

that Nasdaq has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the filing date of the proposed rule change.<sup>10</sup> At any time within 60 days of the filing of the 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.

#### 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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 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 No. SR-NASD-2002-81 and should be submitted by July 29, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46153; File No. SR-NASD-2002-68]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 by the National Association of Securities Dealers, Inc. to Modify Execution Fees for Nasdaq's Intermarket Trading System and Computer Assisted Execution System, and to Extend the Transaction Credit Pilot Program for InterMarket Trades

July 1, 2002.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on June 13, 2002, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. On June 21, 2002, Nasdaq amended the proposal.<sup>3</sup> Nasdaq filed the proposal pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>4</sup> and Rule 19b-4(f)(2) thereunder<sup>5</sup> as one establishing or changing a due, fee, or other charge imposed by the self-regulatory organization, 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 (i) to modify the execution fees for Nasdaq InterMarket trades executed through the Intermarket Trading System ("ITS") and Nasdaq's Computer Assisted Execution System ("CAES"); and (ii) to modify and extend the transaction credit pilot program for InterMarket trades ("Program"). Nasdaq will implement the rule change on July 1, 2002. The text of the proposed rule change is below. Proposed new

language is in *italics*; proposed deletions are in *brackets*.

#### 7010. System Services

(a)-(b) No change.

(c) (1) No change.

(2) Exchange-Listed Securities Transaction Credit[.]

For a pilot period, qualified NASD members that trade securities listed on the NYSE and Amex in over-the-counter transactions reported by the NASD to the Consolidated Tape Association may receive from the NASD transaction credits based on the number of trades so reported. To qualify for the credit with respect to Tape A reports, an NASD member must account for 500 or more average daily Tape A reports of over-the-counter transactions as reported to the Consolidated Tape during the concurrent calendar quarter. To qualify for the credit with respect to Tape B reports, an NASD member must account for 500 or more average daily Tape B reports of over-the-counter transactions as reported to the Consolidated Tape during the concurrent calendar quarter. If an NASD member is so qualified to earn credits based either on its Tape A activity, or its Tape B activity, or both, that member may earn credits from one or both pools maintained by the NASD, each pool representing 40% of the revenue paid by the Consolidated Tape Association to the NASD for each of Tape A and Tape B transactions. A qualified NASD member may earn credits from the pools according to the member's pro rata share of the NASD's over-the-counter trade reports in each of Tape A and Tape B for each calendar quarter starting with July 1, 2000 for Tape A reports (April 1, 2000 for Tape B reports) and ending with the calendar quarter starting on [April] *October 1, 2002. Effective as of July 1, 2002, for purposes of calculating the credit for trades executed through ITS or CAES, trade reports will be credited to the member that sells in response to a buy order or that buys in response to a sell order.*

(d) Computer Assisted Execution Service.

The charges to be paid by members receiving the Computer Assisted Execution Service (CAES) shall consist of a fixed service charge and a per *share* transaction charge plus equipment-related charges.

(1) Service Charges.

\$100 per month for each market maker terminal receiving CAES.

(2) Transaction Charges.

(A) As of [January 1, 1998, \$0.50 per execution] *July 1, 2002, \$0.003 per share executed shall be paid by an order entry firm or CAES market maker that enters*

<sup>10</sup> As required under Rule 19b-4(f)(6)(iii), Nasdaq provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to the filing date.

<sup>11</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> See June 21, 2002 letter from John M. Yetter, Assistant General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission ("Amendment No. 1"). In Amendment No. 1, Nasdaq made technical, non-substantive changes to the proposed rule change.

<sup>4</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>5</sup> 17 CFR 240.19b-4(f)(2).

an order into CAES that is executed in whole or in part, *and \$0.002 per share executed shall be credited to the CAES market maker that executes such an order.*[\*]

(B) As of [November 1, 1997, \$1.00 per commitment] *July 1, 2002, \$0.002 per share executed shall be paid by any member that sends a commitment through the ITS/CAES linkage to buy or sell a listed security that is executed in whole or in part, and \$0.001 per share executed shall be credited to a member that executes such an order.*[\*\*]

[\* As of September 1, 2000, a CAES market maker that receives and executes a CAES order or any part of a CAES order will not be required to pay a CAES transaction charge.]

[\*\* As of September 1, 2000, a member that receives a commitment through the ITS/CAES linkage to buy or sell a security that is executed in whole or in part will not be required to pay a CAES transaction charge.]

