

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46949; File Nos. SR-NASD-2002-161; SR-NYSE-2002-60]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. and Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Establishing Effective Dates for Certain Provisions of NASD Rule 2711, Research Analysts and Research Reports and Certain Provisions of NYSE Rule 472, Communications With the Public

December 4, 2002.

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 November 5, 2002, the National Association of Securities Dealers, Inc. ("NASD"), and on November 8, 2002, the New York Stock Exchange, Inc. ("NYSE" or "Exchange"), filed with the Securities and Exchange Commission ("SEC" or "Commission") proposed rule changes as described in Items I, II, and III below, which Items have been prepared by the respective self-regulatory organizations ("SROs"). On November 26, 2002, NASD filed amendment No. 1 to the proposed rule change.³ The SROs have designated the proposed rule changes as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule series under paragraph (f)(1) of Rule 19b-4 under the Act,⁴ which renders the proposals effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Philip Shaikun, Assistant General Counsel, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated November 26, 2002 ("Amendment No. 1"). In Amendment No. 1, NASD established a further condition for delaying the implementation of NASD Rules 2711(b) and (c) until May 5, 2003 for members that over the previous three years, on average per year, have participated in 10 or fewer investment banking transactions or underwritings as manager or co-manager and generated \$5 million or less in gross investment banking revenues from those transactions. Amendment No. 1 requires that those firms that meet the eligibility requirements outlined above must maintain records of communications that would otherwise be subject to the gatekeeper provisions of Rules 2711(b) and (c). In Amendment No. 1, NASD also corrected a technical error that appeared in its original filing.

⁴ 17 CFR 240.19b-4(f)(1).

changes, as amended, from interested persons.

I. Self-Regulatory Organizations' Statement of the Terms of Substance of the Proposed Rule Change

A. NASD

NASD is filing with the Commission a proposed rule change to establish May 5, 2003 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, will 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 change the effective date for certain provisions of Rule 472 ("Communications with the Public") for certain members and member organizations.

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

In their filings with the Commission, NASD and the NYSE included statements concerning the purpose of and basis for the proposed rule changes. The text of these statements may be examined at the places specified in Item IV below. NASD and the NYSE have prepared summaries, set forth in Sections A, B, and C below.

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

1. NASD's Purpose

NASD is filing the proposed rule change to establish May 5, 2003 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-2002-87,⁵ NASD Rules 2711(b) and (c) as applied to this class of members otherwise would go into effect on November 6, 2002. NASD seeks to delay implementation of these provisions for this limited set of members to allow NASD to continue to explore with the SEC the appropriate treatment of small firms under NASD Rule 2711 and the recently-enacted Sarbanes-Oxley law ("Sarbanes-Oxley"). Smaller members often are the sole or primary source of underwriting and research coverage for some smaller companies; therefore, NASD continues to consider ways to preserve this important role served by these firms, to the extent consistent with the requirements and objectives of Sarbanes-Oxley and NASD Rule 2711.

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.⁶ 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 become effective on November 6, 2002, including two provisions that were delayed pursuant to approval of SR-NASD-2002-87: (1) Provisions that require disclosure of investment banking compensation received by foreign affiliates and (2) prohibitions against trading against a member's recommendation for those members that have instituted a ban on ownership of securities covered by an analyst and that have instituted a specific, periodic divestiture schedule.

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

⁵ See Securities Exchange Act Release No. 46165 (July 3, 2002), 67 FR 46555 (July 15, 2002).

⁶ See Securities Exchange Act Release No. 45908, 67 FR 34968 (May 16, 2002).

the investment banking department from reviewing or approving any research reports 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 may submit sections of the research report to the company to verify factual accuracy and may notify the subject company of a ratings change after the "close of trading" on the business day preceding the announcement of the ratings change. Submissions to the subject company may not include the research summary, the rating or the price target, and a complete draft of the report must be provided beforehand to legal or compliance personnel. Finally, any change to a rating or price target after review by the subject company must first receive written authorization from legal or compliance.

