

the five-day pre-filing requirement and the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow Nasdaq to continue the pilot without interruption. For this reason, the Commission designates the proposal to be effective and operative upon filing with the Commission.<sup>14</sup>

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 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2005-017 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-2005-017. 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-2005-017 and should be submitted on or before March 18, 2005.

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

Margaret H. McFarland,

Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51224; File No. SR-NASD-2005-019]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Modify Pricing for NASD Members Using the Nasdaq Market Center and Nasdaq's Brut Facility

February 17, 2005.

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 February 1, 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 in part as one establishing or changing a due, fee or other charge imposed by the self-regulatory organization under Section 19(b)(3)(A)(ii)<sup>3</sup> of the Act and Rule 19b-4(f)(2) thereunder,<sup>4</sup> and in part as one concerned with the administration of a self-regulatory organization under Section 19(b)(3)(A)(iii)<sup>5</sup> of the Act and

Rule 19b-4(f)(3) thereunder,<sup>6</sup> which renders the proposal 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 proposes to modify the pricing for NASD members using the Nasdaq Market Center and Nasdaq's Brut Facility. Nasdaq states that it will implement the proposed rule change on February 1, 2005. The text of the proposed rule change is available on the NASD's Web site (<http://www.nasdaq.com>), at the NASD's Office of the Secretary, 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

*Consolidation of Fee Schedule for Nasdaq Market Center and Brut Facility.* In November 2004, Nasdaq established a uniform fee schedule for transactions in Nasdaq-listed securities through the Nasdaq Market Center and Nasdaq's Brut Facility.<sup>7</sup> Nasdaq is now proposing a uniform fee schedule for transactions in exchange-listed securities. Nasdaq states that, as is currently true for the Nasdaq Market Center, there will be no charge or credit associated with orders to buy or sell exchange-listed securities other than exchange-traded funds listed on the American Stock Exchange ("Amex-listed ETFs"), although Nasdaq is introducing a fee of \$0.004 per share executed for orders that are routed by Brut using an exchange's proprietary

<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> 15 U.S.C. 78s(b)(3)(A)(ii).

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

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

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

<sup>7</sup> See Securities Exchange Act Release No. 50670 (November 16, 2004), 69 FR 67979 (November 22, 2004) (SR-NASD-2004-167); Securities Exchange Act Release No. 50787 (December 2, 2004), 69 FR 71459 (December 9, 2004) (SR-NASD-2004-170).

<sup>14</sup> 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).

order delivery system (such as the New York Stock Exchange's SuperDOT system). Moreover, as of February 1, 2005, Amex-listed ETFs will be subject to the same tiered fee schedule as Nasdaq-listed securities. As a result, market participants' combined volume in Nasdaq-listed securities and Amex-listed ETFs in both the Nasdaq Market Center and Brut will be considered when determining each market participants' fees for orders in Nasdaq-listed securities and Amex-listed ETFs. In conjunction with this change, the fee schedule is also being clarified by moving transaction charges for exchange-listed securities from NASD Rule 7010(d) to NASD Rule 7010(i) and by clarifying that the fee schedule in NASD Rule 7010(i)(1) applies to Nasdaq-listed securities subject to the Nasdaq UTP Plan. Thus, as provided by NASD Rule IM-4400, the fees associated with dually listed securities that are subject to the Consolidated Quotation Service and Consolidated Tape Association national market system plans are the fees for exchange-listed securities, rather than Nasdaq-listed securities.

According to Nasdaq, the proposed rule change also provides that transactions executed through Nasdaq's Brut Facility will be considered when determining the amount of revenue shared with members under NASD Rule 7010(c)(2), Nasdaq's market data revenue sharing program for exchange-listed securities. Because such transactions are reported through Nasdaq, Nasdaq states that they now result in the receipt of market data revenue by Nasdaq that can be shared with members under the program. Moreover, the proposed rule change provides that executions in exchange-listed securities against a market participants' own quote or order are subject to the same fees as other transactions; currently, all such executions are free in the Nasdaq Market Center.

