SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

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RIN 3235–AI86

Request for Comment on Nasdaq Petition Relating to the Regulation of Nasdaq-Listed Securities

AGENCY: Securities and Exchange Commission.

ACTION: Concept release; request for comment.

SUMMARY: The Securities and Exchange Commission (''Commission'') seeks comment on a petition submitted by the Nasdaq Stock Market, Inc. (''Nasdaq'') concerning the regulation of Nasdaq-listed securities. Specifically, Nasdaq requests that the Commission amend the rules of all markets that trade Nasdaq-listed securities to establish uniform trading rules, and to ensure equal surveillance and enforcement of those rules; order that the exchanges' costs of regulation, including costs associated with proper data collection, surveillance, and enforcement, be aggregated and deducted from the market data revenue collected pursuant to the Nasdaq Unlisted Trading Privileges Plan (''UTP Plan''); and prohibit the launch or continuation of Nasdaq trading by any market that fails to protect investors as required under the Securities Exchange Act of 1934 (''Act''). In addition, the Commission requests comment on whether the same actions would be appropriate for the regulation and trading of exchange-listed securities.

DATES: Comments must be received on or before June 19, 2003.

ADDRESSES: To help us process and review your comments more efficiently, comments should be sent by one of the two methods specified below. Persons wishing to submit written comments should send three copies to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments also may be submitted electronically at the following E-mail address: *rule-comments@sec.gov.* All comment letters should refer to File No. S7–11–03. Comments submitted by E-mail should include this file number in the subject line. Comment letters received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549–1001. Electronically submitted comment letters will be posted on the Commission's Internet Web site (*http://www.sec.gov*).[1]

FOR FURTHER INFORMATION CONTACT: Terri L. Evans at (202) 942–4162 or Ian K. Patel at (202) 942–0089 in the Division of Market Regulation, Commission, 450 Fifth Street, NW., Washington, DC 20549–1001.

SUPPLEMENTARY INFORMATION:

I. Introduction

On April 14, 2003, the Commission received a petition from Nasdaq requesting that the Commission take certain actions (''Nasdaq Petition'') to respond to the greater fragmentation of trading in Nasdaq-listed securities across markets. The Commission is publishing Nasdaq's Petition to expedite and facilitate dialogue among all market participants on the issues raised by Nasdaq. The Commission is not endorsing Nasdaq's characterization of the regulation of Nasdaq-listed securities or its proposed solutions. Rather, the Commission is seeking comment on Nasdaq's Petition and, more generally, the issues raised by the Nasdaq Petition.

II. Background

A. Duties of a Self-Regulatory Organization

In fashioning the Act, Congress chose to develop a unique pattern of regulation combining both industry and government responsibility.[2] This pattern calls upon the exchanges and the National Association of Securities Dealers, Inc. (''NASD'') to exercise delegated governmental power to enforce at their own initiative compliance by members of the securities industry with both the legal requirements laid down in the Act and ethical standards which go beyond those requirements.[3] As a result, the regulatory roles that self-regulatory organizations (''SROs'') play are a vital element in the regulation of the securities industry. An SRO is required to carry out the purposes of the Act, as well as enforce compliance by its members, and persons associated with its members, with the federal securities laws and the SRO's rules.[4]

An SRO is required to have rules designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to refrain from imposing any unnecessary or inappropriate burdens on competition.[5] For example, an SRO must maintain procedures to surveil against rule violations, including insider trading and market manipulation. While different market structures may imply different procedures for accomplishing this task, SROs are required to expend sufficient resources, in terms of both staff and technology, to support their surveillance functions. This includes having officers with expertise in monitoring for compliance with federal securities laws and SRO rules, and an understanding of the role of a registered exchange or association as an SRO. An SRO must deploy adequate examination and surveillance systems and maintain an audit trail of the transactions in its system. And SROs must have adequate measures in place to maintain listing and maintenance standards. SROs' regulatory programs, including those related to the trading of Nasdaq securities, are periodically inspected by the Commission.

An SRO also is required to enforce compliance with applicable laws and rules, and discipline members for violations relating to transactions executed in its market.[6] This responsibility includes the establishment of a disciplinary process including appropriate sanctions for violations of the rules and a fair procedure for administering the

[1] Personal identifying information, such as names or e-mail addresses, will not be edited from electronic submission. Submit only information that you wish to make publicly available.

[2] H.R. Doc. No. 123, 94th Cong., 1st Sess. 48 (1975), Legislative History of the Securities Reform Act of 1975.

