

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-53644; File No. SR-NASD-2006-048)

April 13, 2006

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto to Modify Order Delivery Charges for Orders Delivered to Nasdaq Market Center Participants

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 April 7, 2006, 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. On April 12, 2006, Nasdaq filed Amendment No. 1 to the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

Nasdaq proposes to modify the imposition of fees for orders delivered to Nasdaq Market Center participants that elect to have orders delivered to their Quotes/Orders through the Nasdaq Market Center. Nasdaq plans to implement the proposed rule change, as amended, immediately upon approval by the Commission, if the Commission grants approval. The text of the proposed rule change is below. Proposed new language is underlined; proposed deletions are in [brackets].

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

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

<sup>3</sup> In Amendment No. 1, Nasdaq made non-substantive technical changes to clarify its Statement on Burden on Competition and to conform certain language of the proposed rule text to the current NASD Rule 7010.

**7010. System Services**

(a) – (h) No Change

**(i) Nasdaq Market Center, Brut, and Inet Order Execution and Routing**

(1) The following charges shall apply to the use of the order execution and routing services of the Nasdaq Market Center, Brut, and Inet (the "Nasdaq Facilities") by members for all Nasdaq-listed securities subject to the Nasdaq UTP Plan and for Exchange-Traded Funds that are not listed on Nasdaq. The term "Exchange-Traded Funds" shall mean Portfolio Depository Receipts, Index Fund Shares, and Trust Issued Receipts as such terms are defined in Rule 4420(i), (j), and (l), respectively.

**Order Execution**

Order that accesses the Quote/Order of a market participant that does not charge an access fee to market participants accessing its Quotes/Orders through the Nasdaq Facilities:	
Charge to member entering order:	

Members with an average daily volume through the Nasdaq Facilities in all securities during the month of (i) more than 30 million shares of liquidity provided, and (ii) more than 50 million shares of liquidity accessed and/or routed	\$0.0028 per share executed (or, in the case of executions against Quotes/Orders at less than \$1.00 per share, 0.1% of the total transaction cost)
Other members	\$0.0030 per share executed (or, in the case of executions against Quotes/Orders at less than \$1.00 per share, 0.1% of the total transaction cost)
Credit to member providing liquidity:	
Members with an average daily volume through the Nasdaq Facilities in all securities during the month of more than 30 million shares of liquidity provided	\$0.0025 per share executed (or \$0, in the case of executions against Quotes/Orders at less than \$1.00 per share)
Other members	\$0.0020 per share executed (or \$0, in the case of executions against Quotes/Orders at less than \$1.00 per share)

Order that [accesses] <u>is delivered</u> to the Quote/Order of a market participant [that charges an access fee to market participants accessing its Quotes/ Orders] through the Nasdaq Facilities:	
Charge to member [entering] <u>receiving</u> order:	
<u>All members</u> [Members with an average daily volume through the Nasdaq Facilities in all securities during the month of more than 500,000 shares of liquidity provided]	\$0.001 per share executed [(but no more than \$10,000 per month)]
[Other members	\$0.001 per share executed]

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The text of the proposed rule change, as amended, is also available on Nasdaq's Internet Web site (<http://www.nasdaq.com>), at Nasdaq's principal office, and at the Commission's Public Reference Room.

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 way fees are imposed for orders delivered to the Quotes/Orders of Nasdaq Market Center participants through the Nasdaq Market Center. Currently, Nasdaq imposes a \$0.001 per share executed delivery fee on Nasdaq Market Center users who enter orders that are delivered to other Nasdaq Market Center participants that charge an access fee. Nasdaq proposes to modify this fee structure so as to impose a \$0.001 delivery fee on participants that receive orders (order delivery participants) from the Nasdaq Market Center and eliminate the \$0.001 delivery fee currently charged against the user who entered the order.

Nasdaq's order delivery service is a service provided to participants that wish to participate in the Nasdaq Market Center liquidity pool and control their execution decision external to Nasdaq systems. Order delivery is not a functionality or service that is required to be offered to participants, and it involves additional direct and indirect costs to operate. Specifically, order delivery consumes excess processing and networking capacity and requires unique specifications, requirements, and system development. These costs are directly related to the firms using order delivery, and the benefits of order delivery accrue directly to the firms participating in the system as order delivery participants.

