

believes that procedurally the proposed rule change should adequately ensure that all arbitration cases that would be subject to the MSRB arbitration process will be provided for under the NASD's arbitration program. Those MSRB members who are also NASD members, or members of another SRO with an arbitration forum, will be able to use that SRO's arbitration forum.<sup>10</sup> Those MSRB members who are not also members of another SRO (the bank dealers) will now be deemed "members" of the NASD for purposes of arbitrating claims involving the municipal securities activities of bank dealers. The proposed rule change accomplishes this by subjecting every bank dealer, as of January 1, 1998, to the NASD's Code of Arbitration Procedure for every claim, dispute or controversy arising out of or in connection with the municipal securities activities of the bank dealer acting in its capacity as such. In addition, the proposed rule change requires that bank dealers abide by the NASD's Code just as if they were members of the NASD for purposes of arbitration.

In addition, the Commission believes that the proposed rule change adequately provides for the enforcement of amended Board Rule G-35 because the enforcement mechanism for bank dealers would not be altered. The bank regulatory agencies<sup>11</sup> would continue to be responsible for the inspection and enforcement of bank dealers' municipal securities activities, including arbitration. A bank dealer's failure to pay an arbitration award rendered pursuant to the NASD's Code of Arbitration Procedure would constitute a violation of Board Rule G-35, since it is that rule, as amended, that subjects bank dealers to the NASD's Code. Similarly, a bank dealer's refusal to submit to arbitration pursuant to the NASD's Code of Arbitration Procedure would constitute a violation of Board Rule G-35. The NASD would notify the Board of any such violations and the Board, in turn, would contact the appropriate bank regulatory agency.

Finally, the Board provides adequate measures for the transition from the

MSRB arbitration forum to the NASD arbitration forum. Even though the Board will no longer accept any new claims filed with its arbitration program after January 1, 1998, it will continue to operate its program in order to administer its current, open cases and any new claims received prior to January 1, 1998. The Board will then discontinue its arbitration program when all such cases have been closed.<sup>12</sup>

The Commission notes that the MSRB stated that the Board will cover any costs associated with the NASD arbitrating cases involving the bank dealers that are not covered by the fees bank dealers will pay as parties to an arbitration proceeding, until such time as the NASD receives approval to amend its fees to cover such costs. As members of the NASD for arbitration purposes, bank dealers will pay the same arbitration fees as NASD members. The NASD has also stated that if the number of cases received from the MSRB were to increase substantially, the NASD would want to revisit the fee issue.<sup>13</sup>

The Commission finds good cause to approve Amendment No. 2 to the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. Specifically, Amendment No. 2 is responsive to the commenter's request that the Board publicly disclose the names of arbitrators on all customer-related awards rendered after May 10, 1989 by amending Rule G-35 to make those names publicly available. This amendment should help facilitate the NASD's administration of municipal securities arbitration claims, and will allow the public to receive more accurate and complete information on an arbitrator's past arbitration activities, where an arbitrator appointed in a case has previously served as an arbitrator in the Board's program but has never served as an NASD arbitrator. Accordingly, the Commission believes that it is consistent with Section 15B of the Act to approve Amendment No. 2 to the proposal on an accelerated basis.

<sup>12</sup> The Commission notes that the Board has stated that at that time it will submit a filing to the Commission to delete sections 1 through 36 of Rule G-35, as well as new Section 37, and to rescind Rule A-16 on arbitration fees and deposits.

<sup>13</sup> The Commission notes that if the NASD were to file a proposed rule change to amend fees that apply to its members, and that also apply to the bank dealers, it would be able to file that change under Section 19(b)(3)(A) of the Act, if it otherwise met the criteria. However, if the NASD were to file a proposed rule change that only affected fees for the bank dealers, that change would have to be filed under Section 19(b)(2) of the Act so that the bank dealers would have adequate notice and time to comment on the proposal.

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 2 to the rule proposal. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. 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 at the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the MSRB. All submissions should refer to File No. SR-MSRB-97-4 and should be submitted by December 29, 1997.

## V. Conclusion

*It is therefore Ordered*, pursuant to Section 19(b)(2) of the Act,<sup>14</sup> that the proposed rule change (SR-MSRB-97-04), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>15</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 97-31874 Filed 12-4-97; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-39357; File No. SR-NASD-97-82]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Computer Assisted Execution Service and Intermarket Trading System/Computer Assisted Execution Service Fees

November 25, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act"),<sup>1</sup> notice is hereby given that on November 10, 1997, the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("SEC" or

<sup>14</sup> 15 U.S.C. 78s(b)(2).

<sup>15</sup> 17 CFR 200.30-3(a)(12).

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

NASD. Consequently, the Board's caseload has declined dramatically from 115 cases received in 1988 to 10 cases received in 1996. As of the time of the filing of the proposed rule change, the Board had received two cases in 1997.

<sup>10</sup> The Commission notes that if another SRO wanted to eliminate its arbitration program and send its cases to the NASD, it would be required to file a rule filing under Section 19(b) of the Act, and the Commission would independently consider any such filing.