[3] *Id.* The Commission is charged with supervising the exercise of this regulatory power to assure that it is used effectively to fulfill the responsibilities assigned to the self-regulatory organizations and that it is not used in a manner inimical to the public interest.

[4] *See* section 6(b)(1) of the Act, 15 U.S.C. 78f(b)(1) and section 15A(b)(2), 15 U.S.C. 78*o*–3(b)(2).

[5] *See* section 6(b)(5) of the Act, 15 U.S.C. 78f(b)(5); section 6(b)(8) of the Act, 15 U.S.C. 78f(b)(8); section 15A(b)(6), 15 U.S.C. 78*o*–3(b)(6); and section 15A(b)(9), 15 U.S.C. 78*o*–3(b)(9). For example, an SRO must also have written listing and maintenance standards, as well as an adequate regulatory staff to apply those standards. *See* section 12(d) of the Act, 15 U.S.C. 78l(d); Rule 12d2–2, 17 CFR 240.12d2–2 (requiring national securities exchanges to file an application with the Commission to strike a security from listing and registration). In addition, an SRO must have rules that ensure that no member's order is unfairly disadvantaged and all members are treated fairly. An SRO also is expected to have rules establishing procedures for the clearance and settlement of trades effected on the exchange. *See* Regulation of Exchanges and Alternative Trading Systems, Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998), at section IVB(1).

[6] *See* 19(g)(1) of the Act, 15 U.S.C. 78s(g)(1); *See also* Regulation of Exchanges and Alternative Trading Systems, Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998), at section IVB(1).

disciplinary process.[7] The Commission has previously permitted SROs to agree, with Commission approval, with each other on how to allocate regulatory responsibilities. Rule 17d–2 under the Act permits SROs to establish joint plans for allocating the regulatory responsibilities imposed by the Act with respect to common members.[8] An SRO participating in a regulatory plan is relieved of regulatory responsibilities with respect to a broker-dealer member of such SRO, if those regulatory responsibilities have been designated to another SRO under the regulatory plan. In addition, the Commission recognizes that an SRO can contract with other SROs, pursuant to a regulatory service agreement, to perform certain of these oversight activities. Nonetheless, an SRO retains ultimate responsibility for its self-regulatory responsibilities, even if it has contracted with another SRO to perform oversight activities.

B. Trading in NASDAQ Listed Securities

On April 14, 2003, Nasdaq submitted the Nasdaq Petition, requesting that the Commission address ''unequal and inadequate regulation by some markets that trade securities listed on Nasdaq.'' [9] As discussed in Nasdaq's Regulation White Paper,[10] Nasdaq believes that as trading in Nasdaq securities spreads to a greater number of venues, it becomes increasingly difficult for the NASD or any other individual SRO to oversee adequately trading in those securities. Moreover, Nasdaq contends that this difficulty is particularly true with respect to broker-dealers that quote on one market while printing trades to another market or those that quote and trade the same security in more than one market. Nasdaq believes that it is often unclear which market is responsible for regulating such broker-dealers' activities, and that no market is likely to have adequate information to effectively oversee that activity.[11]

Until recently, most trading in Nasdaq-listed securities was regulated by the NASD. With guidance from the Commission, the NASD developed a regulatory framework to provide investor protection in an open trading environment with multiple market makers. Nasdaq claims that when trading in Nasdaq stocks was almost exclusively limited to the Nasdaq system, NASD was able to view trading in Nasdaq stocks and respond quickly and effectively to protect investors.

According to Nasdaq, the fragmentation of trading of securities listed on Nasdaq by various national and regional exchanges has caused the regulation of Nasdaq trading to become uncoordinated. Nasdaq states that there are harmful disparities in the markets' abilities to regulate the trading of Nasdaq-listed securities: for instance, Nasdaq states that several exchanges do not have rules approved by the Commission for gathering the detailed trading data necessary for the detection of fraud, manipulation, insider trading, and other violations.

In addition, Nasdaq asserts that some markets are lowering their execution and reporting fees to compete for trades in Nasdaq-listed securities. Nasdaq also states that, to hold down costs, these markets avoid incurring new regulatory expenses, such as the costs of adapting their existing rules and surveillance systems to the unique structure and patterns of Nasdaq trading. According to Nasdaq, these markets use the savings from less regulation as an inducement to attract trading away from the NASD's highly regulated markets to less regulated markets, to the detriment of investors.

