Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number 1–11863. This file number should be included on the subject line if e-mail is used. To help us 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/delist.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority. [5]

Jonathan G. Katz,

Secretary.

[FR Doc. E4–2554 Filed 10–7–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold the following meetings during the week of October 11, 2004:

An open meeting will be held on Wednesday, October 13, 2004 at 10 a.m., in Room 1C30, the William O. Douglas Meeting Room, and a closed meeting will be held on Thursday, October 14, 2004 at 10 a.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (4), (5), (7), (8), (9)(B), and (10) and 17 CFR 200.402(a)(3), (4), (5), (7), (8), 9(ii) and (10), permit consideration of the scheduled matters at the closed meeting.

Commissioner Campos, as duty officer, voted to consider the items listed for the closed meeting in closed session.

The subject matter of the open meeting scheduled for Wednesday, October 13, 2004 will be:

The Commission will consider whether to propose amendments to Regulation M (the anti-manipulation rule concerning securities offerings) under the Securities Exchange Act of 1934.

For further information, please contact Denise Landers, Joan Collopy, Elizabeth Sandoe or Elizabeth Marino at (202) 942–0772.

The subject matter of the closed meeting scheduled for Thursday, October 14, 2004 will be:

Formal orders of investigations;

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings of an enforcement nature; Adjudicatory matters;

Regulatory matters regarding financial institutions; and

Amicus consideration.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 942–7070.

Dated: October 6, 2004.

Jonathan G. Katz,

Secretary.

[FR Doc. 04–22814 Filed 10–6–04; 11:14 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50484; File No. SR–CBOE–2003–33]

Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Board Options Exchange, Inc., and Notice of Filing and Order Granting Accelerated Approval to Amendments No. 2, 3 and 4 Relating to Non-Member Market Maker Transaction Fees

October 1, 2004.

I. Introduction

On July 30, 2003, the Chicago Board Options Exchange, Inc. (''CBOE'' or ''Exchange'') submitted to the Securities and Exchange Commission (''Commission''), 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 increase the transaction fee for non-member market fees by $0.02 per contract. On November 13, 2003, CBOE filed Amendment No. 1 to the proposed rule change via facsimile.[3] The proposed rule change, as amended, was published in the **Federal Register** for notice and comment on November 28, 2003.[4] The Commission received one comment on the proposal.[5] On March 5, 2004, CBOE filed Amendment No. 2 to the proposed rule change.[6] On April 22, 2004, CBOE filed Amendment No. 3 to the proposed rule change.[7] On August 20, 2004, CBOE filed Amendment No. 4 to the proposed rule change.[8]

This order approves the proposed rule change as modified by Amendment No. 1. In addition, the Commission is approving on an accelerated basis, and is soliciting comments on, Amendments No. 2, 3 and 4 to the proposed rule change.

II. Description

The Exchange is proposing to change its Fee Schedule to increase transaction fees for orders originating from non-member market makers by $0.02 per contract. In its proposed rule change, CBOE explained that currently the Exchange charges transaction fees for orders executed on behalf of non-member market makers that are equal to member market maker and member firm rates for equity and QQQ options and

[5] 17 CFR 200.30–3(a)(1).

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

[2] 17 CFR 240.19b-4.

[3] *See* letter from Christopher R. Hill, Attorney II, Office of Enforcement, Legal Department, CBOE, to Leah Mesfin, Special Counsel, Division of Market Regulation (''Division''), Commission, dated November 13, 2003 (''Amendment No. 1''). In Amendment No. 1, CBOE revised its statement of the purpose of the proposed rule change to modify its argument in support of the proposal.

[4] *See* Securities Exchange Act Release No. 48815 (November 20, 2003), 68 FR 66908.

[5] *See* letter from Michael J. Simon, Senior Vice President and Secretary, International Stock Exchange, Inc. (''ISE''), to Jonathan G. Katz, Secretary, Commission, dated December 19, 2003.

[6] *See* letter from Christopher R. Hill, Attorney II, Office of Enforcement, Legal Department, CBOE, to Nancy Sanow, Assistant Director, Division, Commission, dated March 5, 2004 (''Amendment No. 2''). In Amendment No. 2, CBOE replaced the rule text to more clearly indicate the changes to be made to the Exchange's Fee Schedule.

