

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58101; File No. SR-NASDAQ-2008-033)

July 3, 2008

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change as Modified by Amendment No. 1 Thereto Related to Submission of Non-Tape Reports

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 April 18, 2008, The NASDAQ Stock Market LLC (“Nasdaq” or the “Exchange”) 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 substantially prepared by the Exchange. On July 3, 2008, Nasdaq filed Amendment No. 1 to the proposed rule change. 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 is proposing a rule change to: (1) offer functionality allowing the submission of non-tape riskless principal reports using Nasdaq’s Automated Confirmation Transaction Service (“ACT”); (2) allow the collection and transfer of fees among Nasdaq members using such submissions, as well as for step-outs; and (3) expand the use of step-outs to include journal entry position movement.

The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets.³

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at <http://nasdaq.complinet.com>.

7038. Step-Outs and Sales Fee Transfers

(a) A Nasdaq member may enter a non-tape, non-clearing submission into the Automated Confirmation Transaction Service (“ACT”) for the purpose of transferring all or a portion of the obligation to pay a Rule 7002 Sales Fee or similar fee of another self-regulatory organization that is associated with a previously executed trade to one or more other Nasdaq members.

(b) A Nasdaq member may enter a non-tape, clearing-only submission into ACT for the purpose of [:

(i) transferring all or a portion of the member’s position in a previously executed trade to one or more other Nasdaq members on whose behalf the trade was executed;

(ii) transferring all or a portion of the member’s position in an account of the member at one clearing broker to an account of the member at another clearing broker] transferring securities from one member to another, provided that the transfer does not constitute a transaction in securities that is otherwise subject to reporting that has not, in fact, been previously and separately reported as a transaction. When submitting a non-tape, clearing-only submission that is used to transfer a position from one member to another member, the submitting member may also indicate that the obligation to pay a Sales Fee or similar fee associated with the position should be transferred.

(c) When ACT is used to transfer a position along with a Sales Fee or similar fee, all parties to the transfer must be Nasdaq members and [must] may be party to an agreement authorizing the transferring party to enter into locked-in trades on its behalf. When ACT is used to transfer Sales Fees or similar fees [without the transfer of the underlying shares] without an accompanying transfer of a securities position, the clearing firms for the trades in question must

be part[y]ies to an agreement authorizing such transfers between themselves and/or the firms on whose behalf they clear trades.

(d) A Nasdaq member is prohibited from using a non-tape, clearing-only ACT submission [entered into ACT] for the purpose of [reporting a trade execution] effecting a transaction required to be trade reported or reporting a trade for regulatory purposes.

Submission of non-tape, clearing, or non-tape, non-clearing records into ACT by Nasdaq members does not satisfy any obligation such members may have to report transactions as required by the applicable rules of other self-regulatory organizations.

(e) – (f) No Change.

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7042. Non-Tape Riskless Submissions

Nasdaq members may make non-tape submissions into the Automated Confirmation Transaction Service (“ACT”) to facilitate riskless transactions taking place on national securities exchanges, or over-the-counter, as follows:

(a) For riskless transactions in which a member, after having received an order to buy a security, purchases the security at the same price to satisfy the order to buy or, after having received an order to sell, sells the security at the same price to satisfy the order to sell, the member may submit, for the offsetting “riskless” portion of the transaction either:

i. a clearing-only report with a capacity indicator of “riskless principal,” “agency,” or “intra-broker” if a clearing report is necessary to clear the transaction; or

ii. a non-tape, non-clearing report with a capacity indicator of “riskless principal,” “agency” or “intra-broker” if a clearing report is not necessary to clear the transaction.

(b) Nothing in this Rule shall relieve any member or other party from its obligation to fully and properly report transactions as required by the applicable rules of other self-regulatory organizations.

