

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51336; File No. SR-NASD-2005-026)

March 9, 2005

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change Relating to TRACE Market Data Fees

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 11, 2005, the National Association of Securities Dealers, Inc. (“NASD”) 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 NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

NASD is proposing to amend NASD Rule 7010(k) relating to Transaction Reporting and Compliance Engine (“TRACE”) transaction data to: (i) terminate the Bond Trade Dissemination Service (“BTDS”) Internal Usage Authorization Fee and the BTDS External Usage Authorization Fee and, in lieu of both fees, establish a Vendor Real-Time Data Feed Fee; (ii) define the term “Tax Exempt Organization,” and amend the defined term “Non-Professional” for purposes of NASD Rule 7010(k)(3); and (iii) make other minor, technical amendments. The text of the proposed rule change is available on NASD’s Web site (<http://www.nasd.com>), at NASD’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.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it had received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD 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

NASD seeks to amend NASD Rule 7010(k) to streamline market data services and fees for TRACE transaction data. Specifically, NASD proposes to replace two fees currently charged to receive delayed-time and real-time TRACE transaction data -- the BTDS Internal Usage Authorization Fee of \$500 per month per application and the BTDS External Usage Authorization Fee of \$1,000 per month per application -- with the Vendor Real-Time Data Feed Fee, a single monthly fee of \$1,500 (subject to certain exceptions) for a feed of real-time TRACE transaction data that the recipient may use in multiple applications. In addition, NASD proposes to amend NASD Rule 7010(k) to define the term "Tax-Exempt Organization" for purposes of identifying the tax-exempt organizations that would qualify to receive a real-time TRACE transaction data feed for a reduced fee of \$400 per month. Also, NASD proposes to amend the defined term "Non-Professional" in NASD Rule 7010(k) to make explicit NASD's current interpretation that a natural person who is a financial professional, or an employee of a financial services entity as specified in the rule, is considered a Non-Professional in those instances where the person accesses the TRACE transaction data to use it solely for personal, non-commercial

uses (e.g., a registered associated person of a broker-dealer accesses the free TRACE data at home to obtain information about bonds held in his personal account). Finally, NASD is proposing other minor, technical amendments to NASD Rule 7010(k).

Current TRACE Market Data Services and Fees

Currently, under NASD Rule 7010(k)(3)(A)(iii), NASD charges a BTDS Internal Usage Authorization Fee of \$500 per month per application or service. For this fee, a party is entitled to receive and use real-time and/or delayed-time TRACE transaction data,³ for internal dissemination and use.⁴ Under NASD Rule 7010(k)(3)(A)(iv), a party paying a BTDS External Usage Authorization Fee of \$1,000 per month per application or service is entitled to use real-time and/or delayed time TRACE transaction data and repackage it for delivery and dissemination externally (i.e., outside the contracting party's organization), such as delivering indices or other products derived from the TRACE data.

³ NASD recently filed a rule change eliminating the fee it charges for use solely of delayed-time TRACE transaction data, the BTDS Professional Delayed-Time Data Display Fee pilot program (i.e., a \$15 fee per month per terminal). The BTDS Professional Delayed-Time Data Display Fee pilot program will end on June 1, 2005. See Securities Exchange Act Release No. 50977 (January 6, 2005), 70 FR 2202 (January 12, 2005) (SR-NASD-2004-189) (notice of rule change for immediate effectiveness filed on December 28, 2004). See also NASD Notice to Members 05-05 (January 2005). In the current proposed rule change, NASD is proposing to eliminate the two remaining fees that are based partially on the receipt of delayed-time TRACE transaction data, and proposing a new fee, the Vendor Real-Time Data Feed Fee, that is based upon the receipt of real-time TRACE transaction data only.

⁴ Permitted internal uses include, but are not limited to, internal operational and processing systems, internal monitoring and surveillance systems, internal price validation, internal portfolio valuation services, internal analytical programs leading to purchase/sale or other trading decisions, and other related activities.

Proposed Vendor Real-Time Data Feed Fee

NASD proposes to eliminate the two current fees, the \$500 BTDS Internal Usage Authorization Fee and the \$1,000 BTDS External Usage Authorization Fee, and replace them with one consolidated fee, the Vendor Real-Time Data Feed Fee. The Vendor Real-Time Data Feed Fee would be \$1,500 for most TRACE data recipients and \$400 for certain qualifying Tax-Exempt Organizations that intend to use the data solely to provide access to TRACE data to Non-Professional users, such as individual investors, at no charge, as discussed in greater detail below.

