attempt to access the other Participant's quote, which could delay the customer's transaction by thirty seconds or more, or (ii) become potentially liable to the other Participant for the amount by which its quote was traded through.

These provisions are particularly restrictive in the case of exchange-traded funds (''ETFs'') tracking the Nasdaq-100 Index (''QQQs''), the Dow Jones Industrial Average (''DIAMONDs''), and the Standard & Poor's 500 Index (''SPDRs''). These ETFs share certain characteristics that may make immediate execution highly desirable to certain investors. In particular, because these ETFs are highly liquid securities and their value is readily derived from the values of the underlying shares, the ability to obtain an immediate execution at a displayed price may be more important than the opportunity to obtain a better price.

The Commission is granting a *de minimis* exemption from the trade-through provisions of the ITS Plan with respect to transactions in these ETFs that are effected at a price no more than three cents away from the best bid and offer quoted in CQS. A *de minimis* exemption will allow Participants and ITS/CAES Market Makers to execute transactions, through automated execution or otherwise, without attempting to access the quotes of other Participants when the expected price improvement would not be significant. The Commission believes that exempting transactions at this level from the ITS trade-through provisions will, on balance, provide investors increased liquidity and increased choice of execution venues while limiting the possibility that investors will receive significantly inferior prices. In particular, the Commission believes that the expected benefit to investors seeking an immediate execution in such ETFs, rather than a delayed execution through ITS, is not likely to exceed three cents per share.

The Commission considered other alternatives to the three-cents threshold and concluded that on balance it represents a sensible compromise between retaining the trade-through provisions in their current form (a zero-cent threshold) and permitting all trade-throughs (a large threshold). The three-cents threshold was chosen to avoid compelling broker-dealers to use ITS unless the expected price improvement is greater than the de facto cost of using ITS. The de facto cost of using ITS is largely due to the option value of the commitments that broker-dealers give to dealers in other markets when trying to obtain better execution prices. The Office of Economic Analysis estimated the value of these options to be between one cent per share and two and one-half cents per share for the securities in question. Further, since execution of a commitment is uncertain, there is a risk that the expected price improvement will be less than the displayed quote would suggest. The staff therefore concluded that a three-cents trade-through threshold was more reasonable. Although the Commission recognizes the limitations of this analysis, it believes that the three-cents threshold represents an appropriate compromise between competing interests.

By granting the exemption on a temporary basis, moreover, the Commission will be able to gather the data necessary to study the effects of an exemption from the ITS trade-through provisions and the desirability of extending the exemption. The Commission therefore believes that it is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a national market system to grant a temporary *de minimis* exemption from the trade-through provisions of the ITS Plan with respect to transactions in these ETFs. In this connection, the Commission emphasizes that the proposed exemption does not relieve brokers and dealers of their best execution obligations under the federal securities laws and SRO rules.

Accordingly, *it is ordered,* pursuant to Section 11A of the Act and Rule 11Aa3–2(f) thereunder, that Participants of the ITS Plan and their members are hereby exempt from Section 8(d) of the ITS Plan during the period covered by this Order with respect to transactions in QQQs, DIAMONDs, and SPDRs that are executed at a price that is no more than three cents lower than the highest bid displayed in CQS and no more than three cents higher than the lowest offer displayed in CQS.

This Order shall be effective commencing on September 4, 2002 through June 4, 2003.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–22531 Filed 9–3–02; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46422; File No. SR–NASD–2002–04]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Amendments to Rule 3010(b)(2) and IM–8310–2

August 28, 2002.

I. Introduction

On January 7, 2002, the National Association of Securities Dealers, Inc. (''NASD''), through its wholly owned subsidiary, NASD Regulation, Inc. (''NASD Regulation'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4 thereunder.[2] On May 31, 2002, NASD filed Amendment No. 1 to the proposed rule change.[3] The proposal amends NASD Rule 3010(b)(2), also known as the ''Taping Rule,'' and NASD–IM–8310–2. Notice of the proposed rule change, as amended, was published for comment in the **Federal Register** on June 18, 2002.[4] The Commission received three comment letters regarding the proposal.[5] This order approves the proposed rule change.

