

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44734; File No. SR-NASD-2001-42]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 To Extend the Expiration Date of Nasdaq's Transaction Credit Pilot Program

August 22, 2001.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on June 27, 2001, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its subsidiary The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. On August 17, 2001, Nasdaq amended the proposal.³ Nasdaq filed the proposal pursuant to Section 19(b)(3)(A) of the Act,⁴ and Rule 19b-4(f)(2) thereunder,⁵ which renders the proposal effective upon filing with the Commission.⁶ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to amend NASD Rule 7010, System Services, to extend Nasdaq's transaction credit pilot program ("Program") for an additional six months (through September 1, 2001) for Tape A and B reports. No other substantive changes are proposed to the Program at this time. The text of the proposed rule change is available at the Association and at the Commission.

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

Nasdaq proposes to extend the Program⁷ for an additional six months (through September 1, 2001) to provide a transaction credit to NASD members that exceed certain levels of trading activity in exchange-listed securities. Nasdaq's InterMarket is a quotation, communication, and execution system that allows NASD members to trade stocks listed on the New York Stock Exchange ("NYSE") and the American Stock Exchange ("Amex").⁸ The InterMarket competes with regional exchanges like the Chicago Stock Exchange ("CHX") and the Cincinnati Stock Exchange ("CSE") for retail order flow in stocks listed on the NYSE and the Amex. The Association collects trade reports from broker-dealers trading these securities in the over-the-counter ("OTC") market and provides the trade reports to the Consolidated Tape Association ("CTA") for inclusion in the Consolidated Tape. As a participant in the CTA Plan, the NASD is entitled to a portion of the revenue that the CTA generates by selling this market data information. NASD's share of the revenues is based on trades that it reports on behalf of these broker-dealers in NYSE-listed securities ("Tape A") and in Amex-listed securities ("Tape B").

The Program began in 1999.⁹ Under the Program, the NASD shares a portion

of these tape revenues by providing a transaction credit to NASD members who exceed certain levels of OTC trading activity in NYSE and Amex securities. The Program helps InterMarket makers and investors lower costs associated with trading listed securities. The Program also is an important tool for Nasdaq to compete against other exchanges (particularly the CSE and the CHX) that offer similar programs¹⁰ and thereby maintain market share in listed securities.

The Program works as follows. Nasdaq calculates two separate pools of revenue from which credits can be earned: one representing 40% of the gross revenues received by the NASD from the CTA for providing trade reports in NYSE-listed securities executed in the InterMarket for dissemination by CTA (Tape A), the other representing 40% of the gross revenue received from CTA for reporting Amex trades (Tape B).

Eligibility for transaction credits is based on concurrent quarterly trading activity. For example, an InterMarket participant that enters the market for Tape A or Tape B securities during a particular quarter and prints an average of 500 daily trades of Tape A securities during the time it is in the market, or that averages 500 Tape B prints during such quarter, would be eligible to receive transaction credits based on its trades during that quarter. Only those NASD members that continue to average an appropriate daily execution level are eligible for transaction credits and thus able to receive a pro-rata portion of the appropriate pool.¹¹ These thresholds permit the NASD to recover appropriate administrative costs related to NASD members that do not exceed the threshold and to provide an incentive to

(November 3, 1999), 64 FR 61680 (November 12, 1999) (SR-NASD-99-59); 42672 (April 12, 2000), 65 FR 21225 (April 20, 2000) (SR-NASD-00-10); 42907 (June 7, 2000), 65 FR 37445 (June 14, 2000) (SR-NASD-00-32); 43831 (January 10, 2001), 66 FR 4882 (January 18, 2001) (SR-NASD-00-72); 44098 (March 23, 2000), 66 FR 17462 (March 30, 2001) (SR-NASD-2001-15).

¹⁰ See Securities Exchange Act Release Nos. 38237 (February 4, 1997), 62 FR 6592 (February 12, 1997) (SR-CHX-97-01) and 39395 (December 3, 1997), 62 FR 65113 (December 10, 1997) (SR-CSE-97-12).