[7] *See* letter from Christopher R. Hill, Attorney II, Office of Enforcement, Legal Department, CBOE, to Nancy Sanow, Assistant Director, Division, Commission, dated April 21, 2004 (''Amendment No. 3''). In Amendment No. 3, CBOE revised the rule text to clarify that the proposed fee increase would not apply to Linkage orders.

[8] *See* letter from Jaime Galvin, Attorney, Legal Division, CBOE, to Jennifer Colihan, Special Counsel, Division, Commission, dated August 19, 2004 (''Amendment No. 4''). In Amendment No. 4, CBOE replaced the rule text to reflect recent changes made to the Exchange's Fee Schedule.

equal to customer rates for index products. CBOE represented that its members have complained that such equivalence of fees is unfair to Exchange members who pay a variety of additional fees through their membership in the Exchange to help offset the Exchange's expenses. Therefore, CBOE explained that it is proposing to increase transaction fees charged to non-member market makers in order to more fairly assess Exchange costs among the individuals and organizations who avail themselves of the Exchange's trading facilities.

In addition, CBOE has represented that because it does not permit non-members to enter orders on the Exchange, it would not assess directly any such fees upon non-members and that the $0.02 increase would not apply to Linkage orders.

III. Summary of Comments and CBOE's Response

The Commission received one comment letter on the proposal rule change in opposition to the proposal.[9] The ISE opposed the proposed rule change on several grounds.

First, the ISE argued that the CBOE failed to explain sufficiently how the proposed rule change is consistent with Sections 6(b)(4)[10] and 6(b)(5)[11] of the Act. The ISE rejected the Exchange's rationale that CBOE members' complaints that uniform fees for all non-customer executions is unfair to Exchange members, who pay a variety of additional fees through their membership to help offset CBOE's systems expenses, as sufficient justification for the proposal. The ISE also argued that even if the issue of fairness in sharing the costs for use of CBOE's systems justified a fee increase, such a fee increase should be imposed on all non-members (including non-member broker-dealers), and not just on non-member market makers. According to the ISE, the Exchange's failure to justify why the fee would be levied on only one subset of non-members, instead of on all non-members, undermines CBOE's argument that it is simply responding to member complaints about the fairness of fees.

In response to these comments, the CBOE emphasized that Section 6(b)(4) the Act only requires an exchange to provide for an ''equitable allocation'' of fees among its members and issuers and other persons using its facilities.[12] The CBOE stated that the Act's use of the term ''equitable'' does not necessarily mean ''equal,'' but rather ''fair.'' This understanding is confirmed, the CBOE argued, by the fact that Section 6(b)(5) of the Act prohibits only ''unfair'' discrimination, not all discrimination. The CBOE argued that the proposed $0.02 per contract fee for non-member market makers to help offset Exchange expenses is an equitable allocation of fees because its members already pay a variety of other fees as members of the Exchange to help meet the Exchange's expenses.

The ISE also asserted that the proposed rule change is anti-competitive because it could act as a disincentive for non-member market makers to send order flow to the CBOE and thus could hinder the price-discovery process. The ISE noted that, while the proposal exempts Linkage transactions from the $0.02 increase, the Linkage Plan states that market makers ''should send Principal Orders through Linkage on a limited basis and not as a primary aspect of their business.'' Further, the ISE stated that the Linkage Plan imposes a strict mathematical limit on the number of Principal Orders that a market maker can send through the Linkage. Thus, the ISE argued, Linkage would not offer an adequate routing alternative for non-member market makers to send Principal Orders to CBOE.

In response to this argument, the CBOE noted that, like other self-regulatory organizations, it needs the ability to spread its operating costs fairly among the parties using its facilities and stated that the ISE overlooks this fact. The CBOE noted that this concern requires it to strike a balance in setting fees on member and non-member market maker transactions. The Exchange stated that the proposed differential between member and non-member market maker fees could not be so small as to incent current CBOE market-makers to abandon their memberships and simply send in their orders as non-members to avoid member dues and fees, as well as market making and regulatory requirements that apply to members. Simultaneously, CBOE conceded that the differential in fees could not be so great as to give non-member market makers a disincentive to routing their orders to CBOE. Thus, CBOE contended that the $0.02 fee differential strikes a fair and reasonable balance between these two competing concerns.

