

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-54931; File No. SR-NASD-2006-115)

December 13, 2006

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Order Granting Accelerated Approval to a Proposed Rule Change, as Amended, Relating to an NASD Trade Reporting Facility Established in Conjunction with the Boston Stock Exchange

I. Introduction

On September 29, 2006, the National Association of Securities Dealers, Inc. (“NASD”) filed with the Securities and Exchange Commission (“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 proposal to establish an NASD trade reporting facility (the “NASD/BSE TRF”) in conjunction with the Boston Stock Exchange, Inc. (“BSE”). The proposed rule change was published for comment in the Federal Register on October 18, 2006.<sup>3</sup> The Commission received one comment letter regarding the proposal.<sup>4</sup> The NASD filed Amendment No. 1 to the proposed rule change on December 5, 2006.<sup>5</sup> This order approves the proposal, as amended, on an accelerated basis.

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

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

<sup>3</sup> See Securities Exchange Act Release No. 54591 (October 12, 2006), 71 FR 61519.

<sup>4</sup> See letter from Alden Adkins, Executive Vice President, BSE, to Robert Colby, Deputy Director, Division of Market Regulation, Commission, dated October 24, 2006 (“BSE Letter”).

<sup>5</sup> In Amendment No. 1, the NASD revises the proposal to: (1) provide notice of final action taken by the NASD with respect to the proposal; (2) amend NASD Rule 4632D(a) to indicate that the NASD/BSE TRF will support the .W and .PRP trade report modifiers; (3) add NASD Rule 4632D(g)(2)(G) to define the term “cancelled” for purposes of determining the deadline for reporting a trade cancellation; (4) add NASD Rule 4632D(i) and 6130D(g) to expressly prohibit the aggregating of trades for purposes of trade reporting to the NASD/BSE TRF; (5) add NASD Rule 6130D(f) to provide trade report modifiers for certain transactions reported to the NASD/BSE TRF in accordance with Section 3 of Schedule A to the NASD By-Laws; and (6) make various technical changes. In addition, in Amendment No. 1 the NASD makes conforming changes to the rules of

In addition, the Commission is publishing notice to solicit comments on the proposed rule change as amended by Amendment No. 1.

II. Description of the Proposal

A. NASD/BSE TRF

The NASD proposes to establish a new trade reporting facility, the NASD/BSE TRF, that will provide NASD members with an additional facility for reporting transactions in NMS stocks, as defined in Rule 600(b)(47) of Regulation NMS under the Act,<sup>6</sup> that are effected otherwise than on an exchange. The NASD/BSE TRF will be operated by the NASD/BSE Trade Reporting Facility LLC (“NASD/BSE TRF LLC”). The NASD/BSE TRF structure and rules are substantially similar to the trade reporting facilities established by the NASD and the Nasdaq Stock Market, Inc. (the “NASD/Nasdaq TRF”) and by the NASD and the National Stock Exchange, Inc. (the “NASD/NSX TRF”), which the Commission approved in June 2006<sup>7</sup> and November 2006,<sup>8</sup> respectively.

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the trade reporting facility operated by the NASD and the National Stock Exchange, Inc. (the “NASD/NSX TRF”) by adding NASD Rules 4632C(h) and 6130C(g) to expressly prohibit the aggregating of trades for purposes of trade reporting to the NASD/NSX TRF.

<sup>6</sup> 17 CFR 242.600(b)(47).

<sup>7</sup> See Securities Exchange Act Release No. 54084 (June 30, 2006), 71 FR 38935 (July 10, 2006) (order approving File No. SR-NASD-2005-087) (“NASD/Nasdaq TRF Approval Order”). Although the NASD/Nasdaq TRF originally accepted transaction reports only for Nasdaq Global Market and Nasdaq Capital Market securities and convertible bonds listed on the Nasdaq Stock Market LLC (“Nasdaq Exchange”), the Commission recently approved an NASD proposal that, among other things, amended the rules of the NASD/Nasdaq TRF to allow NASD members to report transactions in NMS stocks to the NASD/Nasdaq TRF. See Securities Exchange Act Release No. 54798 (November 21, 2006), 71 FR 69156 (November 29, 2006) (order approving File No. SR-NASD-2006-104) (“NASD/Nasdaq TRF November Order”).

