

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-2003-87 and should be submitted by June 27, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>8</sup>

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Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47946; File No. SR-NASD-2002-148]

### Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change and Amendment Nos. 1 and 2, and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 3 and 4 to the Proposed Rule Change by the National Association of Securities Dealers, Inc., to Eliminate the Regulatory Fee and Institute a Transaction-Based Trading Activity Fee

May 30, 2003.

#### I. Introduction

On October 18, 2002, 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")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to eliminate the NASD's Regulatory Fee and institute a new, transaction-based Trading Activity Fee ("TAF"). The NASD amended the proposed rule change on November 5, 2002,<sup>3</sup> and November 8, 2002.<sup>4</sup> The proposed rule change, as modified by Amendment Nos. 1 and 2, was published for notice

and comment in the **Federal Register** on November 19, 2002.<sup>5</sup> The Commission received 23 comments<sup>6</sup> on the proposal.<sup>7</sup> On March 18, 2003, the

<sup>5</sup> See Securities Exchange Act Release No. 46817 (November 12, 2002), 67 FR 69784.

<sup>6</sup> There are 15 comment letters submitted for the instant proposed rule change. However, the Commission also is considering comment letters submitted for SR-NASD-2002-98, SR-NASD-2002-147, SR-NASD-2003-26 and SR-NASD-2003-73. See footnotes 7 and 9, *infra*.

<sup>7</sup> The NASD eliminated the Regulatory Fee and instituted the TAF when it filed SR-NASD-2002-98. See Securities Exchange Act Release No. 46416 (August 23, 2002), 67 FR 55901 (August 30, 2002). The proposal was effective upon filing with the Commission, pursuant to section 19(b)(3)(A)(ii) of the Act, and Rule 19b-4(f)(2) thereunder. 15 U.S.C. 78s(b)(3)(A)(ii), 17 CFR 240.19b-4(f)(2). The Commission received 10 comments on SR-NASD-2002-98. See September 17, 2002 letter from Lanny A. Schwartz, Philadelphia Stock Exchange, Inc. ("Phlx"), to Jonathan G. Katz, Secretary, SEC ("Phlx Letter"); September 18, 2002 letter from Edward J. Joyce, President and Chief Operating Officer, The Chicago Board Options Exchange, Inc. ("CBOE"), to Jonathan G. Katz, Secretary, SEC ("CBOE Letter #1"); September 20, 2002 letter submitted jointly by The American Stock Exchange LLC ("Amex"), CBOE, the International Securities Exchange, Inc. ("ISE"), The Options Clearing Corporation ("OCC"), The Pacific Exchange, Inc. ("PCX"), and the Phlx, to Jonathan G. Katz, Secretary, SEC ("OCC Joint Letter #1") (OCC Joint Letter #1 was later withdrawn.); September 23, 2002 letter from Susan Milligan, First Vice President and Special Counsel, OCC, to Jonathan G. Katz, Secretary, SEC ("OCC Joint Letter #2") (withdraws OCC Joint Letter #1 and substitutes a new letter that is identical to OCC Joint Letter #1 except for the removal of the Amex as a signatory to the letter); September 27, 2002 letter from Jeffrey T. Brown, Senior Vice President ("SVP"), Secretary and General Counsel ("GC"), The Cincinnati Stock Exchange, Inc. ("CSE"), to Jonathan G. Katz, Secretary, SEC ("CSE Letter #1"); September 26, 2002 letter from Stuart J. Kaswell, Senior Vice President ("SVP") and GC, The Securities Industry Association ("SIA"), to Jonathan G. Katz, Secretary, SEC ("SIA Letter #1"); October 21, 2002 letter from Margaret Wiermanski, Chief Compliance Officer, TD Securities, to Jonathan G. Katz, Secretary, SEC ("TD Securities Letter"); March 13, 2003 letter from John Boese, VP, Legal and compliance, The Boston Stock Exchange ("BSE"), to Jonathan G. Katz, Secretary, SEC ("BSE Letter"); March 27, 2003 letter from Edward J. Joyce, President and Chief Operating Officer, CBOE, to Jonathan G. Katz, Secretary, SEC ("CBOE Letter #3"); May 15, 2003 letter from Margaret Wiermanski, VP-Compliance, TD Options, LLC, to Jonathan G. Katz, Secretary, SEC ("TD Options Letter").

The NASD also filed SR-NASD-2002-147, which transformed the TAF into a pilot program, scheduled to terminate on December 31, 2002. See Securities Exchange Act Release No. 46818 (November 12, 2002), 67 FR 69782 (November 19, 2002). The Commission received eight comments on SR-NASD-2002-147, which were submitted as joint letters for SR-NASD-2002-147 and SR-NASD-2002-148. Letters for SR-NASD-2002-147 are not listed separately in this order, because they are fully documented in the list of comment letters for SR-NASD-2002-148.