The CBOE also rejected the ISE's contention that the fee increase would impede inter-market price discovery because, in the CBOE's view, the proposal would expressly exempt Linkage orders from the fee change and because the proposed differential in member and non-member fees is small. CBOE stated that any effect that a fee increase would impose on price discovery is a function of the degree of any proposed price differential. CBOE argued that it has proposed a reasonably small differential in order to achieve its objective of more equitably assessing its costs without negating inter-market price discovery.

Finally, the ISE objected to the proposed rule change because it believed that its approval by the Commission would prompt other exchanges to file similar proposals with the Commission. As a result, the ISE argued, market makers would increasingly have disincentives to send order flow to other exchanges, which could lead to decreasing market efficiency and harming price discovery.

In response to this concern, CBOE suggested that the current highly competitive market for order flow among the various options exchanges would discipline exchanges to keep their transaction fee proposals within reasonable limits.

IV. Discussion and Commission Findings

Under Section 19(b)(2) of the Act,[13] the Commission must approve the CBOE's proposed rule change if it finds that the proposed rule change is consistent with the requirements of the Act and the rules thereunder applicable to a national securities exchange. If the Commission is unable to make that finding, it must institute proceedings to consider whether to disapprove the proposed rule change.

The statutory requirements relevant to such a determination generally are found in Section 6(b) of the Act.[14] That statutory section sets forth the purposes or objectives that the rules of a national securities exchange should be designed to achieve. Those purposes or objectives, which take the form of positive goals, such as to protect investors and the public interest, or prohibitions, such as to not permit unfair discrimination among customers, issuers, brokers or dealers or to not

[9] *See supra* footnote 5.

[10] Section 6(b)(4) of the Act requires that ''the rules of the exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.'' 15 U.S.C. 78f(b)(4).

[11] Section 6(b)(5) of the Act prohibits ''unfair discrimination between customers, issuers, brokers, or dealers.'' 15 U.S.C. 78f(b)(5).

[12] *See* letter from Joanne Moffic-Silver, General Counsel, CBOE, to Jonathan G. Katz, Secretary, Commission, dated February 27, 2004 (''CBOE Letter'').

[13] 15 U.S.C. 78s(b)(2).

[14] 15 U.S.C. 78f(b).

permit any unnecessary or inappropriate burden on competition, are stated as broad and elastic concepts. They afford the Commission considerable discretion to use its judgment and knowledge in determining whether a proposed rule change complies with the requirements of the Act.[15] Furthermore, the subsections of Section 6(b) of the Act must be read with reference to one another and to other applicable provisions of the Act and the rules thereunder.[16] Within this framework, the Commission must weigh and balance the proposed rule change, assess the views and arguments of commenters, and make predictive judgments about the consequences of approving the proposed rule.[17]

After careful consideration of the proposed rule change, the comment letter received, and the Exchange's response to the comment letter, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. In particular, the Commission finds that the proposal is consistent with the requirements of Section 6(b)(4) of the Act,[18] which states that the rules of the exchange must provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities, and with the requirements of Section 6(b)(5) of the Act,[19] which, among other things, states that the rules of the exchange must not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. In addition, the Commission finds that the proposal is consistent with the requirements of Section 6(b)(8) of the Act,[20] which states that the rules of an exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Commission notes that whether a proposed fee can be considered an equitable allocation of a reasonable fee among members and issuers and others using its facilities would depend on the facts and circumstances of the proposal. In evaluating such a proposal, the Commission necessarily would consider and weigh all of the relevant factors. These factors may include, among others, the amount of the fee and whether the fee is an increase or decrease, the classes of persons subject to the fee, the basis for any distinctions in classes of persons subject to the fee, the potential impact on competition, and the impact of any disparate treatment on the goals of the Act.

Taking into account these factors, the Commission believes that the proposed fee satisfies the requirements of Section 6(b)(4) of the Act because, while the fee distinguishes between member and non-member market makers, as well as non-member broker-dealers and non-member market makers, it does not do so in a manner that imposes a significant cost burden on the non-member market makers who send their orders to CBOE. The ISE claims that the Exchange's proposal does not provide for an equitable allocation of reasonable fees among members and, further, does not provide sufficient justification for charging member and non-member market makers disparate fees. The Commission agrees with the position stated in the CBOE Letter, namely, that the Act does not require that members, issuers, and others to pay the same fees for use of an exchange's facilities, but that the fees assessed these categories of users must be equitably allocated, *i.e.*, that they be allocated in a fair manner. Accordingly, the Commission finds that the $0.02 per contract differential for non-member market makers is consistent with Section 6(b)(4) of the Act.

