

NASD's fees, the NASD restates its position that the fees it is proposing "are directly related to the regulatory responsibilities of NASD, are member regulatory fees not market regulatory fees, and are revenue neutral to NASD."¹⁷

Finally, with regard to the concern that commenters are unable to comment meaningfully on the proposal because of the lack of specifics on the trading activity fee in SR-NASD-2002-98, the NASD states that it has since established and published the trading activity fee rates. Furthermore, the trading activity fee portion of the NASD's proposed fee restructuring proposal is now subject to full notice and comment.¹⁸

III. Discussion and Commission Findings

The Commission has reviewed carefully the proposed rule change, the comment letters, and the NASD's response to the comments, and finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association¹⁹ and, in particular, the requirements of section 15A(b)(5) of the Act.²⁰ Section 15A(b)(5) requires, among other things, that the rules of a national securities association 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 association operates or controls. The Commission finds that the three-tiered flat rate for the GIA that the NASD proposes to apply to gross FOCUS revenue and the use of the Personnel Assessment, as described in the instant proposed rule change, is consistent with section 15A(b)(5) of the Act, in that the proposal is reasonably designed to simplify the NASD's fee structure, and to fairly and equitably assess higher fees to those member firms that require a greater portion of NASD regulatory services.

The Commission recognizes the difficulties inherent in restructuring the NASD's regulatory fees, and believes that the NASD has made a good faith effort to do so in a manner that is fair and reasonable. The Commission also notes that the NASD has indicated it will examine the fees periodically, and

will adjust the fees accordingly in an effort to keep the fees at a level that is revenue neutral to the NASD.

While some commenters believe there is no clear nexus between the NASD's proposed fees and the regulatory services the NASD provides, the Commission believes that the NASD had adequately addressed this concern. The Commission believes that both the overall business activity of a firm and the level of transactions a firm handles are reflected in the cost of the NASD's regulatory services. If the fee were based on either measure alone firms whose business is predominantly reflected in one or the other measure would subsidize the operations of other firms. Furthermore, the NASD, as a registered national securities association, has a wide-ranging responsibility for overseeing the just and equitable conduct of its members, as well as its members' financial condition, no matter what activities its members choose to conduct through the broker-dealer. The Commission is satisfied that the NASD's proposed GIA is reasonably tailored to apportion fees based on the regulatory services the NASD provides. Additionally, the Commission agrees that the NASD's decision to reinstate the exclusion for commodities income in the GIA should substantially satisfy the commenters who expressed dissatisfaction with this aspect of the proposal.

With regard to the commenters' concern that approval of the NASD's proposed fee restructuring may set a precedent whereby other markets may institute fees similar to the NASD's fees, the Commission notes that any fee proposal filed with the Commission must meet the statutory standard established in section 15A(b)(5) of the Act.²¹ In particular, the Commission will, as it has done in the instant proposed rule change, assess any such proposal to determine whether or not the proposed fees have a sufficient nexus to the regulatory responsibilities of the proposing entity, and are fees based on the regulation of members as opposed to the regulation of markets.

The Commission believes that the NASD has been responsive to the commenters' concerns that more time and information is necessary to evaluate the NASD's tandem proposed rule changes to restructure its regulatory fees. With the filing of SR-NASD-2002-147 and SR-NASD-2002-148, the NASD has provided the public with further opportunity to evaluate its proposed regulatory fee restructuring.

With regard to all other issues raised by the commenters, the Commission is satisfied that the NASD has adequately and accurately addressed the commenters' concerns.

The Commission finds good cause for approving proposed Amendment No. 2 before the 30th day after the date of publication of notice of filing thereof in the **Federal Register**. The NASD filed Amendment No. 2 in response to comments it received after the publication of the notice of filing of the proposed rule change, to address certain commenters' concerns.²² Because Amendment No. 2 is responsive to these commenters' concerns, the Commission finds good cause for accelerating approval of the proposed rule change, as amended.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 2, including whether Amendment No. 2 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 Amendment No. 2 that are filed with the Commission, and all written communications relating to Amendment No. 2 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-2002-99 and should be submitted by January 28, 2003.

²² Certain commenters objected to the NASD's method of calculating the GIA because it would include revenue from transactions for which there is no regulatory nexus between the transactions and the NASD. See footnote 9, *supra*. Although the NASD believes that the GIA structure as proposed constitutes "a reasonable fee that is equitably allocated, and consistent with the Act," the NASD reinstated the exclusion for commodities. NASD Response Letter at 5. According to the NASD, some of its member firms conduct securities and commodities business in a single jointly registered entity, and other members conduct a substantially similar business as separate entities with separate registrations. Reinstating the exclusion for commodities income allows similarly situated entities to receive the same treatment. While the NASD believes that commodities income drives some of the NASD's regulatory costs for jointly registered firms, it reinstated the exclusion for commodities income. *Id.*

¹⁷ *Id.*

¹⁸ See Securities Exchange Act Release No. 46817 (November 12, 2002), 67 FR 69785 (November 19, 2002) (SR-NASD-2002-148).

¹⁹ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

²⁰ 15 U.S.C. 78o-3(b)(5).

²¹ Exchange rules must comply with section 6(b)(4) of the Act. 15 U.S.C. 78f(b)(4).