*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–FICC–2004–06. 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 Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of FICC and on FICC's Web site at *http://www.ficc.com*. 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–FICC–2004–06 and should be submitted on or before December 6, 2004.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[6]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E4–3157 Filed 11–12–04; 8:45 am]

**BILLING CODE 8010–01–P**

[6] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–50640; File No. SR–NASD–2004–172]**

## Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding Pilot Modifications and Minor Modifications to the Nasdaq Opening Process for Nasdaq-Listed Stocks

November 5, 2004.

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 November 3, 2004, 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 and II below, which items have been prepared by Nasdaq. Nasdaq has designated the proposed rule change as ''non-controversial'' under section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposed rule change 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 is filing the proposed rule change to modify the opening process for Nasdaq securities as follows: (1) Establish a three-month pilot during which Nasdaq would reject the entry of Total Day Orders prior to 9:25 a.m.; (2) clarify the language of Rule 4704(a)(8) which governs the suspension between 9:28 and 9:30 a.m. of requests for cancellation or modification of Regular Hours Orders; and (3) clarify the language of Rule 4120(a)(7) which governs the opening of stocks that are subject to a trade halt. The text of the proposed rule change is set forth below.[5] Proposed new language is in italics; proposed deletions are in [brackets].[6]

* * * * *

4120. Trading Halts

(a) No Change.

(b) Procedure for Initiating a Trading Halt.

(1)–(6) No Change.

(7) A trading halt initiated under Rule 4120(a)(7) shall be terminated when Nasdaq releases the security for trading. Prior to terminating the halt, there will be a 15-minute period during which market participants may enter quotes in that security in Nasdaq systems. [If the inside market is not locked or crossed at the conclusion of that 15-minute period, Nasdaq will release the security for trading and terminate the halt. If the inside market is locked or crossed at the conclusion of the initial 15-minute period, Nasdaq will extend the halt for an additional 15 minutes during which quotations may be entered in Nasdaq systems.] At the conclusion of the [second] 15-minute period, the halt shall be terminated and the security released for trading.

* * * * *

4701. Definitions

(a)–(rr) No Change.

(ss) The term ''Total Day'' or ''X Order'' shall mean,

(a) No Change.

(b) For orders in Nasdaq-listed securities so designated, that if after entry into the Nasdaq Market Center, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential display [between 7:30 a.m. and 4:00 p.m. and for potential] *and* execution between 9:25 a.m. and 4:00 p.m., after which it shall be returned to the entering party. *X Orders entered prior to 9:25 a.m. will be rejected back to the entering party.*

(tt)–(uu) No Change.

* * * * *

4704. Opening Process for Nasdaq-Listed Securities

(a) Definitions. For the purposes of this rule the term:

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

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] The proposed rule change is marked to show changes from the rule text appearing in the NASD Manual available at *www.nasd.com* and the rule text approved by the Commission in Securities Exchange Act Release No. 50405 (September 16, 2004), 69 FR 57118 (September 23, 2004) (SR–NASD–2004–071), and amended in Securities Exchange Act Release No. 50602 (October 28, 2004), 69 FR 64350 (November 4, 2004) (SR–NASD–2004–152). This sentence was corrected by the Commission to reflect the fact that the NASD Manual available at *www.nasd.com* has not been updated to include the rule text for NASD Rule 4704. Telephone conversation between Jeffrey S. Davis, Associate Vice President and Associate General Counsel, Nasdaq, and Ann E. Leddy, Special Counsel, Division of Market Regulation (''Division''), Commission (November 4, 2004).

[6] The Commission corrected proposed rule text on Nasdaq's behalf to mark changes in Rule 4704(a)(8) and new subparagraph (b)(3). Telephone conversation between Jeffrey S. Davis, Associate Vice President and Associate General Counsel, Nasdaq, and Ann E. Leddy, Special Counsel, Division, Commission (November 4, 2004).

(1)–(7) No Change.

