

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-46972; File No. SR-NASD-2002-165]

**Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment No. 1 Thereto Relating to Retroactive Fees for Software Products Offered by The Nasdaq Stock Market, Inc.**

December 9, 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 November 15, 2002, 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 (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. On November 27, 2002, Nasdaq filed Amendment No. 1 to the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons and is approving the proposal on an accelerated basis.

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

Nasdaq is proposing to amend NASD Rule 7050 to establish the fees for software products sold by Nasdaq Trading Applications as part of Nasdaq’s Transaction Services for business products. Nasdaq will apply the proposed rule change on a retroactive basis for the period from July 25, 2002 to the date of this filing.<sup>4</sup> Below is the text of the proposed rule change. Proposed new language is *italicized*.

\* \* \* \* \*

7050. Other Services

(a)–(d) No Change.

(e) *Software Products*

(1) *The following fees shall be paid by customers of Tools™:*

(A) Fee charge	Price
<i>Minimum fee per market participant (includes coverage of up to 49 stocks on an unlimited number of Nasdaq Workstation II terminals located at a single office).</i>	\$1,000/month
<i>Coverage of each additional block of 25 or fewer stocks .....</i>	\$500/month
<i>Each additional office equipped with Tools .....</i>	\$1,000/month
<i>Aggregate maximum fee per market participant .....</i>	\$15,000/month

(B) Customers who also subscribe to Tools Plus<sup>SM</sup> services shall receive the following reduction on fees incurred pursuant to subsection (1)(A):

Number of Tools Plus terminals	Discount
<i>Five or fewer Tools Plus terminals .....</i>	50%
<i>Between six and 15 Tools Plus terminals .....</i>	75%
<i>Greater than 15 Tools Plus terminals .....</i>	100%

(2) *The following deposits and fees shall be paid by all customers of Tools Plus:*

(A) *Each customer shall pay a deposit at the time it initially subscribes to Tools Plus equal to two times the subscriber’s aggregate monthly Terminal Charge (as defined below), calculated based on the number of terminals ordered by the subscriber upon subscribing to Tools Plus (the “Deposit”). The Deposit shall be refunded to the customer upon termination of its subscription to Tools Plus after deducting any outstanding balances owed Nasdaq.*

(B) *Terminal Charge*

Fee charge	Price
<i>Terminal Charge per terminal (“PT”) equipped with Tools Plus (More than 30 terminals if customer signs two year contract).</i>	\$500/PT/month
<i>(All other situations) .....</i>	\$750/PT/month
<i>Minimum fee .....</i>	\$2,000/month

(C) Fee charge	Price
<i>Connection Charge to Nasdaq Computer-to-Computer Interface (CTCI) Connection Charge to Nasdaq Service.</i>	\$265/month
<i>Delivery Platform (SDP) (charged to subscribers who handle customer orders) .....</i>	\$250/month
<i>Installation Fee (one-time charge for Tools Plus and includes one terminal) .....</i>	\$13,550
<i>(Each additional terminal)<sup>5</sup> .....</i>	\$140
<i>Port Charges (one-time charge per line) .....</i>	\$1,250

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

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

<sup>3</sup> See Letter from John A Zecca, Assistant General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation (“Division”), Commission, dated November 26,

2002 (“Amendment No. 1”). In Amendment No. 1, Nasdaq deleted text from Section 3(a)(1) of the 19b-4 filing and from Exhibit 1 to the 19b-4 filing discussing filings previously approved by the Commission.

<sup>4</sup> Nasdaq has filed a separate proposal that was immediately effective pursuant to Section 19(b)(3)

of the Act and Rule 19b-4 thereunder, to impose these same fees prospectively from November 15, 2002, the date of this filing. See Securities Exchange Act Release No. 46973 (December 9, 2002) (SR-NASD-2002-164).

(C) Fee charge	Price
(One-time aggregate charge for two lines) .....	\$2,500
Training Fee on-site at customer .....	\$400/day (plus travel expenses)
Training Fee for course at Nasdaq Tools .....	\$150/course
Electronic communication network (ECN) maintenance charge (charged to subscribers who route orders to ECN).	\$250/per ECN/month

<sup>5</sup> Installation Fee includes two hours of on-site training of customer personnel and all programming costs associated with one customized interface for the customer to access its clearing firm.

