

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-52722; File No. SR-NASD-2005-124)

November 2, 2005

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Repeal NASD Rule 6440(f)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 24, 2005, 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, and II below, which Items have been prepared by NASD. NASD filed this proposal as a “non-controversial” rule change pursuant to Section 19(b)(3)(A)(i)³ of the Act, and Rule 19b-4(f)(6)⁴ thereunder, which renders the proposal effective upon filing with the Commission.⁵ 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

NASD is proposing to repeal NASD Rule 6440(f) in light of proposed rule changes that have recently been approved by the Commission expanding market order protection and limit order

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(i).

⁴ 17 CFR 240.19b-4(f)(6).

⁵ Rule 19b-4(f)(6) allows for a proposed rule change to take effect upon filing with the Commission provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change, at least five business days prior to the date of filing of the proposed rule change. NASD complied with this pre-filing requirement. See email from Stephanie Dumont, NASD to Katherine A. England, Assistant Director, Division of Market Regulation, dated October 11, 2005.

protection to exchange-listed securities.⁶ NASD proposes to make the proposed rule change operative on January 9, 2006. Below is the text of the proposed rule change. Proposed deletions are in brackets.

* * * * *

6440. Trading Practices

(a) through (e) No change.

[(f) (1) No member shall:]

[(A) personally buy or initiate the purchase of an eligible security for its own account or for any account in which it or any person associated with it is directly or indirectly interested, while such member holds or has knowledge that any person associated with it holds an unexecuted market order to buy such security in the unit of trading for a customer; or]

[(B) sell or initiate the sale of any such security for any such account, while it personally holds or has knowledge that any person associated with it holds an unexecuted market order to sell such security in the unit of trading for a customer.]

[(2) No member shall:]

[(A) buy or initiate the purchase of any such security for any such account, at or below the price at which it personally holds or has knowledge that any person associated with it holds an unexecuted limited price order to buy such security in the unit of trading for a customer; or]

⁶ See footnotes 8 and 9, infra.

[(B) sell or initiate the sale of any such security for any such account at or above the price at which it personally holds or has knowledge that any person associated with it holds an unexecuted limited price order to sell such security in the unit of trading for a customer.]

[(3) The provisions of this paragraph shall not apply:]

[(A) to any purchase or sale of any such security in an amount less than the unit of trading made by a member to offset odd-lot orders for customers,]

[(B) to any purchase or sale of any such security upon terms for delivery other than those specified in such unexecuted market or limited price order,]

[(C) to any unexecuted order that is subject to a condition that has not been satisfied.]

[(D) to any purchase or sale for which a member has negotiated specific terms and conditions applicable to the acceptance of limit orders that are:]

[(i) for customer accounts that meet the definition of an "institutional account" as that term is defined in Rule 3110(c)(4); or]

[(ii) for 10,000 shares or more, unless such orders are less than \$100,000 in value.]

(g) through (j) redesignated as (f) through (i)

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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

NASD Rule 6440(f)(1) prohibits a member from personally buying (selling) an exchange-listed security⁷ for its own account while such member holds an unexecuted market order to buy (sell) such security for a customer. Similarly, NASD Rule 6440(f)(2) prohibits a member from buying (selling) an exchange-listed security for its own account while such member holds an unexecuted limit order to buy (sell) such security for a customer. NASD seeks to repeal NASD Rule 6440(f) in light of two proposed rule changes that have recently been approved by the Commission that also restrict a member's trading when holding customer market and limit orders in exchange-listed securities.

Specifically, on August 4, 2005, the Commission approved proposed rule change SR-NASD-2004-089,⁸ which, among other things, expands the application of NASD Interpretative Material (IM) 2110-2, Trading Ahead of Customer Limit Order (commonly referred to as the "Manning Rule") to exchange-listed securities. NASD Interpretive Material 2110-2 generally

⁷ NASD Rule 6440(f) applies to over-the-counter transactions in "eligible securities," which are defined in NASD Rule 6410(d) as "all common stocks, preferred stocks, long-term warrants, and rights entitling the holder to acquire an eligible security, listed or admitted to unlisted trading privileges on the American Stock Exchange or the New York Stock Exchange, and securities listed on regional stock exchanges, which substantially meet the original listing requirements of the New York Stock Exchange or the American Stock Exchange."

⁸ See Securities Exchange Act Release No. 52210 (August 4, 2005), 70 FR 46897 (August

prohibits a member from trading for its own account at prices that would satisfy a customer's limit order, unless the member immediately thereafter executes the customer's limit order. In addition, on August 9, 2005, the Commission approved proposed rule change SR-NASD-2004-045 adopting NASD Rule 2111, which prohibits a member that accepts and holds a customer market order from trading for its own account at prices that would satisfy the customer market order in a Nasdaq or exchange-listed security, unless the member immediately thereafter executes the customer market order.⁹

NASD believes that NASD Rule 6440(f) overlaps and is generally duplicative of the above-referenced rule changes.¹⁰ Accordingly, NASD is proposing to repeal NASD Rule 6440(f) to ensure consistency in the application of limit order and market order protection and to eliminate potential confusion as to members' obligations with respect to these orders in exchange-listed securities.

NASD has filed the proposed rule change for immediate effectiveness. The implementation date will be January 9, 2006, such that both SR-NASD-2004-045 and SR-NASD-2004-089 will be in effect by that date.

11, 2005)(SR-NASD-2004-089).

⁹ See Securities Exchange Act Release No. 52226 (August 9, 2005), 70 FR 48219 (August 16, 2005)(SR-NASD-2004-045).

¹⁰ In SR-NASD-2004-045 and SR-NASD-2004-089, NASD specifically noted its intent to repeal NASD Rule 6440(f) in light of the overlap between the proposed rule changes and NASD Rule 6440(f).

2. Statutory basis

NASD believes that the proposed rule change is consistent with Section 15A(b)(6) of the Act,¹¹ which requires, among other things, that NASD rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the proposed rule change will ensure consistency in the treatment of customer limit orders and customer market orders for exchange-listed securities and will enhance the integrity of the market.

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

NASD does not believe that the proposed rule change will 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

NASD has neither solicited nor received comments on the proposed rule change.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, and NASD provided the Commission with written notice of its intent to file the proposed rule change at least five days prior to the filing date, the proposed rule change has become effective pursuant to Section 19(b)(3)(A)(i)¹² of the Act and Rule 19b-4(f)(6)¹³

¹¹ 15 U.S.C. 78o-3(b)(6).

¹² 15 U.S.C. 78s(b)(3)(A)(i).

thereunder. NASD has complied with this pre-filing requirement.¹⁴ NASD proposes to make the proposed rule change operative on January 9, 2006 to coincide with the implementation of SR-NASD-2004-045 and SR-NASD-2004-089.¹⁵

At any time within 60 days of the filing of the 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.

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.

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. Please include File Number SR-NASD-2005-124 on the subject line.

¹³ 17 CFR 240.19b-4(f)(6).

¹⁴ See footnote 5, supra.

¹⁵ See discussion footnotes 8-10, supra.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number SR-NASD-2005-124. 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 offices 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 File Number SR-NASD-2005-124 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.¹⁶

Jonathan G. Katz
Secretary

¹⁶ 17 CFR 200.30-3(a)(12).