(8) ''Regular Hours Orders'' shall mean any order that may be entered into the system and designated with a time-in-force of IOC, DAY, or GTC. Regular Hours Orders shall be available for execution only during the opening and then during normal trading hours. Regular Hours Orders shall be designated as ''Early Regular Hours Orders'' if entered into the system prior to 9:28 a.m. and designated as ''Late Regular Hours Orders'' if entered into the system at 9:28 a.m. or after. Beginning at 9:28 a.m., requests to cancel or modify Regular Hours Orders shall be suspended until after completion of the Opening Cross at which time such requests shall be processed*, to the extent that such orders remain available within the system.*

(b) Trading Prior To Normal Market Hours. The system shall open all eligible Quotes[/Orders] in Nasdaq-listed securities at 9:25 a.m. in the following manner to prevent the creation of locked/crossed markets.

(1) At 9:25 a.m., the system shall open all Quotes [and limit priced X Orders] in time priority. Quotes [and X Orders] whose limit price does not lock or cross the book shall be added to the book in strict time priority. Quotes [and X Orders] whose limit price would lock or cross the book shall be placed in an ''In Queue'' state.

(2) Next, the system shall begin processing the In Queue Quotes[, IOX Orders, and X Orders] in strict time priority against the best bid (ask) if the In Queue order is a sell (buy) order. If an In Queue Quote [or X Order] is not executable when it is next in time for execution, the system shall automatically add that Quote [or X Order] to the book.

[(3) All Quotes and X Orders that are entered while the system is completing subparagraphs (1) and (2) shall be added to the In Queue file in strict time priority.]

([4]*3*) Once the process set forth in subparagraphs (1)–([3]*2*) is complete, the system shall begin processing Quotes and X and IOX Orders in accordance with their entry parameters

(5)–(6) Re-numbered as (4) and (5).

(c)–(d) 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, 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 has previously proposed to create two new voluntary opening processes—the Modified Opening Process and the Nasdaq Opening Cross—that together constitute the beginning of the trading day for all Nasdaq-listed securities. The Commission approved that proposal on September 16, 2004.[7] Upon implementation of the Opening Cross, Nasdaq has identified several modifications to the operation and rules governing the pre-opening trading environment that it believes would improve the fair and orderly opening of the market in Nasdaq listed securities.

Specifically, upon implementing the improved pre-opening trading environment set forth in Rule 4704(b), Nasdaq identified a harmful unintended consequence of the Modified Opening Process (''MOP'') by which Nasdaq establishes its opening order book and unlocks and uncrosses the market. As described in SR–NASD–2004–071, firms have three options for determining the price at which their carryover quotes are opened at 9:25: (1) The last quotation price entered during the previous day; (2) the last quotation price the firm enters after 7:30 and before 9:25 a.m.; or (3) the quote limits for Nasdaq, currently $.01 (bid) and $2,000 (ask). Many Nasdaq participants have programmed their quotation management systems to select the first option, carrying over the final quotation entered during the previous trading day. At the same time, a small number of firms have entered X Orders into Nasdaq's system that cross the market by a significant amount, in some cases by as much as 20 dollars. When Nasdaq applies the MOP, which automatically executes orders that would cross the market, the system executes those X Orders that are significantly away from the market against the stale carryover quotations of other members resulting in inferior executions.

To address this situation quickly, Nasdaq proposes to change the pre-opening trading environment for a three-month pilot period. Specifically, Nasdaq proposes to move the beginning entry time for X Orders from 7:30 a.m. to 9:25 a.m. As a result, X Orders would not participate in the market opening process described in Rule 4704(b), which begins at 9:25 a.m., and there would be no risk of X Orders automatically executing against a stale quote during that process. Nasdaq believes that this proposed change is necessary and sufficient to address quickly the harmful unintended consequence described above and preserve a fair and orderly opening of trading in Nadsaq. Nasdaq is aware that these changes impose a burden on some firms, but it has concluded that this approach would be the fastest way to effectively address the situation and improve the quality of executions in the MOP. It is important to note that participation in pre-opening trading is completely voluntary on firms' part, that the actual opening of the market and concomitant market maker obligations would continue to begin at 9:30 a.m. as is the case today.

