

of calculating position exercise limits.¹⁸ The different symbols for the old and revised indexes also should help to avoid confusion.

For all of the reasons set forth above, the Commission finds that it is consistent with the protection of investors and the public interest for the proposal to become operative on June 15, 2001. 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.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether it 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. 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 at the Commission's Public Reference Section, 450 Fifth Street, NW, Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the CBOE. All submissions should refer to File No. SR-CBOE-2001-34 and should be submitted by July 13, 2001.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁹

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 01-15680 Filed 6-21-01; 8:45 am]

BILLING CODE 8010-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44423; File No. SR-NASD-2001-34]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Amendments to the Restated Certificate of Incorporation of The Nasdaq Stock Market, Inc.

June 13, 2001.

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 May 8, 2001, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. On June 4, 2001 the NASD filed Amendment No. 1 to the Proposal.³ 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 is proposing to amend its Restated Certification of Incorporation ("Certificate"). Additions are italicized; deletions are bracketed.

* * * * *

Restated Certificate of Incorporation of the NASDAQ Stock Market, Inc.

* * * * *

Article Fourth

A. No change.

B. No change.

C. 1. (a) Except as may otherwise be provided in this Restated Certificate of Incorporation (including any Preferred Stock Designation) or by applicable law, each holder of Common Stock, as such, shall be entitled to one vote for each share of Common Stock held of record by such holder

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Mary M. Dunbar, Vice President, Nasdaq, to Katherine England, Assistant Director, Division of Market Regulation, Commission, dated June 12, 2001 ("Amendment No. 1"). In Amendment No. 1, Nasdaq changed the term "debenture" to "note" throughout the proposed rule text and filing, and clarified the circumstances under which Hellman and Friedman would be entitled to an exemption from the restriction contained in the Restated Certificate of Incorporation that prohibits any beneficial owner of more than five percent of common stocks or notes from voting those excess shares or notes.

on all matters on which stockholders generally are entitled to vote, and no holder of any series of Preferred Stock, as such, shall be entitled to any voting powers in respect thereof.

(b) Except as may otherwise be provided in this Restated Certificate of Incorporation or by applicable law, the holders of the 4.0% Convertible Subordinate Notes due 2006 (the "Notes") which may be issued from time to time by Nasdaq shall be entitled to vote on all matters submitted to a vote of the stockholders of Nasdaq, voting together with the holders of the Common Stock (and of any other shares of capital stock of Nasdaq entitled to vote at a meeting of stockholders) as one class. Each principal amount of Notes shall be entitled to a number of votes equal to the number of votes represented by the Common Stock of Nasdaq that could then be acquired upon conversion of such principal amount of Notes into Common Stock, subject to adjustments as provided in the Notes. Holders of the Notes shall be deemed to be stockholders of Nasdaq, and the Notes shall be deemed to be shares of stock, solely for the purpose of any provision of the General Corporation Law of the State of Delaware or this Restated Certificate of Incorporation that requires the vote of stockholders as a prerequisite to any corporate action.

2. Notwithstanding any other provision of this Restated Certificate of Incorporation, but subject to subparagraph 6 of this paragraph C. of this Article Fourth, in no event shall (i) any record owner of any outstanding Common Stock which is beneficially owned, directly or indirectly, as of any record date for the determination of stockholders and/or holders of Notes entitled to vote on any matter, or (ii) any holder of any Notes which are beneficially owned, directly or indirectly, as of any record date for the determination of stockholders and/or holders of Notes entitled to vote on any matter, by a person (other than an Exempt Person) who beneficially owns shares of Common Stock and/or Notes ("Excess Shares and/or Notes") in excess of five percent (5%) of the then-outstanding shares of Common Stock, be entitled or permitted to vote any Excess Shares and/or Notes. For all purposes hereof, any calculation of the number of shares of Common Stock outstanding at any particular time, including for purposes of determining the particular percentage of such outstanding shares of Common Stock of which any person is the beneficial owner, shall be made in accordance with the last sentence of Rule 13d-3(d)(1)(i) of the General Rules and Regulations under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), as in effect on the date of filing this Restated Certificate of Incorporation.