*Preferred Order Fees and Routing Fees.* Nasdaq is proposing to eliminate the current \$0.02 per order fee for entry of preferred orders into the Nasdaq Market Center. Nasdaq is also proposing to modify the fees for orders that are routed from the Nasdaq Brut Facility to other market centers. Fees are based upon multiple volume-based usage tiers that take account of the combined Nasdaq Market Center and Brut volume of a market participant. According to Nasdaq, in the past, a market participant's volume of liquidity provision in Nasdaq-listed securities determined the tier to which such market participant was assigned. As

discussed above, volume in Amex-listed ETFs will now also be considered in making this volume determination. Moreover, Nasdaq is proposing several modifications to the routing fee schedule. First, the tiers to which a market participant is assigned will now be based in part upon the volume of shares on the Nasdaq Market Center and Brut books that are accessed during a month and the volume of shares routed, as well as the volume of liquidity provided. Moreover, a new tier with a routing charge of \$0.0025 per share executed will be established. Second, orders that are routed outside of both the Nasdaq Market Center and Brut without first attempting to execute against the Brut book (*i.e.*, "Thru Brut orders") will not be counted in determining the routing tier for which a market participant qualifies, and will be assessed a routing charge of \$0.004 per share executed.<sup>8</sup> For other orders, the routing charges will be as follows: (i) if a market participant provides a daily average of 500,000 or fewer shares of liquidity during a month, its routing charge is \$0.003 per share executed; (ii) if a market participant provides a daily average of more than 500,000 but fewer than 10,000,001 shares of liquidity during a month, its routing charge is \$0.0028 per share executed; (iii) if a market participant provides a daily average of more than 10,000,000 but fewer than 20,000,001 shares of liquidity during a month, *or* provides a daily average of more than 20,000,000 shares of liquidity during a month but accesses and/or routes a daily average of 50,000,000 or fewer shares during the month, its routing charge is \$0.0027 per share routed; and (iv) if a market participant provides a daily average of more than 20,000,000 shares of liquidity during a month and accesses and/or routes a daily average of more than 50,000,000 shares during the month, its routing charge will be \$0.0025 per share executed.

Although the newly reduced routing charge is available at only high levels of volume, Nasdaq believes that the change is necessary as a response to a recent decision by a Nasdaq competitor to offer market participants with comparably high volumes reduced fees for accessing liquidity.<sup>9</sup> According to Nasdaq, by

<sup>8</sup> Orders routed by Brut to the Nasdaq Market Center would not be assessed the routing charge, but would be assessed Nasdaq's normal execution charge, if executed. Telephone conversation between John Yetter, Associate General Counsel, Nasdaq, and Marc McKayle, Special Counsel, Division of Market Regulation ("Division"), Commission, and David Liu, Attorney, Division, Commission, on February 17, 2005.

<sup>9</sup> See <http://www.inetats.com/prodsevr/bd/fee/fee.asp>.

lowering its routing fee in a comparable manner, Nasdaq seeks to provide an overall level of transaction fees that allows it to compete for order flow from market participants that are in a position to benefit from its competitor's pricing change. Moreover, Nasdaq notes that routing fees are only one component of the fees that market participants pay, and the credits that they receive, to execute orders during a month. According to Nasdaq, because a market participant qualifying for the reduced routing fee must access and/or route high volumes of liquidity, its average cost of order execution is likely to be higher than the average cost of order execution of a large number of market participants that provide significant liquidity but access and/or route to a lesser extent.

*Additional Clarifications.* The fees currently in NASD Rule 7010(i) are applicable to members and also to non-members that use Nasdaq's Brut Facility.<sup>10</sup> Nasdaq states that it expects that it will continue to seek to apply the same fee schedule to members and non-members that use Brut. Nasdaq is submitting a separate filing to make the proposed rule changes contained in this filing applicable to non-members.<sup>11</sup> In order to facilitate that filing, however, Nasdaq is removing references to non-members from NASD Rule 7010 and adopting a new paragraph that provides that the fees applicable to non-members using Brut are the fees established for members by SR-NASD-2004-167, and made applicable to non-members by SR-NASD-2004-170. Nasdaq states that, because this change does not alter any of the fees currently applicable to non-members, it is being filed as a proposed rule change concerned solely with the administration of a self-regulatory organization under Section 19(b)(3)(A)(iii) of the Act.<sup>12</sup> In SR-NASD-2005-020, Nasdaq is, in turn, proposing to amend this new rule language to provide that the fees applicable to non-members are same as the fees applicable to members established by this rule filing, SR-NASD-2005-019. This procedure will ensure that Nasdaq can file member fee changes on an immediately effective basis, while allowing corresponding fee changes applicable to non-members to be filed either for Commission approval under Section 19(b)(2) of the Act<sup>13</sup> or as

