

2003-09 and should be submitted by March 31, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47436; File No. SR-NASD-2003-26]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Extend a Pilot Program Regarding the Regulatory Fee and the Trading Activity Fee

March 4, 2003.

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 February 28, 2003, the National Association of Securities Dealers, Inc. ("NASD") 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 the NASD. The NASD filed the proposal pursuant to Section 19(b)(3)(A) of the Act,<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission.<sup>5</sup> The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

NASD proposes to extend the pilot program for the Trading Activity Fee ("TAF") through April 1, 2003. The TAF pilot program is currently in effect, and is set to expire on March 1, 2003.<sup>6</sup> NASD has requested that the Commission approve SR-NASD-2002-

148,<sup>7</sup> so that the TAF will be made permanent before the expiration of the TAF pilot program on April 1, 2003. If the Commission does not approve SR-NASD-2002-148, the trading fee component of the member regulatory pricing structure will revert to Section 8 of Schedule A to the NASD By-Laws, as amended. The NASD is making no substantive changes to the pilot program, other than extending the expiration date through April 1, 2003.

#### 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 NASD 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 Association 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 July 24, 2002, the NASD filed SR-NASD-2002-98, which proposed a new member regulatory pricing structuring, including a new TAF, to replace the existing trading fee contained in Section 8 of Schedule A to the NASD By-Laws.<sup>8</sup> The proposed rule change was effective upon filing with the Commission pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>9</sup> and Rule 19b-4(f)(2)<sup>10</sup> thereunder. SR-NASD-2002-98 is currently in effect. Assessments under the new TAF were effective as of October 1, 2002, payable January 15, 2003.<sup>11</sup> On October 18, 2002, the NASD established a sunset provision whereby the TAF established in SR-NASD-2002-98 would cease to exist after December 31, 2002. At the

<sup>7</sup> See Securities Exchange Act Release No. 46817 (November 12, 2002), 67 FR 69785 (November 19, 2002)(SR-NASD-2002-148).

<sup>8</sup> See Securities Exchange Act Release No. 46416 (August 23, 2002), 67 FR 55901 (August 30, 2002) (SR-NASD-2002-98). See also, Securities Exchange Act Release No. 46417 (August 23, 2002), 67 FR 55893 (August 30, 2002) (SR-NASD-2002-99). The NASD also published three *Notices to Members* describing the proposed changes and addressing interpretive questions posed by NASD members. See *Notices to Members 02-41* (July 2002), *02-63* (September 2002), and *02-75* (November 2002).

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>10</sup> 17 CFR 240.19b-4(f)(2).

<sup>11</sup> Member firms were required to pay the TAF in accordance with the pilot program (for the first quarter starting October 1, 2002) by no later than January 15, 2003, and thereafter on a monthly basis.

same time, the NASD filed SR-NASD-2002-148, which is substantially similar to SR-NASD-2002-98, but filed under Section 19(b)(1) of the Act, to allow for additional member comment. Upon expiration of SR-NASD-2002-98, the member regulatory pricing structure was to revert to Section 8 of Schedule A to the NASD By-Laws, as amended.

On December 24, 2002, the NASD extended the TAF pilot program through March 1, 2003. With the instant rule filing, the NASD is further extending the TAF pilot program through April 1, 2003, to allow additional time for the NASD to respond to comments to the original filing, and to allow the Commission more time to review issues presented by the permanent TAF proposed rule change (SR-NASD-2002-148). The NASD asks the Commission to approve SR-NASD-2002-148 before the expiration of the TAF pilot program on April 1, 2003, to make the TAF pilot permanent.

###### 2. Statutory Basis

The NASD believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,<sup>12</sup> in general, and with Section 15A(b)(5) of the Act,<sup>13</sup> 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 that the NASD operates or controls.

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

The NASD 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, as amended.

##### 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. Written comments, however, have been solicited on SR-NASD-2002-98, SR-NASD-2002-147, SR-NASD-2002-148, and SR-NASD-2002-182. The comments are not addressed herein, but are, as appropriate, discussed in connection with the respective rule filings.

