

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- 50317; File No. SR-NASD-2004-94)

September 3, 2004

Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. Relating to Proposed Amendments to TRACE Rule 6250 and Related TRACE Rules To Disseminate Transaction Information on Certain TRACE-Eligible Securities and Facilitate Dissemination of Such Information

I. Introduction

On June 17, 2004, the National Association of Securities Dealers, Inc. (“NASD”) filed with the Securities and Exchange Commission (“SEC” or “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to: amend NASD Rule 6250 to publicly disseminate transaction information for secondary market transactions in all TRACE-eligible securities other than those purchased or sold pursuant to Rule 144A under the Securities Act of 1933 (“Rule 144A Securities”), with information on transactions in certain securities disseminated on a delayed basis; make related amendments to Rule 6210 regarding classification of securities and Rule 6260 requiring the managing underwriter or group of underwriters to provide certain information to NASD, to facilitate dissemination of such transaction information; and delete provisions regarding market aggregates, last sale data, and treatment of certain transaction reports in NASD Rule 6250.

Notice of the proposed rule change was published for comment in the Federal Register on July 2, 2004.³ The Commission received one comment regarding the proposal, from The Bond

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 49920 (June 25, 2004), 69 FR 40429.

Market Association (“TBMA Letter”).⁴ On August 9, 2004, the NASD submitted a response to the TBMA Letter and Amendment No. 1 to the proposed rule change.⁵ This order approves the proposed rule change, as amended.

II. Background

On January 23, 2001, the Commission approved the TRACE Rules to establish a corporate bond trade reporting and transaction dissemination facility and to eliminate Nasdaq’s Fixed Income Pricing System (“FIPS”).⁶ The TRACE Rules became effective on July 1, 2002. On that day, members began to report transactions in all TRACE-eligible securities, and TRACE began the dissemination of certain reported information. Initially, TRACE disseminated transaction information only on investment grade securities with an initial issuance size of \$1 billion or greater, and on 50 high-yield issues previously reported in the FIPS system, called the “FIPS 50.” On January 31, 2003, the Commission approved an NASD proposal to expand TRACE dissemination to cover roughly 75 percent of the average daily trading volume of investment grade securities.⁷

⁴ See letter from Donald R. Mullen, Jr., Goldman, Sachs & Co., Chair, Corporate Credit Markets Division, TBMA, to Jonathan G. Katz, Secretary, Commission, dated July 23, 2004.

⁵ See letter from Marc Menchel, Executive Vice President and General Counsel, Regulatory Policy and Oversight, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated August 6, 2004. Amendment No. 1, which addresses the implementation dates of the proposal, is a technical amendment and therefore not subject to notice and comment. See discussion, *infra*, Part III.

⁶ See Securities Exchange Act Release No. 43873 (January 23, 2001), 66 FR 8131 (January 29, 2001). FIPS, which was operated by Nasdaq, collected transaction and quotation information on domestic, registered, non-convertible high-yield corporate bonds.

⁷ See Securities Exchange Act Release No. 47302 (January 31, 2003), 68 FR 06233 (February 6, 2003).

Initially TRACE Rules required a member to report transaction information to TRACE within 75 minutes of execution. On June 18, 2003, the Commission approved an NASD proposal to reduce the transaction reporting interval from 75 minutes to 45 minutes.⁸ More recently, the Commission approved an NASD proposal to further reduce the transaction reporting interval, from 45 minutes to 30 minutes (effective October 1, 2004), and later to 15 minutes (effective July 1, 2005).⁹

III. The Amended Proposal

As more fully discussed in the Commission's Notice,¹⁰ NASD proposes to amend Rule 6250 to: (1) expand transaction dissemination to include secondary market transactions in all TRACE-eligible securities other than Rule 144A Securities, but provide for delays in dissemination of transactions in certain securities; (2) prohibit dissemination of secondary market transactions in Rule 144A Securities; and (3) delete provisions regarding market aggregate and last sale data and the treatment of certain transaction reports. NASD also proposes to amend Rule 6210 to revise the defined terms "Investment Grade" and "Non-Investment Grade," add a new defined term, "Split-Rated," and make clear that NASD may, for purposes of its rules, classify an unrated TRACE-eligible security as Investment Grade or Non-Investment Grade in certain circumstances. In addition, NASD proposes to amend Rule 6260 to require a managing underwriter or group of underwriters to provide information to enable NASD to

⁸ See Securities Exchange Act Release No. 48056 (June 18, 2003), 68 FR 37886 (June 25, 2003).

