

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-42032; File No. SR-NASD-99-56]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Establishing Execution Fees for the Nasdaq Application of the OptiMark System

October 19, 1999.

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 October 6, 1999, the National Association of Securities Dealers, Inc., ("NASD" or "Association") through its wholly-owned subsidiary, the Nasdaq Stock Market, Inc. ("Nasdaq"), 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 Nasdaq. 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

Nasdaq is proposing to amend NASD Rule 7010 to establish fees for NASD members that obtain executions through, or sponsor customers that use, the Nasdaq Application of the OptiMark System ("Nasdaq Application"). The text of the proposed rule change is available at the NASD and the Commission.

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 SEC recently approved a proposed rule change filed by the NASD to implement the Nasdaq Application.³ The Nasdaq Application permits NASD members and their customers to enter orders in Nasdaq stocks into an anonymous matching system that has been designed, developed, and patented by OptiMark Technologies, Inc. ("OptiMark Match") and has been integrated into Nasdaq's facilities in Trumbull, CT.

The Nasdaq Application allows NASD members (and if sponsored by NASD members, customers of such members) to enter trading interests, called profiles, into Nasdaq-operated systems where those profiles are collected and matched periodically by the OptiMark Match. In addition to matching profiles entered directly into the system, the Nasdaq Application incorporates bids and offers in the Nasdaq Quote Montage, creates profiles for such quotes, and includes the quotes in the next match. The OptiMark Match then attempts to match contra interests at the best prices and sizes according to the rules of the match process. If the system finds that profiles have matched, it creates execution reports for such matched interests. When an execution occurs, Nasdaq will charge a fee for such execution.

Nasdaq will charge NASD members that obtain executions through this new service the following fees. First, as a standard fee for all executions of profiles, Nasdaq shall charge a fee of \$0.01 per share executed to the NASD member in whose name the profile was entered. Second, for executions that occur when a profile is entered by an NASD member for its own account as principal, the NASD member will be charged a discounted execution charge of \$0.005 per share. However, if a profile that would otherwise qualify for a discounted fee receives an execution that results in price improvement of more than the minimum price increment, the execution will be charged the standard rate of \$0.01.⁴

³ Securities Exchange Act Release No. 41967 (September 30, 1999), 64 FR 54704 (October 7, 1999).

⁴ With respect to the price improvement element of the fee structure, as an incentive to provide liquidity to the system, Nasdaq will temporarily waive the imposition of the price improvement aspect of the fee structure. Thus, even if an execution of a profile obtains price improvement as a result of a match, for the next six months, Nasdaq will not impose the higher execution fee if the

Finally, Nasdaq has determined not to charge an execution fee with respect to executions that occur against any market maker or ECN quotations as a result of the Nasdaq Application including such quotations as part of the optiMark Match process.⁵

With respect to customers that are sponsored by NASD members and that directly enter profiles into the Nasdaq Application after signing all necessary agreements with Nasdaq, OptiMark, the sponsoring NASD member, and the Designated Clearing Broker, Nasdaq notes that fees for executions of such profiles shall be charged to the NASD member that is the sponsor of such customer. Therefore, Nasdaq will submit an invoice to the NASD member designated as the clearing broker, who will be responsible for paying the fee to Nasdaq.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Act⁶ in that the proposed fees provide for the equitable allocation of reasonable fees among members.

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

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A) of the Act⁷ and subparagraph (f)(2) of Rule 19b-4⁸ thereunder in that it constitutes a fee for executions charged to NASD members. At any time within 60 days of the filing of the proposed rule change, the

NASD member's principal execution otherwise qualifies for the discounted execution rate.

⁵ As is currently the case for executions through other Nasdaq facilities, an ECN whose quotation is matched with an OptiMark profile may continue to charge a fee to the contra party. Telephone conversation between Eugene A. Lopez, Vice President, Trading and Market Services, Nasdaq, and Richard Strasser, Assistant Director, Division of Market Regulation, SEC, on October 13, 1999.

⁶ 15 U.S.C. 78o-(b)(5).

⁷ 15 U.S.C. 78s(b)(3)(A).

