

currently widely utilized by EAMs) running over a secure "virtual private network" over the Internet. CLICK™ through VPN was designed for EAMs that want a lower cost, lower bandwidth connection to the Exchange than the traditional, dedicated network CLICK™ connection. The Exchange also envisions that EAMs will use CLICK™ through VPN as a back-up or disaster recovery connection to the Exchange. CLICK™ through VPN is merely a different means of connecting to the Exchange's existing system. It does not change the operation of the Exchange's existing system, and it does not require any change to the Exchange's surveillance or communications rules. As a result, the Exchange is proposing to establish a monthly fee of \$200 per Terminal for CLICK™ through VPN. The purpose of the CLICK™ through VPN Fee is to cover the Exchange's costs in connection with maintaining the virtual private network.

## 2. Statutory Basis

The Exchange believes that the basis under the Act for this proposed rule change is the requirement under section 6(b)(4) of the Act<sup>6</sup> that an exchange have an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities.

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

The Exchange believes that the proposed rule change does not impose 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 not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

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

The foregoing rule change has become effective pursuant to section 19(b)(3) of the Act,<sup>7</sup> and Rule 19b-4(f)(2)<sup>8</sup> thereunder because it establishes or changes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of such

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.<sup>9</sup>

## 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, NW., Washington, DC 20549-0609. 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 Section. Copies of such filing will also be available for inspection and copying at the principal office of the ISE. All submissions should refer to the File No. ISE-2003-14 and should be submitted by August 7, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48161; File No. SR-NASD-2003-57]

### **Self-Regulatory Organizations; National Association of Securities Dealers, Inc; Order Granting Approval of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto, and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 3 to the Proposed Rule Change Relating to Revisions to the Uniform Application for Securities Industry Registration or Transfer (Form U-4) and Uniform Termination Notice for Securities Industry Registration (Form U-5)**

July 10, 2003.

## I. Introduction

On April 8, 2003, the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("SEC" or "Commission"), 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> a proposed rule change that would revise the Uniform Application for Securities Industry Registration or Transfer ("Form U-4") and Uniform Termination Notice for Securities Industry Registration ("Form U-5") to: (1) Add disclosure questions to the "Regulatory Disciplinary Actions" subsection of Section 14 (Disclosure Questions) of the Form U-4 to elicit information regarding events that might cause a person to be subject to a statutory disqualification as a result of additional categories of statutory disqualification in the Act created by passage of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley Act"); (2) add a Disclosure Reporting Page ("DRP") and a question to the Form U-5 that parallels the Form U-4 DRP relating to terminations for cause; (3) streamline the language associated with questions on the Form U-4 relating to fingerprinting requirements; and (4) make certain technical, clarifying, and conforming changes to facilitate accurate reporting and filing.

On April 16, 2003, NASD submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> On April 30, 2003, NASD

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

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

<sup>3</sup> See letter from Patrice M. Gliniecki, Vice President and Deputy General Counsel, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated April 16, 2003 ("Amendment No. 1"). In Amendment No. 1, NASD stated that the rule filing

<sup>6</sup> 15 U.S.C. 78(f)(b)(4).

<sup>7</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>8</sup> 17 CFR 19b-4(f)(2).

<sup>9</sup> For the purposes of calculating the 60-day abrogation period, the Commission considers the proposed rule change to have been filed on July 8, 2003, the date ISE filed Amendment No. 2.

<sup>10</sup> 17 CFR 200.30-3(a)(12).

submitted Amendment No. 2 to the proposed rule change.<sup>4</sup> The proposed rule change, as amended, was published for comment in the **Federal Register** on June 4, 2003.<sup>5</sup> The Commission received a comment on the proposal from the Association of Registration Management ("ARM") on June 25, 2003.<sup>6</sup> The NASD responded to this comment by amending the filing on July 1, 2003.<sup>7</sup> The Commission received a second comment on June 26, 2003<sup>8</sup> and the NASD responded to this comment on July 3, 2003.<sup>9</sup> This order approves the proposed rule change, as amended. In addition, the Commission is publishing notice to solicit comment on and is simultaneously approving, on an accelerated basis, Amendment No. 3 to the proposal.

