SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45861A, File No. SR–MSRB–2002–04]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Granting Approval of Proposed Rule Change Relating to Rule G–14, on Reports of Sales or Purchases

May 13, 2002.

Correction

In FR Document No. 02–11394, beginning on page 30989 for Wednesday, May 8, 2002, the heading is corrected as set forth above and the first sentence of the second paragraph of Section III, Discussion, on page 30990 was incorrectly stated. The sentence should read as follows:

After careful review, the Commission finds that the MSRB's proposed rule change consisting of an amendment to Rule G–14, on reports of sales and purchases, meets the statutory standard.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[1]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–12338 Filed 5–16–02; 8:45 am]

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[1] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45916; File No. SR–NASD–2002–61]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Establish a Regulatory Fee and To Increase Market Data Revenue Sharing

May 10, 2002.

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 May 3, 2002, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association''), 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. Nasdaq filed the proposal pursuant to Section 19(b)(3)(A) of the Act,[3] and Rule 19b–4(f)(2) thereunder[4] as one establishing or changing a due, fee or other charge imposed by the self-regulatory organization, 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.

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

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to: (1) Institute a fee for the regulatory services provided in connection with the operation of The Nasdaq Stock Market; (2) expand the market data revenue available for sharing with members under NASD Rule 7010(a)(2) by eliminating the deduction for the cost of regulatory services provided by NASD Regulation, Inc. (''NASDR'') and increasing the percentage of eligible revenue that is shared; and (3) extend the pilot period with respect to which market data revenue sharing is available through December 31, 2002.[5]

The proposed rule change is effective on filing, but Nasdaq will implement the proposed rule change beginning on June 1, 2002, for a pilot period running through December 31, 2002. Accordingly, the first regulatory fee will be based upon market activity during the month of June, and the last fee under the pilot will be based upon market activity during the month of December. The increase in market data revenue sharing will apply to trade reporting activity from June through December.

The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets.

7010. System Services

(a) (1) No change.

(2) Market Data Revenue Sharing

(A) For a pilot period lasting [until] *through* [October] *December* 31, 2002, NASD members shall receive a market data revenue sharing credit. The total credit shall be calculated in accordance with the following formula:

Credit = [(0.80)]*(0.90)* × (Eligible Revenue) × (Member's Volume Percentage)

(B) Definitions. The following definitions shall apply to this Rule:

(i) ''Eligible Revenue'' shall mean[:]

[a.] The portion of the net distributable revenues that Nasdaq, through the NASD, is eligible to receive under the Nasdaq UTP Plan, that is attributed to the Nasdaq Level 1 Service for Eligible Securities.[, minus]

[b. The portion of the fee charged to Nasdaq by NASD Regulation, Inc. for regulatory services allocated to the Nasdaq Level 1 Service for Eligible Securities.]

(ii) ''Eligible Securities'' shall mean all Nasdaq National Market securities and any other security that meets the definition of ''Eligible Security'' in the Nasdaq UTP Plan.

(iii) ''Member's Volume Percentage'' shall mean the average of:

a. The percentage derived from dividing the total number of trades in Eligible Securities that the member reports in accordance with NASD trade reporting rules to the Automated Confirmation Transaction Service (''ACT'') by the total number of trades in Eligible Securities reported to ACT by NASD members, and

b. The percentage derived from dividing the total number of shares represented by trades in Eligible Securities that the member reports in accordance with NASD trade reporting rules to ACT by the total number of shares represented by all trades in Eligible Securities reported to ACT by NASD members.

(iv) ''Nasdaq UTP Plan'' shall mean the Joint Self-Regulatory Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis.

(b)–(p) No change.

* * * * *

7110. Regulatory Services

(a) Fee. NASD members will be assessed a monthly fee for the regulatory services provided in connection with the operation of The Nasdaq Stock Market during a pilot period lasting through December 31, 2002. The fee shall be calculated at the beginning of each month using data

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

[4] 17 CFR 240.19b–4(f)(2).

