

corporate name, "Association," or "the NASD."

II. Summary of Comment and NASD's Response

The Commission received two comment letters on the proposed rule change that opposed the adoption of the proposal in its current form.¹⁰

Specifically, one commenter stated that the proposed rule change requiring principals to attend compliance meetings at the NASD was "bureaucratic excess and self indulgence" as well as difficult to comply with for handicapped individuals.¹¹ A second commenter stated that the NASD's proposal would "impose an undue hardship both in time and monetarily" for small firms.¹²

NASD responded by stating that the commenters mischaracterized the proposal. NASD explained that the proposal requires the attendance of registered principals (in addition to registered representatives) at annual compliance meetings that are conducted by their respective member firms, not the NASD. Furthermore, NASD responded to the commenters' concerns by noting that the rule itself states that members are provided with substantial flexibility in implementing the compliance meeting requirement. NASD further stated that the proposal expressly allows the compliance meeting to be conducted at a principal's place of business and outside of regular business hours. Additionally the meeting may be conducted by video conference, interactive classroom setting, telephone or other interactive means provided appropriate safeguards are in place.¹³

III. Discussion

The Commission has carefully reviewed the proposed rule change, the comment letters, and NASD's response and finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.¹⁴ In particular, the Commission finds that the proposed rule change, as amended, is consistent with Section 15A.¹⁵ Specifically, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act

because it is designed to promote just and equitable principals of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.¹⁶

The NASD's response to the comments adequately addresses the concerns raised. Moreover, the Commission believes that requiring registered principals to attend an interview or meeting at least annually at which relevant compliance matters are discussed will help to ensure that registered principals are current on new compliance requirements and changes at their firms.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁷ that the proposed rule change (SR-NASD-2005-004), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁸

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51609; File No. SR-NASD-2005-013]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto To Create a Uniform Pricing Structure for the Nasdaq Market Center

April 26, 2005.

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 February 8, 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. On April 19, 2005, Nasdaq amended the proposed rule change.³ 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 establish a uniform schedule of fees for all market participants using the trade execution services of the Nasdaq Market Center. Nasdaq would implement the proposed rule change immediately upon approval by the Commission. The text of the proposed rule change, as amended, is available on Nasdaq's Web site (<http://www.nasdaq.com/about/LegalCompliance.stm>), at Nasdaq's principal office, 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

Nasdaq is proposing the adoption of a uniform pricing and credit rebate structure applicable to all users of the Nasdaq Market Center. Under the proposal, all users of the Nasdaq Market Center would be charged the same tier-based per-share amounts for entering orders into the system, and all users would be entitled to the same tier-based levels of rebate credits based on the liquidity provided by those orders.⁴

To accomplish this, Nasdaq proposes to: (1) Eliminate the separate \$0.001 fee it currently imposes on market participants for non-directed or preferred orders that access the quote/orders of market participants that charge access fees for accessing their

¹⁰ See First Winston Letter and Bandes Letter.

¹¹ See Bandes Letter.

¹² See First Winston Letter.

¹³ See NASD Response Letter.

¹⁴ In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁵ 15 U.S.C. 78o-3.

¹⁶ 15 U.S.C. 78o-3(b)(6).

¹⁷ 15 U.S.C. 78s(b)(2).

¹⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Amendment No. 1 (replacing and superseding the original filing in its entirety).

⁴ This same pricing structure also applies to Nasdaq's Brut facility.

quotes/orders through the Nasdaq Market Center; and (2) require that electronic communication networks ("ECNs") and alternative trading systems ("ATSs") that wish to participate in the Nasdaq Market Center not charge any fee to broker-dealers that access them through the Nasdaq Market Center.