⁹ See Securities Exchange Act Release No. 49854 (June 14, 2004), 69 FR 35088 (June 23, 2004).

¹⁰ See supra note 3, at 14-32. A full description of the proposal is contained in the Notice.

implement the dissemination criteria regarding the new issue aftermarket in Rule 6250; and to make certain minor, technical changes.

With respect to revisions to the dissemination provisions in Rule 6250, NASD proposes to delay dissemination of transaction information in the new issue aftermarket by two business days for bonds rated by an NRSRO or classified by NASD as BBB, and by ten business days for bonds rated by an NRSRO or classified by NASD as BB or lower. In addition, NASD proposes to delay dissemination of transaction information in the secondary market other than the new issue aftermarket, for two business days for bonds rated by an NRSRO or classified by NASD as BB, and for four business days for bonds rated by an NRSRO or classified by NASD as B or lower, for transactions greater than \$1 million (par value) where the security trades, on average, less than one time per day. Notwithstanding these delays, NASD estimates that approximately 99 percent of all secondary public transactions and 95 percent of par value traded in TRACE-eligible securities will be disseminated immediately on receipt of the transaction information by NASD.

NASD proposes to implement the dissemination provisions in two stages. In Stage One, NASD plans to implement the definitional change to Rule 6210 and implement immediate dissemination of TRACE-eligible securities other than Rule 144A Securities, except those subject to dissemination delays. Stage One will be effective not later than 60 days after the date of this approval. In Stage Two, NASD plans to complete the implementation of the rule changes approved by this Order. Stage Two will be effective on February 1, 2005. NASD represents that it intends to continue to review the trading and liquidity of TRACE-eligible securities during the implementation of Stages One and Two. As part of this review process, NASD states that, not later than nine months after implementation of Stage Two, it will ask the BTRC to reconvene to

review the proposal. NASD states that, based on this review, the BTRC and NASD staff will make recommendations to the NASD Board. NASD states that the NASD Board will review the recommendations and decide whether to amend the dissemination provisions then in effect.

IV. Summary of Comment Letter and NASD's Response Thereto

A. TBMA Letter

In its letter, TBMA states that, while its representatives on the Bond Transaction Reporting Committee ("BTRC")¹¹ participated in the development of the proposal, they did not unanimously support it. TBMA states that its membership continues to have serious concerns about potential harm to liquidity resulting from dissemination of transaction data on lower rated, less frequently traded issues. The letter states that, while the proposal affords some protection for large trades in these issues, TBMA believes the delayed dissemination it proposes does not go far enough to protect liquidity. Specifically, TBMA states that certain of its members believe there is a set of infrequently traded BBB-rated bonds that should be subject to the same two-business day delay that applies to infrequently traded BB-rated bonds. TBMA also believes that the NASD proposal should count only large transactions (over \$1 million), as opposed to every transaction, in determining trading frequency for a given security for purposes of determining whether dissemination delays apply to large transactions in that security. TBMA urges NASD to monitor the effects of the increased dissemination set forth in the proposal, and seek appropriate adjustments to the proposed dissemination scheme on an expedited basis should harm to liquidity

¹¹ The BTRC is a committee of the NASD Board of Governors that is responsible for advising the NASD Board on issues relating to expansion of dissemination of transaction information through TRACE. The BTRC is appointed by the NASD Board and has ten members. Five of the ten members were recommended by the NASD staff; the other five were recommended by TBMA.

be shown to result. TBMA also recommends that NASD make its consolidated transaction data publicly available, so that the industry can assess the effects of transparency on liquidity.

