2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[4] in general, and furthers the objectives of Sections 6(b)(1) and 6(b)(5) of the Act,[5] in particular in that it will enhance the ability of the Exchange to enforce compliance by its members and persons associated with its members with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange; and it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

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

The Exchange does not believe that the proposed rule change will 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 Exchange consents, the Commission will:

(A) By order approve such 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. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Amex–2006–57 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Amex–2006–57. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the Amex. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Amex–2006–57 and should be submitted on or before November 7, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[6]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E6–17169 Filed 10–16–06; 8:45 am]

BILLING CODE 8011–01–P

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(1) and (b)(5).

[6] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–54585; File No. SR–NASD–2005–101]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 Thereto Relating to Expansion of OATS Reporting Requirements to OTC Equity Securities

October 10, 2006.

I. Introduction

On August 25, 2005, the National Association of Securities Dealers, Inc. (''NASD'') 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] the proposed rule change relating to expansion of the Order Audit Trail System (''OATS'') reporting requirements to OTC equity securities. The proposed rule change was published for comment in the **Federal Register** on October 18, 2005.[3] The Commission received three comment letters on the proposal.[4] NASD filed Partial Amendment No. 1 to the proposed rule change on September 21, 2006 (''Amendment No. 1'').[5] This order approves the proposed rule change, grants accelerated approval to Amendment No. 1, and solicits

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 52581 (October 11, 2006), 70 FR 60592 (the ''Notice'').

[4] Two comment letters were specific to this proposal. *See* letters to Jonathan G. Katz, Secretary, Commission, from John Polanin Jr., Chair, SIA Self-Regulation and Supervisory Practices Committee, dated December 2, 2005 (''SIA Letter'') and from Phylis M. Esposito, Executive Vice President, Chief Strategy Officer, Ameritrade, Inc., dated November 8, 2005 (''Ameritrade Letter''). One comment letter expressed general opposition to OATS. *See* letter filed via the Commission's Web Comment Form, from Rich Bertematti, dated September 7, 2006 (''Bertematti Letter''). In addition, NASD received comment letters about the proposed rule change following publication in NASD's Notice to Members 04–80 (November 2004). NASD addressed those comment letters in the Notice.

[5] In Amendment No. 1, NASD proposes to (1) amend NASD Rule 6955(b)(2) to clarify that members will not be required to comply with OATS reporting obligations with respect to an OTC equity security until a symbol has been assigned to the security; (2) exclude direct participation programs (''DPPs'') from the proposed definition of ''OTC equity security;'' (3) extend the implementation period; and (4) make technical changes necessary in light of the commencement of The NASDAQ Stock Market LLC (''Nasdaq'') as a national securities exchange. NASD also responded to comment letters received.

comments from interested persons on Amendment No. 1.

II. Description of the Proposed Rule Change

NASD Rules 6950 through 6957 impose obligations on member firms to record in electronic form and report to NASD on a daily basis certain information with respect to orders originated, received, transmitted, modified, canceled or executed by NASD members relating to equity securities listed and traded on Nasdaq. OATS captures this order information and integrates it with quote and transaction information to create a time-sequenced record of orders, quotes and transactions. NASD believes this information is critical to its conducting surveillance and investigations of member firms for violations of NASD rules and Federal securities laws.

To enhance the effectiveness of OATS as a regulatory tool, NASD proposes to amend NASD Rules 6951, 6952, and 6955 to require members to record and report to OATS order information relating to OTC equity securities.[6] Currently, the OATS requirements do not apply to OTC equity securities and as a result, NASD is unable to recreate, on an automated basis, an order and transaction audit trail for these securities. NASD believes that expanding OATS requirements to these securities would enhance its ability to review and examine for member compliance with certain trading rules, including, but not limited to, NASD's rules governing best execution and interpositioning,[7] limit order protection,[8] and offers at stated prices.[9]

In addition, NASD proposes two technical changes that are necessary given the commencement of Nasdaq as a national securities exchange.

III. Summary of Comments

The Commission received comment letters in response to the publication of the notice in the **Federal Register**.[10] The primary issues two of the commenters raised concern the scope of a member's obligations to record and report OATS information relating to OTC equity securities and the timing of the proposed rule change.

