

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-51478; File No. SR-NSX-2005-01)

April 5, 2005

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Stock Exchange Relating to the Exchange's Regulatory Transaction Fee

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> notice is hereby given that on March 31, 2005, the National Stock Exchange<sup>SM</sup> ("NSX" or "Exchange") 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 NSX. The Exchange filed this proposal pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. 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

NSX proposes to amend Exchange Rule 11.10(A)(q), which pertains to the transaction fee that NSX assesses to members and uses to help fund the Exchange's fee obligations to the Commission under Section 31 of the Act.<sup>5</sup> NSX proposes to amend the title and text of the rule to make clear the distinction between the Exchange's Section 31 fee obligations and the transaction fee the Exchange assesses members to fund those obligations, and to amend the text to explicitly

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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> 15 U.S.C. 78s(b)(3)(A).

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

reference that the NSX Rule 11.10(A)(q) fee will change in tandem with Section 31 rate changes announced by the Commission. Proposed new language is underlined. Proposed deletions are in brackets.

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## RULES

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## NATIONAL STOCK EXCHANGE

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### CHAPTER XI

#### Trading Rules

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#### Rule 11.10 National Securities Trading System Fees

##### A. Trading Fees

(a) – (p) No change.

(q) [SEC]Regulatory Transaction Fee.[ -] Under Section 31 of the Act, the Exchange must pay certain fees to the Commission. To help fund the Exchange's obligations to the Commission under Section 31, this Regulatory Transaction Fee is assessed to members. To the extent there may be any excess monies collected under this Rule, the Exchange may retain those monies to help fund its general operating expense. Each member engaged in executing transactions on the Exchange shall pay, in such manner and at such times as [the Treasurer of] the Exchange shall direct, a Regulatory Transaction F[f]ee equal to [1/300th of one percent of the aggregate dollar amount] (i) the rate determined by the Commission to be applicable to

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15 U.S.C. 78ee.

covered sales occurring on the Exchange in accordance with Section 31 of the Act [of the sales on the Exchange] multiplied by (ii) the member's aggregate dollar amount of covered sales occurring on the Exchange during any computational period [of such securities (other than bonds, debentures and other evidences of indebtedness and any sale or any class of sales of securities which the Securities and Exchange Commission may, by rule, exempt from the imposition of the fee ) executed by such member].

(r) No change.

B. No change.

C. 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, NSX 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. NSX 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

Section 31 of the Act requires NSX, other national securities exchanges, and NASD to pay transaction fees and assessments to the Commission that are designed to recover the costs related to the government's supervision and regulation of the securities markets and securities professionals. On June 28, 2004, the Commission established new procedures governing the calculation, payment, and collection of fees and assessments on securities transactions owed by

national securities exchanges and national securities associations pursuant to Section 31 of the Act.<sup>6</sup> The new procedures became effective August 6, 2004. In accordance with the new procedures, NSX must now provide the Commission with trade data on covered sales<sup>7</sup> occurring on the Exchange, which the Commission uses to calculate the amount of fees due from NSX. Accordingly, the calculation of fees owed by NSX pursuant to Section 31 of the Act is now performed by the Commission.

To recover the costs of NSX's Section 31 obligation, NSX assesses a transaction fee on its members under Exchange Rule 11.10(A)(q). The Exchange has determined to modify the text of Exchange Rule 11.10(A)(q) in response to statements made by the Commission in its Adopting Release that "it is misleading to suggest that a customer or [a self-regulatory organization] member incurs an obligation to the Commission under Section 31."<sup>8</sup> While NSX

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<sup>6</sup> See Securities Exchange Act Release No. 49928 (June 28, 2004), 69 FR 41060 (July 7, 2004) ("Adopting Release").

<sup>7</sup> "Covered sale" means "a sale of a security, other than an exempt sale or a sale of a security future, occurring on a national securities exchange or by or through any member of a national securities association otherwise than on a national securities exchange." 17 CFR 240.31(a)(6).