B. NASD's Response

In response to the TBMA Letter, NASD states that it believes that its proposal strikes a well-reasoned balance between concerns regarding liquidity and the substantial benefits of increased transparency. NASD notes that the proposal was developed and supported by the BTRC. The NASD also notes that, after reviewing the two studies that it commissioned to address the relationship of transparency to liquidity, the NASD found no conclusive evidence that TRACE transparency has adversely affected liquidity, including liquidity of lower-rated bonds. In response to the recommendations of TBMA regarding ongoing NASD review, the NASD states that the proposal provides for NASD to continue to review the trading and liquidity of TRACE-eligible securities during the two stages of implementation of the proposal; and that NASD has authority to effect necessary amendments to TRACE Rules to protect the integrity of the market. In response to the comment of TBMA that NASD should make consolidated TRACE transaction data available, NASD states that transaction information on all publicly disseminated TRACE eligible securities will be available through the NASD website, vendors, or via an electronic feed directly from NASD.

V. **Discussion**

After careful consideration, the Commission finds that the proposed rule change, as amended, is consistent with the Act and the rules and regulations thereunder applicable to a registered securities association and, in particular, with the requirements of Section 15A(b)(6) of

the Act.¹² Specifically, the Commission finds that approval of the proposed rule change is consistent with Section 15A(b)(6) of the Act in that it is 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.¹³

The Commission believes that, by expanding dissemination of transaction information to, by NASD's estimate, roughly 99 percent of all secondary transactions and 95 percent of par value traded in TRACE-eligible securities, the proposal will substantially increase the amount of information available to the public and market participants about the corporate bond markets, thereby promoting the protection of investors and the public interest. Specifically, under the proposal, TRACE will disseminate transaction information on non-investment grade bonds (other than the FIPS 50) for the first time, significantly enhancing the transparency of this important segment of the corporate bond market. The Commission believes that this proposal, in conjunction with the NASD's recent proposal reducing transaction reporting times in TRACE to 30 minutes (effective October 1, 2004), and then to 15 minutes (effective July 1, 2005),¹⁴ represents a significant incremental improvement in the transparency of the corporate bond market. Moreover, the Commission believes that the proposed amendments to Rule 6210 (regarding classification of securities) and Rule 6260 (requiring the managing underwriter or group of underwriters to provide certain information to NASD) should assist the NASD in implementing the proposal.

¹² 15 U.S.C. 78o-3(b)(6).

¹³ In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78(c)(f).

¹⁴ See Securities Exchange Act Release No. 48056 (June 18, 2003), 68 FR 37886 (June 25, 2003), supra note 9.

The Commission notes that the proposal imposes dissemination delays for securities rated BBB or lower in the new issue aftermarket, and for larger transactions in infrequently traded non-investment grade bonds in the secondary market other than the new issue aftermarket. The Commission believes that these dissemination delays may unnecessarily restrict the availability of this transaction information to investors in this market. Moreover, the Commission notes that the two studies commissioned by the NASD to address the relationship between transparency and liquidity found no conclusive evidence that TRACE transparency has adversely affected liquidity.¹⁵ Accordingly, the Commission expects that, not later than November 1, 2005 (nine months after the effective date of Stage Two), the NASD will submit a proposed rule change eliminating the delays in TRACE information dissemination. As previously noted, the Commission received one comment letter, from TBMA, on the proposed rule change. In its letter, TBMA argued that the delayed dissemination regime in the proposal does not go far enough to protect liquidity. As noted above, the Commission notes that economic studies commissioned and cited by NASD have shown no conclusive evidence that the transparency afforded by TRACE has adversely affected market liquidity.

Finally, the Commission believes that amendments to the TRACE Rules to prohibit dissemination of secondary market transactions in Rule 144A Securities and to delete provisions regarding market aggregate and last sale data and the treatment of certain transaction reports, should streamline and clarify the TRACE Rules, thus promoting the protection of investors and the public interest.

¹⁵ See Commission Notice, *supra* note 3, at 16.

VI. Conclusion

For the reasons discussed above, the Commission finds that the amended proposal is consistent with the Act and the rules and regulations thereunder.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change, as amended (SR-NASD-2004-94), be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁶

Margaret H. McFarland
Deputy Secretary

¹⁶ 17 CFR 200.30-3(a)(12).