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

1. Purpose

Nasdaq is proposing to make several modifications to the price schedule for the Tools Plus software product offered by Nasdaq Trading Applications (''NTA'') (formerly Nasdaq Tools, Inc.). Specifically, Nasdaq is (i) modifying the price for installation of NTA's Tools Plus system, and (ii) establishing a price for a new type of Tools Plus terminal that Nasdaq will make available for use by correspondents and floor brokers.[4] Tools Plus is a software product that provides subscribers with order management and routing, trade reporting, clearing, and regulatory compliance functionality.

Installation Fee

Under the current pricing schedule for Tools Plus, a customer pays a fee of $13,550 for the installation of its first Tools Plus terminal and an incremental fee of $140 for the installation of each additional Tools Plus terminal. When Nasdaq installs Tools Plus at the offices of a customer, it must procure Nasdaq-owned hardware, such as servers, routers, and switches, that interfaces with the customer's terminals, as well as commercial software products that run on this equipment. The amount and complexity of hardware and software required to support each customer differs, based on a complex set of variables, including the number of employees of the customer that will use the product; the number, volume, and liquidity of the securities traded by the customer, the extent to which the customer engages in pre-open trading; and the data processing options selected by the customer. Nasdaq represents that the installation fee is intended to cover the costs of this hardware and software, as well as associated Nasdaq personnel costs. Nasdaq has concluded, however, that the current level of installation fees does not cover these costs in many cases. Accordingly, Nasdaq is increasing the basic installation fee to $16,000, with this fee covering the first 15 terminals installed. The fee for additional terminals will be $13,000 for each group of up to 15 terminals installed.

Correspondent/Floor Broker Terminal

Nasdaq is proposing to offer Tools Plus terminals with reduced functionality for use by correspondent firms or floor brokers to route orders to specified broker-dealers with whom they have an established relationship, at a reduced fee of $350 per terminal per month.[5] Unlike a full functionality terminal, the terminals would not contain functionality to accept order flow, to compile statistics on order execution, or to route orders to a wide range of market centers. Accordingly, Nasdaq believes that these terminals should be offered at a reduced price.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,[6] in general, and with Section 15A(b)(5) of the Act,[7] in particular, in that it provides 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 NASD operates or controls.

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.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[8] and subparagraph (f) of Rule 19b–4 thereunder,[9] because it establishes or changes a due, fee, or other charge imposed by the self-regulatory organization. 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 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–2002–177 and should be submitted by January 17, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–32790 Filed 12–26–02; 8:45 am]

BILLING CODE 8010–1–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47025; File No. SR–NYSE–2002–59]

Self Regulatory Organizations; Notice of Filing of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Pilot Programs for Mediation and Administrative Conferences

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 November 4, 2002 the New York Stock Exchange, Inc. (''Exchange'' or ''NYSE'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') a proposed rule change (SR–NYSE–2002–59) as described in Items I, II and

[4] To date, all of Nasdaq's customers for Tools Plus have been NASD members. Nasdaq anticipates, however, that some of the users of floor broker terminals may be non-members. Accordingly, Nasdaq represents that it will file a separate proposed rule change to establish Tools Plus pricing for non-members at levels identical to those established for members, and will not offer Tools Plus products to non-members prior to the effective date of that filing.

[5] *Id.*

[6] 15 U.S.C. 78*o*–3.

[7] 15 U.S.C. 78*o*–3(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

[9] 17 CFR 240.19b–4(f)

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19B–4.

III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule changes from interested persons. On December 18, 2002, the NYSE submitted Amendment No. 1 to the proposal.[3]

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

The Exchange is proposing to allow its pilot programs for Mediation and Administrative Conferences (Rules 638 and 639) to expire on December 30, 2002 and adopt Rules 638 and 639 as amended. The Exchange is also proposing amendments to Rules 628 (Agreement to Arbitrate) and 630 (Uniform Arbitration Code) to reflect to the adoption of Rules 638 and 639. Proposed new language is in *italics;* proposed deletions are in [brackets].

* * * * *

NYSE Constitution and Rules

Rule 628. Agreement to Arbitrate

Article XI of the Constitution and Rules 600–[637]*639* shall be deemed a part of and be incorporated by reference in every agreement to arbitrate under the Constitution and Rules of the New York Stock Exchange, Inc.

* * * * *

Rule 630. Uniform Arbitration Code

The provisions of the Uniform Arbitration Code contained in Rules 600 to [637]*639* shall also apply to controversies between members, allied members, member firms, member organizations and/or non-members who are not [public] customers except in so far as such provisions specifically apply to matters involving [public] customers.

