

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. 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. 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 NASD. All submissions should refer to File No. SR-NASD-2002-183 and should be submitted by January 28, 2003.

IV. Commission's Finding and Order Granting Accelerated Approval of a Proposed Rule Change

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of section 15A of the Act⁹ and the rules and regulations thereunder applicable to a national securities association. Specifically, the Commission finds that the proposed rule change, as amended, is consistent with section 15A(b)(5) of the Act,¹⁰ in that the proposal provides for an equitable allocation of reasonable dues, fees, and other charges among issuers using Nasdaq's facility and/or systems. As represented by Nasdaq, the Commission notes that the proposed fee increase in Nasdaq SmallCap entry and annual fees reflect the additional costs associated with operating Nasdaq SmallCap market, including various regulatory and client services provided to issuers. Namely, Nasdaq represented that it has continued to invest in market services and market quality improvements such as SuperMontage, the Nasdaq Market Intelligence Desk,

and enhancements to NASDAQ.com. Furthermore, as represented by Nasdaq, the increase of a non-refundable application fee from \$1,000 to \$5,000 covers the processing of an issuer application for entry, especially in those instances where an issuer has withdrawn its application or has been denied listing.

The Commission also finds that the proposed rule change consistent with section 15A(b)(6) of the Act¹¹ because the proposed rules promote just and equitable principles of trade, and protect investors and the public interest. In particular, the Commission notes that Nasdaq should provide greater transparency to issuers by codifying its regular practice of charging a \$1,000 fee for the inclusion of any class of rights. Finally, Nasdaq has represented that it would assess appropriate entry fees based on the fee schedule in effect at the time of listing, rather than the application date.

Nasdaq seeks to implement that proposed fees on January 1, 2003. In order to facilitate the implementation of the new fee schedule and ease administration of the fees, Nasdaq has requested that the Commission find good cause to approve the proposed rule change, as amended, before the thirtieth day after the date of publication of notice in the **Federal Register**. The Commission finds good cause to approve the proposed rule change, as amended, prior to the thirtieth day after publication in the **Federal Register**. The Commission believes that granting accelerated approval to the amended proposal will allow Nasdaq to implement the new fees by January 1, 2003 and will provide issuers with notice and an opportunity to budget for additional costs.

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,¹² that the proposed rule change (SR-NASD-2002-183) is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹³

Jill M. Peterson,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47112; File No. SR-NASD-2002-182]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Extending Existing Pilot Program for the Regulatory Fee and Trading Activity Fee

December 31, 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 December 26, 2002, the National Association of Securities Dealers, Inc. ("NASD" or "Association") 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 NASD. The Association filed the proposal pursuant to Section 19(b)(3)(A) of the Act,³ and Rule 19b-4(f)(6) thereunder,⁴ 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

The NASD proposes to extend the pilot program for the Trading Activity Fee ("TAF") through March 1, 2003. The TAF structure as originally proposed in SR-NASD-2002-98⁵ (and modified in SR-NASD-2002-147⁶) is set to expire on December 31, 2002. Upon expiration of SR-NASD-2002-98, the member regulatory pricing structure was to revert to Section 8 of Schedule A of the By-Laws as amended. However, the NASD has determined not to revert to the previous pricing structure, but rather to extend the TAF pilot program, to maintain the status quo and to allow the Commission more time to review issues presented by the TAF proposed rule change.⁷ The NASD proposes no substantive changes to the existing pilot

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

⁵ Securities Exchange Act Release No. 46416 (August 23, 2002), 67 FR 55901 (August 30, 2002).

⁶ Securities Exchange Act Release No. 46818 (November 12, 2002), 67 FR 69782 (November 19, 2002).

⁷ In addition, many NASD member firms have already made programming changes to pay in conformity with the TAF structure that was effective on October 1, 2002.

⁹ 15 U.S.C. 78o-3.

¹⁰ 15 U.S.C. 78o-3(b)(5).

¹¹ 15 U.S.C. 78o-3(b)(6).

