as broker-dealers and comply with the requirements of Regulation ATS. The Commission estimates that there are currently approximately 69 respondents.

Sixty-nine respondents will spend approximately 276 hours per year (69 respondents at 4 burden hours/respondent) to comply with the record preservation requirements of Rule 303. At an average cost per burden hour of $86.54, the resultant cost of compliance for these respondents is $23,885.04 per year (276 burden hours multiplied by $86.54/hour).

Written comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Direct your written comments to Michael E. Bartell, Associate Executive Director, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

Dated: April 17, 2001.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01–10388 Filed 4–25–01; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request; Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:

Form SE, OMB Control No. 3235–0327, SEC File No.270–289

Form ID, OMB Control No. 3235–0328, SEC File No.270–291

Form ET, OMB Control No. 3235–0329, SEC File No.270–290

Form TH, OMB Control No. 3235–0425, SEC File No.270–377

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget requests for extension of the previously approved collections of information discussed below.

Form SE is used by registrants to file paper copies of exhibits that would be difficult or impossible to submit electronically. The information contained in Form SE is used by the Commission to identify paper copies of exhibits. Form SE is a public document and is filed on occasion. Form SE is filed by individuals, companies or other for-profit organizations that are required to file electronically. It is estimated that 110 registrants file Form SE at an estimated .10 hours per response for a total annual burden of 11 hours.

Form ID is used by companies to apply for identification numbers and passwords used in conjunction with the EDGAR electronic filing system. The information provided on Form ID is essential to the security of the EDGAR system. Form ID is not a public document because it is used solely for the purpose of registering filers on the EDGAR system. Form ID must be file every time a registrant or other person obtains or changes an identification number. The form is filed by individuals, companies or other for-profit organizations that are required to filed electronically. It is estimated that 7,000 registrants file Form ID at an estimated .15 hours per response for a total annual burden of 1,050 hours.

Form ET is used by companies to facilitate the transfer of information submitted to the Commission on magnetic tapes to the EDGAR system. Form ET provides technical information about the magnetic tape cartridge contents and identifies a contract person who can answer any questions about the tape cartridge. Form ET is a public document and is filed on occasion. It is filed by individuals, companies or other for-profit organization that are required to file electronically. It must be filed every time a filing is submitted to the Commission on magnetic tape to identify such filings. It is estimated that 120 registrants file Form ET at an estimated .25 hours per response for a total annual burden of 30 hours.

Form TH is used by registrants to notify the Commission that an electronic filer is relying on the temporary hardship exemption for the filing of a document in paper format that would otherwise be required to file electronically as prescribed by Rule 201(a) of Regulations S–T. Form TH is a public document and is filed on occasion. Form TH must be filed every time an electronic filer experiences unanticipated technical difficulties preventing the timely preparation and submission of a required filing. It is estimated that Form TH is filed by 15 registrants at an estimated .33 hours per response for a total annual burden of 5 hours.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Written comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503; and (ii) Michael E. Bartell, Associate Executive Director, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: April 19, 2001.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01–10389 Filed 4–25–01; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–44201; Form Type 34–36 MR; File No. 79–9]

Order Granting Application for a Conditional Exemption by the National Association of Securities Dealers, Inc. Relating to the Acquisition and Operation of a Software Development Company by the Nasdaq Stock Market, Inc.

April 18, 2001.

I. Introduction

On March 3, 2000, the National Association of Securities Dealers, Inc. (''NASD'') and The Nasdaq Stock Market, Inc. (''Nasdaq'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Rule 0–12 [1] under the Securities Exchange Act of 1934 (''Exchange Act''), an application for a conditional exemption under section 36(a)(1) of the Exchange Act [2] relating to the Nasdaq's acquisition and operation of a software development company. In addition, the NASD requested that, if the commission determined to solicit comment on the

[1] 17 CFR 240.0–12.

[2] 15 U.S.C. 78mm(a)(1).

application for a permanent exemption, the Commission grant a temporary conditional exemption for a period of one year.

The notice of application was published in the **Federal Register** on May 1, 2000 (''Public Notice''),[3] along with an order temporarily granting the application for a conditional exemption. In this notice, the Commission stated that it would make a final determination concerning the request for a permanent exemption after reviewing the comments submitted in response to the notice and prior to the expiration of the temporary exemption.[4] No comments were received on the application. This order approves the NASD's application for a conditional exemption under section 36(a)(1) of the Exchange Act [5] relating to Nasdaq's acquisition and operation of a software development company.

The relevant text of the NASD's application is set forth in section II below,[6] followed by the Commission's order granting the NASD's request for an exemption in section III.