* * * * *

Rule 638. Mediation

(a) Mediation Pending Arbitration

(1) [A single mediation session of up to four hours will be conducted in all cases submitted for arbitration where the amount of the claim is $250,000 or more.

(2) The New York Stock Exchange will provide the parties with a mediator. The mediator's fee for the single mediation session shall be $500 and shall be paid by the New York Stock Exchange. If the parties select a mediator of their own choosing, from outside the list of proposed mediators, they shall be responsible for any difference in the mediator's fee. If the parties desire they can extend the mediation beyond the first session at their own expense.] *If the parties agree, any matter submitted for arbitration at the New York Stock Exchange is eligible to be submitted to mediation.*

(2)[(3)] Unless the parties agree on a mediator, the Director of Arbitration, upon request from the parties, will send a list of five proposed mediators together with the mediators' biographical information described in Rule 608. The parties shall have ten days to agree on a mediator from the list or choose their own mediator. If no agreement is reached, the Director of Arbitration will select a mediator from the list unless all the names on the list are objected to by the parties. In that instance, the Director of Arbitration will appoint a mediator from outside the list.

(3)[(4)] Unless otherwise agreed to by the parties, mediation shall not delay the arbitration.

(4)[(5)] The mediation shall be confidential and no record kept of the proceeding. The mediator will not be permitted to act as an arbitrator in the same case and the mediator shall not be called to testify in any proceeding regarding the mediation.

[(6) In all other matters submitted to arbitration, mediation shall be available upon the consent of the parties, at their own expense.] (b) Mediation Prior to Arbitration

(1) If the parties agree, any matter eligible for arbitration under the Constitution and Rules of the New York Stock Exchange may be mediated at the Exchange. To begin a mediation under this paragraph, the parties must file with the Exchange an agreement to mediate.

(2) At the time of filing an agreement to mediate, a party shall pay a non-refundable filing fee to the Exchange as required for the filing of an arbitration for the same amount in dispute under Rule 629 (Schedule of Fees) unless the fee is waived by the Director of Arbitration. The parties are directly responsible for the payment of the mediator's fee.

(3) If the case does not settle after mediation, the non-refundable filing fee will be applied to the non-refundable filing fee if a party elects to commence an arbitration.

* * * * *

Rule 639. Administrative Conferences

[In all cases where the amount of the claim is $250,000 or more, the parties shall attend] *Prior to the scheduling of a hearing [under Rule 607*], an administrative conference *may be scheduled at the request of a party, an arbitrator, or in the discretion of the Director of Arbitration* [with the arbitrators]. [The Director of Arbitration will schedule t]*T*he conference *will be scheduled for a date no sooner than 30 days after the request unless the parties agreed to a date that can be accommodated by the Exchange* [within 90 days after the Director serves the Statement of Claim, unless all parties request that it be scheduled later]. The Administrative Conference will be [conducted] *held* by telephone [with the chairperson presiding] [*and*] *with the arbitrator or a person appointed by the Director of Arbitration* ([*either*] *an Arbitration Counsel* [*or an arbitrator*]) [*will*] *preside during the conference.* In any claims involving a [*public*] customer, *any arbitrator appointed will be a* public arbitrator [will conduct the administrative conference,] unless the [public] customer demands, in writing, a securities arbitrator. [The chairperson shall have discretion to conduct the conference in-person and may request that all of the arbitrators attend the conference.]

At the conference, [the Arbitrator(s) may establish a schedule for discovery and the hearing, issue subpoenas and direct the appearance of witnesses, and resolve or narrow any other issue which may expedite the arbitration] *the presiding person will address procedural matters including, but not limited to, setting a schedule for discovery and the hearing as described in Rule 619 (d) or (e) as applicable.*

[Rules 638 and 639 approved on a two-year basis through December 30, 2002.]

* * * * *

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

In its filing with the Commission, the Exchange 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. The Exchange 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

The Exchange's proposed rule changes are intended to: (1) Adopt a

[3] *See* letter to Florence Harmon, Senior Special Counsel, SEC, from Darla Stuckey, Corporate Secretary, NYSE, dated December 17, 2002 (''Amendment No. 1''). In Amendment No. 1, the NYSE made technical changes to the rule text, the substance of which is incorporated into this notice.

rule for mediation that parties may agree to at their own expense (Rule 638); (2) adopt an Administrative Conference rule that provides for the scheduling of an administrative conference at the request of the parties or discretion of the arbitrator(s) or Director of Arbitration; (3) provide that the Director may appoint a staff member or arbitrator to preside at the administrative conference which is to be held via telephone conference call and limited to procedural matters (Rule 639); and (4) amend Rules 628 (Agreement to Arbitrate) and 630 (Uniform Arbitration Code) to reflect adoption of rules 638 (Mediation) and 639 (Administration Conferences).