3. The following definitions shall apply to this paragraph C. of this Article Fourth:

(a) "Affiliate" shall have the meaning ascribed to that term in Rule 12b-2 of the General Rules and Regulations under the Exchange Act, as in effect on the date of filing this Restated Certificate of Incorporation.

(b) A person shall be deemed the "beneficial owner" of, shall be deemed to have "beneficial ownership" of and shall be deemed to "beneficially own" any securities:

¹⁸ See June 13 Conversation, *supra* note 12.

¹⁹ 17 CFR 200.30-3(a)(12).

(i) which such person or any of such person's Affiliates is deemed to beneficially own, directly or indirectly, within the meaning of Rule 13d-3 of the General Rules and Regulations under the Exchange Act as in effect on the date of the filing of this Restated Certificate of Incorporation;

(ii) which such person or any of such person's Affiliates has (A) the right to acquire (whether such right is exercisable immediately or only after the passage of time) pursuant to any agreement, arrangement or understanding (other than customary agreements with and between underwriters and selling group members with respect to a bona fide public offering of securities), or upon the exercise of conversion rights, exchange rights, rights, warrants or options, or otherwise; provided, however, that a person shall not be deemed the beneficial owner of, or to beneficially own, securities tendered pursuant to a tender or exchange offer made by or on behalf of such person or any of such person's Affiliates until such tendered securities are accepted for purchase; or (B) the right to vote pursuant to any agreement, arrangement or understanding; provided, however, that a person shall not be deemed the beneficial owner of, or to beneficially own, any security by reason of such agreement, arrangement or understanding if the agreement, arrangement or understanding to vote such security (1) arises solely from a revocable proxy or consent given to such person in response to a public proxy or consent solicitation made pursuant to, and in accordance with, the applicable rules and regulations promulgated under the Exchange Act and (2) is not also then reportable on Schedule 13D under the Exchange Act (or any comparable or successor report); or

(iii) which are beneficially owned, directly or indirectly, by any other person and with respect to which such person or any of such person's Affiliates has any agreement, arrangement or understanding (other than customary agreements with and between underwriters and selling group members with respect to a bona fide public offering of securities) for the purpose of acquiring, holding, voting (except to the extent contemplated by the proviso to (b)(ii)(B) above) or disposing of such securities; provided, however, that (A) no person who is an officer, director or employee of an Exempt Person shall be deemed, solely by reason of such person's status or authority as such, to be the "beneficial owner" of, to have "beneficial ownership" of or to "beneficially own" any securities that are "beneficially owned" (as defined herein), including, without limitation, in a fiduciary capacity, by an Exempt Person or by any other such officer, director or employee of an Exempt Person, and (B) the Voting Trust Agreement by among Nasdaq, the National Association of Securities Dealers, Inc., a Delaware corporation (the "NASD"), and The Bank of New York, a New York banking corporation, as such may be amended from time to time (the "Voting Trust Agreement"), shall not be deemed, solely by reason of such person's status or authority as such, to be the "beneficial owner" of, to have "beneficial

ownership" of or to "beneficially own" any securities that are governed by and held in accordance with the Voting Trust Agreement.

(c) A "person" shall mean any individual, firm, corporation, partnership, limited liability company or other entity.

(d) "Exempt Person" shall mean Nasdaq or any Subsidiary of Nasdaq, in each case including, without limitation, in its fiduciary capacity, or any employee benefit plan of Nasdaq or of any Subsidiary of Nasdaq, or any entity or trustee holding Common Stock for or pursuant to the terms of any such plan or for the purpose of funding any such plan or funding other employee benefits for employees of Nasdaq or of any Subsidiary of Nasdaq.

(e) "Subsidiary" of any person shall mean any corporation or other entity of which securities or other ownership interests having ordinary voting power sufficient to elect a majority of the board of directors or other persons performing similar functions are beneficially owned, directly or indirectly, by such person, and any corporation or other entity that is otherwise controlled by such person.

(f) The Board shall have the power to construe and apply the provisions of this paragraph C. of this Article Fourth and to make all determination necessary or desirable to implement such provisions, including, but not limited to, matters with respect to (1) the number of shares of Common Stock beneficially owned by any person, (2) the number of Notes beneficially owned by any person, (3) whether a person is an Affiliate of another, (4) whether a person has an agreement, arrangement or understanding with another as to the matters referred to in the definition of beneficial ownership, (5) the application of any other definition or operative provision hereof to the given facts, or (6) any other matter relating to the applicability or effect of this paragraph C. of this Article Fourth.

