Marc Menchel
Executive Vice President and
General Counsel

October 22, 2004

Ms. Katherine A. England
Assistant Director
Division of Market Regulation
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-1001

Re: **File No. SR-NASD-2004-159 -** Proposed Rule Change To Allow NASD To Review On A Pilot Basis Denial Of Access Complaints Related To The Alternative Display Facility

Dear Ms. England:

Pursuant to Rule 19b-4, enclosed please find the above-numbered rule filing. Also enclosed is a 3-l/2" disk containing the rule filing in Microsoft Word 7.0 to facilitate production of the Federal Register release.

If you have any questions, please contact Stephanie Dumont, Office of General Counsel, at (202) 728-8176; e-mail Stephanie.Dumont@nasd.com; or Philip Shaikun, Office of General Counsel, NASD, at (202) 728-8451; e-mail Philip.Shaikun@nasd.com. The fax number of the Office of General Counsel is (202) 728-8264.

Very truly yours,

Marc Menchel
Executive Vice President
and General Counsel

Enclosures

File No. SR-NASD-2004-159
Consists of 25 Pages
October 22, 2004

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C.

Form 19b-4

Proposed Rule Change

by

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

Pursuant to Rule 19b-4 under the
Securities Exchange Act of 1934

1. Text of Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), the National Association of Securities Dealers, Inc. ("NASD") is filing with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change to establish on a pilot basis new Rule 4400A, which would give NASD the authority to receive and review complaints against NASD Alternative Display Facility ("ADF") market participants that allege denial of direct or indirect access required pursuant to Rule 4300A. Rule 4400A further would set forth the procedures and review process for such complaints. The proposed rule change also would delegate authority to NASD's Market Regulation Committee ("MRC") to review denial of access determinations rendered in accordance with Rule 4400A.

The proposed rule change would apply during the time that the NASD Alternative Display Facility operates on a pilot basis. The Commission previously approved the ADF as a nine-month pilot to quote and trade only Nasdaq-listed securities.[1] NASD subsequently filed for immediate effectiveness proposed rule changes to extend the pilot until October 26, 2004.[2] The text of the proposed rule is set forth below. Proposed new language is underlined; proposed deletions are in brackets.

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[1] Exchange Act Release No. 46249 (July 24, 2002), 67 FR 49822 (July 31, 2002).

[2] Exchange Act Release No. 47633 (April 10, 2003), 68 FR 19043 (April 17, 2003); Exchange Act Release No. 49131 (January 27, 2004), 69 FR 5229 (Feb. 3, 2004).

PLAN OF ALLOCATION AND DELEGATION OF FUNCTIONS BY NASD TO SUBSIDIARIES

I. NASD, Inc.

The NASD, Inc. (referenced as "NASD"), the Registered Section 15A Association, is the parent company of the wholly-owned Subsidiaries NASD Regulation, Inc. (referenced individually as "NASD Regulation"), The Nasdaq Stock Market, Inc. (referenced individually as "Nasdaq")"), and NASD Dispute Resolution, Inc. (referenced individually as "NASD Dispute Resolution") (referenced collectively as the "Subsidiaries"). The term "Association" shall refer to the NASD and the Subsidiaries collectively.

A. through C. No Change.

D. Market Regulation Committee

The Market Regulation Committee shall exercise the functions contained in Rule 4000A Series in accordance with the procedures specified therein.

E. Access to and Status of Officers, Directors, Employees, Books, Records, and Premises of Subsidiaries

(No Change).

* * * * *

4400A. Review of Direct or Indirect Access Complaints

(a) Authority to Receive Complaints

(1) For the purposes of this Rule, a "direct or indirect access complaint" is a complaint against an NASD Market Participant, as defined in Rule 4300A(d)(4), that alleges a denial or limitation of access in contravention of Rule 4300A.

(2) Any member that wishes to file a direct or indirect access complaint shall submit a written complaint, via facsimile, personal delivery, courier or overnight mail, to

ADF Operations and simultaneously serve by the same means the respondent in accordance with Rule 9134(b). Officers of NASD designated by a President of NASD or one of its divisions shall have the authority to review and make a determination regarding direct or indirect access complaints.