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7043. Inclusion of Transaction Fees in Clearing Reports Submitted to ACT

(a) Nasdaq members may agree in advance to transfer a transaction fee charged by one member to another member on a transaction effected on an exchange or otherwise through the submission of a clearing report to the Automated Confirmation Transaction Service (“ACT”). Such report, inclusive of the transaction fee, will be submitted to the National Securities Clearing Corporation for processing. To facilitate the transfer of the transaction fee, the report submitted to ACT shall provide, in addition to all other information required to be submitted, a total per share or contract price amount, inclusive of the transaction fee. Such reports shall only submitted where there exists a written agreement between the members permitting the submission of fee-inclusive clearing reports between them. Nothing in this paragraph shall relieve a member from its obligations under Nasdaq rules and the federal securities laws. The ability to transfer transaction fees as described above shall be limited to transactions and/or submissions made pursuant to Rule 7038 or 7042.

(b) The fee for submission of the above shall be \$0.03 per side.

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(b) Not applicable.

(c) Not applicable.

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The text of the proposed rule change is also available on the Exchange's Web site (<http://www.nasdaqtrader.com>), at Nasdaq's Office of the Secretary, 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, the Exchange 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 Exchange 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 is proposing a rule change to: (1) allow Nasdaq members to submit non-tape, riskless reports using Nasdaq's Automated Confirmation Transaction Service ("ACT"); (2) allow Nasdaq members to use ACT to collect and transfer fees in connection with non-tape, riskless principal submissions and step-outs; and (3) broaden the scope of permitted step-outs.

Non-Tape Riskless Submission

Nasdaq proposes to establish a functionality that will allow Nasdaq exchange member submission of non-tape, riskless reports (including the non-tape portion of a riskless transaction taking place on other national securities exchanges or over-the-counter) to ACT.⁴ These reports

⁴ ACT is a technology asset of Nasdaq. Prior to the commencement of operation of the Trade Reporting Facility (now the FINRA/Nasdaq TRF) and the start of Nasdaq's operation as a national securities exchange in August 2006, it was common for industry participants to refer to 'reporting trades to ACT.' Now, ACT technology serves multiple SROs/markets and provides an electronic system through which certain trades, transfers,

are intended to facilitate the transfer of information between parties to the transactions; make electronically available trade record information in the system to parties; and, if requested, the ultimate transmission of the transfer records to an appropriate clearing agency.

In defining what constitutes a riskless transfer, Nasdaq has determined to follow the general standard for riskless principal transactions articulated in Financial Industry Regulatory Authority (“FINRA”) Rule 4632(d)(3)(B) and require that the Nasdaq member have had an order in hand, and have given the party providing the order the same price as the Nasdaq member obtained in the public marketplace, prior to the submission of post-trade riskless transfer entry, either as principal or agent, into ACT. These riskless submissions into ACT are voluntary and do not replace any separate reporting obligation that may also be applicable. Under the proposal, Nasdaq members will be allowed to submit records for riskless transfers using the following capacities: “Riskless Principal” where the member acted as principal on the open market trade or trades related to the riskless submission; “Agent” where the member acted as agent on the open market trade or trades related to the riskless submission; and “Intra-Broker” where the transfer is occurring strictly within a member Firm.

In FINRA Notice to Members 2007-38, that SRO allowed, among other things, the submission of certain non-tape reports to represent the offsetting riskless portion of a previously executed public market trade while restricting its members’ ability to submit such non-tape reports to a FINRA facility if the public trade report was not also reported to a FINRA facility.

The only exception to this prohibition was if the non-tape report was submitted to reflect the

and instructions can be reported or communicated. Among other functions, ACT connects to DTCC’s continuous net settlement and trade comparison systems for equities, with all clearing submissions being marked to accurately reflect the executing market. ACT responds to all entries with rejects or acknowledgements, stores all records submitted to it, and provides both step-out and sales fee transfer capabilities to users.

offsetting portion of a riskless principal transaction or an agency transaction where a firm acts as agent on behalf of another member firm. As such, FINRA's rule prevents firms from using a market's (FINRA's) functionality to facilitate riskless securities transfers between two broker units of a single member.⁵ Nasdaq, however, believes that using non-tape reports in such a manner is desirable and proposes offering an "Intra-Broker" non-tape reporting capacity submission for use in these circumstances. For example, Firm ABCD and ABCQ are entities of ABC Brokerage, but two completely different business units. ABCD uses ABCQ's systems to access liquidity in the marketplace. In the market, ABCQ is the broker against which clearing of the public market trade is submitted. ABCD and ABCQ clear separately. ABCQ needs to get the shares to ABCD. It's not a trade, and because they're the same broker from a member perspective, they can't move the shares as a riskless transfer under FINRA's rules. In this situation, use of the "Intra-Broker" capacity through Nasdaq's ACT system would be available.