## II. Summary of Comments and Response to Comments

### A. ARM Comment

As stated above, the Commission received the ARM Comment on the proposed rule change on June 25, 2003, in which ARM made two primary arguments. First, ARM asserted that the information being sought by the introduction of questions 14D(2)(a) and (b) on the Form U-4 is redundant of the information already being sought by existing question 14D on the Form U-4. Moreover, ARM argued that this addition of a new question would "present a monumental task to [the securities] industry" due to the sheer number of Form U-4 amendments that

would be effective on July 14, 2003, instead of June 30, 2003.

<sup>4</sup> See letter from Patrice M. Gliniecki, Vice President and Deputy General Counsel, NASD, to Katherine England, Assistant Director, Division, Commission, dated April 29, 2003 ("Amendment No. 2"). In Amendment No. 2, NASD amended the filing to correct typographical errors on pages 51 of 100 and 68 of 100 of the filing. On page 51 of 100, the NASD added the following language to renumbered question 14D(1)(e): "denied, suspended, or revoked your registration license or." On page 68 of 100, the NASD eliminated the word "or" before "commodities exchange."

<sup>5</sup> See Securities Exchange Act Release No. 47936 (May 28, 2003), 68 FR 33545.

<sup>6</sup> See letter from Mario Di Trapani, President, ARM, to Jonathan G. Katz, Secretary, Commission (June 24, 2003) ("ARM Comment").

<sup>7</sup> See letter from Patrice M. Gliniecki, Vice President and Deputy General Counsel, NASD, to Katherine A. England, Assistant Director, Division, Commission (July 1, 2003) ("Amendment No. 3") (The Commission notes that the NASD inadvertently numbered Amendment No. 3 as Amendment No. 1).

<sup>8</sup> See letter from Dan Jamieson ("Jamieson") to Jonathan Katz, Secretary, Commission (June 26, 2003) ("Jamieson Comment").

<sup>9</sup> See e-mail from Richard E. Pullano, Associate Vice President/Chief Counsel Registration & Disclosure, NASD, to Katherine A. England, Assistant Director, Division, Commission (July 3, 2003) ("NASD Response").

would be required. ARM noted its concern that, upon the introduction of the new question, "every registered person in NASD's WebCRD database (approximately 650,000 individuals) would \* \* \* immediately have an *incomplete* Form U-4 on file." Second, ARM argued that the expanded definition of statutorily disqualified person, contained in the Sarbanes-Oxley Act, extends to non-registered individuals as well as registered individuals. In order to capture non-registered persons (and decrease the administrative burden on member firms), ARM suggested an annual certification procedure in which broker-dealer employees would certify their answers to the proposed questions instead of adding the new questions to the Form U-4.

### B. Amendment No. 3

NASD responded to the ARM comment through Amendment No. 3. In Amendment No. 3, NASD conceded that there is an overlap between the information elicited by current Question 14D and proposed Question 14D(2), but that the literal language of current Question 14D does not specifically require individuals to report final orders of the National Credit Union Administration ("NCUA") or state credit union regulators. Further, NASD does not agree with ARM that it may be implied on the basis of the current Form U-4 definition of "investment-related" that such orders should be reported under current Question 14D. In light of the fact that the Sarbanes-Oxley Act created a new set of statutory disqualifications, NASD, representatives of other self-regulatory organizations, and state regulators (including representatives of the North American Securities Administrators Association ("NASAA")), made a policy decision that, although Question 14D currently requires firms to report most events that may cause an individual to become statutorily disqualified under the Sarbanes-Oxley Act, the forms should be amended to require firms and individuals to report all such information (in response to questions that specifically track the language of the Sarbanes-Oxley Act) in a new question.

NASD disagreed with ARM's suggestion that, as an alternative to including these questions on the forms, NASD should adopt a rule that would require firms to have their employees certify annually their answers to the proposed questions. First, NASD stated that it does not believe that this approach would save time and effort, since it likely would require firms to

establish a methodology for requesting and collecting this information on paper. Second, NASD noted its belief that firms and individuals should be required to report timely (rather than annually) all statutorily disqualifying events on the Forms, including statutorily disqualifying events pursuant to the Sarbanes-Oxley Act.