[5] When Nasdaq filed the proposed rule change, the proposed rule language stated the pilot period would last ''until'' December 31, 2002, while the description of the proposal stated the pilot period would last ''through'' December 31, 2002. To avoid confusion, Nasdaq consented to change the proposed rule language to state that the pilot period would last through December 31, 2002. The Commission did not require Nasdaq to file a formal amendment to accomplish this change, since it was Nasdaq's intention to have the pilot period last through December 31, 2002. *See* telephone conversation between John M. Yetter, Assistant General Counsel, Nasdaq, and Joseph Morra, Special Counsel, Division of Market Regulation, SEC, May 10, 2002.

concerning market activity during the prior month, in accordance with the following formula:

Regulatory Fee = ((Monthly Regulatory Charge) × (Member's Quote Share) × 0.4) + ((Monthly Regulatory Charge) × (Member's Position Share) × 0.2) + ((Monthly Regulatory Charge) × (Member's ACT Record Share) × 0.4)

(b) Transitional Fee Reduction. The fee for regulatory services payable by a member in a given month shall be reduced by an amount calculated in accordance with the following formula (if such amount is positive):

Fee Reduction = (Aggregate Fee Reduction) × (Member's Share of Fee Reduction)

(c) Definitions. The following definitions shall apply to this Rule:

(1) ''Aggregate Fee Reduction'' shall mean the lesser of (i) the Aggregate Impact during a month or (ii) $416,667.

(2) ''Aggregate Impact'' shall mean the sum of each Member's Impact that is positive.

(3) ''Implicit Monthly Fee'' shall mean the product of (i) the Monthly Regulatory Charge with respect to a particular month and (ii) the Member's Volume Percentage (as defined in Rule 7010(a)(2)) during such month.

(4) ''Market ACT Record Total'' shall mean the sum of each Member's ACT Record Total.

(5) ''Member's ACT Record Share'' shall mean a percentage calculated by dividing the Member's ACT Record Total by the Market ACT Record Total.

(6) ''Member's ACT Record Total'' shall mean the greater of (i) the number of all types of ACT records in which the member is the reporting party during the month, minus the number of ACT records reported for dissemination to the public in which the member is either the reporting party or the contra-party during the month, or (ii) the number of ACT records reported for dissemination to the public in which the member is the reporting party during the month.

(7) ''Member's Impact'' shall mean the difference between the regulatory fee payable by the member under subsection (a) with respect to a particular month and the highest Implicit Monthly Fee for such member in any month between January 2002 and such month.

(8) ''Member's Position Share'' shall mean a percentage calculated by dividing (i) the sum of the number of days during the month that the member posted a bid or offer under its name with respect to each Nasdaq-listed security by (ii) the sum of the number of days during the month that each member posted a bid or offer under its name with respect to each Nasdaq-listed security.

(9) ''Member's Quote Share'' shall mean a percentage calculated by dividing the member's quotation activity in Nasdaq-listed securities during the month by the quotation activity of all members in Nasdaq-listed securities during the month. Prior to the introduction of the version of the Nasdaq National Market Execution System (the ''NNMS'') commonly referred to as SuperMontage, quotation activity shall be measured by quotation updates. In the version of the NNMS commonly referred to as SuperMontage, quotation activity shall be measured by any entry, modification, cancellation, or cancel/replace of a member's best priced Quote/Order on the bid or the offer side of the market.

(10) ''Member's Share of Fee Reduction'' shall mean a percentage calculated by dividing the Member's Impact by the Aggregate Impact.

(11) ''Monthly Regulatory Charge'' shall mean sum of (i) the fee that Nasdaq pays to NASD Regulation, Inc. for regulatory services with respect to Nasdaq-listed securities for the month, and (ii) costs incurred by Nasdaq's MarketWatch Department for regulatory services with respect to Nasdaq-listed securities during the month.

(12) ''Nasdaq-listed securities'' shall mean Nasdaq National Market securities and Nasdaq SmallCap Market securities.

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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 proposes to change the manner in which it shares tape revenue with NASD members that report trades in Nasdaq-listed securities to Nasdaq's Automated Confirmation Transaction Service (''ACT''), and is instituting a direct fee for the regulatory services provided in connection with the operation of The Nasdaq Stock Market. Nasdaq is making these changes to ensure that Nasdaq can effectively compete with exchanges that trade Nasdaq securities on an unlisted trading privileges basis (''UTP Exchanges'') without impairing the effectiveness of Nasdaq's regulatory program.

