

submitting financial information to FICC unless such conversion is specifically requested by FICC, (2) eliminate the requirement that FICC make a determination as to the adequacy of an applicant's personnel, physical facilities, books and records, accounting systems, or internal procedures, (3) require that a non-U.S. applicant represent to FICC in writing that it is regulated in a way that is generally comparable to the way in which domestic FICC members are regulated, (4) add a requirement to the GSD's rules that a non-U.S. netting applicant represent in writing that it is in compliance with the financial reporting and responsibility standards of its home country, and (5) eliminate the requirement that GSD comparison-only applicants submit financial information to FICC.

#### *1. Amend the Rules of the GSD and MBSB That Require Financial Information Submitted by an Applicant To Be in Dollar Equivalents*

When FICC receives financial information from non-U.S. members and applicants, FICC's credit risk staff will perform the conversion to U.S. dollars whenever it is necessary. The credit risk staff will perform the conversion as of the date of the financial statements. Therefore, FICC is eliminating the current requirement that the conversion to U.S. dollars be made by the applicant or member prior to submitting financial information to FICC unless such conversion is specifically requested by FICC.

#### *2. Amend the Operational Capability Requirement Contained in the Rules of the GSD and the MBSB*

FICC's current operational capability rules are too broad and impose upon FICC an obligation to make determinations with respect to the operational capability of an applicant or member that FICC staff is not equipped or trained to make.<sup>3</sup> Such determinations are more appropriately left to the applicant or member's designated examining authority. The operational capability aspect that is relevant to FICC and upon which FICC must make a determination is the ability of an applicant or member to send input to FICC and to receive output from FICC on a timely and accurate basis. Therefore, FICC is eliminating the requirement that it make a

<sup>3</sup> For example, the GSD rules currently require that a determination be made with respect to whether the membership applicant has adequate personnel, physical facilities, and accounting systems, among other things, to satisfactorily handle transactions.

determination as to the adequacy of an applicant's personnel, physical facilities, books and records, accounting systems, or internal procedures.

#### *3. Amend the Comparability Requirement of the GSD's Rules for Non-U.S. Members*

The GSD rules currently provide that a non-U.S. entity shall be eligible to become a netting member if FICC has determined that the entity is regulated in its home country in a way that is generally comparable to the way in which similar domestic members are regulated. The comparability determination has been difficult to make because there is no objective set of guidelines that FICC can use to confirm the comparability requirement. As a result, comparability determinations have necessarily become judgment calls made by FICC staff using information provided by the applicant.

Because the netting service is a guaranteed service and because FICC only accepts regulated entities as members, FICC should focus on making sure that its non-U.S. members (as is the case with its domestic members) are regulated by a financial regulatory authority in their home country in certain key areas as opposed to being concerned with "comparability" of regulation. These key areas are maintenance of relevant books and records, regular inspections and examinations, and minimum financial standards. Therefore, FICC is amending the comparability requirement to require that the applicant represent to FICC in writing that it is regulated in these key areas.<sup>4</sup> In conjunction with this change, FICC is adding a requirement to the GSD's rules that a non-U.S. netting applicant represent in writing that it is in compliance with the financial reporting and responsibility standards of its home country.<sup>5</sup>

#### *4. Amend the GSD's Rules That Require Comparison-Only Applicants and Members To Submit the Same Financial Information as Netting Applicants and Members*

The GSD's comparison-only service is not a guaranteed service. Comparison-only members do not have minimum financial requirements and are not required to make clearing fund deposits. Therefore, FICC is eliminating the requirement that GSD comparison-only applicants submit financial information to FICC. The GSD's rules will continue to give FICC the ability to require

<sup>4</sup> This approach is currently used by the Emerging Markets Clearing Corporation ("EMCC").

<sup>5</sup> Id.

comparison-only members to submit financial information.

In addition to these proposed rule changes, FICC is making a technical change to the rules of the MBSB to move language relating to cross-guaranty agreements to a more appropriate place in the rules.