Rules 638 (Mediation) and 639 (Administrative Conferences) were originally approved by the Commission on a 2-year pilot basis on November 19, 1998.[4] On December 29, 2000, the Commission approved amendments to the two pilot rules and granted a 2-year extension.[5]

The Exchange is proposing to allow the pilot to expire and adopt Rule 638 as amended to eliminate automatic scheduling of mediation and the Exchange's payment of $500 toward the mediator's fee. As amended, Rule 638 will provide for mediation in any case where the parties agree, and at their own expense, either before, an arbitration is filed or during the pendency or an arbitration.

The intent of the pilot mediation rule was to encourage an early resolution of disputes. The results have not been as good as anticipated. Initially, practitioners favored the pilot mediation program because it aided them in getting their clients to consider mediation, which is a process completely under the parties control. However, in 1999 only 41% of industry cases submitted for mediation settled. The percentage fell to 26% in 2000, then rose to 40% and fell to 38% respectively in 2001 and 2002. In addition, mediations involving customers, which settled at over 90% in 1999 and 2000, fell to 65% in 2001 and just barely 50% in the first half of 2002. Recently parties participating in the pilot, particularly customers, have complained that the mediation sessions are too often used as means of obtaining discovery, or the opposing party appears with little or no authority to settle.

Mediation works best when both parties are willing to negotiate and craft their own resolution rather than leaving the final determination to a third party, such as an arbitrator. Accordingly, the Exchange is proposing amending the mediation rules to provide for mediation only upon agreement of the parties and at their expense. The Exchange will continue to facilitate mediations in cases filed for arbitration without imposing any additional administrative fees. Parties who wish to mediate prior to arbitration will continue to be required to submit a filing fee, which will be credited toward the arbitration, if mediation is unsuccessful.

As a companion to the mediation pilot, the Exchange adopted, on a pilot basis, Rule 639 Administrative Conferences, with the intent of bringing parties and arbitrators together early in the process with a view toward expediting the arbitration. Originally designed for claims of $500,000 or more, Rule 639 was amended in December 2000 and the ceiling lowered to $250,000. Under the pilot, an administrative conference was automatically scheduled shortly after the answer to the statement of claim was filed.

In the time since its adoption, the administrative conference pilot proved to be useful in cases where the parties cooperated in pursuing a swift resolution of their dispute. In other cases it has become an abused process where parties have sought to use the conference to delay the process and thus defeated the original intent of the pilot.

The Exchange is proposing to allow the pilot to expire[6] and adopt Rule 639, as amended, to provide that an administrative conference will be scheduled only when requested by the parties or at the discretion of the Director of Arbitration or the arbitrator(s). The Director of Arbitration will appoint a member of the Exchange arbitration staff or an arbitrator to preside. The administrative conference will be conducted via conference call. The conference will be limited to procedural matters such as discovery and scheduling of the hearing. An arbitrator may issue an order at the conclusion of the administrative conference. If an arbitration staff member presides, he or she will assist the parties in reaching agreement on procedural issues.

The proposed amendments to Rules 628 and 630 reflect the adoption of Rules 638 and 639.

2. Statutory Basis

The Exchange believes that the proposed changes are consistent with Section 6(b)[7] of the Act,[8] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles by insuring that members and member organizations and the public have a fair and impartial forum for the resolution of their disputes.

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

The Exchange 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.

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

The Exchange has neither solicited nor received 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 a 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 self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule changes, or

(B) Institute proceedings to determine whether the proposed rule changes should be disapproved.

IV. Solicitation of Comments

Interested person 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 (6) 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

[4] *See* Securities Exchange Act Release Act 34–40695 (November 19, 1998).

[5] *See* Securities Exchange Act Release No. 34–43785 (December 29, 2000).

[6] Because this proposed rule has not yet been approved, the NYSE plans to file a proposed rule change to extend the pilot until such time as SR–NYSE–2002–59 is approved by the Commission. Telephone conversation between Robert S. Clemente, Director of Arbitration, NYSE, and Florence E. Harmon, Senior Special Counsel, SEC on December 9, 2002.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

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 Exchange. All submissions should refer to the file number SR–NYSE–2002–59 and should be submitted by January 17, 2003.

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

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 02–32738 Filed 12–26–02; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47024; File No. SR–NYSE–2002–37]

Self-Regulatory Organizations; New York Stock Exchange; Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 Thereto by New York Stock Exchange To Amend the Exchange's Automatic Execution Facility (NYSE Direct+)

December 18, 2002.

