

For the Commission by the Division of Market Regulation, pursuant to delegated authority.⁴

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Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47857; File No. SR-NASD-2003-77]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc. To Amend the Fee Schedule for the Nasdaq Application of the Primex Auction System®

May 14, 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 April 30, 2003, the National Association of Securities Dealers, Inc. ("NASD"), 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. On May 2, 2003, Nasdaq filed a letter to correct a typographical error in the proposal.³ Nasdaq has designated this proposal as one constituting a fee filing under section 19(b)(3)(A) of the Act,⁴ which renders the rule effective upon the Commission's receipt of this filing. Nasdaq began assessing fees pursuant to the revised fee schedule beginning on May 1, 2003. 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 the Substance of the Proposed Rule Change

Nasdaq proposes to amend NASD Rule 7010(r) to modify the fee schedule for the Nasdaq Application of the Primex Auction System ("Primex"). Nasdaq will implement the proposed rule change on May 1, 2003. The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets.

Rule 7010(r). Nasdaq Application of the Primex Auction System

The following charges shall apply to the use of the Nasdaq Application of the Primex Auction System:

- (1) Transaction Charges:
 - Execution Services—for all participants:
 - Order entry—No fee.
 - Auction Response (per share, per execution). *—\$[.005] .003
 - Matching Rights—Primex Auction Market Makers (PAMMs) only:
 - 50 Percent Match—No fee.
 - Two-Cent Match (per share, per retained order—\$2.50 Maximum). ** —\$.0025
 - Revenue Sharing—PAMMs only.
 - Each order executed: ***— $\frac{1}{3}$ of transaction fee.
 - (2) Monthly Access fees [No change.]
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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 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.

* This fee applies to both Indications and "real-time" Responses. When two orders match directly, a fee is charged to the party that entered the second order.

** This fee is charged in the event a PAMM attaches its matching right to an order, and the crowd offers two cents or less price improvement to that order.

*** Paid to a PAMM when it enters an order that interacts with crowd interest in the system. Revenue sharing applies only to orders in those securities in which the firm is registered as a PAMM. The revenue sharing amounts will be paid on a monthly basis.

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

1. Purpose

The amendments modify NASD Rule 7010(r), which establishes the fee schedule for Primex. Specifically, the amendments reduce the auction response fee from \$.005 to \$.003 per execution, per share.

While the fee schedule for Primex was filed initially in December 2001, the prices for the fee schedule were established in 2000.⁵ Nasdaq represents that since that time transaction prices in the overall market have decreased. As a result, Nasdaq believes that the Primex fee schedule is no longer competitive. This proposal responds to the developments in the market and reduces the auction response fee.

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 fees among members. Nasdaq believes the fee reduction recognizes the changes in pricing that have occurred in the market and are designed to make the fees for Primex competitive with other trading venues. Nasdaq represents that these fees will be charged consistently to all members that choose to use Primex.

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 or appropriate in furtherance of the purposes of the Act.

⁵ See Securities Exchange Act Release No. 45285 (January 15, 2002), 67 FR 3521 (January 24, 2002). In the filing establishing the original fee schedule for Primex, Nasdaq indicated it would not charge any fees during the initial few months Primex was operating, and that it would notify members through a Head Trader Alert when it would begin assessing fees. On July 31, 2002, Nasdaq filed a proposed rule change revising the original fee schedule for Primex. See Securities Exchange Act Release No. 46361 (August 15, 2002), 67 FR 54246 (August 21, 2002). Nasdaq began assessing fees on August 1, 2002 according to the revised fee schedule; fees were never charged under the original fee schedule.

⁶ 15 U.S.C. 78o-3.

⁷ 15 U.S.C. 78o-3(b)(5).

⁴ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Eleni Constantine, Associate General Counsel, Nasdaq, to Katherine England, Assistant Director, Division of Market Regulation, Commission, dated May 2, 2003 ("Clarification Letter"). In the Clarification Letter, Nasdaq corrected a typographical error in a footnote that is not part of the text being amended regarding the revenue sharing payment schedule. Nasdaq stated that the revenue sharing amounts are paid on a monthly basis, not on a quarterly basis, as previously published in the **Federal Register**. See Securities Exchange Act Release No. 45285A (March 5, 2002), 67 FR 10962 (March 11, 2002). Thus, footnote * * * should read: "Paid to a PAMM when it enters an order that interacts with crowd interest in the system. Revenue sharing applies only to orders in those securities in which the firm is registered as a PAMM. The revenue sharing amounts will be paid on a monthly basis." Nasdaq represents that the footnote reads this way in its Manual.

⁴ 15 U.S.C. 78s(b)(3)(A).