### **III. Discussion**

Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency be designed to remove impediments to the perfection of a national system for the prompt and accurate clearance and settlement of securities transactions and must not be designed to permit unfair discrimination in the admission of participants or among participants in the use of FICC.<sup>6</sup> The Commission finds that FICC's proposed rule change is consistent with these requirements because it refines and improves FICC's rules and procedures with regard to applicants and members.

### **IV. Conclusion**

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act and the rules and regulations thereunder.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR-FICC-2004-01) be and hereby is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>7</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-50604; File No. SR-NASD-2004-155]

### **Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. to Establish Access Fees for Non-NASD Members Using Nasdaq's Brut Facility**

October 28, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

<sup>6</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>7</sup> 17 CFR 200.30-3(a)(12).

("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 18, 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. On October 26, 2004, Nasdaq submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> Nasdaq has filed the proposal pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>4</sup> and Rule 19b-4(f)(6) thereunder,<sup>5</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, 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 access fees for non-NASD members using its Brut trading facility. The text of the proposed rule change is available at the Office of the Secretary, Nasdaq, and at the Commission.

### **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 represents that, on September 7, 2004, Nasdaq completed its purchase of the Brut ECN ("Brut"). Once purchased by Nasdaq, Brut became a

"facility" of a national securities association,<sup>6</sup> thereby making the pricing for Brut's services subject to Section 15A(b)(5) of the Act, which requires that the fees of a national securities association be equitably allocated among members and issuers and other persons using the facility.<sup>7</sup> In a separate filing in October 2004, Nasdaq established such a fee structure for NASD members who access orders residing in Brut's system.<sup>8</sup> In that proposal, Nasdaq created a tiered fee structure in which the per share fee charged to a member to access liquidity in Brut varies based on the amount of liquidity added to Brut by that member. Members that provide an average daily volume of 50,000 shares or less over a calendar month are charged \$0.003 per share when accessing liquidity in the Brut system for that same month. Members that provide an average daily volume of 50,001 shares or more over a calendar month are charged \$0.0027 per share when accessing liquidity in the Brut system for that same month. In this filing, Nasdaq proposes to make the same fee structure applicable to non-NASD members that use the Brut system, likewise starting in October 2004. Nasdaq notes that Brut has only twelve non-NASD members using its system and believes that this proposal would ensure that all users (members and non-members) are subject to a uniform and objective pricing schedule.

##### **2. Statutory Basis**

Nasdaq believes that the proposed rule change, as amended, is consistent with the provisions of Section 15A of the Act,<sup>9</sup> in general, and with Section 15A(b)(5) of the Act,<sup>10</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 association operates or controls.

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

Nasdaq does not believe that the proposed rule change, as amended, 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**

The foregoing proposed rule change, as amended, is subject to Section 19(b)(3)(A)(iii) of the Act<sup>11</sup> and Rule 19b-4(f)(6) thereunder<sup>12</sup> because the proposal: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative prior to 30 days after the date of filing or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest; provided that Nasdaq has given the Commission 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, or such shorter time as designated by the Commission. 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>13</sup>

Nasdaq has requested that the Commission waive the five-day pre-filing notice requirement and 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 such waiver will permit Nasdaq to make Brut's fee structure consistent for both NASD members and non-NASD members. In addition, the Commission has determined to waive the five-day pre-filing notice requirement. For these reasons, the Commission designates the proposal to be effective and operative upon filing with the Commission.<sup>14</sup>

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>12</sup> 17 CFR 240.19b-4(f)(6).

<sup>13</sup> See Section 19(b)(3)(C) of the Act, 15 U.S.C. 78s(b)(3)(C).

<sup>14</sup> For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on

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

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

<sup>3</sup> See letter from Edward S. Knight, Executive Vice President and General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated October 26, 2004 ("Amendment No. 1"). Amendment No. 1 made technical corrections to the proposed rule text of the originally filed proposed rule change.

<sup>4</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>5</sup> 17 CFR 240.19b-4(f)(6).

<sup>6</sup> See Section 3(a)(2) of the Act, 15 U.S.C. 78c(a)(2).