A. Scope of a Member's OATS Obligations Relating to OTC Equity Securities

1. Comments Relating to the Issuance of a Security Symbol

One of the commenters requested clarification of the definition and scope of ''OTC equity security'' and suggested that the appropriate scope of OATS reporting should include only those securities currently subject to Automated Confirmation Transaction (''ACT'') Service reporting requirements.[11] NASD responded that it does not believe that the scope of the proposed definition of ''OTC equity security'' should be limited as suggested by this commenter and stated that, as originally proposed, members should be required to record and report OATS information for all OTC equity securities. However, to address the situation where an OTC equity security does not have a symbol assigned to it at the time an OATS order event occurs, NASD proposed a clarifying change in Amendment No. 1 whereby, pursuant to NASD Rule 6955(b)(2), members would not be required to comply with their OATS reporting obligations with respect to an OTC equity security until a symbol has been assigned to that security.[12] NASD explained that members would still have an obligation to immediately record all other applicable OATS information in accordance with the provisions of NASD Rule 6954, irrespective of whether the security has a symbol assigned to it at the time the order is originated or received.[13] NASD represented to the Commission that it would detail these obligations under NASD Rules 6954 and 6955 in a Notice to Members and the revised OATS Technical Specifications,[14] both of which NASD will publish following this approval of the proposed rule change.

2. Comments Relating to DPPs

One commenter stated that DPPs should not be OATS reportable because they are ''effectively subscriptions, not trades'' and sold through a process that is not captured in automated systems within the firm.[15] Additionally, this commenter stated that the volume for these securities is low, and OATS reporting may discourage the sale of such products.[16] In response to the concerns raised by this commenter, NASD proposed in Amendment No. 1 to exclude DPPs from the definition of ''OTC equity security.'' NASD stated, however, that it would continue to monitor member activities relating to DPPs and may determine, at a later date, that applying OATS requirements to DPPs is appropriate. If that situation arises, NASD represented that it would submit a proposed rule change.

3. Additional Comments

One commenter stated that members should not be required to identify the type of security (*e.g.*, Nasdaq, OTCBB, Pink Sheets) in OATS reports and suggested that NASD provide a list of all OATS reportable securities, so that members do not have to rely on third party vendors for this information.[17] NASD responded that it will not require at this time that members identify the type of security as part of their OATS obligations. In addition, NASD stated it would provide a list of OTC equity securities that are subject to the OATS requirements on the OATS Web site.[18]

This same commenter also suggested that OATS should be capable of recognizing stocks that have had symbol changes and suggested that using the CUSIP number instead of the security symbol may be appropriate.[19] NASD responded by stating that a change to CUSIP number rather than security symbol would be costly and burdensome and is unnecessary because NASD's OATS system is able to track symbol changes (*e.g.*, where an ''E'' is appended to the symbol of an OTCBB issuer that is delinquent in its SEC filings).

One commenter stated that it understands OATS reporting is not required for OTC options, derivatives or

[6] NASD proposes to define ''OTC equity security'' as any equity security that: (1) Is not listed on a national securities exchange; or (2) is listed on one or more regional stock exchanges and does not qualify for dissemination of transaction reports via the facilities of the Consolidated Tape.

[7] NASD Rule 2320.

[8] NASD Rule 6541.

[9] NASD Rule 3320.

[10] *See supra,* note 4.

[11] *See* SIA Letter, *supra* note 4, at 4.

[12] In proposing this exception from the reporting obligations, NASD emphasized that members should be diligent in their efforts to obtain a symbol, as necessary, for securities they wish to trade so that they can comply with their trade reporting obligations under NASD Rule 6620. NASD Rule 6620(c)(1) requires that each trade report include the symbol of the OTC equity security; trade reports that do not contain this information are rejected by the system. In addition, NASD noted that members have an obligation to report trades within ninety seconds of execution or on a next-day basis, as applicable under Rule 6620(a).

[13] NASD stated that it does not believe that members should face any technological difficulties in recording OATS information for an OTC equity security that does not have a symbol assigned to it, but the extended implementation period should allow sufficient time to address any such problems.

[14] NASD states that since OATS Phase III has been implemented, it does not expect any significant changes to the OATS Technical Specifications as a result of this proposed rule change. NASD anticipates that the only such change would be expansion of the list of securities that are OATS reportable.

[15] *See* SIA Letter, *supra* note 4, at 4–5.

[16] *Id.*

[17] *See* Ameritrade Letter, *supra* note 4, at 2.

