longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve the proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR–NASD–2002–157 and should be submitted by January 6, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–31551 Filed 12–13–02; 8:45 am]

BILLING CODE 8010–01–P

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46974; File No. SR–NASD–2002–113]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. Relating to the Implementation of a Fingerprinting Program for Nasdaq Employees and Independent Contractors

December 9, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 16, 2002, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. Nasdaq amended the proposed rule change on September 10, 2002.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

Nasdaq is proposing to adopt NASD Rule 0140, Fingerprint-Based Background Checks of Nasdaq Employees and Independent Contractors, which will establish a program for conducting fingerprint-based background checks of Nasdaq employees and independent contractors. Nasdaq will implement the proposed rule change as soon as practicable following approval by the Commission. Below is the text of the proposed rule, as amended. Proposed rule language, as amended, is in italics.

0140. Fingerprint-Based Background Checks of Nasdaq Employees and Independent Contractors.

(a) In order to enhance the physical security of the facilities, systems, data, and information of The Nasdaq Stock Market, Inc. (''Nasdaq''), it shall be the policy of Nasdaq to conduct a fingerprint-based criminal records check of (i) all prospective and current employees, (ii) all prospective and current independent contractors who have or are anticipated to have access to Nasdaq facilities for ten business days or longer, and (iii) all prospective and current temporary employees who have or are anticipated to have access to Nasdaq facilities for ten business days or longer. Nasdaq shall apply this policy in all circumstances where permitted by applicable law.

(b) Nasdaq shall submit fingerprint cards obtained pursuant to the foregoing policy to the Attorney General of the United States or his or her designee for identification and processing. Nasdaq shall at all times maintain the security of fingerprint cards and information received from the Attorney General or his or her designee.

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

(d) A prospective employee who refuses to submit to fingerprinting shall be denied employment by Nasdaq, and a prospective independent contractor or temporary employee who refuses to submit to fingerprinting shall be denied access to Nasdaq facilities. A current employee, independent contractor, or temporary employee who refuses to submit to fingerprinting will be terminated following notice and being given three opportunities to submit.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change, as amended. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In the wake of the September 11, 2001 terrorist attacks, Nasdaq has been exploring ways in which to enhance the security of the critical financial infrastructure that it operates. Market participants use Nasdaq systems to execute and report transactions in Nasdaq-listed securities and rely upon Nasdaq for the dissemination of quotation and transaction information,

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

[2] 17 CFR 240.19b–4.

[3] *See* September 9, 2002, letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission (''Amendment No. 1''). In Amendment No. 1, Nasdaq added language to the proposed rule text to indicate that the rule applies only where permitted by applicable law and deleted text from the Purpose sections of the form and draft notice related to the preemption of certain state laws by Commission order.

while the capital markets have traditionally looked to Nasdaq as the market of choice for new listings. According to Nasdaq, 4,109 companies (with a market valuation of $2.9 trillion) had shares listed for trading on Nasdaq as of December 31, 2001; the average daily volume of transactions during 2001 was 1.9 billion shares valued at $44.1 billion. Accordingly, a significant disruption in the operation of Nasdaq systems could have serious adverse effects on U.S. and world financial markets.

Nasdaq has active and aggressive programs in place to minimize the risk of system disruptions, including the use of multiple computer facilities in separate geographic locations that are designed to provide redundancy and back-up. In addition, since 1999, Nasdaq has conducted background checks and urinalysis drug testing of all new employees. The background check involves verification of social security number, previous employment, education, credentials, and professional licenses, as well as a name-based criminal record check. The latter consists of an examination of courthouse records of counties where the applicant, according to his employment application, resided during the past seven years. Although this process constitutes a measure of due diligence, it is subject to evasion by applicants who provide false information. Moreover, it does not provide a basis for conducting a comprehensive nationwide search of records. As a result, even if an applicant with a criminal history provides accurate information, the search would not uncover pertinent records if the applicant was tried and convicted in a jurisdiction other than his place of residence.

By contrast, a background check that makes use of the fingerprint database maintained by the Federal Bureau of Investigation (''FBI'') permits a nationwide search that covers federal, state, local, and military convictions. Accordingly, it significantly reduces the number of ''false negatives'' (*i.e.*, failures to uncover pertinent criminal records) associated with less comprehensive searches and eliminates ''false positives'' caused by confusion of individuals having the same or similar names.

Access to the FBI's database is permitted only when authorized by law. Numerous federal and state laws, however, authorize employers to conduct fingerprint-based background checks that make use of the FBI's database.[4] Notably, section 17(f)(2) of the Act[5] and SEC Rule 17f–2[6] require employees of broker-dealers, transfer agents, and clearing agencies to be fingerprinted and authorize self-regulatory organizations (''SROs'') to maintain facilities for processing and storing fingerprint cards and criminal record information received from the FBI database with respect to such cards. Ironically, section 17(f)(2) of the Act[7] does not require SROs to fingerprint their own employees. Nasdaq strongly believes, however, that a proposed rule change to institute a fingerprinting program for Nasdaq employees and independent contractors will enhance NASD's ability to perform its statutory obligations under section 15A of the Act[8] and is therefore authorized under that section. Specifically, by allowing Nasdaq to conduct a more thorough background check of persons that have access to Nasdaq facilities, the proposed rule change will enhance Nasdaq's ability to identify and exclude individuals whose prior criminal activities may pose a threat to the security of Nasdaq operations. This will in turn assist NASD in carrying out the purposes of the Act, preventing fraudulent and manipulative acts and practices, promoting just and equitable principles of trade, removing impediments to and perfecting the mechanism of a free and open market and a national market system, and protecting investors and the public interest. Moreover, although section 17(f)(2) of the Act does not mandate the fingerprinting of SRO employees, it explicitly directs the Attorney General (*i.e.*, the FBI) to provide SROs designated by the Commission with access to criminal history record information.