¹¹ As explained in Nasdaq's original pilot filing, the qualification thresholds were selected based on Nasdaq's belief that such members represent clear examples of a member's commitment to operating in the InterMarket and competing for order flow. See Securities Exchange Act Release No. 41174 (March 16, 1999), 64 FR 14034 (March 23, 1999) (SR-NASD-99-13). Nasdaq continues to believe that such threshold numbers represent clear examples of a member's commitment to operating in the InterMarket.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See August 16, 2001 letter from Mary Dunbar, Vice President, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, SEC, and attachments ("Amendment No. 1"). Amendment No. 1 completely replaces and supersedes the original proposal.

⁴ 15 U.S.C. 78s(b)(3)(A).

⁵ 17 CFR 240.19b-4(f)(2).

⁶ For purposes of calculating the 60-day abrogation period, the Commission considers the abrogation period to have commenced on August 17, 2001, the date that Nasdaq filed Amendment No. 1.

⁷ The transaction credit can be applied to any and all charges imposed by NASD or its non-self-regulatory organization affiliates. Any remaining balance may be paid directly to the member.

⁸ Nasdaq's InterMarket formerly was referred to as Nasdaq's Third Market. See Securities Exchange Act Release No. 42907 (June 7, 2000), 65 FR 37445 (June 14, 2000) (SR-NASD-00-32).

⁹ See Securities Exchange Act Release No. 41174 (March 16, 1999), 64 FR 14034 (March 23, 1999) (SR-NASD-99-13). The SEC issued notice of subsequent extensions of the Program. See Securities Exchange Act Release Nos. 42095

NASD members to actively trade in these securities.

The current Program expired on June 30, 2001. Because the Program has helped Nasdaq maintain market share in listed securities, Nasdaq proposes to extend the current Program for an additional six months, through September 1, 2001.

2. Statutory Basis

Nasdaq believes the proposed rule change is consistent with Section 15A(b)(6) of the Act,¹² in that the proposal is designed to promote just and equitable principles of trade and to remove impediments to and perfect the mechanism of a national market system, and, in general to protect investors and the public interest. Nasdaq also believes that the proposed rule change is consistent with Section 15A(b)(5) of the Act¹³ 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 Association 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, as amended.

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 effective pursuant to Section 19(b)(A)(ii) of the Act¹⁴ and subparagraph (f)(2) of Rule 10b-4 thereunder,¹⁵ because it establishes or changes a due, fee, or other charge imposed by the Association. 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.

¹² 15 U.S.C. 78o-3(b)(6).

¹³ 15 U.S.C. 78o-3(b)(5).

¹⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁵ 17 CFR 240.196-4(f)(2).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent, 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 will also be available for inspection and copying at the principal office of the Association. All submissions should refer to the file number SR-NASD-2001-42 and should be submitted by [insert date 21 days from the date of publication].

For the Commission, by the Division of Market Regulations, pursuant to delegated authority.¹⁶

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44732; File No. SR-NASD-2001-44]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. to Allow ECN and ATS Participation on the OTC Bulletin Board

August 22, 2001.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4² thereunder, notice is hereby given that on July 12, 2001, 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

¹⁶ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

have been prepared by Nasdaq. 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 proposing to add new NASD Rule 6540(b) to the NASD Rule 6500 Series, which governs the operation of the OTC Bulletin Board ("OTCBB"). The purpose of the proposed rule change is to permit alternative trading systems ("ATSs") and electronic communication systems ("ECNs") to participate in the OTCBB. The text of the proposed rule change is below. Proposed new language is italicized.

* * * * *

6540. Requirements Applicable to Market Makers

- (a) No change.
- (b) *An alternative trading system (ATS), as defined in Regulation ATS, Rule 300(a), or electronic communications network (ECN) as defined in SEC Rule 11Ac1-1(a)(8), shall be eligible to participate in the Service, provided however, that such ATS or ECN is an NASD member and otherwise meets the requirements for participation set forth in the OTC Bulletin Board Rules. Where used in the OTC Bulletin Board Rules, the term "market maker" shall be construed to include a participating ATS or ECN.*
- (c) No change.

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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

Nasdaq proposed to permit ATSs and ECNs to post quotes and otherwise participate in the OTCBB. The OTCBB is a quotation service that displays quotes, last-sale prices, and volume