(4) The Board shall have the right to demand that any person who is reasonably believed to hold of record or beneficially own Excess Shares and/or Notes supply Nasdaq with complete information as to (a) the record owner(s) of all shares and/or Notes beneficially owned by such person who is reasonably believed to own Excess Shares and/or Notes, and (b) any other factual matter relating to the applicability or effect of this paragraph C. of this Article Fourth as may reasonably be requested of such person.

5. Any constructions, applications, or determinations made by the Board, pursuant to this paragraph C. of this Article Fourth, in good faith and on the basis of such information and assistance as was then reasonably available for such purpose, shall be conclusive and binding upon Nasdaq [and], its stockholders and the holders of the Notes.

6. Notwithstanding anything herein to the contrary, subparagraph 2 of this paragraph C. of this Article Fourth shall not be applicable to any Excess Shares and/or Notes beneficially owned by (a) the NASD or its Affiliates until such time as the NASD beneficially owns five percent (5%) or less of the outstanding shares of Common stock [or] and/or Notes, (b) any other person as may be

approved for such exemption by the Board prior to the time such person beneficially owns more than five percent (5%) of the outstanding shares of Common Stock and/or Notes or (c) Hellman & Friedman Capital Partners IV, L.P., H&F International Partners IV-A, L.P., Hellman & Friedman International Partners IV-B, L.P., and H&F Executive Fund, L.P. if the Board has approved an exemption for any other person pursuant to Section 6(b) of this paragraph C. of this Article Fourth (other than an exemption granted in connection with the establishment of a strategic alliance with another exchange or similar market). The Board, however, may not approve an exemption under [this] Section 6(b): (i) for a registered broker or dealer or an Affiliate thereof (provided that, for these purposes, an Affiliate shall not be deemed to include an entity that either owns ten percent or less of the equity of a broker or dealer, or the broker or dealer accounts for one percent or less of the gross revenues received by the consolidated entity); or (ii) an individual or entity that is subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act. The Board, may approve an exemption for any other stockholder or holder of Notes if the Board determines that granting such exemption would (A) not reasonably be expected to diminish the quality of, or public confidence in, The Nasdaq Stock Market or the other operations of Nasdaq, on the ability to prevent fraudulent and manipulative acts and practices and on investors and the public, and (B) promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to and facilitating transactions in securities or assist in the removal of impediments to or perfection of the mechanisms for a free and open market and a national market system.

7. In the event any provision (or portion thereof) of this paragraph C. of this Article Fourth shall be found to be invalid, prohibited or unenforceable for any reason, the remaining provisions (or portions thereof) of this paragraph C. of this Article Fourth shall remain in full force and effect, and shall be construed as if such invalid, prohibited or unenforceable provision (or portion hereof) had been stricken herefrom or otherwise rendered inapplicable, it being the intent of Nasdaq [and], its stockholders and the holders of the Notes that each such remaining provision (or portion thereof) of this paragraph C. of this Article Fourth remains, to the fullest extent permitted by law, applicable and enforceable as to all stockholders and all holders of Notes, including stockholders and holders of Notes that beneficially own Excess Shares and/or Notes, notwithstanding any such finding.

* * * * *

Article Ninth

Nasdaq reserves the right to amend, alter, change, or repeal any provisions contained in this Restated Certificate of Incorporation, in the manner now or hereafter prescribed by statute, and all rights conferred herein are granted subject to this reservation; provided, however, that the affirmative vote of the

holders of at least 66⅔% of the voting power of the outstanding Voting Stock, voting together as a single class, shall be required to amend, repeal or adopt any provision inconsistent with paragraph C. of Article Fourth, Article Fifth, Article Seventh, Article Eighth or this Article Ninth; *provided further, however, the affirmative vote of at least 66⅔% of the voting power of the holders of the outstanding Notes shall also be required to (i) amend paragraph C. of Article Fourth in a manner that would adversely affect the rights of the holders of the Notes thereunder without similarly affecting the rights of the holders of the Common Stock thereunder or (ii) amend this clause.*

