

the **Federal Register**. The Commission notes that the proposed pricing and rebate schedule for non-NASD members are identical to those in SR-NASD-2005-035, which implemented a new pricing and rebate schedule for NASD members and which became effective as of April 1, 2005. The Commission notes that this change will promote consistency in Nasdaq's fee schedule by applying the same pricing and rebate schedule with the same date of effectiveness for both NASD members and non-NASD members. Therefore, the Commission finds that there is good cause, consistent with Section 19(b)(2) of the Act,<sup>7</sup> to approve the proposed rule change on an accelerated basis.

## V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>8</sup> that the proposed rule change (File No. SR-NASD-2005-038) be approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E5-1746 Filed 4-12-05; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51499; File No. SR-NASD-2005-035]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. to Modify Pricing for NASD Members Using the Nasdaq Market Center and Nasdaq's Brut Facility

April 6, 2005.

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 28, 2005, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), 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 Nasdaq. Nasdaq has designated this proposal as one establishing or changing a due, fee or other charge imposed by the self-regulatory organization under Section 19(b)(3)(A)(ii)<sup>3</sup> of the Act 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

Nasdaq proposes to modify the pricing for NASD members using the Nasdaq Market Center and Nasdaq's Brut Facility. Nasdaq states that it will implement the proposed rule change on April 1, 2005. The text of the proposed rule change is available on the NASD's Web site (<http://www.nasd.com>), at the NASD's Office of the Secretary, and at the Commission's Public Reference Room.

### 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.

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

##### 1. Purpose

The Nasdaq Market Center and Brut Facility combined fee structure is based upon multiple volume-based usage tiers that take into account the volume of a market participant across both systems. Currently, market participants must provide more than 500,000 shares of average daily liquidity each month to reduce their per-share execution costs or routing charges. In order to receive a higher liquidity provider credit, users must provide in excess of 1,000,000 shares of average daily liquidity each month in Nasdaq and/or Brut.

Nasdaq stated that, in this filing, it proposes to: (1) Increase to just over 2,000,000 shares the amount of average daily liquidity needed to be provided by a market participant to have its per-share execution or routing costs reduced; and (2) increase to 2,000,000 shares the number of shares of average daily liquidity needed to be provided each month before a market participant becomes eligible for an increased liquidity provider credit. The resulting modified fee structure<sup>5</sup> is summarized below:

Charge to member entering order:	
Average daily shares of liquidity provided through the Nasdaq Market Center and/or Nasdaq's Brut Facility by the member during the month:	
Greater than 10 million .....	\$0.0027 per share executed (but no more than \$108 per trade for trades in securities executed at \$1.00 or less per share).
Greater than 2,000,000 but less than or equal to 10,000,000 .....	\$0.0028 per share executed (but no more than \$112 per trade for trades in securities executed at \$1.00 or less per share).
2,000,000 or less .....	\$0.0030 per share executed (but no more than \$120 per trade for trades in securities executed at \$1.00 or less per share).

<sup>7</sup> 15 U.S.C. 78s(b)(2).

<sup>8</sup> 15 U.S.C. 78s(b)(2).

<sup>9</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> 15 U.S.C. 78s(b)(3)(A)(ii).

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

<sup>5</sup> The fees currently in Rule 7010(i) are applicable to non-members that use Nasdaq's Brut Facility. Nasdaq will seek to apply the same fee schedule

proposed here for non-members that use Brut. Accordingly, Nasdaq is submitting a separate filing (SR-NASD-2005-038) to make the proposed rule changes contained in this filing applicable to non-members.

Charge to member entering order:	
Average daily shares of liquidity provided through the Nasdaq Market Center and/or Nasdaq's Brut Facility by the member during the month:	
Greater than 20 million .....	\$0.0025 per share executed (but no more than \$100 per trade for trades in securities executed at \$1.00 or less per share).
Greater than 2,000,000 but less than or equal to 20,000,000 .....	\$0.0022 per share executed (but no more than \$88 per trade for trades in securities executed at \$1.00 or less per share).
Less than or equal to 2,000,000 .....	\$0.0020 per share executed (but no more than \$80 per trade for trades in securities executed at \$1.00 or less per share).
Routed orders	
Any order entered by a member that is routed outside of both the Nasdaq Market Center and Nasdaq's Brut Facility and that does not attempt to execute in Nasdaq's Brut Facility prior to routing.	\$0.004 per share executed.
Any other order entered by a member that is routed outside of both the Nasdaq Market Center and Nasdaq's Brut Facility.	
Average daily shares of liquidity provided through the Nasdaq Market Center and/or Nasdaq's Brut Facility by the member during the month and average daily shares accessed through and/or routed from the Nasdaq Market Center and/or Nasdaq's Brut Facility by the member during the month (excluding orders routed outside of both the Nasdaq Market Center and Nasdaq's Brut Facility that do not attempt to execute in Nasdaq's Brut Facility prior to routing):	
Greater than 20 million shares of liquidity provided and greater than 50 million shares accessed or routed .....	\$0.0025 per share executed.
Greater than 10 million but less than or equal to 20 million shares of liquidity provided and any amount accessed or routed, OR greater than 20 million shares of liquidity provided and 50 million or fewer shares accessed and/or routed.	\$0.0027 per share executed.
Greater than 2,000,000 but less than or equal to 10,000,000 shares of liquidity provided and any amount accessed and/or routed.	\$0.0028 per share executed.
Less than or equal to 2,000,000 shares of liquidity provided and any amount accessed and/or routed .....	\$0.0030 per share executed.

Nasdaq believes that the proposed changes to its fee structure are reasonable, and draw an appropriate balance between the value-added benefits provided to the users by the Nasdaq Market Center and Brut systems and the fees imposed for such services.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,<sup>6</sup> in general, and with Section 15A(b)(5) of the Act,<sup>7</sup> in particular, in that the proposed rule change 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.

### 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

Nasdaq states that written comments were neither solicited nor received.

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

The forgoing rule change is subject to Section 19(b)(3)(A)(ii) of the Act<sup>8</sup> and subparagraph (f)(2) of Rule 19b-4<sup>9</sup> thereunder because it establishes or changes a due, fee, or other charge imposed by the self-regulatory organization. Accordingly, the proposal is effective upon Commission receipt of the filing. 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.<sup>10</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-2005-035 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-2005-035. 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 the 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

<sup>6</sup> 15 U.S.C. 78o-3.

<sup>7</sup> 15 U.S.C. 78o-3(b)(5).

<sup>8</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>9</sup> 17 CFR 240.19b-4(f)(2).

<sup>10</sup> 15 U.S.C. 78s(b)(3)(C).

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-2005-035 and should be submitted on or before May 4, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E5-1747 Filed 4-12-05; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51478; File No. SR-NSX-2005-01]

### 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

April 5, 2005.

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 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 OF NATIONAL STOCK EXCHANGE

\* \* \* \* \*

#### CHAPTER XI

##### Trading Rules

\* \* \* \* \*

#### 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 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 notes that it

<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

Continued

<sup>11</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> 15 U.S.C. 78s(b)(3)(A).

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

<sup>5</sup> 15 U.S.C. 78ee.