In the past, Nasdaq has funded the costs associated with regulatory services through the market data revenue that it receives through the NASD, under the Joint Self-Regulatory Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis (the ''Nasdaq UTP Plan'' or the ''Plan''). The portion of this revenue used to fund regulation may be characterized as an implicit fee for regulatory services, based on the magnitude of trade reporting activity. Recently, however, UTP Exchanges have expanded their programs for trading Nasdaq securities and have begun sharing the market data revenue that they receive under the Plan with market participants that execute and/or report trades through their facilities. Nasdaq has also instituted a program for sharing market data revenue with members, but shares only a portion of the revenues remaining after funding its regulatory costs. [6]

Nasdaq has concluded that financing regulatory services out of market data revenue divorces the costs of regulation from the marketplace activities that necessitate it and thereby reduces the transparency of these costs to market participants. Nasdaq is also concerned that using market data revenue for this purpose may ultimately prove untenable in an environment where the sharing of market data revenues has become a basis for competition. Accordingly, Nasdaq is implementing a direct, explicitly formulated fee on members for regulatory services and is eliminating the deduction for regulatory costs from its market data revenue sharing program. At the same time, Nasdaq will increase the amount of tape revenue shared with NASD members that trade report Nasdaq securities to Nasdaq.

The Act imposes obligations on self-regulatory organizations to oversee the activities of their members. Currently, the NASD divides its regulatory responsibilities with respect to The

[6] Securities Exchange Act Release Nos. 45342 (Jan. 28, 2002), 67 FR 5109 (Feb. 1, 2002) (SR–NASD–2001–96); and 45444 (Feb. 14, 2002), 67 FR 8051 (Feb. 21, 2002) (SR–NASD–2002–17).

Nasdaq Stock Market between Nasdaq and NASDR, with Nasdaq's MarketWatch Department performing real-time surveillance and NASDR's Market Regulation Department performing extensive post-trade surveillance and investigation of the quoting and trading activity of NASD member firms. MarketWatch monitors quote and trade information, as well as third-party news sources, to detect unusual market activity that may be indicative of rule violations or disorderly market conditions. It helps to detect and correct inaccurate trade reports and monitors the market to resolve locked and crossed markets and trade-or-move rule violations. NASDR's Market Regulation Department conducts surveillance on a vast range of regulatory matters, including compliance with rules relating to order handling, trade reporting, best execution, and limit order protection, and the detection of wash sales, front running, manipulation, insider trading, and other forms of fraud. The Market Regulation Department also conducts on-site examinations of market makers, prosecutes violations of Nasdaq marketplace rules, and refers violations of SEC rules to the Commission.

Nasdaq bears the cost of all of these regulatory services, however: Directly, in the case of the MarketWatch Department, and through payments to NASDR in the case of its Market Regulation Department. If the Commission grants Nasdaq's application to register as a national securities exchange, Nasdaq will be directly responsible for regulation of its members, but will discharge many of its responsibilities through a Regulatory Services Agreement with NASDR, under which Nasdaq will continue to pay NASDR for services provided. Thus, the financial burden associated with regulation will remain largely unchanged following exchange registration.[7]

Nasdaq's traditional practice of funding regulatory costs out of market data revenue[8] is not sustainable in an environment where market participants have increasing opportunities to execute and/or report trades through UTP Exchanges and where Nasdaq UTP Plan participants compete by sharing market data revenue with market participants. Market data revenue sharing, although a feature of the current competitive environment, has the potential to wipe out the resources traditionally used to fund regulation. Moreover, if a market participant chooses to post quotes on Nasdaq but to report some portion of its trades to a UTP Exchange, the decrease in market data revenue received by Nasdaq will not be offset by a decrease in its regulatory costs. As long as the market participant remains active in Nasdaq, NASD/Nasdaq retains a responsibility for maintaining a program aimed at detecting regulatory infractions by the market participant and its customers.

Fragmentation of trade reporting data will make Nasdaq's regulatory program less effective and more costly, however, because NASDR will not have ready access to information about trades reported to UTP Exchanges. This will make it more difficult for NASDR to detect a range of abuses, including insider trading, wash sales, short sale rule violations, and violations of best execution obligations and limit order protection obligations. For example, a party wishing to trade on the basis of material non-public information might distribute its trading between market venues, making it less likely that the trades observed by any one regulator would give rise to suspicion. If an investigation of fraudulent conduct were commenced, moreover, NASDR would have to obtain information about suspicious trades from UTP Exchanges and/or their members. In time-sensitive investigations, the resulting delays may prevent regulators from taking prompt action to stop the fraudulent conduct. Moreover, the ultimate outcome of such an investigation may be adversely affected if the trade reporting rules of the UTP Exchange do not require the same range of information as NASD/Nasdaq trade reporting rules.