<sup>8</sup> See Securities Exchange Act Release No. 54715 (November 6, 2006), 71 FR 66354 (November 14, 2006) (order approving File No. SR-NASD-2006-115) (“NASD/NSX TRF Approval Order”).

The NASD/BSE TRF will be a facility, as defined under the Act,<sup>9</sup> of the NASD, subject to regulation by the NASD and to the NASD's registration as a national securities association. NASD members<sup>10</sup> that match and/or execute orders internally or through proprietary systems may submit reports of these trades, with appropriate information and modifiers, to the NASD/BSE TRF, which will then report them to the appropriate exclusive securities information processor ("SIP").<sup>11</sup> NASD/BSE TRF transaction reports disseminated to the media will include a modifier indicating the source of the transactions that will distinguish them from transactions executed on or through the BSE. The NASD/BSE TRF will provide the NASD with a real-time copy of each trade report for regulatory review purposes. At the option of the participant, the NASD/BSE TRF may provide the necessary clearing information regarding transactions to the National Securities Clearing Corporation.

B. Limited Liability Company Agreement of the NASD/BSE TRF LLC

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<sup>9</sup> 15 U.S.C. 78c(a)(2).

<sup>10</sup> Only NASD members in good standing may participate in the NASD/BSE TRF. See NASD Rule 6120D(a)(1). NASD/BSE TRF participants also must meet the minimum requirements set forth in NASD Rule 6120D, including the execution of, and continuing compliance with, a Participant Application Agreement; membership in, or maintenance of, an effective clearing arrangement with a participant of a registered clearing agency registered pursuant to the Act; and the acceptance and settlement of each trade that the NASD/BSE TRF identifies as having been effected by the participant. NASD Rule 6190D, "Termination of Access," allows the NASD to terminate access to the NASD/BSE TRF if a participant fails to: (1) abide by the rules or operating procedures of the trade reporting service of the NASD/BSE TRF or the NASD; (2) honor contractual agreements entered into with the NASD or its subsidiaries or the Participant Application Agreement; or (3) pay promptly for services rendered to the trade reporting service of the NASD/BSE TRF.

<sup>11</sup> The NASD/BSE TRF will have controls in place to ensure that transactions reported to the NASD/BSE TRF that are significantly away from the current market will not be submitted to the SIP. The NASD represents that this is consistent with current practice and notes that the Alternative Display Facility ("ADF") and the NASD/Nasdaq TRF currently do not submit such trades to the SIP.

The NASD and the BSE will jointly own the NASD/BSE TRF LLC, which will operate the NASD/BSE TRF. The NASD has filed the Limited Liability Company Agreement of the NASD/BSE TRF LLC (the “LLC Agreement”) as part of the current proposal. The LLC Agreement recognizes the NASD as having sole regulatory responsibility for the NASD/BSE TRF. The NASD, as the “SRO Member” under the LLC Agreement, will perform the “SRO Responsibilities”<sup>12</sup> for the NASD/BSE TRF. The BSE, as the “Business Member” under the LLC Agreement, will be primarily responsible for the management of the facility’s business affairs to the extent those activities are not inconsistent with the regulatory and oversight functions of the NASD. The BSE will pay the cost of regulation and provide systems to enable NASD members to report trades to the NASD/BSE TRF. The BSE will be entitled to the profits and losses, if any, derived from the operation of the NASD/BSE TRF.<sup>13</sup> Under Section 9(d) of the LLC Agreement, each Member agrees to comply with the federal securities laws and the rules and regulations thereunder and to cooperate with the Commission pursuant to its regulatory authority and the provisions of the LLC Agreement.

The NASD/BSE TRF LLC will be managed by, or under the direction of, a Board of Directors to be established by the NASD and the BSE. The NASD will have the right to designate at least one Director, the SRO Member Director, to the NASD/BSE TRF LLC Board of Directors. The SRO Director must approve, by consent, all “Major Actions,” as defined in Section 10(e) of the LLC Agreement. In addition, each Director agrees to comply with the

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<sup>12</sup> The LLC Agreement defines “SRO Responsibilities” as those duties or responsibilities of an self-regulatory organization (“SRO”) pursuant to the Act and the rules promulgated thereunder, including but not limited to those set out in Section 9(a) of the LLC Agreement. See Schedule A of the LLC Agreement.

