

securities frequently involves extensive product-focused consultations between the Nasdaq staff and the staff of the Commission and, in many cases, product-specific rule change filings by Nasdaq with the Commission. As the value of such securities is usually linked to the value of other securities or indexes, Nasdaq examines (as part of the initial listing process) and monitors the activity in (on an on-going basis) such "linked" securities and indexes. Nasdaq believes that the new application fee and the revised annual fees will better reflect the actual level and cost of the resources that Nasdaq devotes to listing these securities and overseeing market activities directly or indirectly (*i.e.*, by virtue of linked securities or indexes) related to these securities and their issuers.

Nasdaq believes that the proposed fee levels are both reasonable in light of the associated costs and at the same time responsive to the need to remain competitive relative to other markets. In this regard, Nasdaq notes that the proposed fees will be similar to the existing applicable American Stock Exchange ("AMEX") fees.<sup>5</sup>

Nasdaq proposes to make all changes effective upon Commission approval, with the exception of the annual fee change, which will become effective on January 1, 2005.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,<sup>6</sup> in general and with section 15A(b)(5) of the Act,<sup>7</sup> in particular, in that it provides 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*

Nasdaq 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 were neither solicited nor received.

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

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.

### **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-2004-166 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-2004-166. 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 Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such 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-2004-166 and should be submitted on or before December 1, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>8</sup>

**J. Lynn Taylor,**

*Assistant Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-50626; File No. SR-NASD-2004-133]

### **Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Proposed Amendments to NASD Rule 9522 ("Initiation of Eligibility Proceeding; Member Regulation Consideration")**

November 3, 2004.

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 September 1, 2004, the National Association of Securities Dealers, Inc. ("NASD") 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 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**

NASD proposes to amend NASD Rule 9522 ("Initiation of Eligibility Proceeding; Member Regulation Consideration"). The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets.

#### 9500. OTHER PROCEEDINGS

\* \* \* \* \*

<sup>8</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>5</sup> See AMEX Company Guide §§ 140 and 141.

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

<sup>7</sup> 15 U.S.C. 78o-3(b)(5).

9522. Initiation of Eligibility Proceeding; Member Regulation Consideration

(a) through (e)(1) No change.

(e)(2) Matters that may be Approved by the Department of Member Regulation after the Filing of an Application.

The Department of Member Regulation, as it deems consistent with the public interest and the protection of investors, may approve an application filed by a disqualified member or sponsoring member if a disqualified member or disqualified person is subject to one or more of the following conditions but is not otherwise subject to disqualification (other than a matter set forth in subparagraph (e)(1)):

(A) through (C) No change.

(D) The disqualification consists of a court order or judgment of injunction or conviction, and such order or judgment:

(i) No change.

(ii) includes such restrictions or limitations for a specified time period and such time period has elapsed[.]; or

(E) *The disqualified person's functions are purely clerical and/or ministerial in nature.*

\* \* \* \* \*

## 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. 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

NASD's Rule 9520 Series sets forth NASD's eligibility procedures under which persons subject to a statutory disqualification may become or remain associated with a member firm. NASD Rule 9522 specifies when Member Regulation may approve a matter<sup>3</sup> and when the National Adjudicatory Council ("NAC") must consider a matter. The purpose of the proposed rule change to NASD Rule 9522(e)(2) is

<sup>3</sup> Member Regulation does not have the authority to deny an Application or other written request for relief. See NASD Rule 9522(e) and NASD Rule 9523.

to give Member Regulation the authority to approve the MC-400 Applications ("Applications") of statutorily disqualified persons who will be engaged solely in clerical and/or ministerial activities.

Rule 19h-1 under the Act,<sup>4</sup> which prescribes the form and content of, and establishes the mechanism by which the SEC reviews, proposals submitted by NASD (and other self-regulatory organizations) to allow persons subject to statutory disqualification to become or remain associated with member firms, exempts from the filing requirement persons who are statutorily disqualified but who perform only clerical or ministerial functions.<sup>5</sup> Currently, the NASD Rule 9520 Series requires the NAC (after a hearing and consideration by the Statutory Disqualification ("SD") Committee) to determine whether a statutorily disqualified person may associate with a member firm in a purely clerical and/or ministerial capacity.