Also in Amendment No. 3, NASD provided an in depth discussion of how it intends to ease the administrative burden on firms with which the ARM Comment was concerned. The NASD noted that beginning July 14, 2003, it will implement procedures with respect to filing answers to proposed Question 14D(2).<sup>10</sup> NASD noted generally that a change to a disclosure question or the addition of a new disclosure question on Form U-4 requires the prompt filing of an amended Form U-4 only if a registered person is subject to an action or event that requires an affirmative response to the changed or new question or additional disclosure on detailed DRPs relating to the new or changed question. Firms making such amendments to Section 14 (Disclosure Questions) or any DRP also generally are required to complete Section 15D of the Form U-4 (the Individual/Applicant's Amendment Acknowledgment and Consent). If a registered person has not been the subject of an action or event that is elicited by a changed or new disclosure question, he or she need not answer the changed or new disclosure question until an amended Form U-4 filing is otherwise required (e.g., with the filing of a change of address, a request for a new registration category or license, or any new or amended responses to the questions in Section 14 or related DRPs).

Further, the NASD elaborated that, with respect to the proposed new Question 14D(2), firms need to determine immediately whether their registered persons have been subject to an action that requires reporting under the new question. Firms then will be required to amend Forms U-4 to respond to Question 14D(2) promptly (i.e., not later than 30 days from implementation of the new question or August 13, 2003). Registered persons will be required to amend their Form U-4 by August 13, 2003 only when a firm has determined that one of its registered persons must answer "yes" to any part of Question 14D(2). Firms must obtain a completed Form U-4 Section 15D (the Individual/Applicant's Amendment Acknowledgment and Consent) in such

<sup>10</sup> In addition, NASD will publish a Notice to Members explaining these procedures and publish these procedures on the NASD Web Site.

cases. These amendment filings must include completed DRP(s) covering the proceedings or action reported. Firms are required to maintain a copy, with original signatures, of these amendment filings.

While NASD noted its appreciation that this requirement places an administrative burden on firms, it stated the belief that the NASD has taken sufficient steps to mitigate the burden. First, as a practical matter, NASD stated that current Question 14D elicits virtually all information required by the Sarbanes-Oxley Act changes with the exception of NCUA and state credit union regulatory proceedings or actions. Consequently, according to NASD, registered persons already should have reported most information responsive to the Sarbanes-Oxley Act changes, with the exception of those proceedings or actions. While registered persons with affirmative answers to current Question 14D also may be required to report an affirmative answer to new Question 14D(2), a statistical review done by the NASD of information in the CRD system reflects that only about five percent of registered persons (approximately 3,600 individuals) have affirmative answers to current Question 14D. Moreover, based on preliminary discussions with the NCUA and state regulators, NASD noted its belief that the number of required amendment filings to report NCUA and state credit union regulatory proceedings/actions will be even smaller, involving less than one-tenth of one percent of registered persons. Thus, NASD attested that the number of Form U-4 amendments firms will be obligated to file to report affirmative answers to new Question 14D(2) by August 13, 2003 will be quite small. Firms will, however, be required to obtain Section 15D (the registered person's acknowledgement and consent), with original signatures, for these registered persons.

Moreover, in Amendment No. 3, NASD noted that any registered person who has not filed an amended Form U-4 reporting credit union regulatory proceedings within the specified 30-day period will be deemed to have represented that he or she has not been the subject of any such proceedings. Firms will be entitled to submit amended Forms U-4 on behalf of such registered persons without completing Section 15D, provided that the amended filing does not involve any other Section 14 Disclosure Question changes. Although firms will not be required to obtain an executed Section 15D from registered persons under these circumstances, the registered persons will be required to answer the new

14D(2) questions.<sup>11</sup> NASD cautioned that a registered person who fails timely to notify his or her member firm of a reportable credit union regulatory proceeding will be deemed to have made a false or incomplete filing, irrespective of whether his or her firm has made a specific inquiry of its registered persons about such proceedings. In addition, NASD emphasized that reporting such proceedings is an affirmative obligation of the registered person, which is not excused by a firm's failure specifically to inquire as to the existence of such proceedings.

