

of its tape revenue, Nasdaq does not believe that there is any requirement that a plan for sharing tape revenue with NASD members must use the same formula as the plan under which NASD receives the revenue. Indeed, by providing transaction credits to liquidity providers, Nasdaq hopes to encourage members to commit capital to transactions through InterMarket and/or to allow customer orders to interact with orders that they receive through InterMarket. Accordingly, Nasdaq believes that the proposed rule change will foster the provision of additional liquidity through InterMarket, thereby enhancing its efficiency by increasing the likelihood that InterMarket orders will be promptly executed. By contrast, the current program grants credits solely on the basis of whether a member happens to be selling in a particular transaction.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the Act, including section 15A(b)(5) of the Act,<sup>10</sup> which requires that the rules of the NASD 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 proposed rule change will lower the cost of conducting business through InterMarket for members that provide liquidity through ITS or CAES. Nasdaq believes that encouraging members to provide liquidity will enhance the efficiency of InterMarket and benefit investors whose trades are routed to InterMarket by increasing the likelihood that they will be promptly executed.

### *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

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 number SR-NASD-2002-115 and should be submitted by December 10, 2002.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 02-29242 Filed 11-18-02; 8:45 am]

**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46818; File No. SR-NASD-2002-147]

### **Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment Nos. 1 and 2 by the National Association of Securities Dealers, Inc. Sunsetting Revisions to NASD By-Laws Regarding the Regulatory Fee and SEC Section 31 Transaction Fee Made in SR-NASD-2002-98**

November 12, 2002.

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 October 18, 2002, the National Association of Securities Dealers, Inc. ("NASD" or "Association") 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 the NASD. On November 5, 2002, the NASD amended the proposal.<sup>3</sup> The NASD again amended the proposed rule change on November 8, 2002.<sup>4</sup> The Association filed the proposal pursuant to section 19(b)(3)(A) of the Act,<sup>5</sup> and Rule 19b-4(f)(3) thereunder<sup>6</sup> as being concerned solely with the administration of the self-regulatory organization, which renders the proposal effective upon filing with the Commission.<sup>7</sup> 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**

The NASD proposes to: (1) Amend Schedule A of the NASD By-Laws to

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

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

<sup>3</sup> See November 4, 2002 letter from Barbara Z. Sweeney, Senior Vice President ("SVP") and Corporate Secretary, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, and attachments ("Amendment No. 1"). Amendment No. 1 completely replaced and superseded the original proposed rule change.

<sup>4</sup> See November 7, 2002 letter from Barbara Z. Sweeney, SVP and Corporate Secretary, NASD, to Katherine A. England, Assistant Director, Division, Commission, and attachments ("Amendment No. 2"). Amendment No. 2 completely replaced and superseded Amendment No. 1 and the original filing.

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

<sup>6</sup> 17 CFR 240.19b-4(f)(3).

<sup>7</sup> For purposes of calculating the 60-day abrogation period, the Commission considers the period to have commenced on November 8, 2002, the date the NASD filed Amendment No. 2.

<sup>10</sup> 15 U.S.C. 78o-3(b)(5).

<sup>11</sup> 17 CFR 200.30-3(a)(12).

sunset the Trading Activity Fee ("TAF") established in SR-NASD-2002-98,<sup>8</sup> terminating on December 31, 2002; and (2) correct language in section 2 that was mistakenly referenced in SR-NASD-2002-98. The NASD is sunsetting the changes made in SR-NASD-2002-98 in response to member comments asserting that a full notice and comment period would be beneficial to NASD members. In addition, the NASD would like an opportunity to review the published TAF rates. The NASD also filed SR-NASD-2002-148, a proposed rule change that is substantially similar to SR-NASD-2002-98 under section 19(b)(1) of the Act.

In the instant filing, the NASD is including the TAF rates (retroactively effective to October 1, 2002, but giving members until January 15, 2003 to remit such fees), correcting the heading of section 2, deleting footnotes containing TAF rates (because the rate information is now included in the body of the filing), inserting a reference to a recent *Notice to Members* that discusses the TAF in appropriate footnotes, and making minor technical, non-substantive changes to the filing.

The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets.

#### Schedule A to the NASD By-Laws

\* \* \* \* \*

#### Section 2—Member [Regulation] Regulatory Fees

(a) Recovery of cost of services. NASD shall, in accordance with this section, collect [M]member [Regulation] regulatory fees that are designed to recover the costs to NASD of the supervision and regulation of members, including performing examinations, processing of membership applications, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. NASD shall periodically review these revenues in conjunction with these costs to determine the applicable rate. NASD shall publish notices of the fees and adjustments to the assessment rates applicable under this section.

(b) Each member shall be assessed a Trading Activity Fee for the sale of covered securities.

