

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46521; File No. SR-NASD-2002-33]

### Self Regulatory Organizations; Notice of Filing of a Proposed Rule Change by the National Association of Securities Dealers, Inc., Relating to Fees for Nasdaq Data Entitlement Packages

September 20, 2002.

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 March 7, 2002, the National Association of Securities Dealers, Inc. ("NASD") 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. On April 25, 2002, Nasdaq filed Amendment No. 1 that entirely replaced the original rule filing.<sup>3</sup> On July 29, 2002, Nasdaq filed Amendment No. 2 that entirely replaced the original rule filing and Amendment No. 1.<sup>4</sup> On August 23, 2002, Nasdaq filed Amendment No. 3 that entirely replaced the original rule filing and Amendment Nos. 1 and 2.<sup>5</sup> On September 13, 2002, the Nasdaq submitted Amendment No. 4 that entirely replaced the original rule filing and Amendment Nos. 1, 2, and 3.<sup>6</sup> The Commission is publishing this notice to solicit 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 proposes to amend NASD Rule 7010. Following approval by the Commission, the proposed rule change will become effective upon notice to vendors 30 days after the Nasdaq Order Display Facility, hereafter referred to as

"SuperMontage," begins operation.<sup>7</sup> Below is the text of the proposed rule change (including footnotes). Proposed new language is in italics; proposed deletions are in brackets.<sup>8</sup>

\* \* \* \* \*

*Rule 7010. Charges for Services and Equipment.*

*(q) Nasdaq Data Entitlement Packages*

*(1) DepthView and PowerView*  
*The DepthView entitlement package contains all information disseminated through the Nasdaq Aggregated Depth at Price (ADAP) data feed: The five best price levels in Nasdaq on both the bid and offer side of the market. Each price level is dynamically updated and displays the aggregate size of "displayed" trading interest, attributable and non-attributable, at each price level. The Nasdaq PowerView entitlement package consists of DepthView and the Nasdaq Quotation Dissemination Service (NQDS) feed.*

*(A)(i) Except as provided in (1)(A)(ii) below, for DepthView, there will be a \$50.00 monthly charge to be paid for each controlled device.<sup>9</sup>*

*(ii) the charge to be paid by a non-professional<sup>10</sup> subscriber for each*

<sup>7</sup> It is presently expected that SuperMontage will begin operation on October 14, 2002.

<sup>8</sup> The Commission notes that it made typographical changes to the rule text. Nasdaq has committed to submitting an amendment reflecting those changes. Telephone conversation between Eleni Constantine, Associate General Counsel, Office of General Counsel, Nasdaq and Susie Cho, Special Counsel, Division, Commission, September 16, 2002.

<sup>9</sup> A controlled device is any device that a distributor of the Nasdaq Data Entitlement Package(s) permits to: (a) Access the information in the Nasdaq Data Entitlement Package(s); or (b) communicate with the distributor so as to cause the distributor to access the information in the Nasdaq Data Entitlement Package. If a controlled device is part of an electronic network between computers used for investment, trading or order routing activities, the burden will 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 would be excluded from the entitlement requirement.

<sup>10</sup> A "non-professional" is a natural person who is neither: (a) Registered or qualified in any capacity with the Commission, the Commodity Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (b) engaged as an "investment advisor" as that term is defined in Section 201(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); nor (c) employed by a bank or other organization exempt from registration under federal or state securities law to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt.

controlled device shall be \$25.00 per month.

