

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

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or 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*

No written comments were solicited or received with respect to the proposed rule change.

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

The CBOE has filed the proposed rule change pursuant to section 19(b)(3)(A) of the Act<sup>6</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>7</sup> Because the foregoing rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6) thereunder. At any time within 60 days of the filing of such 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.

Pursuant to Rule 19b-4(f)(6)(iii) under the Act,<sup>8</sup> the proposal may not become operative for 30 days after the date of its filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, and the self-regulatory organization must file notice of its intent to file the proposed rule change at least five business days beforehand. The Exchange has requested that the Commission waive the five-day pre-filing requirement and the 30-day operative delay so that the proposed rule change will become immediately effective upon filing.

The Commission believes that waiving the five-day pre-filing provision and the 30-day operative delay is consistent with the protection of

investors and the public interest.<sup>9</sup> The Commission believes that waiving the pre-filing requirement and accelerating the operative date does not raise any new regulatory issues, significantly affect the protection of investors or the public interest, or impose any significant burden on competition and, therefore, designates the proposed rule change as effective and operative immediately.

### **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. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2004-49 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number SR-CBOE-2004-49. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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 the filing also will be available for inspection and copying at the principal offices of the CBOE. All comments received will be posted without change; the Commission does not edit personal identifying

information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CBOE-2004-49 and should be submitted on or before August 19, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-50068; File No. SR-NASD-2004-101]

### **Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Provide a Monthly Flat Fee for the Internal Distribution of PostData as an Alternative to the Monthly Per-Subscriber Fees Presently Available Under NASD Rule 7010(s)**

July 23, 2004.

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 June 28, 2004, 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. 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 provide a monthly flat fee for the internal distribution of PostData as an alternative to the monthly per-subscriber fees presently available under NASD Rule 7010(s). The text of the proposed rule change is below.<sup>3</sup> Proposed new language is in *italics*.

### **7010 System Services**

(a)-(r) No change

<sup>10</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> The proposed rule change is marked to show changes from the rule as it appears in the electronic NASD Manual available at <http://www.nasd.com>.

<sup>6</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>7</sup> 17 CFR 240.19b-4(f)(6).

<sup>8</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>9</sup> For purposes only of waiving 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).

(s) NasdaqTrader.com Volume and Issue Data Package Fee

The charge to be paid by the subscriber for each entitled user receiving the Nasdaq Volume and Issue Data Package via NasdaqTrader.com shall be \$70 per month. The charge to be paid by market data distributors for this information shall be \$35 per month for each end user receiving the information through the data vendor. *A distributor, as defined in Rule 7010(q)(6)(B), may distribute and use the data internally for a flat monthly fee of \$2000 (rather than paying the \$35 end user fee for each user). Internal distribution means providing the data to those persons covered by the distributor agreement with Nasdaq signed by the distributor taking the data.* The availability of this service through NasdaqTrader.com shall be limited to NASD members, Qualified Institutional Buyers (as defined in Rule 144A of the Securities Act of 1933) and data vendors. The Volume and Issue Data package includes:

- (1) Daily Share Volume reports
- (2) Daily Issue Data
- (3) Monthly Volume Summaries
- (4) Buy Volume Report
- (5) Sell Volume Report
- (6) Crossed Volume Report
- (7) Consolidated Activity Volume Report

All fees assessed under this subsection will be waived for a period of up to two months for all new subscribers and potential new subscribers. This fee waiver period would be applied on a rolling basis, determined by the date on which a new subscriber or potential subscriber contacts Nasdaq to receive access to PostData.

(t)–(u) 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. 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

Nasdaq proposes to provide a monthly flat fee for the internal distribution of PostData as an alternative to the monthly per-subscriber fees presently available under NASD Rule 7010(s).

PostData is a voluntary trading data distribution facility, accessible to NASD members, buy-side institutions, and market data vendors through the NasdaqTrader.com Web site.<sup>4</sup> PostData consists of seven reports provided in a single package: (1) Daily Share Volume Report provides subscribers with T+1 daily share volume in each Nasdaq security, listing the volume by any NASD member that permits the dissemination of this information; (2) Daily Issue Data summarizes the previous day's activity for every Nasdaq issue; (3) Monthly Summaries provide monthly trading volume statistics for the top 50 market participants sorted by industry sector, security, or type of trading (e.g., block or total); (4) Buy Volume Report; (5) Sell Volume Report; (6) Crossed Volume Report; and (7) Consolidated Activity Volume Report.<sup>5</sup> Each of the final four reports offers information regarding total Nasdaq reported buy (or sell, or cross, or consolidated) volume in the security, and rankings of registered market makers based upon various aspects of their activity in Nasdaq. The reports also provide information about the number and character of each market maker's trades with respect to block volume, be it buy, sell, cross, or consolidated interest.