Market data redistribution charges, which are set by the relevant market data provider, are passed through to Tools Plus subscribers at cost. on interfaces for customers of Nasdaq Tools Plus shall be billed according to the following rates:

(D) Labor rates for programming customized interfaces and maintenance

Calendar Year 2002	Calendar Year 2003 and thereafter
Senior Programmer: \$175/hour .....	\$200/hour
Programmer: \$125/hour .....	\$150/hour
Junior Programmer: \$100/hour .....	\$125/hour
Project Management: \$150/hour .....	\$175/hour
Network Engineer: \$125/hour .....	\$150/hour
Operations Support: \$100/hour .....	\$125/hour

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**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 comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. Nasdaq has prepared summaries, set forth below in Sections A, B, and C, 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

a. *Background.* Nasdaq has integrated the software product line of its former subsidiary, Nasdaq Tools, Inc., into Nasdaq. The purpose of this proposed rule change is to establish fees for these software products.

On March 7, 2000, Nasdaq purchased Financial Systemware, Inc., a manufacturer of software products for the financial services industry. Financial Systemware was renamed "Nasdaq Tools, Inc." and became a wholly-owned subsidiary of Nasdaq.<sup>6</sup>

<sup>6</sup> On April 18, 2001, the Securities and Exchange Commission (the "Commission") issued an order entitled "Order Granting Application for a Conditional Exemption by the National Association of Securities Dealers, Inc. Relating to the Acquisition and Operation of a Software Development Company by the Nasdaq Stock Market, Inc." (the "Exemption Order"). See

On July 31, 2002, Nasdaq Tools, Inc. was merged into Nasdaq, with Nasdaq assuming all of the assets and liabilities of Nasdaq Tools, Inc. Nasdaq now provides these software products through Nasdaq Trading Applications, a part of Nasdaq's Transactions Services business products. Nasdaq Trading Applications currently sells two products: Tools™ and Tools Plus SM. These products assist market participants with their trading.

Tools is a management software product that enhances the functionality of the Nasdaq Workstation II ("NWII") and assists market participants (primarily market makers)<sup>7</sup> in efficiently managing their quotes, monitoring and executing incoming orders, checking for closed, locked, or crossed markets, and monitoring the depth of the market. Tools Plus is an order management service for market

Securities Exchange Act Release No. 44201 (April 18, 2001), 66 FR 21025 (April 26, 2002). The Exemption Order gave Nasdaq a conditional exemption from Section 19(b) of the Securities Exchange Act of 1934 (the "Act") that allowed Nasdaq Tools, Inc. to operate its business without triggering the proposed rule change requirements of Section 19(b). Nasdaq filed a letter dated July 25, 2002 informing the Commission that from that date forward Nasdaq would comply with Section 19(b) with respect to Nasdaq Tools' products. See Letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Jonathan G. Katz, Secretary, Commission, dated July 25, 2002. In the letter, Nasdaq acknowledged that it would have to seek a new exemption order from the Commission if Nasdaq subsequently determined to operate Nasdaq Tools in a manner requiring exemptive relief of Section 19(b) of the Act.

<sup>7</sup> Nasdaq has represented that only members will be affected by these fees. Telephone conversation between John A. Zecca, Assistant General Counsel, Nasdaq and Susie Cho, Special Counsel, Division, Commission, December 3, 2002.

participants that improves order and quote features and facilitates trade reporting and compliance with SEC and NASD requirements. The order and quote features include: Real-time valuation (including tracking positions, profits and losses, automatic execution and display of orders); direct access to electronic communication networks ("ECNs"); and risk management. In addition, Tools Plus assists subscribers with trade reporting to the Automated Confirmation Transaction Service ("ACT"). Tools Plus distributes data associated with compliance obligations including the NASD's Order Audit Trail System ("OATS") and Rules 11Ac1-5<sup>8</sup> and 11Ac1-6<sup>9</sup> under the Act. Tools Plus also aids market participants in fulfilling SEC-mandated compliance and reporting obligations by delivering customer data to the market maker's clearing firm. The Tools and Tools Plus products are discussed in more detail below.

