

arguments concerning the foregoing, including whether the proposed rule change 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](mailto:rule-comments@sec.gov). Please include File Number SR-BSE-2004-51 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-BSE-2004-51. 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 Room. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. 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-BSE-2004-51 and should be submitted on or before May 19, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-51590; File No. SR-CBOE-2005-10]

### **Self-Regulatory Organizations; Chicago Board Options Exchange, Inc.; Order Approving Proposed Rule Change To Revise Certain Membership Rules Related to the Testing and Orientation Requirements for Nominees of Member Organizations Approved Solely as Clearing Members**

April 21, 2005.

On January 25, 2005, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") 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> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to revise membership rules related to the testing and orientation requirements for certain members and to make other non-substantive changes. The proposed rule change was published for comment in the **Federal Register** on March 17, 2005.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

Pursuant to the proposed rule change, the Exchange will revise Exchange Rule 3.8(a)(iii) to provide that nominees of a member organization approved solely as a Clearing Member are not required to have an authorized trading function. The effect of the rule change is to eliminate the requirement that nominees of Clearing Members attend the Exchange's Member Orientation Program and pass the Exchange's Trading Member Qualification Exam. Clearing Members who wish to engage in trading activities on the Exchange will still be required to designate a nominee who has an authorized trading function. The proposed rule change also makes certain other technical changes to internal Exchange procedures for categorizing its members.

The Commission 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 exchange and, in particular, the requirements of Section 6(b)(5) of the Act,<sup>4</sup> which requires that the rules of the exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable

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

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

<sup>3</sup> See Securities Exchange Act Release No. 51361 (March 11, 2005), 70 FR 13058.

<sup>4</sup> 15 U.S.C. 78f(b)(5).

principles of trade, and in general, to protect investors and the public interest. The Commission finds that removing the requirements that nominees of member organizations approved solely as Clearing Members attend the Exchange's Member Orientation Program and pass the Exchange's Trading Member Qualification Exam is consistent with the requirements of Section 6(b)(5) of the Act because the exemption only applies to the nominees of member organizations that are not engaged with trading with the public.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>5</sup> that the proposed rule change (SR-CBOE-2005-10) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>6</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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**BILLING CODE 8010-01-P**

## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-51598; File No. SR-NASD-2004-185]

### **Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the National Association of Securities Dealers, Inc. To Establish a Unitary Fee Schedule for Distribution of Real Time Data Feed Products Containing Nasdaq Market Center Data**

April 21, 2005.

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 December 14, 2004, the National Association of Securities Dealers, Inc. ("NASD"), 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 February 17, 2005, Nasdaq filed Amendment No. 1 to the original filing.<sup>3</sup> Nasdaq filed Amendment No. 2 on April 14, 2005.<sup>4</sup> The Commission is publishing this notice to solicit

<sup>5</sup> 15 U.S.C. 78s(b)(2).

<sup>6</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> Amendment No. 1 replaced and superseded the original proposed rule change in its entirety.

<sup>4</sup> Amendment No. 2 replaced and superseded the original proposed rule change, as amended.

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

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 is filing a proposed rule change to modify NASD Rule 7010 to establish a unitary fee schedule for the distribution of Nasdaq Market Center real time data feed products.

The text of the proposed rule change is below.<sup>5</sup> Proposed new language is

*italicized*; proposed deletions are in [brackets].<sup>6</sup>

\* \* \* \* \*

**Rule 7010. System Services**

(a)–(k) No change

(l) Market Data Distributor [or Vendor Annual Administrative] Fees

(1) Nasdaq Market Data Distributors [or Vendors] shall be assessed the following annual administrative fee:

Delayed distributor .....	\$250[.00]
0–999 real-time terminals ...	500[.00]
1,000–4,999 real-time terminals .....	1,250[.00]
5,000–9,999 real-time terminals .....	2,250[.00]
10,000+ real-time terminals	3,750[.00]

The Association may waive all or part of the foregoing charges.

