

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51609; File No. SR-NASD-2005-013)

April 26, 2005

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto to Create a Uniform Pricing Structure for the Nasdaq Market Center

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 8, 2005, 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 April 19, 2005, Nasdaq amended the proposed rule change.³ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

Nasdaq proposes to establish a uniform schedule of fees for all market participants using the trade execution services of the Nasdaq Market Center. Nasdaq would implement the proposed rule change immediately upon approval by the Commission. The text of the proposed rule change, as amended, is available on Nasdaq’s Web site (<http://www.nasdaq.com/about/LegalCompliance.stm>), at Nasdaq’s principal office, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Amendment No. 1 (replacing and superseding the original filing in its entirety).

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 the adoption of a uniform pricing and credit rebate structure applicable to all users of the Nasdaq Market Center. Under the proposal, all users of the Nasdaq Market Center would be charged the same tier-based per-share amounts for entering orders into the system, and all users would be entitled to the same tier-based levels of rebate credits based on the liquidity provided by those orders.⁴

To accomplish this, Nasdaq proposes to: (1) eliminate the separate \$0.001 fee it currently imposes on market participants for non-directed or preferenced orders that access the quote/orders of market participants that charge access fees for accessing their quotes/orders through the Nasdaq Market Center; and (2) require that electronic communication networks ("ECNs") and alternative trading systems ("ATs") that wish to participate in the Nasdaq Market Center not charge any fee to broker-dealers that access them through the Nasdaq Market Center.

⁴ This same pricing structure also applies to Nasdaq's Brut facility.

Nasdaq believes that the adoption of a uniform fee structure appropriately recognizes the similarities among all categories of market participants when they provide liquidity through the display of priced orders using the Nasdaq Market Center. Further, Nasdaq believes that adoption of the uniform pricing structure described above would increase the level of cost certainty and price transparency for users of the Nasdaq Market Center, thereby allowing them to make better-informed decisions about where and how to place their orders for potential execution. Finally, by centralizing through Nasdaq the imposition and collection of fees and the payment of credit rebates, Nasdaq expects to reduce the administrative burden on many market participants that currently pay execution fees and receive rebates for transactions initiated through the Nasdaq Market Center using a variety of payment processes, depending on the counter-party to a specific trade.

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)(6) of the Act,⁶ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

⁵ 15 U.S.C. 78o-3.

⁶ 15 U.S.C. 78o-3(b)(6).

In addition, Nasdaq believes that establishing uniform pricing across all categories of market participants is consistent with Section 15A(b)(5),⁷ as well as Commission Regulation ATS,⁸ the Adopting Release for which stated that “[t]here are a number of ways the exchange or association could address the issue of fees charged by alternative trading systems. For example, subject to Commission review and approval, an exchange or association could establish a standard for what constitutes a fair and reasonable fee for non-subscriber access to an alternative trading system.”⁹ Furthermore, Regulation ATS’ Rule 301(b)(4) provides in relevant part that, “... if the national securities exchange or national securities association to which an alternative trading system provides the prices and sizes of orders ... establishes rules designed to ensure consistency with standards for access to the quotations displayed on such national securities exchange, or the market operated by such national securities association, the alternative trading system shall not charge any fee to members that is contrary to, that is not disclosed in the manner required by, or that is inconsistent with any standard of equivalent access established by such rules.”¹⁰

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

Nasdaq 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, as amended. As the Commission noted in its approval of SR-NASD-2003-128, which created the current \$0.003 per-share maximum ECN access fee, the ability of an

⁷ 15 U.S.C. 78o-3(b)(5).

⁸ 17 CFR 242.300 et seq.

⁹ Securities Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844, 70871 (Dec. 22, 1998).

¹⁰ 17 CFR 242.301(b)(4).

SRO to establish access fee standards is specifically permitted by Regulation ATS, and not prohibited by either Sections 15A or 6(e) of the Exchange Act.¹¹ In addition, the Commission reiterated that, for an access fee rule to be approved by the Commission, the rule must be necessary to maintain consistency within the SRO's market and be designed to promote just and equitable principles of trade, to promote fair competition, to facilitate transactions in securities, and in general, to protect investors and the public interest.¹² Nasdaq believes that the instant proposal satisfies these requirements.

First, the Nasdaq Market Center remains a voluntary system, and ECNs unwilling to accept the same fee structure as other users of the Nasdaq Market Center are free to trade on other venues or participate in the Nasdaq Market Center as order-entry firms. Second, as noted above, Nasdaq's proposal is designed to provide a level of cost-certainty and price transparency that seeks to encourage greater use of the Nasdaq Market Center—including increased participation by market makers, order-entry firms, and ECNs. Finally, the proposed uniform fee structure ensures the equal treatment of all users of the system, maintains consistency within the Nasdaq Market Center, and prevents the system's neutral execution algorithms from being used to impose non-competitive fees on other market participants.

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.

¹¹ Securities Exchange Act Release No. 49220 (Feb. 11, 2004), 69 FR 7836, 7841-42 (Feb. 19, 2004).

¹² See id. at 7840.

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 such 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, 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-2005-013 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-2005-013. 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. 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-2005-013 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.¹³

Margaret H. McFarland
Deputy Secretary

¹³ 17 CFR 200.30-3(a)(12).