As the Commission noted in its approval order of NASD Rule 2711, several commenters argued that the gatekeeper provisions would impose significant costs, especially for smaller firms that would have to hire additional personnel. Commenters also noted that personnel often wear multiple hats in smaller firms, thereby causing a greater burden to comply with the restriction on supervision and control by investment banking personnel over research analysts. These comments raised the prospect that the rules might force some firms out of business or reduce important sources of capital and research coverage for smaller companies and companies of regional or local interest.

NASD shares the concern raised by these commenters. To that end, NASD has been exploring with the SEC possible exemptions or accommodations that can be made while preserving the purposes of the rule. In SR-NASD-2002-87, NASD sought comment on whether the parameters set forth above to be eligible for delayed implementation of Rules 2711(b) and (c) should be made permanent or whether another approach should be considered. Moreover, in July 2002, NASD issued

Notice to Members 02-44, which similarly sought comment on whether certain members should be exempted from certain provisions of the Rule and what criteria should be employed to fashion such an exemption. NASD received 10 comments in response to the *Notice to Members*.⁷ Generally, the comments emphasized the financial and administrative burdens imposed by NASD Rule 2711 to implement the gatekeeper provisions and to structure firms so that research personnel are not subject to supervision by investment banking personnel. Commenters argued that the conflicts addressed by NASD Rule 2711 are less pronounced with respect to smaller firms and that the burdens of compliance could force firms to discontinue their research business.

According to NASD, the enactment of Sarbanes-Oxley has further complicated the picture with respect to small firms. NASD believes that, while the provisions of Sarbanes-Oxley related to analyst conflicts closely parallel NASD Rule 2711 in many respects, they also require the SEC or self-regulatory organizations, such as NASD and NYSE, to promulgate additional—and sometimes more burdensome—rules on firms to further limit the influence of investment banking on research and increase analyst accountability. Notably, Sarbanes-Oxley makes no explicit exception for small firms. NASD is currently assessing, with the SEC and NYSE, the implications of Sarbanes-Oxley generally and its impact on small firms, specifically.

Meanwhile, compliance with NASD Rules 2711(b) and (c) continues to pose financial and administrative challenges for certain smaller firms. As such, NASD believes it appropriate to extend the effective date of those provisions for the limited class of members cited above, so that NASD may fully explore with the SEC the treatment of small firms that is consistent with the mandates of Sarbanes-Oxley, the purposes of NASD Rule 2711 and the best interests of the markets and the investing public. Therefore, NASD

⁷ Letter from David Amster, CRT Capital Group, dated August 19, 2002; Letter from Peter V.B. Unger, Fulbright & Jaworski, LLP, dated August 30, 2002; Letter from First Analysis Securities Corp., dated August 30, 2002; Letter from Scott Cleland and John Eade, Investorside Research Association, dated August 29, 2002; Letter from W. Gray Medlin, The Carson Medlin Co., dated August 29, 2002; Letter from Cathryn Streeter, BioScience Securities, Inc., dated August 28, 2002; E-mail from James Nelson, Minnesota Valley Investments, dated July 31, 2002; E-mail from Joe B. Kercheville, Kercheville & Company, dated August 28, 2002; E-mail from Ray Chin, DBS Vickers Securities (USA) Inc., dated July 29, 2002; Letter from Stuart J. Kaswell, Securities Industry Association, dated August 30, 2002.

proposes to delay the effective date of NASD Rules 2711(b) and (c) until May 5, 2003 for those members that over the previous three years, on average per year, have participated in 10 or fewer investment banking transactions or underwritings as manager or co-manager and generated \$5 million or less in gross investment banking revenues from those transactions.

As a further condition for the delayed implementation date, those firms that meet the eligibility requirements outlined above would be required to maintain records of communications that would otherwise be subject to the gatekeeper provisions of Rules 2711(b) and (c).

2. NASD's Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁸ which requires, among other things, that NASD's rules must 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. NASD believes that this proposed rule change would reduce or expose conflicts of interest and thereby significantly curtail the potential for fraudulent and manipulative acts. NASD further believes that the proposed rule change will provide investors with better and more reliable information with which to make investment decisions.