II. NASD's Application for Exemption

On behalf of the NASD an Nasdaq, pursuant to section 36 of the Exchange Act and Rule 0–12 thereunder, we are writing to apply for an exemption from section 19(b) of the Exchange Act, to (1) permit Nasdaq to acquire [7] and operate a software development company, Financial Systemware, Inc. (''FSI''), to market certain financial services software, ''OTC Tools'' and related software (''Software''), and to expand the products and services offered by FSI to include service bureau and back-office functions for NASD broker-dealers, without filling proposed rule changes pursuant to Rule 19b–4 under the Exchange Act before making or implementing any modifications to the Software, or with respect to each new software product or service offered by FSI (provided those new software products and services are offered in a manner that is not inconsistent with the representations contained in this letter), and (2) permit FSI to determine prices for such software products and services based on competitive market factors without filing proposed rule changes pursuant to Rule 19b–4 under the Exchange Act.

Subject to receiving the exemptive relief requested herein, Nasdaq plans to acquire the assets of FSI, whose primary line of business is the development and distribution of a financial services software product called ''OTC Tools.'' OTC Tools is designed for and marketed to NASD broker-dealers that use Nasdaq Workstation II terminals. OTC Tools is a Microsoft Windows-based software product that enhances and simplifies a user's interactions with, and use of, the Nasdaq Workstation II terminal, but does not change or alter the current features of Nasdaq, SelectNet or SOES (*i.e.,* the facilities of the NASD). The NASD and Nasdaq proposed that Nasdaq will operate FSI as a stand-alone business, capitalized separately and not subsidized by NASD members or other revenues of the NASD or Nasdaq.

OTC Tools offers a variety of features to assist NASD broker-dealers in efficiently managing their quotes, monitoring and executing incoming orders, continually checking for closed, locked or crossed markets, and monitoring the depth of the market. These functions to be performed by OTC Tools are not central to the core functionality of Nasdaq's marketplace. Rather the functions involved are supplemental to, and independent of, the primary functions of Nasdaq.

Currently, the Software, which is being commercially marketed to NASD broker-dealers, offers a variety of features to assist them in efficiently managing their quotes, monitoring and executing incoming orders, continually checking for closed, locked, or crossed markets, and monitoring the depth of the market. There is a high level of effective competition in providing these types of software products and services to market participants. For example, Automatic Securities Clearance, through its BRASS service, provides order-management services and software to a large number of NASD member firms that are in many respects similar to the Software. Other firms, such as Eagle Trading, ADP, TCAM and Royal Blue, offer order handling packages that compete with those offered by FSI. Similarly, many NASD member firms have developed internal order management and order-routing software that provides independent functions comparable to those provided by the Software.

Technology applications for broker-dealers and market makers develop and change very rapidly, and FSI needs to be able to move quickly to modify existing products and develop new software products. If FSI were required to follow the procedures for rule filings and approvals each time the Software is modified or enhanced, the delays and administrative difficulties associated with the rule filing process would put FSI at a significant competitive disadvantage relative to other software developers that are not affiliated with an SRO. Moreover, the NASD and Nasdaq would not be able to provide NASD broker-dealers with the type of timely and effective software development that users desire and have indicated they need. Thus, in this competitive software market, the delays and administrative difficulties associated with the rule filing process would, in the NASD's view, put FSI at such a competitive disadvantage so as to render the acquisition of FSI or the rights to the software impracticable.

As described in Exchange Act Rule 0–12, in connection with a request for exemption from any provision of the Exchange Act, the applicant is required to state any conditions or limitations it believes would be appropriate for the protection of investors. As a general matter, the NASD and Nasdaq believe the request submitted herein is appropriate because it deals with nonessential services of the NASD and provides the benefit of optional technological innovation designed to improve the productivity of NASD member firms. The following limitations on the exemptive relief requested are, in the view of the NASD and Nasdaq, not objectionable to further this objective and to ensure that the operation of FSI is generally consistent with the requirements of the Exchange Act applicable to SROs.

Continued Presence of Competition

As indicated above, at the time of this application, there is a high level of effective competition in providing software to market makers. Automatic Securities Clearance, through its BRASS service, for example, provides order-management services and software that are in many respects similar to the Software to a large number of NASD member firms. Other firms, such as Eagle Trading, ADP, TCAM and Royal Blue, offer order handling packages that compete with those offered by FSI. Similarly, many NASD member firms have developed internal order management and order-routing software

[3] *See* Securities Exchange Act Release No. 42713 (April 24, 2000), 65 FR 25401.

[4] *Id.* at 25401. Nasdaq has submitted a letter reiterating the NASD's and Nasdaq's commitment to continue to comply with the terms and conditions of the conditional exemption and to continue to operate Nasdaq Tools, Inc. (formerly known as Financial Systemware, Inc.) in a manner that does not provide the company with an unfair competitive advantage. *See* letter from S. William Broka, Senior Vice President, Nasdaq, to Jonathan G. Katz, Secretary, Commission, dated February 5, 2001.

[5] 15 U.S.C. 78mm(a)(1).