II. Description of the Proposed Rule Change

NASD Rule 3010(b)(2) requires NASD members to adopt special supervisory procedures and to tape record all of their registered representatives' telephone calls with customers (or potential customers) when they meet specified threshold levels of representatives that have worked at disciplined firms. A firm is ''disciplined'' within the meaning of the Rule if, in connection with securities sales practices, it has been expelled from membership or participation in a securities self-regulatory organization, or is subject to an order of the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Grace Yeh, Assistant General Counsel, NASD Regulation, to Katherine England, Assistant Director, Division of Market Regulation, Commission, dated May 31, 2002.

[4] *See* Securities Exchange Act Release No. 46067 (June 12, 2002), 67 FR 41561.

[5] *See* letters to the Secretary, SEC, from Brad Bervert, President, Financial World Corporation, dated June 4, 2002 (''Bervert Letter''), and William Perry, President and Chief Executive Officer, Pro-Integrity Securities, Inc., dated June 27, 2002 (''Perry letter''); e-mail from James St. Claire, Chief Executive Officer, ViewTrade Securities, Inc., dated August 2, 2002 (''St. Claire e-mail'').

Commission revoking its registration as a broker or dealer.[6]

NASD now proposes several changes to the Rule. First, NASD proposes to permit firms to avoid its application by reducing their staffing levels to fall below the specified threshold levels within 30 days of receiving notice or obtaining actual knowledge that they are subject to the Rule. Thereafter, the firm could not rehire the terminated individuals for at least 180 days. Firms could not hire additional registered representatives to fall below the thresholds; the rule only permits firms to reduce their population of registered representatives from disciplined firms. A firm would only be permitted to adjust its staffing levels once, and only the first time it becomes subject to the Taping Rule. NASD has represented that although a new entity resulting from a restructuring, such as a merger, would be allowed to take advantage of the new procedures even if a participant in the restructuring had previously done so, this would not be permitted where an entity was restructured in an attempt to avoid the Rule.

NASD would also revise the criteria for determining whether a firm is subject to the Taping Rule. Specifically, persons who were registered with one or more disciplined firms for 90 days or less within the last three years and who have no disciplinary history, as defined in NASD–IM–1011–1, would not count as former associates of disciplined firms, although they would still count toward the firm's total number of registered persons.

In addition to these changes, the proposal would extend the period that firms must maintain taping systems from two years to three years, extend the time for firms to install taping systems from 30 days to 60 days, and revise the rule to state that exemptions will be available only in ''exceptional circumstances.''

Several other changes are also proposed. Specifically, NASD would substitute ''associated with one or more Disciplined Firms in a registered capacity'' for ''employed by one or more Disciplined Firms'' in subparagraph (b)(2)(viii) of the Rule to reflect that the calculation of registered representatives from disciplined firms includes independent contractors previously registered with disciplined firms. NASD would also clarify that firms must both establish and ''implement'' the required systems within the time set forth in the Rule, and that the compliance period begins on the date that the member establishes its special supervisory procedures and implements its taping system.

Finally, NASD proposes to amend NASD–IM–8310–2 to allow investors and the general public to ascertain whether a particular firm is subject to the Taping Rule via the NASD Public Disclosure Program's toll-free telephone listing.

III. Summary of Comments

The Commission received three comment letters regarding the proposed rule change. The commenters were generally supportive. However, two believed that NASD should have proposed to apply the amendments to firms already subject to the Taping Rule.[7] One of the commenters opposed the extension of the taping period to three years as being unduly burdensome. This commenter also opposed disclosure of whether a particular firm was subject to the Taping Rule, on the grounds that the Rule was meant to be remedial in nature, and that the public might construe its application as a disciplinary sanction.[8] The commenter also suggested that NASD should consider the level of experience of individual representatives and the reason their previous firm was disciplined in determining whether they should be counted toward the threshold levels, and that the rule should be modified to permit exemptions depending on whether NASD had particular concerns about a firm's population of former associates of disciplined firms.[9] Another commenter suggested that NASD should define the circumstances where it would grant an exemption to include where an employee had been associated with a disciplined firm within the past three years, but had departed prior to the activities that led to the disciplinary action.[10]

IV. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities association.[11] The Commission finds that the proposal is consistent with the requirements of section 15A(b)(6) of the Act,[12] which requires that the rules of a registered national securities association be designed to prevent 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.