NASD would charge each person or organization that receives real-time TRACE data via any data feed (except certain qualifying Tax-Exempt Organizations) the Vendor Real-Time Data Feed Fee of \$1,500 in proposed NASD Rule 7010(k)(3)(A)(ii), whether the data is received directly from NASD or from a vendor that redistributes TRACE transaction data in real time. As is currently the case, each organization or person receiving such data, whether from NASD or a vendor, would enter into an agreement with NASD. The data recipient would be entitled to use the TRACE transaction data in an unlimited number of internal and external applications, as described in proposed NASD Rule 7010(k)(3)(A)(ii), in contrast to the single-use or single-application limits that are in effect currently under either the \$500 BTDS Internal Usage Authorization Fee or the \$1,000 BTDS External Usage Authorization Fee. However, the Vendor Real-Time Data Feed Fee of \$1,500 would not include NASD's monthly charge for each desktop or other interrogation display device receiving the real-time data.⁵

⁵ Similarly, neither the BTDS Internal Usage Authorization Fee nor the BTDS External Usage Authorization Fee currently in effect includes the monthly charge for each desktop or interrogation display device receiving real-time data.

NASD believes that introducing a single fee for any party that desires to be a vendor (or a third-party recipient) taking a real-time TRACE transaction data feed would better reflect NASD's administrative costs, allocate such costs appropriately among real-time TRACE transaction data recipients based upon use and misappropriation risk, and simplify the fee structure. Under the current BTDS TRACE transaction data fee structure, a vendor taking a real-time TRACE transaction data feed that uses the data only on a next-day basis does not pay NASD a fee. However, for such vendors, NASD is exposed to the same risk -- the risk of misappropriation of TRACE data -- that it bears in connection with vendors or third-party data recipients that pay to receive and use such data real-time.

Currently, any vendor taking a real-time TRACE transaction data feed has the technical capability to use the real-time data wrongfully in violation of the terms of its service and fee agreement with NASD, such as redistributing real-time TRACE transaction data without appropriate authorization or failing to maintain proper controls or to adequately track data usage. To prevent or limit such misuse and misappropriation, NASD requires direct contractual relationships with anyone receiving a feed of real-time TRACE transaction data. These agreements, and the usage tracking that go along with them, result in NASD bearing the administrative cost for contract creation, management, and the monitoring of the usage of TRACE data through audits. NASD believes that the proposal to apply a single fee to any party desiring to receive a real-time TRACE transaction data feed would better reflect and allocate NASD's administrative costs.

NASD believes that the single fee for all recipients of a real-time TRACE transaction data feed also simplifies the fee structure and eliminates many of the questions regarding permitted uses by vendors and other TRACE transaction data recipients. For example, the new

Vendor Real-Time Data Feed Fee is based on per-organization usage, rather than per-application, and vendors of real-time TRACE transaction data (or recipients of such data through a vendor) would be better able to use the TRACE data in multiple internal or external applications without bearing additional costs.

Reduced Vendor Real-Time Data Feed Fee for Tax-Exempt Organizations

NASD is proposing in NASD Rule 7010(k)(3)(A)(iii) that the Vendor Real-Time Data Feed Fee be reduced to \$400 per month for qualifying Tax-Exempt Organizations. By reducing the fee, NASD seeks to accommodate such organizations that intend to use the TRACE transaction data solely for distribution to Non-Professionals at no charge.

In proposed NASD Rule 7010(k)(3)(C)(ii), NASD proposes to define “Tax-Exempt Organization” for purposes of NASD Rule 7010(k)(3) to mean “an organization that is described in Section 501(c) of the Internal Revenue Code (26 U.S.C. §501(c)); has received recognition of the exemption from federal income taxes from the Internal Revenue Service; and obtains and uses real-time TRACE transaction data solely for redistribution to Non-Professionals, as defined for purposes of Rule 7010(k)(3), at no charge.” Tax-exempt organizations that wish to obtain a real-time TRACE transaction data feed, but do not intend to provide access or redistribute data exclusively to Non-Professionals as defined under proposed NASD Rule 7010(k)(3)(C)(ii) at no charge would be required to pay the Vendor Real-Time Data Feed Fee of \$1,500 per month. Similarly, tax-exempt organizations that intend to obtain a real-time TRACE transaction data feed and use it not only for providing access or redistributing the TRACE data to Non-Professionals, but also for other uses, would be required to pay the \$1,500 fee per month.

