

Market are \$50,000,000 and \$35,000,000, respectively.

For purposes of initial listing eligibility, Nasdaq has historically interpreted the term market capitalization to include only the value of listed securities. In connection with continued listing eligibility, however, Nasdaq has also considered market capitalization to include classes of non-redeemable convertible preferred stock, provided that the conversion price was "in the money." According to Nasdaq, this approach has created uncertainty among issuers and investors as to the definition and application of the market capitalization listing standard. In addition, Nasdaq's Marketplace Rules do not define market capitalization and Nasdaq believes that this term may be thought to include more than just the value of listed securities or non-redeemable convertible preferred stock that is in the money.

Accordingly, Nasdaq is amending the description of the market capitalization listing standard so that it is based on the market value of listed securities. In conjunction with this change, Nasdaq also is adding a definition of the term "listed securities" to Nasdaq's Marketplace Rules. Nasdaq believes that these modifications will clarify for issuers and investors that initial and continued listing eligibility will be based only upon the value of an issuer's securities that are quoted on Nasdaq or listed on a national securities exchange.

III. Discussion

After careful review, 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 association.⁵ In particular, the Commission believes that the proposal is consistent with the requirements of sections 15A(b)(6) of the Act,⁶ which requires, among other things, that the Association's rules are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

The Commission believes that the rule change should clarify the standards under which issuers can qualify for listing on the National Market. In particular, the rule change should clarify for issuers and investors that initial and continued listing eligibility will be based only upon the value of an

issuer's securities that are quoted on Nasdaq or listed on a national securities exchange.

IV. Amendment No. 1

The Commission finds good cause for approving Amendment No. 1 prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. In Amendment No. 1, Nasdaq notified the Commission that in order to minimize the impact of the proposed rule change on existing issuers, the rule will go into effect on June 1, 2002. The Commission believes that this is a suitable delay to allow issuers listed on the National Market to become informed of the rule change and prepare accordingly. Therefore, the Commission finds that granting accelerated approval to Amendment No. 1 is appropriate and consistent with section 19(b)(2) of the Act.⁷

V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 1, including whether it 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-2001-84 and should be submitted by February 14, 2002.

VI. Conclusion

For all of the aforementioned reasons, 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.

It Is Therefore Ordered, pursuant to section 19(b)(2) of the Act,⁸ that the proposed rule change (SR-NASD-2001-84) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁹

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No 34-45285; File No. SR-NASD-2001-93]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc.; Relating to Fees Associated With the Nasdaq Application of the Primex Auction SystemTM

January 15, 2002.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 17, 2001, 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 ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq has designated this proposal as one constituting a fee filing under section 19(b)(3)(A) of the Act, which renders the rule effective upon the Commission's receipt of this filing. Nasdaq will not assess fees pursuant to this fee schedule for approximately the first three months after the Nasdaq application of the Primex Auction System ("Primex" or "System") is operational.³ Nasdaq intends to begin assessing fees pursuant to this fee schedule beginning on April 1, 2002. However, Nasdaq will issue a Head Trader Alert to notify users of the exact date it will begin assessing fees. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ As described above, Nasdaq will not assess any fees pursuant to the fee schedule during the initial few months the System is operating, which also means Nasdaq will not share any transaction fees in accordance with the fee schedule during such period. However, Primex Trading N.A., L.L.C., an entity independent of Nasdaq and the licensor of the System, has indicated it will pay any revenue sharing amounts earned by participants during such period.

⁵ In approving this rule proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁶ 15 U.S.C. 78o-3(b)(2) and (6).

⁷ 15 U.S.C. 78s(b)(2).

⁸ 15 U.S.C. 78s(b)(2).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq is proposing to amend NASD Rule 7010 to establish the fee schedule for Nasdaq's application of the Primex Auction System.TM Below is the text of the proposed rule change. Proposed new

language is in italics; proposed deletions are in brackets.

7010. System Services

(a)-(q) No changes.