[6] The full text of the NASD's exemption application was published in the Public Notice and is incorporated herein by reference.

[7] The NASD filed its application on March 3, 2000. Subsequently, Nasdaq completed its acquisition of the assets of the software development company.

that provides independent functions comparable to those provided by the Software. Moreover, the software industry in general, and the financial software industry in particular have low barriers to entry, so that, as the markets evolve and technology is increasingly brought to bear on securities trading, new entrants can, in our view, emerge. NASD and Nasdaq understand that the Commission may reconsider at a later date its decision to grant the exemptive relief requested herein in the event that effective competition for these software products and services no longer exists.

Independent Functionality of Nasdaq and Other NASD-Sponsored Services

NASD and Nasdaq believe that providing the Software to NASD member firms does not, and will not, affect the basic functionality of the Nasdaq system. In acquiring FSI and providing the software to NASD member firms, the core functions of Nasdaq (currently provided through the Nasdaq Workstation II terminal system) will not be changed. Nasdaq and other NASD-sponsored systems (such as the Automated Confirmation Transaction Service) operate and will continue to operate independently of the Software. Use of the Software is not, and will not in the future, be necessary to access Nasdaq or any other NASD market-related facility, and NASD members that do not use the Software will be able to enter and change quotes, route orders, effective transactions and perform all market functions in Nasdaq. The NASD and Nasdaq believe that requiring full Nasdaq core functionality without use of the Software is an appropriate condition to the grant of the exemptive relief requested.

Full Public Access to Nasdaq Through the Application Programming Interface (''API'')[9] Will Continue

As the Commission is aware, the Nasdaq system is an open architecture system and Nasdaq has provided an API that enables firms to have access to the Nasdaq system through their own software or computer system. The NASD and Nasdaq are fully committed to maintaining the API to provide for fair and equitable access to the system and to encourage the development of software by NASD member firms and competing software vendors. Thus, we believe that conditioning the exemptive relief on continued free and open access to Nasdaq through the API is appropriate in light of the commitment of the NASD and Nasdaq to maximum competition in offering services to NASD members.

Fair Access to Information on Nasdaq Developments

As a fourth condition consistent with the statutory objective and our stated objective of maintaining a competitive software market, the NASD and Nasdaq agree not to provide FSI an information advantage concerning Nasdaq core facilities, particularly changes and improvements to the system, that is not available to the industry generally or to vendors of financial software for market makers and order entry firms, and will prevent FSI from having any advance knowledge of proposed changes or modifications to core Nasdaq facilities. This is appropriate to avoid giving FSI any informational advantage in the development and enhancement of software products for the Nasdaq market.

In this regard, FSI will not share employees with the NASD, Nasdaq or any other NASD affiliate, and will be housed in office space separate from that of the NASD or Nasdaq. In addition, FSI will be notified of any changes or improvements to the Nasdaq system in the same manner that other competing vendors are notified of such changes or improvements. For example, in addition to mailings and Web site disclosure of changes to Nasdaq or to Nasdaq technical specifications, Nasdaq currently meets at least quarterly with all vendors to discuss proposed modifications to the System and changes that are in the pipeline (subject to Commission approval, where needed). FSI will be traded, for purposes of these mailings, disclosures and meetings, the same as any third party vendor and will not receive any information regarding planned or actual changed to Nasdaq in advance of other vendors Conversely, FSI will not disclose any system or design specifications, or any other information to any employees with the NASD, Nasdaq or any other NASD affiliate that would give FSI an unfair advantage over its competitors.

For the reasons set forth above, the NASD hereby requests that the Commission grant an exemption from Section 19(b), and the rules and regulations thereunder, to (1) permit the Nasdaq to operate FSI and offer software to market makers (and other NASD member firms) without filing proposed rule changes with respect to making or implementing any modifications to the Software, or with respect to each new software product or service offered by FSI (provided those new software products and services are offered in a manner that is not inconsistent with the representations contained in this letter), and (2) permit FSI to determine prices for such software products and services based on competitive market factors without filing proposed rule changes.

III. Order Granting Conditional Exemption

The Commission has determined to grant the NASD's application for a conditional exemption. The Commission finds that the conditional exemption from the provisions of section 19(b) is necessary and appropriate in the public interest and is consistent with the protection of investors. In particular, the exemption could help promote efficiency and competition in the market to provide enhanced software services to broker-dealers who interact with the NASD's facilities, while upholding the regulatory objectives of the Exchange Act.

As discussed further below, the NASD, as a registered self-regulatory organization, operates a number of facilities used by broker-dealers that effect transactions in securities in the over-the-counter, particularly securities that are qualified for inclusion in Nasdaq. These facilities, which include the automated quotations network that is the heart of Nasdaq, order delivery and execution systems, and a transaction reporting system, are made available broker-dealer subscribes primarily through the Nasdaq Workstation II (''NWII'') service. The NASD has adopted an open architecture system that provides an API between the NWII system and a subscriber's computer system. The API allows broker-dealers to employ specialized software that supplements the NWII service and enhances their interaction with the NASD's facilities, thereby facilitating their trading and other proprietary activities. Currently, a number of companies independent of the NASD offer this type of software product for sale to broker-dealers. Nasdaq has acquired one of these companies—FSI.