NASD believes that the fee reduction for qualifying Tax-Exempt Organizations providing TRACE information to Non-Professionals at no charge furthers an NASD goal of making

TRACE transaction information more accessible to individual investors. Also, NASD believes that the proposed \$400 Vendor Real-Time Data Feed Fee for qualifying Tax-Exempt Organizations would appropriately reduce the costs of obtaining the data when the data would be used exclusively for the benefit of Non-Professionals (primarily, individual investors).

“Non-Professional”

NASD is proposing to amend NASD Rule 7010(k)(3)(C)(ii) to clarify the definition of “Non-Professional” and renumber the provision as NASD Rule 7010(k)(3)(C)(i). NASD believes that the current definition of “Non-Professional” is unclear as to whether a natural person who is registered in one of several capacities as a securities or commodities professional, or performs similar functions but is not required to be registered due to an exemption, or is an employee of certain financial services businesses,⁶ may be a Non-Professional if the natural person uses TRACE transaction information solely for personal, non-commercial uses. NASD currently interprets the term Non-Professional to include any natural person who obtains access to TRACE transaction data and uses it for his or her personal, non-commercial use, even if such natural person is registered personnel or otherwise an employee of a financial services entity (e.g., broker-dealer or investment adviser), or is himself or herself registered or qualified in some capacity with the Commission, or another federal or state agency that regulates and

⁶ See NASD Rule 7010(k)(3)(C)(ii), subparagraph (a), regarding a natural person “registered” or “qualified in any capacity with the Commission, the Commodity Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association”; subparagraph (b), regarding a natural person “engaged as an ‘investment adviser’ as that term is defined in Section 202(a)(11) of the Investment Advisers Act of 1940 (whether or not registered or qualified under that Act)”; and subparagraph (c), regarding a natural person “employed by a bank, insurance company or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt.”

monitors financial services business activities and the individuals engaged in such businesses, as specified in current NASD Rule 7010(k)(3)(C)(ii), subparagraphs (a) through (c).

NASD proposes to make clear that such professionals and other employees in the financial services industry may be considered Non-Professionals when they are accessing and using the TRACE transaction data solely for personal, non-commercial uses. For example, under proposed NASD Rule 7010(k)(3)(C)(i), subparagraph (c), a natural person who is engaged as an investment adviser and accesses TRACE data to review transaction pricing in TRACE-eligible bonds in his personal account would be considered using the data solely for his personal, non-commercial use and during that access and use would be a Non-Professional. Also, NASD proposes to clarify in subparagraph (d) of proposed NASD Rule 7010(k)(3)(C)(i) that, in addition to persons employed by a bank, insurance company, or other organization exempt from registration under federal or state securities laws to perform functions that ordinarily would require registration, other employees of such organizations who use TRACE transaction information solely for their personal, non-commercial use, would be Non-Professionals. NASD also proposes to make other technical, clarifying amendments to the definition of “Non-Professional” and to NASD Rule 7010(k).

NASD would announce the effective date of the proposed rule change in a Notice to Members to be published no later than 60 days following Commission approval if the Commission approves the proposed rule change. The effective date would be no later than 45 days following publication of the Notice to Members announcing Commission approval.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁷ which requires, among other things, that NASD rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and Section 15A(b)(5) of the Act,⁸ which requires, among other things, that NASD rules provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system that NASD operates or controls.

NASD believes that providing a reduced TRACE data fee for qualifying Tax-Exempt Organizations and clarifying the term Non-Professional would foster the continued dissemination of TRACE data for the protection of investors and in furtherance of the public interest. NASD believes that consolidating the two TRACE data fees into one fee and providing a reduced TRACE data fee for qualifying Tax-Exempt Organizations would equitably allocate fees among subscribers of TRACE data that desire TRACE transaction data for commercial use or benefit, or redistribution to Non-Professionals, and would not adversely affect the use and distribution of TRACE data, for the protection of investors and in furtherance of the public interest.

⁷ 15 U.S.C. 78o-3(b)(6).

⁸ 15 U.S.C. 78o-3(b)(5).

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

NASD does not believe that the proposed rule change could result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

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

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 NASD 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 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-2005-026 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-2005-026. 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 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 publicly available. All submissions

should refer to File Number SR-NASD-2005-026 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.⁹

Jill M. Peterson
Assistant Secretary

⁹ 17 CFR 200.30-3(a)(12).