Finally, NASD concluded in Amendment No. 3 that these procedures should avoid imposing on firms the unwarranted administrative burdens and costs associated with obtaining more than 600,000 copies of Form U-4 Section 15D with original signatures for registered persons who have no reportable credit union regulatory proceedings.

#### *C. Jamieson Comment*

The Jamieson Comment was received by the Commission on June 26, 2003 in which Jamieson made one primary argument that was germane to the NASD's proposed rule change. Specifically, Jamieson questioned the need and rationale for the proposal to add Question 7F to the Form U-5. That question would allow firms to report

<sup>11</sup> The CRD system will process such Form U4 filings as follows. If a registered person has a "yes" answer to any question in Questions 14A through J in the Disclosure Section of the Form U-4 on or after July 14, the CRD system will require that the firm filing an amended Form U-4 enter a response (by selecting the appropriate "yes" or "no" radio button) to new disclosure Question 14D(2) and also obtain a completed Section 15D. If those questions are not answered, the filing will fail the CRD system completeness check. For the sake of clarity, NASD notes that an amendment to a Form U-4 filing on or after July 14, for the purpose of adding a "yes" answer to Questions 14A through J, when previously there had been no "yes" answers, would require the firm filing the amendment to answer new disclosure Question 14D(2) and obtain a completed Section 15D.

If a registered person does not have a "yes" answer to questions 14A through J in the Disclosure Section of the Form U4, the CRD system will default new disclosure Question 14D(2) with a "no" response for any filings prepared for submission after implementation of the new questions, and the firm will not be required to obtain a completed Section 15D for the purposes of answering Question 14D(2). Form U4 amendments filed by the firm for such individuals will not fail the completeness check due to these new questions; however, by submitting the filing, firms will be representing that they are filing "no" answers to the new questions, unless they affirmatively change the "no" answer to "yes" before submitting the filing. Similarly, as discussed above, registered persons who have not filed an amended Form U-4 reporting credit union regulatory proceedings within the specified 30-day period will be deemed to have represented that they have not been the subject of any such proceedings.

that an individual was terminated after allegations of certain violations, fraud, wrongful taking of property, or failure to supervise, and would further clarify the terminated individual's obligation to report the termination on the Form U-4 in response to current Question 14J thereon.

#### *D. NASD Response*

The Commission received the NASD Response to the Jamieson Comment on July 3, 2003. NASD noted in its response that the new question 7F on the Form U-5 does not change the reporting obligations of either a broker-dealer or a registered person. Instead, the new question parallels Form U-4, Question 14J, relating to terminations for cause and will provide a firm with a specific question to answer if it has terminated a registered person under the circumstances identified in the question.

NASD further argued that affirmative responses to proposed Question 7F should clarify for NASD staff and terminated individuals the specific basis for and circumstances surrounding the termination (and whether it requires an affirmative answer on the corresponding Form U-4 question). The new question also should enable firms to specifically identify and provide supporting details regarding certain categories of terminations for cause. Currently, NASD staff must rely on the reason for termination provided by the terminating firm, which may provide an adequate response regarding the reason for termination, but may not provide sufficient detail to allow staff or the terminated person to determine whether an affirmative response is required to Form U-4, Question 14J. Similarly, NASD stated that although current Question 7B on Form U-5 elicits information relating to an internal review conducted by a firm relating to certain violations, fraud, wrongful taking of property, or failure to supervise, an affirmative answer to that question reports only that a terminated person was under internal review for those particular circumstances or conduct either at the time of termination or after; it does not, however, specifically identify whether the registered person was terminated for the reasons specified in the question.

