

foster competition, as market data vendors obtain verified data from PostData, provide enhancements to the data, and in turn, sell the enhanced data to retail customers.²⁵

The Commission expects that Nasdaq will continue to examine the fees and fee structure of PostData, and will take whatever steps are necessary to ensure that the fees remain consistent with the mandate established in section 15A(b)(5) of the Act,²⁶ so that the fees associated with PostData remain equitable. The Commission also expects that Nasdaq will provide the Commission with the information the Commission requested in its original approval order of the PostData pilot²⁷ as soon as practicable.

V. Conclusion

It is therefore Ordered, pursuant to section 19(b)(2) of the Act²⁸, that the proposed rule change (SR-NASD-2003-03) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁹

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47584; File No. SR-NYSE-2002-35]

Self-Regulatory Organizations; Notice of Filing of Amendment No. 3 to a Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Business Continuity and Contingency Planning

March 27, 2003.

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 March 27, 2003, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") Amendment No. 3³ to

the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The NYSE submitted the proposed rule change to the Commission on August 16, 2002, and it was published in the **Federal Register** on September 9, 2002 ("Original Notice").⁴ The NYSE subsequently submitted amendments to the proposed rule change on January 13, 2003,⁵ and March 7, 2003.⁶ Amendment No. 3 incorporates and replaces Amendments Nos. 1 and 2 in their entirety. The Commission is publishing Amendment No. 3 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 Exchange is proposing to clarify that proposed new NYSE Rule 446 ("Business Continuity and Contingency Plans")—which would require members and member organizations to develop, maintain, review, and update business continuity and contingency plans that establish procedures to be followed in the event of an emergency or significant business disruption—also would require such plans to be reasonably designed to enable members and member organizations to continue their businesses in the event of a significant business disruption.

Below is the text of the proposed rule change, as amended. The base text is that provided in the Original Notice. Language added by Amendment No. 3 is in *italics*; language deleted by Amendment No. 3 is in brackets:

* * * * *

Business Continuity and Contingency Plans

New Rule 446

(a) Members and member organizations must develop and maintain a written business continuity and contingency plan establishing procedures [to be followed in the event of] *relating to* an emergency or significant business disruption. *Such procedures must be reasonably designed to enable members and member organizations to continue their businesses in the event of a future significant business disruption.*

⁴ Securities Exchange Act Release No. 46443 (August 30, 2002), 67 FR 57264.

⁵ See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy Sanow, Division of Market Regulation, Commission, dated January 10, 2003 ("Amendment No. 1").

⁶ See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Katherine A. England, Division of Market Regulation, Commission, dated March 6, 2003 ("Amendment No. 2").

Members and member organizations must make such plan available to the Exchange upon request.

(b) Members and member organizations must conduct, *at a minimum*, a yearly review of their business continuity and contingency plan to determine whether any modifications are necessary in light of changes to the member's or member organization's operations, structure, business or location. *In the event of a material change to a member's or member organization's operations, structure, business or location, the member or member organization must promptly update its business continuity and contingency plan.*

(c) The [requirements of] *elements that comprise* a business continuity and contingency plan shall be tailored to the size and needs of a member or member organization *so as to enable the member or member organization to continue its business in the event of a future significant business disruption.* Each plan, however, must, at a minimum, address, if applicable:

- (1) books and records back-up and recovery (hard copy and electronic);
- (2) identification of all mission critical systems and back-up for such systems;
- (3) financial and operational risk assessments;
- (4) alternate communications between customers and the firm;
- (5) alternate communications between the firm and its employees;
- (6) alternate physical location of employees;
- (7) business constituent, bank and counter-party impact;
- (8) regulatory reporting; and
- (9) communications with regulators.

To the extent that any of the above items is not applicable, the member's or member organization's business continuity and contingency plan must specify the item(s) and state the rationale for not including each such item(s) in its plan. If a member or member organization relies on another entity for any of the above-listed categories or any mission critical system, the member's or member organization's business continuity and contingency plan must address this relationship.

(d) The term "mission critical system," for purposes of this Rule, means any system that is necessary, depending on the nature of a member's or member organization's business, to ensure prompt and accurate processing of securities transactions, including order taking, entry, execution, comparison, allocation, clearance and settlement of securities transactions, the

²⁵ The Commission notes that PostData relates to enhanced data that is not integral to the ability of a broker-dealer or customer to trade. *Cf. NASD v. SEC*, footnote 12, *supra*.

²⁶ 15 U.S.C. 78o-3(b)(5).

²⁷ See footnote 23, *supra*.

²⁸ 15 U.S.C. 78s(b)(2).

²⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Katherine A. England, Division of Market Regulation, Commission, dated March 26, 2003 ("Amendment No. 3").