Nasdaq initially raised many of these concerns in its Regulation White Paper prior to submitting its Petition. In response to the Regulation White Paper, The Cincinnati Stock Exchange, Inc. (''CSE'') asserted that ''the current surveillance infrastructure provides an effective means for the ongoing regulation of the markets. This infrastructure, which has been in place for over 20 years, is organized in a manner that fairly distributes responsibilities and costs among the various self-regulatory organizations.'' [12] CSE also noted that the Intermarket Surveillance Group (''ISG'') was established for the purpose of coordinating regulatory efforts to address potential intermarket manipulations and trading abuses. As a result, CSE recommended, in part, that Nasdaq work with the ISG to address its concerns regarding intermarket surveillance methodologies and the allocation of intermarket responsibilities prior to abandoning the existing SRO and ISG infrastructure. In addition, CSE contended that Nasdaq is merely speculating about the adequacy of other markets' surveillance programs, the adequacy of which is subject to Commission oversight and generally kept confidential between the Commission and the respective regulator. And lastly, CSE noted that if the regulatory concerns raised by Nasdaq exist, they exist for all securities, including exchange-listed securities.

III. Summary of the NASDAQ Petition

To address the regulatory issues identified by Nasdaq, Nasdaq requests that the Commission intercede in three ways. First, Nasdaq requests that the Commission exercise its authority under section 19(c) of the Act [13] and Rule 192 of the Commission's Rules of Practice [14] to amend the rules of all markets that trade Nasdaq-listed securities to establish uniform trading rules, and to ensure equal surveillance and enforcement of those rules. Second, Nasdaq requests that the Commission exercise its authority under section 11A(a)(3)(B) of the Act,[15] and Rule 11Aa3–2(b)(2) [16] to immediately order that the exchanges' costs of regulation—including audit trail collection, surveillance, and enforcement—be aggregated and deducted from the market data revenue collected pursuant to the UTP Plan.[17] Finally, Nasdaq asks the Commission to identify markets that trade Nasdaq-listed securities without approved rules, order audit trails, surveillance, and examination programs that are sufficient to protect investors that buy and sell Nasdaq-listed securities on those markets. For those that do not, Nasdaq requests that the Commission exercise its authority under

[7] *See* section 6(b)(6) of the Act, 15 U.S.C. 78f(b)(6); section 6(b)(7) of the Act, 15 U.S.C. 78f(b)(7); section 15A(b)(7), 15 U.S.C. 78*o*–3(b)(7); and section 15A(b)(8), 15 U.S.C. 78*o*–3(b)(8). While exchanges are required to enforce compliance by their members, and persons associated with their members, with applicable laws and rules, the Commission has used its authority under sections 17 and 19 of the Act to allocate to particular SROs oversight of broker-dealers that are members of more than one SRO. *See* 15 U.S.C. 78q and 78s. *See also* 17 CFR 240.17d–2; 17 CFR 240.19g2–1.

[8] 17 CFR 240.17d–2.

[9] *See* letter to Jonathan G. Katz, Secretary, Commission, from Edward Knight, Executive Vice President and General Counsel, Nasdaq, dated April 11, 2003 at 2 (File No. 4–479).

[10] Nasdaq Regulation White Paper: A Call for a Fairer Allocation of Responsibilities and Costs in a Fragmented Market, dated January 24, 2003 (''Regulation White Paper'').

[11] *See* Regulation White Paper, *supra* note, at 1.

[12] *See* letter from Jeffrey T. Brown, Senior Vice President, Secretary and General Counsel, CSE, to Chairman Pitt, Commissioner Atkins, Commissioner Campos, Commissioner Glassman, and Commissioner Goldschmid, dated February 19, 2003, at 1 (''CSE Letter''). The CSE also stated that if ''weaknesses exist in the system, CSE supports efforts by all markets to work together and improve intermarket coordination of securities regulation to ensure that our markets are fair, orderly and protect investors.'' *Id.*

[13] 15 U.S.C. 78s(c).

[14] 17 CFR 201.192.

[15] 15 U.S.C. 78k–1(a)(3)(B).

[16] 17 CFR 240.11Aa3–2(b)(2).

[17] The UTP Plan is the 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.

section 12(f)(2) and (f)(3) of the Act [18] to prohibit the launch or continuation of Nasdaq trading by any market that fails to protect investors as required under the Act.

Each of Nasdaq's proposals is set forth in great detail below.

