use the CRD or IARD systems; clarifying certain items that have been a source of confusion for WebCRD users; and updating the Forms to add examination and registration categories that were not previously included.

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

NASD Regulation 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

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 NASD 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 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 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 will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR–NASD–2002–05 and should be submitted by February 28, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[42]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–2959 Filed 2–6–02; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45379; File Nos. SR–NASD–2001–64 and SR–NASD–2001–68]

Self Regulatory Organizations; Order Granting Approval of Proposed Rule Changes by the National Association of Securities Dealers, Inc., To Adjust the Fees Charged to NASD Non-Members for the Use of the Nasdaq National Market Execution System and the SelectNet Service

January 31, 2002.

I. Introduction

On September 28, 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 (''SEC'' or ''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 to adjust the fees charged to NASD non-members for the use of the Nasdaq National Market Execution System (''NNMS'' or ''SuperSOES'') and the SelectNet Service.[3] On October 4, 2001, Nasdaq filed a second proposed rule change to increase the per share charge for use of SuperSOES on a pilot basis.[4] The Commission received three comment letters on the proposals.[5] This order approves the proposed rule changes.

II. Description of the Proposals

A. SR–NASD–2001–64

In SR-NASD–2001–64, Nasdaq proposes to adjust the fees for SelectNet and the NNMS for NASD non-members and consolidate the rules governing these fees into NASD Rule 7010(i).[6] First, Nasdaq proposes to replace the current order execution charge in the NNMS, which is based on the number of orders executed per month, with a $0.001 per share charge for execution of orders through the NNMS. Second, Nasdaq proposes to impose a $0.10 order entry charge on orders in both the NNMS and SelectNet.

Third, Nasdaq proposes to modify the charges for order execution in SelectNet to reflect its transformation, in connection with the implementation of the NNMS, into a system that is intended to be used primarily for the delivery of negotiable, non-liability orders to market makers and electronic communication networks that participate in the NNMS.[7] Nasdaq will charge $0.90 per execution for the first 25,000 liability orders executed in a month, $0.60 per execution for the next 25,000 liability orders executed, $0.10 per execution for the next 200,000 liability orders executed, and will assess no order-execution charge for the remaining liability orders executed in a month. In addition, Nasdaq will charge a fee of $0.90 per execution for all non-liability orders executed.

B. SR–NASD–2001–68

In this filing, Nasdaq proposes to increase the per share charge for orders entered and executed in the NNMS from $0.001 per share to $0.002 per share, in keeping with Nasdaq's ongoing efforts to

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[42] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] *See* Securities Exchange Act Release No. 44898 (October 2, 2001), 66 FR 51703 (October 10, 2001) (File No. SR-NASD–2001–64). *See also* Securities Exchange Act Release No. 44899 (October 2, 2001) (File No. SR-NASD–2001–63, which applied the new fees to NASD members, effective upon filing, and was implemented on October 1, 2001).

[4] *See* Securities Exchange Act Release No. 44914 (October 9, 2001), 66 FR 52649 (October 16, 2001) (File No. SR-NASD–2001–68). *See also* Securities Exchange Act Release No. 44910 (October 5, 2001) (File No. SR-NASD–2001–67, which applied these pilot changes to NASD members, effective upon filing, for a pilot period from November 1, 2001 through October 31, 2002).

[5] *See* Letter from Meyer S. Frucher, Chairman and Chief Executive Officer, Philadelphia Stock Exchange, Inc. (''Phlx'') to Jonathan G. Katz, Secretary, Commission, dated October 31, 2001 (''Phlx Letter''); Letter from Michael T. Dorsey, Senior Vice President, General Counsel and Secretary, Knight Trading Group, Inc. to Jonathan G. Katz, Secretary, Commission, dated November 2, 2001 (''Knight Letter''); and Letter from Michael Bird, Chairman, Trading Issues Committee, Security Traders Association, to Jonathan G. Katz, Secretary, Commission, dated November 6, 2001 (''STA Letter'').

[6] SR-NASD–2001–63 applied the same fees to NASD members, effective upon filing, and was implemented on October 1, 2001.

[7] Under current rules, SelectNet may still be used for liability orders by (i) national securities exchanges trading Nasdaq-listed securities pursuant to grants of unlisted trading privileges (''UTP Exchanges'') that choose not to participate in the automatic execution functionality of the NNMS, and (ii) other market participants directing orders to market participants that choose not to participate in the automatic execution functionality of the NNMS. The NASD filed a proposed rule change to prohibit UTP Exchanges that do not participate in the NNMS from using SelectNet. *See* Securities Exchange Act Release No. 45319 (January 18, 2002), 67 FR 3923 (January 28, 2002).

align charges with costs and benefits.[8] Nasdaq will implement this proposed rule change on the first day of the month immediately following Commission approval; it will remain in effect, on a pilot basis, until October 31, 2002.