(2) *The charge to be paid by Distributors of the following Nasdaq market center real time data feeds shall*

	Monthly direct access fee	Monthly internal distributor fee	Monthly external distributor fee
Issue Specific Data:			
Dynamic Intraday .....	\$2,500	\$1,000	\$2,500
Total View			
Open View			
Daily .....	500	0	500
MFQS			
Market Summary Statistics:			
Intraday .....	500	50	1,500
Real Time Index			

(3) A “distributor” of Nasdaq data is any entity that receives a feed or data file of Nasdaq data directly from Nasdaq or indirectly through another entity and then distributes it either internally (within that entity) or externally (outside that entity). All distributors shall execute a Nasdaq distributor agreement. Nasdaq itself is a vendor of its data feed(s) and has executed a Nasdaq distributor agreement and pays the distributor charge.

(4) “Direct Access” means a telecommunications interface with Nasdaq for receiving Nasdaq data via a Nasdaq-operated website, system or application, the MCI Financial Extranet, or via an Extranet access provider or other such provider that is fee-liable under Rule 7010(v), but does not include Nasdaq Workstation II/API Service that is fee liable under Rule 7010(f)(1).

(m)–(p) No Change.

(q) Nasdaq TotalView

(1) TotalView Entitlement. The TotalView entitlement allows a subscriber to see all individual Nasdaq Market Center participant orders and quotes displayed in the system as well as the aggregate size of such orders and quotes at each price level in the execution functionality of the Nasdaq Market Center, including the NQDS feed.

(A) No Change.

[(B) Distributors of individual participant data in the TotalView Entitlement shall pay a charge of \$7,500 per month. Distributors of only the aggregate data in the TotalView Entitlement shall pay a charge of \$1,000 per month.]

(B[C]) 30-Day Free-Trial Offer. Nasdaq shall offer all new individual subscribers and potential new individual subscribers a 30-day waiver of the user fees for TotalView. This waiver shall not include the incremental fees assessed for the NQDS-only service, which are \$30 for professional users and \$9 for non-professional users per month. This fee waiver period shall be applied on a rolling basis, determined by the date on which a new individual subscriber or potential individual subscriber is first entitled by a distributor to receive access to TotalView. A distributor may only provide this waiver to a specific individual subscriber once.

For the period of the offer, the TotalView fee of \$[3]40 per professional user and \$5 per non-professional user per month shall be waived.

(2) [Definitions.

(A) ]A “controlled device” is any device that a distributor of the Nasdaq data entitlement package(s) permits to: (i) access the information in the Nasdaq data entitlement package(s); or (ii) communicate with the distributor so as

to cause the distributor to access the information in the Nasdaq data entitlement package(s). If a controlled device is part of an electronic network between computers used for investment, trading or order routing activities, the burden shall be on the distributor to demonstrate that the particular controlled device should not have to pay for an entitlement. For example, in some display systems the distributor gives the end user a choice to see the data or not; a user that chooses not to see it would not be charged. Similarly, in a non-display system, users of controlled devices may have a choice of basic or advanced computerized trading or order routing services, where only the advanced version uses the information. Customers of the basic service then would be excluded from the entitlement requirement.

[(B) A “distributor” of a Nasdaq data feed is any firm that receives a Nasdaq data feed directly from Nasdaq or indirectly through another vendor and then distributes it either internally or externally. All distributors shall execute a Nasdaq distributor agreement. Nasdaq itself is a vendor of its data feed(s) and has executed a Nasdaq distributor agreement and pays the distributor charge.]

(3) No Change.

(4) No Change.

(r)–(w) No Change.

\* \* \* \* \*

<sup>5</sup> With the permission of Nasdaq, the Commission made a typographical, non-substantive correction to the text of the proposed rule change. See telephone conversation between Jeff Davis, Associate General

Counsel, Nasdaq, and Raymond Lombardo, Attorney, Division of Market Regulation, Commission, April 21, 2005.

<sup>6</sup> The proposed changes are marked from NASD Rule 7010 as it appears in the NASD Manual available at [www.nasdaq.com](http://www.nasdaq.com).