*(B)(i) Except as provided in paragraph (1)(B)(ii) below, for PowerView, there will be a \$75.00 monthly charge to be paid for each controlled device.<sup>11</sup>*

*(ii) the charge to be paid by a non-professional<sup>12</sup> subscriber for each 2 controlled device will be \$29.00 per month.<sup>13</sup>*

*(C) Distributors<sup>14</sup> of ADAP data (either through DepthView or PowerView) shall pay a charge of \$1,000.00 per month.*

*(2) TotalView*

*The NQDS Prime data feed (hereinafter referred to as "Prime") consists of the individual Nasdaq SuperMontage participant orders and quotes that make up the top five price levels in the SuperMontage System. The TotalView entitlement package includes the information disseminated through the Prime data feed in addition to the data contained in the PowerView entitlement package.*

*(A) Distributors of TotalView data shall pay a charge of \$7,500.00 per month.*

*(B) For TotalView, there will be a charge of \$150.00 per month per controlled device.<sup>15</sup>*

\* \* \* \* \*

#### 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.

<sup>11</sup> So long as NQDS is subject to the Nasdaq Unlisted Trading Privileges (UTP) Plan, the revenues garnered from use of PowerView that are directly attributable to the sale of NQDS under the currently approved pricing for NQDS will be shared pursuant to the UTP Plan.

<sup>12</sup> See footnote 10 (definition of non-professional).

<sup>13</sup> See footnote 11 (sharing of revenue pursuant to the UTP Plan).

<sup>14</sup> 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 must execute a Nasdaq distributor agreement. Nasdaq itself is a vendor of its data feed(s) and will execute a Nasdaq distributor agreement and pay the distributor charge.

<sup>15</sup> So long as NQDS is subject to the Nasdaq UTP Plan, the revenues from TotalView that are directly attributable to the sale of NQDS under the currently approved pricing for NQDS will be shared pursuant to the UTP Plan.

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

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

<sup>3</sup> See Letter from Mary M. Dunbar, Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated April 25, 2002.

<sup>4</sup> See Letter from Mary M. Dunbar, Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated July 26, 2002.

<sup>5</sup> See Letter from Mary M. Dunbar, Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated August 22, 2002.

<sup>6</sup> See Letter from Mary M. Dunbar, Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated September 13, 2002.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Data Feeds

Nasdaq believes that it has consistently supported the broadest, most effective dissemination of market information to public investors. In its multiple rule filings regarding SuperMontage,<sup>16</sup> Nasdaq described new data feed products that it represents will vastly expand the ability of market participants to see and show trading interest: The Nasdaq Prime data feed, which will be available through a Nasdaq entitlement package called "TotalView," and the Aggregate Depth at Price ("ADAP") data feed, available through "DepthView", "PowerView", and "TotalView".<sup>17</sup> As the SuperMontage rule filings and the SEC approvals set out in detail, TotalView will provide, on a real-time basis: (1) All individual attributable quote/order information at the five best price levels displayed by the Nasdaq SuperMontage system; (2) the aggregate size of all unattributed quotes or orders at each of the top five price levels, on both sides of the market, that are in the SuperMontage system; (3) the aggregate attributable and unattributable quote and orders at each of the top five price levels, on both sides of the market, that are in the SuperMontage system; (4) the quote and order data found in the Nasdaq Quotation Dissemination Service ("NQDS")<sup>18</sup> data feed, including the best attributed quotation from each Nasdaq participant, and (5) the Nasdaq Inside Price. By using TotalView, vendors will be able to integrate the expanded quote and order information that is provided in the

<sup>16</sup> These rule filings were approved by the Commission in Securities Exchange Act Release No. 43863 (January 19, 2001), 66 FR 8020 (January 26, 2001) and Securities Exchange Act Release No. 45790 (April 19, 2002), 67 FR 21007 (April 29, 2002).

<sup>17</sup> To the extent Nasdaq acts as a vendor, Nasdaq must comply with the requirements of the vendor display rule. 17 CFR 240.11Ac1-2. Vendors purchasing data feeds from Nasdaq are likewise responsible for their compliance with the vendor display rule.

<sup>18</sup> The NQDS data feed currently consists of: (1) Real-time quotes for each Market Maker and Electronic Communication Network (ECN) in NASDAQ National Market and SmallCap issues; (2) real-time best bid or offer ("BBO") quotes for each regional UTP exchange that quotes in NASDAQ-listed issues; and (3) real-time National BBO quote appendages for NASDAQ National Market and SmallCap issues. Telephone conversation between Eleni Constantine, Associate General Counsel, Office of General Counsel, Nasdaq and Susie Cho, Special Counsel, Division, Commission, September 19, 2002.