A. Uniform Trading Rules

Nasdaq requests that the Commission act immediately to establish uniform trading rules and ensure equal surveillance and enforcement of those rules because of its concern that investors are potentially harmed by the lack of uniform trading rules and from unequal surveillance and enforcement of rules.[19] Nasdaq states that it attempted, unsuccessfully, to persuade the other exchanges that trade Nasdaq stocks to act jointly to adopt uniform market rules and surveillance and enforcement mechanisms to eliminate these regulatory disparities. Specifically, Nasdaq asked that the UTP Plan be amended to prohibit certain defined conduct. Under that proposal, so-called Prohibited Conduct would have included, without limitation: any activity that is prohibited by any provision of the Act or rule adopted under the Act, market manipulation, illegal short selling, insider trading, fraud, front running, marking the open or the close, and non-compliance with the limit order display rule, and firm quote rule.[20] Nasdaq believes that to prevent regulatory arbitrage all SROs' rulebooks should contain uniform rules on these matters, and that each SRO should vigorously surveil and enforce those uniform rules.

For example, Nasdaq claims that although it has a short-sale rule, several UTP Exchanges trade Nasdaq issues with no short-sale price test. Nasdaq asserts that industry participants route short-sale orders to exchanges without short-sale rules specifically to avoid NASD and Nasdaq rule restrictions. Nasdaq claims that certain exchanges publicize this disparity to attract order flow to their markets.

In addition, Nasdaq concludes, after review of the rulebooks of various markets, that no other market currently executing trades in Nasdaq-listed securities has rules requiring its members to report order audit trail information or operates a Commission-approved order audit trail. Nasdaq collects order audit trail information through its Order Audit Trail System (''OATS'') and through its Automated Confirmation Transaction service (''ACT''). Nasdaq asserts that the NASD uses this data to create a fully integrated audit trail of quotes, trades, and orders to run its surveillance programs to detect insider trading, fraud, best execution violations, spoofing, purposeful late trade reporting, short-sale violations, untimely execution of market orders, and a wide variety of other potential rule violations.

For transactions reported away from Nasdaq, Nasdaq states that the NASD eventually receives the quotes and trade reports of the regional exchanges through the ISG. However, Nasdaq claims that the ISG audit trail only provides trade information at the clearing firm level (as opposed to both the clearing firm and the executing firm levels). In addition, according to Nasdaq, the time fields in the data are not generated by clocks subject to uniform synchronization protocols, as is the case with OATS data. Moreover, Nasdaq states that ISG data is not provided in a format that is conducive to integration into NASD's automated surveillance systems. As a result, manually processing this information can be time-intensive; furthermore, Nasdaq states that this data is not received until two days after the trade date. Nasdaq believes that such a delay can significantly hinder NASD's ability to investigate unlawful trading activity on a real-time basis and can prevent NASD from obtaining non-stale regulatory information in an ongoing investigation. The NASD uses this information to detect violations involving wash sales, fraud, insider trading, marking the close, best execution, riskless principal trade reporting, Regulation M, firm quote compliance, and limit order protection, among others.[21]

At a more fundamental level, Nasdaq believes that consolidated regulation protects investors better than the coordinated regulation that ISG facilitates. In addition, Nasdaq believes that consolidated regulation should be crafted by the entities that will be governed. ISG is a voluntary organization whose membership includes SROs (only some of which trade Nasdaq-listed securities) and certain foreign entities that are not regulated as SROs by the Commission.

To combat these perceived problems, Nasdaq asks the Commission, at a minimum, to add to the rules of all SROs that trade Nasdaq-listed securities, rules requiring an electronic audit trail identical to the NASD's OATS Rules [22] and short-sale restrictions similar to NASD Rule 3350. Nasdaq also asks that, if the Commission's review of other markets' rules, surveillance, or enforcement reveals inequalities that can be addressed through the adoption of uniform rules, the Commission add those rules as well, to ensure that there are no regulatory inconsistencies among SROs that trade Nasdaq-listed securities.

Request for Comments on the Need for Uniform Trading Rules and Surveillance

The Commission welcomes comment on all aspects of Nasdaq's petition, including the following matters:

Q1. Do commenters agree with Nasdaq that there is unequal regulation of trading in Nasdaq securities?

Q2. Should all exchanges and associations trading Nasdaq securities have rules requiring detailed audit trail information?

Q3. Should all exchanges and associations trading Nasdaq securities be required to automate their surveillance and examination of Nasdaq trading on their markets?