(1) Covered Securities. For purposes of the rule, covered securities shall mean:

(i) All exchange registered securities wherever executed (other than bonds,

debentures, and other evidence of indebtedness);

(ii) All other equity securities traded otherwise than on an exchange; and

(iii) All security futures wherever executed.

(2) Transactions exempt from the fee. The following shall be exempt from the Trading Activity Fee:

(i) Transactions in securities offered pursuant to an effective registration statement under the Securities Act of 1933 (except transactions in put or call options issued by the Options Clearing Corporation) or offered in accordance with an exemption from registration afforded by Section 3(a) or 3(b) thereof, or a rule thereunder;

(ii) Transactions by an issuer not involving any public offering within the meaning of Section 4(2) of the Securities Act of 1933;

(iii) The purchase or sale of securities pursuant to and in consummation of a tender or exchange offer;

(iv) The purchase or sale of securities upon the exercise of a warrant or right (except a put or call), or upon the conversion of a convertible security; and

(v) Transactions that [which] are executed outside the United States and are not reported, or required to be reported, to a transaction reporting association as defined in Rule 11Aa3-1 and any approved plan filed thereunder. NASD may exempt other securities and transactions as it deems appropriate. (3) Fee Rates\*

(i) Each member shall pay to NASD a fee per share for each sale of a covered equity security.

(ii) Each member shall pay to NASD a fee per contract for each sale of an option.

(iii) Each member shall pay to NASD a fee for each round turn transaction (treated as including one purchase and one sale of a contract of sale for future delivery) of a security future.

\* Trading Activity Fee rates are as follows: Each member shall pay to NASD \$0.00005 per share for each sale of a covered equity security, with a maximum charge of \$5 per trade; \$0.002 per contract for each sale of an option; and \$0.04 per contract for each round turn transaction of a security future. In addition, if the execution price for a covered security is less than the Trading Activity Fee rate (\$0.00005 for covered equity securities, \$0.002 for covered option contracts, or \$0.04 for a security future) on a per share, per contract, or round turn transaction basis then no fee will be assessed.

(4) Reporting of Transactions. Members shall report to NASD the aggregate share, contract, and/or round turn volume of sales of covered

securities in a manner as prescribed by NASD from time to time.

\* \* \* \* \*

#### Section [2] 4—Fees

\* \* \* \* \*

(b) [The] NASD shall assess each member a fee of:

\* \* \* \* \*

[(3)] \$20.00 for each amended Form U-4 or Form U-5 filed by the member with the NASD;

[(4)](3) \$95.00 for the additional processing of each initial or amended Form U-4 or Form U-5 that includes the initial reporting, amendment, or certification of one or more disclosure events or proceedings;

[(5)](4) \$10.00 for each fingerprint card submitted by the member to [the] NASD, plus any other charge that may be imposed by the United States Department of Justice for processing such fingerprint card; and

[(6)](5) \$30.00 annually for each of the member's registered representatives and principals for system processing.

\* \* \* \* \*

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

In its filing with the Commission, the NASD 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. The Association 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

On July 24, 2002, the NASD filed SR-NASD-2002-98 and SR-NASD-2002-99, which proposed a new member regulatory pricing structure.<sup>9</sup> With the instant filing (SR-NASD-2002-147), the NASD is establishing a sunset provision for the TAF established by SR-NASD-2002-98. The TAF will cease to exist after December 31, 2002, and the

<sup>9</sup> Securities Exchange Act Release Nos. 46416 (Aug. 23, 2002), 67 FR 55901 (Aug. 30, 2002) (SR-NASD-2002-98) and 46417 (Aug. 23, 2002), 67 FR 55893 (Aug. 30, 2002) (SR-NASD-2002-99). The NASD also published three *Notices to Members* describing the proposed changes and addressing interpretive questions posed by NASD members. See *Notice to Members 02-41* (July 2002), *Notice to Members 02-63* (September 2002), and *Notice to Members 02-75* (October 30, 2002).

<sup>8</sup> Securities Exchange Act Release No. 46416 (August 23, 2002), 67 FR 55901 (August 30, 2002).

member regulatory pricing structure will revert to section 8 of Schedule A of the By-Laws as amended, absent further action. The NASD is sunsetting the changes made to the TAF in SR-NASD-2002-98 in response to member comments asserting that a full notice and comment period would be beneficial to NASD members. In addition, the NASD would like an opportunity to review its published rates. Further, the NASD is amending Schedule A, section 2 of the By-Laws, to correct language that was mistakenly referenced in SR-NASD-2002-98.<sup>10</sup> In the instant filing, the NASD is including the TAF rates (retroactively effective to October 1, 2002, but allowing members until January 15, 2003 to remit such fees), correcting the heading of section 2, deleting footnotes in the filing regarding the TAF rates and inserting the rate language into the body of the proposed rule language, inserting a reference to *Notice to Members 02-75* (issued October 30, 2002, and discussing the TAF), and making minor technical, non-substantive changes to the filing.