b. *Tools:* Tools is a Microsoft Windows-based software product for market participants that provides quote and order management features. Tools increases the functionality of NWII by eliminating or reducing the number of mouse point-and-click features required to execute functions on NWII terminals and providing access to compliance alerts. Tools functions on the NWII without the purchase of additional hardware. Customers of Tools do not receive any priority or other advantage in accessing Nasdaq's systems as a result of their subscription to Tools. The Tools software allows a NWII user to:

<sup>8</sup> 17 CFR 240.11Ac1-5.

<sup>9</sup> 17 CFR 240.11Ac1-6.

- Monitor on a single display window selected securities for a number of preset criteria and quickly edit or activate the main quote management features.

- Automatically send for execution an order equal to the aggregate number of shares available for a particular stock through the Nasdaq National Market Execution System (also known as "SuperSoes") and Nasdaq Order Display Facility (also known as "SuperMontage") at the inside market and simultaneously update the quote for the stock.

- Monitor SelectNet broadcast orders for electronic execution based on pre-selected order size and price increment parameters and simultaneously update the quote for the stock.

- Limit the impact of a single large order on the price of a security by dividing the order and executing block orders of a size that will not update the quote for the stock.

- Preset trading parameters for selected groups of stocks, called "baskets," which Tools will execute in order sizes up to the aggregate number of shares available for each stock at the inside market.

- Monitor securities for locked/crossed markets through a Locked/Crossed Market Alert Window and communicate with another market maker who has locked or crossed the market for a stock.

Tools is distributed as an integrated product that includes all features without additional charge. The fee schedule for Tools proposed in the rule change would apply to all customers of Tools and are comparable to fees previously charged for Tools. In accordance with prior practice, the proposed fee schedule calculates fees for use of the Tools product on a monthly basis.

Specifically, the market participant would pay a minimum monthly fee of \$1,000 that entitles it to cover up to 49 stocks on an unlimited number of NWII terminals in a single office, with coverage of additional stocks sold in blocks of 25 stocks for \$500 per block. Nasdaq also would assess an additional fee of \$1,000 for each additional branch office equipped with Tools software. There would be a maximum monthly fee of \$15,000 per market participant. Nasdaq would discount the fees charged on Tools for customers who also subscribe to Tools Plus. Such customers would receive the following discounts on any Tools fees:

- Five or fewer Tools Plus terminals—50% discount on Tools fees;

- Between six and 15 Tools Plus terminals—75% discount on Tools fees; and

- Greater than 15 Tools Plus terminals—100% discount (no additional Tools fees charged).

Nasdaq believes that the proposed discount on Tools fees for customers who also subscribe to Tools Plus is consistent with the provisions of Section 15A(b)(5)<sup>10</sup> and 15A(b)(6)<sup>11</sup> of the Act. Section 15A(b)(5) requires the equitable allocation of reasonable fees and charges among members and other users of facilities operated or controlled by a national securities association. Section 15A(b)(6) requires rules that foster cooperation and coordination with persons engaged in facilitating transactions in securities and that are not designed to permit unfair discrimination between customers, issuers, brokers or dealers. Nasdaq receives cost savings when delivering two software products to the same customer. These savings include reductions in:

- Installation costs, through savings in travel and work hours;

- Training expenses, as Nasdaq personnel can train the same personnel on both systems simultaneously, reducing on-site travel;

- Costs of ongoing technical support; and

- Billing and collection costs.