Q4. Should all exchanges and associations trading Nasdaq securities have similar rules to regulate short selling?

Q5. What other trading rules should be uniform across all markets?

Q6. How should the Commission address any regulatory gaps that can arise when trading in the same security is fragmented across different SROs?

Q7. To what extent is ISG a useful mechanism for coordinating intermarket regulatory efforts? Does ISG fully address the regulatory gaps Nasdaq contends exist? Does the fact that the Commission does not have direct oversight of ISG limit the sufficiency of the ISG framework in ensuring adequate regulation of violative conduct in the trading of Nasdaq securities that can occur across markets, such as insider trading or certain market manipulations?

Q8. Are there models sufficient to address potential concerns raised by fragmentation of regulation by multiple SROs trading Nasdaq securities?

Q9. Are there advantages or disadvantages to a single market regulator with regulatory oversight across all markets trading Nasdaq securities?

[18] 15 U.S.C. 78l(f)(2), (f)(3).

[19] Nasdaq discussed in greater details its views about the harmful regulatory arbitrage that occurs when markets apply different trading rules to the same conduct in its Regulation White Paper.

[20] Most members of the UTP Operating Committee asserted that the Nasdaq UTP Plan was not the proper forum for resolving regulatory issues.

[21] Nasdaq states that on an average day, OATS processes 65 million order reports and that NASD currently has six full time staff members dedicated to OATS compliance.

[22] See NASD Rules 6951 through 6957.

Q10. Should a competitive bidding process be required to determine which entity will serve as the single regulator?

B. Allocation of Regulatory Costs

Nasdaq urges the Commission to equitably allocate regulatory costs across markets that trade Nasdaq-listed securities to ensure that intermarket competition does not come at the cost of adequate regulation. As set forth in the Regulation White Paper, Nasdaq believes that all markets that trade the same securities should share the responsibility of equal regulation. In Nasdaq's view, these shared responsibilities include the uniform rules, surveillance, and enforcement discussed above.

Nasdaq claims that in the absence of a framework for adopting uniform order audit trails and uniform enforcement of marketplace rules, Nasdaq is forced to subsidize other markets' regulatory costs, creating a classic free-riding dilemma. Nasdaq funds NASD's OATS to collect trading information from all NASD members, whether or not the trades are reported to Nasdaq. For example, Nasdaq claims that Island ECN (''Island''), an NASD member, reports 15 percent of all Nasdaq trades to the CSE, and then, where Island is the reporting party, Island sends detailed information about those trades to OATS. Therefore, according to Nasdaq, although CSE receives the market data revenue attributable to those trades, the NASD and Nasdaq bear the costs of receiving and storing Island's OATS data as well as the costs of regulating Island's conduct as an NASD member.

Nasdaq believes that the fairest way to allocate the costs of supervising the trading of Nasdaq stocks is to aggregate the exchanges' costs of regulation, which include costs associated with surveillance and enforcement, and to deduct that amount from the market data revenue collected pursuant to the Nasdaq UTP Plan. Nasdaq believes that the Commission could apply this allocation method to today's regulatory environment, as well as in the future to the single regulator, ISG, and DEA regulatory models that Nasdaq has identified in its Regulation White Paper. Nasdaq believes that this means of funding aggregate regulatory costs will counter the existing economic incentives that are leading markets to reduce their regulatory costs to compete for order flow.

Request for Comments on the Allocation of Regulatory Costs

The Commission welcomes comment on all aspects of Nasdaq's petition requesting the reallocation of regulatory costs, including the following matters:

Q1. Should proceeds from the Nasdaq UTP Plan be withheld to pay for regulatory costs?

Q2. Would Nasdaq's proposal to aggregate and deduct regulatory costs from market data revenue result in adequate regulation? If so, what costs would appropriately be considered regulatory costs and therefore, appropriately deducted from the market data revenue?

Q3. Should other methods of fairly allocating regulatory costs be considered?

Q4. Should the NASD be required, as suggested by the CSE, to alter its systems to include more data from inter-market trading to improve inter-market surveillance? [23] If so, who should pay for this enhancement?

Q5. Who would determine what are legitimate regulatory costs? On what basis should such a determination be made?

