

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51187; File No. SR-NASD-2005-021)

February 10, 2005

Self Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc. to Provide Guidance Regarding Members' Regulatory Transaction Fees

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 February 4, 2005, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. NASD has designated the proposed rule change as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization pursuant to Section 19(b)(3)(A)(i) of the Act³ and Rule 19b-4(f)(1) thereunder,⁴ which renders the proposal effective upon receipt of this filing by 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

NASD is filing Notice to Members ("NtM") 05-11, providing further guidance regarding members' obligations under Section 3 of Schedule A to the NASD By-Laws

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(i).

⁴ 17 CFR 240.19b-4(f)(1).

(Regulatory Transaction Fees) and a self-reporting form that is used by members to report trade data that is not captured.

No changes to the text of NASD rules are required by this proposed rule change.

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

In its filing with the Commission, NASD 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 IV below. NASD 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 August 2004, NASD issued NtM 04-63 (Transaction Fees: New SEC Procedures Relating to Section 31 of the Securities Exchange Act of 1934) informing member firms of the new Commission procedures governing the calculation, payment, and collection of fees and assessments on securities transactions owed by national securities exchanges and associations to the Commission pursuant to Section 31 of the Act. NtM 04-63 also discussed the obligations of member firms under Section 3 of Schedule A to the NASD By-Laws in light of the new Commission procedures.

Following the publication of NtM 04-63, NASD staff has received a significant number of questions from member firms regarding these obligations. Accordingly, NASD staff is providing further guidance regarding these obligations in NtM 05-11. In NtM 05-11, NASD staff is, among other things, providing guidance on what constitutes

an away-from-the-market sale and additional information regarding member firms' self-reporting obligations. NASD also is reminding members about the restrictions on the use of the Step-Out function in ACT for transferring NASD's regulatory transaction fee to correspondents or broker-dealer customers. In addition, NtM 05-11 is revoking prior guidance concerning the appropriate rounding methodology used by member firms when they choose to pass regulatory transaction fees to their customers. Specifically, the guidance in NtM 05-11 regarding rounding supersedes the rounding guidance provided in NtM 04-63 or any prior NtMs and Member Alerts.

NASD believes that the guidance provided in NtM 05-11 constitutes an interpretation of Section 3 of Schedule A to the NASD By-Laws that, due to its nature, should be filed as a proposed rule change. In addition, NASD also is filing its Permanent Self-Reporting Form with the Commission.⁵ A copy of the Permanent Self-Reporting Form will be attached to NtM-05-11. NASD has revised its Permanent Self-Reporting Form to: (1) incorporate the new rate structure that became effective on January 7, 2005 (in conformity with the change to the Commission's Section 31 fee rate); (2) incorporate minor changes to the instructions section; and (3) create an obligation on certain member

⁵ As noted in NtM 05-11, clearing and self-clearing member firms will now be required to file with NASD the Permanent Self-Reporting Form each month, regardless of whether they have qualifying transactions for that month. NASD is requiring a monthly filing by all clearing and self-clearing member firms to ensure that they conduct the necessary review to determine that all qualifying transactions have been properly reported. Member firms that do not have any reportable transactions for a given month will be required to submit the blank form signed by an authorized representative, along with a statement that the firm had no reportable transactions for the month. While NASD is filing its Permanent Self-Reporting Form with the Commission in this instance, NASD does not intend to file its Permanent Self-Reporting Form with the Commission each time it makes a non-substantive change to the text of the form or changes that reflect adjustments in the amount or scope of the fee, where such adjustments are determined solely by reference to Section 31 of the Act.

firms to file the Permanent Self-Reporting Form each month (regardless of whether they have any reportable transactions).

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁶ which requires, among other things, that NASD's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. In addition, NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Act,⁷ which requires, among other things, that NASD's rules provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system that NASD operates or controls, insofar as it is intended to assist members in complying with Section 3 of Schedule A to the NASD By-Laws.

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

NASD 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.

⁶ 15 U.S.C. 78o-3(b)(6).

⁷ 15 U.S.C. 78o-3(b)(5).

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

The proposed rule change has become effective pursuant to Section 19(b)(3)(A)(i) of the Act⁸ and Rule 19b-4(f)(1) thereunder.⁹ NASD asserts that the proposed rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of NASD. NASD will announce the implementation date of the proposed rule change in NtM 05-11, which NASD expects to issue on the same date as the filing of the proposed rule change with the Commission. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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-NASD-2005-021 on the subject line.

⁸ 15 U.S.C. 78s(b)(3)(A)(i).

⁹ 17 CFR 240.19b-4(f)(1).

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-2005-021. 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 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 the File Number SR-NASD-2005-021 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁰

Margaret H. McFarland
Deputy Secretary

¹⁰ 17 CFR 200.30-3(a)(12).