In addition, Nasdaq is already designing further system modifications that would address the problem on a permanent basis. Specifically, Nasdaq is considering three potential changes: (1) Applying the Market Opening Process at 9 a.m. rather than 9:25 as currently approved; (2) extending the availability of Total Day and Total Immediate or Cancel Orders to 9 a.m. from 9:25 as currently approved; and (3) establishing a system default that protects market participants from unexpected executions upon the opening of Nasdaq's execution functionality at 9 a.m. These modifications would provide a more efficient long-term solution, but they would take longer to implement than simply rejecting X Orders until 9:25. Nasdaq believes it is imperative to address the situation quickly and to simultaneously pursue a long-term solution.

Nasdaq has identified two additional technical modifications, unrelated to the substantive proposal at hand, that it believes would eliminate potential confusion about the effect of Nasdaq's approved rules. First, Nasdaq proposes to clarify that requests for suspension or modification of orders governed by Rule 4704(a)(8) would be processed only if such orders remain available for execution within Nasdaq's system. Such orders would not be available if, for example, the system executed the order during the Nasdaq Opening Cross or during the opening process for non-cross eligible Nasdaq securities.

[7] *See,* Securities Exchange Act Release No. 50405 (September 16, 2004), 69 FR 57118 (September 23, 2004) (SR–NASD–2004–071).

Second, Nasdaq proposes to modify the language of Rule 4120(a)(7) to clarify the manner in which Nasdaq will open trading in stocks that are the subject of an initial public offering (''IPO''). Currently Rule 4120(a)(7) provides for up to two 15-minute Quote Only Periods prior to the release of trading in an IPO. The second quote only period is necessary only in the event that the market is locked or crossed at the end of the first quote only period. The MOP is designed to create an unlocked and uncrossed bid and offer for the opening of trading, and to execute quotes and orders that would lock or cross the market in a fair and orderly manner. Because Nasdaq would apply the MOP at the close of the first 15-minute Quote Only Period, and the MOP will automatically unlock/uncross the market, the second 15-minute period is unnecessary.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,[8] in general, and with section 15A(b)(6) of the Act,[9] in particular, in that section 15A(b)(6) requires, among other things, that the NASD's rules be designed to protect investors and the public interest. Nasdaq believes that its current proposal is consistent with the NASD's obligations under these provisions of the Act because it would result in a more orderly opening for all Nasdaq stocks. The proposed rule change would create a fair, orderly, and unified opening for Nasdaq stocks, prevent the occurrence of locked and crossed markets in halted securities, and preserve price discovery and transparency that is vital to an effective opening of trading.

*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.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

Nasdaq neither solicited nor received written comments with respect to the proposed rule change.

[8] 15 U.S.C. 78*o*–3.

[9] 15 U.S.C. 78*o*–3(b)(6).

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

Because the foregoing proposed rule change does not:

(i) Significantly affect the protection of investors or the public interest;

(ii) Impose any significant burden on competition; and

(iii) Become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest,[10] it has become effective pursuant to section 19(b)(3)(A) of the Act[11] and Rule 19b–4(f)(6) thereunder.[12] 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.

Nasdaq has requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow Nasdaq to implement the proposed pilot without delay, which should provide a temporary remedy to the problem posed by X Orders automatically executing against stale quotes during the MOP. The Commission also believes that waiving the 30-day operative delay would permit Nasdaq to effect the clarifying changes to Rule 4120(b)(7) and Rule 4704(a)(8) without delay. For this reason, the Commission designates the proposal to be effective and operative upon filing with the Commission.[13]

[10] The Commission revised this section to add the representations on Nasdaq's behalf that the proposed rule change does not significantly affect the protection of investors or the public interest and does not impose any significant burden on competition. Nasdaq made these representations in the filing itself but failed to include them in the exhibit. Telephone conversation between Jeffrey S. Davis, Associate Vice President and Associate General Counsel, Nasdaq, and Ann E. Leddy, Special Counsel, Division, Commission (November 4, 2004).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6). The Commission notes that Nasdaq provided written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change at least five business days prior to the date of filing of the proposed rule change.

