

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47692; File No. SR-NASD-2003-66]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. to Rebate Certain Past Primex Auction System Logon Charges for Certain Participants

April 17, 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 April 2, 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 Nasdaq has prepared. 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 modify NASD rule 7010(r) to enable Nasdaq to waive all Primex Auction System ("Primex") logon charges for the period of August 2002 through November 2002 for those Primex participants that, in connection with their participation in Primex during that period, were customers of the Brass Service Bureau and Order Management System ("Brass"). Nasdaq will implement the proposed rule change as soon as practicable after the Commission approves it.

The text of the proposed rule change is below. Proposed new text is *italicized*.

\* \* \* \* \*

#### Rule 7010(r). Nasdaq Application of the Primex Auction System<sup>TM</sup>

(1) No change.

(2) No change.

(3) *Waiver of Logon Fees*

*All monthly logon fees for the period of August 2002 through November 2002 are waived for those Primex Auction System participants that, in connection with their participation in the Primex Auction System during such period, were customers of the Brass Service Bureau and Order Management System.*

\* \* \* \* \*

#### 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

Certain Primex participants are also users of Brass. The Brass system is integrated with such participants' internal order management system, and these participants rely on Brass for routing their respective orders to Primex. Due to Brass' delay in completing the needed interfaces, participants that expected to use Brass for routing their Primex orders were unable to do so, yet they were being charged the Primex logon fees. The proposed rule change would waive the logon fees during the period August 2002 through November 2002 for the affected participants.

The proposed waiver would apply to all logon charges, including each participant's logons for access via Brass as well as such a participant's logons for direct access not involving Brass. Generally, participants that intend to route their Primex orders through Brass also maintain separate Primex logons for direct access via the Primex Workstation, which can be used in conjunction with the Brass service in order to view transactions in Primex. Such Primex Workstation logons were of limited utility to those participants that intended, but were unable to, access Primex through Brass during the August 2002 through November 2002 period. Consequently, Nasdaq believes that waiving all logon charges for the affected participants would be fair and equitable. However, the waiver would not apply to network charges, because such charges arose from Nasdaq's obligations to third party network providers, which Nasdaq incurred specifically for the benefit of the participants.

###### 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the

provisions of section 15A of the Act,<sup>3</sup> in general and with section 15A(b)(5) of the Act,<sup>4</sup> in particular, which requires that the rules of the NASD provide for equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the NASD operates or controls. The proposed waiver of certain Primex logon charges ensures that the Primex charges are allocated reasonably and equitably.

##### 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

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 NASD consents, the Commission will:

(A) By order approve the 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

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

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

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

<sup>4</sup> 15 U.S.C. 78o-3(b)(5).

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 also will be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR-NASD-2003-66 and should be submitted by May 15, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>5</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47685; File No. SR-NASD-2003-73]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Extend the Pilot Period for the Regulatory Fee and the Trading Activity Fee

April 16, 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 April 14, 2003, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in items I and II below, which Items have been prepared by the NASD. The NASD filed the proposal pursuant to section 19(b)(3)(A) of the Act,<sup>3</sup> and rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission.<sup>5</sup> 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 NASD proposes to extend the pilot period for the Trading Activity Fee ("TAF") through June 1, 2003. The TAF (as originally proposed in SR-NASD-

2002-98) is in effect, and is set to expire on April 15, 2003.<sup>6</sup> The NASD is requesting the Commission approve SR-NASD-2002-148, granting permanent approval of the TAF, before the expiration of the TAF pilot on June 1, 2003.<sup>7</sup> If the Commission does not approve SR-NASD-2002-148 before the expiration of the TAF pilot on June 1, 2003, the trading fee component of the member regulatory pricing structure will revert to Section 8 of Schedule A to the NASD By-Laws, as amended.