In addition, the ISE takes issue with the fact that the fee differential would be applied to a subset of non-member users of the CBOE's facilities and not to all non-member broker-dealers. Under Section 6(b)(5) of the Act, the rules of the Exchange must not be designed to permit unfair discrimination between brokers, dealers and customers. The Commission notes that the Act does not require that the Exchange's rules be designed to prohibit all discrimination, but rather they must not permit unfair discrimination. In the Commission's view, the $0.02 per contract fee differential for non-member market makers is reasonable under the circumstances and it is not unfairly discriminatory for the Exchange to charge non-member market makers a nominally higher fee than other non-members who submit orders to the Exchange. Accordingly, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act.

The ISE further argues that the proposed rule change is anti-competitive because it would act as a disincentive for non-member market makers to send order flow to the Exchange in an attempt to further the price discovery process. Thus, the ISE raises the issue whether the fee differential satisfies the requirement of Section 6(b)(8) of the Act that it not impose any burden on competition that is not necessary or appropriate in furtherance of the Act's purposes. The Commission does not believe that the proposed fee imposes an unnecessary or inappropriate burden on competition. Fair competition among the options markets must take into account all of the relevant facts and circumstances, including the fact that they are organizations composed of members. It is important to note that membership carries with it certain duties, responsibilities, and costs not applicable to non-members. Thus, in the circumstances of this filing, it is not inconsistent with fair competition for the CBOE to charge non-member market makers a reasonable fee when utilizing systems whose development has been financed by CBOE members.

Moreover, because access to CBOE's facilities would not be more restrictive under the proposed rule change and because non-member market makers can submit orders via the Linkage system, the Commission does not believe that the proposal would harm the depth and liquidity of the options market.[21] The Commission notes that the depth and liquidity of any particular option is dependent on numerous variables, including the degree of buying and selling activity in the underlying security. In addition, the degree to which an options exchange captures order flow in a particular option is dependent on various factors, such as the narrowness of spreads and the speed of execution. The Commission, however, does not dispute that if such a fee were too large it possibly could deter some non-member market makers from sending order flow to the Exchange, which, in turn, ultimately could have an adverse effect on competition. As the CBOE Letter pointed out, however, the Exchange has an incentive to assure that any differential in fees not be so large as to discourage non-member market makers from sending orders to the Exchange.

[15] *See Bradford National Clearing Corp.* v. *Securities and Exchange Commission,* 590 F.2d 1085 (D.C. Cir. 1978).

[16] *See* Securities Exchange Act Release No. 37273 (June 4, 1996), 61 FR 29438 (June 10, 1996).

[17] *Id.*

[18] 15 U.S.C. 78f(b)(4).

[19] 15 U.S.C. 78f(b)(5).

[20] 15 U.S.C. 78f(b)(8).

[21] The Commission does not intend the approval of this proposal to establish a precedent that would permit the Exchange to make distinctions in the treatment of orders on its floor or through its electronic facilities as a means to discriminate unfairly against its competitors. Orders for the account of non-member market makers must continue to be treated in the same way as other orders. For example, the proposal would not affect the way non-member market maker orders are routed or the priority they are given.

The Commission believes that, in this case, the fee differential is consistent with Section 6(b)(8) of the Act.

Finally, the ISE posits that approval of the proposed rule changed would have ''cascading negative effects,'' because other exchanges likely would submit proposed rule changes that impose higher fees on non-member market makers and because, in the ISE's view, differential treatment of non-member market makers across exchanges ultimately could decrease market efficiency and harm the price discovery process. The Commission agrees that the current system whereby each exchange charges the same transaction fees for member and non-member market makers is easy and practical to administer both for the Commission, when it determines whether those fees are consistent with the Act, and for the exchanges, when they assess those fees on users of their facilities. As noted above, however, the Commission believes that the Act does not require identical treatment for each class or subclass of users of an exchange's facilities, but rather mandates fair treatment, assuming that a proposed fee differential does not raise other issues under the Act. If any other exchange files a similar fee proposal with the Commission, it would have to be analyzed based on its own set of facts and circumstances. Nevertheless, the Commission intends to monitor whether the CBOE's proposed fee differential for non-member market makers has any adverse consequences for the options markets.

