

representatives of Inet,<sup>15</sup> about the issues originally raised by Instinet. Again according to NASD, while Inet explained that the proposed requirements to capture a routed order identifier for electronic orders would require the ECN to make technological changes, it did not believe these changes would be overly burdensome as long as NASD allowed an adequate implementation period. Accordingly, the Commission believes that the regulatory benefits to be derived from the greater automation provided by the proposed rule change should outweigh the burden imposed on ECNs.

Because this proposal was previously noticed for public comment as part of NASD-00-23,<sup>16</sup> and, as described above, NASD has adequately responded to comments received on the proposal, the Commission finds good cause, pursuant to section 19(b)(2) of the Act,<sup>17</sup> for approving the proposed rule change prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. The proposed rule change will become effective 90 days following publication of a Notice to Members, which will be published no later than 60 days from the date of this approval order.

## V. Conclusion

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act,<sup>18</sup> that the proposed rule change (SR-NASD-2004-137) is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>19</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50406; File No. SR-NASD-2004-119]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto Regarding Fees for Orders and Quotes Executed in the Nasdaq Closing Cross

September 16, 2004.

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 August 10, 2004, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), submitted to 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. On August 23, 2004, Nasdaq amended the proposed rule change.<sup>3</sup> On September 13, 2004, Nasdaq amended the proposed rule change.<sup>4</sup> Nasdaq has designated the proposed rule change as "establishing or changing a due, fee, or other charge" under Section 19(b)(3)(A) of the Act,<sup>5</sup> and Rule 19b-4(f)(2) thereunder,<sup>6</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

Nasdaq is filing this proposed rule change to establish fees for quotes and orders executed in the Nasdaq Closing Cross. The text of the proposed rule change is set forth below. Proposed new

language is in *italics*; proposed deletions are in [brackets].<sup>7</sup>

\* \* \* \* \*

### Rule 7010. System Services

(a)-(h) No Change.

(i) Nasdaq Market Center order execution)

(1) and (2) No Change.

(3) [Pilot—] Closing Cross

[For a period of three months commencing on the date Nasdaq implements its Closing Cross (as described in Rule 4709) 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 Closing Cross.]

*Market-on-Close and Limit-on-executed: \$0.0005 per share.*

*Close orders executed in the Nasdaq Closing Cross.*

*All other quotes and orders executed in the Nasdaq Closing Cross: No charge for execution.*

(j)-(u) 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, 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.

<sup>7</sup> The proposed rule language is marked to show changes to Rule 7010(i) as currently reflected in the NASD Manual available at [www.nasd.com](http://www.nasd.com), as amended by SR-NASD-2004-076 (filed May 5, 2004 and amended on July 2, 2004 and July 23, 2004), Securities Exchange Act Release No. 50074 (July 23, 2004); 69 FR 49866 (July 30, 2004), and SR-NASD-2004-106, Securities Exchange Act Release No. 50038 (July 19, 2004); 69 FR 44699 (July 27, 2004). Amendment 2 to SR-NASD-2004-076, filed on July 23, 2004, inadvertently omitted modifications to the language of Rule 7010(i) that were made effective on July 12, 2004 by SR-NASD-2004-106. Amendment 1 to SR-NASD-2004-119, filed on August 23, 2004, then omitted to reflect the changes effected by Amendment 2 to SR-NASD-2004-076. This amendment is marked to reflect the changes to Rule 7010(i) from SR-NASD-2004-076 and to ensure that the language of Rule 7010(i) is properly reflected in the NASD manual.

<sup>15</sup> See note, 11, *supra*.

<sup>16</sup> See note 6, *supra*.

<sup>17</sup> 15 U.S.C. 78s(b)(2).

<sup>18</sup> 15 U.S.C. 78s(b)(2).

<sup>19</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> See letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated August 20, 2004 ("Amendment No. 1"). In Amendment No. 1, Nasdaq restated the proposed rule change in its entirety.

<sup>4</sup> See letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated September 10, 2004 ("Amendment No. 2"). In Amendment No. 2, Nasdaq restated the proposed rule change in its entirety.

<sup>5</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>6</sup> 17 CFR 240.19b-4(f)(2).

*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 Closing Cross, which is a new process for determining the Nasdaq Official Closing Price for the most liquid Nasdaq stocks.<sup>8</sup> The Nasdaq Closing Cross is designed to create a more robust close that allows for price discovery, and an execution that results in an accurate, tradable closing price. Nasdaq established a pilot program, commencing with the launch of the Closing Cross, during which no execution charges were charged, and no liquidity provider credits were offered, for those quotes and orders executed in the Nasdaq market center as part of the Nasdaq Closing Cross.<sup>9</sup>

Nasdaq has determined to end the pilot program and establish the following pricing for the Nasdaq Closing Cross. Nasdaq will assess a fee of \$0.0005 per share executed during the Nasdaq Closing Cross for all Market-on-Close and Limit-on-Close orders. At this time, Nasdaq will assess no fees and offer no rebates for quotations and other orders executed during the Nasdaq Closing Cross.<sup>10</sup> Nasdaq will monitor the effectiveness of the proposed pricing schedule in preserving and enhancing the success of the Nasdaq Closing Cross to date.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,<sup>11</sup> in general, and with Section 15A(b)(5),<sup>12</sup> 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 that NASD operates or controls. Nasdaq believes that the proposed fees for Market-on-Close and Limit-on-Close orders are consistent with the statute in that they are designed to result in an execution charge approximating the execution charge for quotes and orders entered and executed in the Nasdaq Market Center throughout the trading day. Nasdaq believes that assessing no fee

and offering no rebate for quotations and other orders executed during the Nasdaq Closing Cross is consistent with the statute because it is designed to encourage the entry of Imbalance Only orders to minimize imbalances resulting from the Closing Cross algorithm, and to preserve the Closing Cross liquidity provided by quotations and orders from the continuous market.

*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.

*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 Act,<sup>13</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder,<sup>14</sup> 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.<sup>15</sup>

**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-NASD-2004-119 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-2004-119. 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 Room. 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-2004-119 and should be submitted on or before October 14, 2004.

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>8</sup> Securities Exchange Act Release No. 49406 (March 11, 2004); 69 FR 12879 (March 18, 2004)(SR-NASD-2004-173).

<sup>9</sup> Securities Exchange Act Release No. 49576 (April 16, 2004); 69 FR 22112 (April 23, 2004)(SR-NASD-2004-048).

<sup>10</sup> In the event Nasdaq determines to assess such fees, Nasdaq will file a rule proposal with the Commission.

<sup>11</sup> 15 U.S.C. 78o-3.

<sup>12</sup> 15 U.S.C. 78o-3(b)(5).

<sup>13</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>14</sup> 17 CFR 240.19b-4(f)(2).

<sup>15</sup> For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change, as amended, under Section 19(b)(3)(C) of the Act, the Commission considers the period to commence on September 15, 2004, the date Nasdaq filed Amendment No. 2. See 15 U.S.C. 78s(b)(3)(C).

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