Nasdaq believes that the Commission must develop a policy response to the regulatory challenges posed by fragmentation of trade reporting activity. To enhance its ability to fulfill its own regulatory obligations, however, Nasdaq also believes that a restructuring of its traditional mechanisms for funding regulatory services is necessary. Rather than using a shrinking pool of market data revenue to underwrite regulation, Nasdaq believes that it must institute a direct charge on members. Such a charge will ensure that each member pays its fair share of the regulatory costs necessitated by its participation in the Nasdaq market. It will also provide Nasdaq with flexibility to share market data revenue in a manner consistent with UTP exchanges, rather than using these revenues to cross-subsidize regulation.

For the remainder of 2002, Nasdaq proposes to fund the costs associated with regulation of The Nasdaq Stock Market by imposing a fee based upon the number of markets that a member makes in Nasdaq securities (*i.e.,* the number of stocks in which the member posts a quote, whether it is a market maker or an electronic communications network), the number of quotation changes generated by that firm, and the number of ACT records reported by the firm. The number of markets that a member makes and its quoting activity correlate to the resources that NASDR (and therefore Nasdaq) must expend to surveil the firm for compliance with rules relating to the handling of customer orders, such as the SEC's Order Handling Rules and the NASD's ''Manning'' Rule, as well as the resources expended by Nasdaq's MarketWatch Department. A firm's ACT records correlate with resources expended to surveil for compliance with trading and reporting rules, such as rules relating to short sales, trade reporting, best execution, wash sales, front running, insider trading, and fraud.

To a large extent, the regulatory costs incurred by Nasdaq are technological: The costs associated with developing, operating, and maintaining systems that are capable of storing and analyzing vast quantities of market data. These systems include Nasdaq MarketWatch's Surveillance Delivery Real-Time (''SDR'') system, which conducts real-time analysis of quote and trade information, as well as third-party news sources, for unusual market activity or conduct that may violate marketplace

[7] The costs of regulation incurred by Nasdaq to operate The Nasdaq Stock Market should not be confused with costs incurred by the NASD in performing non-Nasdaq regulatory activities—such as member examinations and regulating the sales and trading of fixed income securities, investment company securities, and other non-Nasdaq securities—which are financed through assessments under the NASD By-Laws.

[8] Prior to the introduction of its market data revenue sharing program, Nasdaq financed all of its regulatory costs from market data revenue. Under the market data revenue sharing program that Nasdaq put into effect in February 2002, Nasdaq shares 80% of ''eligible revenue'' with members, with each member's share of eligible revenue based on the percentage of trades reported through ACT that are attributable to the member (measured with reference to the number of trades and share volume). Securities Exchange Act Release Nos. 45342 (Jan. 28, 2002), 67 FR 5109 (Feb. 1, 2002) (SR–NASD–2001–96); and 45444 (Feb. 14, 2002), 67 FR 8051 (Feb. 21, 2002) (SR–NASD–2002–17). However, ''eligible revenue'' consists solely of the market data revenue associated with Nasdaq's basic data service, the Nasdaq Level 1 Service, minus the portion of the fee charged to Nasdaq by NASDR for regulatory services that is allocated to Nasdaq Level 1 Service. (The allocation of the fee to Level 1 is made in proportion to the revenue derived from Level 1 in comparison to other market data revenue.) Thus, under the current program, the entire NASDR fee is recovered before any revenue is shared. Under this approach, an NASD member is implicitly charged the market regulation fee on the basis of the number of trades and the share volume that the NASD member trade reports to Nasdaq.

rules, and NASDR's detection systems, such as the Advanced Detection System (''ADS'') and the Securities Observation News Analysis and Research (''SONAR'') system, which conduct more extensive post-trade analysis, both through automated detection algorithms and through the powerful analytical tools that they provide to NASDR personnel. Accordingly, Nasdaq believes that it is reasonable to assess a regulatory charge based upon the quoting and trading data that feed into these systems.

To be sure, there may be other aspects of a member's activity that create regulatory costs. Accordingly, during the remaining months of 2002, Nasdaq will conduct an extensive analysis of the costs incurred to regulate particular market activities (*e.g.,* quoting, trade execution, trade reporting, listing, order entry, *etc.*) with the goal of more precisely calibrating fees for regulation with the activities that necessitate it. In the meantime, however, Nasdaq believes that it is essential to begin the process of passing regulatory costs through to members directly, to ensure that regulatory arbitrage does not emerge as a serious threat to market integrity.

