For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–774 Filed 2–24–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51225; File No. SR–NASD–2005–020]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Modify Pricing for Non-Members Using Nasdaq's Brut Facility

February 17, 2005.

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 February 1, 2005, 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 and II below, which Items have been prepared by Nasdaq. Nasdaq has 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, 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 pricing for non-members using Nasdaq's Brut Facility. Nasdaq proposes to implement the proposed rule change on February 1, 2005. The text of the proposed rule change is available on the NASD's Web site (*http://www.nasd.com*), at the NASD'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, 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

Consolidation of Fee Schedule for Nasdaq Market Center and Brut Facility. In November 2004, Nasdaq established a uniform fee schedule for transactions in Nasdaq-listed securities through the Nasdaq Market Center and Nasdaq's Brut Facility.[5] In SR–NASD–2005–019, Nasdaq proposed a uniform fee schedule for NASD members executing transactions in exchange-listed securities through the Nasdaq Market Center and Nasdaq's Brut Facility.[6] Nasdaq is now proposing to make the uniform fee schedule applicable to non-members trading through Nasdaq's Brut Facility.

Nasdaq states that, as is currently true for the Nasdaq Market Center, there will be no order specific charges or credits associated with orders to buy or sell exchange-listed securities other than exchange-traded funds listed on the American Stock Exchange (''Amex-listed ETFs''), although Nasdaq is introducing a fee of $0.004 per share executed for orders that are routed by Brut using an exchange's proprietary order delivery system (such as the New York Stock Exchange's SuperDOT system). Moreover, as of February 1, 2005, Amex-listed ETFs will be subject to the same tiered fee schedule as Nasdaq-listed securities. As a result, market participants' combined volume in Nasdaq-listed securities and Amex-listed ETFs in both the Nasdaq Market Center and Brut will be considered when determining each market participants' fees for orders in Nasdaq-listed securities and Amex-listed ETFs. In conjunction with this change, the fee schedule is also being clarified by moving transaction charges for exchange-listed securities from NASD Rule 7010(d) to NASD Rule 7010(i) and by clarifying that the fee schedule in NASD Rule 7010(i)(1) applies to Nasdaq-listed securities subject to the Nasdaq UTP Plan. Thus, as provided by NASD Rule IM–4400, the fees associated with dually listed securities that are subject to the Consolidated Quotation Service and Consolidated Tape Association national market system plans are the fees for exchange-listed securities, rather than Nasdaq-listed securities. Moreover, the proposed rule change provides that executions in exchange-listed securities against a market participants' own quote or order are subject to the same fees as other transactions; currently, all such executions are free in the Nasdaq Market Center.

Routing Fees. Nasdaq is also proposing to modify the fees for orders that are routed from the Nasdaq Brut Facility to other market centers. Fees are based upon multiple volume-based usage tiers that take account of the combined Nasdaq Market Center and Brut volume of a market participant. According to Nasdaq, in the past, a market participants' volume of liquidity provision in Nasdaq-listed securities has determined the tiers to which a market participant was assigned. As discussed above, volume in Amex-listed ETFs will now also be considered in making this volume determination. Moreover, Nasdaq is proposing several modifications to the routing fee schedule. First, the tiers to which a market participant is assigned will now be based in part upon the volume of shares on the Nasdaq Market Center and Brut books that are accessed during a month and the volume of shares routed, as well as the volume of liquidity provided. Moreover, a new tier with a routing charge of $0.0025 per share executed will be established. Second, orders that are routed outside of both the Nasdaq Market Center and Brut without first attempting to execute against the Brut book (*i.e.*, ''Thru Brut orders'') will not be counted in determining the routing tier for which a market participant qualifies, and will be assessed a routing charge of $0.004 per share executed.[7] For other orders, the

[15] 17 CFR 200.30–3(a)(12).

[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] *See* Securities Exchange Act Release No. 50670 (November 16, 2004), 69 FR 67979 (November 22, 2004) (SR–NASD–2004–167); Securities Exchange Act Release No. 50787 (December 2, 2004), 69 FR 71459 (December 9, 2004) (SR–NASD–2004–170).

[6] *See* SR–NASD–2005–019 (February 1, 2005).