<sup>13</sup> See Section 15 of the LLC Agreement.

federal securities laws and the rules and regulations thereunder and to cooperate with the Commission and the SRO Member pursuant to their regulatory authority.<sup>14</sup> Further, when discharging her or her duties as a member of the Board of Directors, each Director must take into consideration whether his or her actions as a Director would cause the NASD/BSE TRF or either Member to engage in conduct that would be inconsistent with the purposes of the Act.<sup>15</sup>

The initial term of the LLC Agreement is three years. During that time, until the NASD/BSE TRF reaches “Substantial Trade Volume” (defined as 250,000 trades or more per day for three consecutive months), the BSE may terminate the arrangement for convenience. After the NASD/BSE TRF reaches Substantial Trade Volume, either Member may terminate the LLC Agreement by providing to the other Member prior written notice of at least one year. In addition, the NASD may terminate in the event its status or reputation as an SRO is called into jeopardy by the actions of the BSE or the NASD/BSE TRF LLC. If the NASD/BSE TRF LLC arrangement is terminated, the NASD represents that it would be able to fulfill all of its regulatory obligations with respect to over-the-counter (“OTC”) trade reporting through its other facilities, including the NASD/Nasdaq TRF, the ADF, and the ITS/CAES System.

C. NASD/BSE TRF Rules

1. NASD Rule 4000D and 6000D Series

The NASD proposes to adopt the NASD Rule 4000D Series, “The NASD/BSE Trade Reporting Facility,” and 6000D Series, “NASD/BSE Trade Reporting Facility Systems and Programs,” to establish, respectively, trade reporting and clearing and comparison rules for the

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<sup>14</sup> See Section 10(b) of the LLC Agreement.

<sup>15</sup> Id.

NASD/BSE TRF.<sup>16</sup> The NASD Rule 4000D and 6000D Series are substantially similar to the NASD Rule 4000 and 6000 Series governing the NASD/Nasdaq TRF and the NASD Rule 4000C and 6000C Series governing the NASD/NSX TRF.<sup>17</sup>

D. Amendment No. 1

Amendment No. 1 makes several changes to the proposal. In the original proposal, proposed NASD Rule 4632D(a)(7) indicated that stop stock transactions, transactions at prices based on average-weighting or other special formulae, and certain transactions that reflected a price different from the current market could not be reported to the NASD/BSE TRF and had to be reported to the NASD via an alternative electronic mechanism. Amendment No. 1 revises NASD Rule 4362D(a) to indicate that the NASD/BSE TRF will support these trades and thus will support the .W and .PRP trade report modifiers. Specifically, new NASD Rules 4632D(a)(4) and (a)(9) require NASD members to append the .W trade report modifier to, respectively, transaction reports occurring at prices based on average-weighting or other special pricing formulae and to reports of stop stock transactions. New NASD Rule 4362D(a)(7) will require members to append the .PRP trade report modifier to transaction reports that reflect a price different from the current market when the execution price is based on a prior reference point in time. New NASD Rules 43632D(a)(4), (7), and (9) are substantially the same as current NASD Rules 4632(a)(4), (7), and (9), which apply to the NASD/Nasdaq TRF.

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<sup>16</sup> The NASD notes that all other NASD rules that apply to OTC trading generally will apply to trades reported to the NASD/BSE TRF.

<sup>17</sup> Some differences among the rules governing the governing the trade reporting facilities result from differences among the trade reporting systems of the facilities. For example, because neither the NASD/BSE TRF or the NASD/NSX TRF has a trade comparison functionality, the rules governing the NASD/BSE TRF and the NASD/NSX TRF contain

In addition, Amendment No. 1 adds NASD Rule 6130D(f), which requires the use of specified trade report modifiers for the reporting of certain types of transactions that are assessed a regulatory transaction fee in accordance with Section 3 of Schedule A to the NASD By-Laws. Specifically, NASD Rule 6130D(f) provides trade report modifiers for the reporting of odd-lot transactions, away from the market sales, and purchases or sales of securities effected upon the exercise of an over-the-counter option. These transactions are not to be reported to the NASD/BSE TRF for purposes of publication.<sup>18</sup> NASD Rule 6130D(f) is substantially similar to NASD Rule 6130(g), which became effective on December 1, 2006.<sup>19</sup>

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no provisions relating to trade matching, trade acceptance, or aggregate volume matching. The rules governing the NASD/Nasdaq TRF contain such provisions.