V. Amendments No. 2, 3 and 4

The Commission finds good cause for approving Amendments No. 2, 3 and 4 prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. In Amendments No. 2, 3 and 4, the Exchange, respectively, set forth the rule text of the complete Fee Schedule relating to transaction costs, clarified the treatment of Linkage orders in the rule text of the Fee Schedule, and updated the rule text of the Fee Schedule to reflect recent revisions.[22] In the Commission's view, these amendments were not significant and did not affect the substance of the proposed rule change. Therefore, the Commission finds that granting accelerated approval to Amendments No. 2, 3 and 4 is appropriate and consistent with Section 19(b)(2) of the Act.[23]

VI. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendments No. 2, 3 and 4, including whether it 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–CBOE–2003–33 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–CBOE–2003–33. 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 CBOE. 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–CBOE–2003–33 and should be submitted on or before October 29, 2004.

VII. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[24] that the proposed rule change (SR–CBOE–2003–33), as amended by Amendment No. 1, be, and it hereby is, approved, and that Amendments No. 2, 3 and 4 to the proposed rule change be, and hereby are, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[25]

Margaret H. McFarland,

Deputy Secretary.

Exhibit A

New text is *italicized*; deleted text is in [brackets].

CHICAGO BOARD OPTIONS EXCHANGE, INC. FEE SCHEDULE—AUGUST 1, 2004

	Per Contract
1. *OPTION TRANSACTION FEES (1)(3)(4)(7)*	
EQUITY OPTIONS (13):	
I. CUSTOMER	$.00
MARKET-MAKER (MM) (standard rate)(10)	.22
II. MEMBER FIRM PROPRIETARY: (11).	
• FACILITATION OF CUSTOMER ORDER	.20
• NON-FACILITATION ORDER	.24
IV. BROKER-DEALER	.25
V. NON-MEMBER MARKET MAKER [(8)]	.[24]*26*
VI. DESIGNATED PRIMARY MARKET-MAKER (DPM) (10)	.12
VII. ELECTRONIC DPM (e-DPM) (14)	.25
VIII. LINKAGE ORDERS (8)	.24
QQQ OPTIONS:	
I. CUSTOMER $.00.	
II. MARKET-MAKER (MM) AND DPM (standard rate)(10)	.24

[22] *See* Securities Exchange Act Release No. 50175 (August 10, 2004), 69 FR 51129 (August 17, 2004).

[23] 15 U.S.C. 78s(b)(2).

[24] *Id.*

[25] 17 CFR 200.30–3(a)(12).