[7] Orders routed by Brut to the Nasdaq Market Center would not be assessed the routing charge, but would be assessed Nasdaq's normal execution charge, if executed. Telephone conversation between John Yetter, Associate General Counsel, Nasdaq, and Marc McKayle, Special Counsel, Division of Market Regulation (''Division''), Commission, and David Liu, Attorney, Division, Commission, on February 17, 2005.

routing charges will be as follows: (i) If a market participant provides a daily average of 500,000 or fewer shares of liquidity during a month, its routing charge is $0.003 per share executed; (ii) if a market participant provides a daily average of more than 500,000 but fewer than 10,000,001 shares of liquidity during a month, its routing charge is $0.0028 per share executed; (iii) if a market participant provides a daily average of more than 10,000,000 but fewer than 20,000,001 shares of liquidity during a month, *or* provides a daily average of more than 20,000,000 shares of liquidity during a month but accesses and/or routes a daily average of 50,000,000 or fewer shares during the month, its routing charge is $0.0027 per share routed; and (iv) if a market participant provides a daily average of more than 20,000,000 shares of liquidity during a month and accesses and/or routes a daily average of more than 50,000,000 shares during the month, its routing charge will be $0.0025 per share executed.

Although the newly reduced routing charge is available at only high levels of volume, Nasdaq believes that the change is necessary as a response to a recent decision by a Nasdaq competitor to offer market participants with comparably high volumes reduced fees for accessing liquidity.[8] According to Nasdaq, by lowering its routing fee in a comparable manner, Nasdaq seeks to provide an overall level of transaction fees that allows it to compete for order flow from market participants that are in a position to benefit from its competitor's pricing change. Moreover, Nasdaq notes that routing fees are only one component of the fees that market participants pay, and the credits that they receive, to execute orders during a month. According to Nasdaq, because a market participant qualifying for the reduced routing fee must access and/or route high volumes of liquidity, its average cost of order execution is likely to be higher than the average cost of order execution of a large number of market participants that provide significant liquidity but access and/or route to a lesser extent.[9]

2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with the provisions of Section 15A of the Act,[10] in general, and with Section 15A(b)(5) of the Act,[11] in particular, in that the proposed rule change 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. The proposed rule change applies to non-members that use Nasdaq's Brut Facility for certain fee changes that are being implemented in SR–NASD–2005–019 for NASD members that use the Nasdaq Market Center and/or Nasdaq's Brut Facility.[12] Accordingly, the proposed rule change promotes an equitable allocation of fees between members and non-members using Nasdaq's order execution facilities.

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

Nasdaq does not believe that the proposed rule change, as amended, will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

The foregoing proposed rule change, as amended, is subject to Section 19(b)(3)(A)(iii) of the Act[13] and Rule 19b–4(f)(6) thereunder[14] because the proposal: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative prior to 30 days after the date of filing or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest; provided that Nasdaq has given the Commission notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. At any time within 60 days of the filing of such 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.[15]

Nasdaq has requested that the Commission waive the five-day pre-filing notice requirement and the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will permit Nasdaq to make Brut's fee structure consistent for both NASD members and non-NASD members. In addition, the Commission has determined to waive the five-day pre-filing notice requirement. 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 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–NASD–2005–020 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–2005–020. 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

[8] *See http://www.inetats.com/prodserv/bd/fee/fee.asp.*

[9] Nasdaq is also proposing to eliminate the current $0.02 per order fee for entry of preferenced orders in the Nasdaq Market Center. Although this change is being made to the unified member fee schedule, it would not directly affect non-members because the Nasdaq Market Center is not directly accessible by non-members. *See* SR–NASD–2005–019 (February 1, 2005).

[10] 15 U.S.C. 78*o*–3.

[11] 15 U.S.C. 78*o*–3(b)(5).

[12] *See* SR–NASD–2005–019 (February 1, 2005).

[13] 15 U.S.C. 78s(b)(3)(A)(iii).

[14] 17 CFR 240.19b–4(f)(6).

[15] *See* Section 19(b)(3)(C) of the Act, 15 U.S.C. 78s(b)(3)(C).

[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).

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 the 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–2005–020 and should be submitted on or before March 18, 2005.