* * * * *

Article Eleventh

In light of the unique nature of Nasdaq and its operations and in light of Nasdaq's status as a self-regulatory organization, the Board of Directors, when evaluating (A) any tender or exchange offer or invitation for tenders of exchanges, or proposal to make a tender or exchange offer or request or invitation for tenders or exchanges, by another party, for any equity security of Nasdaq, (B) any proposal or offer by another party to (1) merge or consolidate Nasdaq or any subsidiary with another corporation or other entity, (2) purchase or otherwise acquire all or a substantial portion of the properties or assets of Nasdaq or any subsidiary, or sell or otherwise dispose of to Nasdaq or any subsidiary all or a substantial portion of the properties or assets of such other party, or (3) liquidate, dissolve, reclassify the securities of, declare an extraordinary dividend of, recapitalize or reorganize Nasdaq, (C) any action, or any failure to act, with respect to any holder or potential holder of Excess Shares *and/or* Notes subject to the limitations set forth in subparagraph 2 of paragraph C. of Article Fourth, (D) any demand or proposal, precatory or otherwise, on behalf of or by a holder or potential holder of Excess Shares *and/or* Notes subject to the limitations set forth in subparagraph 2 of paragraph C. of Article Fourth or (E) any other issue, shall, to the fullest extent permitted by applicable law, take into account all factors that the Board of Directors deems relevant, including, without limitation, to the extent deemed relevant, (i) the potential impact thereof on the integrity, continuity and stability of The Nasdaq Stock Market and the other operations of Nasdaq, on the ability to prevent fraudulent and manipulative acts and practices and on investors and the public, and (ii) whether such would promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to and facilitating transactions in securities or assist in the removal of impediments to or perfection of the mechanisms for a free and open market and a national market 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

The purpose of the proposed rule change is to amend the Certificate to afford the holders of 4.0% Convertible Subordinated Notes due 2006 (the "Notes") the right to vote with Nasdaq stockholders. Nasdaq has sold \$240 million of the Notes to Hellman & Friedman Capital Partners IV, L.P., H&F International Partners IV-A, L.P., H&F International Partners IV-B, L.P., and H&F Executive Fund IV, L.P. (collectively the "HFCP IV LPs"). The Notes are convertible at any time during a five-year period into shares of Nasdaq common stock at a conversion price of \$20 per share; thus, the Notes purchased by the HFCP IV LPs would be convertible into 12,000,000 shares of Nasdaq common stock.

Nasdaq and the NASD have entered into an agreement pursuant to which Nasdaq has used substantially all of the cash raised from the sale of the Notes to repurchase outstanding shares of Nasdaq common stock owned by the NASD. The purchase of shares from the NASD allows the NASD and Nasdaq to reduce the NASD's ownership interest in Nasdaq without diluting other existing equity holders in Nasdaq. The NASD will, however, retain voting control of Nasdaq until Nasdaq obtains approval of its application to register as a securities exchange, which it submitted to the Commission on November 9, 2000.⁴ Prior to exchange registration, Nasdaq's activities that involve functions or responsibilities of a registered securities association will be subject to the NASD's oversight under the Plan of Allocation and Delegation by

⁴ Certain exhibits to Nasdaq's application were incomplete, and therefore on March 15, 2001, Nasdaq submitted to the Commission revised exhibits to address the deficiencies. As a result, Nasdaq's Form 1 was completed and officially filed with the Commission on March 15, 2001.

NASD to Subsidiaries, as approved by the Commission, as well as the NASD's voting control.

Article Fourth

Paragraph C.1. Nasdaq proposes to amend this paragraph of the Certificate to provide that holders of the Notes have the right to vote with Nasdaq stockholders, with each holder of Notes entitled to a number of votes equal to the number of shares of common stock such holder would obtain upon conversion of the principal among of Notes held by such person. The amendment will also provide that holders of Notes shall be deemed to be stockholders and the Notes shall be deemed to be shares of stock solely for the purposes of provisions of the Delaware General Corporation Law and the Certificate that require the vote of stockholders as a prerequisite to corporate action.

