

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50636; File No. SR-NASD-2004-161)

November 4, 2004

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Establish a Pilot Program Waiving Fees and Credits for Orders and Quotes Executed in the Nasdaq Opening Cross

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 22, 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. Nasdaq has designated this proposal as one establishing or changing a due, fee or other charge under Section 19(b)(3)(A)(ii) of the Act³ and Rule 19b-4(f)(2) thereunder,⁴ which renders the rule effective upon Commission receipt of this filing. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

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

Nasdaq is filing this proposed rule change to waive, for a pilot period of three months, the Nasdaq Market Center execution fees and credits for those quotes and orders executed in the Nasdaq Opening Cross. The pilot program will commence when Nasdaq implements the Opening Cross.

The text of the proposed rule change is below. Proposed new language is in italics.⁵

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Rule 7010. System Services

(a) – (h) **No Change.**

(i) Nasdaq Market Center order execution

(1) - (3) **No Change.**

(4) Opening Cross

For a period of three months commencing on the date Nasdaq implements its Opening Cross (as described in Rule 4704(d)), members shall not be charged Nasdaq Market Center execution fees, or receive Nasdaq Market Center liquidity provider credits, for those quotes and orders executed in the Nasdaq Opening Cross.

(j) – (u) No change.

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⁵ The proposed rule change is marked to show changes to Rule 7010(i) as currently reflected in the NASD Manual available at www.nasd.com. There are no other pending or recently approved rule filings that would affect the text of Rule 7010(i).

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

The Commission recently approved the Nasdaq Opening Cross, which is a new process for determining the Nasdaq Official Opening Price (“NOOP”) for the most liquid Nasdaq stocks.⁶ The Nasdaq Opening Cross is designed to create a more robust opening⁷ that allows for price discovery, and an execution that results in an accurate, tradable opening price. Nasdaq is seeking to establish a three-month pilot program, commencing with the launch of the Opening Cross, during which no Nasdaq Market Center execution charges will be charged, and no liquidity provider credits will be offered, for those quotes and orders executed in the Nasdaq market center as part of the Nasdaq Opening Cross.⁸

⁶ See Securities Exchange Act Release No. 50405 (Sept. 16, 2004); 69 FR 57118 (Sept. 23, 2004) (SR-NASD-2004-071).

⁷ Telephone conversation between Jeffrey S. Davis, Associate Vice President and Associate General Counsel, Nasdaq, and Terri L. Evans, Special Counsel, Commission, on November 4, 2004 (replacing the word “close” with “opening”).

⁸ Nasdaq established a similar pilot fee waiver with respect to the Nasdaq Closing Cross. See Securities Exchange Act Release No. 49576 (April 16, 2004); 69 FR 22112 (April 23, 2004) (SR-NASD-2004-048).

The pilot program will enable Nasdaq to evaluate more accurately the effectiveness of the Opening Cross in establishing the NOOP by eliminating any pricing disincentives that could arise as a result of a price schedule not established on the basis of actual trading data. During the pilot program, Nasdaq staff will study the behavior and participation in the Opening Cross to determine the optimum pricing schedule.⁹

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,¹⁰ in general, and with Section 15A(b)(5) of the Act,¹¹ in particular, in that it 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. Nasdaq believes that the proposed pilot program is an equitable allocation of fees because the program will apply equally to all members whose quotes and orders are executed as part of the Nasdaq Opening Cross. Furthermore, Nasdaq believes that the program is reasonable because it will allow Nasdaq, for a limited period of time, to analyze participation in the process and use the results to create an optimum fee schedule based on actual trading data.

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, as amended.

⁹ Nasdaq would consider extending the pilot if more information is needed at the end of the three-month period.

¹⁰ 15 U.S.C. 78o-3.

¹¹ 15 U.S.C. 78o-3(b)(5).

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

The proposed rule change has become immediately effective pursuant to Section 19(b)(3)(A)(ii) of the Act¹² and subparagraph (f)(2) of Rule 19b-4 thereunder,¹³ because it establishes or changes a due, fee, or other charge imposed by Nasdaq. At any time within 60 days of the filing of the 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.

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-2004-161 on the subject line.

¹² 15 U.S.C. 78s(b)(3)(a)(ii).

¹³ 17 CFR 240.19b-4(f)(2).

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-2004-161. 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, 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-2004-161 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.¹⁴

J. Lynn Taylor
Assistant Secretary

¹⁴ 17 CFR 200.30-3(a)(12).