

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-50157; File No. SR-NASD-2004-095)

August 5, 2004

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc. Adopting a Fingerprinting Program for NASD Employees and Independent Contractors in the State of New York, and, as Dictated by Business Need, in Other Jurisdictions

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 June 18, 2004, the National Association of Securities Dealers, Inc. (“NASD”), 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 NASD. The NASD filed the proposed rule change under paragraph (f)(3) of Rule 19b-4 under the Act.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Pursuant to New York State law, the NASD proposes to adopt a program for conducting fingerprint-based background checks of NASD employees and independent contractors in the State of New York, and in other jurisdictions as business need may dictate.

Below is the text of the proposed rule change. Proposed new language is italicized.

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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> 17 CFR 240.19b-4(f)(3).

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**Policy to Conduct Fingerprint-Based Background Checks of NASD Employees and Independent Contractors.**

(a) In accordance with the requirements of the law of the State of New York “New York State”), it shall be the policy of NASD to conduct a fingerprint-based criminal records check of (i) all prospective and current employees located in New York State, and (ii) all prospective and current independent contractors and temporary employees located in New York State who provide services to NASD within New York State and who have access to secure records or systems, or other material or secure buildings or secure property for a specified number of days as determined by NASD from time to time.

(b) As business need may dictate and where permitted by applicable law, NASD will implement a program outside of New York State to conduct a fingerprint-based criminal records check of (i) any or all prospective and current employees, and (ii) any or all prospective and current independent contractors or temporary employees who provide services to NASD and who have access to records or systems, or other material or secure buildings or secure property for a specified number of days as determined by NASD from time to time.

(c) In implementing the program in New York State or in other jurisdictions, NASD shall submit fingerprint images or cards obtained pursuant to the foregoing program to the Attorney General of the United States or his or her designee for identification and processing. NASD shall at all times maintain the security of fingerprint images or cards and information received from the Attorney General or his or her designee.

(d) NASD shall evaluate information received from the Attorney General or his or her designee in accordance with the terms of a written fingerprint policy and provisions of applicable law. A felony or serious misdemeanor conviction will be a factor in considering whether to hire a prospective employee, take adverse employment action with respect to a current employee, or deny prospective or current independent contractors or temporary employees access to NASD's facilities or records.

(e) A prospective employee who refuses to submit to fingerprinting shall be denied employment by NASD, and a prospective independent contractor or temporary employee who refuses to submit to fingerprinting under the program shall be denied access to NASD facilities or records. A current employee, independent contractor, or temporary employee who refuses to submit to fingerprinting under the program will be terminated after having been given notice and three opportunities to comply.

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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

1. Purpose

On August 20, 2002, Governor George E. Pataki signed into law an act that requires fingerprint-based background checks of self-regulatory organization (“SRO”) employees who are regularly employed in New York State.<sup>4</sup> The New York law also requires an SRO to fingerprint independent contractors that provide services to the SRO if those individuals have “access to records . . . or other material or secure buildings or secure property, which place the security of [the SRO] at risk.”<sup>5</sup> The New York law requires NASD to implement and maintain a fingerprinting program for employees and certain independent contractors in New York State.

Access to the Federal Bureau of Investigation’s (“FBI”) database of fingerprint-based criminal records is permitted only when authorized by law. Numerous federal and state laws authorize employers to conduct fingerprint-based background checks that make use of the FBI’s database.<sup>6</sup> Notably, Section 17(f)(2) of the Act<sup>7</sup> and SEC Rule 17f-2<sup>8</sup> require employees of broker-dealers, transfer agents, and clearing agencies to be fingerprinted and authorize SROs to maintain facilities for processing and storing

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<sup>4</sup> 2002 N.Y. Laws 453 (Aug. 20, 2002).

<sup>5</sup> 2002 N.Y. Laws 453 (Aug. 20, 2002).

<sup>6</sup> See, e.g., 42 U.S.C. 5119a (child care providers); Pub. L. 92-544, 86 Stat. 1109, 1115 (employees of federally chartered or insured banks); Alaska Stat. 04.11.295 (liquor license applicants); Ariz. Rev. Stat. 32-122.02 (home inspectors); Cal. Bus. & Prof. Code 6980.18 (locksmiths); Fla. Stat. 468.453 (athlete agents); Official Code Ga. Ann. 43-47-6 (used car dealers); Ohio Rev. Code Ann. 3770.051 (vendors of lottery equipment).

<sup>7</sup> 15 U.S.C. 78q(f)(2).

<sup>8</sup> 17 CFR 240.17f-2.

fingerprint cards and criminal record information received from the FBI database with respect to such cards. Although Section 17(f)(2) does explicitly direct the Attorney General of the United States (i.e., the FBI) to provide SROs designated by the Commission with access to criminal history record information, it does not, however, require SROs to fingerprint their own employees. NASD believes, therefore, that a proposed rule change for a fingerprinting program for NASD employees and independent contractors located in New York State is a necessary component of NASD's compliance with New York State law, and of any plan by NASD, as dictated by its assessment of business need, to implement a program for fingerprint-based background checks of its employees and independent contractors in other jurisdictions as permitted by law.

As reflected in the text of the proposed rule change, the program applies to: (1) prospective and current NASD employees in New York State, as well as prospective and current temporary employees and independent contractors in New York State who have or are anticipated to have access to NASD facilities in New York State or NASD records or systems for a specified number of days as determined by NASD from time to time, and (2) as NASD deems necessary according to business need, to prospective and/or current employees in other jurisdictions, as well as prospective and current temporary employees and independent contractors who have or are anticipated to have access to NASD facilities or records in other jurisdictions.

NASD evaluates information received from the FBI concerning an individual in accordance with the terms of NASD's written fingerprint policy, which reflects the application of employment laws governing the use of information concerning criminal convictions in employment decisions. In accordance with such laws, a felony or serious

misdemeanor conviction will be a factor in considering whether to hire a prospective employee, take adverse employment action with respect to a current employee, or deny prospective or current independent contractors or temporary employees access to NASD's facilities or records.

## 2. Statutory Basis

NASD believes that the proposed rule change is consistent with Section 15A(b)(6) of the Act<sup>9</sup>, which requires, among other things, that NASD's rules must be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and, in general, protect investors and the public interest. NASD believes the proposed rule change will provide a basis for NASD's compliance with New York State law, which requires fingerprint-based background checks of SRO employees who are regularly employed in New York State as well as of independent contractors that provide services to the SRO if those individuals have "access to records ... or other material or secure buildings or secure property, which place the security of [the SRO] at risk", and further permit NASD to implement a fingerprinting program in other jurisdictions, as business need may dictate.

### (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.

### (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.

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<sup>9</sup> 15 U.S.C. 78o-3(6).

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

The proposed rule change has been filed by the NASD pursuant to Section 19(b)(3)(A) of the Act<sup>10</sup> and subparagraph (f)(3) of Rule 19b-4 thereunder.<sup>11</sup> Because the foregoing proposed rule change is concerned solely with the administration of the NASD, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>12</sup> and Rule 19b-4(f)(3)<sup>13</sup> thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such proposed 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.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment for (<http://www.sec.gov/rules/sro.shtml>);
- or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include SR-NASD-2004-095 on the subject line.

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<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>11</sup> 17 CFR 240.19b-4(f)(3)

<sup>12</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>13</sup> 17 CFR 240.19b-4(f)(3).

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to SR-NASD-2004-095. 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 such filing also will be available for inspection and copying at the principal office of NASD. 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 SR-NASD-2004-095 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>14</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>14</sup> 17 CFR 200.30-3(a)(12).