Subsequently, the NASD filed the instant proposed rule change (SR-NASD-2002-148), which contained substantially the same proposed rule language as was contained in SR-NASD-2002-98, but was submitted pursuant to Section 19(b)(2) of the Act to allow for an additional notice and comment period per the commenters' requests. See Securities Exchange Act Release No. 46817 (November 12, 2002), 67 FR 69785 (November 19,

NASD responded to the comments, and amended the proposed rule change again.<sup>8</sup> On April 14, 2003, the NASD extended the pilot program through June 1, 2003.<sup>9</sup> On May 19, 2003, the NASD amended the proposed rule change a fourth time.<sup>10</sup> This order

2002). The Commission received 15 comments on SR-NASD-2002-148. See December 6, 2002 letter from Edward J. Joyce, President and Chief Operating Officer, CBOE, to Jonathan G. Katz, Secretary, SEC ("CBOE Letter #2"); December 6, 2002 letter from William C. McGowan, Managing Director, TD Professional Execution, Inc., to Jonathan G. Katz, Secretary, SEC ("TD ProEx Letter"); December 10, 2002 letter from Eric Noll, Susquehanna International Group, LLP, to Jonathan G. Katz, Secretary, SEC ("Susquehanna Letter"); December 10, 2002 letter from Jeffrey T. Brown, SVP, Secretary and GC, CSE, to Jonathan G. Katz, Secretary, SEC ("CSE Letter #2"); December 9, 2002 letter from Barry S. Augenbraun, SVP and Corporate Secretary, Raymond James Financial, Inc., to Jonathan G. Katz, Secretary, SEC ("Raymond James Letter"); December 9, 2002 letter from Stuart J. Kaswell, SVP and GC, SIA, to Jonathan G. Katz, Secretary, SEC ("SIA Letter #2"); January 23, 2003 letter from Mary McDermott-Holland, Vice Chairman, Chair, Trading Issues Committee, to Jonathan G. Katz, Secretary, SEC ("STA Letter"); December 11, 2002 letter from Darla C. Stuckey, Corporate Secretary, The New York Stock Exchange, Inc. ("NYSE"), to Jonathan G. Katz, Secretary, SEC ("NYSE Letter #1"); December 5, 2002 letter, submitted jointly by CBOE, OCC, ISE, PCX, and Phlx, to Jonathan G. Katz, Secretary, SEC ("OCC Joint Letter #3"); BSE Letter; CBOE Letter #3; March 24, 2003 letter submitted jointly by CBOE, OCC, ISE, PCX, and Phlx, to Jonathan G. Katz, Secretary, SEC ("OCC Joint Letter #4"); TD Options Letter; April 10, 2003 letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Jonathan G. Katz, Secretary, SEC ("NYSE Letter #2"); May 27, 2003 letter from Gabriel A. Duran, Chief Compliance Officer, GVR Company, LLC, to Jonathan G. Katz, Secretary, SEC ("GVR Letter").

The NASD extended the pilot in SR-NASD-2002-182, through March 1, 2003. The Commission received no comments on SR-NASD-2002-182. The NASD extended the pilot through April 1, 2003 in SR-NASD-2003-26. See Securities Exchange Act Release No. 47436 (March 4, 2003), 68 FR 11422 (March 10, 2003). The Commission received two comments on SR-NASD-2003-26. NYSE Letter #2; GVR Letter.

<sup>8</sup> See March 18, 2003 letter from Barbara Z. Sweeney, SVP and Corporate Secretary, NASD, to Katherine A. England, Assistant Director, Division, SEC, ("NASD Response Letter" or "Amendment No. 3"). In Amendment No. 3, the NASD (1) responded to the comments; (2) incorporated the interpretations contained in *Notices to Members 02-36* and *02-75* in the proposed rule language. See also, March 28, 2003 letter from Kathleen A. O'Mara, Associate General Counsel, Regulatory Policy and Oversight, NASD, to Katherine A. England, Assistant Director, and Joseph Morra, Special Counsel, Division of Market Regulation, SEC (via email) ("NASD Response Letter #2").

<sup>9</sup> See Securities Exchange Act Release No. 47685 (April 16, 2003), 68 FR 20198 (April 24, 2003) (SR-NASD-2003-73). The Commission received two comments on the proposed rule change. See May 13, 2003 letter from Robert Bellick, Christopher Gust, Wolverine Trading, LLC, to Jonathan G. Katz, Secretary, SEC ("Wolverine Letter"); GVR Letter.

<sup>10</sup> See May 19, 2003 letter from Barbara Z. Sweeney, SVP and Corporate Secretary, NASD, to Katherine A. England, Assistant Director, Division, SEC ("Amendment No. 4"). In Amendment No. 4, the NASD proposes to exempt from the TAF listed

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<sup>8</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 November 4, 2002 letter from Barbara Z. Sweeney, Senior Vice President ("SVP") and Corporate Secretary, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), SEC, and attachments ("Amendment No. 1"). Amendment No. 1 completely replaced and superseded the original proposed rule change.

<sup>4</sup> See November 7, 2002 letter from Barbara Z. Sweeney, SVP and Corporate Secretary, NASD, to Katherine A. England, Assistant Director, Division, SEC, and attachments ("Amendment No. 2"). Amendment No. 2 completely replaced and superseded Amendment No. 1 and the original proposed rule change.