The rule that Nasdaq is proposing is concerned with the administration of Nasdaq and Nasdaq believes that it might therefore be filed on an immediately effective basis pursuant to section 19(b)(3)(A)(iii) of the Act[9] and Rule 19b–4(f)(3)[10] thereunder. However, Nasdaq is seeking Commission approval for the rule under section 19(b)(2)[11] because Nasdaq believes that it would not be appropriate or practical to institute a fingerprinting program without an explicit determination by the Commission that the program is authorized under the Act. Nasdaq believes that such a determination will be required by the FBI as a precondition to Nasdaq obtaining an Originating Agency Identifier (''ORI'') number from the FBI that will identify Nasdaq as an entity authorized to submit fingerprints to the FBI.

According to Nasdaq, an act to require fingerprint-based background checks of SRO employees who are regularly employed in New York State was passed by both the New York State Assembly and Senate and signed into law by Governor George E. Pataki on August 20, 2002.[12] The New York law also requires SROs to fingerprint independent contractors that provide services to them if those individuals have ''access to records * * * or other material or secure buildings or secure property, which place the security of [the SRO] at risk.'' The New York law will require Nasdaq to implement its proposed fingerprinting program for employees and some independent contractors in New York State. However, Commission approval of the program would still be required to implement the program in other states where Nasdaq has critical operations, especially Connecticut and Maryland.[13]

As reflected in the text of the proposed rule change, the program will apply to prospective and current employees, as well as prospective and current temporary employees and independent contractors who have or are anticipated to have access to Nasdaq facilities for ten business days or longer. Refusal to submit to fingerprinting will be grounds for termination or denial of employment or access to Nasdaq facilities. Information received from the FBI concerning an individual will be evaluated in accordance with the terms of a written fingerprint policy, which reflects the application of employment laws governing the use of information concerning criminal convictions in employment decisions. In accordance with such laws, a felony or serious

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

[5] 15 U.S.C. 78q(f)(2).

[6] 17 CFR. 240.17f–2.

[7] 15 U.S.C. 78q(f)(2).

[8] 15 U.S.C. 78o–3.

[9] 15 U.S.C. 78s(b)(3)(A)(iii).

[10] 17 CFR 240.19b–4(f)(3).

[11] 15 U.S.C. 78s(b)(2).

[12] 2002 N.Y. Laws 453 (Aug. 20, 2002).

[13] Nasdaq notes that a California statute provides that employers in that state may not require employees to submit to fingerprinting as a condition of employment if the fingerprints are provided to a third party. Cal. Labor Code 1051. Although Nasdaq has a small number of California employees, they are not involved in the day-to-day operation of Nasdaq market systems. Accordingly, Nasdaq will exempt California employees from its program.

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

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A(b)(2) and (b)(6) of the Act,[14] in that the proposal is designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove the impediments to and perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest. Nasdaq believes that the proposed rule will assist the NASD in carrying out the purposes of the Act.

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

Nasdaq does not believe that the proposed rule change, as amended, would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change as amended, or

B. Institute proceedings to determine whether the proposed rule change, as amended, should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR–NASD–2002–113 and should be submitted by January 6, 2003.

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

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–31591 Filed 12–13–02; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46977; File No. SR–NASD–2002–160]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Remove Inoperative Rule Language Relating to Fees for the Nasdaq Workstation I Service

December 9, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 5, 2002, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Nasdaq has prepared. Nasdaq has designated this proposal as one concerned solely with the administration of the self-regulatory organization under section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(3) thereunder,[4] which renders the rule immediately effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

Nasdaq proposes to amend NASD Rules 7010(f) and 7020 to remove inoperative rule language relating to fees for the discontinued Nasdaq Workstation I service. Nasdaq will implement the proposed rule change immediately upon filing.

The text of the proposed rule change is below. Proposed new language is in *italics*; proposed deletions are in [brackets].

A. Rule 7010. System Services

(a)–(e) No change.

(f) Nasdaq Workstation™ Service:

(1) [The following charges shall apply to the receipt of Level 2 or Level 3 Nasdaq Service via an authorized personal computer (PC):]

[Service Charge]	[$345/PC/month].
[Advance Communication Charge]	[$135/PC/month for the first unit, $85/PC/month for each additional unit at the same site].
[Maintenance (offered only on UNISYS and Tandem PCs)]	[$55/PC/month].
[Second Monitor/keyboard Attached to an Authorized PC]	[$195/month].

[14] 15 U.S.C. 78o–3(b)(2) and 15 U.S.C. 78o–3(b)(6).

[15] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(3).