

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51599; File No. SR-NASD-2005-048]

### 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 Nasdaq's Brut Facility

April 22, 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 April 8, 2005, 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)<sup>3</sup> of the Act and Rule 19b-4(f)(2) thereunder,<sup>4</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 Nasdaq's Brut Facility ("Brut"). Nasdaq states that it will implement the proposed rule change on April 11, 2005. The text of the proposed rule change is available on the NASD's Web site (<http://www.nasd.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

Nasdaq's proposed rule change contains two modifications to the fees applicable to transactions in exchange-listed securities.

Nasdaq currently charges a fee of \$0.004 per share executed with respect to any order to buy or sell exchange-listed securities that is routed by Brut to an exchange using such exchange's proprietary order delivery system (such as the New York Stock Exchange's ("NYSE") SuperDOT system). This proposed rule change would reduce this fee for some orders and eliminate it entirely for others.

Under the proposal, the fee for orders to buy or sell exchange-listed securities (assuming such securities are subject to the Consolidated Quotations Service and Consolidated Tape Association Plans and are not Exchange Traded Funds listed on the American Stock Exchange) that are routed by Brut to an exchange using the exchange's proprietary order delivery system would be reduced to \$0.0004 per share executed. This fee would only be charged, however, if the orders to which it otherwise applies are routed outside Brut and the Nasdaq Market Center ("NMC") without first attempting to execute within Brut or the NMC. If an order to which this fee would otherwise apply first attempts to execute against the book maintained by Brut or the NMC, then this fee would no longer be applicable.

By lowering (and eliminating in many cases) the routing fees for certain orders for exchange-listed securities received by Brut, Nasdaq states that it seeks to continue to improve Brut's competitiveness in attracting buy and sell orders for exchange-listed securities. Nasdaq believes that its participants would benefit from the increased liquidity in exchange-listed securities that the proposal is designed to stimulate. Furthermore, Nasdaq states that all investors would benefit from increased competition in this area. Finally, Nasdaq believes that the distinction for fee purposes between orders that check the Brut (or NMC) book before routing and those that are designated for routing regardless of available prices in such book would encourage orders to check the Brut

book, which it believes would benefit both the particular investor (who, as a result, may find a better execution) and the market as a whole.

At the same time, the proposed rule change seeks to establish a new fee designed to recover the commissions billed by NYSE specialists to Brut for certain types of limit orders. According to Nasdaq, generally, NYSE specialists charge Brut for executions of limit orders that remained unexecuted on the specialists' books for more than 5 minutes. While the specialists' fee schedules vary, Nasdaq states that the proposed Brut fee of \$0.009 per share is generally designed to recover for Brut some of the associated cost.<sup>5</sup>

The new fee would apply when a limit order is delivered to the NYSE via the NYSE's proprietary order delivery system and the time to execute such an order exceeds five minutes (measured as the difference between the time of the NYSE's electronic acknowledgment of the order and the time of execution). The new fee would not apply, however, to day orders executed in the specialists' opening and to good-till-cancelled orders if executed in the opening on the day when they were entered. The new fee would also not apply to any on-close orders or market orders.

This filing applies only to fees charged to NASD members. Nasdaq has submitted a separate filing to make the proposed rule changes contained in this filing applicable to non-members.<sup>6</sup>

##### 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,<sup>7</sup> in general, and with Section 15A(b)(5) of the Act,<sup>8</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.

#### 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

<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> Such orders could also incur the \$0.0004 per share fee discussed above if they are routed outside Brut and the NMC without first attempting to execute within Brut or the NMC. Telephone conversation between Alex Kogan, Associate General Counsel, Nasdaq, John Roeser, Assistant Director, Division of Market Regulation ("Division"), Commission, and David Liu, Attorney, Division, Commission, on April 20, 2005.

<sup>6</sup> See SR-NASD-2005-049.

<sup>7</sup> 15 U.S.C. 78o-3.

<sup>8</sup> 15 U.S.C. 78o-3(b)(5).

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 to Section 19(b)(3)(A)(ii) of the Act<sup>9</sup> and subparagraph (f)(2) of Rule 19b-4<sup>10</sup> thereunder because it establishes or changes a due, fee, or other charge imposed by the 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>11</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-2005-048 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-2005-048. 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-2005-048 and should be submitted on or before May 19, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-51600; File No. SR-NSCC-2005-01]

**Self-Regulatory Organizations; National Securities Clearing Corporation; Order Granting Approval of a Proposed Rule Change To Amend Its Operational Capability Requirement for Membership**

April 22, 2005.

**I. Introduction**

On January 19, 2005, the National Securities Clearing Corporation ("NSCC") filed with the Securities and Exchange Commission ("Commission") proposed rule change File No. SR-NSCC-2005-01 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").<sup>1</sup> Notice of the proposed rule change was published in the **Federal Register** on March 17, 2005.<sup>2</sup> No comment letters were received. For the reasons discussed below, the

Commission is now granting approval of the proposed rule change.

**II. Description**

The proposed rule change amends Section I.A.3. of Addendum B, Section I.A.3. of Addendum I, Section I.3. of Addendum Q, and Section I.2. of Addendum R of NSCC's Rules and Procedures concerning the operational capability requirements of applicants for membership. NSCC's current rules specify that an applicant must "have adequate personnel capable of handling transactions with the Corporation [NSCC] and adequate physical facilities, books and records and procedures to fulfill anticipated commitments to and to meet the operational requirements of the Corporation [NSCC] \* \* \*." NSCC believes that these provisions may be interpreted to impose upon NSCC an obligation to make determinations with respect to these particular aspects of applicants' and members' operational capability. NSCC ordinarily leaves such determinations to the applicants' and members' designated examining authorities. The operational capability that NSCC ordinarily focused upon during the application process is the applicant's ability to appropriately communicate with NSCC; that is, the applicant's ability to input data to NSCC and to receive output from NSCC on a timely and accurate basis.

NSCC believes that it is appropriate to clarify these sections of its Rules and Procedures so that they reflect the practices of NSCC and so that there will be no misunderstandings as to their meaning. The text of the above-referenced sections of NSCC's Rules and Procedures will be amended to delete references to adequate personnel and adequate facilities, books, and records that are extraneous to the ability of applicants to communicate with NSCC. In place, these sections will state that an applicant must "be able to satisfactorily communicate with the Corporation [NSCC] \* \* \*." NSCC will continue to retain the right to examine any aspect of an applicant's or member's business pursuant to the provisions of NSCC Rule 15.

**III. Discussion**

Section 17A(b)(3)(F) of the Act requires among other things that the rules of a clearing agency be designed to assure the safeguarding of securities and funds in its custody or control or for which it is responsible.<sup>3</sup> The Commission finds that NSCC's proposed rule change is consistent with this requirement because it eliminates a

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>10</sup> 17 CFR 240.19b-4(f)(2).

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

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

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

<sup>2</sup> Securities Exchange Act Release No. 51363 (March 11, 2005), 70 FR 13060.

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