

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-55697; File No. SR-NASD-2007-027)

May 2, 2007

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change to NASD By-Laws Relating to SEC Section 31-Related 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 April 17, 2007, 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 substantially prepared by NASD. The Commission is publishing this notice to solicit comments on the proposal from interested persons.

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

NASD is proposing to allow member firms to voluntarily submit, within six months of the effective date of this rule proposal, funds previously accumulated by member firms to satisfy their, and subsequently NASD’s, obligation to remit SEC Section 31-related fees, to NASD. Below is the text of the proposed rule change. Proposed new language is in italics.

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SCHEDULE A TO NASD BY-LAWS

Assessments and fees pursuant to the provisions of Article VI of the By-Laws of

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

NASD shall be determined on the following basis.

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Section 3—Regulatory Transaction Fee

Each member shall be assessed a regulatory transaction fee. The amount shall be determined periodically in accordance with Section 31 of the Act. Transactions assessable under this Section 3 that must be reported to NASD shall be reported in an automated manner.

IM-Section 3—Temporary Program to Address Accumulated Funds

Pursuant to Section 3 of Schedule A, NASD makes an assessment on member firms that NASD uses to pay fees owing to the SEC in accordance with Section 31 of the Act (“the Section 3 assessment”). The Section 31 fees payable by NASD to the SEC is determined based on the aggregate dollar amount of “covered sales,” as defined by SEC Rule 31, effected otherwise than on an exchange by or through any member of the NASD. Members, in many cases, have passed along the Section 3 assessment on a trade-by-trade basis to their customers or correspondent firms. For certain reasons, including the difference between the calculation of the Section 3 assessment on an aggregate basis and its collection by member firms from customers or correspondent firms on a disaggregated trade-by-trade basis, there has been an historical accumulation of funds collected by members that are in excess of their Section 3 assessment. Consequently, these funds were not remitted to NASD.

NASD has determined that it is appropriate for these accumulated funds, if remitted to the NASD, to be used to pay NASD’s current Section 31 fees, which conforms the use of those funds with the stated purpose for which they were collected.

Consequently, members may voluntarily remit all or part of historically accumulated funds that were collected and are in surplus to the Section 3 assessment of such firms in accordance with the terms of this Interpretive Material.

This temporary program will automatically sunset six months after the effective date, and thereafter may not be utilized by members after a date certain. Members are reminded that the SEC stated in its release adopting new Rule 31 and Rule 31T that “it is misleading to suggest that a customer or [self-regulatory] member incurs an obligation to the Commission under Section 31.” Further, NASD has issued guidance to members in the form of two *Notices to Members* to ensure there is no confusion in the marketplace between NASD’s “Regulatory Transaction Fee” and the “SEC’s Section 31 Fee.”

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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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

Pursuant to Section 31 of the Act³ and SEC Rule 31, NASD and the national securities exchanges (collectively “SROs”) are required to pay a transaction fee to the

³ 15 U.S.C. 78ee.

SEC that is designed to recover the costs related to the government's supervision and regulation of the securities markets and securities professionals. To offset this obligation, NASD assesses its clearing and self-clearing members a regulatory fee in accordance with Section 3 of Schedule A of the NASD By-Laws, which mirrors the SEC Section 31 fee in scope and amount. Clearing members may in turn seek to charge a fee to their customers or correspondent firms. Any allocation of the fee between the clearing member and its correspondent firm or customer is the responsibility of the clearing member.

Reconciling the amounts billed by NASD and the amounts collected from the customers historically had been difficult for member firms, causing surpluses to accumulate at some broker-dealer firms (referred to as "accumulated funds"). These accumulated funds were not remitted to NASD, despite the fact that these charges may have been previously identified as "Section 31 Fees" or "SEC Fees" by certain firms.⁴

In November 2004, NASD received a letter from the SEC's Division of Market Regulation requesting, among other things, that NASD conduct an analysis to ascertain the amount of accumulated funds and present a plan for broker-dealers to dispose of or otherwise resolve title to such accumulated funds. Accordingly, in an effort to ascertain

⁴ NASD's rule also previously referred to this fee as an "SEC Transaction Fee." The SEC stated in its release adopting new Rule 31 and Rule 31T that "it is misleading to suggest that a customer or [self-regulatory organization] member incurs an obligation to the Commission under Section 31." See Securities Exchange Act Release No. 49928 (June 28, 2004), 69 FR 41060, 41072 (July 7, 2004). In response to this statement, NASD amended its rule to refer to this fee as a "Regulatory Transaction Fee." See Securities Exchange Act Release No. 50274 (August 26, 2004), 69 FR 53757 (September 2, 2004) (SR-NASD-2004-129). Further, NASD issued guidance to ensure there is no confusion in the marketplace regarding NASD's "Regulatory Transaction Fee" and the "SEC's Section 31 Fee." See Notice to Members 05-11 (February 2005) and Notice to Members 04-63 (August 2004).

the amount of accumulated funds, NASD surveyed 240 member clearing and self-clearing firms to review their practices regarding the collection of such fees from customers. After compiling and analyzing the data provided by member firms, NASD staff found that over half of the firms surveyed did not have an accumulated funds balance. NASD worked with the other SROs to recommend a potential solution to allow NASD member firms to resolve title to the accumulated funds. It was determined, based upon information provided in connection with NASD's survey, that it would be virtually impossible to return customer-related accumulated funds to the customers that had paid these funds to the firms.⁵

The current proposed rule change is aimed at enabling those fees that may have been collected for purposes of paying an "SEC Fee" or "Section 31 Fee" to be used to pay such fees. NASD is proposing new interpretive material ("IM") that will allow firms, on a one-time-only basis, voluntarily to remit historically accumulated funds to NASD. These funds then would be used to pay the SRO's current Section 31 fees in conformity with prior representations made by member firms. Finally, to the extent the payment of these historically accumulated funds is in excess of the fees due the SEC from NASD under Section 31 of the Act, such surplus shall be used by NASD to offset other NASD regulatory costs.

As stated above in Item 2, the effective date of the proposed rule change would be six months following Commission approval, if the Commission grants approval. In

⁵ NASD had asked all surveyed firms whether they could "identify and relate the funds to specific customers on a transaction by transaction basis." The surveyed firms universally stated that tracking fractions of a penny to individual customers would be impossible and any over-collections could not be passed back at the customer level.

addition, the IM would automatically sunset six months after the effective date.

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 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. NASD believes that the proposed rule change will provide a transparent way of addressing the issue of accumulated funds. As this proposed rule change would automatically sunset, it will be of a limited duration. Moreover, based on the reminder set forth in the IM and the issuance of prior Notices to Members on this matter, the accumulation of funds that are collected and disclosed as “Section 31 Fees” or “SEC Fees” should not reoccur.

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

NASD does not believe that the proposed rule change 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.

⁶ 15 U.S.C. 78o-3(b)(6).

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 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. 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-2007-027 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-2007-027. 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 offices 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-2007-027 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.⁷

Florence E. Harmon
Deputy Secretary

⁷ 17 CFR 200.30-3(a)(12).