<sup>18</sup> See NASD Rule 4632D(f).

<sup>19</sup> See Securities Exchange Act Release No. 53977 (June 12, 2006), 71 FR 43976 (June 16, 2006) (order approving File No. SR-NASD-2006-055). See also Securities Exchange Act Release No. 54909 (December 11, 2006) (notice of filing and immediate effectiveness of File No. SR-NASD-2006-129) (proposing a substantially similar rule for the NASD/NSX TRF) (“December Notice”).

Amendment No. 1 also adds NASD Rules 4632D(i) and 6130D(g) to the rules of the NASD/BSE TRF, and makes conforming changes to the rules of the NASD/NSX TRF.<sup>20</sup> These rules add express provisions prohibiting the aggregation of trades for purposes of trade reporting to the NASD/BSE TRF and the NASD/NSX TRF. The NASD notes that the original proposal indicated that members would not be permitted to aggregate individual executions of orders in a security at the same price into a single transaction report submitted to the NASD/BSE TRF. Similarly, the NASD notes that aggregation is not permitted for purposes of trade reporting to the NASD/NSX TRF.<sup>21</sup> For the sake of clarity, and to maintain consistency among the rules governing its trade reporting facilities, the NASD has determined to add an express prohibition on aggregating trades to the rules of both the NASD/BSE TRF and the NASD/NSX TRF.

Finally, Amendment No. 1 contains several technical changes. In this regard, Amendment No. 1 adds NASD Rule 4632D(g)(2)(G) for purposes of determining the deadline for reporting a trade cancellation to the NASD/BSE TRF. This paragraph is identical to NASD Rule 4632(g)(2)(G) of the NASD/Nasdaq TRF rules and was omitted inadvertently from NASD Rule 4632D. Amendment No. 1 also replaces an incorrect reference in NASD Rule 6190D to the “Applicant Participation Agreement” with a reference to the “Participant Application Agreement;” replaces a reference in NASD Rule 4632D(d)(1) to “Registered ECNs” with a reference to “Reporting ECNs,” which is the defined term in NASD Rule 6110D; revises NASD Rule 6130D(d)(2) to require trade reports to include the number of shares or bonds; and revises NASD Rule 4632D to clarify a reference to a Non-Reporting Member or other contra party, and to refer to a “Security Identification Symbol” rather than a “stock symbol.”

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<sup>20</sup> See NASD Rules 4632C(h) and 6130C(g).



E. Implementation

In light of the systems changes necessary for the NASD to implement the NASD/BSE TRF for non-Nasdaq exchange-listed securities, the NASD proposes to implement the proposal in two phases. Specifically, the NASD proposes to implement the proposed rule change with respect to Nasdaq-listed equity securities and convertible debt on the first day of operation of the NASD/BSE TRF, and to implement the proposed rule change with respect to non-Nasdaq exchange-listed securities at a later date.

The NASD will announce the implementation of the first phase of the proposed rule change no later than 30 days following Commission approval of the proposal, and the second phase no later than 90 days following Commission approval.

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<sup>21</sup> See NASD/NSX TRF Approval Order, supra note 8.

### III. Summary of Comments

The Commission received one comment letter regarding the proposal.<sup>22</sup> The commenter argued that the NASD/NSX TRF would have an unfair competitive advantage over the NASD/BSE TRF if the NASD/NSX TRF were approved prior to the NASD/BSE TRF. Specifically, the commenter believes that “the first regional exchange operated TRF [will] capture the lion’s share of members seeking an alternative to the Nasdaq operated TRF.”<sup>23</sup> Citing the Congressional finding in Section 11A(a)(1)(C)(ii) of the Act<sup>24</sup> that “[i]t is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure...fair competition among brokers and broker-dealers, among exchange markets, and between exchange markets and markets other than exchange markets. . .,” the commenter asked the Commission to approve the current proposal and the NASD/NSX TRF proposal simultaneously. In support of this argument, the commenter also noted the similarities between the NASD/NSX TRF proposal and the current proposal.