<sup>7</sup> 15 U.S.C. 78o-3(b)(5). Nasdaq currently operates Brut pursuant to a Temporary Conditional Exemption ("Exemption") issued by the Commission pursuant to Section 36(a) of the Act. See Securities Exchange Act Release No. 50311 (September 3, 2004), 69 FR 54818 (September 10, 2004). The Exemption requires Nasdaq to file proposed rule changes under Section 19(b) of the Act if it seeks to modify Brut's fee schedule.

<sup>8</sup> See Securities Exchange Act Release No. 50502 (October 7, 2004), 69 FR 61275 (October 15, 2004) (SR-NASD-2004-149).

<sup>9</sup> 15 U.S.C. 78o-3.

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

#### 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2004-155 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-2004-155. 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 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-2004-155 and should be submitted on or before November 29, 2004.

efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>15</sup> 17 CFR 200.30-3(a)(12).

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. 34-50615; File No. SR-NYSE-2004-58]

#### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to its Original Financial Listing Standards Pilot Program

October 29, 2004.

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 12, 2004, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") 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 Exchange. The proposed rule change has been filed by the NYSE as a "non-controversial" rule change pursuant to Rule 19b-4(f)(6) under the Act.<sup>3</sup> 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

The Exchange seeks to extend its original financial listing standards pilot program (the "Pilot Program")<sup>4</sup> until the earlier of January 31, 2005, or such date as the Commission may approve File Number SR-NYSE-2004-20,<sup>5</sup> which seeks permanent approval of the Pilot Program. The Pilot Program established revised financial standards applicable to the listing of equity securities on the Exchange. The Pilot Program is currently in effect on an extended basis until the earlier of October 31, 2004, or such date as the

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

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

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

<sup>4</sup> See Securities Exchange Act Release Nos. 49154 (January 29, 2004), 69 FR 5633 (February 5, 2004) (approving File No. SR-NYSE-2003-43); and 50123 (July 29, 2004), 69 FR 57474 (August 5, 2004) (File No. SR-NYSE-2004-40).

<sup>5</sup> See Securities Exchange Act Release No. 49917 (June 25, 2004), 69 FR 40439 (July 2, 2004).

Commission may approve File Number SR-NYSE-2004-20.

#### 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 Exchange 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 Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

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

##### 1. Purpose

On January 29, 2004, the Commission granted accelerated approval to the Pilot Program on a six-month pilot basis through July 30, 2004.<sup>6</sup> Two comments were received in response to File Number SR-NYSE-2003-43.<sup>7</sup> The NYSE thereafter filed File Number SR-NYSE-2004-15 on March 16, 2004 for immediate effectiveness,<sup>8</sup> which suspended portions of the original Pilot Program regarding minimum numerical continued listing set forth in Section 802.01B of the NYSE's Listed Company Manual. In File Number SR-NYSE-2004-15, the Exchange noted its intention to publish the requirements of the original Pilot Program regarding minimum numerical continued listing standards set forth Section 802.01B for public comment on a non-accelerated timeframe. SR-NYSE-2004-15 did not, however, affect the Pilot Program with respect to original listing standards set forth in Sections 102.01C and 103.01B of the NYSE's Listed Company Manual or the Pilot Program's non-substantive change to the language of Section 802.01C.

On April 4, 2004, the Exchange filed File Number SR-NYSE-2004-20, which seeks permanent approval for the Pilot Program currently in effect with respect

<sup>6</sup> See Securities Exchange Act Release No. 49154, *supra* note 4. The Exchange subsequently extended the Pilot Program until the earlier of October 31, 2004, or such date as the Commission may approve File Number SR-NYSE-2004-20. See Securities Exchange Act Release No. 50123, *supra* note 4.

<sup>7</sup> See letters to Jonathan G. Katz, Secretary, Commission, from W. Randy Eaddy, Kilpatrick Stockton LLP, dated March 11, 2004, and Kenneth A. Hoogstra, von Briesen & Roper, s.c., dated February 25, 2004.

<sup>8</sup> See Securities Exchange Act Release No. 49443 (March 18, 2004), 69 FR 13929 (March 24, 2004).