### **III. Discussion and Commission's Findings**

The Commission has carefully reviewed the proposed rule change, the comments, and the NASD's responses thereto, and finds that the proposed rule change, as amended, is consistent with the Act and the rules and regulations

promulgated thereunder applicable to a national securities association,<sup>12</sup> and, in particular, with the requirements of Section 15A<sup>13</sup> of the Act. Specifically, the Commission finds that approval of the proposed rule change is consistent with Section 15A(b)(6)<sup>14</sup> of the Act because it is designed to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Commission finds that the proposed rule change, as amended, is reasonably designed to accomplish these ends by eliciting the reporting of events that may cause an individual to be subject to a statutory disqualification as that definition has been expanded by the Sarbanes-Oxley Act and, generally, making changes to the Forms U-4 and U-5 that should increase the accuracy and completeness of the information reported on the forms.

The Commission has carefully considered the relevant issues raised by ARM's and Jamieson's comments and is not persuaded by their arguments. With respect to the concerns raised in the ARM Comment, the Commission believes that the NASD has sufficiently responded through Amendment No. 3. Specifically, the Commission believes that the policy decision made in connection with the adoption of proposed Questions 14D(2)(a) and (b) to the Form U-4 was appropriate. In spite of the fact that certain overlap may exist between proposed Questions 14D(1) and 14D(2), the Commission agrees that the creation of a new set of statutory disqualifications by the U.S. Congress through the Sarbanes-Oxley Act is significant and warrants an additional question on the Form U-4 to assure accurate and complete reporting. Likewise, the Commission believes that an annual certification process would not be appropriate in this case.

In addition, the Commission believes that Amendment No. 3, regarding the implementation of the proposed rule change, proposes a fair and reasonable balance between the administrative burden that will be imposed upon member firms and the benefit that the proposed rule change will produce. The NASD's estimates with respect to the relatively low number of firms and representatives that will likely be affected by the new questions to be persuasive.

The Commission believes that the NASD has addressed the concerns

raised in the Jamieson Comment. The Commission believes it is important for NASD staff and terminated individuals to be able to determine the specific basis for and circumstances surrounding the termination (and whether it requires an affirmative answer on the corresponding Form U-4 question). The Commission also considers it significant that, although current Question 7B on Form U-5 elicits information relating to an internal review conducted by a firm, it does not specifically identify whether the registered person was terminated for the reasons specified in the question. Proposed Question 7F should provide this information.

Finally, the Commission, pursuant to Section 19(b)(2)<sup>15</sup> of the Act, finds good cause for approving Amendment No. 3 prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. As discussed above, the Commission believes that the NASD has responded to the concerns raised in the ARM Comment and has struck a fair and reasonable balance between the burden that the proposed rule change will impose upon member firms and the benefit that the proposed rule change will produce. In addition, the Commission notes that granting accelerated approval to Amendment No. 3 will facilitate the timely implementation of the proposed rule change and facilitate the NASD's meeting the pre-scheduled CRD systems change implementation date for these forms changes.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 3, including whether the amendment is 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 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 the NASD. All submissions should refer to File No.

SR-NASD-2003-57 and should be submitted by August 7, 2003.

#### V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>16</sup> that the proposed rule change (SR-NASD-2003-57), as modified by Amendment Nos. 1 and 2, be, and it hereby are, approved, and that Amendment No. 3 be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>17</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48159; File No. SR-NYSE-2002-64]

#### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc. To Amend the Interpretation of NYSE Rule 345A ("Continuing Education for Registered Persons")

July 10, 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 December 16, 2002, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On June 11, 2003, the NYSE filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice 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 proposed Interpretation of NYSE Rule 345A ("Continuing Education for Registered Persons") would require registered persons to complete a Firm Element Continuing Education Program, prior to December 31, 2006, or pass a qualification exam module prior to selling security futures contracts or

<sup>12</sup> 15 U.S.C. 78ff(b). In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

<sup>13</sup> 15 U.S.C. 78o-3.

<sup>14</sup> 15 U.S.C. 78o-3(b)(6).

<sup>15</sup> 15 U.S.C. 78s(b)(2).

<sup>16</sup> 15 U.S.C. 78s(b)(2).

<sup>17</sup> 17 CFR 200.30-2(a)(12).

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

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