The riskless reports may be used for clearing, non-clearing, QSR, and Give-Ups. Nasdaq will continue to honor Attachment 2's and Uniform Trade Reporting Agreements on file with it or the FINRA/Nasdaq TRF. When used with clearing, or otherwise specifically requested, the reports shall also be included in Nasdaq Risk Management calculations. Submission of non-tape, clearing, or non-tape, non-clearing records into ACT by Nasdaq members will not satisfy any obligation the member may otherwise have to report or represent the same transactions under the rules of any other self-regulatory organization.

⁵ In effect, FINRA's position prohibits a firm from moving riskless share portions to itself. Consolidation through merger and acquisition is common in the securities industry, and there are environments where, due to lack of integration, it would be preferable for firms to move shares between elements of the same broker by submitting appropriate non-tape share transfer reports to and through a third-party system (like ACT) rather than in-house systems - if they exist.

Transaction Fees

Current trade-reporting rules of other SROs allow transaction fees to be included in clearing reports. Nasdaq proposes to establish similar rules for transaction fees to be included in clearing reports that are submitted in connection with non-tape, riskless principal submissions and step-outs. Under the proposal, Nasdaq members may also seek to impose or transfer to another Nasdaq member such transaction fees in the clearing reports that Nasdaq forwards to the National Securities Clearing Corporation (“NSCC”) for trade clearance. Nasdaq will impose a \$0.03 per-side fee for each such clearing report. Nasdaq notes that under NASD Rule 7002B, FINRA/Nasdaq TRF participants are charged a fee of \$0.03 per side for submission of a clearing report to transfer a transaction fee charged by one FINRA member to another.

Step-Outs

Although not defined by rule, a step-out is transfer of all or a portion of a broker-dealer’s securities position to another broker-dealer that does not constitute a trade.⁶

This filing builds upon Nasdaq’s previous attempts to provide useful step-out parameters for its members. Nasdaq initially offered step-out capability in 2007 in light of FINRA rules that restricted step-outs to those portions of trades that were originally executed by and reported to FINRA facilities.⁷ Nasdaq viewed this requirement as overly restrictive because certain broker-dealers wished to engage in step-outs but either did not have systems in place to capture the

⁶ For example, one broker might buy a block of securities on behalf of several other broker-dealer customers. That broker “steps-out” of the initial trade to transfer all or a portion of its position to its broker-dealer customers. In this situation, the block transaction effected in a securities market will contain instructions for NSCC to allocate certain positions to the stepped-out broker’s customers. In another form of a step-out that occurs outside a securities exchange, a broker uses a clearing-only report through ACT to transfer some or all of its securities position from an account at one clearing broker to an account at another clearing broker, for its own internal accounting purposes.

⁷ See Securities Exchange Act Release No. 56345 (Aug. 31, 2007), 72 FR 51880 (Sep. 11, 2007).

venue of the original trade execution and/or may have executed various portions of the underlying trade in non-FINRA facilities, thereby preventing them from being able to comply with the FINRA requirements. Accordingly, Nasdaq allowed step-out capability with respect to any trade that a Nasdaq member was a party to regardless of the market on which the trade was executed.⁸

Nasdaq amended its step-out rules again in 2007 to specify that an authorizing agreement is required between clearing firm members when they seek to transfer certain sales fees but not the underlying shares; no authorizing agreement is required when Nasdaq members conduct step-outs when such transfers are accompanied by a transfer of the underlying shares only.⁹