Specifically, the Commission believes that the proposal to allow firms an opportunity to reduce staffing levels in order to fall below the Taping Rule's threshold levels is proper. This change should allow firms a degree of flexibility when they might inadvertently or unintentionally become subject to the Rule due, for example, to sudden turnover among registered persons or other events beyond the firm's control. At the same time, NASD's proposal includes measures to prevent firms from taking inappropriate advantage of the new provisions. The staff adjustment would only be permitted once, and only on the first occasion that the firm triggers the Rule. Moreover, it could not be accomplished by hiring more personnel, but only by reducing the number of employees from previously disciplined firms. Additionally, the member could not re-hire a terminated employee for 180 days. Finally, notwithstanding the inherent difficulty a firm would face if it sought to restructure and then terminate personnel for the sole purpose of avoiding the Taping Rule, NASD has stated that it will not allow a firm to evade the Rule through such a measure.

The Commission also believes that NASD's proposal to change the calculation of the threshold levels by not counting persons that were short-term employees of disciplined firms as having worked at disciplined firms is proper. The Commission agrees with NASD that such employees are less likely to have received poor training or learned improper sales tactics, and are more likely to have any ''bad habits'' corrected by proper training and supervision at their new firm. As an additional safeguard, the proposed rule change provides that such short-term employees may not themselves have a relevant disciplinary history. These changes should adequately address the suggestions by one of the commenters that NASD should consider the histories and qualifications of individual personnel in evaluating whether a firm is subject to the Rule or should be exempted, while at the same time retaining clear, workable standards.

[6] NASD Rule 3010(b)(2)(x).

[7] *See* Bervert letter, Perry letter, *supra,* note 4.

[8] *See* Perry letter, *supra* n. 4.

[9] *See* Perry letter, *supra* n. 4.

[10] *See* St. Claire e-mail, *supra* n. 4.

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

[12] 15 U.S.C. 78o(b)(6).

NASD has also proposed to change the Rule to provide that exemptions will only be granted in ''exceptional circumstances.'' This change, coupled with those described above, should help to reduce the number of requests that might otherwise consume time and resources on the part of both NASD and firms subject to the Rule. Furthermore, NASD's proposal to extend the duration of the taping requirement from two years to three years from the date taping begins is proper. Although one commenter noted that this constitutes a higher compliance burden, it should reduce any confusion that might be caused by the difference between the Rule's current two-year taping requirement and the Rule's requirement that member firms must review the last three years of their employees' work history to determine whether they had worked at disciplined firms. The Commission also believes that the proposal to allow 60 days, instead of 30, for the installation of taping systems is appropriate. One commenter noted that it could take 60 days to implement a taping system.

The proposed clarifying changes to the Rule are also consistent with the Act. The substitution of ''associated with one or more Disciplined Firms in a registered capacity'' for ''employed by one or more Disciplined Firms'' in subparagraph (b)(2)(viii) of the Rule should eliminate any misconception that representatives that were independent contractors [13] of disciplined firms do not count toward the threshold levels. Likewise, adding language to clarify that firms that become subject to the Rule must ''implement'' the required procedures within the allotted time period should make clear that the taping and supervisory procedures must be put into use within the prescribed time period. Finally, NASD's proposal to clarify that the taping compliance period begins on the date that the member implements its taping system should help to ensure that the Rule's requirements are easily understood.