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

In its filing with the Commission, the NASD included statements concerning the purpose of and basis for its proposal and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in item IV below. The NASD 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

On July 24, 2002, the NASD filed SR-NASD-2002-98, which proposed a new member regulatory pricing structure, including the TAF, to replace the existing trading fee contained in Section 8 of Schedule A to the NASD By-Laws.<sup>8</sup> SR-NASD-2002-98 is currently in effect. Assessments under the TAF were effective as of October 1, 2002, payable January 15, 2003.<sup>9</sup> On October 18, 2002, the NASD established a sunset

<sup>6</sup> See Securities Exchange Act Release No. 46416 (August 23, 2002), 67 FR 55901 (August 30, 2002) (SR-NASD-2002-98). See also Securities Exchange Act Release Nos. 47112 (December 31, 2002), 68 FR 824 (January 7, 2003) (SR-NASD-2002-182), 47436 (March 4, 2003), 68 FR 11422 (March 10, 2003) (SR-NASD-2003-26), and 47623 (April 3, 2003), 68 FR 17712 (April 10, 2003) (SR-NASD-2003-65).

<sup>7</sup> See Securities Exchange Act Release No. 46817 (November 12, 2002), 67 FR 69785 (November 19, 2002) (SR-NASD-2002-148).

<sup>8</sup> Securities Exchange Act Release No. 46416 (August 23, 2002), 67 FR 55901 (August 30, 2002) (SR-NASD-2002-98). See also Securities Exchange Act Release No. 46417 (August 23, 2002), 67 FR 55893 (August 30, 2002) (SR-NASD-2002-99). The NASD also published three *Notices to Members* describing the proposed changes and addressing interpretive questions posed by NASD members. See *Notices to Members 02-41* (July 2002), *02-63* (September 2002), and *02-75* (November 2002).

<sup>9</sup> Member firms were required to pay the TAF in accordance with the pilot program (for the first quarter starting October 1, 2002) by no later than January 15, 2003, and thereafter, on a monthly basis.

provision whereby the TAF established by SR-NASD-2002-98 would cease to exist after December 31, 2002.<sup>10</sup> Upon expiration of SR-NASD-2002-98, the member regulatory pricing structure was to revert to Section 8 of Schedule A to the NASD By-Laws, as amended.

On December 24, 2002, the NASD extended the TAF pilot through March 1, 2003. On February 28, 2002, the NASD again extended the TAF pilot through April 1, 2003. On March 31, 2003, the NASD again extended the TAF pilot program through April 15, 2003. With the instant proposed rule change, the NASD is extending the TAF pilot through June 1, 2003, to allow the Commission additional time to review issues presented by the proposal to make the TAF permanent (SR-NASD-2002-148). The NASD requests that the Commission approve SR-NASD-2002-148 before the expiration of the TAF pilot on June 1, 2003.

###### 2. Statutory Basis

The NASD believes that the proposed rule change is consistent with the Act, including Section 15A(b)(5),<sup>11</sup> which requires, among other things, that the NASD's rules provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system that the NASD operates or controls.

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

The NASD 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 on this proposed rule change were neither solicited nor received. Written comments, however, have been solicited by publication in the **Federal Register** of SR-NASD-2002-98, SR-NASD-2002-147, SR-NASD-2002-148, SR-NASD-2002-182, and SR-NASD-2003-26.

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

Because the foregoing proposed rule change does not:

<sup>10</sup> At the same time, the NASD filed a new proposed rule change (SR-NASD-2002-148), substantially similar to SR-NASD-2002-98, but filed under Section 19(b)(1) of the Act, to allow for additional comment.

<sup>11</sup> 15 U.S.C. 70-3(b)(5).

<sup>5</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> 15 U.S.C. 78s(b)(3)(A).

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

<sup>5</sup> The Commission waived the five-day pre-filing notice requirement. See Rule 19b-4(f)(6)(iii). 17 CFR 240.19b-4(f)(6)(iii). The NASD also asked the Commission to waive the 30-day operative delay.