

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51611; File No. SR-NASD-2005-026)

April 26, 2005

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

I. Introduction

On February 11, 2005, the National Association of Securities Dealers, Inc. (“NASD”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change relating to Transaction Reporting and Compliance Engine (“TRACE”) market data fees. The Commission published the proposed rule change for comment in the Federal Register on March 16, 2005.³ The Commission received one comment letter on the proposal.⁴ On April 25, 2005, NASD filed a response to the comment letter.⁵ This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The proposed rule change would amend NASD Rule 7010(k) relating to TRACE transaction data to: (i) terminate the Bond Trade Dissemination Service (“BTDS”) Internal

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 51336 (March 9, 2005), 70 FR 12921 (March 16, 2005) (“Notice”).

⁴ See letter from Andrew C. Wels, Chairman, Technology & Regulation Market Data Subcommittee, Securities Industry Association (“SIA”), to Jonathan G. Katz, Secretary, Commission, received April 8, 2005 (undated) (“SIA Letter”).

⁵ See letter from Sharon K. Zackula, Associate General Counsel, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated April 25, 2005 (“NASD Letter”).

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 proposal is discussed in greater detail in the Commission’s notice soliciting public comment.⁶

III. Summary of Comments Received and NASD Response

The Commission received one comment letter on the proposal.⁷ The SIA Letter supports NASD’s proposed rule change. However, the commenter requests that NASD clarify whether “market data subscribers who are natural persons using a brokerage account established in the name of an entity name they or their family control” are considered “Non-Professional” within the meaning of the rule.⁸ In addition, the commenter states, with regard to a reduced fee for Tax Exempt Organizations, that further review “may be warranted to determine the justifiable basis for a reduced fee, including a better description of the tax exempt organizations that would benefit from a reduced price structure, a better explanation as to why the reduced fee is necessary, and an analysis of the potential impact such a proposal may have on competition.”⁹

In response to the SIA Letter, NASD states that it “will consider identifying certain non-natural persons as “Non-Professionals” as part of its continuing review and interpretation of

⁶ See Notice, supra note 3.

⁷ SIA Letter, supra note 4.

⁸ Id. at 3.

⁹ Id. at 4.

TRACE data fees and access.”¹⁰ In addition, NASD states that “[t]he proposed definition of Tax-Exempt Organization limits significantly the number and type of organizations that may apply to receive Real-Time TRACE transaction data at the reduced fee and, by definition, limits the use of Real-Time TRACE transaction data solely for data access programs for the benefit of individual investors and not for commercial purposes.”¹¹ Given these restrictions, NASD does not believe that the proposal will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.¹²

The SIA Letter also stated that the rationale NASD followed in its proposal – that financial services industry employees should be considered non-professionals when they access data for personal, non-commercial uses – should be applied uniformly to all other individual subscribers of bond or equity market data no matter which self regulatory organization, directly or indirectly, controls the market data.¹³ The SIA Letter petitions the Commission for rulemaking to review the definitions of “Professional” and “Non-Professional” as interpreted for market data fee and administrative purposes by the Consolidated Tape Association, the NASDAQ UTP Plan, the New York Stock Exchange, NASDAQ, the Options Price Reporting Authority, and NASD.¹⁴ This petition will be considered separately from this proposal.

¹⁰ NASD Letter at 2 (“For purposes of TRACE fees, NASD has interpreted the term “Non-Professional” to further NASD’s goal of providing access to TRACE market data at no charge to persons who seek to use TRACE market data for personal, rather than commercial, purposes.”).

¹¹ Id. at 3.

¹² See id.

¹³ SIA Letter at 1.

¹⁴ See id.

IV. Discussion

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities association.¹⁵ In particular, the Commission believes that the proposed rule change is consistent with Section 15A(b)(6) of the Act,¹⁶ which requires, among other things, that the rules of an association 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,¹⁷ which requires, among other things, that rules of an association provide for the equitable allocation of reasonable dues, fees, and other charges among members, issuers, and other persons using any facility or system which the association operates or controls. Consolidating the two TRACE data fees into one fee and reducing the TRACE data fee for qualifying Tax-Exempt Organizations appears reasonable and should not adversely affect the use and distribution of TRACE data. In addition, the Commission believes that clarifying who is a “Non-Professional” and therefore is not subject to TRACE fees is reasonable and consistent with the goal of wide dissemination of TRACE transaction data.

¹⁵ In approving this proposed rule change, the Commission notes that it has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁶ 15 U.S.C. 78o-3(b)(6).

¹⁷ 15 U.S.C. 78o-3(b)(5).

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁸ that the proposed rule change (SR-NASD-2005-026) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁹

Margaret H. McFarland
Deputy Secretary

¹⁸ 15 U.S.C. 78s(b)(2).

¹⁹ 17 CFR 200.30-3(a)(12).