In this filing, Nasdaq proposes to further broaden its step-out parameters. First, Nasdaq would expand the scope of step outs to include all securities transfers from one Nasdaq member to another provided that the transfer does not constitute a reportable trade. Thus, under the proposed rule, the step-out could not only be used to allocate securities positions originating from a previously executed trade¹⁰ or to transfer securities from one clearing member to another clearing member for accounting purposes¹¹ but also, for example, for stock loan purposes to service a short position.¹²

⁸ The step-out report submitted to ACT under this rule change was marked as a Nasdaq Exchange entry so as to clearly distinguish it from an NASD/Nasdaq TRF entry, which also is reported through ACT. Also under this rule change, the parties to a step-out under Nasdaq rules must all be Nasdaq members and must be parties to an agreement such as the NASD's new Uniform Trade Reporting Facility Service Bureau/Executing Broker Agreement under which the broker transferring the position has received authorization from the transferee broker to act on its behalf.

⁹ See Securities Exchange Act Release No. 56929 (Dec. 7, 2007), 72 FR 71176 (Dec. 14, 2007).

¹⁰ See Nasdaq Rule 7038(b)(i).

¹¹ See Nasdaq Rule 7038(b)(ii).

¹² See Proposed Rule 7038(b).

Second, Nasdaq proposes to eliminate the authorizing agreement requirement when Nasdaq members use ACT to effect a step-out along with a sales or similar fee. Nasdaq states that step-outs are already completed pursuant to formal agreements among Nasdaq members or through ACT's comparison processes, which renders the current Nasdaq requirement unnecessarily duplicative. Nasdaq points out that the transaction comparison process requires the implicit acquiescence of both parties for the ACT system to complete the step-out transaction. In other words, a member will retain an opportunity to manually reject or reverse the step-out and fee transfer arrangement if it disagrees with their terms when presented to it even after it is initially affirmed. As support for this proposed rule change, Nasdaq states that it determined through discussions with its member firms that many firms preferred to handle step-outs on a match/compare basis, i.e. manually, even when they had a fee agreement between them and that it was an unnecessary burden for firms to sign separate agreements to move Section 31 fees associated with step-out submissions to ACT since this functionality already was in place on ACT.

This proposed rule change would not change the requirement of a formal sales fee transfer agreement between firms that wish to use ACT to move sales fees without an accompanying transfer of securities. Nasdaq believes that it is important to retain the requirement that the parties to a fee transfer have a written agreement specifically permitting such fee transfers because a sales fee transfer that moves no shares is not a step-out and therefore there are no specific share movements for firms to readily identify as being associated with the fee transfer.

Finally, Nasdaq proposes to clarify Nasdaq members' reporting requirements associated with step-out submissions to ACT. Nasdaq proposes to amend Rule 7038(d) by adding

language that would state that (1) members may not submit step-outs into ACT for the purpose of “effecting” (instead of “reporting a trade execution”) a transaction required to be trade reported; and (2) submitting step-outs into ACT does not satisfy any other SRO’s requirements that members might have to report transactions.

Nasdaq believes that the above proposals enhance the ability of Nasdaq members to transfer securities positions and their associated fees in an efficient and transparent manner.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,¹³ in general, and with Sections 6(b)(4) and (5) of the Act,¹⁴ in particular, in that the proposal 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 Nasdaq operates or controls, and is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Nasdaq believes that enhancing its step-out and fee transfer functionality benefits its members by enhancing the efficiency and transparency of their post-trade operations. Nasdaq’s proposed fees are reasonable and comparable to other fees for reporting submissions.

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.

¹³ 15 U.S.C. 78f.

¹⁴ 15 U.S.C. 78f(b)(4) and (5).

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 Nasdaq 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. Please include File Number SR-NASDAQ-2008-033 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NASDAQ-2008-033. 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 Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. 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-NASDAQ-2008-033 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁵

Florence E. Harmon
Acting Secretary

¹⁵ 17 CFR 200.30-3(a)(12).