### IV. Discussion

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.<sup>25</sup> In particular, the Commission finds that the proposed rule change, as amended, is consistent with Section 15A(b)(6) of the Act<sup>26</sup> in that it is designed to prevent

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<sup>22</sup> See BSE Letter, supra note 4.

<sup>23</sup> See BSE Letter, supra note 4.

<sup>24</sup> 15 U.S.C. 78k-1(a)(1)(C)(ii).

<sup>25</sup> In approving this proposed rule change, the Commission has considered the proposal’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>26</sup> 15 U.S.C. 78o-3(b)(6).

fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The NASD/BSE TRF will provide NASD members with an additional mechanism for reporting transactions in exchange-listed securities effected otherwise than on an exchange. Rule 601 of Regulation NMS requires the NASD to file a transaction reporting plan regarding transactions in listed equity and Nasdaq securities that are executed by its members otherwise than on a national securities exchange.<sup>27</sup> Under Rule 603 of Regulation NMS,<sup>28</sup> national securities exchanges and national securities associations act jointly pursuant to an effective national market system plan to disseminate consolidated information, including a national best bid and offer, and quotations for and transactions in NMS stocks. Today, the NASD operates the ADF,<sup>29</sup> NASD/Nasdaq TRF<sup>30</sup> and the NASD/NSX TRF,<sup>31</sup> and the ITS/CAES System<sup>32</sup> for

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<sup>27</sup> Under Rule 601(b) of Regulation NMS, broker-dealers are prohibited from executing a transaction otherwise than on a national securities exchange unless there is an effective transaction reporting plan. NASD Rule 5000 requires NASD members to report transactions in exchange-listed securities effected otherwise than on an exchange to NASD.

<sup>28</sup> 17 CFR 242.603.

<sup>29</sup> Currently, the ADF only accepts quotes and trades in Nasdaq-listed securities. The Commission recently approved a proposal to extend the ADF to non-Nasdaq exchange-listed securities. See Securities Exchange Act Release No. 54537 (September 28, 2006), 71 FR 59173 (October 6, 2006) (order approving File No. SR-NASD-2006-091).

<sup>30</sup> See NASD/Nasdaq TRF Approval Order and NASD/Nasdaq TRF November Order, supra note 7.

<sup>31</sup> See NASD/NSX TRF Approval Order, supra note 8.

<sup>32</sup> The ITS/CAES System provides a means by which NASD and its members can comply with the terms of the Intermarket Trading System Plan (“ITS Plan”). The ITS/CAES System reports trades in non-Nasdaq exchange-listed securities that are effected in the ITS/CAES System or in NASD members’ proprietary systems. The Commission recently approved an NASD proposal to amend the ITS/CAES System to reflect the operation of the Nasdaq Exchange as a national securities exchange. See NASD/Nasdaq TRF November Order, supra note 7.

collecting transaction reports. In addition, the NASD is a participant in the Nasdaq UTP Plan<sup>33</sup> with regard to transaction reports in Nasdaq-listed securities, and the CTA Plan<sup>34</sup> with regard to securities listed on exchanges other than Nasdaq.

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<sup>33</sup> Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis (“Nasdaq UTP Plan”).

<sup>34</sup> Consolidated Tape Association Plan (“CTA Plan”).

Upon approval of the NASD/BSE TRF, the NASD will operate another facility for the purposes of accepting transaction reports from its members. The Commission has previously recognized that the Act does not prohibit the NASD from establishing multiple facilities for fulfilling its regulatory purposes.<sup>35</sup> Indeed, as noted above, the NASD currently operates multiple facilities for fulfilling its regulatory obligations. Therefore, the Commission believes that it is consistent with the Act for the NASD to establish the NASD/BSE TRF for purposes of fulfilling its regulatory obligations. The NASD represented that if the NASD/BSE TRF LLC arrangement is terminated, the NASD will be able to fulfill all of its regulatory obligations with respect to OTC trade reporting through its other facilities, including the NASD/Nasdaq TRF and the ADF.