(3) Based upon a review of the complaint and such investigation that the officer, in his or her sole discretion, may decide to conduct, the officer shall promptly determine whether there has been a denial of access by the NASD Market Participant. If the officer determines that there has been a denial of access, the officer shall direct a party or parties to take appropriate remedial action, including but not limited to restrictions regarding participation in the ADF until such remedial action is completed. NASD shall provide to the parties written notification of the determination by the close of business following the day the determination is rendered. The determination shall be sent to the facsimile number listed in the parties' contact questionnaire submitted to NASD pursuant to Article IV, Section 3 of NASD's By-Laws or another contact specifically designated by a party. The determination, and any remedial action directed for failure to comply with the determination, shall be effective when issued or as specified, and shall remain in effect during any review or appeal. The determination shall not constitute an estoppel as to NASD nor bind NASD in any subsequent administrative, civil, or disciplinary proceeding.

(b) Procedures for Review of Determinations

(1) Any member that seeks review of a determination issued pursuant to paragraph (a) hereof, shall submit a written appeal setting forth the grounds for such review. The written appeal shall be submitted via facsimile, personal delivery, courier or

overnight mail, to NASD and served by the same means on the opposite party, in accordance with Rule 9134(b), by close of the next business day after receipt of the written determination. Written appeals that are not served upon NASD and the opposite party by the close of the next business day after receipt of the written determination will not qualify for further administrative consideration, without prejudice as to the rights of a party to submit the dispute to arbitration or another adjudicatory forum.

(2) Once a written appeal has been received in accordance with subparagraph (b)(1) above:

(A) the party seeking review shall have up to twenty-four (24) hours, or such longer period as specified by NASD staff, to submit to NASD and the opposite party via facsimile, personal delivery, courier or overnight mail, any supporting written information concerning the appeal;

(B) after receipt of the foregoing supporting written information, the party served with the appeal shall have up to twenty-four (24) hours, or such longer period as specified by NASD staff, to submit any relevant written information to NASD and the party seeking review via facsimile, personal delivery, courier or overnight mail;

(C) if the party seeking review fails to serve the opposite party any written information required pursuant to this subparagraph, that party's written complaint will not qualify for further administrative consideration, without prejudice as to the rights of a party to submit the dispute to arbitration or another adjudicatory forum.

(3) Each member and/or person associated with a member involved in the review shall provide NASD with any information that it requests to resolve the matter on a timely basis notwithstanding the time parameters set forth in paragraph (b)(2) above.

(4) All requests for information pursuant to this rule shall be sent by the specified means to a receiving location that, from time to time, may be designated by NASD.

(c) Review by a Subcommittee of the Market Regulation Committee

(1) If a party has applied for review of a determination, and the procedural requirements of subparagraph (b) above have been satisfied, the determination shall be reviewed and a decision rendered by a three-member subcommittee comprised of current or former industry members of NASD's Market Regulation Committee. Upon consideration of the record, and after such hearings as it may in its discretion order, the subcommittee, in accordance with the requirements set forth in Rule 4300A, shall render a determination.

(2) The subcommittee shall provide written notification of its determination to the parties by the close of business following the day the determination is rendered. The subcommittee's determination shall not prejudice the rights of a party to submit the dispute to arbitration or another adjudicatory forum. The subcommittee's determination, and any remedial action directed for failure to comply with the determination, shall be effective when issued or as specified, constitute final NASD action, and remain in effect during any review or appeal. The subcommittee's determination shall not constitute an estoppel as to NASD nor bind NASD in any subsequent administrative, civil, or disciplinary proceeding.

* * * * *

(b) Not applicable.

(c) Not Applicable.

2. Procedures of the Self-Regulatory Organization

(a) The proposed rule change was approved by the Executive Committee of the Board of Governors of NASD on September 15, 2003 and authorized for filing with the SEC. No other action by NASD is necessary for the filing of the proposed rule change. Section 1(a)(ii) of Article VII of NASD By-Laws permits the Board of Governors of NASD to adopt amendments to NASD Rules without recourse to the membership for approval.