Nasdaq believes that the adoption of a uniform fee structure appropriately recognizes the similarities among all categories of market participants when they provide liquidity through the display of priced orders using the Nasdaq Market Center. Further, Nasdaq believes that adoption of the uniform pricing structure described above would increase the level of cost certainty and price transparency for users of the Nasdaq Market Center, thereby allowing them to make better-informed decisions about where and how to place their orders for potential execution. Finally, by centralizing through Nasdaq the imposition and collection of fees and the payment of credit rebates, Nasdaq expects to reduce the administrative burden on many market participants that currently pay execution fees and receive rebates for transactions initiated through the Nasdaq Market Center using a variety of payment processes, depending on the counter-party to a specific trade.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,⁵ in general and with section 15A(b)(6) of the Act,⁶ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

In addition, Nasdaq believes that establishing uniform pricing across all categories of market participants is consistent with section 15A(b)(5),⁷ as well as Commission Regulation ATS,⁸ the Adopting Release for which stated that "[t]here are a number of ways the exchange or association could address the issue of fees charged by alternative

trading systems. For example, subject to Commission review and approval, an exchange or association could establish a standard for what constitutes a fair and reasonable fee for non-subscriber access to an alternative trading system."⁹ Furthermore, Regulation ATS' Rule 301(b)(4) provides in relevant part that, "* * * if the national securities exchange or national securities association to which an alternative trading system provides the prices and sizes of orders * * * establishes rules designed to ensure consistency with standards for access to the quotations displayed on such national securities exchange, or the market operated by such national securities association, the alternative trading system shall not charge any fee to members that is contrary to, that is not disclosed in the manner required by, or that is inconsistent with any standard of equivalent access established by such rules."¹⁰

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

Nasdaq does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. As the Commission noted in its approval of SR-NASD-2003-128, which created the current \$0.003 per-share maximum ECN access fee, the ability of an SRO to establish access fee standards is specifically permitted by Regulation ATS, and not prohibited by either sections 15A or 6(e) of the Exchange Act.¹¹ In addition, the Commission reiterated that, for an access fee rule to be approved by the Commission, the rule must be necessary to maintain consistency within the SRO's market and be designed to promote just and equitable principles of trade, to promote fair competition, to facilitate transactions in securities, and in general, to protect investors and the public interest.¹² Nasdaq believes that the instant proposal satisfies these requirements.

First, the Nasdaq Market Center remains a voluntary system, and ECNs unwilling to accept the same fee structure as other users of the Nasdaq Market Center are free to trade on other venues or participate in the Nasdaq Market Center as order-entry firms. Second, as noted above, Nasdaq's

proposal is designed to provide a level of cost-certainty and price transparency that seeks to encourage greater use of the Nasdaq Market Center—including increased participation by market makers, order-entry firms, and ECNs. Finally, the proposed uniform fee structure ensures the equal treatment of all users of the system, maintains consistency within the Nasdaq Market Center, and prevents the system's neutral execution algorithms from being used to impose non-competitive fees on other market participants.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change; or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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. Please include File Number SR-NASD-2005-013 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-2005-013. This file number should be included on the subject line if e-mail is used. To help the

⁵ 15 U.S.C. 78o-3.

⁶ 15 U.S.C. 78o-3(b)(6).

⁷ 15 U.S.C. 78o-3(b)(5).

⁸ 17 CFR 242.300 *et seq.*

⁹ Securities Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844, 70871 (Dec. 22, 1998).

¹⁰ 17 CFR 242.301(b)(4).

¹¹ Securities Exchange Act Release No. 49220 (Feb. 11, 2004), 69 FR 7836, 7841-42 (Feb. 19, 2004).

¹² See *id.* at 7840.

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 Section. 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-2005-013 and should be submitted on or before May 23, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹³

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51611; File No. SR-NASD-2005-026]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change Relating to TRACE Market Data Fees

April 26, 2005.