[9] API provides an electronic interface between a subscriber's computer system and the Nasdaq Workstation II system. Through the use of the API, a subscriber may build its own workstation presentation software to integrate the Nasdaq Workstation II service into the subscriber's existing presentation facilities. The API allows a subscriber to emulate the Nasdaq Workstation II presentation software with equivalent functionality, capacity utilization and through-part capability, in addition to providing enhanced capability to develop customized internal presentations for use in support of a subscriber's activities. API also allows a subscriber to operate a quote-update facility to assist solely in complying with the Commission's Order Handling Rules. Generally, a subscriber establishes an API ''linkage,'' such as a Nasdaq Workstation II substitute or quote update facility, which in turn connects to a service delivery platform via an API server.

Certain of the functions offered through FSI's products, when considered together with the other services offered by the NASD and its affiliates,[10] could cause such products to be considered part of the NASD's facilities. Consequently, changes to the products or the fees charged for the products could trigger the proposed rule change requirements of section 19(b),[11] which include filings with the Commission, public notice and comment on those filings, and Commission review and approval of the proposed rule change. These requirements could significantly hamper the ability of FSI to compete effectively in a rapidly changing technology market to provide specialized software to broker-dealers. The requested conditional exemption would allow FSI to modify its products, offer new products, and set fees for its products without going through the proposed rule change procedures of section 19(b).[12]

In granting the Commission broad exemptive authority in section 36,[13] Congress intended to incorporate flexibility into the Exchange Act regulatory scheme to reflect a rapidly changing marketplace. Congress particularly intended for the Commission to use this flexibility to promote efficiency and competition.[14] The Commission believes that the NASD's requested conditional exemption will help achieve these goals, while upholding the regulatory objectives of the Exchange Act. In particular, the exemption could facilitate vigorous competition in the market to provide enhanced software services to broker-dealers by allowing FSI to compete on a more equal footing with companies that are not subject to the regulatory requirements applicable to an SRO. The exemption is subject to four principal conditions to help assure that FSI will not obtain an unfair competitive advantage because of its ownership by Nasdaq.

The Commission believes that granting a conditional exemption is warranted because (1) the products of FSI are not required for broker-dealers to access the NASD's fundamentally important or core services, including quotation collection and dissemination, order routing and execution, and transaction reporting, and (2) the opportunity for fair competition will be preserved in the market to provide enhanced software services to broker-dealers who use the NASD's facilities. Under these circumstances, the Commission believes that competitive forces, rather than the regulatory protections provided by the proposed rule change process, can be relied on to uphold the objectives of the Exchange Act in an efficient manner. Fair and vigorous competition, by creating incentives for companies to provide superior software products at fair prices, can serve the interests of broker-dealers, and ultimately those of their investor customers.

A. The NASD's Facilities and Its Open Architecture System

The NASD currently operates a number of facilities for broker-dealers that effect transactions in securities traded in the OTC markets. These facilities include (1) an automated quotations system, (2) the SelectNet order delivery system,[15] (3) the Small order Execution System (''SOES''), and (4) the Automated confirmation Transaction Service (''ACT'').

Currently, Nasdaq is a telecommunications network for the centralized collection and dissemination of quotations from market makers and electronic communications, networks (''ECNs''). This service allows broker-dealers to enter, retrieve, monitor, and adjust quotations throughout the trading day. The NASD's SelectNet facility offers broker-dealers the ability to automate the negotiation and execution of trades and eliminates the need for verbal contact between trading desks. It allows Nasdaq subscribers to direct orders for the purchase and sale of Nasdaq stocks to specified market makers or ECNs, or to broadcast orders for Nasdaq stocks to all market makers and ECNs. SelectNet also identifies incoming and outgoing orders and allows traders to see subsequent messages and negotiation results. The NASD's SOES facility automatically executes small agency orders routed to market makers, reports completed trades for public dissemination, and sends information with respect to those trades to clearing corporations for comparison and settlement. Finally, the NASD's ACT facility is an automated service that speeds the post-execution steps of price and volume reporting and the comparison and clearing of securities transactions.

Access to the NASD's facilities is made available primarily through the NASD's NWII service. In addition, the NASD has adopted an open architecture system that provides full public access to its facilities through the API. The API provides an electronic interface between a subscriber's computer system and the NWII system. Through the use of the API, a subscriber may employ its own workstation presentation software to integrate the NWII services into its presentation capabilities. The API thereby allows a subscriber to develop customized internal presentations for use in support of the subscriber's activities. In sum, core NASD services are provided through the NWII system, while subscribers also are able to develop or purchase customized software that enhances the NWII services and responds to their individual needs.

