

May 19, 2003

Katherine A. England
Assistant Director
Division of Market Regulation
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-1001

Re: File No. SR-NASD-2002-148 – Revisions to NASD By-Laws for the Regulatory Fee and the Trading Activity Fee; Amendment No. 4

Dear Ms. England:

Pursuant to Rule 19b-4, enclosed please find the above-numbered rule filing. Also enclosed is a 3-1/2" disk containing the rule filing in Microsoft Word 7.0 to facilitate production of the Federal Register release.

If you have any questions, please contact Kathleen A. O'Mara, Associate General Counsel, Office of General Counsel, Regulatory Policy and Oversight, at (202) 728-8056; e-mail kathleen.omara@nasd.com. The fax number of the Office of General Counsel is (202) 728-8264.

Very truly yours,

Barbara Z. Sweeney
Senior Vice President
and Corporate Secretary

Enclosures

cc: Joseph Morra, Esq.

File No. SR-NASD-2002-148
Amendment No. 4
Consists of 16 Pages
May 19, 2003

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C.

Form 19b-4

Proposed Rule Change

by

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

Pursuant to Rule 19b-4 under the
Securities Exchange Act of 1934

1. Text of Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ the National Association of Securities Dealers, Inc. (“NASD”) is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed change to Schedule A of the NASD By-Laws. Specifically, NASD is proposing to amend Section 2(b)(2) of Schedule A to exempt members’ listed options transactions from the Trading Activity Fee (“TAF”) when NASD is not the designated options examining authority (“DOEA”) for that member firm. Below is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are bracketed.

* * * * *

Schedule A to NASD By-Laws

* * * * *

Section 2 – Member Regulatory Fees

(a) No Change.

(b) No Change.

(1) No Change.

(2) Transactions exempt from the fee. The following shall be exempt from the Trading Activity Fee:

(i) Transactions in securities offered pursuant to an effective registration statement under the Securities Act of 1933 (except transactions in put or call options issued by the Options Clearing Corporation) or offered in accordance with

¹ 15 U.S.C. § 78s(b)(1).

an exemption from registration afforded by Section 3(a) or 3(b) thereof, or a rule thereunder;

(ii) Transactions by an issuer not involving any public offering within the meaning of Section 4(2) of the Securities Act of 1933;

(iii) The purchase or sale of securities pursuant to and in consummation of a tender or exchange offer;

(iv) The purchase or sale of securities upon the exercise of a warrant or right (except a put or call), or upon the conversion of a convertible security;

(v) Transactions that are executed outside the United States and are not reported, or required to be reported, to a transaction reporting association as defined in Rule 11Aa3-1 and any approved plan filed thereunder;

(vi) Proprietary transactions by a firm that is a member of both NASD and a national securities exchange, effected in its capacity as an exchange specialist or market maker, that are subject to Securities Exchange Act of 1934, Section 11(a) and Rule 11a1-1(T)(a) thereunder; however this exemption does not apply to other transactions permitted by Section 11(a) such as bona fide arbitrage or hedge transactions;

(vii) Transactions by a firm that is a floor based broker and that is a member of both NASD and a national securities exchange provided that the floor based broker qualifies for exemption from NASD membership under Exchange Act Rule 15b9-1;

(viii) Transactions in conventional options;

(ix) Transactions in options and futures involving narrow and broad based indexes; [and]

(x) Transactions in security futures held in futures accounts[.]; and

(xi) Transactions in exchange listed options effected by a member when NASD is not the designated options examining authority for that member.

NASD may exempt other securities and transactions as it deems appropriate.

(3) No change.

(4) No change.

* * * * *

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

(a) The underlying proposed rule change was approved by the NASD Board of Governors at its meeting on May 23, 2002, which authorized the filing of the rule change with the SEC. It was reviewed by the Small Firm Advisory Board on May 8, 2002. No other action by NASD is necessary for the filing of this proposed rule change. Section 1(a)(ii) of Article VII of the NASD By-Laws permits the NASD Board of Governors to adopt amendments to NASD Rules without recourse to the membership for approval. NASD will announce the proposed rule change in a Notice to Members to be published no later than 60 days following Commission approval. The proposed effective date for this amendment is January 1, 2004.

(b) Questions regarding this rule filing may be directed to Kathleen A. O'Mara, Associate General Counsel, Office of General Counsel, Regulatory Policy and Oversight, at (202) 728-8056.