(r) *Nasdaq Application of the Primex Auction System*TM

The following charges shall apply to the use of the Nasdaq Application of the Primex Auction System:

| | |
|--|--------------------------------------|
| (1) <i>Transaction Charges:</i> | |
| <i>Execution Services—for all participants:</i> | |
| <i>Order entry</i> | No fee. |
| <i>Auction Response (per share, per execution—\$5.00 maximum).*</i> | \$.01. |
| <i>Matching Rights—Primex Auction Market Markers (PAMMs) only:</i> | |
| <i>50 Percent Match</i> | No fee |
| <i>Two-Cent Match (per share, per retained order—\$2.50 Maximum.**</i> | \$.0025. |
| <i>Revenue Sharing—PAMMs only:</i> | |
| <i>Each order executed:***</i> | 1/3 of traction fee. |
| (2) <i>Monthly Access fees:</i> | |
| <i>Software:</i> | |
| <i>Workstation license or unique logon:</i> | <i>Per workstation logon:</i> |
| <i>Stations/logons 1-10</i> | \$200. |
| <i>Stations/logons 11-25</i> | \$100. |
| <i>Stations/logons 26 and above</i> | \$50. |
| <i>Proprietary interface license:</i> | <i>Per license:</i> |
| <i>API specification</i> | \$500. |
| <i>FIX (customized protocol)</i> | \$500. |
| <i>Network:</i> | |
| <i>Dedicated line:</i> | <i>Per line:</i> |
| <i>256K primary with backup</i> | \$1,564. |
| <i>Installation/Uninstall</i> | \$1,000 per Nasdaq Staff site visit. |

* This fee applies to both Indications and "real-time" Responses. When two orders match directly, a fee is charged to the party that entered the second order.

** This fee is charged in the event a PAMM attaches its matching right to an order, and the crowd offers two cents or less price improvement to that order.

*** Paid to PAMM when it enters an order that interacts with crowd interest in the system. Revenue sharing applies only to orders in those securities in which the firm is registered as a PAMM. The revenue sharing amounts will be paid on a quarterly basis.

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

On August 17, 2001, Nasdaq filed a Form PILOT to commence operation of the Primex System.⁴ The System is designed to replicate, in an electronic form, the competitive trading crowd that

is associated with an auction market. The System is completely voluntary and available to any NASD member in good standing. Non-NASD members can access the System through an NASD member that subscribes to Primex. Members that desire access to the System must execute the necessary agreements with Nasdaq. Members granted access to the System are referred to as Participants. There are two types of Participants in Primex: (1) Crowd Participants, and (2) Primex Auction Market Makers ("PAMMs").

By becoming a Participant, members automatically receive the right to trade as Crowd Participants. Crowd Participants can view all orders exposed in the System; interact with any order put to auction by responding to the auction using all of the System's response tools; submit orders to be auctioned; and trade as principal, agent, or riskless principal. Crowd Participants can interact with orders being auctioned by submitting Indications, which are instructions to the System that can reside within the System and automatically respond in a certain manner to an auction if and when orders put to auction are available, or by submitting a Response. A Response is

an individual instruction that is entered and responds in "real time" to orders being auctioned. A firm that elects to register as a PAMM has the same rights and entitlements as Crowd Participants, but because they elect to meet other additional qualifications,⁵ PAMMs are entitled to additional privileges. For example, PAMMs are entitled to use the System's automated Match Parameters allowing them to participate in the execution of their own customer orders submitted to the System (e.g., the Two Cent Match Parameter or the 50% Match Parameter⁶). PAMMs also are entitled to

⁵ The requirements to become and maintain registration as a PAMM are contained in NASD Rule 5020. In general, a PAMM for a particular security eligible for trading in the System must be either: (1) A Nasdaq market maker in the security, if the security is listed on Nasdaq; or (2) a Consolidated Quotation System market maker, if the security is listed on an exchange. PAMMs may retain their PAMM status for a prospective calendar quarter provided they had qualified by submitting to the System a minimum percentage of certain order-types in the previous calendar quarter, as detailed in NASD Rule 5020. There never is any requirement for participants to register as a PAMM or to submit any amount of orders at any time.