[18] This list can currently be found under the Symbol Directory at *http://www.nasdaqtrader.com/trader/symboldirectory/symbol.stm.*

[19] *See* Ameritrade Letter, *supra* note 4, at 2.

swaps, and with respect to foreign securities, trades effected by NASD members in the U.S. would be reportable, while trades effected by a foreign affiliate of a member would not be reportable.[20] NASD confirmed that the commenter's understanding relating to the proposed OATS reporting requirements on this point is correct. NASD stated that, in addition, with respect to non-member foreign affiliates of members, OATS obligations do not apply, provided that the order is never received or held by the member, for example, where the order originates with a foreign affiliate and is not routed to the member. NASD clarified that, with respect to orders received by members for foreign securities that otherwise meet the definition of an OTC equity security, members would have an OATS obligation, irrespective of whether the order is ultimately effected inside or outside the United States. If, for example, a member receives an order in a foreign security and routes that order to a foreign exchange for handling and execution, the member would need to record and report to OATS the receipt of that order and the route to the foreign exchange.

Finally, this commenter also stated that an audit trail is not necessary for all markets and that NASD should be required to make the case that the accretive value of an order audit trail to the surveillance of the OTC market outweighs the imposition of additional costs and burdens on member firms.[21] NASD responded that it does not agree that it has to meet that standard and, rather, that the standards it must satisfy in any proposed rule change are set forth in Sections 15A [22] and 19(b) of the Act.[23] NASD believes it has made the requisite showing. NASD also responded that while it recognizes that the proposed rule change may impose additional costs and burdens on member firms, OATS reporting of OTC equity securities is important to NASD's surveillance systems and regulatory program. In recognition of the potential additional burden on members, however, as discussed in greater detail below, NASD proposed to extend the implementation period of the proposed rule change.

B. Timing of Proposed Rule Change

One commenter stated that NASD should allow a minimum of six months for implementation of the changes necessary for OATS reporting of OTC equity securities.[24] Another commenter stated that OATS for OTC equity securities should not be implemented until the industry can properly devote the personnel and technical resources necessary to achieve compliance.[25] This commenter also stated that OTC markets are manual by nature, and expanding OATS reporting to OTC equity securities at this time could render obsolete all of the work that has been put into production for OATS Phase III compliance.[26]

NASD responded that while it does not agree that the proposed expansion of OATS reporting to OTC equity securities would have a negative impact on the work done relating to OATS Phase III, it does acknowledge the technological burdens that may be imposed on members as a result of this proposal, as well as the fact that members have a number of regulatory initiatives requiring technological and system changes. Accordingly, in Amendment No. 1, NASD proposed an implementation date of six months following publication of revised OATS Technical Specifications incorporating the proposed rule change, which will be published no later than sixty days following Commission approval of the proposed rule change.[27] NASD believes that the extended implementation period will provide members sufficient time to make any adjustments necessary to implement OATS reporting for OTC equity securities, especially since, according to NASD, the technical specifications for OATS reporting of OTC equity securities would be substantially similar to the technical specifications that have been in place since July of 2006 for OATS Phase III.

In addition, one commenter suggested that NASD implement certain operational and/or procedural regulations relating to the OTC marketplace, such as expansion of the trade-through protections and limit order display requirements, prior to implementation of OATS reporting requirements and that until such time, best execution standards for NMS stocks and OTC stocks will remain unequal.[28] In response to this comment, NASD noted that it already has order handling and trading rules in effect that apply to the OTC marketplace, including, but not limited to, Rule 2320 (Best Execution and Interpositioning) and Rule 6541 (Limit Order Protection). NASD further stated that OATS reporting is necessary to enhance NASD's ability to review and examine for member compliance with these and other rules.

Finally, NASD responded to a commenter that expressed general opposition to OATS and asserted that OATS is a mechanism for NASD to generate income through fines.[29] The commenter further claimed that there has been no evidence that OATS has helped the investing public or assisted in any way in improving the capital markets.[30] In addition, the commenter noted the burdens that OATS imposes on members, and in particular, small firms.[31] NASD responded that it is aware of the costs and technological burdens associated with the proposed rule change, and in recognition proposed an extended implementation period in Amendment No. 1.

IV. Discussion and Commission Findings

The Commission has reviewed carefully the proposed rule change, the comment letters, and NASD's response to the comments. The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association,[32] particularly Section 15A(b)(6) of the Act,[33] which, among other things, requires that the rules of a national securities association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

As discussed above, NASD currently requires member firms to record and report order information for transactions in Nasdaq Stock Market equity securities. NASD's OATS uses this

[20] *See* SIA Letter, *supra* note 4, at 4. This commenter also suggested that NASD exclude from the requirements of Rule 6620 transactions executed on a foreign exchange that is an ''affiliate member'' of the Intermarket Surveillance Group. *Id.* NASD has stated that Rule 6620 is not at issue in this rule filing.

[21] *See* SIA Letter, *supra* note 4, at 4.

[22] 15 U.S.C. 78*o*–3.

[23] 15 U.S.C. 78s(b).