I. Introduction

On February 11, 2005, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change relating to Transaction Reporting and Compliance Engine ("TRACE") market data fees. The

Commission published the proposed rule change for comment in the **Federal Register** on March 16, 2005.³ The Commission received one comment letter on the proposal.⁴ On April 25, 2005, NASD filed a response to the comment letter.⁵ This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The proposed rule change would amend NASD Rule 7010(k) relating to TRACE transaction data to: (i) Terminate the Bond Trade Dissemination Service ("BTDS") Internal Usage Authorization Fee and the BTDS External Usage Authorization Fee and, in lieu of both fees, establish a Vendor Real-Time Data Feed Fee; (ii) define the term "Tax Exempt Organization," and amend the defined term "Non-Professional" for purposes of NASD Rule 7010(k)(3); and (iii) make other minor, technical amendments. The proposal is discussed in greater detail in the Commission's notice soliciting public comment.⁶

III. Summary of Comments Received and NASD Response

The Commission received one comment letter on the proposal.⁷ The SIA Letter supports NASD's proposed rule change. However, the commenter requests that NASD clarify whether "market data subscribers who are natural persons using a brokerage account established in the name of an entity name they or their family control" are considered "Non-Professional" within the meaning of the rule.⁸ In addition, the commenter states, with regard to a reduced fee for Tax Exempt Organizations, that further review "may be warranted to determine the justifiable basis for a reduced fee, including a better description of the tax exempt organizations that would benefit from a reduced price structure, a better explanation as to why the reduced fee is necessary, and an analysis of the potential impact such a proposal may have on competition."⁹

³ Securities Exchange Act Release No. 51336 (March 9, 2005), 70 FR 12921 (March 16, 2005) ("Notice").

⁴ See letter from Andrew C. Wels, Chairman, Technology & Regulation Market Data Subcommittee, Securities Industry Association ("SIA"), to Jonathan G. Katz, Secretary, Commission, received April 8, 2005 (undated) ("SIA Letter").

⁵ See letter from Sharon K. Zackula, Associate General Counsel, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated April 25, 2005 ("NASD Letter").

⁶ See Notice, *supra* note 3.

⁷ SIA Letter, *supra* note 4.

⁸ *Id.* at 3.

⁹ *Id.* at 4.

In response to the SIA Letter, NASD states that it "will consider identifying certain non-natural persons as 'Non-Professionals'" as part of its continuing review and interpretation of TRACE data fees and access.¹⁰ In addition, NASD states that "[t]he proposed definition of Tax-Exempt Organization limits significantly the number and type of organizations that may apply to receive Real-Time TRACE transaction data at the reduced fee and, by definition, limits the use of Real-Time TRACE transaction data solely for data access programs for the benefit of individual investors and not for commercial purposes."¹¹ Given these restrictions, NASD does not believe that the proposal will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.¹²

The SIA Letter also stated that the rationale NASD followed in its proposal—that financial services industry employees should be considered non-professionals when they access data for personal, non-commercial uses—should be applied uniformly to all other individual subscribers of bond or equity market data no matter which self regulatory organization, directly or indirectly, controls the market data.¹³ The SIA Letter petitions the Commission for rulemaking to review the definitions of "Professional" and "Non-Professional" as interpreted for market data fee and administrative purposes by the Consolidated Tape Association, the NASDAQ UTP Plan, the New York Stock Exchange, NASDAQ, the Options Price Reporting Authority, and NASD.¹⁴ This petition will be considered separately from this proposal.

IV. Discussion

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities association.¹⁵ In particular, the Commission believes that the proposed rule change is consistent with section

¹⁰ NASD Letter at 2 ("For purposes of TRACE fees, NASD has interpreted the term 'Non-Professional' to further NASD's goal of providing access to TRACE market data at no charge to persons who seek to use TRACE market data for personal, rather than commercial, purposes.")

¹¹ *Id.* at 3.

¹² See *id.*

¹³ SIA Letter at 1.

¹⁴ See *id.*

¹⁵ In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹³ 17 CFR 200.30-3(a)(12).

¹⁴ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.