Many broker-dealers have taken advantage of the API and employ software to enhance the NASD services provided through the NWII system. Some broker-dealers have developed such software internally. In addition, a number of companies independent of the NASD have developed this type of software and offered it for sale to broker-dealers. For example, the promotional materials of one company states that its product ''provides full integrated and enhanced Nasdaq Workstation II features,'' including automated management of quotations, automated ACT reporting, and automated SelectNet order entry and order acceptance. Other competing companies make similar assertions concerning the ability of their products to enhance the interaction of broker-dealers with the NASD's facilities, as well as to facilitate a wide array of other broker-dealer proprietary activities.

The Nasdaq has acquired one of these companies—FSI. FSI is a software development company that offers a product called OTC Tools. OTC Tools includes a variety of features to assist NASD members in conducting their proprietary activities, including efficiently managing their quotes, monitoring and executing incoming orders, continually checking for closed, locked, or crossed markets, and monitoring the depth of the market.[16]

[10] The companies that currently offer the enhanced software products for broker-dealers are not owned by an SRO. When considered alone, their activities do not fall within the definition of a facility of an SRO, and they therefore are not subject to the proposed rule change requirements of Section 19(b).

[11] 15 U.S.C. 78s(b).

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

[13] 15 U.S.C. 78mm.

[14] *See* discussion at Section III.C., commission's Exemptive Authority under Section 36, *infra.*

[15] The Commission approved a proposed rule change by the NASD to establish a revised order delivery and execution system—the Nasdaq National Market Execution System. Securities Exchange Act Release No. 42344 (Jan. 18, 2000), 65 FR 3987.

[16] For example, the current version of OTC Tools enables a user (1) to maintain a pre-configured maximum market spread in specific securities when making spread in specific securities when making adjustments in a quotation at one side of the market; (2) to capture and execute incoming

To enable FSI to modify its products, offer new products, and set fees for its products as freely and quickly as its competitors that are not owned by an SRO, the NASD has requested a conditional exemption from the proposed rule change provisions of section 19(b).

B. Proposed Rule Change Provisions of Section 19(b)

Section 19(b) [17] requires that every SRO file with the Commission copies of any proposed rule or any proposed change in, addition to, or deletion from the rules of such SRO, accompanied by a concise general statement of the basis and purpose of such proposed rule change. The Commission is required to publish notice of the filing of a proposed rule change and to give interested persons an opportunity to submit written data, views, and arguments. Section 19(b) [18] provides that the Commission shall approve an SRO's proposed rule change if it is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the SRO.

The term ''rules of a self-regulatory organization'' is defined in section 3(a)(28) of the Exchange Act [19] to include the rules of an association of broker-dealers that is a registered securities association, and the term ''rules of an association'' is defined in section 3(a)(27) [20] to include such of the stated policies, practices, and interpretations of the association as the Commission determines by rule to be necessary or appropriate in the public interest or for the protection of investors. In Exchange Act Rule 19b–4,[21] the Commission has defined ''stated policy, practice, or interpretation'' to include any material aspect of the operation of the facilities of a self-regulatory organization. The term ''facility'' when used with respect to an exchange [22] is defined very broadly in section 3(a)(2) [23] to include, among other things, any tangible or intangible property of the exchange and any right to the use of such property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including any system of communication to or from the exchange).

Certain aspects of the software products that enhance a broker-dealer's interaction with the NASD's facilities, when considered together with the other services offered by the NASD and its affiliates, fall with the Exchange Act definition of a facility and therefore require the filing of a proposed rule change for material changes in the software and the fees charged for the software. The NASD has requested a conditional exemption for this requirement under Section 36 of the Exchange Act.[24]

C. Commission's Exemptive Authority Under Section 36

Section 36(a)(1) of the Exchange Act [25] grants the Commission broad authority to exempt any person from any provision of the Act to the extent that such exemption is necessary or appropriate in the public interest and is consistent with the protection of investors. In enacting section 36, Congress indicated that it expected that ''the Commission will use this authority to promote efficiency, competition and capital formation.'' [26] It particularly intended to give the Commission sufficient flexibility to respond to changing market and competitive conditions:

> The Committee recognizes that the rapidly changing marketplace dictates that effective regulation requires a certain amount of flexibility. Accordingly, the bill grants the SEC general exemptive authority under both the Securities Act and the Securities Exchange Act. This exemptive authority will allow the Commission the flexibility to explore and adopt new approaches to registration and disclosure. It will also enable the Commission to address issues relating to the securities markets more generally. For example, the SEC could deal with the regulatory concerns raised by the recent proliferation of electronic trading systems, which do not fit neatly into the existing regulatory framework.[27]

At the same time that it added section 36 to the Exchange Act, Congress enacted Section 3(f),[28] which charges the Commission, when it is engaged in rulemaking itself or reviewing an SRO rule and is required to consider whether an action is necessary or appropriate in the public interest, also to consider whether the action will promote efficiency, competition, and capital formation.