(b) Questions regarding this rule filing may be directed to Stephanie M. Dumont, Associate General Counsel, Office of General Counsel, Regulatory Policy and Oversight at (202) 728-8176 or Philip Shaikun, Associate General Counsel, Office of General Counsel, Regulatory Policy and Oversight at (202) 728-8451.

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

(a) Purpose

Background

On July 24, 2002, the Commission approved SR-NASD 2002-97, which authorizes NASD to operate the ADF on a pilot basis for nine months, pending the anticipated approval of SR-NASD-2001-90, which proposes to operate the ADF on a permanent basis.[3] NASD subsequently filed for immediate effectiveness proposed rule changes to extend the pilot until October 26, 2004.[4] As described in detail in SR-NASD-2001-90, the ADF is a quotation

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[3] Exchange Act Release No. 46249 (July 24, 2002), 67 FR 49822 (July 31, 2002).

[4] Exchange Act Release No. 47633 (April 10, 2003), 68 FR 19043 (April 17, 2003); Exchange Act Release No. 49131 (January 27, 2004), 69 FR 5229 (February 3, 2004).

collection, trade comparison, and trade reporting facility developed by NASD in accordance with the Commission's SuperMontage Approval Order[5] and in conjunction with Nasdaq's anticipated registration as a national securities exchange. [6]

For the duration of the pilot period, ADF will provide NASD market participants (market makers and ECNs) the ability to post quotations in Nasdaq securities and will provide all members that participate in the ADF the ability to view quotations and report transactions in Nasdaq securities to the Exclusive Securities Information Processor ("SIP") for Nasdaq-listed issues[7] for consolidation and dissemination of data to vendors and ADF market participants. The facility also will provide for trade comparison through the Trade Reporting and Comparison Service ("TRACS"). The facility further will provide for real-time data delivery to NASD for regulatory purposes, including enforcement of firm quote and related rules. It is anticipated that the ADF will operate on a pilot basis until the effective date of SR-NASD-2001-90, the approval of which would provide for the operation of the ADF on a permanent basis and an expansion of ADF-eligible securities to include all exchange-listed securities.

Order Access Rule

The ADF does not provide an order routing capability. Instead, pilot Rule 4300A requires market participants to provide direct electronic access to other market participants and to provide to all other NASD members direct electronic access or allow for indirect electronic access to the individual market participant's quote. This rule provides the means for ADF

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5 Exchange Act Release No. 43863 (January 19, 2001), 66 FR 8020 (January 26, 2001) (File No. SR-NASD-99-53).

6 Exchange Act Release No. 44396 (June 7, 2001), 66 FR 31952 (June 13, 2001) (File No. 10-131).

7 Nasdaq initially will be the designated SIP for all transactions and quotations in Nasdaq securities. During the pilot period, the SIP will distribute individual quotations for both ADF and Nasdaq market makers and ECNs.

market participants and other broker/dealers to access ADF quotes and, among other things, to meet the firm quote and locked and crossed quotation requirements.

Authority and Review Procedures

The proposed rule change would give NASD the authority to receive and review complaints against ADF market participants that allege denial of direct or indirect access required by Rule 4300A. The proposed rule change is not intended to include complaints that allege (1) a denial of direct or indirect access because of non-payment of fees for access to an NASD Market Participant's quotations that are imposed by the NASD Market Participant in accordance with SEC rules and regulations or otherwise or (2) a specific instance or group of instances over discrete time periods where an NASD Market Participant is alleged to have not honored its quotation in accordance with applicable SEC and NASD rules with respect to orders received electronically pursuant to NASD Rule 4300A.[8] Under the proposed rule change, the process for proper denial of access complaints would be as follows:

The complainant would be required to file a written complaint with ADF Operations via facsimile, personal delivery, courier or overnight mail, that specifically alleges denial of access to an ADF market participant's quotation. The complainant would be required to serve a copy of the complaint by the same means on the opposite party ("respondent") in accordance with NASD Rule 9134(b).