<sup>10</sup> Under NASD Rule 4710, the fees applicable to UTP Exchanges that participate in the Nasdaq Market Center are governed by contract.

<sup>11</sup> See SR-NASD-2005-020 (February 1, 2005).

<sup>12</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>13</sup> 15 U.S.C. 78s(b)(2).

“non-controversial” filings under Rule 19b-4(f)(6) under the Act.<sup>14</sup>

## 2. Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,<sup>15</sup> in general, and with Section 15A(b)(5) of the Act,<sup>16</sup> in particular, in that the proposed rule change 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. Nasdaq states that, although the proposed reduction in routing fees is applicable only to market participants with high volumes of liquidity accessing and liquidity provision activity, the average cost of order execution of such market participants is actually higher than the average cost of a large number of lower volume market participants. Accordingly, Nasdaq believes that the proposed routing fee change is consistent with an equitable allocation of fees. Moreover, as with all of Nasdaq’s tiered fees, Nasdaq states that the change takes account of Nasdaq’s lower per share costs and enhanced revenue opportunities associated with higher volumes of liquidity provision and liquidity accessing. Nasdaq believes that the proposed changes with respect to exchange-listed securities will introduce greater uniformity and clarity in the fee schedule applicable to such securities.

### 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.

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

Nasdaq states that written comments were neither solicited nor received.

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

The forgoing rule change is subject in part to Section 19(b)(3)(A)(ii) of the Act<sup>17</sup> and subparagraph (f)(2) of Rule 19b-4<sup>18</sup> thereunder because it establishes or changes a due, fee, or other charge imposed by the self-

regulatory organization and in part to Section 19(b)(3)(A)(iii) of the Act<sup>19</sup> and subparagraph (f)(3) of Rule 19b-4<sup>20</sup> thereunder because it is concerned with the administration of a self-regulatory organization. Accordingly, the proposal is effective upon Commission receipt of the filing. At any time within 60 days of the filing of such 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.<sup>21</sup>

## 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2005-019 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-2005-019. 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 the 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-2005-019 and should be submitted on or before March 18, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>22</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51230; File No. SR-NASD-2004-045]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto To Adopt NASD Rule 2111 To Prohibit Members From Trading Ahead of Customer Market Orders

February 18, 2005.

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 March 12, 2004, the National Association of Securities Dealers, Inc. (“NASD”), filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. On February 16, 2005, NASD amended the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.<sup>4</sup>

<sup>22</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 Amendment No. 1 to SR-NASD-2004-045 filed on February 16, 2005. Amendment No. 1 made clarifying changes to the proposed rule text.

<sup>4</sup> NASD notes that related to this proposed rule filing it has also filed SR-NASD-2004-026, a proposed rule change that would amend NASD Rule 2320(a), known as the “Best Execution Rule.” See Securities Exchange Act Release No. 51229 (February 18, 2005) (SR-NASD-2004-026). NASD has also filed SR-NASD-2004-089, a proposed rule change that would provide price improvement to customer limit orders under certain circumstances. See Securities Exchange Act Release No. 51231 (February 18, 2005) (SR-NASD-2004-089).

<sup>14</sup> 17 CFR 240.19b-4(f)(6).

<sup>15</sup> 15 U.S.C. 78o-3.

<sup>16</sup> 15 U.S.C. 78o-3(b)(5).

<sup>17</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>18</sup> 17 CFR 240.19b-4(f)(2).

<sup>19</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>20</sup> 17 CFR 240.19b-4(f)(3).

<sup>21</sup> 15 U.S.C. 78s(b)(3)(C).