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

Because the foregoing proposed rule change does not:

<sup>12</sup> 15 U.S.C. 78o-3.

<sup>13</sup> 15 U.S.C. 78o-3(b)(5).

<sup>9</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> 15 U.S.C. 78s(b)(3)(A).

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

<sup>5</sup> The NASD asked the Commission to waive the five-day pre-filing notice requirement and the 30-day operative delay. 17 CFR 240.19b-4(f)(6).

<sup>6</sup> See Securities Exchange Act Release No. 46416 (August 23, 2002), 67 FR 55901 (August 30, 2002) (SR-NASD-2002-98). See also Securities Exchange Act Release No. 47112 (December 31, 2002), 68 FR 824 (January 7, 2003)(SR-NASD-2002-182).

(i) Significantly affect the protection of investors or the public interest;

(ii) Impose any significant burden on competition; and

(iii) Become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>14</sup> and Rule 19b-4(f)(6) thereunder.<sup>15</sup> At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such 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.

The NASD has requested that the Commission waive the five-day pre-filing notice requirement and the 30-day operative delay. The Commission believes waiving the five-day pre-filing notice requirement and the 30-day operative delay is consistent with the protection of investors and the public interest. Acceleration of the operative date will allow the pilot to operate without interruption through April 1, 2003. For these reasons, the Commission designates the proposal to be effective and operative upon filing with the Commission.<sup>16</sup>

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal 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 number

SR-NASD-2003-26 and should be submitted by March 31, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>17</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47437; File No. SR-NASD-2003-21]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Establishing a Pricing Schedule for the Use of Nasdaq Trading Applications' Tools Plus Product for Non-NASD Members

March 4, 2003.

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 February 14, 2003, 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, II, and III below, which Items have been prepared by Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

Nasdaq proposes to establish a pricing schedule for the use of Nasdaq Trading Applications' ("NTA") Tools Plus product by persons that are not NASD members. Nasdaq will implement this rule change 30 days after the date of this filing. Because Nasdaq proposes to charge non-members the same prices for Tools Plus as it currently charges to members under NASD Rule 7050(e)(2), there is no change in rule language.

#### 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 IV 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

Nasdaq is proposing to establish a pricing schedule for the use of NTA's Tools Plus product by persons that are not NASD members. The proposed pricing schedule is identical to the one already established for NASD members by NASD Rule 7050(e)(2).<sup>3</sup> Tools Plus is a software product that provides subscribers with order management and routing, trade reporting, clearing, and regulatory compliance functionality. NTA was formerly Nasdaq Tools, Inc., a subsidiary of Nasdaq that was merged into Nasdaq in 2002.

In SR-NASD-2002-177, Nasdaq established a fee of \$350 per terminal per month for 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.<sup>4</sup>

Unlike a full functionality Tools Plus 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. This prior filing established prices for use of this product by NASD members, but did not cover non-members. Nasdaq believes, however, that the most likely customers for the floor broker terminal are regional securities exchanges, which may purchase such terminals for use by their members, rather than the floor brokers themselves. Accordingly, Nasdaq proposes to offer Tools Plus to non-members at the same prices at which it is offered to members.<sup>5</sup> Use of floor

<sup>3</sup> See Securities Exchange Act Release No. 47067 (December 20, 2002), 67 FR 79213 (December 27, 2002) (SR-NASD-2002-177); Securities Exchange Act Release No. 46972 (December 9, 2002), 67 FR 77301 (December 17, 2002) (SR-NASD-2002-165); and Securities Exchange Act Release No. 46973 (December 9, 2002), 67 FR 77305 (December 17, 2002) (SR-NASD-2002-164).

<sup>4</sup> See Securities Exchange Act Release No. 47067 (December 20, 2002), 67 FR 79213 (December 27, 2002) (SR-NASD-2002-177).

<sup>5</sup> Nasdaq does not currently offer Tools Plus to non-members, and it is unclear whether any demand for the product among non-members will

Continued

<sup>14</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>15</sup> 17 CFR 240.19b-4(f)(6).

<sup>16</sup> For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>17</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.