[24] *See* Ameritrade Letter, *supra* note 4, at 2.

[25] *See* SIA Letter, *supra* note 4, at 2.

[26] *See* SIA Letter, *supra* note 4, at 3.

[27] The initial rule text as published in the notice proposed an implementation date of 120 days from publication of the OATS Reporting Technical Specifications.

[28] *See* Ameritrade Letter, *supra* note 4, at 3.

[29] *See* Bertematti Letter, *supra* note 4, at 1.

[30] *Id.*

[31] *Id.*

[32] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[33] 15 U.S.C. 78*o*–3(b)(6).

information for integration with trade and quotation information to provide NASD with an accurate time-sequenced record of orders and transactions to detect for possible violations of NASD rules and other securities laws and regulations. NASD recognizes that the trading in OTC equity securities is often more manual than Nasdaq Stock Market equity securities, and while this may result in additional burdens on member firms to capture this data electronically, NASD believes that reporting information related to OTC equity securities is critical to its surveillance program. The Commission believes that it is consistent with the Act for NASD to expand the OATS reporting requirements to include OTC equity securities to assist it in detecting possible fraud or manipulation in the trading of such securities in order to help protect investors.

In addition, the Commission believes that the technical changes proposed by NASD, which NASD has noted are needed in light of Nasdaq's operation as a national securities exchange, are not only consistent with the Act, but also necessary to clarify NASD's rules.

V. Solicitation of Comments Concerning Amendment No. 1

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 1, including whether Amendment No. 1 to the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASD–2005–101 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASD–2005–101. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASD–2005–101 and should be submitted on or before November 7, 2006.

VI. Accelerated Approval of Amendment No. 1

The Commission finds good cause for approving Amendment No. 1 to the proposed rule change prior to the thirtieth day after publication for comment in the **Federal Register** pursuant to Section 19(b)(2) of the Act.[34] As discussed in greater detail above, in Amendment No. 1, NASD proposed revisions to clarify that member firms do not need to comply with the OATS reporting obligations with respect to an OTC equity security until a symbol has been assigned to that security. In addition, in response to a comment letter, it proposed to exclude DPPs from the definition of OTC equity security. Because two commenters raised issues specific to the timing of the proposed rule change, NASD also proposed an extended implementation period in Amendment No. 1. Finally, NASD proposed two technical changes in Amendment No. 1 that are necessary to reflect the commencement of Nasdaq as a national securities exchange.

Since the changes proposed in Amendment No. 1 address commenter concerns and make changes that the Commission believes will help clarify the proposed rule change and should assist firms by providing greater guidance, as well as time for testing systems to help ensure compliance with the rule, and it does not raise any new issues of regulatory concern, the Commission finds good cause to accelerate approval of Amendment No. 1, consistent with Section 15A(b)(6) of the Act[35] and Section 19(b) of the Act.[36]

VII. Conclusion

It is Therefore Ordered, pursuant to Section 19(b)(2) of the Act,[37] that the proposed rule change (File No. SR–NASD–2005–101), as amended, be and hereby is, approved, and that Amendment No. 1 is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[38]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E6–17167 Filed 10–16–06; 8:45 am]

BILLING CODE 8011–01–P

[34] 15 U.S.C. 78s(b)(2).

[35] 15 U.S.C. 78*o*–3(b)(6).

[36] 15 U.S.C. 78s(b).

[37] 15 U.S.C. 78s(b)(2).

[38] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–54411A; File No. SR–NASD–2004–171]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change Relating to Rule 2340 Concerning Customer Account Statements

October 6, 2006.

Correction

FR Doc. E6–15186, beginning on page 54105 in the issue of September 13, 2006,[1] contained an incorrect footnote. On page 54107, in the 1st column, footnote 24 provided an incomplete description of an explanation of an interpretive position in Securities Exchange Act Release No. 31511.

The corrected citation to Release No. 31511 in footnote 24 reads as follows:

''*See* Securities Exchange Act Release No. 31511 (Nov. 24, 1992), 57 FR 56973 (Dec. 2, 1992) (amending the SEC's net capital rule and explaining the staff's interpretation that to avoid more stringent capital requirements under the rule, an introducing firm must ''have in place a clearing agreement with a registered broker-dealer that states, for the purposes of SIPA and the Commission's financial responsibility rules, customers are customers of the clearing, and not the introducing, firm. Furthermore, the clearing firm must issue account statements directly to customers. Each statement must contain the name and telephone number of a

[1] *See* Securities Exchange Act Release No. 54411 (Sept. 7, 2006), 71 FR 54105 (Sept. 13, 2006).