Section 36 [29] and section 3(f) [30] reaffirm a fundamental and long-established principle of the Exchange Act—investor interests are best served by a regulatory structure that facilitates fair and vigorous competition among market participants. Congress emphasized this principle, for example, when it amended the Exchange Act in 1975:

> In 1936, this Committee pointed out that a major responsibility of the SEC in the administration of the securities laws is to 'create a fair field of competition.' This responsibility continues today. * * * The objective would be to enhance competition and to allow economic forces, interacting within a fair regulatory field, to arrive at appropriate variations in practices and services. It would obviously be contrary to this purpose to compel elimination of differences between types of markets or types of firms that might be competition-enhancing.[31]

In recent years, the Commission has exercised its section 36 [32] exemptive authority to enhance competition as a means to meet the objectives of the Exchange Act. For example, it exempted alternative trading systems from many of the requirements that otherwise would apply to an ''exchange,'' including registration and the filing of proposed rule changes, when such requirements were not necessary or appropriate to further the Exchange Act's objectives. In adopting this exemption, the Commission stated that it ''believes that it regulation of markets should both accommodate traditional market structures and provide sufficient flexibility to ensure that new markets promote fairness, efficiency, and transparency.'' [33]

In addition, the Commission has used its exemptive authority to revise the proposed rule change requirements of section 19(b) to meet the changing needs of the SROs in a competitive international marketplace. For example, the Commission amended Rule 19b–4 [34] in 1998 to streamline the requirements for introduction of new derivative securities products.[35] At the same time,

SelectNet orders in several different fashions by combining multiple keystroke or mouse functions; (3) to send, with a single point-and-click feature, multiple SelectNet preferenced orders to preset market makers or ECNs; and (4) to monitor SelectNet broadcast orders for electronic execution based on the user's pre-configured order selection file.

[17] 15 U.S.C. 78s

[18] 15 U.S.C. 78s(b).

[19] 15 U.S.C. 78c(a)(28).

[20] 15 U.S.C. 78c(a)(27).

[21] 17 CFR 240.19b–4.

[22] The Commissions has found that Nasdaq falls within the definition of ''exchange'' under Section 3(a)(1) of the Act. Securities Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844 (''ATS Release'') at nn. 58–61 and accompany text.

[23] 15 U.S.C. 78c(a)(2).

[24] 15 U.S.C. 78mm.

[25] 15 U.S.C. 78mm(a)(1).

[26] H.R. Rep. No. 104–622, 104th Cong., 2d Sess. 38 (1996).

[27] S. Rep. No. 104–293, 104th Cong., 2d Sess. 15 (1996).

[28] 15 U.S.C. 78c(f).

[29] 15 U.S.C. 78mm.

[30] 15 U.S.C. 78c(f).

[31] S. Rep. No. 94–75, 94th Cong., 1st Sess. 8 (1975).

[32] 15 U.S.C. 78mm.

[33] ATS Release, note 21 above, section I.

[34] 17 CFR 240.19b–4.

[35] Securities Exchange Act Release No. 40761 (Dec. 8, 1998), 63 FR 70952.

the Commission adopted Rule 19b–5 [36] to help reduce impediments to competitive innovation by SROs by exempting them from the requirement to file proposed rule changes for pilot trading systems for a two-year period. In adopting this exemption, the Commission noted that ''excessive regulation of traditional exchanges, alternative trading systems, or other markets hinders these exchanges' ability to compete and survive in the global arena'' and found that the exemption from section 19(b) for pilot trading programs ''responds to the SROs' need for a more balanced competitive playing field.'' [37]

D. Conditional Exemption for FSI

The NASD has requested a conditional exemption that would allow FSI to modify its products, offer new products, and set fees for its products without filing proposed rule changes under section 19(b). The exemption would be subject to four principal conditions: (1) The continued presence of effective competition in the market to provide software products that enhance a broker-dealer's interaction with the NASD's facilities; (2) the independent functionality of the NASD's facilities; (3) continued full pubic access to the NASD's facilities through the API; and (4) fair access to information concerning the NASD's facilities and systems.

The Commission believes that the requested conditional exemption will help promote efficiency and competition, while upholding the regulatory objectives of the Exchange Act. Nasdaq's ownership of a software company whose products facilitate a broker-dealer's interaction with the NASD's facilities could promote efficiency and competition. Specifically, permitting FSI, with the assistance of Nasdaq's knowledge of the securities market, to compete on equal footing with other software providers, could result in the development of products with features that more closely respond to the needs of a wide variety of broker-dealers, both large and small. Such products may result in increased efficiency of operations for these broker-dealers. Thus, this exemption may enable FSI to offer software products—enhanced by Nasdaq's insight and experience in the market—that could act as spur to competition and thereby help generate better software products for broker-dealers.