C. Prohibition of Trading in Nasdaq-Listed Securities

Finally, Nasdaq asks the Commission to identify the markets that trade Nasdaq-listed securities without approved rules, order audit trails, surveillance, and examination programs sufficient to protect investors that buy and sell Nasdaq-listed securities on those markets. Specifically, Nasdaq believes it is unclear whether SROs, other than the NASD, have comparable algorithmic systems and examinations focused on detecting violations of Commission and SRO investor protection and trading rules.[24] In addition, while trading on Nasdaq is subject to a short-sale price test (NASD Rule 3350), several exchanges trade Nasdaq-listed securities without being subject to a comparable price test.[25] As a result of such disparities, Nasdaq believes that the level of regulatory protection an investor receives depends almost entirely on the market to which the investor's order is routed. For those markets that in Nasdaq's view do not have adequate regulatory protections, Nasdaq asks the Commission to exercise its authority under section 12(f)(2) and (f)(3) of the Act [26] to prohibit the launch or continuation of Nasdaq trading by any market that fails to protect investors as required under the Act.

IV. Exchange-Listed Securities and Exchange-Listed Options

In response to the Regulation White Paper, CSE asserted that Nasdaq ignored that ''the same cross-market manipulation issues that form the predicate for the regulatory solution it advocates in the Nasdaq world apply equally to all other securities, including the NYSE-listed stocks in which Nasdaq trades over 10% of the volume.''[27] The CSE noted that, contrary to its position on the regulation of Nasdaq securities, Nasdaq did not appear to be arguing that the same surveillance programs were inadequate as applied toward NYSE-listed securities.[28] Subsequently, in its Petition, Nasdaq expressly stated that it was not addressing the application of the principles expressed in its Petition to exchange-listed securities.[29]

The Commission notes that exchange-listed securities and securities options may be traded on more than one market and, therefore, the same regulatory issues raised by Nasdaq could arise. At present, trading in exchange-listed securities is more concentrated than the trading in Nasdaq securities.[30] In addition, the options markets are in the process of implementing a consolidated options audit trail system that will enable the options exchanges to reconstruct markets promptly, effectively surveil them and enforce order handling, firm quote, trade reporting and other rules.[31]

Request for Comments on the Application of Nasdaq's Recommendations to Exchange Listed Securities

The Commission requests comment on whether the same regulatory concerns raised by Nasdaq for Nasdaq securities, such as regulatory

[23] *See* CSE Letter, *supra* note at note 4.

[24] Nasdaq represented that while the CSE has asserted that its Firm Order Submission system is an order audit system for the surveillance of trading on the CSE, it was Nasdaq's understanding that FOS is a voluntary system used primarily for settling commercial disputes between traders rather than an integrated, comprehensive means for surveilling trading on the CSE.

[25] The Commission notes, however, that short sales in Nasdaq securities would be subject to borrowing requirements, pursuant to an NASD or UTP exchange rule. *See, e.g,* NASD Rule 3370.

[26] 15 U.S.C. 78l.

[27] *See* CSE Letter, *supra* note 12, at 2.

[28] *Id.*

[29] *See* Nasdaq Petition at note 11.

[30] *See* Table 12, Share Volume by Exchanges, SEC Annual Report 2002 at 175. In 2001, the NYSE had 84.31 percent of the share volume for exchanges. Share volume for exchanges includes stocks, rights, and warrants.

[31] *See* Exchange Act Release No. 43268 (September 11, 2000) (order requiring, in part, the options markets to design and implement a consolidated options audit trail system that provides an accurate, time-sequenced record of electronic orders, quotations, and transactions). The International Securities Exchange (''ISE'') was not a respondent in the proceedings instituted by this order and therefore has not been ordered to comply with the undertaking. Nevertheless, the ISE has agreed to participate in the audit trail.

fragmentation and arbitrage, exist for exchange-listed stocks and options. In addition, the Commission specifically requests comment on the following:

Q1. Do commenters believe that there is unequal regulation of exchange-listed securities among the markets trading such securities? If so, do commenters believe that the proposals made by Nasdaq with respect to Nasdaq securities would address such unequal regulation in the listed markets? If not, what other approaches do commenters recommend?

Q2. Should the Commission require an intermarket consolidated order audit trial system for Nasdaq-listed and exchange-listed securities, other than options?

V. General Request for Comments

In addition to the questions above, the Commission seeks comment on issues presented in the Nasdaq Petition. More specifically, how should the Commission make sure that each SRO that trades Nadsaq securities fulfills its statutory obligations to surveil trading in such securities?

By the Commission.

Dated: May 14, 2003.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–12604 Filed 5–19–03; 8:45 am]

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