(e)—(r) 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, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

#### 1. Purpose

Nasdaq's InterMarket is a quotation, communication, and execution system that allows NASD members to trade stocks listed on the New York Stock Exchange ("NYSE") and the American Stock Exchange ("Amex").<sup>6</sup> The InterMarket competes with regional exchanges like the Chicago Stock Exchange ("CHX") and the Cincinnati Stock Exchange ("CSE") for retail order flow in stocks listed on the NYSE and the Amex. The InterMarket comprises CAES, a system that facilitates the execution of trades in listed securities between NASD members that

participate in the InterMarket, and ITS, a system that permits trades between NASD members and specialists on the floors of national securities exchanges that trade listed securities.<sup>7</sup>

Nasdaq proposes to modify the InterMarket fee structure to encourage market participants to provide additional liquidity to support executions through the InterMarket and thereby enhance its competitiveness. Specifically, Nasdaq will replace the current CAES execution fee of \$0.50 with a per share execution fee of \$0.003, and will credit \$0.002 per share to a member whenever it provides the liquidity to support an execution through CAES (*i.e.* sells in response to a buy order or buys in response to a sell order). Similarly, the current ITS execution fee of \$1.00 will be replaced with a per share execution fee of \$0.002, and a member that provides liquidity to support an ITS execution will receive a credit of \$0.001 per share. This fee structure is similar to the structure that has been in place for Nasdaq's SuperSOES system since November 2001 and that will be used for Nasdaq's SuperMontage system which Nasdaq hopes to launch in the third quarter of 2002.<sup>8</sup>

Nasdaq also proposes to modify the Program that began in 1999.<sup>9</sup> Under the Program, Nasdaq shares a portion of the tape revenues that it receives (through the NASD) from the Consolidated Tape Association ("CTA"), by providing a transaction credit to members who exceed certain levels of OTC trading activity in NYSE and Amex listed securities. The Program helps InterMarket market makers and investors lower costs associated with trading listed securities. The Program is also an important tool for Nasdaq to compete against other exchanges (particularly CSE and CHX) that offer

similar programs<sup>10</sup> and thereby maintain market share in listed securities.

Under the Program, Nasdaq calculates two separate pools of revenue from which credits can be earned: one representing 40% of the gross revenues received from the CTA for providing trade reports in NYSE-listed securities executed in the InterMarket for dissemination by the CTA ("Tape A"), the other representing 40% of the gross revenue received from the CTA for reporting Amex trades ("Tape B"). Eligibility for transaction credits is based on concurrent quarterly trading activity. Hitherto, trade reports of ITS and CAES transactions, which are reported to Nasdaq automatically, have been attributed to the sell side of the trade.<sup>11</sup> As an added encouragement for members to provide liquidity for executions through ITS and CAES, however, Nasdaq is modifying the Program to attribute ITS and CAES trades to a member that provides liquidity (*i.e.*, that sells in response to an order to buy or that buys in response to an order to sell). As is currently the case, members will be required to maintain an average daily level of attributable trades during a quarter to be eligible for a credit.

Nasdaq is also extending the Program, which is scheduled to expire on June 30, 2002. Because the Program has helped Nasdaq maintain market share in listed securities, Nasdaq proposes to extend the Program through December 31, 2002.

#### 2. Statutory Basis

Nasdaq believes the proposed rule change is consistent with the Act, including Section 15A(b)(5) of the Act,<sup>12</sup> which requires that the rules of the NASD provide 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, and Section 15A(b)(6) of the Act,<sup>13</sup> which requires rules that are not designed to permit unfair discrimination between customers, issuers, brokers or dealers.

<sup>10</sup> See Securities Exchange Act Release Nos 38237 (February 4, 1997), 62 FR 6592 (February 12, 1997)(SR-CHX-97-01) and 39395 (December 3, 1997), 62 FR 65113 (December 10, 1997)(SR-CSE-97-12).

<sup>11</sup> Non-Nasdaq system trades that are reported to Nasdaq are attributed to the member identified in the trade report as the executing party, which is either the reporting party or a "give-up" on whose behalf the trade is reported. The crediting of non-Nasdaq system trades remains unchanged.

<sup>12</sup> 15 U.S.C. 78o-3(b)(5).

<sup>13</sup> 15 U.S.C. 78o-3(b)(6).

<sup>6</sup> Nasdaq's InterMarket formerly was referred to as Nasdaq's Third Market. See Securities Exchange Act Release No. 42907 (June 7, 2000), 65 FR 37445 (June 14, 2000) (SR-NASD-2000-32).

<sup>7</sup> See CAES/ITS User Guide, p.5, at [www.intermarket.nasdaqtrader.com](http://www.intermarket.nasdaqtrader.com).

<sup>8</sup> See Securities Exchange Act Release Nos. 44910 (October 5, 2001), 66 FR 52167 (October 12, 2001) (SR-NASD-2001-67); and 45906 (May 10, 2002), 67 FR 34965 (May 16, 2002) (SR-NASD-2002-44).