On September 27, 2002, the NASD announced the initial TAF rates. The TAF rates were as follows:

- \$0.0001 per share for each sale of a covered equity security
- \$0.002 per contract for each sale of an option
- \$0.08 per contract for each round turn transaction of a security future

On October 3, 2002, in response to members' comments, the NASD modified the TAF rates to incorporate a per trade maximum, retroactively effective to October 1, 2002. The revised TAF rates were modified as follows:

- For each sale of a covered equity security, each member shall pay to the NASD \$0.0001 per share, with a maximum charge of \$10 per trade.
- For each sale of an option, each member shall pay to the NASD \$0.002 per contract.
- For each round turn transaction of a security future, each member shall pay to the NASD \$0.08 per contract.
- Additionally, if the execution price for a covered equity security is less than the TAF rate (\$0.0001) on a per share basis, then no fee will be assessed.

On October 18, 2002, the NASD filed two subsequent proposed rule changes that are directly related to SR-NASD-2002-98. The first is the instant filing (SR-NASD-2002-147), which establishes a sunset provision that

terminates on December 31, 2002 the changes made to Schedule A to the NASD By-Laws in SR-NASD-2002-98, and makes corrections to language that was mistakenly referenced in SR-NASD-2002-98. The second proposed rule change is SR-NASD-2002-148, which contains substantially the same proposed rule language that was contained in SR-NASD-2002-98, but is submitted pursuant to section 19(b)(1) of the Act<sup>11</sup> to allow for an additional notice and comment period. The NASD filed SR-NASD-2002-148 in response to comments made by NASD members that the TAF should not be effective upon filing, but instead should be given a full notice and comment period. In addition, this subsequent comment period allows the NASD to examine further the impact of the published TAF rates currently in effect. The NASD will adjust the TAF rates accordingly if the rates are inconsistent with the NASD's overall intent that the amendments to its pricing structure be revenue neutral. The NASD intends that SR-NASD-2002-148 be read in conjunction with SR-NASD-2002-99. The two separate yet related proposed rule changes are the result of a review of the overall NASD pricing structure, and will be used to fund the NASD's member regulatory activities.

On January 1, 2003, if the Commission has not approved SR-NASD-2002-148, the TAF as established in SR-NASD-2002-98 will terminate and will revert to section 8 of Schedule A of the By-Laws as amended, until such time that an approved alternative funding source is in place.

On October 30, 2002, based on further analysis of trading volumes and feedback from member firms, the NASD again adjusted the rate structure. The TAF was revised (retroactively effective to October 1, 2002, but allowing members until January 15, 2003 to remit such fees), as follows:

- The initial rate of \$0.0001 for covered equity securities was reduced to \$0.00005.
- The maximum charge on covered equity securities was reduced to \$5.00.
- The initial rate of \$0.08 for security futures was reduced to \$0.04.
- The minimum exclusion was extended to cover options and futures, clarifying that if the execution price for a covered security is less than the TAF rate on a per share, per contract, or round turn transaction basis, then no fee will be assessed.

## 2. Statutory Basis

The NASD believes that the proposed rule change is consistent with the Act, including section 15A(b)(5) of the Act,<sup>12</sup> which requires, among other things, that the NASD's rules provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system that the NASD operates or controls.

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

The NASD 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)(3)(A) of the Act<sup>13</sup> and subparagraph (f)(3) of Rule 19b-4 thereunder,<sup>14</sup> because it is concerned solely with the administration of 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.

## 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 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

<sup>10</sup> In its efforts to amend rule language to reflect its corporate restructuring, the NASD inadvertently added incorrect rule text. The correct rule language cited herein was approved by the Commission in SR-NASD-99-43.

<sup>11</sup> 15 U.S.C. 78s(b)(1).

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

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

<sup>14</sup> 17 CFR 240.19b-4(f)(3).

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 file number SR-NASD-2002-147 and should be submitted by December 10, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>15</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 02-29314 Filed 11-18-02; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46817; File No. SR-NASD-2002-148]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 by the National Association of Securities Dealers, Inc. Relating to the Regulatory Fee and the SEC Section 31 Transaction Fee

November 12, 2002.