Given the pace of change in software technology and market conditions, the Commission believes that the procedural requirements of section 19(b) [38] could significantly hamper the ability of FSI to compete effectively with companies that are not subject to the same regulatory requirements. A software company needs to act rapidly and nimbly in developing and pricing its products. If FSI were required to comply with the proposed rule change requirements, it necessarily would be subject to greater expense, delay, and uncertainty in offering products and setting prices than its competitors. Although the requirements of section 19(b) [39] serve vital regulatory functions, particularly with respect to the fundamentally important or core services of an SRO, the Commission does not believe that they are necessary to further the public interest in the context of the limited services to be provided by FSI.

In reviewing a proposed rule change under Section 19(b), the Commission focuses on the particular section of the Exchange Act that sets forth substantive requirements for the SRO's rules. For a national securities association such as the NASD, section 15A [40] of the Exchange Act requires, among other things, that its rules (1) provide for the equitable allocation of reasonable dues, fees, and other charges among members using any facility or system which the association operates or controls (subparagraph (b)(5)); (2) be designed to promote just and equitable principles of trade, 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, and not be designed to permit unfair discrimination between customers, issuers, or broker-dealers (subparagraph (b)(7)); and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act (subparagraph (b)(9)).

The four principal conditions of the requested exemption will help assure that these regulatory objectives are upheld without requiring Commission review and approval of FSI's products and fees.[41] First, the products of FSI will not be necessary for broker-dealers to access the NASD's fundamentally important or core services, including quotation collection and dissemination, order routing and execution, and trade reporting.[42] The NASD and Nasdaq have agreed to maintain an independent functionality for the NASD's market-related facilities—that is, neither FSI's products nor enhanced software products of any kind will be necessary for a broker-dealer to obtain access to the NASD's fundamentally important or core services. The basic software products necessary to obtain such access (currently provided through the NWII service) will be provided separately from FSI.

In addition, for broker-dealers who wish to employ software products that enhance their interaction with the NASD's facilities, the exemption is conditioned on the continued existence of effective competition in the market to provide such type of products. This condition will work to assure that broker-dealers have a variety of viable software products from which to choose. To maintain an opportunity for fair competition, the NASD and Nasdaq have agreed to continue to provide open architecture systems that enable full public access to the NASD's facilities through the API. The NASD and Nasdaq also have agreed not to provide an unfair information advantages to FSI. FSI will not be given information concerning the NASD's facilities that is not available to the industry generally or to other companies competing to provide enhanced software products to broker-dealers. In particular, the NASD and Nasdaq will prevent FSI from having any advance private knowledge of proposed changes or modifications to the NASD's facilities. To help meet this condition, FSI will not share employees with the NASD or any NASD affiliate and will be housed in office space separate from that of the NASD or Nasdaq.

Given these conditions, the Commission does not believe that the regulatory protections offered by Commission review and approval of proposed rule changes are necessary or appropriate to further the Exchange Act's regulatory objectives. Access to the NASD's fundamentally important and core services will be independently maintained by the NASD and fully subject to the Exchange Act's regulatory

[36] 17 CFR 240.19b–5.

[37] ATS Release, note 21 above, section VI.A.

[38] 15 U.S.C. 78s(b).

[39] 15 U.S.C. 78s(b).

[40] 15 USC 78*o*–3

[41] The Commission reserves the right to modify, by order, the terms and scope of the exemption from the proposed rule change requirements if it determines such modification is appropriate for the protection of investors or in the public interest.

[42] This approach is consistent with the Commission's decision in an administrative proceeding that included a denial of access claim under Section 19(d) of the Exchange Act. *In the Matter of the Application of Morgan Stanley & Co.,* Admin. Proc. File No. 3–9289 (Dec. 17, 1997) (''In those cases in which we have found a denial of access, an SRO had denied or limited the applicant's ability to utilize one of the fundamentally important services offered by the SRO. The services at issue were not merely important to the applicant but were central to the function of the SRO.'').

scheme, including the proposed rule change requirements of Section 19(b).[43] Fair competition will be maintained in the market to provide enhanced software products to broker-dealers. Under these circumstances, the Commission believes at this point that competitive forces can be relied upon to produce software products at fair prices that meet the needs of broker-dealers. In sum, the Commission believes that FSI will neither be unnecessarily hampered in its competition to provide software services to broker-dealers nor given an unfair competitive advantage because of its ownership by Nasdaq.

IV. Conclusion

It Is Therefore Ordered, pursuant to section 36(a)(1) of the Exchange Act,[44] that the NASD's application for a conditional exemption (Form Type 34–36 MR; File No. 79–9) is approved.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01–10394 Filed 4–25–01; 8:45 am]

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[43] 15 U.S.C. 78s(b).

