

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 Amex. All submissions should refer to file number SR-Amex-2003-20 and should be submitted by April 30, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>14</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47621; File No. SR-NASD-2003-56]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. Regarding Fees for the Reporting of SuperMontage Transactions Through the Automated Confirmation Transaction Service ("ACT")

April 2, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and rule 19b-4<sup>2</sup> thereunder, notice is hereby given that on March 24, 2003, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), submitted to 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 March 27, 2003, Nasdaq filed Amendment No. 1 to the proposed rule change.<sup>3</sup> Nasdaq has designated this proposal as one establishing or changing a due, fee or other charge imposed by

the self-regulatory organization under section 19(b)(3)(A)(ii) of the Act<sup>4</sup> and rule 19b-4(f)(2) thereunder.<sup>5</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

Nasdaq proposes to waive certain fees for the reporting of SuperMontage transactions associated with the use of the ACT.<sup>6</sup> Nasdaq proposes to implement the proposed rule change on April 1, 2003.

Below is the text of the proposed rule change, as amended.<sup>7</sup> Proposed new language is *italicized*; proposed deleted language is [bracketed].

\* \* \* \* \*

### 7000. CHARGES FOR SERVICES AND EQUIPMENT

#### 7010. System Services

(a)-(f) No change.

(g) Automated Confirmation Transaction Service

(1) The following charges shall be paid by the participant for use of the Automated Confirmation Transaction Service (ACT):

Transaction Related Charges:

Reporting of transactions through SuperMontage (or any other transaction execution system that makes use of SuperMontage's functionality to report transactions).	\$0.029/side ( <i>subject to waiver under paragraph (2) below</i> ).
Reporting of all other transactions in Nasdaq National Market and SmallCap Market securities not subject to comparison through ACT ("Covered Transactions")	
Average daily volume of media transaction reports for Covered Transactions during the month in which a participant is the reporting party:	Fee per side for reports of Covered Transactions to which such participant is a party:
0 to 10,000 .....	\$0.029.
10,001 to 50,000 .....	\$0.029 for a number of reports equal to 10,000 times the number of trading days in the month \$0.015 for all remaining reports.
More than 50,000 .....	\$0.029 for a number of reports equal to 10,000 times the number of trading days in the month \$0.015 for a number of reports equal to 40,000 times the number of trading days in the month \$0.00 for all remaining reports.
Reporting of all other transactions not subject to comparison through ACT.	\$0.029/side.
Comparison .....	\$0.0144/side per 100 shares (minimum 400 shares; maximum 7,500 shares).
Late Report—T+N .....	\$0.288/side.
Browse/query .....	\$0.288/query*.
Terminal fee .....	\$57.00/month (ACT only terminals).

<sup>14</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> See letter from John M. Yetter, Assistant General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated March 26, 2003 ("Amendment No. 1"). In Amendment No. 1, Nasdaq amended its proposal to state that, for purposes of determining eligibility for the fee waiver, if a market participant has more than one market participant identifier ("MPID") associated with the same Central Registration Depository ("CRD") number, the

activity associated with all of those MPIDs will be aggregated; however, activity associated with MPIDs assigned to subsidiaries or other affiliates of the market participant that have a different CRD number will not be aggregated. See SR-NASD-2003-17 (permitting market makers and ECNs to receive a second identifier). 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.

<sup>4</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>5</sup> 17 CFR 240.19b-4(f)(2).

<sup>6</sup> Nasdaq represents that this filing applies to usage of ACT by NASD members. The usage of ACT by non-members is governed by NASD Rule 6120.

<sup>7</sup> The proposed rule text is marked to show changes from the language of the NASD Rule 7010 as amended by SR-NASD-2003-51 (filed March 24, 2003). That proposed rule change, which was effective immediately upon filing, introduced volume discounts for reporting most non-SuperMontage transactions in Nasdaq National Market and SmallCap Market securities.

CTCI fee .....	\$575.00/month.
WebLink ACT .....	\$300/month (full functionality) or \$150/month (up to an average of twenty transactions per day each month)**.
Risk Management Charges .....	\$0.035/side and \$17.25/month per correspondent firm (maximum \$10,000/month per correspondent firm).
Corrective Transaction Charge .....	\$0.25/Cancel, Error, Inhibit, Kill, or "No" portion of No/Was transaction, paid by reporting side; \$0.25/Break, Decline transaction, paid by each party.
ACT Workstation .....	\$525/login/month***.

(2) The \$0.029 fee for reporting of transactions executed through SuperMontage (and other transaction execution systems that make use of SuperMontage's functionality to report transactions) will be waived for an ACT participant during any month in which the participant: (i) executed an average daily volume of 10,000 or more transactions through SuperMontage or any other transaction execution system using SuperMontage's functionality to report transactions; (ii) reported to ACT at least 98% of the internalized transactions in Nasdaq National Market and SmallCap Market securities executed by the participant during the month; and (iii) posted in SuperMontage at least 70% of the bids, offers, and non-marketable limit orders in Nasdaq National Market and SmallCap Market securities communicated by the participant to any market center. Nasdaq may request that a participant provide data supporting the participant's certification that it is eligible for the foregoing waiver, and will deem a participant that fails to provide such data upon request to be ineligible for the waiver. If a participant has more than one market participant identifier ("MPID") associated with the Central Registration Depository ("CRD") number under which it conducts business, eligibility will be determined by aggregating activity associated with all of its MPIDs (but not activity associated with MPIDs assigned to subsidiaries or other affiliates with a different CRD number).