The NASD represented that it will have an integrated audit trail of all trade reporting facilities, ADF, and ITS/CAES System transactions, and will have integrated surveillance capabilities. NASD has represented that it expects to automate its integrated audit trail and surveillance by the end of the fourth quarter of 2006 for Nasdaq-listed securities and by the end of the first quarter of 2007 for non-Nasdaq exchange-listed securities. The Commission believes that an integrated audit trail and integrated surveillance capabilities are important to the NASD's ability to conduct effective surveillance of OTC trading in exchange-listed securities when transactions in those securities can be reported to one of the NASD's trade reporting facilities, the ADF, or the ITS/CAES System.

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<sup>35</sup> See NASD/Nasdaq TRF Approval Order, supra note 7.

A commenter suggested that the Commission approve the current proposal simultaneously with the NASD/NSX TRF.<sup>36</sup> As noted above, the Commission has approved the NASD's proposal to establish the NASD/NSX TRF.<sup>37</sup> The Commission stated in the NASD/NSX TRF Approval Order that it did not believe that it should delay the operation of the NASD/NSX TRF until other trade reporting facilities are ready to operate.<sup>38</sup> The Commission stated, further, that it believed that approving the NASD/NSX TRF and allowing it to begin operations immediately could enhance competition by providing a new facility, in addition to those that are operating currently, for reporting OTC trades in exchange-listed securities.<sup>39</sup>

A. NASD/BSE TRF Rules

Most of the provisions in the new NASD Rule 4000D and 6000D Series, which establish the trade reporting and clearing and comparison rules for the NASD/BSE TRF, are substantially similar to the NASD Rule 4000 and 6000 Series and the NASD Rule 4000C and 6000C Series that the Commission approved for the NASD/Nasdaq TRF<sup>40</sup> and the NASD/NSX TRF,<sup>41</sup> respectively. Other provisions in the rules of the NASD/BSE TRF are substantially similar to

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<sup>36</sup> See BSE Letter, supra note 4.

<sup>37</sup> See NASD/NSX TRF Approval Order, supra note 8.

<sup>38</sup> See NASD/NSX TRF Approval Order, supra note 8.

<sup>39</sup> See NASD/NSX TRF Approval Order, supra note 8.

<sup>40</sup> See NASD/Nasdaq TRF Approval Order, supra note 7.

<sup>41</sup> See NASD/NSX TRF Approval Order, supra note 8.

existing NASD rules.<sup>42</sup> The Commission finds that the provisions of the NASD Rule 4000D and 6000D Series that are substantially similar to existing NASD rules are consistent with Act.

In Amendment No. 1, the NASD proposes to adopt rules for the NASD/NSX TRF and the NASD/BSE TRF that expressly prohibit members from aggregating trades for purposes of trade reporting to the NASD/NSX TRF and the NASD/BSE TRF.<sup>43</sup> The NASD notes that both its initial NASD/BSE TRF proposal and the NASD/NSX TRF proposal<sup>44</sup> stated this prohibition, which the NASD now proposes to include in the rules of the NASD/NSX TRF and the NASD/BSE TRF. The Commission finds that these provisions are consistent with the Act because they will help to clarify the rules governing the NASD/NSX TRF and the NASD/BSE TRF.

In addition, Amendment No. 1 revises NASD Rules 4632D(a)(4), (7), and (9) to reflect that the NASD/BSE TRF will support the .W and .PRP modifiers, and adds NASD Rule NASD Rule 4632D(g)(2)(G), which is identical to NASD Rule 4632(g)(2)(G), and was inadvertently omitted. Amendment No. 1 also proposes to adopt NASD Rule 6130D(f), which provides trade report modifiers for certain transactions and is substantially similar to NASD Rules 6130(g) and

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<sup>42</sup> For example, the two- and three-party trade reporting rules in NASD Rules 4632D(c) and (d) are substantially similar to the two- and three-party trade reporting rules of the ADF. See NASD Rules 4632A(c) and (d). Similarly, the provisions of NASD Rule 6130D(f), which provide trade report modifiers for certain transactions that are assessed a regulatory transaction fee in accordance with Section 3 of Schedule A to the NASD By-Laws, are substantially similar to NASD Rule 6130(g), which governs the NASD/Nasdaq TRF. The NASD also adopted substantially similar provisions for the NASD/NSX TRF in NASD Rule 6130C(f). See December Notice, supra note 19.