**Rule 7030. Special Options**

Receive only printer .....	.....	\$100/month.
Local Posting .....	Permits subscriber to use Nasdaq Level 3 terminals to enter quotations simultaneously into an internal computer system.	\$10/month.
Dual Keyboard .....	.....	\$15/month.
[Nasdaq Market Index] .....	[Permits vendor to process Nasdaq Level 1 and Last Sale data feeds solely for the purpose of supplying subscribers with distribute real-time calculations of the Nasdaq market indexes to all of its subscribers, including those that do not otherwise subscribe to real-time Nasdaq Level 1 or NQDS services.]	[2,000/month]
Non-Continuous Access to Nasdaq Level 1 and Last Sale Information.	Permits vendor to process and distribute Nasdaq Level 1 and Last Sale information to its subscribers on a non-continuous or query-response basis.	\$.005/query.

\* \* \* \* \*

**Rule 7060. Partial Month Charges**

*Distributors may elect to have [T]the charges for the month of commencement or termination of service [will] be billed on a full month basis or prorated based on the number of trade days in that month.*

\* \* \* \* \*

**Rule 7090. Mutual Fund Quotation Service**

(a)–(d) No change.

(e) Distributors receiving MFQS shall pay a monthly fee of \$1,000. For the purposes of this subsection only, the term “distributor” shall refer to any firm that receives the MFQS data feed and distributes it to third parties. All such firms must execute a Nasdaq Distributor Agreement.]

\* \* \* \* \*

**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 offers various data products that firms may purchase and redistribute either within their own organizations or to outside parties. Nasdaq assesses “distributor fees” that are designed to encourage broad distribution of the data, and allow Nasdaq to recover the relatively high fixed costs associated with supporting connectivity and contractual relationships with distributors. Because

the data products and associated fees were established over many years, the method of calculating such fees must be updated. Nasdaq is proposing to establish a revised monthly distributor pricing structure for its real time data feed products that it believes will allocate equitably data fees across the customer base of data distributors and consumers of Nasdaq market data.

Specifically, the current proposal would establish a distributor fee pricing structure for four real time data feed products: TotalView, OpenView, Mutual Fund Quotation Service (“MFQS”), and Real Time Index. The proposed fees will be assessed to distributors of these real time data feed products, those vendors that receive the real time data feeds that can be re-transmitted in an uncontrolled format. The distributor fees do not apply to Nasdaq’s web-based historical data products, which are governed by NASD Rule 7010(p), and they do not apply to data feeds that are produced pursuant to the national market system plan governing Nasdaq stocks (“Nasdaq UTP Plan”). The proposed distributor pricing is also distinct from any per display device or per user population fees for data products such as TotalView.

The proposed pricing structure is comprised of two components for each Nasdaq real time data feed product: (1) a Direct Access Fee, and (2) either an Internal Distribution Fee or an External Distribution Fee. The Direct Access Fee will apply to any organization that receives a real time data product directly from Nasdaq via a data feed. Distributors receiving Nasdaq real time data indirectly (*i.e.*, via re-transmission from another entity) are not liable for the Direct Access Fee. This fee allows Nasdaq to recover the fixed costs of establishing and maintaining relationships with direct access distributors.

The Internal Distribution Fee will apply to any organization that receives a real time data feed product (either directly from Nasdaq or through a vendor) and distributes the data solely within its own organization. The External Distribution Fee will apply to

any organization that receives a real time data feed product (either directly from Nasdaq or through a vendor) and distributes the data outside its own organization. The External Distribution Fee is higher than the Internal Distribution Fee because external distributors typically have broader distribution of the data than internal distributors. An organization that receives real time data directly from Nasdaq will pay the Direct Access Fee plus the higher of either the Internal Distribution or External Distribution Fee but not both. An organization that only receives real time data feeds indirectly and distributes it within its organization will pay the Internal Distribution Fee; an organization that receives data indirectly and distributes it outside its organization will pay the External Distribution Fee, and an organization that receives real time data feeds indirectly and distributes it both internally and externally will pay the External Distribution Fee.