The denial of access complaint would be reviewed by an officer designated by a President of NASD or one its divisions to make a determination on the merits of the complaint. The officer may, at his or her discretion, conduct further investigation before rendering a decision as to whether there has been a denial of access in contravention of Rule 4300A. In the

event that the officer determines that there has been a denial of access, he or she may impose equitable remedies against the market participant, including restricting participation in the ADF. Any such remedies immediately would become effective and remain in place during the pendency of any further review or appeal.

The proposed rule change also would provide for a review of the initial determination by a three-member subcommittee consisting of current or former MRC members. A party seeking such review would be required to submit a written appeal to NASD by the close of business on the next business day after receipt of the initial determination and to simultaneously serve a copy of the written appeal to the opposite party. The party seeking review would be accorded twenty-four (24) hours, or a longer period determined by NASD staff, after submission of the appeal to provide to NASD and the opposing party any supporting written information concerning the appeal. The opposing party would then have the same amount of time to submit written documentation in support of its position. A three-member subcommittee of current or former MRC members would then render a final determination based on the record and any hearing it shall determine to hold in its discretion. The rule proposal would require the MRC subcommittee to provide written notification of its decision by the close of business the day following its determination. The decision and any remedial action ordered would be effective upon issuance of the written decision and remain in effect during the pendency of further appeals or other legal proceedings.

The MRC decision would constitute final NASD action, which could be appealed to the SEC. The decision would not prejudice the rights of the parties to subsequently submit the

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[8] NASD's Market Regulation Department has established a real-time process to receive, evaluate and act upon firm quote complaints.

matter to arbitration or another adjudicatory forum as appropriate. Furthermore, the decision would not operate as an estoppel or otherwise bind NASD in any subsequent legal proceeding.

Plan of Allocation and Delegation to Subsidiaries

Pursuant to Article XIII, Section 1 of the NASD By-Laws, the Board of Governors is vested with the authority to limit the activities, functions and operations of members for failure to comply with NASD rules. Section 2 of Article XIII permits the Board of Governors to delegate that authority. In accordance with those provisions, the proposed rule change also would amend the Plan of Allocation and Delegation to Subsidiaries to expressly delegate to the MRC the authority to review denial of access determinations and impose equitable remedies as set forth in Rule 4000A Series.

(b) Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, which requires, among other things, that NASD's rules 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 the procedures to hear denial of access complaints will maintain the integrity of the ADF and provide a fair process for review.

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

NASD 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, as amended.

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

6. Extension of Time Period for Commission Action

NASD does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Exhibits

1. Exhibit 1: Completed notice of proposed rule change for publication in the Federal Register.

Pursuant to the requirements of the Securities Exchange Act of 1934, NASD has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

NASD

BY:_____
Marc Menchel, Executive Vice President and General Counsel

Date: October 22, 2004

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- ; File No. SR-NASD-2004-159)

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Allow NASD To Review On A Pilot Basis Denial Of Access Complaints Related To The Alternative Display Facility

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 , the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons. For the reasons discussed below, the Commission is granting accelerated approval of the proposed rule change.

I. SELF-REGULATORY ORGANIZATION'S STATEMENT OF THE TERMS OF SUBSTANCE OF THE PROPOSED RULE CHANGE

NASD is proposing to amend its Rules to establish on a pilot basis new Rule 4400A, which would give NASD the authority to receive and review complaints against NASD Alternative Display Facility ("ADF") market participants that allege denial of direct or indirect access required pursuant to Rule 4300A. Proposed Rule 4400A further would set forth the procedures and review process for such complaints. The proposed rule change also would delegate authority to NASD's Market Regulation Committee ("MRC") to review denial of access determinations rendered in accordance with Rule 4400A. The text of the proposed rule

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1 15 U.S.C. 78s(b)(1).

2 17 CFR § 240.19b-4.

change is set forth below. Proposed new language is underlined; proposed deletions are in brackets.