<sup>43</sup> See NASD Rules 4632C(h) and 6130C(g) (governing the NASD/NSX TRF); and 4632D(i) and 6130D(g) (governing the NASD/BSE TRF).

<sup>44</sup> See NASD/NSX TRF Approval Order, supra note 8.



6130C(f).<sup>45</sup> Because proposed NASD Rule 6130D(f), and the proposed changes to NASD Rule 4632D(a) and NASD Rule 4632D(g), adopt rule provisions for the NASD/BSE TRF that are identical or substantially similar to existing NASD rules, the Commission finds that these changes are consistent with the Act. Similarly, Commission finds that the technical changes described in Section II.D. above, which correct errors in the text of the NASD/BSE TRF's rules, are consistent with the Act because they will help to ensure the accuracy of the NASD's rules.

B. NASD/BSE TRF LLC

The NASD and the BSE will jointly own the NASD/BSE TRF LLC, which will operate the NASD/BSE TRF. The NASD has filed the LLC Agreement as part of the current proposal.<sup>46</sup> The LLC Agreement is substantially similar to the limited liability company agreement of the NASD/Nasdaq TRF LLC ("NASD/Nasdaq TRF LLC Agreement") that the Commission approved in the NASD/Nasdaq TRF Approval Order<sup>47</sup> and to the limited liability company agreement of the NASD/NSX TRF that the Commission approved in the NASD/NSX TRF Approval Order.<sup>48</sup> Accordingly, for the reasons discussed in the NASD/Nasdaq TRF Approval Order with respect to the NASD/Nasdaq TRF LLC Agreement, the Commission finds that the LLC Agreement is consistent with the Act.<sup>49</sup>

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<sup>45</sup> See note 42, supra.

<sup>46</sup> The Commission notes that any changes to the LLC Agreement that are stated policies, practices, or interpretations of the NASD, as defined in Rule 19b-4 under the Act, must be filed with the Commission pursuant to Section 19(b) of the Act and Rule 19b-4 thereunder.

<sup>47</sup> See note 7, supra.

<sup>48</sup> See note 8, supra.

<sup>49</sup> The Commission incorporates by reference the discussion and analysis of the NASD/Nasdaq TRF LLC and NASD/Nasdaq TRF LLC Agreement set forth in the NASD/Nasdaq TRF Approval Order, supra note 7.

The Commission notes that the NASD/BSE TRF LLC, as the operator of an NASD facility, is an integral part of a SRO registered pursuant to the Act and, as such, is subject to obligations imposed by the Act. The Commission underscores that these obligations endure so long as the NASD/BSE TRF LLC operates an NASD facility.

The Commission believes that the LLC Agreement makes clear that the NASD will have sole regulatory responsibility for the activities of NASD members related to the facility operated by the NASD/BSE TRF LLC and provides the NASD with certain rights that are intended to preserve its regulatory authority and control.<sup>50</sup> The Commission believes that the provisions of the LLC Agreement will allow the NASD to carry out its self-regulatory responsibilities with respect to its facility and that both the Commission and the NASD will have sufficient regulatory jurisdiction over the controlling parties of the NASD/BSE TRF LLC to carry out their responsibilities under the Act.

For example, under the LLC Agreement, each Member and each director of the NASD/BSE TRF LLC agrees to comply with the federal securities laws and rules and regulations thereunder and to cooperate with the Commission pursuant to its regulatory authority and the provisions of the LLC Agreement. In addition, the NASD and the BSE acknowledge in the LLC Agreement that — to the extent directly related to the NASD/BSE TRF LLC's activities — their books, records, premises, officers, directors, governors, agents, and employees will be deemed to be the books, records, premises, officers, directors, governors, agents, and employees of the NASD itself and its affiliates for the purposes of, and subject to oversight pursuant to, the

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<sup>50</sup> For example, pursuant to the LLC Agreement, the NASD must consent before certain “Major Actions,” as defined in the LLC Agreement, with respect to the NASD/BSE TRF LLC are effective.

