

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47876; File Nos. SR-NASD-2003-79; SR-NYSE-2003-17]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Changes by the National Association of Securities Dealers, Inc. and the New York Stock Exchange, Inc. Relating to Establishing Effective Dates for Certain Provisions of NASD Rule 2711, Research Analysts and Research Reports, and NYSE Rule 472, Communications with the Public

May 15, 2003.

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 May 6, 2003, the National Association of Securities Dealers, Inc. ("NASD"), and on May 9, 2003, the New York Stock Exchange, Inc. ("NYSE" or "Exchange"), filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule changes as described in Items I, II, and III below, which Items have been prepared by the respective self-regulatory organizations ("SROs"). The SROs have designated the proposed rule changes as constituting stated policies, practices, or interpretations with respect to the meaning, administration, or enforcement of an existing rule series under paragraph (f)(1) of Rule 19b-4 under the Act,<sup>3</sup> which render the proposals effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule changes from interested persons.

#### I. Self-Regulatory Organizations' Statements of the Terms of Substance of the Proposed Rule Changes

##### A. NASD

NASD is filing with the SEC a proposed rule change to establish July 30, 2003, or until a superseding permanent exemption is approved by the SEC and becomes effective, as the effective date for NASD Rules 2711(b) and (c) for members that over the previous three years, on average, have participated in 10 or fewer investment banking transactions as manager or co-manager and generated \$5 million or less in gross investment banking revenues from those transactions. NASD Rules 2711(b) and (c), when effective, prohibit a research analyst from being

subject to the supervision or control of any employee of a member's investment banking department, and will further require legal or compliance personnel to intermediate certain communications between the research department and either the investment banking department or the company that is the subject of a research report or recommendation ("subject company").

##### B. NYSE

The NYSE is filing with the SEC a proposed rule change that would establish July 30, 2003, or until such date as a permanent exemption is approved by the SEC and becomes effective, as the effective date for certain provisions of Rule 472 ("Communications with the Public") for certain members and member organizations.

#### II. Self-Regulatory Organizations' Statements of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

In their original rule filings with the Commission, the SROs included statements concerning the purpose of, and basis for, the proposed rule changes and discussed any comments they received on the proposed rule changes. The text of these statements may be examined at the places specified in Item IV below. The SROs have prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

##### A. Self-Regulatory Organizations' Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

###### 1. NASD's Purpose

NASD is filing the proposed rule change to establish July 30, 2003, or until the date a superseding permanent exemption is approved by the SEC and becomes effective, as the effective date for NASD Rules 2711(b) and (c) for members that over the previous three years, on average per year, have participated in 10 or fewer investment banking transactions as manager or co-manager and generated \$5 million or less in gross investment banking revenues from those transactions. Pursuant to the SEC's approval of SR-NASD-2002-87<sup>4</sup> and SR-NASD-2002-161<sup>5</sup>, NASD Rules 2711(b) and (c), as applied to this class of members, otherwise would have gone into effect

on May 5, 2003. NASD seeks to delay implementation of these provisions for these members while it finalizes a proposal to create a permanent exemption for firms that engage in limited underwriting activity. The purpose of the delayed implementation—and ultimately a permanent exemption—is to preserve the role of certain smaller firms that often are the sole or primary source of underwriting and research coverage for some smaller or regional companies.

On May 10, 2002, the Commission approved new NASD Rule 2711, which governs conflicts of interest when research analysts recommend equity securities in research reports and during public appearances.<sup>6</sup> The Commission approved a staggered implementation period for the rule. Most provisions of the rule became effective on July 9, 2002, including those that restrict supervision and control of research analysts by the investment banking department. The "gatekeeper" provisions, described below, became effective September 9, 2002. The remaining provisions of the Rule became effective on November 6, 2002.

NASD Rule 2711(b) contains provisions that generally restrict the relationship between the research and investment banking departments, including "gatekeeper" provisions that require a legal or compliance person to intermediate certain communications between the research and investment banking departments. NASD Rule 2711(b)(1) prohibits a research analyst from being under the control or supervision of any employee of the investment banking department. NASD Rule 2711(b)(2) prohibits employees in the investment banking department from reviewing or approving any research report prior to publication. NASD Rule 2711(b)(3) creates an exception to (b)(2) to allow investment banking personnel to review a research report prior to publication to verify the factual information contained therein and to screen for potential conflicts of interest. Any permissible written communications must be made through an authorized legal or compliance official or copied to such official. Oral communications must be made through, or in the presence of, an authorized legal or compliance official and must be documented.

Similarly, NASD Rule 2711(c) restricts communications between a member and the subject company of a research report, except that a member

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

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

<sup>3</sup> 17 CFR 240.19b-4(f)(1).

<sup>4</sup> See Securities Exchange Act Release No. 46165 (July 3, 2002), 67 FR 46555 (July 15, 2002).

<sup>5</sup> See Securities Exchange Act Release No. 46949 (December 4, 2002), 67 FR 76202 (December 11, 2002).

<sup>6</sup> See Securities Exchange Act Release No. 45908 (May 10, 2002), 67 FR 34968 (May 16, 2002) ("May 10th order").