NASD wishes to be able to handle these matters more expeditiously, while also retaining the necessary ability to conduct a thorough review to determine whether a disqualified person may enter or continue in the securities industry in a clerical and/or ministerial capacity. Therefore, under the proposed rule change, the sponsoring firm would continue to be required to file an Application on behalf of the disqualified individual seeking to engage in solely clerical and/or ministerial activities. Member Regulation would have the authority under amended NASD Rule 9522(e)(2) to approve the Application. In the event Member Regulation does not approve the Application, the sponsoring member would have the right to proceed under Rule 9524 (*i.e.*, to have the matter decided by the NAC after a hearing and consideration by the SD Committee).<sup>6</sup>

If Member Regulation determines that the Application should be approved, but with specific supervisory requirements,

<sup>4</sup> 17 CFR 240.19h-1.

<sup>5</sup> Rule 19h-1(a)(2) under the Act specifies that notices must be filed with the Commission if, among other things, a disqualified person " \* \* \* controls [the] member, is a general partner or officer (or person occupying a similar status or performing a similar function) of [the] member, is an employee who, on behalf of [the] member, is engaged in securities advertising, public relations, research, sales, trading, or training or supervision of other employees who engage or propose to engage in such activities, except clerical and ministerial persons engaged in such activities, or is an employee with access to funds, Securities or books and records, \* \* \* "

<sup>6</sup> Member Regulation also retains the discretion to refer any matter to the NAC, rather than exercise its authority under NASD Rule 9522 to review an Application or other request for relief.

the parties would have the option of proceeding under NASD Rule 9523. NASD Rule 9523 provides that the Chairman of the Statutory Disqualification Committee ("Chairman"), acting on behalf of the NAC, may accept a letter indicating that the sponsoring firm and Member Regulation have consented to the imposition of an agreed-upon supervisory plan. The Chairman also has the option of rejecting the plan or referring the matter to the NAC. The plan is deemed final if it is accepted by the NAC or the Chairman. If the parties cannot agree on a supervisory plan, the sponsoring member may request NAC consideration of the matter under NASD Rule 9524.

Should the Commission approve this proposed rule change, NASD will announce the effective date of the proposed rule change in a *Notice to Members* to be published no later than 60 days following Commission approval. The effective date will be 30 days following publication of the *Notice to Members* announcing Commission approval.

#### 2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>7</sup> which requires, among other things, that NASD rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest and Section 15A(b)(8) of the Act,<sup>8</sup> which requires that NASD rules provide a fair procedure for the denial of membership to any person seeking membership therein. NASD believes that its proposed rule change is consistent with the provisions of the Act noted above in that it provides for a fair procedure for determining whether a statutorily disqualified person may participate in the securities industry in a clerical and/or ministerial capacity.

### 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.

<sup>7</sup> 15 U.S.C. 78o-3(b)(6).

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

*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**

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.

**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 No. SR-NASD-2004-133 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-2004-133. 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 Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of 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 No. SR-NASD-2004-133 and should be submitted on or before December 1, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

**J. Lynn Taylor,**

*Assistant Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-50636; File No. SR-NASD-2004-161]

**Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Establish a Pilot Program Waiving Fees and Credits for Orders and Quotes Executed in the Nasdaq Opening Cross**

November 4, 2004.

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 October 22, 2004, 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 under section 19(b)(3)(A)(ii) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the rule effective upon Commission receipt of this filing. The Commission is publishing this notice to solicit

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

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

comments on the proposed rule change from interested persons.

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

Nasdaq is filing this proposed rule change to waive, for a pilot period of three months, the Nasdaq Market Center execution fees and credits for those quotes and orders executed in the Nasdaq Opening Cross. The pilot program will commence when Nasdaq implements the Opening Cross.

The text of the proposed rule change is below. Proposed new language is in italics.<sup>5</sup>

\* \* \* \* \*

**Rule 7010. System Services**

(a)-(h) No Change.

(i) Nasdaq Market Center order execution.

(1)-(3) No Change.

(4) *Opening Cross*

*For a period of three months commencing on the date Nasdaq implements its Opening Cross (as described in Rule 4704(d)), members shall not be charged Nasdaq Market Center execution fees, or receive Nasdaq Market Center liquidity provider credits, for those quotes and orders executed in the Nasdaq Opening Cross.*

(j)-(u) No change.

\* \* \* \* \*

**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**

The Commission recently approved the Nasdaq Opening Cross, which is a new process for determining the Nasdaq Official Opening Price ("NOOP") for the

<sup>5</sup> The proposed rule change is marked to show changes to Rule 7010(i) as currently reflected in the NASD Manual available at <http://www.nasd.com>. There are no other pending or recently approved rule filings that would affect the text of Rule 7010(i).