¹² 15 U.S.C. 78s(b)(2).

¹³ 17 CFR 200.30-3(a)(12).

program, other than to extend its operation through March 1, 2003.

The text of the proposed rule change is available at the NASD 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, the NASD 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 Association 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

On July 24, 2002, the NASD filed SR-NASD-2002-98, which proposed a new member regulatory pricing structure.⁸ The proposed rule change was filed for immediate effectiveness pursuant to Section 19(b)(3)(A)(ii) of the Act⁹ and Rule 19b-4(f)(2)¹⁰ thereunder. SR-NASD-2002-98 is currently in effect. Assessments under the new TAF were effective as of October 1, 2002.¹¹ On October 18, 2002, the NASD established a sunset provision whereby the TAF would cease to exist after December 31, 2002.¹² Upon expiration of SR-NASD-2002-98, the member regulatory pricing was to revert to Section 8 of Schedule A of the By-Laws as amended.

The NASD has determined not to revert to the previous pricing structure established in Section 8 of Schedule A of the NASD By-Laws, but rather to

extend the TAF pilot program in order to maintain the status quo and to allow the Commission more time to review issues presented by the TAF proposed rule change. Accordingly, the NASD filed the instant proposed rule change to extend the TAF structure pilot program through March 1, 2003. The NASD proposes no other changes to the pilot, other than to extend its operation through March 1, 2003.

2. Statutory Basis

The NASD believes that the proposed rule change is consistent with the Act, including Section 15A(b)(5) of the Act,¹³ which requires, among other things, that the NASD's rules provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system that the NASD operates or controls.

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

The NASD 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, as amended.

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

Written comments on this proposed rule change were neither solicited nor received. Written comments have been solicited on SR-NASD-2002-98, SR-NASD-2002-147 and SR-NASD-2002-148. These comments are not addressed herein, but are, as appropriate, discussed in connection with the respective rule filings.

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

Because the foregoing proposed rule change does not:

- (i) Significantly affect the protection of investors or the public interest;
- (ii) Impose any significant burden on competition; and

(iii) Become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁴ and Rule 19b-4(f)(6) thereunder.¹⁵ 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.

The NASD has requested that the Commission waive the five-day pre-filing notice requirement and the 30-day operative delay. The Commission believes waiving the five-day pre-filing notice requirement and the 30-day operative delay is consistent with the protection of investors and the public interest. In particular, acceleration of the operative date will allow the pilot to operate without interruption. For these reasons, the Commission designates the proposal to be effective and operative upon filing with the Commission.¹⁶

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-2002-182 and should be submitted by January 28, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁷

Margaret H. McFarland,

Deputy Secretary.

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⁸ Securities Exchange Act Release No. 46416 (August 23, 2002), 67 FR 55901 (August 30, 2002)(SR-NASD-2002-98). See also Securities Exchange Act Release No. 46417 (August 23, 2002), 67 FR 55893 (August 30, 2002)(SR-NASD-2002-99). The NASD also published two *Notices to Members* describing the proposed changes and addressing interpretive questions posed by NASD members. See *Notice to Members 02-41* (July 2002), and *Notice to Members 02-63* (September 2002).

⁹ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁰ 17 CFR 240.19b-4(f)(2).

¹¹ Member firms must pay the TAF for the first quarter starting October 1, 2002 by no later than January 15, 2003.

¹² At the same time, the NASD filed a new proposed rule change (SR-NASD-2002-148), substantially similar to SR-NASD-2002-98 but filed under Section 19(b)(1) of the Act, to allow for additional notice and comment. The NASD sought Commission approval of SR-NASD-2002-148 with an implementation date of December 31, 2002. To date, this proposed rule filing is pending with the Commission.

¹³ 15 U.S.C. 78o-3(b)(5).

¹⁴ 15 U.S.C. 78s(b)(3)(A).

¹⁵ 17 CFR 240.19b-4(f)(6).

¹⁶ For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁷ 17 CFR 200.30-3(a)(12).