

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.

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

1. Purpose

In SR-NASD-2003-98, Nasdaq recently amended the various NASD rules governing trade reporting to define with greater clarity the reporting obligations applicable to transactions executed through ECNs that are reported to ACT.⁷ In general, SR-NASD-2003-98 was not intended to require ECNs to modify their current trade reporting practices. Rather, the purpose of the filing was to codify these practices in the form of clear, enforceable rules to provide greater guidance to market participants.

Since the approval of SR-NASD-2003-98, however, several ECNs have informed Nasdaq that one aspect of the rule change would result in an alternation of current practices (and associated programming costs), and Nasdaq has concluded that this alternation would not result in any offsetting benefit. NASD Rule 6130 provides that where one ECN routes an order to another ECN that executes the order, the ECN that executes the order would be responsible for reporting the transaction, or requiring a subscriber to report the transaction, in accordance with one of the three basic methods for trade reporting established by the rule. For purposes of allocating trade reporting responsibility between ECN subscribers, the routing ECN would be deemed to be a *market maker*. The ECNs that are affected by this rule have informed Nasdaq, however, that in such circumstances they have treated the routing ECN as an *order entry firm*. Thus, where an executing ECN reports trades for its subscribers and identifies a subscriber as the reporting party, when the ECN receives an order from a

routing ECN that is matched against the order of an order entry firm or another ECN, the sell side has generally been identified as the reporting party. If the executing ECN matched the routed order against the order of a market maker, however, the market maker has been identified as the reporting party. The same priority rules would also apply when the executing ECN uses the trade reporting model in which it requires one of its subscribers to report the trade.

The benefit sought to be gained from SR-NASD-2003-98 was to enhance predictability and enforceability by codifying existing practices. In keeping with these goals, Nasdaq believes that it is acceptable for executing ECNs to treat routing ECNs as order entry firms. Thus, Nasdaq proposes to amend NASD Rule 6130(c)(6) accordingly.

In order to allow for adequate notice to market participants of this additional change, Nasdaq is also proposing to delay the effective date of SR-NASD-2003-98 for an additional two weeks, until November 10, 2003. Nasdaq had previously delayed this effective date from October 6, 2003 until October 27, 2003.⁸ Nasdaq will inform market participants of the delay and the rule change through a Head Trader Alert posted on www.nasdaqtrader.com.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,⁹ in general, and with Section 15A(b)(6) of the Act,¹⁰ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and to protect investors and the public interest. The proposed rule change will clarify the trade reporting obligations associated with transactions conducted through ECNs but will minimize the extent to which ECNs will be required to implement non-substantive modifications to existing practices.

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

Nasdaq 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

The Exchange has neither solicited nor received written comments on the proposed rule change.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate; and the Exchange has given the Commission written notice of its intention to file the proposed rule change at least five business days prior to filing, or such shorter time as designated by the Commission, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹¹ and Rule 19b-4(f)(6)¹² thereunder. At any time within 60 days of the filing of the 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.

Nasdaq has requested that the Commission waive the 5-day pre-filing notice requirement and the 30-day operative delay. The Commission believes waiving the 5-day pre-filing notice requirement and the 30-day operative delay is consistent with the protection of investors and the public interest. Acceleration of the operative date will allow both the trade reporting rules approved by the Commission in SR-NASD-2003-98 and the minor modification to those rules proposed in SR-NASD-2003-160 to take effect without undue delay, thereby lessening the extent to which ECNs that use ACT would be required to make non-substantive modifications to their existing trade reporting practices.¹³

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Persons making

¹¹ 15 U.S.C. 78s(b)(3)(A).

¹² 17 CFR 240.19b-4(f)(6).

¹³ For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁷ Securities Exchange Act Release No. 48442 (September 4, 2003), 68 FR 53767 (September 12, 2002) (SR-NASD-2003-98) (approval order).

⁸ Securities Exchange Act Release No. 48625 (October 10, 2003), 68 FR 59961 (October 20, 2003) (SR-NASD-2003-152).

⁹ 15 U.S.C. 78o-3.

¹⁰ 15 U.S.C. 78o-3(b)(6).