Nasdaq's total regulatory costs for the period from June 1, 2002 to December 31, 2002 are expected to be approximately $38,967,000: $3,967,000 for the operation of the MarketWatch Department and $35,000,000 to be paid to NASDR for the services that it provides.[9] During each month of this period, Nasdaq will allocate 40% of the cost to members based upon their quotation activity, 40% based on their ACT records, and 20% based upon the markets that they make.[10] Specifically, quotation activity will be measured by dividing the quotation activity attributable to the member by all quotation activity during the month.[11] Market making will be measured by dividing (i) the sum of the number of days during the month that the member posted a bid or offer under its name with respect to each Nasdaq-listed security by (ii) the sum of the number of days during the month that each member posted a bid or offer under its name with respect to each Nasdaq-listed security.[12]

Because all ACT records (clearing and non-clearing, tape and non-tape) have regulatory costs associated with them, it could be argued that a portion of the regulatory fee should be tied directly to the number of records in which a member is a reporting party. Some market participants, however, routinely interpose themselves as a counter party to their customers' trades, and therefore use multiple ACT records to report a single transaction fee: A fee tied directly to the number of records would impose a heavy burden upon such market participants, in effect penalizing them for their business model and the patterns of ACT usage that it dictates. To avoid this result, the number of ACT records used to calculate each member's share is the *greater of* (i) the number of all types of ACT records (*i.e.,* clearing and non-clearing, tape and non-tape) in which the member is the reporting party, minus the number of ACT records reported for dissemination to the public (*i.e.,* tape records) in which the member is either the reporting party or the contra-party, *or* (ii) the number of ACT records reported for dissemination to the public (*i.e.,* tape records) in which the member is the reporting party. For a firm that frequently uses multiple records to report a single transaction, the first part would result in the greater number, but the subtraction of tape records would offset the double counting that would occur if all ACT records were considered. For a firm that does not frequently use multiple records, the first part would drastically undercount its usage, so the second part (ACT tape records that it reports) provides a better measure of its activity. The number of reports attributed to each member under this formula would then be totaled to determine the percentage of the total attributable to each member.

The regulatory charge assigned to some members may be higher than the implicit fee that they would have ''paid'' under the old system for funding regulation. Although Nasdaq believes that the ultimate goal of an explicit regulatory fee must be to charge each member the regulatory costs to which its activities give rise, the pilot fee that Nasdaq is introducing itself represents a transitional step between the implicit fee and the more precisely calibrated fee that Nasdaq will develop this year. Accordingly, to ease the transition, the proposed rule change incorporates a fee reduction, calculated with reference to the difference between a member's regulatory fee and the implicit fee that the member paid, or would have paid, during that month or any preceding month of 2002. Specifically, all members whose regulatory fee in a particular month exceeds the highest implicit fee [13] in that month or any preceding month of 2002 will be eligible to receive a fee reduction in proportion to the member's share of the total impact on adversely affected members. The aggregate amount of the fee reduction per month will be the lesser of (i) the total impact on adversely affected members or (ii) $416,667, an amount that represents Nasdaq's projection of the average monthly difference between the regulatory fee chargeable to members (before the fee reduction) and the increased amount of market data revenue that will be shared with members in the period from June through December 2002 as a result of the proposed rule changes to NASD Rule 7010(a)(2) made by this filing. The fee reduction for a specific member will be determined by multiplying the aggregate amount of fee reduction by a percentage calculated by dividing the impact on the member [14] by the total impact on all adversely affected members.

In addition, Nasdaq will be eliminating the deduction of regulatory charges from the pool of revenue eligible for sharing under its market data revenue sharing program, and increasing the percentage of eligible revenue shared from 80% to 90%. As a result, from Nasdaq's revenue perspective, it is expected that the net effect of all the changes made by this filing will be revenue neutral or revenue diminishing. Particular members, however, may pay more or less, on a net basis, than they would have without these changes.

In particular, members that choose to report a significant number of trades through non-Nasdaq facilities will pay more than under an implicit fee model, but Nasdaq presumes that they choose

[9] These amounts exclude regulatory costs associated with the operation of Nasdaq's OTC Bulletin Board Service and Intermarket Trading System/Computer Assisted Execution System, which are used for trading securities other than Nasdaq-listed securities. The regulatory costs associated with these systems are not being charged directly to members under this proposed rule change.