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

(a) Purpose

On July 24, 2002, NASD filed SR-NASD-2002-98, which proposed a new member regulatory pricing structure, including a new TAF to replace the existing trading fee contained in Section 8 of Schedule A to the NASD By Laws.² The proposed rule change was filed with the SEC for immediate effectiveness pursuant to Section 19(b)(3)(A)(ii) of the Securities Exchange Act of 1934³ and Rule 19b-4(f)(2) thereunder.⁴ Assessments under the new TAF were effective as of October 1, 2002, payable January 15, 2003.⁵ On October 18, 2002, NASD filed SR-NASD-2002-148, sunsetting the TAF effective December 31, 2002 and re-filing the proposal under 19(b)(2) of the Act to allow for additional member comment.⁶ On December 24, 2002, NASD extended the TAF in its current form as a pilot program through March 1, 2003. NASD subsequently has extended the pilot program through June 1, 2003.

In response to comments, NASD is proposing to amend Section 2(b)(2) of Schedule A to exempt members' otherwise eligible listed options transactions from the TAF when NASD is not the DOEA. NASD has direct sales practice and other regulatory responsibility over its members'

² Securities Exchange Act Rel. No. 46416 (Aug. 23, 2002), 67 FR 55901 (Aug. 30, 2002) (SR-NASD-2002-98). See also Securities Exchange Act Rel. No. 46417 (Aug. 23, 2002), 67 FR 55893 (Aug. 30, 2002) (SR-NASD-2002-99). NASD also published three Notices to Members describing the proposed changes and addressing interpretive questions posed by NASD members. See Notice to Members 02-41 (July 2002); Notice to Members 02-63 (September 2002); and Notice to Members 02-75 (November 2002).

³ 15 U.S.C. § 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

⁵ Member firms were required to pay the TAF in accordance with the pilot program (for the first quarter starting October 1, 2002) by no later than January 15, 2003 and, thereafter, on a monthly basis.

⁶ 15 U.S.C. § 78s(b)(2).

non-floor based transactions in listed options, making the assessment of fees on those transactions appropriate under the Act. However, NASD acknowledges that its regulatory burden in this area is alleviated somewhat by its participation in the Options Self-Regulatory Council, a plan filed with the SEC under Rule 17d-2 of the Act (“Plan”).⁷ Under the Plan, each broker-dealer that conducts a public options business is allocated to one of the Plan participants, who then assumes primary options sales practice regulatory responsibility for that firm for a two-year period. Currently, NASD is DOEA for approximately two-thirds of the 450 broker-dealers conducting a public options business, with the remaining firms divided among six other SROs.

NASD acknowledges that the Plan serves to reduce its options sales practice regulatory responsibility and expense. NASD also has become aware of fees assessed by other SROs on joint members solely as a result of the allocation of those firms to those SROs.⁸ As a result, NASD believes that it would be consistent with the underlying purposes of the Plan for those NASD member firms not designated to NASD to be exempt from the listed options portion of the TAF.⁹ Because NASD strongly believes that the fee as it currently is assessed is consistent with the Act, and to provide member firms with time to make necessary programming and billing changes, NASD proposes that the exemption not take effect until January 1, 2004.

⁷ Securities Exchange Act Rel. No. 46800 (Nov. 8, 2002), 67 FR 69774 (Nov. 19, 2002).

⁸ *See e.g.* Securities Exchange Act Rel. No. 47577 (March 26, 2003), 68 FR 16109 (Apr. 2, 2003) (SR-PCX-2003-03) (Pacific Exchange rule filing establishing a DOEA fee).

⁹ Notwithstanding its participation in the Plan, NASD does not believe it is precluded from seeking further amendments to the TAF with respect to the reduction or elimination of the proposed exemption contained in this rule filing in the event of a change of factors surrounding its sales practice and other regulatory responsibilities.

(b) Statutory Basis

NASD believes that the proposed rule change is consistent with the Act, including Section 15A(b)(5) of the Act,¹⁰ which requires, among other things, that 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 NASD operates or controls.

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

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.

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

Written comments on this amendment were neither solicited nor received. Written comments, however, have been solicited by publication in the Federal Register of SR-NASD-2002-98, SR-NASD-2002-147, SR-NASD-2002-148, SR-NASD-2002-182, SR-NASD-2003-26, and SR-NASD-2003-73. This amendment is in response to comments filed in connection with SR-NASD-2002-98 and SR-NASD-2002-148.

