

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-52091; File No. SR-NASD-2005-072)

July 20, 2005

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Order Granting Accelerated Approval to the Proposed Rule Change and Amendment Nos. 1 and 2 Thereto Modifying Pricing for Non-Members Using Nasdaq's Brut Facility

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 June 1, 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 and II below, which Items have been prepared by Nasdaq. Nasdaq originally filed the proposal as a "non-controversial" rule change pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6)(iii) thereunder.⁴ On June 9, 2005, Nasdaq filed an amendment to the proposed rule change.⁵ On July 1, 2005, Nasdaq filed Amendment No. 2, which replaced the text of the original filing in its entirety.⁶ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons, and at the same time is granting accelerated approval of the proposed rule change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6)(iii).

⁵ See Partial Amendment dated June 9, 2005 ("Amendment No. 1). Amendment No. 1 made minor technical corrections to the discussion section and to the proposed rule text.

⁶ See Amendment dated July 1, 2005 ("Amendment No. 2). Amendment No. 2 clarified that the proposed rule change was being submitted for consideration pursuant to Section 19(b)(2) instead of under Section 19(b)(3)(A) and Rule 19b-4(f)(6) thereunder.

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

Nasdaq proposes to modify the pricing for non-NASD members using Nasdaq's Brut Facility. Nasdaq requested approval to implement the proposed rule change retroactively as of June 1, 2005. The text of the proposed rule change, as amended, is cited below. Proposed new language is italicized; proposed deletions are in brackets. The text of the proposed rule change is also available on Nasdaq's Web site (<http://www.nasdaq.com>), at Nasdaq's Office of the Secretary, and at the Commission's Public Reference Room.

7010. System Services

(a) – (h) No change.

(i) Nasdaq Market Center and Brut Facility Order Execution

(1) - (5) No change.

(6) The fees applicable to non-members using Nasdaq's Brut Facility shall be the fees established for members under Rule 7010(i), as amended by SR-NASD-2005-019, SR-NASD-2005-035, [and] SR-NASD-2005-048 and SR-NASD-2005-071, and as applied to non-members by SR-NASD-2005-020, SR-NASD-2005-038, [and] SR-NASD-2005-049 and SR-NASD-2005-072.

(j) - (v) No 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, Nasdaq included statements concerning the purpose of and basis for the proposed rule change, as amended, 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

In SR-NASD-2005-071,⁷ which was filed on an immediately effective basis and applies to NASD members, Nasdaq has proposed to modify the fee schedule applicable to orders in Nasdaq-listed stocks and exchange-traded funds listed on the American Stock Exchange that are entered into the Nasdaq Market Center or Nasdaq's Brut Facility and routed to another market center for execution. In this filing, Nasdaq is proposing to apply the same modification to non-NASD members that use Nasdaq's Brut Facility.

Routing charges are tiered, based upon the volume of shares on the Nasdaq Market Center and Brut books that are accessed during a month and the volumes of shares routed, and the volume of liquidity provided. The routing charges are currently as follows: (i) if a market participant provides a daily average of 2,000,000 or fewer shares of liquidity during a month, its routing charge is \$0.003 per share executed; (ii) if a market participant provides a daily average of more than 2,000,000 but fewer than 10,000,001 shares of liquidity during a month, its routing charge is \$0.0028 per share executed; (iii) if a market participant provides a daily average of more than

⁷ Securities Exchange Act Release No. 52089 (July 20, 2005).

10,000,000 but fewer than 20,000,001 shares of liquidity during a month, or provides a daily average of more than 20,000,000 shares of liquidity during a month but accesses and/or routes a daily average of 50,000,000 or fewer shares during the month, its routing charge is \$0.0027 per share routed; and (iv) if a market participant provides a daily average of more than 20,000,000 shares of liquidity during a month and accesses and/or routes a daily average of more than 50,000,000 shares during the month, its routing charge is \$0.0025 per share executed. In anticipation of the expected lower trading volumes at all market centers during the summer months, and in order to ensure that Nasdaq's pricing structure remains competitive, Nasdaq is lowering the 50,000,000 share threshold for the \$0.0027 and \$0.0025 pricing tiers to 40,000,000 shares. Thus, the most favorable routing fee would be available to any market participant that provides a daily average of more than 20,000,000 shares of liquidity during a month and access and/or routes a daily average of more than 40,000,000 shares during a month.

2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with the provisions of Section 15A of the Act,⁸ in general, and Section 15A(b)(5)⁹ of the Act, in particular, in that the proposed rule change provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the NASD operates or controls. According to Nasdaq, the proposed rule change applies to non-members that use Nasdaq's Brut Facility. The same fee change is also being implemented for NASD members that use the Nasdaq Market Center and/or Nasdaq's Brut Facility. Accordingly, the proposed change, as amended, promotes an equitable allocation of fees between members and non-members using Nasdaq's order execution facilities.

⁸ 15 U.S.C. 78q-3.

⁹ 15 U.S.C. 78q-3(b)(5).

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

Nasdaq 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.

III. 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-2005-072 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number SR-NASD-2005-072. 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 Nasdaq's Office of the Secretary. 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-2005-072 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a self-regulatory organization.¹⁰ Specifically, the Commission believes that the proposed rule change, as amended, is consistent with Section 15A(b)(5) of the Act,¹¹ which requires that the rules of the self-regulatory organization provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facilities or system which it operates or controls.

The Commission notes that this proposal, which would modify pricing for non-NASD members using the Nasdaq's Brut facility, would permit the schedule for non-NASD members to mirror the schedule applicable to NASD members that became effective as of June 1, 2005, pursuant to SR-NASD-2005-071.

¹⁰ The Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

¹¹ 15 U.S.C. 78q-3(b)(5).

The Commission finds good cause for approving the proposed rule change, as amended, prior to the 30th day of the date of publication of the notice thereof in the Federal Register. The Commission notes that the proposed fees for non-NASD members are identical to those in SR-NASD-2005-071, which implemented those fees for NASD members and which became effective as of June 1, 2005. The Commission notes that this change will promote consistency in Nasdaq's fee schedule by applying the same pricing schedule with the same date of effectiveness for both NASD members and non-NASD members. Therefore, the Commission finds that there is good cause, consistent with Section 19(b)(2) of the Act,¹² to approve the proposed change on an accelerated basis.

¹² 15 U.S.C. 78s(b)(2).

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹³ that the proposed rule change (File No. SR-NASD-2005-072), as amended, is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

Jill M. Peterson
Assistant Secretary

¹³ 15 U.S.C. 78s(b)(2).

¹⁴ 17 CFR 200.30-3(a)(12).