[10] A greater weight is assigned to the quotation and ACT record components because of the predominance of costs associated with the storage and analysis of quotation and trading data.

[11] In Nasdaq's current quoting environment, a member may display only one two-sided quote per stock. In Nasdaq's future SuperMontage environment, a member may maintain Quotes/Orders at multiple price levels. Accordingly, the best priced Quote/Order on the bid and the offer side of the market will be used to measure quotation activity.

[12] For example, if a member posted quotes in 30 stocks during every day of a month with 22 trading days, the numerator used to calculate its ''position share'' would be 660.

[13] Calculated by multiplying regulatory costs for the month by the member's share of trade activity for the month, measured using the same methodology as under the market data revenue sharing program.

[14] That is, the difference between the member's regulatory fee and the implicit fee that the member paid, or would have paid, during that month or any preceding month of 2002.

to report trades elsewhere in large part because of the market data revenue sharing offered by exchanges where they print trades. The new regulation fee, however, will ensure that such members bear a portion of the cost of the regulatory services that continue to benefit them, their customers, and the market as a whole.

2. Statutory Basis

Nasdaq believes the proposed rule change is consistent with the Act, including section 15A(b)(5) of the Act,[15] which requires that the rules of the NASD provide for the equitable allocation of reasonable fees, dues, and other charges among members and issuers and other persons using any facility or system which the NASD operates or controls, and section 15A(b)(6) of the Act,[16] which requires rules that are not designed to permit unfair discrimination between customers, issuers, brokers or dealers. The regulatory fee is objectively allocated among members based on their quotation activity, ACT reporting activity, and market-making activity during a recent prior period. The level of the fee is reasonable, in that it is designed to pass through the costs that Nasdaq will incur during the last eight months of 2002 to regulate the market. Moreover, Nasdaq expects that the increase in the level of market data revenue sharing available to members will be at least equal to the total regulatory charges. Accordingly, the proposed rule change is expected to be revenue-neutral or revenue diminishing from Nasdaq's perspective.

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

Nasdaq believes that the proposed rule change will not 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 proposed rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act [17] and subparagraph (f)(2) of Rule 19b–4 thereunder,[18] because it establishes or changes a due, fee, or other charge imposed by the Association. 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 proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. 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 will also be available for inspection and copying at the principal office of the Association. All submissions should refer to file number SR–NASD–2002–61 and should be submitted by June 7, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[19]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–12336 Filed 5–16–02; 8:45 am]

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[15] 15 U.S.C. 78o–3(b)(5).

[16] 15 U.S.C. 78o–3(b)(6).

[17] 15 U.S.C. 78s(b)(3)(A)(ii).

[18] 17 CFR 240.19b-4(f)(2).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45915; File No. SR–NASD–2001–44]

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. To Allow Electronic Communications Networks and Alternative Trading Systems To Participate in the Over-the-Counter Bulletin Board

May 10, 2002.

I. Introduction

On July 12, 2001, 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'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to allow electronic communications networks (''ECNs'') and alternative trading systems (''ATSs'') to participate in the Over-the-Counter Bulletin Board (''OTCBB''). On August 28, 2001, the Commission published notice of the proposal in the **Federal Register**.[3] The Commission received seven comments on the proposal. On January 18, 2002, the NASD submitted Amendment No. 1 to the proposal.[4] This notice and order approves the proposed rule change, solicits comment from interested persons on Amendment No. 1, and approves Amendment No. 1 on an accelerated basis.

II. Description of the Proposal

The OTCBB is an automated quotation service that displays real-time quotes, last-sale prices, and volume information in over-the-counter (''OTC'') equity securities.[5] The OTCBB,

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 44732 (August 22, 2001), 66 FR 45348.

[4] *See* Letter from Teri Nelson Jacoby, Office of General Counsel, Nasdaq, to Katherine A. England, Division of Market Regulation (''Division''), Commission, dated January 18, 2002 (''Amendment No. 1''). In Amendment No. 1, the NASD proposed additional rule text to clarify that an ATS or ECN that participates on the OTCBB must reflect non-subscriber access or post-transaction fees in its posted quote on the OTCBB.

[5] An OTC equity security generally is an equity security that is not listed or traded on Nasdaq or a national securities exchange. OTCBB securities include national, regional, and foreign equities, warrants, units, American Depositary Receipts, and direct participation programs securities.