PostData is currently available through the NasdaqTrader.com Web site. Information is provided directly to subscribers for a fee of \$70 per month. The information is also provided to market data distributors to be redistributed to their retail customers for whom the data distributor pays a \$35 per month fee to Nasdaq for each end user obtaining this information.

Nasdaq proposes to establish a third method of availability for PostData, specifically, a \$2000 monthly fee for internal distribution by distributors, as defined in NASD Rule 7010(q)(6)(B). This would allow customers to pay a \$2000 flat monthly fee, rather than the \$35 monthly fee for each end user. Both

sell-side and buy-side firms that use PostData information for non-display purposes, such as for analytics or graphics, have indicated their interest in such a fee schedule because it relieves them of the administrative burden of tracking the end users that are entitled to receive the information and of reporting the number of such individuals to Nasdaq.

#### 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,<sup>6</sup> in general, and with section 15A(b)(5) of the Act,<sup>7</sup> in particular, in that the proposal 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 association operates or controls. Nasdaq believes the internal distribution fee is equitable in that it provides a potentially more economical option to distributors that primarily use PostData information on an internal basis, and reduces such distributors' administrative burdens.

### 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.

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

Nasdaq neither solicited nor received written comments with respect to the proposed rule change.

## 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.

<sup>4</sup> See Securities Exchange Act Release No. 45270 (January 11, 2002), 67 FR 2712 (January 18, 2002).

<sup>5</sup> See Securities Exchange Act Release No. 46316 (August 6, 2002), 67 FR 52504 (August 12, 2002).

<sup>6</sup> 15 U.S.C. 78o–3.

<sup>7</sup> 15 U.S.C. 78o–3(b)(5).

#### 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. Comments may be submitted by any of the following methods:

##### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-NASD-2004-101 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number SR-NASD-2004-101. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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 Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-NASD-2004-101 and should be submitted on or before August 19, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>8</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50064; File No. SR-PCX-2003-64]

#### **Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the Pacific Exchange, Inc. Relating to Facilitation Crosses**

July 22, 2004.

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 November 20, 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. On July 7, 2004, and July 15, 2004, respectively, the Exchange filed Amendment Nos. 1 and 2 to the proposed rule change.<sup>3</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**

PCX is proposing to modify its facilitation crossing procedures in several respects in order to ensure that the customer side of a facilitation order will be executed if it is priced at or between quoted markets. Among other things, the proposal would also increase to 40% the guaranteed percentage of the customer order that a Floor Broker is entitled to cross at the quoted market. The text of the proposed rule change is set forth below. Proposed new language is italicized and proposed deletions are in brackets.

<sup>8</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> See letters from Mai S. Shiver, Acting Director/ Senior Counsel, PCX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated July 6, 2004, and July 14, 2004. The changes made by Amendment Nos. 1 and 2 have been incorporated in this notice.

#### **Rules of the Board of Governors of the Pacific Exchange, Inc.**

##### **Rule 6**

##### **Options Trading**

##### **"Crossing" Orders and Stock/Option Orders**

Rule 6.47 (a)—No change.  
(b) *Facilitation Procedure.* [Crossing of Facilitation Orders.] *The Facilitation Procedure is a process by which a [A] Floor Broker who holds an order for a [public] customer [or a broker-dealer] ("[c]Customer [o]Order") and an order for the proprietary account of an OTP Holder or OTP Firm or an organization under common control with a Lead Market Maker "LMM" that is representing that customer (the "[f]Facilitation [o]Order") may cross those orders [only if the following procedures and requirements are followed]. The Floor Broker may do so by following the Facilitation Procedure outlined in this subsection (b) of this Rule. The Floor Broker must be willing to facilitate the entire size of the Customer Order entered via the Facilitation Procedure.*

(1) The size of the [c]Customer [o]Order subject to facilitation must be at least fifty contracts. Orders for less than fifty contracts may be facilitated pursuant to this rule but are not subject to the firm guarantees of subsections (4) through (6) of this Rule [below pertaining to firm guarantees] and therefore must satisfy all orders in the book and orders represented in the trading crowd (affording the trading crowd a reasonable period of time to respond) before the floor broker may cross the order.

(2) The option order tickets for both the [f]Facilitation [o]Order and the [c]Customer [o]Order must display all of the terms of such orders, including any contingencies involving, and all related transactions in, either options or underlying or related securities. The Floor Broker must disclose all securities that are components of the [c]Customer [o]Order.

(3) The Floor Broker must request bids and offers for all components of the [c]Customer [o]Order, including the size of the order, but does not have to specifically request a "facilitation market." Once the trading crowd has been afforded a reasonable time to provide a quote, the quote will remain in effect only for such time as is necessary for the Floor Broker to immediately vocalize the Customer Order. [and clearly disclose his intention to execute a facilitation cross transaction to the trading crowd. Once the trading crowd has provided a quote,