Act. This provision will reinforce the Commission's ability to exercise its authority under Section 19(h)(4) of the Act<sup>51</sup> with respect to the officers and directors of the NASD/BSE TRF LLC because all such officers and directors—to the extent that they are acting in matters related to the NASD/BSE TRF LLC's activities—would be deemed to be the officers and directors of the NASD itself. Furthermore, under the LLC Agreement, the records of the NASD and BSE, to the extent that they are related to the NASD/BSE TRF LLC's activities, are deemed to be records of the NASD itself and are subject to the Commission's examination authority under Section 17(b)(1) of the Act.<sup>52</sup>

The LLC Agreement also provides that the NASD and the BSE, and each officer, director, agent, and employee thereof, irrevocably submits to the jurisdiction of the U.S. federal courts, the Commission, and the NASD for the purpose of any suit, action, or proceeding pursuant to the U.S. federal securities laws and the rules and regulations thereunder arising from, or relating to, the NASD/BSE TRF LLC's activities.

The Commission also believes that the requirements of Section 19(b) of the Act and Rule 19b-4 thereunder provide the Commission with sufficient authority over changes in control of the NASD/BSE TRF LLC to enable the Commission to carry out its regulatory oversight responsibilities with respect to the NASD and its facilities.

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<sup>51</sup> 15 U.S.C. 78s(h)(4). Section 19(h)(4) of the Act authorizes the Commission, by order, to remove from office or censure any officer or director of an SRO if it finds after notice and an opportunity for hearing that such officer or director has: (1) willfully violated any provision of the Act or the rules and regulations thereunder, or the rules of such SRO; (2) willfully abused his or her authority; or (3) without reasonable justification or excuse, has failed to enforce compliance with any such provision by a member or person associated with a member of the SRO.

<sup>52</sup> See Section 17(c) of the LLC Agreement.

The Commission notes that the NASD is required to enforce compliance with the provisions of the LLC Agreement because they are “rules of the association” within the meaning of Section 3(a)(27) of the Act.<sup>53</sup> A failure on the part of the NASD to enforce its rules could result in a suspension or revocation of its registration pursuant to Section 19(h)(1) of the Act.<sup>54</sup>

C. Accelerated Approval of the Proposed Rule Change as Amended by Amendment No. 1

The Commission finds good cause for approving the proposed rule change as amended by Amendment No. 1 prior to the thirtieth day after the date of publication of notice of filing thereof in the Federal Register. As described more fully above, the changes to NASD Rules 4362D(a), 4632D(g), and 6130D(f) adopt provisions for the NASD/BSE TRF that are identical to or substantially the same as existing NASD rules. The Commission believes that these changes do not raise new regulatory issues and will help to provide consistency in the NASD’s trade reporting rules. Amendment No. 1 also revises the rules of the NASD/NSX TRF and the NASD/BSE TRF to include an express prohibition on the aggregating of trades for purposes of trade reporting to these facilities. The Commission believes that this change strengthens and clarifies the rules governing the NASD/NSX TRF and the NASD/BSE TRF by providing an express prohibition on the aggregating of trades for purposes of trade reporting to the facilities. Finally, Amendment No. 1 includes technical changes that correct errors in the text of the NASD/BSE TRF’s rules, thereby helping to ensure the accuracy of the NASD’s rules. For these reasons, the Commission finds that it is consistent with Sections 15A(b)(6) and 19(b) of the Act to approve the proposed rule change as amended by Amendment No. 1 on an accelerated basis.

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<sup>53</sup> 15 U.S.C. 78c(a)(27).

<sup>54</sup> 15 U.S.C. 78s(h)(1).

## V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change as amended by Amendment No. 1, including whether it is consistent with the Act. Comments may be submitted by any of the following methods:

### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2006-115 on the subject line.

### Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASD-2006-115. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal

identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASD-2006-115 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>55</sup> that the proposed rule change (SR-NASD-2006-115), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>56</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>55</sup> 15 U.S.C. 78s(b)(2).

<sup>56</sup> 17 CFR 200.30-3(a)(12).