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

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–775 Filed 2–24–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51229; File No. SR–NASD–2004–026]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto To Amend NASD Rule 2320(a) Governing Best Execution

February 18, 2005.

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 February 12, 2004, 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. On May 11, 2004, NASD amended the proposed rule change.[3] On February 14, 2005, NASD amended the proposed rule change a second time.[4] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.[5]

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

NASD is proposing to amend Rule 2320(a) (''Best Execution Rule''). Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

2300. TRANSACTIONS WITH CUSTOMERS

2320. Best Execution and Interpositioning

(a) In any transaction for or with a customer *or a customer of another broker-dealer*, a member and persons associated with a member shall use reasonable diligence to ascertain the best [inter-dealer] market *center* for the subject security and buy or sell in such market *center* so that the resultant price to the customer is as favorable as possible under prevailing market conditions. Among the factors that will be considered in determining whether a member has used ''reasonable diligence'' are:

(1) [T]*t*he character of the market for the security, e.g., price, volatility, relative liquidity, and pressure on available communications;

(2) the size and type of transaction;

(3) the number of [primary] market[s] *centers* checked;

(4) *accessibility of the quotation* [location and accessibility to the customer's broker/dealer of primary markets and quotations sources.]*; and*

(5) the terms and conditions of the order which result in the transaction, as communicated to the member and persons associated with the member.

(b) through (g) 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, 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

Background. The Best Execution Rule currently requires a member, in any transaction for or with a customer, to use reasonable diligence to ascertain the best inter-dealer market for a security and to buy or sell in such a market so that the price to the customer is as favorable as possible under the prevailing market conditions. NASD has received a number of questions regarding the application of the term ''customer,'' in the context of best execution. NASD Rule 0120(g) defines ''customer'' to exclude a broker or dealer, unless the context otherwise requires. For example, if a firm that receives an order from a customer (''originating broker-dealer'') routes the order to a member firm (''recipient member'') and the recipient member executes the order in a manner inconsistent with the Best Execution Rule, the recipient member could argue that it has not violated the Best Execution Rule because the transaction was not ''for or with a customer,'' but rather for or with a broker-dealer.

NASD believes that not applying the Best Execution Rule to recipient members is contrary to the interests of the investing public as well as the general intent of the Best Execution Rule. To determine whether the scope of the Best Execution Rule requires further clarification to include customer orders received by a member from another broker-dealer, NASD issued *Notice to Members 02–40* in July 2002 seeking comment on this issue. NASD received eleven comment letters in response to NASD *Notice to Members 02–40*.[6] The

---

[17] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Amendment No. 1 to SR–NASD–2004–026 filed on May 11, 2004. *See infra* discussion accompanying notes 6–7.

[4] *See* Amendment No. 2 to SR–NASD–2004–026 filed on February 14, 2005. *See infra* discussion accompanying note 7.

[5] NASD notes that related to amending NASD Rule 2320(a) it has also filed SR–NASD–2004–045, a proposed rule change that would require market order protection by prohibiting members from trading ahead of a customer market order. *See* Securities Exchange Act Release No. 51230 (February 18, 2005) (SR–NASD–2004–045). NASD has also filed SR–NASD–2004–089, a proposed rule change that would require limit order protection by requiring members to provide price improvement under certain circumstances. See Securities Exchange Act Release No. 51231 (February 18, 2005)(SR–NASD–2004–089).

[6] *See* letter from Dan Jamieson dated July 18, 2002; letter from Seidel & Shaw, LLC dated July 29, 2002; letter from Consolidated Financial Investments, Inc. dated Aug. 1, 2002; letter from the Law Offices of Steve A. Buchwalter, P.C. dated Aug. 6, 2002; letter from A.G. Edwards & Sons, Inc. dated Aug. 8, 2002; letter from Raymond James & Associates, Inc. dated Aug. 8, 2002; letter from T. Rowe Price Investment Services, Inc. dated Aug. 8, 2002; letter from Security Traders Association dated Aug. 22, 2002; letter from The Island ECN, Inc. dated Aug. 22, 2002; letter from the Trading Committee and the Self-Regulation and Supervisory Practices Committee of the Securities Industry Association dated Sept. 9, 2002; and letter from the Subcommittee on Market Regulation of the