

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-48234; File No. SR-NASD-2003-93)

July 28, 2003

Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change by the National Association of Securities Dealers, Inc., to Increase the Trading Activity Fee

I. Introduction

On June 11, 2003, 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 proposed rule change to increase its Trading Activity Fee ("TAF") by adjusting the rates for covered equity securities. The proposed rule change was published for notice and comment in the Federal Register on June 25, 2003.<sup>3</sup> The Commission received one comment letter on the proposal.<sup>4</sup> On July 23, 2003, the NASD filed its response to comments.<sup>5</sup> This order approves the proposed rule change.

II. Summary of Comments

The Commission received one comment letter on the NASD's proposal to increase the TAF.<sup>6</sup>

- The CSE Letter

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

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

<sup>3</sup> See Securities Exchange Act Release No. 48061 (June 19, 2003), 68 FR 37887.

<sup>4</sup> See July 17, 2003 letter from Jeffrey T. Brown, Senior Vice President and General Counsel, The Cincinnati Stock Exchange ("CSE") to Jonathan G. Katz, Secretary, SEC ("CSE Letter").

<sup>5</sup> See July 23, 2003 letter from Barbara Z. Sweeney, Senior Vice President and Corporate Secretary, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation, SEC ("NASD Response Letter").

<sup>6</sup> See footnote 4, supra.

The CSE disapproved of the proposed rule change, stating the proposal would "double the ill-defined TAF with no justification" and with "little check or recourse on the part of the non-NASD markets."<sup>7</sup> The CSE suggested that the Commission require the NASD to provide supporting documentation to explain the need for increasing the TAF before allowing the NASD to double the fee.<sup>8</sup> Additionally, the CSE stated that the NASD must delineate its responsibilities covered by the TAF, explain how those responsibilities are unique to the NASD, and provide a cost analysis that establishes a nexus between those responsibilities and the fees.<sup>9</sup>

The CSE also stated that the TAF, along with the NASD's Gross Income Assessment, allows "for the subsidization of NASD regulatory activities through the forced taxing of transactions occurring on other markets."<sup>10</sup> According to the CSE, the NASD is using the TAF and Gross Income Assessment, under the guise of revenue neutrality, to subsidize its regulatory activities with monies generated on other markets.<sup>11</sup>

The CSE asked for an accounting, and an explanation of why the NASD believes it is proper to limit this fee adjustment to the TAF, when the TAF is only one component of a fee structure that also includes the Gross Income Assessment ("GIA") and the Personnel Assessment ("PA").<sup>12</sup>

- The NASD's Response to Comments

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<sup>7</sup> CSE Letter at 1.

<sup>8</sup> Id. at 2.

<sup>9</sup> Id.

<sup>10</sup> Id. at 3.

<sup>11</sup> Id.

<sup>12</sup> Id. at 4.

The NASD filed the instant proposed rule change because revenue generated by the TAF at the original rate was lower than expected.<sup>13</sup> The NASD noted that it originally proposed a TAF rate of .0001 per share, but reduced the rate to 0.00005 "after informal feedback from the membership about the level of volume meeting the definition of 'covered equity security.'"<sup>14</sup> The NASD filed the instant proposed rule change to remedy a shortfall in revenue.<sup>15</sup>

With regard to the CSE's comments that (i) the NASD has not adequately defined its responsibilities, nor has it established a sufficient nexus between its responsibilities and fees; and (ii) where intermarket fees are being assessed, a higher standard of scrutiny should be applied, the NASD noted that the Commission addressed both of these issues in its order approving the TAF.<sup>16</sup>

Finally, the NASD explained that the TAF does not underwrite "the regulation of Nasdaq and the Alternative Display Facility" and that the TAF, GIA, and PA fund the NASD's member regulatory programs.<sup>17</sup>

### III. Discussion and Commission Findings

The Commission has reviewed carefully the proposed rule change, the comment letter, and the NASD's response to the comments, and 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>18</sup> and, in particular, the requirements of Section 15A(b)(5) of the Act.<sup>19</sup>

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<sup>13</sup> NASD Response Letter at 1.

<sup>14</sup> Id. at 1-2.

<sup>15</sup> Id. at 2.

<sup>16</sup> Id.

<sup>17</sup> Id. at 3.

<sup>18</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

Section 15A(b)(5) requires, among other things, that the rules of a national securities association provide 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 association operates or controls. The Commission finds that the proposed increase in the rate for the TAF as described in the instant proposed rule change is consistent with Section 15A(b)(5) of the Act, in that the proposal is reasonably designed to recover NASD costs related to regulation and oversight of its members.

The Commission believes the CSE Letter raises no novel issues that were not addressed in the Commission's original TAF approval order.<sup>20</sup> The Commission also believes that the NASD adequately responded to the issues the CSE raised in its letter.

The Commission expects that the NASD will continue to monitor the revenue generated by the TAF, as well as the revenue generated by the Gross Income Assessment and the Personnel Assessment, and will take whatever steps are necessary to ensure that the fees remain consistent with the mandate established in Section 15A(b)(5) of the Act,<sup>21</sup> so that the fees remain equitable, as well as consistent with the NASD's expressed goal.

#### IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act<sup>22</sup>, that the

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<sup>19</sup> 15 U.S.C. 78o-3(b)(5).

<sup>20</sup> See Securities Exchange Act Release No. 47946 (May 30, 2003), 68 FR 34021 (June 6, 2003)(SR-NASD-2002-148)(approval order).

<sup>21</sup> 15 U.S.C. 78o-3(b)(5).

<sup>22</sup> 15 U.S.C. 78s(b)(2).

proposed rule change (SR-NASD-2003-93) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>23</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>23</sup> 17 CFR 200.30-3(a)(12).