Tax-Exempt Organization limits significantly the number and type of organizations that may apply to receive Real-Time TRACE transaction data at the reduced fee and, by definition, limits the use of Real-Time TRACE transaction data solely for data access programs for the benefit of individual investors and not for commercial purposes."<sup>11</sup> Given these restrictions, NASD does not believe that the proposal will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.<sup>12</sup>

The SIA Letter also stated that the rationale NASD followed in its proposal—that financial services industry employees should be considered non-professionals when they access data for personal, non-commercial uses—should be applied uniformly to all other individual subscribers of bond or equity market data no matter which self regulatory organization, directly or indirectly, controls the market data.<sup>13</sup> The SIA Letter petitions the Commission for rulemaking to review the definitions of "Professional" and "Non-Professional" as interpreted for market data fee and administrative purposes by the Consolidated Tape Association, the NASDAQ UTP Plan, the New York Stock Exchange, NASDAQ, the Options Price Reporting Authority, and NASD.<sup>14</sup> This petition will be considered separately from this proposal.

#### IV. Discussion

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities association.<sup>15</sup> In particular, the Commission believes that the proposed rule change is consistent with section

<sup>10</sup> NASD Letter at 2 ("For purposes of TRACE fees, NASD has interpreted the term 'Non-Professional' to further NASD's goal of providing access to TRACE market data at no charge to persons who seek to use TRACE market data for personal, rather than commercial, purposes.")

<sup>11</sup> *Id.* at 3.

<sup>12</sup> See *id.*

<sup>13</sup> SIA Letter at 1.

<sup>14</sup> See *id.*

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

<sup>13</sup> 17 CFR 200.30-3(a)(12).

<sup>14</sup> 15 U.S.C. 78s(b)(1).

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

15A(b)(6) of the Act,<sup>16</sup> which requires, among other things, that the rules of an association 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, and section 15A(b)(5) of the Act,<sup>17</sup> which requires, among other things, that rules of an association provide for the equitable allocation of reasonable dues, fees, and other charges among members, issuers, and other persons using any facility or system which the association operates or controls. Consolidating the two TRACE data fees into one fee and reducing the TRACE data fee for qualifying Tax-Exempt Organizations appears reasonable and should not adversely affect the use and distribution of TRACE data. In addition, the Commission believes that clarifying who is a "Non-Professional" and therefore is not subject to TRACE fees is reasonable and consistent with the goal of wide dissemination of TRACE transaction data.

## V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,<sup>18</sup> that the proposed rule change (SR-NASD-2005-026) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>19</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51613; File No. SR-NYSE-2004-42]

### Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto To Eliminate the Requirement That a Floor Official Approve Certain Transactions on the Exchange's Automated Bond System

April 26, 2005.

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 August 10, 2004, the New York Stock Exchange, Inc. ("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. On March 30, 2005, the NYSE filed Amendment No. 1 to the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The NYSE proposes to amend Exchange Rule 86(g) relating to the Exchange's Automated Bond System® ("ABS"). The text of the proposed rule change, as amended, is available on the NYSE's Web site (<http://www.nyse.com>), at the NYSE's principal office, 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 NYSE's Fixed Income Market is centered on its ABS, a fully automated trading and information system that allows subscribing firms to enter, maintain, view, and execute bond orders through screen displays in their offices. Orders are maintained, displayed, and matched in ABS on a

strict price-and-time priority basis. ABS displays current market data and provides subscribers with immediate execution reports and locked-in trade comparisons. ABS also provides real-time last sale and quotation information to subscribers and market data vendors.

At year-end 2004, ABS had a subscriber base of 37 member firms with an installed base of 115 screens. All bonds listed on the NYSE trade through ABS. Exchange bond volume for the year 2004 was approximately \$1.3 billion par value. About 94% of NYSE bond volume was in straight, or non-convertible, debt and the remaining 6% of NYSE bond volume was in convertible bonds.

Exchange Rule 86 governs trading in ABS. Existing NYSE Rule 86(g) requires that all ABS transactions in non-convertible bonds that are made two points or more away from the last sale, or more than 30 days after the last sale, may be made only with the approval of a Floor Official. As a practical matter, the Floor Official may require that the bonds be bid up or offered down before approving such transactions.<sup>4</sup>

The Exchange proposes to eliminate the current NYSE Rule 86(g). The requirement in Exchange Rule 86(g) for Floor Officials to approve orders entered at an increment of two points or greater from the last transaction has long been made unnecessary by the fact that ABS is an order-driven system in which subscribing firms may enter only priced orders, and a firm entering an order in ABS at a variation of two points or greater is already required to immediately confirm the price of such order prior to the order's acceptance into ABS. The entering firm would no longer need to confirm an order entered into ABS more than 30 days from the last trade of the bond issue, if the price of the entered order were less than two points from the previous trade price.

<sup>4</sup> If, for example, an order is entered into ABS to buy 10 XYZ bonds at 93 when the last sale for XYZ occurred at 90, the Floor Official could determine that XYZ bond should be "bid up" at a decided price increment away from the limit order for a decided period of time, typically one "point" for one minute. The NYSE bond supervisor would then enter the bidding-up starting price, price increment, time increment, and final price into ABS, upon which a message appears on all ABS screens alerting subscribing firms that bidding up in XYZ has commenced. An ABS user could execute against that "bid" by entering an order to sell at 91 into the system. If, after one minute, the "bid" at 91 generated no interest among ABS users, the order would be bid at 92 for one minute. If that "bid" generated no interest, then the order would, after one minute, be bid at 93 or be matched (traded) at 93, depending on whether there was a contra-side order to sell at 93 in the ABS at that point in time. Telephone conversation between Fred Siesel, Consultant, NYSE, and Tim Fox, Attorney, Commission on April 18, 2005.

<sup>16</sup> 15 U.S.C. 78o-3(b)(6).

<sup>17</sup> 15 U.S.C. 78o-3(b)(5).

<sup>18</sup> 15 U.S.C. 78s(b)(2).

<sup>19</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> In Amendment No. 1, which replaced and superceded the original filing in its entirety, the NYSE supplemented its rationale for the proposal by, among other things, describing the process that a Floor Official follows when considering whether to approve a transaction that would occur at a price that is at least two points or more than 30 days from the last transaction; recounting some of the history of bond trading on the NYSE; explaining that the Exchange has not found it necessary to reinstate the two-point/30-day provision for convertible bonds since it eliminated its applicability to convertible bonds in 1998; and noting that Exchange Rule 86(g) requires all orders to be entered into ABS at a limit price, and that ABS automatically asks a user to reconfirm the price of an order that is entered at a price two or more points away from the last sale.