

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-2003-102 and should be submitted by August 28, 2003.

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. 34-48279; File No. SR-NASD-2003-52]

### Self-Regulatory Organizations; Order Granting Approval to Proposed Rule Change by the National Association of Securities Dealers, Inc. To Establish a Fee for Receipt of Mutual Fund Quotation Service Data by Distributors

August 1, 2003.

On March 24, 2003, 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"), 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> a proposed rule change to establish a \$1,000 per month distributor fee for receipt of mutual fund information through Nasdaq's Mutual Fund Quotation Service ("MFQS"). The fee would be assessed on all distributors, as defined in proposed NASD Rule 7090(e)—*i.e.*, firms that receive the data and distribute it to third parties.

The proposed rule change was published for comment in the **Federal Register** on April 24, 2003.<sup>3</sup> By letters dated, respectively, May 30, 2003 and July 18, 2003, Nasdaq clarified the scope

and purpose of the fee.<sup>4</sup> The Commission received no comments on the proposed rule change.<sup>5</sup>

The Commission has carefully reviewed the NASD's proposed rule change and finds that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association and, in particular, the requirements of Section 15A of the Act<sup>6</sup> and the rules and regulations thereunder.<sup>7</sup> The Commission finds specifically that the proposed rule change is consistent with Section 15A(b)(5) of the Act<sup>8</sup> because the fee will be assessed against all firms that receive the Nasdaq MFQS data and distribute it to third parties. In addition, Nasdaq represents that the amount of the fee is sufficient to compensate Nasdaq for services it provides to distributors and their subscribers by collecting and processing the mutual fund data feed, producing the data feed, and providing data quality services. At the same time, Nasdaq believes the amount of the fee will not discourage wide distribution of the data.<sup>9</sup>

Finally, the Commission finds that the proposal is consistent with Section 15A(b)(6) of the Act<sup>10</sup> because vendors are free to choose whether to receive the data, and the fee is uniformly charged

<sup>4</sup> See: letter from Eleni Constantine, Office of the General Counsel, Nasdaq to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), dated May 30, 2003 ("first clarifying letter"); and letter from Eleni Constantine, Office of the General Counsel, Nasdaq to Katherine A. England, Assistant Director, Division, dated July 18, 2003 ("second clarifying letter").

<sup>5</sup> Nasdaq has consented to an extension of time for Commission action on the proposal until August 1, 2003, under Section 19(b)(2)(B) of the Act.

<sup>6</sup> 15 U.S.C. 78o-3.

<sup>7</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>8</sup> Section 15A(b)(5) of the Act requires that the rules of national securities association provide 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. 15 U.S.C. 78o-3(b)(5).

<sup>9</sup> In its first clarifying letter, Nasdaq represented that mutual fund data is delivered through the legacy data feeds. Nasdaq stated that these products provide MFQS data, OTC Bulletin Board data and index data. Nasdaq represented that the legacy data feed products operate at a very substantial deficit without this new fee. In determining how to reflect these costs in the fee Nasdaq estimated the likely population of users. Its best estimate was that the population of users was probably similar to the firms that pay Nasdaq's index distribution fee. Nasdaq believed that it could most fairly spread the costs over the estimated population if the fee were set at \$1,000.

<sup>10</sup> Section 15A(b)(6) of the Act requires that the rules of an association not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. 15 U.S.C. 78o-3(b)(6).

to all firms that receive the data and distribute it to third parties; to the extent that Nasdaq.com chooses to so receive and distribute the data, it too will be assessed the fee.<sup>11</sup>

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>12</sup> that the proposed rule change (SR-NASD-2003-52) be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48280; File No. SR-NASD-2003-119]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to the Listing and Trading of Index Leveraged Stock Market Return Securities Based Upon the Nasdaq-100 Index

August 1, 2003.

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 August 1, 2003, 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" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq.

The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

<sup>11</sup> In this regard, in its second clarifying letter, Nasdaq represents that, before creation of the internal securities information processor ("SIP") about a year ago, the Nasdaq proprietary data that comprises the mutual fund data was built into the feed that dealers were required to take. Nasdaq also represents that, with the creation of the internal SIP, the mutual fund data at issue has been separated out from the core SIP data and is provided over a feed that only contains Nasdaq proprietary data. Nasdaq states that this proposal enables vendors to choose whether to take the mutual fund data, without affecting their ability to take the required consolidated data through the SIP. Finally, Nasdaq states that, to the extent that vendors (including Nasdaq.com) choose to take this data and to gain value by redistributing it, Nasdaq will charge a fee for this data, which it incurs costs in compiling.

<sup>12</sup> 15 U.S.C. 78s(b)(2).

<sup>13</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>12</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 Securities Exchange Act Release No. 47688 (April 17, 2003), 68 FR 20199.