Paragraph C.2. Nasdaq proposes to amend the provision of the Certificate that imposes restrictions on stockholders voting shares in excess of 5% of outstanding stock. The amendment would make the same restriction applicable to holders of the Notes. Any person who beneficially owns shares of common stock and/or Notes in excess of 5% of then then-outstanding shares of common stock would not be permitted to vote such excess shares and/or Notes. As is true under the current Certificate, the calculation of the number of shares of common stock outstanding at any particular time is to be made in accordance with the last sentence of SEC Rule 13d-3(d)(1)(i).⁵ As a result, shares of common stock that may be acquired by a holder of Notes through conversion would be deemed to be outstanding for purposes of calculating the voting power owned by such holder.

Paragraph C.3.(f), C.4., and C.5. Currently, these paragraphs (1) authorize the Nasdaq Board of Directors to make determinations necessary to implement Paragraph C of Article Fourth of the Certificate, including determinations about stockholders' beneficial ownership of shares, (2) empower the Nasdaq Board of Directors to demand that any person who is reasonably believed to be the beneficial owner of shares in excess of the 5% voting limitation provide information about such person's ownership interests, and (3) provide that determinations made by the Nasdaq Board of Directors to implement Paragraph C of Article Fourth of the Certificate are conclusive and binding

⁵ 17 CFR 240.13d-3(d)(1)(i).

upon Nasdaq and its stockholders. Nasdaq proposes to amend these paragraphs to include conforming references to the Notes.

Paragraph C.6. Currently, this paragraph provides that the 5% voting limitation does not apply to (1) the NASD or its affiliates until such time as the NASD beneficially owns 5% or less of Nasdaq's outstanding common stock, or (2) any other person that the Nasdaq Board of Directors may exempt prior to the time that such person beneficially owns more than 5% of the outstanding shares of common stock. The paragraph also provides that the Board may not approve an exemption from the 5% limit for a registered broker or dealer or an affiliate thereof⁶ or a person that is subject to a statutory disqualification under Section 3(a)(39) of the Act.⁷ In addition, before granting an exemption, the Nasdaq Board must make certain findings with respect to the effect of an exemption on enumerated aspects of Nasdaq's regulatory obligations.

The proposed rule amendment would add conforming references to the Notes and would also provide that the HFCEP IV LPs will be exempted from the 5% voting limitation if the Nasdaq Board of Directors approves an exemption from the 5% voting limitation for any other person (other than an exemption

granted in connection with the establishment of a strategic alliance with another exchange or similar market). This exemption would not apply to any other person to whom the HFCEP IV LPs might transfer Notes and/or common stock.

Paragraph C.7. This paragraph is a savings clause that provides that if any portion of Paragraph C. of Article Fourth of the Certificate is found to be invalid, the validity of remaining provisions shall not be affected. Nasdaq proposes to amend the paragraph to include conforming references to the Notes.

Article Ninth

Nasdaq proposes to amend this article to provide that a two-third vote of the holders of outstanding Notes is required (1) to amend Paragraph C. of Article Fourth of the Certificate in a manner that would adversely affect the rights of the holders of the Notes without similarly affecting the rights of stockholders or (2) to amend such two-thirds voting requirement.

Article Eleventh

This article authorizes the Nasdaq Board of Directors to consider the effect of proposed corporate action on enumerated aspects of Nasdaq's regulatory obligations. Nasdaq proposes to amend the provision to include conforming references to the Notes.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A(b)(2) and (6) of the Act, which require, among other things, that the Association be so organized and have the capacity to be able to carry out the purposes of the Act and to comply with and enforce compliance with the provisions of the Act, and that the Association's rules are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. Nasdaq believes that the changes proposed to its Certificate are consistent with maintaining the 5% voting limitation that is currently contained in the Certificate, which serves the public interest by ensuring that certain individuals and entities cannot gain undue influence over the operations of Nasdaq. In its order approving the Certificate, the Commission found that this 5% voting limitation and other limitations affecting the control of

Nasdaq fulfill the obligations arising under Section 15A(b)(2) and (6).⁸

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 comments on 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.

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 No.