Nasdaq Prime feed with the other Nasdaq data in the TotalView package.

Subject to the requirements of the vendor display rule,<sup>19</sup> subscribers who do not need all the information in TotalView can purchase certain portions separately. DepthView will provide the aggregated size at each of the top five price levels, both on the bid and the ask, within the Nasdaq SuperMontage system. Nasdaq plans to promote DepthView broadly as the window into Nasdaq SuperMontage for the trading, investment, and broker communities. DepthView also provides valuable insight into how large an order can be executed immediately within SuperMontage with little or no price impact. Nasdaq believes that the deeper view afforded by the aggregate figures provided by DepthView promote market transparency and allow for more informed choice for the investor. PowerView includes both DepthView and the data available in the NQDS data feed,<sup>20</sup> including the best-attributed quotation from each Nasdaq participant in each Nasdaq National Market and Small Cap Market stock.

Nasdaq is not offering the first two elements of TotalView separately. This is because the key portions of the third and fourth elements of TotalView can be derived from the first two by sophisticated subscribers. In Nasdaq's view, allowing the production of derivative feeds in this uncontrolled manner creates financial risk because there is no sure way Nasdaq would be able to detect whether aggregate data came from Nasdaq or was calculated by the vendor. An incremental package that only offered the portions of TotalView that are not available through PowerView would include only market participants' inferior quotes, at price levels two through five. (Best quotes, including all of price level one, would already be available through Power View.) There is no point in offering such an entitlement separately, since viewing this information on a standalone basis would distort subscribers' view of the market.

Equitable Allocation of Fees

Controlled Device

As noted in footnote 9, the appropriate entitlement charge must be paid for each "controlled device" that has the capacity either to access or utilize a particular data feed, whether the controlled device displays the data, "receives" it, or has the ability to utilize it even though the data remains "on" another device. As noted, controlled

devices that are part of a network receiving a particular data feed will be required to pay the entitlement charge unless the distributor demonstrates to Nasdaq that the particular controlled device in fact has no capacity to access or utilize the data feed (because the system agreement precludes it, for example).

TotalView

As noted, TotalView will provide the individual market participants that make up the depth of SuperMontage at each of the top five price levels. TotalView, because it will be significantly more bandwidth intensive than any Nasdaq data entitlement to date, and because of a distinct value it provides to the Nasdaq trading community, is expected to be a niche product for specialized traders. Because of its specialized nature, unique value and high bandwidth requirements, TotalView has been priced to capture that value from a limited number of customers. Accordingly, Nasdaq is not providing a non-professional fee for TotalView at this time.

Nasdaq represents that it has designed the distributor charges for TotalView to encourage transparency and display of the SuperMontage data. First, Nasdaq has kept the base distributor charge as low as possible to promote the widespread adoption of the data feed by market data vendors. Second, by charging the same entitlement charge to all controlled devices that are connected to a system that receives the Prime data, whether or not they choose to display the data, Nasdaq hopes to encourage firms that provide non-display services to choose also to display the data to their customers, since doing so will not cost them any more than not doing so. The pricing rule is intended to create a rebuttable presumption that a controlled device has access to Prime if it is connected to a network that receives Prime data; however, the contract terms will provide a mechanism for vendors to rebut this presumption by providing Nasdaq a system description that states which customers do and do not have access.

DepthView and PowerView

Nasdaq anticipates its users will receive a high value from the depth-of-market information in DepthView, as stated above. Moreover, DepthView requires more processing capacity to calculate its five aggregated price levels on each side, so its price should be commensurate with the processing required to generate the ADAP data feed. Also, the price was chosen after consideration of the prices other major

<sup>19</sup> 17 CFR 240.11Ac1-2.