<sup>9</sup> See Securities Exchange Act Release No. 41174 (March 16, 1999), 64 FR 14034 (March 23, 1999) (SR-NASD-99-13). The Commission issued notice of subsequent extensions of the Program. See Securities Exchange Act Release Nos. 42095 (November 3, 1999), 64 FR 61680 (November 12, 1999) (SR-NASD-99-59); 42672 (April 12, 2000), 65 FR 21225 (April 20, 2000) (SR-NASD-2000-10); 42907 (June 7, 2000), 65 FR 37445 (June 14, 2000) (SR-NASD-2000-32); 43831 (January 10, 2001), 66 FR 4882 (January 18, 2001) (SR-NASD-2000-72); 44098 (March 23, 2000), 66 FR 17462 (March 30, 2001) (SR-NASD-2001-15); 44734 (August 22, 2001), 66 FR 4537 (August 26, 2001) (SR-NASD-2001-42); and 45273 (January 14, 2002); 67 FR 2716 (January 18, 2002) (SR-NASD-2001-92).

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

Nasdaq believes that the proposed rule change will not 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 proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>14</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder,<sup>15</sup> because the proposal establishes or changes a due, fee, or other charge. At any time within 60 days of the filing of the 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.

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 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 Association. All submissions should refer to file number SR-NASD-2002-68 and should be submitted by July 29, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>16</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-46152; File No. SR-OCC-2001-09]**

### **Self-Regulatory Organizations; The Options Clearing Corporation; Order Granting Accelerated Approval of a Proposed Rule Change Regarding Access to The Option Clearing Corporation's Information and Data Systems Via Electronic Means**

July 1, 2002.

On August 1, 2001, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> a proposed rule change (File No. OCC-2001-09). On April 23, 2002, OCC filed an amendment to the proposed rule change. Notice of the proposal was published in the **Federal Register** on June 7, 2002.<sup>2</sup> No comment letters were received. For the reasons discussed below, the Commission is approving the proposed rule change on an accelerated basis.

#### **I. Description**

The proposed rule change amends OCC's rules regarding access to its information and data systems via electronic means. OCC rules currently support on-line data entry and data retrieval, but these provisions are limited solely to direct access via on-line terminals. OCC is in the process of developing a new clearance and settlement system to replace its existing system.<sup>3</sup> The new system will support internet access at a clearing member's election. The proposed rule change adds the definition of "electronic data entry,"

which is broken down into "electronic data entry" and "electronic data retrieval," to Rule 101 to provide a more flexible and broader description of the electronic means by which OCC and its clearing members can communicate.<sup>4</sup>

The proposed rule change also eliminates outdated provisions that require clearing members to send representatives to access lock boxes to obtain papers and documents distributed by OCC and clarifies the manner by which clearing members exchange information with OCC. Under the proposed rule change, Rules 205 ("Submission of Items to Corporation [OCC]") and 206 ("Retrieval of Items from Corporation [OCC]") require that a clearing member submit and retrieve instructions, notices, reports, data, and other items via electronic data entry or electronic data retrieval unless otherwise prescribed by OCC. Rules 205 and 206 also provide that such electronic transmissions constitute valid "writings" for purposes of applicable law. In the event unusual or unforeseen conditions prevent a clearing member from submitting or retrieving such items electronically, OCC has the discretion to designate alternative means or to extend any applicable cutoff times as may be deemed reasonable, practicable, and equitable under the circumstances. The proposed rule change amends Rule 208 ("Reports by the Corporation [OCC]") to provide clearing members with the ability to notify OCC via facsimile or e-mail of any errors contained in reports made available by OCC.

Under the proposed rule change, a new Rule 212 ("Security Measures") sets forth the obligations of clearing members to comply with security measures implemented by OCC, including access codes and authorization stamps. Under Rule 212, a clearing member would be bound by submissions made using a current access code or authorization stamp.

Finally, the proposed rule change makes conforming changes to Interpretations and Policies under Rules 801 ("Exercise of Options") and 1606A ("Alternative Settlement Procedures") to delete references to "on-line data entry" and to replace those references with the newly defined term "electronic data entry." Interpretations and Policies .01 under Rule 801 also is amended to

<sup>16</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> Securities Exchange Act Release No. 46005 (May 30, 2002), 67 FR 39460.

<sup>3</sup> As previously reported to the Commission, OCC is developing a new clearance and settlement system known as ENCORE to replace its existing system, INTRACS. OCC's implementation strategy is to replace INTRACS on a modular basis with new development code modules replacing targeted pieces of INTRACS, which pieces will then be "decommissioned." Newly developed and installed code will interface with remaining portions of INTRACS until the old system is completely replaced.

<sup>4</sup> Under the proposal, "electronic data entry" is defined as the transmission by a clearing member to OCC via electronic means of reports, notices, instructions, data, or other items. "Electronic data retrieval" is defined as the retrieval by a clearing member via electronic means of reports, notices, instructions, data, and other items made available by OCC.

<sup>14</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>15</sup> 17 CFR 240.19b-4(f)(3).