The incremental discount on Tools also reflects economies of scale for larger volume customers of Tools Plus who are likely to use Tools on a large number of terminals. In addition, there is overlap between the functionality of the two products. For example, both Tools and Tools Plus deliver market information disseminated by Nasdaq and provide quote update features. Thus, the discount also serves to avoid charging customers of both products twice for similar functionality. For these reasons, Nasdaq believes that the discount allows an equitable allocation of fees among Tools and Tools Plus customers.

c. *Tools Plus*. Nasdaq Tools, Inc. launched Tools Plus in the fall of 2001 as an order management service for NWII users that provides continuously updated valuation (including tracking positions, profits and losses, automatic execution), order display and risk management functions. Tools Plus also assists subscribers with trade reporting to ACT and connections to ECNs. Tools Plus distributes data associated with compliance obligations including the NASD's OATS Rules and Rules 11Ac1–

5<sup>12</sup> and 11Ac1–6<sup>13</sup> under the Act. Tools Plus also delivers customer data to the customer's clearing firm. In particular, Tools Plus allows a customer to:

- Pre-configure the screen layout to monitor orders and quotes using various criteria.

- Combine multiple keystroke or mouse functions when executing orders and routing orders through Nasdaq systems (SuperMontage, SuperSoes, SelectNet or the Advanced Computerized Execution System ("ACES")), and non-Nasdaq systems (such as ECNs or other Tools Plus customers).

- Access a single screen quote montage displaying customized quote information from various ECNs connected to Tools Plus (currently, Wave Securities, LLC (ARCA) and Redibook ECN, LLC; Brut, LLC; The Island ECN; Instinet; MarketXT, Inc.; and B-Trade Services, LLC), if the customer has a subscriber agreement with the ECN.

- Access the following tools to manage risk and assess the profitability of trading activity at the firm:

- A monitoring feature that allows a supervisor to see the activity of each trader in the firm and track on a continuous basis each trader's profitability and long, short and total trade exposure.

- Updated information on the profitability for the firm of trading in a particular security.

- Facilitate compliance with Commission and self regulatory organization requirements by:

- Tracking and displaying all orders covered by NASD IM–2110–2, which prohibits NASD members from trading ahead of customer limit orders.

- Compiling order and trade data that can automatically be sent to the market maker's clearing firm after the close of the trading day.

- Reporting statistical information on order execution required by Rules 11Ac1–5 and 11Ac1–6 under the Act to third-party disclosure services.

- Creating a data file that meets the NASD's OATS requirements, which can be transmitted to the NASD on a nightly basis.<sup>14</sup>

<sup>12</sup> 17 CFR 240.11Ac1–5.

<sup>13</sup> 17 CFR 240.11Ac1–6.

<sup>14</sup> Nasdaq reaffirms the representation made in a prior rule change that we commit that we will not use OATS data to gain a competitive advantage over another SRO or broker dealer (market maker or ECN) and confirms that we have put in place effective internal controls to carry out this policy of not using OATS data to obtain a competitive advantage. See Letter from Richard G. Ketchum,

<sup>10</sup> 15 U.S.C. 78o–3(b)(5).

<sup>11</sup> 15 U.S.C. 78o–3(b)(6).

• Customize Tools Plus software to accept order flow from any custom interface and to route orders to any system that the market maker requests.

Nasdaq provides two Microsoft NT database servers per market maker (the "client servers"). These servers are housed at the Nasdaq Trading Applications facility, currently in Jersey City, New Jersey. The client servers are connected through Nasdaq Trading Applications' network infrastructure to the Tools Plus core servers that redistribute market data that is provided from the multiple data sources, including Nasdaq systems and ECNs and other non-Nasdaq systems discussed above. The client servers also store all order, position tracking and profit and loss information. Customers of Tools Plus do not receive any priority or other advantage in accessing Nasdaq's systems as a result of their subscription to Tool Plus. Tools Plus is designed to comply with the requirements of Rule 11Ac1-2(c) under the Act.<sup>15</sup>

The fees schedule for Tools Plus proposed in the rule change would apply to all customers and are comparable to fees previously charged for Tools Plus. The Tools Plus proposed fee structure consists of charges for installation, monthly terminal fees, connection to ECNs, monthly maintenance, equipment and pass through fees from the various data providers. The fee proposal includes a monthly fee per terminal of \$750, with a volume reduction to \$500 per terminal for customers with more than 30 or more terminals equipped with Tools Plus if the customer signs a two year contract (collectively, "Terminal Charges"). There is a monthly minimum aggregate fee for Terminal Charges of \$2,000 per subscriber. Nasdaq Tools requires a deposit equal to two times the customer's actual monthly Terminal Charges, which is refunded to the customer upon termination of the contract net of any outstanding balances owed Nasdaq.

