

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50670; File No. SR-NASD-2004-167)

November 16, 2004

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness 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 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 October 29, 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, II, and III below, which Items have been prepared by Nasdaq. On November 8, 2004, Nasdaq submitted Amendment No. 1 to the proposed rule change.³ Nasdaq has designated this proposal as one establishing or changing a due, fee or other charge imposed by the self-regulatory organization under Section 19(b)(3)(A)(ii)⁴ of the Act and Rule 19b-4(f)(2) thereunder,⁵ which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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 8, 2004 (“Amendment No. 1”). Amendment No. 1 made technical corrections to the proposed rule text of the originally filed proposed rule change.

⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

⁵ 17 CFR 240.19b-4(f)(2).

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

Nasdaq proposes to establish a new pricing and rebate schedule for NASD members that spans activity on both the Nasdaq Market Center ("NMC") and Nasdaq's Brut Facility ("Brut"), to be implemented on November 1, 2004. The text of the proposed rule change, as amended, 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 IV 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

Nasdaq is proposing to establish a new pricing and rebate schedule for NASD members for Nasdaq-listed securities that spans activity on both the NMC and Brut. The fee and rebate structure is based on multiple volume-based usage tiers that take into account the combined NMC and Brut volume of a member. A member will pay varying fees for having orders routed away from the systems or when accessing liquidity ("take-outs") based upon the member's combined volume activity in the NMC and Brut. Likewise, rebates for 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. The new 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 it will continue to charge a \$0.001 per share NMC order delivery charge on NMC orders delivered to fee-charging ECNs participating in NMC. 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 represents that, in conjunction with the adoption of this pricing structure, Brut will cease charging an access fee on orders delivered to it from the NMC. In addition, Nasdaq represents that

it currently does not charge when a firm executes against its own quote or order. Nasdaq represents that, upon the implementation of the above pricing schedule, Nasdaq will begin charging for these executions at the rates listed above.

2. Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with the provisions of Section 15A of the Act,⁶ in general, and with Section 15A(b)(5) of the Act,⁷ in particular, in that the proposed rule change provides for the equitable allocation of reasonable dues, fees, and other charges among members.

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

The forgoing rule change is subject to Section 19(b)(3)(A)(ii) of the Act⁸ and subparagraph (f)(2) of Rule 19b-4⁹ thereunder because it establishes or changes a due, fee, or other charge imposed by the self-regulatory organization. Accordingly, the proposal is effective upon Commission receipt of the filing. At any time within 60 days

⁶ 15 U.S.C. 78o-3.

⁷ 15 U.S.C. 78o-3(b)(5).

⁸ 15 U.S.C. 78s(b)(3)(A)(ii).

⁹ 17 CFR 240.19b-4(f)(2).

of the filing of such 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.¹⁰

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-2004-167 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-2004-167. 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

¹⁰ 15 U.S.C. 78s(b)(3)(C).

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-2004-167 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.¹¹

Margaret H. McFarland
Deputy Secretary

¹¹ 17 CFR 200.30-3(a)(12).