

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, 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.

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 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 such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

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 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-2002-138 should be submitted by July 31, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁶

J. Lynn Taylor,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48125; File No. SR-NASD-2002-139]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. To Amend NASD Rule 4350 To Require Listed Companies To Adopt a Code of Conduct for All Directors, Officers, and Employees

July 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 October 10, 2002, 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 January 15, 2003, Nasdaq submitted Amendment No. 1 to the proposed rule change.³ 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 the Substance of the Proposed Rule Change

Nasdaq proposes to amend Rule 4350 to require listed companies to adopt a code of conduct for all directors, officers and employees.⁴ Issuers must comply with the rule as of six months from the date of approval.

The text of the proposed rule change is below. Proposed new language is in *italics*.

4350. Qualitative Listing Requirements for Nasdaq National Market and Nasdaq

⁶ 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 Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated January 15, 2003.

⁴ See also Securities Exchange Act Release No. 47516 (March 17, 2003), 68 FR 14451 (March 25, 2003) (NASD 2002-141) for a description of additional proposed revisions to NASD's corporate governance listing standards.

Small Cap Market Issuers Except for Limited Partnerships Traded on the Nasdaq National Market

(a)-(l) No change.

(m) *Each Issuer shall adopt a code of conduct applicable to all directors, officers and employees, which shall be publicly available. A code of conduct satisfying this rule must comply with the definition of a "code of ethics" set out in Section 406(c) of the Sarbanes-Oxley Act of 2002 ("the Sarbanes-Oxley Act") and any regulations promulgated thereunder by the Commission. In addition, the code must provide for an enforcement mechanism. Any waivers of the code for directors or executive officers must be approved by the Board and must be disclosed in the issuer's public filings, not later than the next periodic report.*
IM-4350-7:

Ethical behavior is required and expected of every corporate director, officer and employee whether or not a formal code of conduct exists. The requirement of a publicly available code of conduct applicable to all directors, officers and employees of an issuer is intended to demonstrate to investors that the board and management of Nasdaq issuers have carefully considered the requirement of ethical dealing and have put in place a system to ensure that they become aware of and take prompt action against any questionable behavior. For company personnel, a code of conduct with enforcement provisions provides assurance that reporting of questionable behavior is protected and encouraged, and fosters an atmosphere of self-awareness and prudent conduct.

Rule 4350(m) requires issuers to adopt a code of conduct complying with the definition of a "code of ethics" under Section 406(c) of the Sarbanes-Oxley Act of 2002 ("the Sarbanes-Oxley Act") and any regulations promulgated thereunder by the Commission. Thus, the code must include such standards as are reasonably necessary to promote the ethical handling of conflicts of interest, full and fair disclosure, and compliance with laws, rules and regulations, as specified by the Sarbanes-Oxley Act. However, the code of conduct required by Rule 4350(m) must apply to all directors, officers, and employees. Issuers can satisfy this obligation by adopting one or more codes of conduct, such that all directors, officers and employees are subject to a code that satisfies the definition of a "code of ethics."

As the Sarbanes-Oxley Act recognizes, investors are harmed when the real or perceived private interest of a director, officer or employee is in conflict with

the interests of the company, as when the individual receives improper personal benefits as a result of his or her position with the company, or when the individual has other duties, responsibilities or obligations that run counter to his or her duty to the company. Also, the disclosures an issuer makes to the Commission are the essential source of information about the company for regulators and investors—there can be no question about the duty to make them fairly, accurately and timely. Finally, illegal action must be dealt with swiftly and the violators reported to the appropriate authorities.

Each code of conduct must require that any waiver of the code for executive officers or directors may be made only by the board and must be promptly disclosed to shareholders, along with the reasons for the waiver. This disclosure requirement provides investors the comfort that waivers are not granted except where they are truly necessary and warranted, and that they are limited and qualified so as to protect the company to the greatest extent possible. Disclosure should be made in the issuer's regular public filings, not later than the next periodic report. Thus, a domestic issuer must make this disclosure in its next quarterly or annual report, whichever is sooner, and foreign issuers must make it in their next semi-annual report. An issuer may alternatively choose to include this disclosure in an 8-K filed before its next periodic report.

Each code of conduct must also contain an enforcement mechanism that ensures prompt and consistent enforcement of the code, protection for persons reporting questionable behavior, clear and objective standards for compliance, and a fair process by which to determine violations.

* * * * *

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

The proposed rule change requires companies to adopt and make publicly available a code of conduct applicable to directors, officers, and employees, which complies with the definition of a "code of ethics" set out in Section 406(c) of the Sarbanes-Oxley Act of 2002 and any regulations promulgated by the Commission thereunder, and provides for an enforcement mechanism. Any waivers of the code for directors or executive officers must be approved by the board and must be promptly made publicly available. By expressly setting out the inherent obligation of ethical conduct in this manner, Nasdaq intends to provide further assurance to investors, regulators and itself that each of its issuers has in place a system to focus attention throughout the company on the obligation of ethical conduct, encourage reporting of potential violations, and deal fairly and promptly with questionable behavior. A code of conduct provides objective standards for compliance, increasing transparency and accountability in this key area.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,⁵ in general and with section 15A(b)(6) of the Act,⁶ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, remove impediments to a free and open market and a national market system, and, in general, to protect investors and the public interest.