Nasdaq real time data feed products that are available for distribution would be divided into two categories and each will have a Direct Access Fee, Internal Distribution Fee, and External Distribution Fee assigned. Nasdaq TotalView, OpenView, and MFQS will be labeled as “Issuer Specific Data” and Nasdaq Real Time Index will be labeled as “Market Summary Statistics.” Currently, there is no monthly distribution fee for OpenView and the monthly distribution fee for Nasdaq TotalView (set forth at Rule 7010(q)) is based on whether the data distributor receives the TotalView data in an aggregate or detailed form. The monthly fee for TotalView data in aggregate form is \$1,000 per distributor and in detailed form is \$7,500 per distributor. Under the proposed fee structure, TotalView and OpenView, whether in aggregate or detailed form, will be labeled as “Issue Specific Data-Dynamic Intraday” data for which the proposed monthly fees are \$2,500 for Direct Access, \$1,000 for Internal Distribution, and \$2,500 for

External Distribution.<sup>7</sup> Organizations that currently purchase detailed TotalView information, particularly internal distributors and non-direct connection recipients, will pay less in the future; organizations that currently purchase aggregate TotalView data, particularly those that access the data directly, will pay higher fees.

The current monthly fee for distribution of the MFQS is \$1,000 for each external distributor. Under the new fee structure, MFQS data will be labeled as "Issue Specific Data—Daily" data for which the proposed monthly fees are \$500 for Direct Access, \$500 for External Distribution, and no charge for Internal Distribution. The proposed pricing will benefit external distributors that do not take their data directly from Nasdaq. Organizations that take their data directly from Nasdaq but only distribute it internally will pay the Direct Access Fee.

Under the current monthly fee structure set forth in NASD Rule 7030, the fee for Real-Time Index data is \$2,000 for external distributors. Under the proposed fee structure, Real-Time Index data will be labeled as "Market Summary Statistics—Intraday." The proposed monthly fees for Market Summary Statistics will involve a Direct Access fee of \$500, an Internal Distribution Fee of \$50, and an External Distribution fee of \$1,500. The proposed pricing will decrease the costs of non-direct connection external distributors, but increase them for organizations that distribute the data internally.

Nasdaq is also proposing a more flexible policy for distributor reporting of, and payment for, market data usage. NASD Rule 7060 currently provides that such reporting be based on a pro-rated accounting of the specific installation and termination dates for service. Because some data distributors prefer to report data usage on a "full-month" basis, Nasdaq proposes to offer its market data distributors the option of reporting and paying based on either a pro-rated or full-month basis. The selection of pro-rated or full-month reporting will be the business decision of each market data distributor based on its needs and the needs of its customers.

<sup>7</sup> Nasdaq believes that because OpenView provides the same depth and scope of information for exchange-listed securities as TotalView does for Nasdaq-listed securities, and entails similar costs, it is appropriate to put into place the same distribution fee structure for OpenView at this time. Telephone conversation between Bill O'Brien, Senior Vice President, Market Data Distribution, Nasdaq, and Ira Brandriss, Assistant Director, Division of Market Regulation, Commission, April 21, 2005.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,<sup>8</sup> in general and with Section 15A(b)(5) of the Act,<sup>9</sup> in particular, in that the revised and updated fee schedule provides for the equitable allocation of reasonable charges among the persons distributing and purchasing Nasdaq real time market center data. The proposed pricing structure will enable Nasdaq to respond more rapidly to customer requests for additional or varied dissemination of information. Nasdaq believes that encouraging the redistribution of the Nasdaq real time market center data will improve transparency and thereby benefit the investing public.

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

Nasdaq does not believe that the proposed rule change will impose any inappropriate burden on competition.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which Nasdaq consents, the Commission will:

- (a) By order approve such proposed rule change; or
- (b) Institute proceedings to determine whether the proposed rule change should be disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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

<sup>8</sup> 15 U.S.C. 78o-3.

<sup>9</sup> 15 U.S.C. 78o-3(b)(5).

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2004-185 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-NASD-2004-185. 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 Room. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. 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-NASD-2004-185 and should be submitted on or before May 19, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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<sup>10</sup> 17 CFR 200.30-3(a)(12).