The term "internalized transaction" refers to a transaction in which a customer order received by the participant is executed against another customer order received by the participant, or against the account of the participant as principal, but that is not facilitated or executed using a Nasdaq system or the system of any market center other than the participant. The term "market center" refers to any exchange market maker, OTC market maker, alternative trading system, national securities exchange, or national securities association.

\* Each ACT query incurs the \$0.288 fee; however, the first accept or decline processed for a transaction is free, to insure that no more than \$0.288 is charged per comparison.

Subsequent queries for more data on the same security will also be processed free. Any subsequent query on a different security will incur the \$0.288 query charge.

\*\* For the purposes of this service only, a transaction is defined as an original trade entry, either on trade date or as-of transactions per month.

\*\*\* A firm that uses ACT risk management through one or more NWII terminals when the ACT Workstation is introduced will be eligible to evaluate the ACT Workstation for a free, three-month trial period, provided that the firm continues to pay charges associated with its NWII terminal(s) during that period.

(h)–(s) No change.

\* \* \* \* \*

## 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.

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

#### 1. Purpose

ACT is an automated trade reporting and reconciliation service that speeds the post-execution steps of price and volume reporting, comparison, and clearing of trades completed in Nasdaq, OTC Bulletin Board, and other over-the-counter securities. ACT handles transactions executed through Nasdaq's automated trading systems, as well as transactions negotiated over the telephone and internalized transactions. It also manages post-execution procedures for transactions in exchange-listed securities that are traded in the Nasdaq InterMarket.

Nasdaq represents that, as part of an ongoing effort to reduce the costs incurred by market participants to use Nasdaq services, it proposes to waive the ACT fees for transactions that are

executed through SuperMontage (or any other transaction execution system, such as Liquidity Tracker, that uses SuperMontage's functionality to report transactions). Currently, Nasdaq assesses a fee of \$0.029 per side for the reporting of such transactions, which are reported to ACT automatically. Under the proposed rule change, as amended, however, this fee would be waived for a participant during a month in which the participant: (i) Executed an average daily volume of 10,000 or more transactions through SuperMontage (or any other system that uses SuperMontage functionality to report trades); (ii) reported to ACT at least 98% of the internalized transactions<sup>8</sup> in Nasdaq National Market and SmallCap market securities executed by the participant during the month; and (iii) posted in SuperMontage at least 70% of the bids, offers, and non-marketable limit orders in Nasdaq National Market and SmallCap Market securities communicated by the participant to any market center.<sup>9</sup> A participant seeking to qualify for the fee waiver would certify its eligibility, and Nasdaq could request that the participant provide data to support its certification. If a participant has more than one MPID associated with the CRD number under which it conducts business, eligibility will be determined by aggregating activity associated with all of its MPIDs (but not activity associated with MPIDs assigned to subsidiaries or other affiliates with a different CRD number).

Nasdaq represents that it is currently facing competition from market centers that are willing to offer market participants free trade reporting services,<sup>10</sup> and from one market center

<sup>8</sup> The Nasdaq proposal defines "internalized transactions" as a transaction in which a customer order received by the participant is executed against another customer order received by the participant, or against the account of the participant as principal, but that is not facilitated or executed using a Nasdaq system or the system of any market center other than the participant.

<sup>9</sup> The Nasdaq proposal defines "market center" as any exchange market maker, OTC market maker, alternative trading system, national securities exchange, or national securities association.

<sup>10</sup> See, e.g., Securities Exchange Act Release No. 47331 (February 10, 2003), 68 FR 7635 (February 14, 2003) (File No. SR-NASD-2003-09)

that is effectively sharing market data revenue associated with transactions in Nasdaq-listed securities by “mutualizing” revenues with certain of its members,<sup>11</sup> notwithstanding the Commission’s Order of Summary Abrogation (the “Order”) regarding market data revenue sharing programs.<sup>12</sup> 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,<sup>13</sup> 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,<sup>14</sup> in general and with section 15A(b)(5) of the Act,<sup>15</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 which the NASD

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

<sup>11</sup> 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).

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

<sup>13</sup> 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).

<sup>14</sup> 15 U.S.C. 78o-3.

<sup>15</sup> 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 Act<sup>16</sup> and subparagraph (f)(2) of rule 19b-4 thereunder,<sup>17</sup> 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.<sup>18</sup>

## 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

<sup>16</sup> 15 U.S.C. 78s(b)(3)(a)(ii).

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

<sup>18</sup> 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.<sup>19</sup>

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”)<sup>1</sup> and rule 19b-4 thereunder,<sup>2</sup> 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*.

\* \* \* \* \*

<sup>19</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.