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PLAN OF ALLOCATION AND DELEGATION OF FUNCTIONS BY NASD TO SUBSIDIARIES

I. NASD, Inc.

The NASD, Inc. (referenced as "NASD"), the Registered Section 15A Association, is the parent company of the wholly-owned Subsidiaries NASD Regulation, Inc. (referenced individually as "NASD Regulation"), The Nasdaq Stock Market, Inc. (referenced individually as "Nasdaq")"), and NASD Dispute Resolution, Inc. (referenced individually as "NASD Dispute Resolution") (referenced collectively as the "Subsidiaries"). The term "Association" shall refer to the NASD and the Subsidiaries collectively.

A. through C. No Change.

D. Market Regulation Committee

The Market Regulation Committee shall exercise the functions contained in Rule 4000A Series in accordance with the procedures specified therein.

E. Access to and Status of Officers, Directors, Employees, Books, Records, and Premises of Subsidiaries

(No Change).

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4400A. Review of Direct or Indirect Access Complaints

(a) Authority to Receive Complaints

(1) For the purposes of this Rule, a "direct or indirect access complaint" is a complaint against an NASD Market Participant, as defined in Rule 4300A(d)(4), that alleges a denial or limitation of access in contravention of Rule 4300A.

(2) Any member that wishes to file a direct or indirect access complaint shall submit a written complaint, via facsimile, personal delivery, courier or overnight mail, to ADF Operations and simultaneously serve by the same means the respondent in accordance with Rule 9134(b). Officers of NASD designated by a President of NASD or one of its divisions shall have the authority to review and make a determination regarding direct or indirect access complaints.

(3) Based upon a review of the complaint and such investigation that the officer, in his or her sole discretion, may decide to conduct, the officer shall promptly determine whether there has been a denial of access by the NASD Market Participant. If the officer determines that there has been a denial of access, the officer shall direct a party or parties to take appropriate remedial action, including but not limited to restrictions regarding participation in the ADF until such remedial action is completed. NASD shall provide to the parties written notification of the determination by the close of business following the day the determination is rendered. The determination shall be sent to the facsimile number listed in the parties' contact questionnaire submitted to NASD pursuant to Article IV, Section 3 of NASD's By-Laws or another contact specifically designated by a party. The determination, and any remedial action directed for failure to comply with the determination, shall be effective when issued or as specified, and shall remain in effect

during any review or appeal. The determination shall not constitute an estoppel as to NASD nor bind NASD in any subsequent administrative, civil, or disciplinary proceeding.

(b) Procedures for Review of Determinations

(1) Any member that seeks review of a determination issued pursuant to paragraph (a) hereof, shall submit a written appeal setting forth the grounds for such review. The written appeal shall be submitted via facsimile, personal delivery, courier or overnight mail, to NASD and served by the same means on the opposite party, in accordance with Rule 9134(b), by close of the next business day after receipt of the written determination. Written appeals that are not served upon NASD and the opposite party by the close of the next business day after receipt of the written determination will not qualify for further administrative consideration, without prejudice as to the rights of a party to submit the dispute to arbitration or another adjudicatory forum.

(2) Once a written appeal has been received in accordance with subparagraph (b)(1) above:

(A) the party seeking review shall have up to twenty-four (24) hours, or such longer period as specified by NASD staff, to submit to NASD and the opposite party via facsimile, personal delivery, courier or overnight mail, any supporting written information concerning the appeal;

(B) after receipt of the foregoing supporting written information, the party served with the appeal shall have up to twenty-four (24) hours, or such longer period as specified by NASD staff, to submit any relevant written information to

NASD and the party seeking review via facsimile, personal delivery, courier or overnight mail;

(C) if the party seeking review fails to serve the opposite party any written information required pursuant to this subparagraph, that party's written complaint will not qualify for further administrative consideration, without prejudice as to the rights of a party to submit the dispute to arbitration or another adjudicatory forum.

(3) Each member and/or person associated with a member involved in the review shall provide NASD with any information that it requests to resolve the matter on a timely basis notwithstanding the time parameters set forth in paragraph (b)(2) above.