3. NYSE's Purpose

The Exchange is filing the proposed rule change to establish May 5, 2003, as the effective date for: NYSE Rules 472(b)(1), (2) and (3), subject to certain conditions, for members and member organizations that over the previous three years, on average, have participated in ten or fewer underwritings as manager or co-manager and generated \$5 million or less in gross investment banking revenues from those transactions.

On May 10, 2002, the Commission approved amendments to NYSE Rules 351 ("Reporting Requirements") and 472, which place prohibitions and/or restrictions on Investment Banking Department, Research Department and Subject Company relationships and communications and impose new disclosure requirements on members and member organizations and their associated persons.⁹ At the same time, the Commission also approved a

⁸ 15 U.S.C. 78o-3(b)(6).

⁹ See Securities Exchange Act Release No. 45908, 67 FR 34968 (May 16, 2002).

staggered implementation period for the Rules. Most provisions of the Rules became effective on July 9, 2002, including those that restrict supervision and control of associated persons by the investment banking department and those that require disclosure of investment banking compensation received from a subject company. The "gatekeeper" provisions, described below, became effective September 9, 2002.

On July 9, 2002, the Exchange filed, for immediate effectiveness, SR-NYSE-2002-23¹⁰ that extended the effective date of September 9, 2002 for certain provisions of NYSE Rule 472. Specifically, November 6, 2002 was established as the effective date for NYSE Rules 472(b)(1), (2) and (3) ("Gatekeeper Provisions") for members or member organizations 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.

Small Firm Relief

NYSE Rule 472 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. NYSE Rule 472(b)(1) prohibits an associated person (also referred to throughout this filing as a "research analyst") from being under the control or supervision of any employee of the investment banking department.

NYSE Rule 472(b)(1) also prohibits the investment banking department from reviewing or approving any research reports prior to distribution. NYSE Rule 472(b)(2) creates an exception to the prohibition of (b)(1) 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, NYSE Rule 472(b)(3) restricts communications between a

member or member organization and the subject company of a research report, except that a member or member organization may submit sections of the research report to the subject company to verify factual accuracy and may notify the subject company of a ratings change after the "close of trading" on the business day preceding the announcement of the ratings change. Submissions to the subject company may not include the research summary, the rating or the price target, and a complete draft of the research report must be provided beforehand to legal or compliance personnel. Finally, any change to a rating or price target after review by the subject company must first receive written authorization from a legal or compliance official.

As the Commission noted in its approval order,¹¹ several commenters argued that the "gatekeeper" provisions would impose significant costs, especially for smaller firms that may have to hire additional personnel to comply with the requirements. Commenters also noted that personnel often wear multiple hats in smaller firms, thereby causing a greater burden to comply with the restriction on supervision and control by investment banking personnel over research analysts. These comments raised the prospect that the Rules might force some firms out of the investment banking or research business and/or reduce important sources of capital and research coverage for smaller companies.

In order to provide time to review those issues, the Exchange is proposing to delay implementation of NYSE Rules 472(b)(1), (2), and (3) until May 5, 2003 for members and member organizations that over the previous three years, on average, have participated in 10 or fewer underwritings as manager or co-manager and generated \$5 million or less in gross investment banking revenues from those transactions.

Those members or member organizations that meet the eligibility requirements outlined above for the delayed implementation date, would be required to disclose in research reports that they are delaying implementation of this Rule provision until May 5, 2003. Further, they would also be required to maintain records of communications that would otherwise be subject to the gatekeeper provisions of NYSE Rules 472(b)(2)(i) and (ii).

The Exchange believes it appropriate to extend until May 5, 2003, the effectiveness of this provision for small

firms that meet the requirements described above. The Exchange believes that for these members and member organizations, provided they comply with the conditions described, the temporary relief from these provisions will not adversely impact the spirit or intent of the Rule initiative.

4. NYSE's Statutory Basis

The Exchange believes that the statutory basis for the proposed rule change is Section 6(b)(5) of the Exchange Act¹² which requires, among other things, that the rules of the Exchange 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 interests.

B. Self-Regulatory Organizations' Statement on Burden on Competition

NASD and the NYSE do not believe that the proposed rule changes will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organizations' Statement on Comments on the Proposed Rule

NASD and the NYSE have neither solicited nor received written comments on the proposed rule changes.

