

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-55886; File No. SR-NASD-2007-027)

June 8, 2007

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change Relating to SEC Section 31-Related Fees

On April 17, 2007, the National Association of Securities Dealers, Inc. (“NASD”) filed with the Securities and Exchange Commission (“SEC” or “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposal to allow member firms to voluntarily submit, within six months of the effective date of the proposal, funds previously accumulated by member firms to satisfy their, and subsequently NASD’s, obligation to remit SEC Section 31-related fees, to NASD. The proposed rule change was published for comment in the Federal Register on May 9, 2007.<sup>3</sup> The Commission received one comment letter regarding the proposal.<sup>4</sup> This order approves the proposed rule change.

Pursuant to Section 31 of the Act<sup>5</sup> and SEC Rule 31,<sup>6</sup> NASD and the national securities exchanges (collectively “SROs”) are required to pay a transaction fee to the 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,

---

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Securities Exchange Act Release No. 55697 (May 2, 2007), 72 FR 26432 (May 9, 2007).

<sup>4</sup> See Letter from Mary Yeager, Assistant Secretary, New York Stock Exchange LLC (“NYSE”) to Nancy M. Morris, Secretary, Commission, dated June 5, 2007 (“NYSE Comment”).

<sup>5</sup> 15 U.S.C. 78ee.

<sup>6</sup> 17 CFR 240.31.

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 a clearing member and its correspondent firm or customer is the responsibility of the clearing member.

NASD states that reconciling the amounts billed by NASD to member firms and the amounts collected by member firms from their customers historically has been difficult, causing surpluses to accumulate at some member 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.<sup>7</sup>

Prompted by a November 2004 Commission letter requesting an NASD analysis of and plan for addressing the accumulated funds issue, NASD surveyed 240 member clearing and self-clearing firms to review their practices regarding the collection of such fees from customers, discovering 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

---

<sup>7</sup> 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.” 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).

and, in the process, concluded that it would be virtually impossible to return customer-related accumulated funds to the customers that had paid these funds to the firms.<sup>8</sup>

Consequently, NASD has proposed interpretive material (“IM”) that will allow firms, on a one-time-only basis, voluntarily to remit historically accumulated funds (collected for purposes of paying an “SEC Fee” or “Section 31 Fee”) to NASD. These funds then would be used to pay NASD’s current Section 31 fees in conformity with prior representations made by member firms. 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 would be used by NASD to offset other NASD regulatory costs. The effective date of the proposed rule change is December 8, 2007, six months following the date of this approval order. Moreover, the IM will automatically sunset on June 8, 2008, six months after the effective date.

The Commission received one comment letter regarding the proposed rule change, from NYSE. NYSE acknowledged that the proposal provides “member firms a ready and efficient means” for dealing with accumulated funds but questioned “whether there is a nexus between amounts accumulated by NASD member firms and sales effected through facilities of the NASD or Nasdaq (prior to the separation of NASD from Nasdaq and Nasdaq’s registration as an exchange)” and whether it would be feasible for member firms to correlate each execution market with a specific portion of the

---

<sup>8</sup> 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.

accumulated funds held by the firm.<sup>9</sup> As a result, NYSE argued that “the fairest way to address this issue is for all exchanges to adopt procedures similar to those in the [NASD proposal], and to allow a member firm to remit accumulated funds to any SRO of which it is a member” and indicated its intention to submit a proposed rule change similar to the NASD proposal that would allow NYSE members and member organizations to remit all or a portion of their accumulated funds to the NYSE to permit the Exchange to make payments required by Section 31.<sup>10</sup>

After carefully considering the proposal and the comment submitted, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.<sup>11</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,<sup>12</sup> 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.

The Commission believes that this NASD program will provide a reasonable means for member firms to dispose of any accumulated funds they may have in their possession.<sup>13</sup> The Commission notes that, because the program is voluntary, it imposes

---

<sup>9</sup> See NYSE Comment at 1.

<sup>10</sup> Id. at 2.

<sup>11</sup> In approving this proposal, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>12</sup> 15 U.S.C. 78o–3(b)(6).

<sup>13</sup> The Commission notes that it has previously issued guidance that any fee collected by broker-dealers from their customers should not be referred to as an “SEC Fee” or “Section 31 Fee.” See Securities Exchange Act Release No. 49928

no obligation on any NASD member that believes that accumulated funds should be retained or disposed of in another manner. The NYSE Comment does not raise any issue that would preclude approval of the NASD proposal.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>14</sup> that the proposed rule change (File No. SR-NASD-2007-027) be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant delegated authority.<sup>15</sup>

Florence E. Harmon  
Deputy Secretary

---

(June 28, 2004), 69 FR 41060, 41072 (July 7, 2004). If broker-dealers adhere to this guidance, issues related to accumulated funds should not recur.

<sup>14</sup> 15 U.S.C. 78s(b)(2).

<sup>15</sup> 17 CFR 200.30-3(a)(12).