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 October 18, 2002, the National Association of Securities Dealers, Inc. ("NASD" or "Association") 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 the NASD. The Association amended the proposed rule change on November 5, 2002.<sup>3</sup> On November 8, 2002, the NASD again amended the proposal.<sup>4</sup> 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

The NASD proposes to amend Schedule A to the NASD By-Laws to amend its member regulatory pricing structure. Under the structure this rule proposal is intended to change, three types of fees and assessments are used to fund the NASD's member regulatory activities: Regulatory Fee,<sup>5</sup> Personnel Assessment, and Gross Income Assessment.<sup>6</sup> The proposed restructuring is comprised of four amendments: (1) Eliminate the Regulatory Fee; (2) institute a new transaction-based Trading Activity Fee ("TAF") similar to the SEC's Section 31 Fee; (3) increase the rates assessed to member firms under the Personnel Assessment; and (4) implement a simplified three-tiered flat rate for the Gross Income Assessment and eliminate current deductions and exclusions.<sup>7</sup> This rule filing is to be read as a part of a package of two separate yet related rule filings<sup>8</sup> submitted to the SEC as a result of a review of the overall NASD pricing structure<sup>9</sup> and is intended to address the first two amendments to NASD pricing restructuring by eliminating the Regulatory Fee and instituting a new transaction-based TAF.

These fees assessed upon and paid by member firms are used by the NASD to fund NASD's member regulatory activities, including the supervision and regulation of members through examinations, processing of membership applications, financial monitoring, policy, rulemaking, interpretative, and enforcement activities. These amendments to this pricing structure are intended to serve the following purposes: (1) Simplify the NASD's fee structure; (2) ensure fairness in the NASD's fee structure by assessing higher fees to those member firms that require more NASD regulatory services; (3) assess a transaction-based fee in a manner that, unlike the Regulatory Fee,

does not influence where members choose to execute trades; (4) reduce the cyclical nature of the current NASD fee structure; and (5) eliminate the NASD's reliance on funds generated from the Regulatory Fee on transactions executed through Nasdaq.

The NASD believes assessing Regulatory Fees only for Nasdaq transactions is no longer appropriate for three reasons. First, Nasdaq is separating from the NASD and registering as a national securities exchange. Second, the current fee structure is out of step with recent changes in the markets, such as the drastic growth in trading volumes, reductions in average trade size, decimalization, and trading no longer remaining exclusive to the listing exchange. Finally, the Regulatory Fee is only assessed against Nasdaq-listed and other transactions that are reported through the Automated Confirmation Transaction (ACT) system,<sup>10</sup> although these fees are used to support member regulatory activities across all markets.

In the instant proposed rule change, the NASD is including the TAF rates (retroactively effective to October 1, 2002, but giving members until January 15, 2003 to remit fees for the preceding quarter), including a reference to *Notice to Members 02-75* (issued on October 30, 2002 and discussing the TAF), and making minor technical, non-substantive changes to the proposed rule change. In addition, certain footnotes containing TAF rates have been deleted (because the TAF rate information is now included in the body of the proposed rule language).

Below is the text of the proposed rule change. The text below shows amended rule language that would be necessary if SR-NASD-2002-98 were not in place.<sup>11</sup> Proposed new language is in italics; proposed deletions are in brackets.

Schedule A to [the] NASD By-Laws

Assessments and fees pursuant to the provisions of Article VI of the By-Laws of [the] NASD shall be determined on the following basis.

\* \* \* \* \*

<sup>15</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 November 4, 2002 letter from Barbara Z. Sweeney, Senior Vice President ("SVP") and Corporate Secretary, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, and attachments ("Amendment No. 1"). Amendment No. 1 completely replaced and superseded the original proposed rule change.

<sup>4</sup> See November 7, 2002 letter from Barbara Z. Sweeney, SVP and Corporate Secretary, NASD, to Katherine A. England, Assistant Director, Division, Commission, and attachments ("Amendment No. 2"). Amendment No. 2 completely replaced and superseded Amendment No. 1 and the original proposed rule change.

<sup>5</sup> The Regulatory Fee is described in section 8(a) of Schedule A to NASD By-Laws.

<sup>6</sup> The Personnel Assessment and Gross Income Assessment are described in Section 1 of Schedule A to NASD By-Laws.

<sup>7</sup> The changes resulting from the proposed restructuring would be revenue neutral.

<sup>8</sup> See also SR-NASD-2002-99.

<sup>9</sup> The NASD, in its pricing restructuring review, proposed changes to the Regulatory Fee in *Special Notice to Members 02-09* and requested comments. The NASD received a number of comments. In response to those comments, the proposal set forth in *Special Notice to Members 02-09* is not being pursued.

<sup>10</sup> This package of filings proposed rule changes to NASD's Member Regulation fees. It is not related to the recent Nasdaq filing regarding Nasdaq's Regulatory Fee. See Nasdaq SR-NASD-2002-61.

<sup>11</sup> The Commission notes that, because SR-NASD-2002-98 was effective upon filing with the Commission, the rule language that was proposed in SR-NASD-2002-98 is in fact a rule. The Commission recognizes, however, that the instant filing presents rule language that would be necessary if SR-NASD-2002-98 were not an established rule to more clearly demonstrate how the NASD's member regulatory pricing structure is proposed to be amended by the recent filings described in this proposed rule change.