[13] For purposes only of waiving the 30-day operative delay of the proposed rule change, the Commission considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

**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.* Please include File Number SR–NASD–2004–172 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–2004–172. 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 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–2004–172 and should be submitted on or before December 6, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[14]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E4–3160 Filed 11–12–04; 8:45 am]

**BILLING CODE 8010–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–50647; File No. SR–NASD–2004–158]**

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Establish Fee for Direct ECN Connections to the Nasdaq Market Center

November 8, 2004.

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 October 22, 2004, 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) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the rule effective upon Commission receipt of this filing. 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 the Substance of the Proposed Rule Change

Nasdaq proposes to establish a fee for direct connections by electronic communication networks (''ECNs'') to the Nasdaq Market Center. Nasdaq will implement the proposed rule change immediately. The text of the proposed rule change is below. Proposed new language is in italic.

7000. Charges for Services and Equipment

7010. System Services

(a)–(e) No change.

(f) Nasdaq Workstation™ Service.

(1) (A) The following charges shall apply to the receipt of Level 2 or Level 3 Nasdaq Service via equipment and communications linkages prescribed for the Nasdaq Workstation II Service:

| | |
|---|---|
| Service Charge | $2,035/month per service delivery platform (''SDP'') connected via T1 circuits; $1,000/month per SDP connected via Digital Subscriber Line (''DSL''), plus $1,000 per DSL early termination fee if service is terminated within 60 days of installation. |
| Display Charge | $525/month per logon for the first 150 logons; $200/month for each additional logon. |
| Additional Circuit/SDP Charge | $3,235/month. |
| PD and SDP Maintenance: | |
| Monthly maintenance agreement | $55/presentation device (''PD'') logon or SDP/month. |
| Hourly fee for maintenance provided without monthly maintenance agreement. | $195 per hour (two hour minimum), plus cost of parts. |
| *ECN Direct Connection* | *$1,000 per port pair per month.* |

(2) No change.

(g)–(w) 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, 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

Currently, ECNs connect to Nasdaq through an application programming interface (''API'') protocol that relies upon a Service Delivery Platform (''SDP''), a server machine containing Nasdaq-installed software that is located at the premises of the ECN. Nasdaq is now introducing an option for ECNs to connect to Nasdaq through a dedicated point-to-point linkage to Nasdaq Market Center host computers, rather than through an SDP. Nasdaq believes that allowing ECNs to establish a direct connection will enhance their ability to interact with the Nasdaq Market Center in an efficient manner, and that those ECNs that continue to quote in Nasdaq will respond favorably to being allowed to establish direct connections. In fact, one such ECN has already commenced testing such a connection and is prepared to avail itself of the service once it is made available. Accordingly, Nasdaq is proposing to offer such connections at a fee of $1,000 per port pair per month, as an alternative to an SPD/API connection. This fee compares favorably with the current fee of $2,035 per SPD per month.[5]

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,[6] in general, and sections 15A(b)(5) of the Act,[7] in particular, 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 NASD operates or controls. The proposed rule change will provide ECNs

[14] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] NASD Rules provide that order-delivery ECNs must respond to messages sent to them by the system within 5 seconds on average, and in no event later than 30 seconds for any one message. Nasdaq recently filed a related proposed rule change to NASD Rule 4710 to provide that the response time of an order-delivery ECN may be measured either by the ECN's SDP (in the case of ECN's using SDPs) or by the Nasdaq Market Center (in the case of ECNs opting to establish direct connections. *See* SR–NASD–2004–156 (October 15, 2004).

[6] 15 U.S.C. 78o–3.

[7] 15 U.S.C. 78o–3(5).