<sup>20</sup> See note 19, *supra*.

exchanges charge for aggregated order data.<sup>21</sup>

Nasdaq anticipates that offering a significantly discounted non-professional rate for DepthView and PowerView will provide an opportunity for many investors to take advantage of the transparency offered by these new feeds.

#### Redistribution

There will be no restrictions regarding redistribution of the data in TotalView, DepthView, or PowerView to qualified vendors and broker-dealers that have entered into distributor agreements with Nasdaq. As is current practice, the display requirements that Nasdaq chooses to place on these data feeds will be covered under the Distributor Agreements we enter into with distributors of Nasdaq data, rather than being subject to rule. The display requirements will be minimal and are not expected specifically to preclude vendors from blending this data with data from other sources to create an integrated feed. However, Nasdaq plans to require vendors specifically to identify the data from the feeds as data coming from Nasdaq, so as to distinguish it from data that they may get from other sources. The specific display requirements are available on NasdaqTrader.com.

#### 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,<sup>22</sup> in general and with Section 15A(b)(5) of the Act,<sup>23</sup> in particular, which requires that the rules of the NASD provide for the equitable allocation of reasonable fees, dues, and other charges among members and issuers and other persons using any facility or system which the NASD operates or controls.

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

Nasdaq does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

<sup>21</sup> For example, NYSE's Open Order Book, which was approved by the SEC in December 2001, has a monthly charge of \$5,000.00 for access and \$50.00 per display. See Securities Exchange Act Release No. 45138 (December 7, 2001), 66 FR 64895 (December 14, 2001).

<sup>22</sup> 15 U.S.C. 78o-3.

<sup>23</sup> 15 U.S.C. 78o-3(b)(5).

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

Nasdaq did not solicit or receive written comments on the proposed rule change.

#### 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 the NASD 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. 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 at 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-2002-33 and should be submitted by October 18, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>24</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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<sup>24</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46520; File No. SR-PCX-2002-26]

### Self-Regulatory Organizations; Pacific Exchange, Inc.; Order Approving Proposed Rule Change and Amendment No. 1 Thereto, and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 2 to Proposed Rule Change Relating to Maintenance of Books and Records

September 20, 2002.

On April 22, 2002, the Pacific Exchange, Inc. ("PCX" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC"), 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 codify the existing obligations of PCX members to keep and preserve books and records, and to maintain daily position statements and error account information. PCX submitted Amendment No. 1 to the proposed rule change on June 11, 2002.<sup>3</sup> The proposed rule change was published for comment in the **Federal Register** on July 9, 2002.<sup>4</sup> The Commission received no comments on the amended proposal. On September 11, 2002, PCX submitted Amendment No. 2 to the proposed rule change.<sup>5</sup> This order approves the proposed rule change, as amended. In addition, the Commission is publishing this notice to solicit comments on Amendment No. 2 from interested

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

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

<sup>3</sup> See letter from Mai S. Shiver, Senior Attorney, Regulatory Policy, PCX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated June 10, 2002 ("Amendment No. 1"). In Amendment No. 1, the Exchange: (1) stated that the proposed rule change was being filed pursuant to Section 19(b)(2) of the Act and requested accelerated effectiveness; (2) revised typographical errors in the proposed rule text; (3) added the parenthetical (including any interpretation relating thereto) to proposed PCX Rule 4.20(a); and (4) clarified that the phrase "contra organization" in proposed PCX Rule 4.20(b) is an industry term of art that also means counter party.

<sup>4</sup> See Securities Exchange Act Release No. 46128 (June 26, 2002), 67 FR 45577.

<sup>5</sup> See letter from Mai S. Shiver, Senior Attorney, Regulatory Policy, PCX, to Nancy J. Sanow, Assistant Director, Division, Commission, dated September 10, 2002 ("Amendment No. 2"). In Amendment No. 2, PCX revised the second sentence of proposed Rule 4.20(b) to read: "Each Member or Member Organization must promptly report any differences to the contra organization and make every effort to promptly resolve the differences."