III. Summary of Comments

The Commission received three comment letters on the proposals. One commenter expressed general support for Nasdaq's new pricing system but did not specifically address the proposals contained in SR–NASD–2001–64 and SR–NASD–2001–68.[9] Another commenter, writing in support of the proposed rule changes, believed that a per share approach with SuperSOES is appropriate, because it seems to be the general method of calculating fees by Nasdaq's competitors and members.[10] The commenter also noted that the new fee structure would allow Nasdaq to become more competitive with other trading venues.[11]

The third commenter objected on the basis that allowing Nasdaq to charge national securities exchanges for execution and entry of orders, while also requiring national securities exchanges to pay as part of the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation, and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis (''Plan'')[12] in effect amounts to dual charges for the same service.[13] The commenter believed that Nasdaq's pricing policy thus might not promote a level playing field.[14]

Nasdaq's Response to the Comments

Nasdaq filed its response to comments with the Commission on January 15, 2002.[15] In the Nasdaq Letter, Nasdaq responds that charges of duplicative fees ''reflect a misunderstanding of the nature of the fees to be established by [SR–NASD–2001–64 and SR–NASD–2001–68] and therefore do not articulate a reasoned basis for challenging those fees.''[16] Nasdaq believes that the Plan does not guarantee access to Nasdaq market participants through Nasdaq proprietary trading systems. Nevertheless, Nasdaq notes that it has, via NASD rule, allowed UTP Exchanges to use two of its proprietary systems, SuperSOES and SelectNet. Nasdaq stated that the UTP Filings merely change the fees to be paid by UTP Exchanges that elect to use these systems. Specifically, the UTP Filings would specify order entry and order execution charges for the use of SelectNet and the NNMS by UTP Exchanges, including a per share charge for orders executed through the NNMS.

At this time, only two UTP Exchanges—the Chicago Stock Exchange and the Boston Stock Exchange—participate in the NNMS and SelectNet. According to Nasdaq, other UTP Exchanges that commence trading of Nasdaq securities can, if they choose, avoid paying any of the fees to be established by the UTP Filings by using the telephone linkages guaranteed by the Plan, as the Cincinnati Stock Exchange currently does. Alternatively, if they elect to use Nasdaq execution systems, Nasdaq believes that they must pay the fees associated with those systems.

Nasdaq also represented that the costs incurred by Nasdaq in developing and maintaining the NNMS and SelectNet are not, and never have been, covered by the Plan.[17] According to Nasdaq, those costs are not deducted from the data revenues distributed to Plan participants, nor were they included in the initial development costs shared among Plan participants.[18]

IV. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association, and, in particular, the requirements of section 15A of the Act.[19] Specifically, the Commission finds that the proposal is consistent with section 15A(b)(5) of the Act,[20] which requires that the rules of a national securities association provide for the equitable allocation of reasonable fees, dues, and other charges among members and issuers and other persons using any facility or system which the NASD operates or controls.

The Commission believes that Nasdaq may adjust the fees charged to NASD non-members for the use of SuperSOES and the SelectNet Service to align those fees with the fees charged to members.[21] If UTP Exchanges trade Nasdaq securities on Nasdaq SuperSOES and SelectNet, Nasdaq may charge fees for usage as long as those fees are reasonable and equitably allocated.[22] The Commission notes that Nasdaq is currently working on upgrades to the UTP lines in order to meets its obligations as the exclusive securities information processor under the OTC/UTP Plan.

V. Conclusion

It Is Therefore Ordered, pursuant to section 19(b)(2) of the Act,[23] that the proposed rule changes (SR–NASD–2001–64 and SR–NASD–2001–68) be and hereby are approved on a pilot basis through October 31, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[24]

Margaret H. McFarland,

Deputy Secretary.

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[8] SR–NASD–2001–67 applied these same changes to NASD members, effective upon filing, for a pilot period from November 1, 2001 through October 31, 2002.

[9] *See* STA Letter.

[10] *See* Knight Letter, p. 2.

[11] *See* Knight Letter, p. 4.

[12] The Plan governs the collection, consolidation, and dissemination of quotation and transaction information for Nasdaq/NM securities listed on an exchange or traded on an exchange pursuant to unlisted trading privileges (''UTP''). The Plan provides for the collection from Plan participants, and the consolidation and dissemination to vendors, subscribers and others, of quotation and transaction information in ''eligible securities.'' The Plan also contains various provisions concerning its operation and sets out the responsibilities of the participants with respect to each other and the Plan processor.

[12] *See* Phlx Letter, p. 1.

[14] *Id.*

[15] *See* Letter from John Yetter, Assistant General Counsel, Nasdaq, to Belinda Blaine, Associate Director, Division of Market Regulation (''Division''), Commission, dated January 15, 2002 (''Nasdaq Letter''). The Nasdaq Letter responds to comments on SR–NASD–2001–64, SR–NASD–2001–68, and SR–NASD–2001–72 and amends SR–NASD–2001–72. Nasdaq filed SR–NASD–2001–72 on October 9, 2001. *See* Securities Exchange Act Release No. 44931 (October 12, 2001), 66 FR 53276 (October 19, 2001). Under the proposal, the per share charge for orders executed in the NNMS by non-members would increase to $0.003 per share and will remain at $0.002 per share for NASD Members. The Commission has not yet acted on SR–NASD–2001–72.

[16] Nasdaq Letter, pp. 2–3.

[17] Nasdaq Letter, p. 3.

[18] Nasdaq Letter, pp. 3–4.

[19] 15 U.S.C. 78*o*–3(b). In approving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[20] 15 U.S.C. 78o-3(b)(5).

[21] *See supra* note 3 (SR–NASD–2001–3) and note 4 (SR–NASD–2001–67).

[22] For example, the NYSE charges NYSE non-members certain fees to access its Super Designated Order Turnaround System (SuperDOT), the NYSE's electronic order routing system.

[23] 15 U.S.C. 78s(b)(2).

[24] 17 CFR 200.30–3(a)(12).