CHICAGO BOARD OPTIONS EXCHANGE, INC. FEE SCHEDULE—AUGUST 1, 2004—Continued

III. MEMBER FIRM PROPRIETARY: (11).	
• FACILITATION OF CUSTOMER ORDER	.20
• NON-FACILITATION ORDER	.24
IV. BROKER-DEALER	.25
V. NON-MEMBER MARKET MAKER [(8)]	.[24]*26*
VI. LINKAGE ORDERS (8)	.24
INDEX OPTIONS (includes Dow Jones DIAMONDS, OEF and other ETF index options):	
I. CUSTOMER (2):	
• S&P 100, PREMIUM > or = $1	.35
• S&P 100, PREMIUM <$1	.20
• MNX (MINI-NASDAQ 100)	.20
• OTHER INDEXES, PREMIUM > OR = $1	.45
• OTHER INDEXES, PREMIUM <$1	.25
II. MARKET-MAKER AND DPM—EXCLUDING DOW JONES PRODUCTS (10)	.24
MARKET-MAKER—DOW JONES PRODUCTS (10)	.34
III. MEMBER FIRM PROPRIETARY: (11)	
• FACILITATION OF CUSTOMER ORDER	.20
• NON-FACILITATION ORDER	.24
IV. BROKER-DEALER, EXCLUDING MINI-NASDAQ 100 (MNX)	Index Customer Rates
• BROKER-DEALER—MNX, PREMIUM > or = $1	.45
• BROKER-DEALER—MNX, PREMIUM <$1	.25
V. NON-MEMBER MARKET MAKER [(8)]:	
• S&P 100 (including OEF), PREMIUM > or = $1	.[35]*37*
• S&P 100 (including OEF), PREMIUM <$1	.[20]*22*
• OTHER INDEXES, PREMIUM > or = $1	.[45]*47*
• OTHER INDEXES, PREMIUM <$1	.[25]*27*
VI. MNX DPM SUPPLEMENTAL TRANSACTION FEE	.25
VII. RUT DPM and MARKET MAKER LICENSE FEE (Russell 2000 cash settled index) (12)	.40
VIII. LINKAGE ORDERS (8):	
• *S&P 100 (OEF), PREMIUM > or = $1*	*.35*
• *S&P 100 (OEF), PREMIUM <$1*	*.20*
• *OTHER INDEXES, PREMIUM > or = $1*	*.45*
• *OTHER INDEXES, PREMIUM <$1*	*.25*
2. *MARKET-MAKER, e-DPM & DPM MARKETING FEE* (in option classes in which a DPM has been appointed)(6)	.40
3. *FLOOR BROKERAGE FEE (1)(5):*	
• EQUITY & QQQ CUSTOMER ORDER	.00
• ALL OTHER EQUITY, QQQ AND INDEX OPTIONS (8)	.04
• CROSSED ORDERS	.02
4. *RAES ACCESS FEE (RETAIL AUTOMATIC EXECUTION SYSTEM) (1)(4):*	
INDEX CUSTOMER TRANSACTIONS	.25
• DOW JONES, ASSESSED ON THE FIRST 25 CONTRACTS ONLY	
NON-CUSTOMER TRANSACTIONS (ORIGIN CODE OTHER THAN "C")(8)(9)	.30

Notes:

(1) Per contract side, including FLEX options. Transaction Fees are also applicable to orders processed via CBOEdirect.

(2) Please see item 18 for details of the Customer Large Trade Discounts for the period 7/1/03–12/31/04.

(3) Member transaction fee policies and rebate programs are described in the last section.

(4) Transaction and RAES fees are charged to the CBOE executing firm on the input record.

(5) Charged to executing broker. DPMs are assessed for agency and "book" executions (non-cust. orders). Market-Maker and DPM floor brokerage fees are eligible for the Prospective Fee Reduction Program, as described in Section 19. To be eligible for the discounted "crossed" rate, the executing broker acronym, executing firm number and order ID data must be the same on both the buy and sell side of an order.

(6) The Marketing Fee will be assessed only on transactions of Market-Makers, e-DPMs and DPMs resulting from customer orders from payment accepting firms with which the DPM has agreed to pay for that firm's order flow, and with respect to orders from customers that are for 200 contracts or less.

(7) Cabinet trades are not assessed transaction fees. Only index options are assessed a cabinet fee of $.10 per contract side.

(8) [Includes,] *Linkage order fees in effect* on a pilot basis until July 31, 2005, [orders from members of other exchanges executing Linkage transactions,] except for Satisfaction Orders, which are not assessed Exchanges fees per Linkage rules. *The floor brokerage fee for "all other equity, QQQ and index options" and the RAES access fee for non-customer transactions also apply to linkage orders.*

(9) Effective 10/1/03, non-customer equity options RAES orders entered from the trading floor will not be assessed the RAES access fee.

(10) Eligible for the Prospective Fee Reduction Program as described in Section 19.

(11) Please see Section 20 for details of the Member Firm Proprietary and Firm Facilitation Fees Cap.

(12) The RUT License Transaction Fee applies to all RUT contracts traded by the DPM and other Market-Makers. The RUT DPM shall be assessed for any shortfall between the proceeds of the RUT License Fee and the Exchange's license obligation to Russell.

(13) Market-Maker, firm and broker-dealer transaction fees are capped at 2,000 per dividend spread transaction, defined as any trade done to achieve a dividend arbitrage between any two deep-in-the-money options. To qualify a transaction for the cap, a rebate request with supporting documentation must be submitted to the Exchange.