Nasdaq believes that the proposed fee change more fairly and accurately aligns fees for order delivery within the Nasdaq Market Center by charging the firm that chooses to use order delivery functionality rather than the firm that has its order delivered. This fee modification better reflects the value of the benefits that accrue to order delivery recipients in the system. Furthermore, by no longer assessing a charge to the order entering firm, firms accessing liquidity within the Nasdaq Market Center can be more certain of their cost of using the system.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,<sup>4</sup> in general, and with Section 15A(b)(5) of the Act,<sup>5</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 which the NASD operates or controls. In particular, Nasdaq believes that the proposed rule change more fairly and accurately aligns its fees for delivering orders to Nasdaq Market Center participants with the benefits accruing to entities that receive such order flow. In addition, to the extent that Nasdaq's proposal correctly assigns costs of order delivery to the small number of order delivery recipients that benefit from that functionality, the proposal also is a tangible benefit to the large number of market participants, including public investors, that will no longer be required to subsidize it.

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

Nasdaq does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Assessment of the competitive impact of any proposal must begin with a proper understanding of the notion of competition among market centers. Such understanding must be informed by the

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<sup>4</sup> 15 U.S.C. 78q-3.

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

Act itself and by the commonly accepted principles of U.S. competition law generally (e.g., the Sherman Antitrust Act and the Clayton Act), as applied by the courts and by the Antitrust Division of the U.S. Department of Justice.

The objective of assuring competition among markets is cited in Section 11A of the Act<sup>6</sup> alongside, inter alia, the objectives of achieving “economically efficient execution of securities transactions” and of creating “the opportunity for more efficient and effective market operations.”<sup>7</sup> Not surprisingly, in antitrust law, the notion of competition is also always seen through the prism of economic efficiency. The law views competition as a force that encourages greater efficiency of operations, lower prices, and better service to market participants. Market behavior that promotes efficiency, lower fees, and better service is what both the Act and the antitrust laws seek to encourage.

As the Commission is aware, Nasdaq operates in the intensely competitive global exchange marketplace for listings, financial products, and market services. Nasdaq’s ability to compete in this environment is based on a number of factors including technological quality, fairness and market transparency, price of services, quality of our markets (including spreads and depth of market), customer service, total transaction costs, and speed of our execution services. Relying on its array of services and benefits, Nasdaq competes with exchanges, Electronic Communication Networks (“ECNs”), and other Alternative Trading Systems (“ATs”) for the privilege of providing market and listing services to broker-dealers and issuers. Moreover, within Nasdaq’s own systems, ECNs and other ATs compete with market makers and agency broker-dealers for retail and institutional order flow. It is in both arenas that Nasdaq’s current method of imposing fees for order delivery services negatively impacts the overall competitive

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<sup>6</sup> 15 U.S.C. 78k-1 et seq.

<sup>7</sup> 15 U.S.C. 78k-1(a)(1).

environment. First, Nasdaq's current imposition of fees for order delivery on parties entering orders into the Nasdaq Market Center creates disincentives for order flow providers to send orders to Nasdaq for processing and thereby harms Nasdaq's ability to compete with other markets operated by self-regulatory organizations – none of which provide order delivery, and consequently do not charge for it. For the same reasons, the present non-alignment of order delivery costs with those market participants that actually benefit from this functionality results in an improper subsidization of order delivery ECNs within Nasdaq's own system to the detriment of competing market makers and agency brokers that compete with those order delivery ECNs for retail and institutional order flow.

These negative competitive impacts are mitigated by Nasdaq's fee proposal. By imposing a portion of order delivery costs on firms that take advantage of Nasdaq's order delivery functionality, the proposal promotes efficiency, transparency, and lower prices, and is therefore pro-competitive. This is in contrast to the existing regime where order delivery ECNs are able to free-ride on Nasdaq's neutral execution algorithms that deliver orders to the ECNs without cost and provide them with little incentive to enhance their product or services. Nasdaq's proposal would ensure that ECNs more fully support the costs of Nasdaq's distribution of their services. In return, the overwhelming majority of Nasdaq's users would benefit from lower execution prices (and equally important, from the predictability of trade execution charges), while ECNs would have increased financial incentives to operate more efficiently. Finally, to the extent that the pricing change enhances Nasdaq's ability to attract order flow, the overall competitive environment among market centers would be enhanced. All results, by definition, are pro-competitive.

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

No written comments were solicited or received with respect to the proposed rule change.

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, as amended, or
- (B) institute proceedings to determine whether the proposed rule change, as amended, 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, as amended, 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-2006-048 on the subject line.

Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASD-2006-048. 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, 100 F Street, NE, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. 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-2006-048 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

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

Nancy M. Morris  
Secretary

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<sup>8</sup> 17 CFR 200.30-3(a)(12).