(4) All requests for information pursuant to this rule shall be sent by the specified means to a receiving location that, from time to time, may be designated by NASD.

(c) Review by a Subcommittee of the Market Regulation Committee

(1) If a party has applied for review of a determination, and the procedural requirements of subparagraph (b) above have been satisfied, the determination shall be reviewed and a decision rendered by a three-member subcommittee comprised of current or former industry members of NASD's Market Regulation Committee. Upon consideration of the record, and after such hearings as it may in its discretion order, the subcommittee, in accordance with the requirements set forth in Rule 4300A, shall render a determination.

(2) The subcommittee shall provide written notification of its determination to the parties by the close of business following the day the determination is rendered. The subcommittee's determination shall not prejudice the rights of a party to submit the

dispute to arbitration or another adjudicatory forum. The subcommittee's determination, and any remedial action directed for failure to comply with the determination, shall be effective when issued or as specified, constitute final NASD action, and remain in effect during any review or appeal. The subcommittee's determination shall not constitute an estoppel as to NASD nor bind NASD in any subsequent administrative, civil, or disciplinary proceeding.

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II. SELF-REGULATORY ORGANIZATION'S STATEMENT OF THE PURPOSE OF, AND STATUTORY BASIS FOR, THE PROPOSED RULE CHANGE

In its filing with the Commission, NASD 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. NASD 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

(a) Purpose

Background

On July 24, 2002, the Commission approved SR-NASD 2002-97, which authorizes NASD to operate the ADF on a pilot basis for nine months, pending the anticipated approval of SR-NASD-2001-90, which proposes to operate the ADF on a permanent basis.[3] NASD subsequently filed for immediate effectiveness proposed rule changes to extend the pilot until

[3] Exchange Act Release No. 46249 (July 24, 2002), 67 FR 49822 (July 31, 2002).

October 26, 2004.[4] As described in detail in SR-NASD-2001-90, the ADF is a quotation collection, trade comparison, and trade reporting facility developed by NASD in accordance with the Commission's SuperMontage Approval Order[5] and in conjunction with Nasdaq's anticipated registration as a national securities exchange. [6]

For the duration of the pilot period, ADF will provide NASD market participants (market makers and ECNs) the ability to post quotations in Nasdaq securities and will provide all members that participate in the ADF the ability to view quotations and report transactions in Nasdaq securities to the Exclusive Securities Information Processor ("SIP") for Nasdaq-listed issues[7] for consolidation and dissemination of data to vendors and ADF market participants. The facility also will provide for trade comparison through the Trade Reporting and Comparison Service ("TRACS"). The facility further will provide for real-time data delivery to NASD for regulatory purposes, including enforcement of firm quote and related rules. It is anticipated that the ADF will operate on a pilot basis until the effective date of SR-NASD-2001-90, the approval of which would provide for the operation of the ADF on a permanent basis and an expansion of ADF-eligible securities to include all exchange-listed securities.

Order Access Rule

The ADF does not provide an order routing capability. Instead, pilot Rule 4300A requires market participants to provide direct electronic access to other market participants and

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4 Exchange Act Release No. 47633 (April 10, 2003), 68 FR 19043 (April 17, 2003); Exchange Act Release No. 49131 (January 27, 2004), 69 FR 5229 (Feb. 3, 2004).

5 Exchange Act Release No. 43863 (January 19, 2001), 66 FR 8020 (Jan. 26, 2001) (File No. SR-NASD-99-53).

6 Exchange Act Release No. 44396 (June 7, 2001), 66 FR 31952 (June 13, 2001) (File No. 10-131).

7 Nasdaq initially will be the designated SIP for all transactions and quotations in Nasdaq securities. During the pilot period, the SIP will distribute individual quotations for both ADF and Nasdaq market makers and ECNs.

to provide to all other NASD members direct electronic access or allow for indirect electronic access to the individual market participant's quote. This rule provides the means for ADF market participants and other broker/dealers to access ADF quotes and, among other things, to meet the firm quote and locked and crossed quotation requirements.