In addition, Nasdaq would charge subscribers for Computer to Computer Interface ("CTCI") and Service Delivery Platform ("SDP")<sup>16</sup> connections and for market data redistribution charges. Prior to the merger of Nasdaq and Nasdaq Tools, Inc., Nasdaq charged Nasdaq Tools, Inc. as a vendor for such purposes according to the same fee

schedule applied to other vendors.<sup>17</sup> Nasdaq proposes to continue to use the same fee schedule applied to Nasdaq Tools, Inc. for these Nasdaq connections and information unless and until Nasdaq files a new proposed rule change. Nasdaq anticipates that the CTCI and SDP fees charged to customers of Tools Plus would continue to approximate the fees charged to vendors of Nasdaq.<sup>18</sup> The proposed fees are as follows:

- Connection to Nasdaq CTCI: \$265 per subscriber (regardless of number of terminals);
- Connection to Nasdaq SDP: \$250 per month per subscriber (regardless of number of terminals); and
- Market data redistribution charges: as set by relevant market data provider and passed through to Tools Plus subscribers at cost.

The SDP and CTCI charges relate to Tools Plus' CTCI and SDP connections to Nasdaq's systems and are in addition to any SDP and CTCI connections a customer may have to link directly to Nasdaq. The purposes for which Tools Plus connects to Nasdaq are limited and, accordingly, do not require a large amount of bandwidth. Nasdaq Trading Applications is able to send and receive data for a number of customers using the same SDP and CTCI connections and the fees charged to the subscribers to Tools Plus for the connections reflect these economies of scale. An NWII that displays Tools Plus connects directly to Nasdaq systems through an application-programming interface ("API"). Nasdaq directly bills customers of Tools Plus for API linkages.<sup>19</sup>

In addition, Nasdaq proposes to charge the following fees for Tools Plus:

- Installation fee of \$13,550 for Tools Plus and one terminal and \$140 for each additional terminal;
- One-time port charge of \$1,250 for each line or \$2,500 for two lines for access to Tools Plus;
- Training Fees of \$400 per day plus travel expenses for on-site training and \$150 for training course at Nasdaq (2 hours of training per user is included in price of installation); and
- ECN access maintenance charge of \$250 per month for each customer (regardless of number of terminals) for

<sup>17</sup> See NASD Rule 7010(f)(2) (SDP) and Rule 7010(f)(3) (CTCI). The SDP and CTCI fees charged customers of Tools Plus under the proposed fee schedule reflect band width savings that allow multiple customers to use the same SDP and CTCI connections, as discussed *infra*.

<sup>18</sup> Telephone conversation between John A. Zecca, Assistant General Counsel, Nasdaq and Susie Cho, Special Counsel, Division, Commission, December 9, 2002.

<sup>19</sup> Fees related to API linkages are set forth at NASD Rule 7010(f).

each ECN accessed through Tools Plus.<sup>20</sup>

Nasdaq also creates custom interfaces for Tools Plus subscribers. Subscribers are supplied with a Statement of Work that outlines the time and resources needed to complete the project. The Statement of Work must be approved and signed by both the subscriber and Nasdaq before any programming begins. As is currently the case, each Tools Plus subscriber would receive one custom interface to the subscriber's clearing firm as part of the cost of installation of Tools Plus. Nasdaq proposes to charge by the hour for all other customized programming and maintenance on custom interfaces based on the labor schedule set forth below:

Standard labor rates for:

Calendar Year 2002	Calendar Year 2003 and thereafter
Senior Programmer: \$175/hour.	\$200/hour.
Programmer: \$125/hour .....	\$150/hour.
Junior Programmer: \$100/hour.	\$125/hour.
Project Management: \$150/hour.	\$175/hour.
Network Engineer: \$125/hour	\$150/hour.
Operations Support: \$100/hour.	\$125/hour.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,<sup>21</sup> in general, and with Section 15A(b)(5) of the Act,<sup>22</sup> in particular, in that it provides 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. Nasdaq believes that the fees are reasonable in that they have been calculated to approximate the fees previously charged for Tools and Tools Plus products.