(14) Effective October 1, 2004, DPMs and e-DPMs may elect to pay a fixed annual fee of $1.75 million instead of being assessed transaction fees on a per contract basis for their DPM and e-DPM transactions only in all equity option classes. The fixed fee does not cover any floor brokerage fees. DPMs electing to pay the fixed fee will neither be charged CBOE transaction fees for CBOE transactions related to such outgoing P/A orders, nor will they receive the credit back for such fees as set forth in Section 21 of this Fee Schedule. However, pursuant to the second phase of linkage fee set forth in Section 21 of this Fee Schedule, all CBOE DPMs, including those electing the fixed annual fee, who pay transaction fees at other exchanges to execute P/A orders there, will receive a credit of up to 50% of CBOE DPM transaction charges for each such order (currently up to $.06 per contract, with the total of such credits not to exceed the total amount of inbound linkage transaction fees received by CBOE) to help offset the transaction fees of other exchanges that CBOE DPMs incur in filling P/A orders at those exchanges.

Remainder of Fee Schedule: Unchanged.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50485; File No. SR–NASD–2003–201]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Granting Approval of Proposed Rule Change, and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 to the Proposed Rule Change, To Amend Schedule A of the NASD By-Laws To Adjust the Trading Activity Fee Rate, and To Add TRACE-Eligible and Municipal Securities as Covered Securities

October 1, 2004.

I. Introduction

On December 30, 2003, the National Association of Securities Dealers, Inc. (''NASD'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), 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 Schedule A of the NASD By-Laws to adjust the Trading Activity Fee (''TAF'') rate for covered equity securities, and to assess the TAF on corporate debt securities that, under the Trade Reporting and Compliance Engine (''TRACE'') rules, are defined as ''TRACE-eligible securities'' and municipal securities subject to the Municipal Securities Rulemaking Board (''MSRB'') reporting requirements. The proposed rule change was published for notice and comment in the **Federal Register** on January 28, 2004.[3] The Commission received 15 comment letters on the proposal.[4] On May 20, 2004, NASD filed a response to comments, and simultaneously amended the proposal.[5] The NASD provided additional information in a letter dated September 30, 2004 to clarify its response to comments on certain issues.[6] This order approves the proposed rule change, and provides notice of filing and grants accelerated approval of Amendment No. 1.

II. Summary of Comments

The Commission received 15 comment letters on the proposed rule change.[7] Two commenters support the reduction in TAF rates; the other commenters oppose the proposed rule change for varying reasons.[8] The following is a summary of the major concerns that the commenters raised.

• *Imposition of the TAF is Inappropriate Because NASD Has not Provided Evidence to Justify the TAF, and NASD Already Imposes Fees Pursuant to its TRACE Fee Structure on the Same Transactions*

Several commenters believe the imposition of the TAF is unfair because NASD already imposes and collects fees under its TRACE fee structure on the same transactions.[9] These commenters believe the NASD should not be allowed to impose additional fees on these transactions, and express disapproval that NASD has not provided justification for charging a second fee.[10] They want NASD to provide justification for the TAF, and they specifically question what services the original fees have been used to support, the costs associated with those programs, the amount of overall revenue the NASD expects to collect from the TAF, and the additional costs to be supported by the TAF.[11] Similarly, several commenters believe NASD has not provided evidence to justify the imposition of a new fee.[12]

• *NASD Should Create an Exception for Intermediaries To Avoid Duplication of Fees and ''Double Taxation''*

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 49114 (January 22, 2004), 69 FR 4194.

