

that is effectively sharing market data revenue associated with transactions in Nasdaq-listed securities by “mutualizing” revenues with certain of its members,¹¹ notwithstanding the Commission’s Order of Summary Abrogation (the “Order”) regarding market data revenue sharing programs.¹² Because Nasdaq is not permitted to share market information revenues from Nasdaq-listed securities, and because it has too many market participants to effect a “mutualization” ploy, Nasdaq believes that it is placed in a fundamentally unfair competitive position. Nasdaq is proposing wide-ranging price reductions across multiple services,¹³ but Nasdaq represents that it incurs substantial costs in order to operate ACT and to support its regulatory function. Nasdaq believes that the only way for it to compete with an exchange that can single out firms to “mutualize” with is to provide preferred pricing to its members that continue to support Nasdaq with their orders. Accordingly, Nasdaq believes that it is reasonable to offer free reporting of SuperMontage trades to a firm only if the firm’s use of ACT and SuperMontage during a particular month is sufficiently consistent to allow Nasdaq to conclude that the lost revenue will be partially offset by other ACT revenue and transaction execution revenue.

2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with the provisions of section 15A of the Act,¹⁴ in general and with section 15A(b)(5) of the Act,¹⁵ 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

(eliminating trade reporting fees associated with the NASD’s Alternative Display Facility).

¹¹ Securities Exchange Act Release No. 46688 (October 18, 2002), 67 FR 65816 (October 28, 2002) (SR-CSE-2002-14) (describing the Cincinnati Stock Exchange’s market data revenue sharing program for Nasdaq securities).

¹² Securities Exchange Act Release No. 46159 (July 2, 2002), 67 FR 45775 (July 10, 2002).

¹³ See File Nos. SR-NASD-2003-51 (filed March 24, 2003) (reporting of non-SuperMontage trades); SR-NASD-2003-53 (filed March 24, 2003) and SR-NASD-2003-54 (filed March 24, 2003) (Nasdaq Testing Facility); SR-NASD-2003-47 (filed March 21, 2003) and SR-NASD-2003-48 (filed March 21, 2003) (NWII logos); SR-NASD-2003-43 (filed March 20, 2003) and SR-NASD-2003-46 (filed March 20, 2003) (computer-to-computer interface pricing); see also Securities Exchange Act Release No. 47300 (January 31, 2003), 68 FR 6234 (February 6, 2003) (SR-NASD-2003-10) (quotation update fees).

¹⁴ 15 U.S.C. 78o-3.

¹⁵ 15 U.S.C. 78o-3(b)(5).

operates or controls. Nasdaq believes that the proposal, as amended, will allow a reduction in the overall level of ACT fees paid by market participants while ensuring that each participant pays an equitable share of the costs associated with ACT.

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

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

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

Written comments were neither solicited nor received.

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

The foregoing rule change, as amended, has become effective upon March 27, 2003, the date of filing of Amendment No. 1 to the proposed rule change, pursuant to section 19(b)(3)(A)(ii) of the Act¹⁶ and subparagraph (f)(2) of rule 19b-4 thereunder,¹⁷ 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 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.¹⁸

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

¹⁶ 15 U.S.C. 78s(b)(3)(a)(ii).

¹⁷ 17 CFR 240.19b-4(f)(2).

¹⁸ For purposes of determining the effective date of the filing and calculating the 60-day abrogation period, the Commission considers the period to commence on March 27, 2003, the date that Nasdaq filed Amendment No. 1.

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 Nasdaq. All submissions should refer to File No. SR-NASD-2003-56 and should be submitted by April 30, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁹

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47615; File No. SR-PCX-2002-54]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Pacific Exchange, Inc. Relating to a One Tick Step Up Requirement for Auto-Ex in Certain Option Issues

April 2, 2003.

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 August 27, 2002, the Pacific Exchange, Inc. (“PCX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission” or “SEC”) the proposed rule change as described in items I, II and III below, which items have been prepared by the self-regulatory organization. On March 19, 2003, the Exchange submitted Amendment No. 1 to the proposed rule change. 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

The Exchange is proposing to amend its rules by adopting a one tick step up requirement for Market Makers who are participating on the Exchange’s Automatic Execution System (“Auto-Ex”) in certain option issues. The text of the proposed rule change is below. Additions are in *italics*.

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¹⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.