<sup>11</sup> The Office of Comptroller of the Currency, the Federal Reserve Board, and the Federal Deposit Insurance Corporation.

"Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. On November 21, 1997, the Association submitted to the Commission an amendment to the proposed rule changes.<sup>2</sup> 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**

Pursuant to Section 19(b)(1) of the Exchange Act, the NASD, through its wholly-owned subsidiary, Nasdaq, is herewith filing a proposed rule change to amend the Computer Assisted Execution Service ("CAES) and Intermarket Trading System/Computer Assisted Execution Service ("ITS/CAES") fee structure from a per share fee to per trade fee. Below is the text of the proposed rule change. Proposed new language is italicized; proposed deletions are in brackets.

\* \* \* \* \*

#### **7010. System Service**

(a)-(c) No change.

(d) Computer Assisted Execution Service.

The charges to be paid by members receiving the Computer Assisted Execution Service (CAES) shall consist of a fixed service charge and a per [share] *trade* transaction charge [applicable to the market-maker side of a transactional] plus equipment related charges.

#### **(1) Service Charges**

\$100 per month for each market maker terminal receiving CAES.

#### **(2) Transaction Charges**

(A) [\$0.005 per share] *As of November 1, 1997, \$0.50 per execution shall be paid by [the member which receives an order executed through CAES to buy or*

*sell a Nasdaq Stock Market or listed security] any CAES market maker that executes a CAES order or any part of a CAES order.*

(B) *As of January 1, 1998, \$0.50 per execution shall be paid by any order entry firm or CAES market maker that enters an order into CAES that is executed in whole or in part.*

[(B)] (C) [\$0.005 per share] *As of November 1, 1997, \$1.00 per commitment shall be paid by [the] any member which sends or receives a commitment through the ITS/CAES linkage to buy or sell a listed security that is executed in whole or in part.*

(e)-(n) 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, the self-regulatory organization included statements concerning the purpose of an 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. The self-regulatory organization 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 purpose of the proposed rule change is to change the CAES and ITS/CAES fee structure from a per share fee to a per trade fee. Presently, there is a \$0.005 per share fee (no maximum) assessed on Consolidated Quote Service ("CQS") market makers<sup>3</sup> for trades executed through CAES (no charge on order entry firms) and a \$0.005 per share fee (no maximum) assessed on CQS market makers for commitments to trade sent through the ITS/CAES linkage. Because CQS market makers are now obligated under the SEC's Limit Order Display Rule to display individual limit orders up to 9,900 shares and aggregate all "displayable" limit orders at the same price level, however, Nasdaq believes it is now appropriate to assess CAES and ITS/CAES fees on a per trade basis. Since the order sizes now displayable under

the new rule may not represent a market maker's exclusive proprietary interest, Nasdaq believes that a fee structure based on a per share calculation is no longer the fairest or best means to assess CAES and ITS/CAES fees.

Nasdaq notes that other fees applicable to Nasdaq market participants are assessed on a per trade basis, e.g., the present SelectNet fee is \$2.50 per side of each transaction,<sup>4</sup> and the fee for the Small Order Execution System ("SOES") is 50 cents for each order entered by an order entry firm or market maker, and 50 cents for each execution by a market maker. The current CAES and ITS/CAES per share fee structure, however, does not provide for any upper limit on fees.

Presently, the average CAES fee per trade using a per share calculation is \$7.97. Nasdaq believes that adoption of the proposed per trade fee structure for CAES and ITS/CAES will result in an overall reduction of fees and establish a more consistent fee structure for all Nasdaq execution and order routing systems.<sup>5</sup>

#### **2. Statutory Basis**

The proposed rule change is consistent with Section 15A(b)(5) of the Act<sup>6</sup> 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.

New per trade fees established by paragraphs (A) and (C) of the rule will be effective November 1, 1997. The fees established by paragraph (B) will become effective on January 1, 1998 to allow ITS/CAES users adequate time to prepare for the implementation of these charges as well as allow Nasdaq to establish appropriate billing procedures.

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

The Association does not believe that the proposed rule change will impose any inappropriate burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

<sup>4</sup> This fee has been temporarily reduced to \$1.25 per side through December 31, 1997. See Exchange Act Release No. 39248 (October 16, 1997), 62 FR 55296 (October 23, 1997).

<sup>5</sup> Through paragraph (B) of the proposed rule imposes a new fee on order entry firms, Nasdaq believes that such a fee is necessary to more equitably distribute transaction costs.

<sup>6</sup> 15 U.S.C. 78o-3(b)(5).

<sup>2</sup> See Letter from Robert Aber, Vice President and General Counsel, Office of General Counsel, The Nasdaq Stock Market, Inc. ("Nasdaq"), to Katherine England, Assistant Director, Division of Market Regulation, SEC, dated November 21, 1997 ("Amendment No. 1"). The amendment adds language to the notice explaining that one of the purposes of the proposed rule is to create a per transaction fee structure that is fairer to market makers who, under the Order Display Rules, are required to display interest that may not be their own. The amendment also clarifies that the proposed rule is imposing a new fee on order entry firms. The filing of an amendment to a proposed rule change filed under Section 19(b)(3)(A) of the Act and Rule 19b-4(e) thereunder results in a resetting of the 60 day period during which the Commission summarily may abrogate the change in the self-regulatory organization's rules. See 15 U.S.C. 78s(b)(3)(C).