⁶ A small number of the limited partners of the HFCEP IV LPs are registered broker/dealers or affiliates of registered broker/dealers (the "Broker/Dealer Investors"). The Certificate provides that Nasdaq may not exempt a registered broker/dealer or an affiliate thereof from the 5% voting limitation. The Certificate defines "affiliate" with reference to SEC Rule 12b-2, 17 CFR 240.12b-2, which in turn defines an "affiliate" of a specified person as "a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified." The interests of the Broker/Dealer Investors in the HFCEP IV LPs are minimal. Moreover, the limited partnership agreements that govern the HFCEP IV LPs provide that the limited partners shall take no part in the control or management of the business or affairs of the limited partnership, nor shall they have any authority to act for or on behalf of the limited partnership. Accordingly, the HFCEP IV LPs are not affiliates of the Broker/Dealer Investors. Similarly, the investment by the HFCEP IV LPs in Nasdaq will not raise issues under proposed Rule 2130, as proposed in Nasdaq's application for registration as a national securities exchange, if the Broker/Dealer Investors or any of their affiliates become members of Nasdaq following its registration as a national securities exchange. Proposed Rule 2130 provides that no Nasdaq member or person associated with a member may be the beneficial owner of more than 5% of the outstanding shares of Nasdaq's common stock, and further provides that the term "beneficial owner" shall have the meaning set forth in Article Fourth, Paragraph C of the Certificate. Because the Broker/Dealer Investors do not meet the definition of "beneficial owner" in Article Fourth, Paragraph C of the Certificate, beneficial ownership of the Notes (and the common stock underlying the Notes) would not be attributable to them for purposes of proposed Rule 2130.

⁷ 15 U.S.C. 78c(a)(39).

⁸ See Securities Exchange Act Release No. 42983 (June 26, 2000), 65 FR 41116 (July 3, 2000) (File No. SR-NASD-00-27).

SR–NASD–2001–34 and should be submitted by July 13, 2001.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁹

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01–15677 Filed 6–21–01; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–44432; File No. SR–PCX–2001–22]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange, Inc. Relating to Fees for Application for Approved Status Despite Grounds for Statutory Disqualification Fee

June 15, 2001.

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 1, 2001, 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 PCX proposes to change its schedule of Fees and Charges for Exchange Services by adding a fee for an Application for Approved Status Despite Grounds for Statutory Disqualification.³ The text of the proposed rule change is below. New text is in italics.

Text of the Proposed Rule Change

SCHEDULE OF FEES AND CHARGES FOR EXCHANGE SERVICES

* * * * *

PCX GENERAL MEMBERSHIP FEES

Application for Approved Status Despite Ground for Statutory Disqualification.	\$250.00 per application.
--	---------------------------

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 Exchange 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 purpose of the proposed new fee is to cover the expenses of handling the Application for Approved Status Despite Grounds for Statutory Disqualification.

This fee is payable whenever a person or entity is subject to a statutory disqualification under the Act and (1) is an applicant for Exchange membership, (2) is seeking to be an associated person of an Exchange Member (except where the Exchange is merely asked to concur in an SEC Rule 19h–1 filing by another self-regulatory organization), or (3) is an existing Exchange member or associated person who submits an Application for Approved Status Despite Grounds for Statutory Disqualification. This fee is in addition to any other membership fees that might be applicable.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act,⁴ in general, and Section 6(b)(4) of the Act,⁵ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members.⁶

⁴ 15 U.S.C. 78f(b).

⁵ 15 U.S.C. 78f(b)(4).

⁶ The proposed fee will be applied to the expenses of Exchange staff review, investigation and evaluation of Applications for Approved Status Despite Grounds for Statutory Disqualification. Telephone discussion between Cindy L. Sink, Senior Staff Attorney, Regulatory Policy, PCX, Karl Varner, Senior Counsel, Division of Market Regulation (“Division”), Commission, and Frank N.

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

The Exchange does not believe that the proposed rule change will impose 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 on the proposed rule change were neither solicited nor received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)⁷ of the Act and subparagraph (f)(2) of Rule 19b–4⁸ thereunder, because it establishes or changes a due, fee, or other charge. 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.⁹

IV. Solicitation of Comments

Interested persons are invited to submit written data, view 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 PCX. All submissions should refer to File No.

Genco, Attorney Advisor, Division, Commission (June 11, 2001).

⁷ 15 U.S.C. 78s(b)(3)(A).

⁸ 17 U.S.C. 240.19b–4.

⁹ See 15 U.S.C. 78(b)(3)(C).

⁹ 17 CFR 200.30–3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See PCX Rule 1.7(a)—Denial of and Conditions to Membership.