

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50787; File No. SR-NASD-2004-170)

December 2, 2004

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. to Establish Combined Nasdaq Market Center and Brut Pricing for Non-NASD Members

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 2, 2004, 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 and II below, which Items have been prepared by Nasdaq. On November 9, 2004, Nasdaq submitted Amendment No. 1 to the proposed rule change.³ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons, and at the same time is granting accelerated approval of the proposed rule change.

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

Nasdaq proposes to establish a pricing and rebate schedule for non-NASD members that covers activity both on the Nasdaq Market Center ("NMC") and Nasdaq's

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Edward S. Knight, Executive Vice President and General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated November 9, 2004 ("Amendment No. 1"). Amendment No. 1 made technical corrections to the proposed rule text of the originally filed proposed rule change.

Brut Facility ("Brut"). Nasdaq seeks accelerated approval of the proposal and a retroactive effectiveness date of November 1, 2004. The text of the proposed rule change is available at the Office of the Secretary, Nasdaq, and at the Commission.

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. The text of these statements may be examined at the places specified in Item III 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

On November 16, 2004, the Commission published notice of the immediate effectiveness of a proposed rule change submitted by Nasdaq, establishing a new pricing and rebate schedule (effective November 1, 2004) for NASD members for Nasdaq-listed securities that covers activity both on the NMC and Brut.⁴ Nasdaq states that this proposed rule change seeks to impose the same fee and rebate structure on non-NASD members. Nasdaq is seeking accelerated approval of the non-member fee and rebate structure, as well as a retroactive effective date of November 1, 2004. Nasdaq represents that, as set forth in SR-NASD-2004-167, Nasdaq's new fee and rebate structure is based on multiple volume-based usage tiers that take into account the combined NMC and Brut volume of a non-NASD member. Nasdaq states that, like members, a non-NASD

⁴ See Securities Exchange Act Release No. 50670 (November 16, 2004), 69 FR 67979 (November 22, 2004) (SR-NASD-2004-167).

member will pay varying fees for having orders routed away from the systems or when accessing liquidity ("take-outs"), based upon the non-NASD member's combined volume activity in the NMC and Brut. Nasdaq also states that, likewise, rebates for non-NASD members providing liquidity will be based on the combined total of liquidity provided to both systems. Nasdaq believes that this pricing structure will encourage activity on both the NMC and Brut and will not provide financial incentives to use one system versus the other. In addition, Nasdaq states that the proposal will ensure that both NASD members and non-NASD members will pay equivalent fees and receive equivalent rebates based on their trading activity and that the imposition of those fees will begin on the same November 1, 2004 start date. The combined NMC/Brut fee structure for Nasdaq-listed securities is provided below:

Rebate Schedule for Executions in NASDAQ Market Center and Brut

Average daily shares of liquidity provided on NASDAQ and/or BRUT	Liquidity provider rebate per share executed
Greater than 20 million	\$0.0025
Between 1-20 million	\$0.0022
Less than or equal to 1 million	\$0.0020

Fee Schedule for Take-Out and Routing

Average daily shares of liquidity provided on NASDAQ and/or BRUT	Fee to take liquidity / Brut routing fee (per share)
Greater than 10 million	\$0.0027
Greater than 500,000 but less than or equal to 10 million	\$0.0028
Less than or equal to 500,000	\$0.0030

Nasdaq represents that, as with members, Nasdaq will continue to charge non-NASD members a \$0.001 per share NMC order delivery charge on NMC orders delivered to fee-charging ECNs participating in NMC. Nasdaq states that this charge is currently capped at \$10,000 per month for firms providing more than 500,000 shares per day, on average, over the course of the month. Nasdaq also states that, as noted in SR-NASD-2004-167, in conjunction with the adoption of this pricing structure, Brut ceased charging an access fee on orders delivered to it from the NMC and that Nasdaq ended its practice of not charging a fee when a firm executes against its own quote or order. Nasdaq states that these changes will be applicable to non-NASD members as well.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,⁵ in general and with Section 15A(b)(5) of the Act,⁶ in particular, in that proposed rule change provides for the equitable allocation or reasonable dues, fees, and other charges among members and issuers and other persons using any facility

⁵ 15 U.S.C. 78o-3.

⁶ 15 U.S.C. 78o-3(b)(5).

or system which the association operates or controls.

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

Nasdaq does not believe that the proposed rule change, as amended, 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

Nasdaq states that written comments were neither solicited nor received.

III. 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. 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-2004-170 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-NASD-2004-170. 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 Section, 450 Fifth Street, NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the 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-2004-170 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

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 self-regulatory organization.⁷ Specifically, the Commission believes the proposed rule change is consistent with Section 15A(b)(5) of the Act,⁸ which requires that the rules of the self-regulatory organization provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facilities or system which it operates or controls.

The Commission notes that this proposal, which permits the retroactive

⁷ The Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

⁸ 15 U.S.C. 78q-3(b)(5).

application of the pricing and rebate schedule for non-NASD members that covers activity both on the NMC and Brut and is effective as of November 1, 2004, would permit the schedule for non-NASD members to mirror the schedule applicable to NASD members that was effective as of November 1, 2004 pursuant to SR-NASD-2004-167. The Commission believes that the fees are scaled according to objective criteria applied across-the-board to all categories of users, i.e., the pricing and rebate schedule will now apply equally to non-members as well as members, and is based on the volume of business they conduct on the NMS and Brut.

The Commission finds good cause for approving the proposed rule change prior to the 30th day of the date of publication of notice of filing thereof in the Federal Register. The Commission notes that the proposed pricing and rebate schedule for non-NASD members are identical to those in SR-NASD-2004-167, which implemented a new pricing and rebate schedule for NASD members and which was immediately effective upon filing. The Commission notes that this change will promote consistency in Nasdaq's fee schedule by applying the same pricing and rebate schedule for both NASD members and non-NASD members. Therefore, the Commission finds that there is good cause, consistent with Section 19(b)(2) of the Act,⁹ to approve the proposed rule change on an accelerated basis.

⁹ 15 U.S.C. 78s(b)(2).

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁰ that the proposed rule change (File No. SR-NASD-2004-170) be approved on an accelerated basis.

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

Margaret H. McFarland
Deputy Secretary

¹⁰ 15 U.S.C. 78s(b)(2).

¹¹ 17 CFR 200.30-3(a)(12).