Authority and Review Procedures

The proposed rule change would give NASD the authority to receive and review complaints against ADF market participants that allege denial of direct or indirect access required by Rule 4300A. The proposed rule change is not intended to include complaints that allege (1) a denial of direct or indirect access because of non-payment of fees for access to an NASD Market Participant's quotations that are imposed by the NASD Market Participant in accordance with SEC rules and regulations or otherwise or (2) a specific instance or group of instances over discrete time periods where an NASD Market Participant is alleged to have not honored its quotation in accordance with applicable SEC and NASD rules with respect to orders received electronically pursuant to NASD Rule 4300A.[8] Under the proposed rule change, the process for proper denial of access complaints would be as follows:

The complainant would be required to file a written complaint with ADF Operations via facsimile, personal delivery, courier or overnight mail, that specifically alleges denial of access to an ADF market participant's quotation. The complainant would be required to serve a copy of the complaint by the same means on the opposite party ("respondent") in accordance with NASD Rule 9134(b).

The denial of access complaint would be reviewed by an officer designated by a President of NASD or one its divisions to make a determination on the merits of the complaint.

The officer may, at his or her discretion, conduct further investigation before rendering a decision as to whether there has been a denial of access in contravention of Rule 4300A. In the event that the officer determines that there has been a denial of access, he or she may impose equitable remedies against the market participant, including restricting participation in the ADF. Any such remedies immediately would become effective and remain in place during the pendency of any further review or appeal.

The proposed rule change also would provide for a review of the initial determination by a three-member subcommittee consisting of current or former MRC members. A party seeking such review would be required to submit a written appeal to NASD by the close of business on the next business day after receipt of the initial determination and to simultaneously serve a copy of the written appeal to the opposite party. The party seeking review would be accorded twenty-four (24) hours, or a longer period determined by NASD staff, after submission of the appeal to provide to NASD and the opposing party any supporting written information concerning the appeal. The opposing party would then have the same amount of time to submit written documentation in support of its position. A three-member subcommittee of current or former MRC members would then render a final determination based on the record and any hearing it shall determine to hold in its discretion.

The rule proposal would require the MRC subcommittee to provide written notification of its decision by the close of business the day following its determination. The decision and any remedial action ordered would be effective upon issuance of the written decision and remain in effect during the pendency of further appeals or other legal proceedings.

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[8] NASD's Market Regulation Department has established a real-time process to receive, evaluate and act upon firm quote complaints.

The MRC decision would constitute final NASD action, which could be appealed to the SEC. The decision would not prejudice the rights of the parties to subsequently submit the matter to arbitration or another adjudicatory forum as appropriate. Furthermore, the decision would not operate as an estoppel or otherwise bind NASD in any subsequent legal proceeding.

Plan of Allocation and Delegation to Subsidiaries

Pursuant to Article XIII, Section 1 of the NASD By-Laws, the Board of Governors is vested with the authority to limit the activities, functions and operations of members for failure to comply with NASD rules. Section 2 of Article XIII permits the Board of Governors to delegate that authority. In accordance with those provisions, the proposed rule change also would amend the Plan of Allocation and Delegation to Subsidiaries to expressly delegate to the MRC the authority to review denial of access determinations and impose equitable remedies as set forth in Rule 4000A Series.

(b) Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, which requires, among other things, that NASD's rules 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 the procedures to hear denial of access complaints will maintain the integrity of the ADF and provide a fair process for review.

(B) Self-Regulatory Organization's Statement on Burden on Competition

NASD 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, as amended.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. DATE OF EFFECTIVENESS OF THE PROPOSED RULE CHANGE AND TIMING FOR COMMISSION ACTION

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. by order approve such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. SOLICITATION OF COMMENTS

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change [as amended] is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Comments also may be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. SR-NASD-2004-159. This

file number should be included on the subject line if e-mail is used. To help us process and review comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. 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 Room. Copies of such filing will also be available for inspection and copying at the principal office of NASD. All submissions should refer to the file number in the caption above and should be submitted by [insert date 21 days from the date of publication].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Margaret H. McFarland
Deputy Secretary