[4] *See* letters from Paige W. Pierce, Chief Operating Officer, RW Smith & Associates, Inc. (''Smith'') dated February 11, 2004; Richard F. Chapdelaine, Chairman of the Board, Chapdelaine Corporate Securities, & Co. (''CCS'') dated February 12, 2004; Michael Rafferty, Rafferty Capital Markets, LLC (''Rafferty'') dated February 17, 2004; Robert Beck, Principal, Municipal Securities, Edward D. Jones & Co., LP (''Edward Jones'') dated February 17, 2004; Thomas S. Vales, Chief Executive Officer, TheMuniCenter (''TMC'') dated February 18, 2004; Samuel C. Doyle, Executive Vice President, Kirkpatrick, Pettis, Smith, Polian, Inc. (''Kirkpatrick'') dated February 17, 2004; Craig M. Overlander, Senior Managing Director, Bear, Stearns & Co. (''Bear Stearns'') dated February 17, 2004; Richard F. Chapdelaine, Chairman, and August J. Hoerrner, President, Chapdelaine & Co. (''Chapdelaine'') dated February 16, 2004; Mary McDermott-Holland, Chairman of the Board, and John C. Giesea, President and CEO, Security Traders Association (''STA''), dated February 19, 2004; Pamela M. Miller, Senior Vice President, Associated Bond Brokers, Inc. (''ABBI'') dated February 17, 2004; Robert Wolf, Managing Director, Global Head of Fixed Income, and Ray Ormerod, Executive Director, UBS Securities LLC (''UBS'') dated February 18, 2004; O. Gene Hurst, Esq., Counsel for Wolfe & Hurst Bond Brokers, Inc. (''Hurst'') dated February 20, 2004; Lynnette K. Hotchkiss, Senior Vice President and Associate General Counsel, and Michele C. David, Vice President and Assistant General Counsel, The Bond Market Association (''BMA'') dated February 17, 2004; Kimberly Unger, Executive director, The Security Traders Association of New York, Inc. (''STANY'') dated February 18, 2004; all of which were addressed to Jonathan G. Katz, Secretary, Commission. On June 16, 2004, George Miller and Lynnette Hotchkiss of The Bond Market Association submitted a memorandum to Annette Nazareth, Director, Division of Market Regulation, SEC. The Commission considers this memorandum to be a comment letter.

The Smith letter appears to be a template created by The Board Market Association. To the extent that the letter raised issues in an affirmative manner, the Commission considered the issues.

[5] *See* May 19, 2004 letter from Barbara Z. Sweeney, Senior Vice President and Corporate Secretary, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation, SEC, and attachments (''Amendment No. 1'' or ''NASD Response Letter''). In Amendment No. 1, NASD responded to the comments, and modified the proposal to clarify that the TAF will be assessed only on ''TRACE-eligible securities'' where the transaction also is a ''reportable TRACE transaction,'' as those terms are defined in NASD Rule 6210. Additionally, because debt securities that are issued pursuant to Section 4(2) of the Securities Act of 1933 and re-sold pursuant to Rule 144A in secondary market transactions are ''reportable TRACE transactions,'' NASD clarified that these debt transactions are subject to the TAF.

[6] *See* letter from Kathleen O'Mara, Associate General Counsel, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated September 30, 2004 (''NASD Response Letter 2'').

[7] *See* footnote, 4, *supra.*

[8] One commenter expressed support for the proposed reduction in TAF rates, stating that the reduction ''makes progress toward rebalancing the burden of the TAF currently placed on lower priced securities.'' STANY at 2. Another commenter expressed support for the NASD's proposal to revise the TAF rates, but expressed no opinion about the portion of the proposal that would assess the TAF on TRACE-eligible securities and municipal securities. STA at 2.

[9] *See, e.g.,* CCS at 2; Rafferty at 2; Bear Stearns at 1; UBS at 1; BMA at 4. Additionally, some commenters expressed disapproval of the proposal because they believe there is ''no necessity for any additional fees to be imposed upon the municipal securities industry'' and because fees assessed by self-regulatory organizations (''SROs'') should be coordinated across all such organizations with overlapping jurisdictions. *See e.g.,* Hurst at 1, BMA at 5, Bear Stearns at 1.

[10] *See* CCS at 2.

[11] *See e.g.,* Rafferty at 2.

[12] *See* CCS at 2 (''* * * the industry has not received any evidence from the NASD that this fee is warranted.''); Bear Stearns at 1 (''NASD's proposing release does not provide enough information regarding its regulatory costs and overall fees to evaluate the proposal to ensure that it complies with the legal requirements for imposing fees and other charges.'') Chapdelaine at 2 (''* * * where is the NASD's justification for charging members dealing in municipal securities a TAF at the same rate it proposes to charge dealers in other fixed income markets?''); UBS at 1 (the NASD does not provide adequate information ''to support a determination that the Debt TAF would result in an 'equitable allocation of reasonable dues' and otherwise satisfy the requirements of the Securities Exchange Act of 1934 * * *''); BMA at 2, 3 (''* * * the NASD has not provided the industry information that would establish a reasonable nexus between the regulatory costs it seeks to fund and the Debt TAF''); STANY at 2 (''We are unaware of any accounting done by the NASD, which shows revenue generated by transactions or the relationship between the 'taxed' transaction and the cost of regulation associated with those transactions.'').