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, as amended.

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

Written comments were not solicited. Nasdaq received one comment, stating that requiring a code of conduct applicable to all employees would be extremely burdensome for companies

with large numbers of hourly employees and that such employees were unlikely to be faced with ethical issues. Nasdaq believes that the rule filing, as amended, addresses this concern by clarifying that companies have the flexibility to design more than one code of conduct, such that there is an appropriate code for various types of employees. Thus, a company could adopt a simpler code for its hourly employees than for its senior management in recognition of the fewer ethical issues typically facing hourly employees.

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 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 such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the amended 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-2002-139 and should be submitted by July 31, 2003.

⁵ 15 U.S.C. 78o-3.

⁶ 15 U.S.C. 78o-3(b)(6).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁷

J. Lynn Taylor,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48119; File No. SR-PCX-2003-29]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange, Inc., Relating to Exchange Fees and Charges

July 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 June 30, 2003, the Pacific Exchange, Inc. ("PCX" or "Exchange") 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 the Exchange. 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 proposes to amend its Schedule of Fees and Charges to eliminate the continued listing fee and to limit the application of the shortfall fee. The text of the proposed rule change is available at the Office of the Secretary of the PCX and at the Commission.

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

In its filing with the Commission, PCX 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 proposes to amend its Schedule of Fees and Charges in order to: (i) eliminate the continued listing fee, and (ii) modify the shortfall fee, making it inapplicable to issues allocated in the first full four months of trading by a Lead Market Maker ("LMM"). The Exchange believes that this proposal will foster the Exchange's strategic plan of attracting new sources of capital to the Exchange and encouraging LMMs to expand their level of participation on the Exchange by accepting new allocation of issues.

Elimination of the Continued Listing Fee

The Exchange currently assesses LMMs a continued listing fee for issues that have not generated at least \$500 in monthly revenues to the Exchange on a trailing three-month average basis.³ The continued listing fee is calculated as the incremental difference between the \$500 threshold and the amount of revenue generated by the issue. The Exchange recognizes that the continued listing fee may deter an LMM from taking on a newly allocated issue or in maintaining trading activity with respect to a particular issue. As a result, the Exchange has determined that, on balance, the fee no longer supports the Exchange's paramount goal of attracting capital to the Exchange and maintaining a stabilized base of issues. Accordingly, the Exchange believes that it would be advantageous to eliminate the continued listing fee.

Limiting the Application of the Shortfall Fee

In February 2002, the Exchange began to assess a shortfall fee of \$0.35 per shortfall contract on top 120 equity option issues if the PCX volume in the issue was less than 10% of the national volume in that issue for that month.⁴ In June 2002, the Exchange increased the volume base for the LMM shortfall fee from 10% to 12% for the top 120 equity options nationally.⁵ The volume base

for the fee is 12% of the monthly industry volume for each qualifying issue, less the PCX monthly volume for the issue.

From time to time, an LMM may divest itself of a significant number of issues or the Exchange may add new products or new issues for trading. The Exchange encourages applications from qualified LMMs to trade newly posted issues, but given that an LMM will be required to maintain a 12% market share or be subject to the shortfall fee, LMMs may be reluctant to take on the risks of trading a significant number of new issues and opt to take on fewer issues until they have developed a trading strategy relative to the new issues.

In order to help foster demand for top 120 issues during a period of continuing consolidation among trading firms, and to prepare for the implementation of PCX Plus,⁶ the Exchange proposes to eliminate the application of the shortfall fee for the first four full calendar months that an LMM trades a newly allocated issue. The Exchange believes that this modification to its shortfall fee will encourage LMMs to take on larger numbers of issues by limiting their exposure to these fees until they have had sufficient time to develop appropriate marketing and trading strategies.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b)⁷ of the Act, in general, and furthers the objectives of section 6(b)(4)⁸ of the Act in particular, in that it provides for the equitable allocation of reasonable fees among its members.

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

The Exchange believes that the proposed rule change will promote competition by encouraging more LMMs to take on allocations of more issues.

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

Written comments on the proposed rule change were neither solicited nor received.

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

Because the foregoing rule change establishes or changes a due, fee, or

³ See Securities Exchange Act Release No. 42050 (October 21, 1999), 64 FR 58117 (October 28, 1999) (Notice of Filing and Immediate Effectiveness of SR-PCX 99-32).

⁴ See Securities Exchange Act Release No. 45351 (January 29, 2002), 67 FR 5631 (February 6, 2002) (Notice of Filing and Immediate Effectiveness of SR-PCX-2001-51).

⁵ See Securities Exchange Act Release No. 46239 (July 19, 2002), 67 FR 48962 (July 26, 2002) (Notice of Filing and Immediate Effectiveness of SR-PCX-2002-38).

⁶ See Securities Exchange Act Release No. 47838 (May 13, 2003), 68 FR 27129 (May 19, 2003).

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(4).

⁷ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.