I. Introduction

On August 29, 2002, the New York Stock Exchange (''NYSE'') 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: (i) Amend NYSE rule 13 to provide for a one-year pilot program to expand Direct+ order size eligibility for Investment Company Units, including Exchange-Traded Funds (''ETFs''), and Trust Issued Receipts, such as Holding Company Depositary Receipts (''HOLDRs''); (ii) amend NYSE rule 1002 to include Investment Company Units and Trust Issued Receipts and to provide that Investment Company Units trade until 4:15p.m.; and (iii) amend NYSE rule 1005 to reflect that the rule applies to Investment Company Units and Trust Issued Receipts. On September 20, 2002, the rule proposal was published for comment in the **Federal Register**.[3] On December 16, 2002, the NYSE filed Amendment No. 1 to the proposed rule change.[4] No comments were received on the proposed rule change. This order approves the proposed rule change and issues notice of, and grants accelerated approval to, Amendment No. 1.

II. Description of the Proposed Rule Change

NYSE Direct+ provides for the automatic execution of limit orders in a stock (''auto ex'' orders) against trading interest reflected in the Exchange's published quotation.[5] An auto ex order priced at or above the Exchange's published offer price (in the case of an auto ex order to buy), or an auto ex order priced at or below the Exchange's published bid price (in the case of an auto ex order to sell) would receive an automatic execution without being exposed to the auction market, provided the bid or offer is still available.

Currently, order size eligibility for all auto ex orders for stocks is 1099 shares or less. The Exchange is proposing to expand the size of orders eligible for automatic execution under NYSE Direct+ to a maximum of 10,000 shares for two Exchange products. These are Investment Company Units (as defined in paragraph 703.16 of the Listed Company Manual), including ETFs, and Trust Issued Receipts (such as HOLDRs), which are defined in NYSE rule 1200. The Exchange believes that the increase in the number of shares eligible for automatic execution for Investment Company Units and Trust Issued Receipts will serve to attract additional order flow to NYSE Direct+. The expanded order size would be phased in as a pilot program, with order size raised on a gradual, ''stair step'' basis to a maximum of 10,000 shares as experience is gained. The proposed pilot program time period would expire on December 23, 2003.[6]

The NYSE believes that that the appropriate level to start accepting Direct + orders under this proposed rule change will be between 2,500 and 5,000 shares. Subsequent increases in the order eligibility levels will be made after experience is gained with trading at the initial level and at each subsequent level.[7]

To implement the proposed pilot program, the Exchange is modifying NYSE rule 13 to codify the pilot program; amending NYSE rule 1002 to permit orders in Investment Company Units and Trust Issued Receipts to be executed via NYSE Direct + and to provide that orders in Investment Company Units trade until 4:15 p.m.; and modifying NYSE rule 1005 to apply the requirement in the rule of auto ex order entry for the same customer in the same stock at time intervals of no less than 30 seconds between entry of each order, to Investment Company Units and Trust Issued Receipts.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 1, including whether Amendment No. 1 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 also will be available for inspection and copying at the principal office of the NYSE. All submissions should refer to File No. SR-

[9] 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. 45816 (April 24, 2002), 67 FR 30406.

[4] *See* letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, dated December 12, 2002 (''Amendment No. 1''). In Amendment No. 1, the Exchange: (1) provided detailed information about the standards that would be employed to determine whether to increase Direct+ order size and (2) amended rule 13 to specify that the pilot program for increased order size eligibility for Direct+ orders in Investment Company Units and Trust Issued Receipts will run until December 23, 2003.

[5] NYSE Direct+ was originally filed as a one-year pilot. It was approved in Securities Exchange Act Release No. 43767 (December 22, 2000), 66 FR 834 (January 4, 2001). The pilot was subsequently extended for an additional year by SR–NYSE–2001–50 and approved by Securities Exchange Act Release No. 45331 (January 24, 2002), 67 FR 5024 (February 1, 2002). The pilot was recently extended until December 23, 2003. *See* Securities Exchange Act Release No. 34–46906 (November 25, 2002), 67 FR 72260 (December 4, 2002).

[6] *See* Amendment No. 1, *supra* note 4.

[7] The NYSE will consider the ability of the specialist to maintain a fair and orderly market in Investment Company Units or Trust Issued Receipts with the increased Direct+ order size and the operational impact, if any resulting from the increased order size eligibility. The NYSE has also provided that an increase in order size eligibility will be preceded by at least a one-week notice to the membership before implementation. *See* Amendment No. 1, *supra* note 4.