6. Extension of Time Period for Commission Action

Not applicable.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

NASD requests the Commission to find good cause pursuant to Section 19(b)(2) for approving both the proposed amendment and the permanent rule filing prior to the 30th day after

¹⁰ 15 U.S.C. § 78o-3(b)(5).

its publication in the Federal Register. NASD strongly believes that the fee is consistent with the Act, and would like the rule filing approved prior to the expiration of the TAF pilot program on June 1, 2003.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Exhibits

1. Completed notice of proposed rule change for publication in the Federal Register.

Pursuant to the requirements of the Securities Exchange Act of 1934, NASD has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

NASD

BY: _____
Barbara Z. Sweeney, Senior Vice President and
Corporate Secretary

Date: May 19, 2003

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34- ; File No. SR-NASD-2002-148)

Self-Regulatory Organizations; Notice of Filing of Amendment No. 4 to Proposed Rule Change by National Association of Securities Dealers, Inc. Establishing the Regulatory Fee and the Trading Activity Fee as a Pilot Program

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 , the National Association of Securities Dealers, Inc. (“NASD”), filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. 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

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),³ the National Association of Securities Dealers, Inc. (“NASD”) is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed change to Schedule A of the NASD By-Laws. Specifically, NASD is proposing to amend Section 2(b)(2) of Schedule A to exempt members’ listed options transactions from the Trading Activity Fee (“TAF”) when NASD is not the designated options examining authority (“DOEA”) for that member firm. Below

¹ 15 U.S.C. § 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. § 78s(b)(1).

is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are bracketed.

* * * * *

Schedule A to NASD By-Laws

* * * * *

Section 2 – Member Regulatory Fees

(a) No Change.

(b) No Change.

(1) No Change.

(2) Transactions exempt from the fee. The following shall be exempt from the Trading Activity Fee:

(i) Transactions in securities offered pursuant to an effective registration statement under the Securities Act of 1933 (except transactions in put or call options issued by the Options Clearing Corporation) or offered in accordance with an exemption from registration afforded by Section 3(a) or 3(b) thereof, or a rule thereunder;

(ii) Transactions by an issuer not involving any public offering within the meaning of Section 4(2) of the Securities Act of 1933;

(iii) The purchase or sale of securities pursuant to and in consummation of a tender or exchange offer;

(iv) The purchase or sale of securities upon the exercise of a warrant or right (except a put or call), or upon the conversion of a convertible security;

(v) Transactions that are executed outside the United States and are not reported, or required to be reported, to a transaction reporting association as defined in Rule 11Aa3-1 and any approved plan filed thereunder;

(vi) Proprietary transactions by a firm that is a member of both NASD and a national securities exchange, effected in its capacity as an exchange specialist or market maker, that are subject to Securities Exchange Act of 1934, Section 11(a) and Rule 11a1-1(T)(a) thereunder; however this exemption does not apply to other transactions permitted by Section 11(a) such as bona fide arbitrage or hedge transactions;

(vii) Transactions by a firm that is a floor based broker and that is a member of both NASD and a national securities exchange provided that the floor based broker qualifies for exemption from NASD membership under Exchange Act Rule 15b9-1;

(viii) Transactions in conventional options;

(ix) Transactions in options and futures involving narrow and broad based indexes; [and]

(x) Transactions in security futures held in futures accounts[.]; and

(xi) Transactions in exchange listed options effected by a member when NASD is not the designated options examining authority for that member.

NASD may exempt other securities and transactions as it deems appropriate.

(3) No change.

(4) No change.

* * * * *

(b) Not applicable.

(c) Not applicable.

II. SELF-REGULATORY ORGANIZATION'S STATEMENT OF THE PURPOSE OF, AND STATUTORY BASIS FOR, THE PROPOSED RULE CHANGE

In its filing with the Commission, 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. NASD 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, NASD filed SR-NASD-2002-98, which proposed a new member regulatory pricing structure, including a new TAF to replace the existing trading fee contained in Section 8 of Schedule A to the NASD By Laws.⁴ The proposed rule change was filed with the SEC for immediate effectiveness pursuant to Section 19(b)(3)(A)(ii) of the Securities Exchange Act of 1934⁵ and Rule 19b-4(f)(2) thereunder.⁶ Assessments under the new TAF were effective

⁴ Securities Exchange Act Rel. No. 46416 (Aug. 23, 2002), 67 FR 55901 (Aug. 30, 2002) (SR-NASD-2002-98). See also Securities Exchange Act Rel. No. 46417 (Aug. 23, 2002), 67 FR 55893 (Aug. 30, 2002) (SR-NASD-2002-99). NASD also published three Notices to Members describing the proposed changes and addressing interpretive questions posed by NASD members. See Notice to Members 02-41 (July 2002); Notice to Members 02-63 (September 2002); and Notice to Members 02-75 (November 2002).

⁵ 15 U.S.C. § 78s(b)(3)(A)(ii).