⁶ A complete description of the matching parameters and their operation are contained in NASD Rule 5014. Generally, however, when a PAMM submits an order to the System with the 50% Match parameter, the order will be executed

⁴ The Form PILOT was amended on November 26, 2001. See Letter from Peter R. Geraghty, Associate General Counsel, Nasdaq, to John Polise, Senior Special Counsel, Division of Market Regulation, Commission, dated November 26, 2001.

revenue sharing, allowing PAMMs to share in the transaction fee paid by other participants when such participants execute against an order submitted to auction by a PAMM.

Nasdaq will impose monthly fees to access the System. These fees vary based on the method chosen by the Participant to access the System. The System will operate on a network that is independent from Nasdaq's other existing systems (e.g., SuperSoesSM). Primex Participants will be charged a monthly fee for this independent network. In addition, Participants will be charged for each visit by Nasdaq staff to install, or uninstall, software or hardware necessary to access the System.

In addition to monthly charges, Nasdaq will impose fees based on orders executed through the System. As set forth in the schedule of fees, no fee is charged for submitting an order to auction, and in general no fee is charged to have such orders executed.⁷ Execution fees are only charged against Participants that extract liquidity by responding to, and executing against, orders submitted for auction. This execution fee is a penny per share with a maximum charge of \$5.00 per execution. Accordingly, the fee would be charged to a Participant for any execution resulting from that Participant's Indication or real-time Response that interacted with an order put to auction.

In addition, and as discussed above, PAMMs have the option of attaching certain matching rights on orders they submit to the System. Nasdaq will impose a fee when a PAMM utilizes the Two-Cent Match feature and retains an order for execution. In such circumstances, the PAMM will be charged \$.0025 per share, with a \$2.50 maximum per retained order. If the PAMM does not retain the order because the order is executed against the Crowd Participant(s) who has offered more than two cents of price improvement, there is no charge to the PAMM. Instead, Nasdaq will share with the PAMM one-third of the transaction fee collected for such transaction. Nasdaq has decided to share the transaction fee in these circumstances to

against any interest by the Crowd that satisfies the order during its exposure at the price(s) and size of such Crowd interest, for no more than 50% of the order. Any execution with the Crowd will immediately cause the System to provide the order with an additional execution of like size and price against the PAMM that entered the order.

⁷ The one exception is where an order submitted to auction directly meets and interacts with another order submitted to auction, in which case the second order is treated as a Response, and is charged a fee accordingly.

encourage PAMMS to submit orders for auction in the System. The revenue sharing amounts will be paid on a quarterly basis.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A(b)(5) of the Act⁸ in that the proposed fees provide for the equitable allocation of reasonable fees among members. The fees apply equally to all Participants in the System, based upon the category the member has chosen to participate in the System. All members in the same category of Participant (e.g., PAMM) are subject to the same fees.

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

Nasdaq does not believe that the proposed rule change will 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 foregoing rule change has become effective upon filing pursuant to section 19(b)(3)(A) of the Act⁹ and subparagraph (f)(2) of Rule 19b-4 thereunder¹⁰ in that it establishes the fee schedule for the use of a Nasdaq system.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the 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 the file number SR-NASD-2001-93 and should be submitted by February 14, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45301; File No. SR-PCX-2001-45]

Self-Regulatory Organizations; Pacific Exchange, Inc.; Order Granting Approval to Proposed Rule Change Relating to Inactive Lessors' Eligibility To Serve on the Board of Governors

January 17, 2002

On December 7, 2001, the Pacific Exchange, Inc. ("PCX" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend Article III, Section 2(b) of the PCX Constitution and PCX Rule 1.1(h) to provide for the eligibility of inactive lessors to serve on the PCX Board of Governors ("Board").

The proposed rule change was published for comment in the **Federal Register** on December 17, 2001.³ The Commission notes that the proposed rule change was noticed for a 15-day comment period, and the Commission received no comments regarding the proposed rule change.

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the

¹¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 45144 (December 10, 2001), 66 FR 65015.

⁸ 15 U.S.C. 78k-1(b)(5).

⁹ 15 U.S.C. 78s(b)(3)(A).

¹⁰ 17 CFR 240.19b-4(f)(2).