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

The proposed rule changes have been filed by NASD and NYSE as stated policies, practices, or interpretations with respect to the meaning, administration, or enforcement of an existing rule series under Rule 19b-4(f)(1) under the Act.¹³ Consequently, they have become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(1) thereunder.

At any time within 60 days of this filing, the Commission may summarily abrogate these proposals 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.¹⁴

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing,

¹² 15 U.S.C. 78f(b)(5).

¹³ 17 CFR 240.19b-4(f)(1).

¹⁴ For SR-NASD-2002-161, the 60-day period would run from the date of filing of Amendment No. 1.

¹⁰ See Securities Exchange Act Release No. 46182 (July 11, 2002), 67 FR 47013 (July 17, 2002).

¹¹ See Securities Exchange Act Release No. 45908 (May 10, 2002), 67 FR 34968 (May 16, 2002).

including whether the proposed rule changes, as amended, are consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes 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 such filings will also be available for inspection and copying at the principal offices of the NASD and NYSE. All submissions should refer to the file numbers SR-NASD-2002-161 and SR-NYSE-2002-60 and should be submitted by January 2, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁵

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 02-31199 Filed 12-10-02; 8:45 am]

BILLING CODE 8010-01-P

SMALL BUSINESS ADMINISTRATION

[Declaration of Economic Injury Disaster #9T42]

State of New Jersey (and Contiguous Counties in New York)

Bergen County and the contiguous counties of Essex, Hudson and Passaic in the State of New Jersey; and Bronx, New York, Rockland and Westchester Counties in the State of New York constitute an economic injury disaster loan area as a result of a fire that occurred on October 1, 2002 in Fair Lawn, New Jersey. Eligible small businesses and small agricultural cooperatives without credit available elsewhere may file applications for economic injury assistance as a result of this disaster until the close of business on September 4, 2003 at the address listed below or other locally announced locations: U.S. Small Business Administration, Disaster Area 1 Office, 360 Rainbow Blvd, South 3rd Floor, Niagara Falls, NY 14303.

The interest rate for eligible small businesses and small agricultural cooperatives is 3.5 percent.

The numbers assigned for economic injury for this disaster are 9T4200 for New Jersey; and 9T4300 for New York.

(Catalog of Federal Domestic Assistance Program No. 59002.)

Dated: December 4, 2002.

Hector V. Barreto,

Administrator.

[FR Doc. 02-31190 Filed 12-10-02; 8:45 am]

BILLING CODE 8025-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB-6 (Sub-No. 398X)]

The Burlington Northern and Santa Fe Railway Company—Abandonment Exemption—in San Bernardino County, CA

The Burlington Northern and Santa Fe Railway Company (BNSF) has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon a 1.92-mile line of railroad between milepost 9.48 and milepost 11.40 in Redlands, San Bernardino County, CA. The line traverses United States Postal Service Zip Codes 92373 and 92374.

BNSF has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic on the line; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements of 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed. Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on January 11, 2003, unless stayed pending reconsideration. Petitions to stay that do not involve

environmental issues,¹ formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),² and trail use/rail banking requests under 49 CFR 1152.29 must be filed by December 20, 2002. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by January 2, 2003, with: Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423-0001.

A copy of any petition filed with the Board should be sent to BNSF's representative: Michael Smith, Freeborn & Peters, 311 S. Wacker Dr., Suite 3000, Chicago, IL 60606-6677.

If the verified notice contains false or misleading information, the exemption is void *ab initio*.

BNSF has filed an environmental report which addresses the abandonment's effects, if any, on the environment and historic resources. SEA will issue an environmental assessment (EA) by December 17, 2002. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423-0001) or by calling SEA, at (202) 565-1552. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.] Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), BNSF shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by BNSF's filing of a notice of consummation by December 12, 2003, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at "<http://WWW.STB.DOT.GOV>."

Decided: December 4, 2002.

¹ The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. See *Exemption of Out-of-Service Rail Lines*, 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

² Each OFA must be accompanied by the filing fee, which currently is set at \$1,100. See 49 CFR 1002.2(f)(25).

¹⁵ 17 CFR 200.30-3(a)(12).