<sup>3</sup> A CQS market maker is a dealer that, with respect to a reported security, holds itself out as being willing to buy and sell such security for its own account on a regular and continuous basis otherwise than on a national securities exchange in amounts of less than block size and that is registered as such.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

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

The proposed rule change has become effective upon filing pursuant to Section 19(b)(3)(A) of the Act and subparagraph (e) of Rule 19b-4 thereunder, in that the proposal establishes or changes a due, fee, or other charge. 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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. 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 at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR-NASD-97-82 and should be submitted by December 29, 1997.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>7</sup>

**Margaret H. McFarland,**  
*Deputy Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-39356; File No. SR-NASD-97-57]

**Self-Regulatory Organizations; Order Approving Proposed Rule Change by National Association of Securities Dealers Inc. Relating to the Electronic Delivery of Information Between Members and Their Customers**

November 25, 1997.

**I. Introduction**

On July 30, 1997,<sup>1</sup> the National Association of Securities Dealers, Inc. ("NASD" or "Association") submitted to the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> a proposed rule change setting forth the policy of NASD Regulation, Inc. ("NASD Regulation" or "NASDR") regarding electronic delivery of information between members and their customers. A notice of the proposed rule change appeared in the **Federal Register** on September 11, 1997.<sup>4</sup> The Commission received one comment letter addressing the proposed rule change.<sup>5</sup> This order approves the proposed rule change.

**II. Description of Proposal**

The Association filed with the Commission a Notice of Members ("NTM") which establishes the NASDR's policy regarding electronic delivery of information between members and their customers. The NASDR policy will allow members to use electronic media to electronically transmit documents that they are required or permitted to furnish to customers under Association rules and to receive electronic communications from customers. The NTM states that use of electronic media is permitted provided members comply with certain guidelines outlined in Commission

Release Nos. 34-37182<sup>6</sup> and 33-7233.<sup>7</sup> In these releases, the Commission addresses the procedural aspects of how broker-dealers and others may satisfy their delivery obligations under federal securities laws by using electronic media as an alternative to paper-based media provided that they comply with certain prescribed requirements.

The NTM summarizes the Commission procedures, which address, among other things, content, notice, access, evidence to show delivery, and communication of personal financial information, and consent. The NTM also lists current Association rules that require or permit communications between members and their customers for which electronic delivery may be used in accordance with the standards contained in the Commission releases. The policy established in the NTM will also apply to a new rule or an amendment to an existing rule that requires or permits communications between members and their customers unless NASDR specifies otherwise at the time of adoption of the rule or amendment.

**III. Summary of Comments**

The Commission received one comment letter addressing this proposal.<sup>8</sup> While the ICI Letter generally supports the NASDR's NTM, it recommends certain additions to the list of NASD rules contained in the NTM,<sup>9</sup> and responds to a request for comment issued in the notice.<sup>10</sup>

The additional rules that ICI believes should be added to the list of NASD rules contained in the NTM are: Rule 2210 (d) and (f); IM-2210-3; Rule 2830(d); Rule 2830(k)(7); Rule 2830(l)(1)(C); and Rule 3010(g)(2).<sup>11</sup> ICI believes that Rules 2210(d), 2210(f) and IM-2210-3, which outline standards for when members communicate with the public, should be included to confirm that their disclosure and other requirements may be satisfied using electronic media where the communication itself is made through

<sup>6</sup> See, Securities Exchange Act Release No. 37182, May 9, 1996; 61 FR 24644, May 15, 1996, (Commission's interpretation concerning the delivery of information through electronic media in satisfaction of broker-dealer and transfer agent requirements to deliver information under the Act and the rules thereunder).

<sup>7</sup> See, Securities Act Release No. 7233, Oct. 6, 1995; 60 FR 53458, Oct. 13, 1995, (Commission's interpretation concerning the use of electronic media as a means of delivering information required to be disseminated pursuant to the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940).

<sup>8</sup> See *supra* note 5.

<sup>9</sup> ICI Letter at pp. 2-3.

<sup>10</sup> See *supra* note 4, at p. 47859, n.6.

<sup>11</sup> ICI Letter, p. 3.

<sup>1</sup> On August 27, 1997, the NASD amended the exhibit attached to the rule filing. See letter from Mary N. Revell, Associate General Counsel, NASD Regulation, Inc., to Katherine A. England, Assistant Director, Division of Market Regulation, SEC, dated August 26, 1997.

<sup>2</sup> 15 U.S.C. 78s(b)(1).

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> Securities Exchange Act Release No. 39025 (September 5, 1997); 62 FR 47858.

<sup>5</sup> Letter from Joseph P. Savage, Assistant Counsel, Investment Company Institute, to Jonathan G. Katz, Secretary, SEC, dated October 2, 1997 ("ICI Letter").

<sup>7</sup> 17 CFR 200.30-3(a)(12) (1989).