⁸ 17 CFR 240.19b-4(f)(2).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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.

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.⁹ Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549-0609. 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 the NASD. All submissions should refer to file number SR-NASD-99-56 and should be submitted by November 16, 1999.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁰

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-42036; File No. SR-NASD-99-35]

Self Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change Relating to the Definition of "Person Associated With a Member"

October 19, 1999.

I. Introduction

On August 3, 1999, the National Association of Securities Dealers, Inc.

⁹In reviewing the proposed rule change, the commission considered its potential impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁰ 17 CFR 200.30-3(a)(12).

("NASD" or "Association") filed with the Securities and Exchange Commission ("Commission" or "SEC"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend the definition of "person associated with a member" in the By-Laws of the NASD, NASD Regulation, Inc. ("NASD Regulation"), and The Nasdaq Stock Market, Inc. ("Nasdaq"). Notice of the proposed rule change was published in the **Federal Register** on September 10, 1999.³ The commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

The proposed rule change comprises two amendments to the definition of "person associated with a member" in Article I of the NASD By-Laws and conforming amendments to the NASD Regulation and Nasdaq By-Laws.⁴ It also includes a minor textual change to the definition to clarify an ambiguity.

The first amendment expands the definition to apply to certain owners of NASD members ("members") not currently included in its scope, specifically for purposes of NASD Rule 8210, entitled "Provision of Information and Testimony and Inspection and Copying of Books."⁵ Currently, the definition of "person associated with a member" includes only owners who are natural persons engaged in the member's investment banking or securities business and who have a direct or indirect "control" relationship with the member.⁶ The amendment expands the definition to give the staff authority to require the provision of

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 41820 (September 1, 1999), 64 FR 49261.

⁴ The By-Laws of the NASD, NASD Regulation, and Nasdaq are herein collectively referred to as "By-Laws."

⁵ NASD Rule 8210 authorizes the staff of the NASD, for the purpose of an investigation, complaint, examination, or proceeding authorized by the NASD By-Laws or rules, to require a member or associated person to provide information or testimony. The rule also authorizes the staff to inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in the investigation, complaint, examination, or proceeding.

⁶ The By-Laws do not define the term "control." Form BD defines "control" as the "power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. Any person that * * * directly or indirectly has the right to vote 25% or more of a class of voting securities or has the power to sell or direct the sale of 25% or more of a class of voting securities; or * * * in the case of a partnership, has the right to receive upon dissolution, or has contributed 25% or more of the capital, is presumed to control that company."

information and testimony under NASD Rule 8210 from any person—including a natural person or corporate or other entity—who holds a five percent or greater interest in a member firm, regardless of whether they "control" the member firm or are actively engaged in its securities or investment banking business. Such persons are listed in Schedule A of Form BD of a member.

The second proposed provision resolves an anomaly between the current By-Law definition of the term "person associated with a member" and Form U-4, which is the application form for registration that must be signed by prospective registrants. Form U-4 states that by signing the Form, the applicant is subject to the jurisdiction of the NASD and any state in which he is applying for registration. However, the current definition of "associated person" in the By-Laws does not address applicants for registration. The proposed rule change makes the By-Laws consistent with Form U-4 in this respect by including in the definition a person who has applied for registration.

Finally, the word "other" is inserted into subsection 2 of the definition of "person associated with a member" to clarify that the subsection describes only natural persons.

The NASD proposes to make the rule change effective for all members within 45 days after Commission approval. The effective date will be announced at least 15 days in advance in a Notice To Members.

III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations under the Act, and, in particular, the requirements of section 15A⁷ of the Act applicable to a registered securities association.⁸ Specifically, the Commission finds that approval of the proposed rule change is consistent with Section 15A(b)(6)⁹ of the Act, which requires, among other things, that the Association's rules 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. The Commission finds that the proposed rule change will promote the objectives of Section 15A(b)(6) of the Act by helping the NASD obtain necessary information to conduct its regulatory

⁷ 15 U.S.C. 78o-3.

⁸ In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁹ 15 U.S.C. 78o-3(b)(6)