[44] 15 U.S.C. 78mm(a)(1).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–44209; File No. 265–22]

Advisory Committee on Market Information

AGENCY: Securities and Exchange Commission.

ACTION: Notice of meeting of the Securities and Exchange Commission Advisory Committee on Market Information.

SUMMARY: The fifth meeting of the Securities and Exchange Commission Advisory Committee on Market Information (''Committee'') will be held on May 14, 2001, in the William O. Douglas Room, at the Commission's main offices, 450 Fifth Street, NW., Washington, DC, beginning at 9 a.m. The meeting will be open to the public, and the public is invited to submit written comments to the Committee.

ADDRESSES: Written comments should be submitted in triplicate and should refer to File No. 265–22. Comments should be submitted to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

FOR FURTHER INFORMATION CONTACT: Anitra Cassas, Special Counsel, Division of Market Regulation, at 202–942–0089; Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–1001.

SUPPLEMENTARY INFORMATION: In accordance with section 10(a) of the Federal Advisory Committee Act, 5 U.S.C. App. 10a, and the regulations thereunder, the Designated Federal Official of the Committee, David S. Shillman, has ordered publication of this notice that the Committee will conduct a meeting on May 14, 2001, in the William O. Douglas Room at the Commission's main offices, 450 Fifth Street, NW., Washington, DC beginning at 9 a.m. The meeting will be open to the public. This will be the fifth meeting of the Committee. The purpose of this meeting will be to discuss alternative models for the provision of market data, and other issues relating to the public availability of market information in the equities and options markets.

Dated: April 20, 2001.

Jonathan G. Katz,

Secretary.

[FR Doc. 01–10387 Filed 4–25–01; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–44197; File No. SR–CBOE–00–49]

Self-Regulatory Organizations; Chicago Board Options Exchange, Inc., Order Approving Proposed Rule Change Relating to RAES Eligibility Requirements for SPX Options

April 18, 2001.

I. Introduction

On September 20, 2000, the Chicago Board Options Exchange, Inc. (''CBOE'' or ''Exchange'' filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposal to amend CBOE Rule 24.16, which governs the eligibility of Market-Makers to participate on the Exchange's Retail Automatic Execution System (''RAES'') in options on the Standard & Poor's 500 Index (''SPX'').

The proposed rule change was published for comment in the **Federal Register** on December 14, 2000.[3] No comments were received on the proposal. This order approves the proposed rule change.

The text of the proposed rule change is set forth below. Proposed new language is in italics; proposed deletions are in brackets.

* * * * *

Rule 24.16

(a) Individual Members. Any individual Exchange member who has registered as a Market-Maker, who has signed the RAES Participation Agreement applicable to individuals, and who has completed the RAES instructional program is eligible to log onto RAES in SPX, so long as the requirements set forth in paragraph (iv) below are met:

* * * * *

(iv) RAES participation in SPX is limited to SPX Market-Makers. To qualify, a Market-Maker must: (A) be approved under Exchange rules as a Market-Maker with a letter of guarantee, *and* (b) maintain his principal business on the CBOE as a Market-Maker.[, (C) execute at least fifty percent of his Market-Maker contracts for the preceding calendar month in SPX and (D) execute at least seventy-five percent of his Market-Maker trades for the preceding calendar month in SPX in person. In making these calculations, RAES trades will not be considered.]

* * * * *

(d) Member Organizations with Multiple Nominees

(i) A member organization with multiple Market-Maker/nominees on the floor may arrange to have the RAES trades of all its nominees assigned to a single Market-Maker account, provided that the firm's participating nominees have first executed the RAES Participation Agreement applicable to firms and the manager of the multiple nominee account has satisfactorily completed the RAES instructional program. Thereafter, each of the participating nominees will be able to trade through RAES only in the manner described below, and not as a member of a joint account or as an individual. Each eligible nominee must meet the SPX Market-Maker [obligations] *requirements* set forth in paragraph [(c)(i)(A)–(D)]*(a)(iv) above. Members of a multiple nominee RAES account may only participate in that one account and may not participate directly or indirectly in any other RAES account, nor may a member organization participate directly or indirectly in SPX on RAES in more than one account.*

* * * * *

(e) Authority to Disapprove

(i) No person or entity may participate directly or indirectly in RAES, or share in the profits, directly or indirectly, with more than RAES group.[. which may not exceed the maximum number of RAES participants set by the appropriate MPC from time to time. In no event may the appropriate MPC set a maximum number higher than 33⅓% of the average number of RAES participants for the prior quarter. The appropriate MPC will give groups one month's notice if a reduction in group size becomes necessary due to application of this size limit. The appropriate MPC reserves the authority to establish lower limits on the size of groups eligible to use RAES. Size limits may be imposed by the appropriate MPC at any time.]

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

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 43677 (December 5, 2000), 65 FR 78230.