⁶ 17 CFR 240.19b-4(f)(2).

as of October 1, 2002, payable January 15, 2003.⁷ On October 18, 2002, NASD filed SR-NASD-2002-148, sunsetting the TAF effective December 31, 2002 and re-filing the proposal under 19(b)(2) of the Act to allow for additional member comment.⁸ On December 24, 2002, NASD extended the TAF in its current form as a pilot program through March 1, 2003. NASD subsequently has extended the pilot program through June 1, 2003.

In response to comments, NASD is proposing to amend Section 2(b)(2) of Schedule A to exempt members' otherwise eligible listed options transactions from the TAF when NASD is not the DOEA. NASD has direct sales practice and other regulatory responsibility over its members' non-floor based transactions in listed options, making the assessment of fees on those transactions appropriate under the Act. However, NASD acknowledges that its regulatory burden in this area is alleviated somewhat by its participation in the Options Self-Regulatory Council, a plan filed with the SEC under Rule 17d-2 of the Act ("Plan").⁹ Under the Plan, each broker-dealer that conducts a public options business is allocated to one of the Plan participants who then assumes primary options sales practice regulatory responsibility for that firm for a two-year period. Currently, NASD is DOEA for approximately two-thirds of the 450 broker-dealers conducting a public options business, with the remaining firms divided among six other SROs.

NASD acknowledges that the Plan serves to reduce its options sales practice regulatory responsibility and expense. NASD also has become aware of fees assessed by other SROs on

⁷ Member firms were required to pay the TAF in accordance with the pilot program (for the first quarter starting October 1, 2002) by no later than January 15, 2003 and, thereafter, on a monthly basis.

⁸ 15 U.S.C. § 78s(b)(2).

⁹ Securities Exchange Act Rel. No. 46800 (Nov. 8, 2002), 67 FR 69774 (Nov. 19, 2002).

joint members solely as a result of the allocation of those firms to those SROs.¹⁰ As a result, NASD believes that it would be consistent with the underlying purposes of the Plan for those NASD member firms not designated to NASD to be exempt from the listed options portion of the TAF.¹¹ Because NASD strongly believes that the fee as it currently is assessed is consistent with the Act, and to provide member firms with time to make necessary programming and billing changes, NASD proposes that the exemption not take effect until January 1, 2004.

(2) Statutory Basis

NASD believes that the proposed rule change is consistent with the Act, including Section 15A(b)(5) of the Act,¹² which requires, among other things, that 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 NASD operates or controls.

(B) Self-Regulatory Organization's Statement on Burden on Competition

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 particular proposed rule change were neither solicited nor received. Written comments, however, have been solicited by publication in the Federal Register

¹⁰ See e.g. Securities Exchange Act Rel. No. 47577 (March 26, 2003), 68 FR 16109 (Apr. 2, 2003) (SR-PCX-2003-03) (Pacific Exchange rule filing establishing a DOEA fee).

¹¹ Notwithstanding its participation in the Plan, NASD does not believe it is precluded from seeking further amendments to the TAF with respect to the reduction or elimination of the proposed exemption contained in this rule filing in the event of a change of factors surrounding its sales practice and other regulatory responsibilities.

¹² 15 U.S.C. § 78o-3(b)(5).

of SR-NASD-2002-98, SR-NASD-2002-147, SR-NASD-2002-148, SR-NASD-2002-182, SR-NASD-2003-26, and SR-NASD-2003-73. This amendment is in response to comments filed in connection with SR-NASD-2002-98 and SR-NASD-2002-148.

III. DATE OF EFFECTIVENESS OF THE PROPOSED RULE CHANGE AND TIMING FOR COMMISSION ACTION

NASD has requested that the Commission find good cause pursuant to Section 19(b)(2) for approving the proposed rule change prior to the 30th day after publication in the Federal Register. The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to NASD and, in particular, the requirements of Section 15A and the rules and regulations thereunder. The Commission finds good cause for approving the proposed rule change prior to the 30th day after the date of publication of the notice of filing thereof in that accelerated approval of the rule filing will ensure that the TAF, currently a pilot program and due to expire on June 1, 2003, will not lapse. In addition, the Commission notes that the proposed amendment exempting listed options transactions will not take effect until January 1, 2004. This will allow NASD member firms to make necessary programming and billing changes.

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- A. by order approve such proposed rule change, or
- B. institute proceedings to determine whether the proposed rule change should be disapproved.

NASD proposes that this amendment become effective on January 1, 2004.

IV. SOLICITATION OF COMMENTS

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. 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 NASD. All submissions should refer to the file number in the caption above and should be submitted by [insert date 21 days from the date of publication].

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

Margaret H. McFarland
Deputy Secretary

¹³ 17 CFR 200.30-3(a)(12).