

the NASD has direct responsibility to oversee the firm's dealing with the public in effecting the transactions; the NASD may also have responsibility to oversee the impact of the trading on the firm's financial condition. In most cases, where responsibility for certain member activities has been allocated to other SROs, the NASD retains responsibility for other member functions. Thus, while trading activity is not wholly correlated to the full range of NASD responsibility for members in all instances, the Commission believes that they are closely enough connected to satisfy the statutory standard. To more narrowly tailor the transaction fees to regulatory duties, the NASD filed Amendment No. 4 to create an exemption from the TAF for listed options transactions of members for which the NASD is not the designated options examining authority. The Commission is granting accelerated approval of Amendment Nos. 3 and 4 to ensure that these changes are made simultaneously with the approval of the TAF proposal.³⁸ The Commission is satisfied that the NASD has made a good faith effort to exclude those types of transactions where there does not exist a substantial nexus to the NASD's regulatory responsibilities.

The Commission does not believe that approval of the NASD's TAF proposal opens the door to the imposition of fees on transactions executed on markets for which an SRO either has little or no nexus to regulatory tasks performed by the SRO or for which the SRO has no business interest. In setting their fees, the SROs must meet the statutory standard established in sections 6(b)(5)³⁹ and 15A(b)(5) of the Act.⁴⁰ Most SROs do not have the broad aegis of the NASD regarding members' customer business, and so will not have a regulatory nexus to support a transaction fee applicable to other markets.

The NASD currently excludes debt, mutual funds, and variable annuities from the scope of the TAF, because of difficulties of measurement. The Commission urges the NASD to consider ways to take into account

activity in all the areas the NASD must oversee, to better allocate regulatory costs to these activities.⁴¹

Similarly, the Commission does not share the commenters' concern that the NASD could raise the TAF at any time. The NASD must file any proposed changes to the TAF with the Commission, and the NASD has agreed to file all future changes to the TAF for full notice and comment pursuant to section 19(b)(2) of the Act.⁴² Therefore, if the NASD wishes to modify the TAF in the future, the NASD must file a proposed rule change pursuant to section 19(b)(2) of the Act,⁴³ for notice, public comment, and approval by the Commission.

In response to the commenters' concerns that the interpretations contained in *Notice to Members 02-63* and *Notice to Members 02-75* could be revoked or modified at any time, the NASD filed Amendment No. 3 to include the relevant language in the proposed rule language.

The Commission finds good cause for approving proposed Amendment Nos. 3 and 4 before the 30th day after the date of publication of notice of filing thereof in the **Federal Register**. The NASD filed Amendment Nos. 3 and 4 in response to comments it received after publication of the notice of filing of the proposed rule change, to address certain commenters' concerns. Because Amendment Nos. 3 and 4 are responsive to commenters' concerns, the Commission finds good cause for accelerating approval of the proposed rule change, as modified by Amendment Nos. 3 and 4.

The Commission expects that the NASD will continue to monitor the manner in which the TAF is implemented, and will take whatever steps are necessary to ensure that the fees remain consistent with the mandate established in section 15A(b)(5) of the Act,⁴⁴ so that the TAF remains

equitable, as well as consistent with the NASD's expressed goal.

V. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment Nos. 3 and 4, including whether Amendment Nos. 3 and 4 are 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 Amendment Nos. 3 and 4 that are filed with the Commission, and all written communications relating to Amendment Nos. 3 and 4 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-2002-148 and should be submitted by June 27, 2003.

VI. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,⁴⁵ that the proposed rule change (SR-NASD-2002-148), as modified by Amendment Nos. 1 and 2, be, and it hereby is, approved, and that Amendment Nos. 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.⁴⁶

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03-14258 Filed 6-5-03; 8:45 am]

BILLING CODE 8010-01-P

³⁸ The Commission notes that an SRO may not grant exemptions to its rules unless the SRO has Commission-approved rules that gives it the authority to do so. Furthermore, where such authority exists, an SRO must file a proposed rule change to grant an exemption, unless the circumstances for the exemption are truly unique. The NASD stated the exemption created by Amendment No. 4 will be implemented on January 1, 2004.

³⁹ 15 U.S.C. 78f(b)(5).

⁴⁰ 15 U.S.C. 78o-3(b)(5). In reviewing other similar fee proposals, the Commission will, as it has done here, examine the proposals to ensure that the costs borne by firms are commensurate with the functions performed.

⁴¹ Although the NASD did not delineate its responsibility for regulating trading in the over-the-counter market in unlisted securities, the Commission believes that the NASD indeed shoulders such a responsibility, and that it should devote an appropriate portion of the TAF to expanding and enhancing its examination and surveillance programs in that particular area. In this connection, the Commission notes that it approved recently an NASD proposal that will give the NASD access to real-time quotation activity in such securities. See Securities Exchange Act Release No. 47587 (March 27, 2003), 68 FR 16328 (April 3, 2003) (SR-NASD-2000-42)(approval order). The Commission expects the NASD to devote appropriate resources to take advantage of this expanded information.

⁴² 15 U.S.C. 78s(b)(2). See NASD Response Letter #2.

⁴³ 15 U.S.C. 78s(b)(2).

⁴⁴ 15 U.S.C. 78o-3(b)(5).

⁴⁵ 15 U.S.C. 78s(b)(2).

⁴⁶ 17 CFR 200.30-3(a)(12).