<sup>8</sup> See Adopting Release, 69 FR at 41072. The Exchange has also reviewed the rounding convention it had previously utilized in assessing the NSX Rule 11.10(A)(q) fee to its members. Prior to that review, the Exchange calculated the fee based on the sell-side value per trade multiplied by the Commission's current rate. This number was then rounded, and the rounded amount for each of the member's monthly sell-side transactions was then added up to arrive at the total amount due from the member for a given month. The Exchange then used the monies collected to fund the Exchange's payment of the amount due the Commission under Section 31 of the Act. After its review and after consultation with the Commission staff, the Exchange has determined to round the applicable fees due on a per-member basis and not on a per-transaction basis and announced this change in rounding convention to its membership through a regulatory circular. See NSX Regulatory Circular 04-11. As of August 2, 2004, the fee is now calculated based on each member's overall sell-side transaction value multiplied by the Commission's applicable Section 31 fee rate.

notes that it has previously filed amendments Exchange Rule 11.10(A)(q) with the Commission,<sup>9</sup> to avoid any possible confusion as discussed in the Adopting Release, the Exchange is revising the title and text of Exchange Rule 11.10(A)(q). Specifically, in conformity with the Adopting Release, NSX is changing the name of the rule and related references from "SEC Fee" to "Regulatory Transaction Fee." The rule is also being amended to make clear that, to the extent the Exchange may collect more from members under Exchange Rule 11.10(A)(q) than is due from the Exchange to the Commission under Section 31 of the Act for covered sales occurring on the Exchange, for example due to rounding differences, the excess monies collected may be used by the Exchange to fund its general operating expense. The Exchange is also revising the text to explicitly reference that the Regulatory Transaction Fee rate applicable to each member's aggregate amount of covered sales occurring on the Exchange will continue to be set, as it is today, in accordance with Section 31 of the Act.<sup>10</sup>

Though the requirements of Section 31 of the Act, including the new procedures established by the Commission, apply directly to NSX and other self-regulatory organizations, and

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<sup>9</sup> See, e.g., Securities Exchange Act Release No. 37586 (August 20, 1996), 61 FR 45467 (August 29, 1996) (notice of filing and immediate effectiveness of File No. SR-CSE-96-04). The Exchange recently changed its name and was formerly known as the Cincinnati Stock Exchange or "CSE." See Securities Exchange Act Release No. 48774 (November 12, 2003), 68 FR 65332 (November 19, 2003) (notice of filing and immediate effectiveness of File No. SR-CSE-2003-12).

<sup>10</sup> The Exchange is also amending Rule 11.10(A)(q) to reflect that the applicable fee rate is periodically adjusted in accordance with Section 31. In the past, NSX has notified members, through regulatory circulars and other means, of any periodic adjustments to the fee rate made by the Commission. NSX will continue to notify members of any such adjustments in the future since NSX seeks to recover the costs of its Section 31 obligation from its members. Because these amendments are similar to those proposed in another rule proposal pending with the Commission, File No. SR-CSE-2003-07, the Exchange plans to file amendment 3 to File No. SR-CSE-2003-07 to reflect these revisions.

not their membership, the requirements will affect the obligations of members under Exchange Rule 11.10(A)(q). Therefore, NSX has issued a Regulatory Circular to inform members of the new procedures relating to Section 31 of the Act to remind members of their continuing obligation to pay the transaction fees assessed by NSX pursuant to Exchange Rule 11.10(A)(q) so that it can recover the costs of its Section 31 obligation, and to clarify the manner in which the Exchange would use rounding to calculate each member's applicable NSX Rule 11.10(A)(q) fee.<sup>11</sup>

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>12</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act,<sup>13</sup> in particular, in that it provides for the equitable allocation of dues, fees, and other charges among its members.

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

The Exchange does not believe that the proposed rule change will impose 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 on the proposed rule change were neither solicited nor received.

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

The foregoing proposed rule change has become immediately effective pursuant to

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<sup>11</sup> See NSX Regulatory Circular 04-011 (August 2, 2004).

<sup>12</sup> 15 U.S.C. 78f(b).

<sup>13</sup> 15 U.S.C. 78f(b)(4).

Section 19(b)(3)(A)(ii) of the Act<sup>14</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder,<sup>15</sup> because it establishes or changes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of such 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](mailto:rule-comments@sec.gov). Please include File Number SR-NSX-2005-01 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-NSX-2005-01. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your

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<sup>14</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>15</sup> 17 CFR 240.19b-4(f)(2).

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 Exchange. 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-NSX-2005-01 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.<sup>16</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>16</sup> 17 CFR 200.30-3(a)(12).