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

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

<sup>20</sup> This charge only applies to subscribers who route orders to the ECN.

<sup>21</sup> 15 U.S.C. 78o-3.

<sup>22</sup> 15 U.S.C. 78o-3(b)(5).

President, Nasdaq, to Robert L.D. Colby, Deputy Director, Division, Commission, dated January 8, 2001.

<sup>15</sup> 17 CFR 240.11Ac1-2(c).

<sup>16</sup> SDP charges are only paid by subscribers who handle customer orders.

*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 on the proposed rule change contained in this filing.

### III. 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 in the Commission's Public Reference Room. Copies of the 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-2002-165 and should be submitted by January 7, 2003.

### IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association,<sup>23</sup> and in particular, the requirements of Section 15A(b)(5) of the Act,<sup>24</sup> which requires that the rules of an 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 notes that these fees will

only be charged to users of Tools and Tools Plus and that the fees will be applied uniformly to all customers. In addition, the Commission notes that these fees have been calculated to be comparable with fees previously charged for Tools and Tools Plus.

The Commission also notes that Nasdaq has represented that when Nasdaq Tools Inc. was a subsidiary, Nasdaq treated Nasdaq Tools Inc. as a vendor in assessing certain fees and that it will continue to apply the same schedule as applied to Nasdaq Tools Inc. For example, Nasdaq proposes to continue to use the same fee schedule applied to Nasdaq Tools, Inc. for CTCI and SDP connections and information unless and until Nasdaq files a new proposed rule change.<sup>25</sup> The Commission also notes that customers of Tools and Tools Plus do not receive any other advantage in accessing Nasdaq's systems as a result of their subscription to Tools or Tools Plus.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. The Commission notes that Nasdaq has requested accelerated approval because these fees are the same fees that are being charged prospectively for the same products and are consistent with the fees previously charged to customers of Tools and Tools Plus.<sup>26</sup> The Commission believes that accelerated approval of the proposal will permit the most efficient implementation of the fees and reduce confusion for existing customers of Tools and Tools Plus. Based on the above, the Commission believes that there is good cause, consistent with Section 15A(b)(5)<sup>27</sup> and Section 19(b)<sup>28</sup> of the Act to approve the proposal on an accelerated basis.

### V. Conclusion

*It Is Therefore Ordered*, pursuant to Section 19(b)(2) of the Act,<sup>29</sup> that the proposed rule change (SR-NASD-2002-165), as amended, is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>30</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 02-31650 Filed 12-16-02; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46973; File No. SR-NASD-2002-164]

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December 9, 2002.

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

Nasdaq is proposing to amend NASD Rule 7050 to establish the fees for software products sold by Nasdaq Trading Applications as part of Nasdaq's Transaction Services for business products.<sup>3</sup> Below is the text of the proposed rule change. Proposed new language is *italicized*.<sup>4</sup>

\* \* \* \* \*

7050. Other Services

(a)-(d) No Change.

(e) *Software Products*

<sup>23</sup> In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>24</sup> 15 U.S.C. 78o-3(b)(5).

<sup>25</sup> See *supra* note 17.

<sup>26</sup> See *supra* note 4.

<sup>27</sup> 15 U.S.C. 78o-3(b)(5).

<sup>28</sup> 15 U.S.C. 78s(b).

<sup>29</sup> 15 U.S.C. 78s(b)(2).

<sup>30</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> Telephone conversation between John A. Zecca, Assistant General Counsel, Nasdaq and Susie Cho,

Special Counsel, Division, Commission, December 3, 2002.

<sup>4</sup> Nasdaq has filed a separate proposal pursuant to Section 19(b)(1) of the Act and Rule 19b-4 thereunder, to impose these same fees on a retroactive basis for the period from July 25, 2002 to the date of this filing. See Securities Exchange Act Release No. 46972 (December 9, 2002) (SR-NASD-2002-165).