As noted above, NASD has also proposed to permit, upon request, public disclosure of whether a particular firm is subject to the Taping Rule. This disclosure would be made available through the toll-free telephone listing of NASD's Public Disclosure Program. Although one of the commenters asserted that the public might interpret the Rule's application as a disciplinary sanction, rather than a remedial measure, this does not mean that the disclosure should not be permitted. Rather, the Commission believes that this disclosure will benefit investors and the general public by providing information that will permit them to consider the level of experience and training of a firm's representatives. Therefore, this should allow investors a better opportunity to evaluate their choices in selecting a broker/dealer.

Finally, the Commission believes that NASD's proposal to apply the changes prospectively is appropriate. Retroactive application would allow firms currently subject to the Rule to evade the requirements entirely, and thereby inappropriately restrict NASD's oversight of such firms' sales training and practices.

V. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[14] that the proposed rule change (SR–NASD–2002–04) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–22461 Filed 9–3–02; 8:45 am]

BILLING CODE 8010–01–P

[13] The Commission notes that the issue of independent contractors was addressed in a letter from the Division of Market Regulation to NASD. *See* letter from Douglas Scarff, Director, Division of Market Regulation, Commission, to Gordon Macklin, President, NASD (June 18, 1982).

[14] 15 U.S.C. 78s(b)(2).

[15] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements Filed During the Week Ending August 23, 2002

The following Agreements were filed with the Department of Transportation under the provisions of 49 U.S.C. Sections 412 and 414. Answers may be filed within 21 days after the filing of the application.

Docket Number: OST–2002–13190.

Date Filed: August 20, 2002.

Parties: Members of the International Air Transport Association.

Subject: CTC COMP 0411 dated 2 August 2002. Worldwide Area Resolutions (changes to rates) except to/from USA/US Territories, CTC COMP 0417 dated 20 August 2002, technical correction Summary attached. Minutes—CTC COMP 0400 dated 25 June 2002. Tables—CTC1 Rates 0017, CTC2 EUR Rates 0018, CTC2 ME–AFR Rates 0029, CTC3 Rates 0020, CTC12 NATL–TC2 Rates 0068, CTC12 MATL–TC2 Rates 0034, CTC12 SATL–TC2 Rates 0033, CTC23 AFR–TC3 Rates 0020, CTC23 EUR–TC3 Rates 0021, CTC23 ME–TC3 Rates 0032, CTC31 N/C Rates 0014, CTC31 S Rates 0013, CTC123 Rates 0015. Intended effective date: 1 October 2002.

Docket Number: OST–2002–13192.

Date Filed: August 20, 2002.

Parties: Members of the International Air Transport Association.

Subject: PTC1 0226 dated 16 August 2002, Mail Vote 2226, TC1 Within South America, Expedited Special Amending Resolution 010y r1–r7, Intended effective date: 15 September 2002.

Docket Number: OST–2002–13193.

Date Filed: August 20, 2002.

Parties: Members of the International Air Transport Association.

Subject: PTC1 0227 dated 16 August 2002, Mail Vote 227, TC1 Longhaul (except between USA and Chile), Expedited Special Amending Resolution 010z r1–r4, Intended effective date: 15 September 2002.

Docket Number: OST–2002–13205.

Date Filed: August 21, 2002.

Parties: Members of the International Air Transport Association.

Subject: PTC2 EUR–ME 0144 dated 19 July 2002, TC2 Europe-Middle East Resolutions r1–r25. Minutes—PTC2 EUR–ME 0146 dated 20 August 2000. Tables—PTC2 EUR–ME Fares 0063 dated 26 July 2002, PTC2 EUR–ME Fares 0065 dated 26 July 2002, Technical Correction to PTC2 EUR–ME Fares 0063, PTC2 EUR–ME Fares 0067 dated 2 August 2002, Technical Correction to PTC EUR–ME Fares 0063, Intended effective date: 1 January 2003.

Andrea M. Jenkins,

Federal Register Liaison.

[FR Doc. 02–22511 Filed 9–3–02; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending August 23, 2002

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier