

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>4</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45206; File No. SR-NASD-2001-76]

### Self-Regulatory Organizations; Order Granting Accelerated Approval to a Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. Amending NASD Rules 4510, 4520 and 4530 Relating to Issuer Entry and Annual Fee Schedules

December 28, 2001.

#### I. Introduction

On October 31, 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 ("Commission"), 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> a proposed rule change to amend Association Rules 4510, 4520, and 4530 pertaining to issuer entry and annual fee schedules for The Nasdaq National and The Nasdaq SmallCap Markets for both domestic and non-U.S. listings as well as additional conforming changes. On November 21, 2001, Nasdaq filed Amendment No. 1 to the proposed rule change.<sup>3</sup> The proposed rule change and Amendment No. 1 were published for comment in the **Federal Register** on November 30, 2001.<sup>4</sup> No comments were received regarding the proposed rule change, as amended. This order approves the proposed rule change, as amended, on an accelerated basis.

#### II. Description of the Proposed Rule Change

The NASD proposed to amend the Association Rules 4510, 4520, 4530 pertaining to issuer entry and annual fees on The Nasdaq National Market and

The Nasdaq SmallCap Market for both domestic and foreign listings. It has been approximately ten years since the NASD amended the entry and annual fees for SmallCap<sup>5</sup> and American Depository Receipts ("ADR") listings,<sup>6</sup> and four years since it amended The Nasdaq National Market entry and annual fees.<sup>7</sup>

The NASD proposed to increase entry and annual fees for The Nasdaq National Market, including ADRs. The Nasdaq National Market entry fees would be split into two fee schedules: one schedule for all U.S. issuers and foreign issuers raising capital in conjunction with their listing on Nasdaq; and another schedule for foreign issuers that are not raising capital in connection with their listing. This second schedule has somewhat lower fees for foreign listings under 5 million shares, in recognition of the fact that these listings are non-capital raising and generally represent secondary market listings. The NASD will also increase its existing annual fee structure for The Nasdaq National Market.

The NASD proposed to increase entry and annual fees for The Nasdaq SmallCap Market as well. ADRs on The Nasdaq SmallCap Market will follow the same annual fee schedule as domestic and foreign issues. Finally, the NASD intends to add a new fee schedule to the NASD Rule 4500 Series for Other Securities qualified under NASD Rule 4420(f). Finally, the NASD requested that the new fees apply as of January 1, 2002 in order to be consistent with the expectations of Nasdaq listed companies and to ease administration of the fees.<sup>8</sup>

#### III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.<sup>9</sup> In particular, the Commission finds that the proposed rule change, as amended, is consistent with section 15A(b)(6) of the Act<sup>10</sup> because it is designed to promote just and equitable principles of trade. In addition, the Commission finds that the proposed rule change, as amended, is consistent with section 15A(b)(5) of the

Act<sup>11</sup> because it provides for the equitable allocation of reasonable dues, fees, and other charges among members, issuers, and other persons using any facility or systems which the association operates. Specifically, the increase reflects additional costs that Nasdaq has represented it incurs for services provided to issuers. As represented by the NASD, it has committed increased resources to provide regulatory oversight, client coverage, and professional services to listed companies. The Nasdaq represents that additional resources were committed to fund regulatory costs associated with the institution of corporate governance requirements on The Nasdaq SmallCap Market in 1997. Furthermore, Nasdaq represents that it has made several market improvements such as Nasdaq Online, the Nasdaq Marketsite, and enhancements to Nasdaq.com, as well as market quality improvements such as decimalization, SuperSOES, and the development of SuperMontage. In addition, Nasdaq has represented that it also intends to allocate resources to fund service enhancements requested by Nasdaq companies, such as creating a telephone and technology-based corporate-client information center to provide Nasdaq companies with a range of integrated products and services in a more centralized and timely manner.<sup>12</sup>

Nasdaq seeks to implement the proposed fees on January 1, 2002. In order to be consistent with the expectations of Nasdaq listed companies and to ease administration of the fees, Nasdaq has requested that the Commission find good cause for approving the proposed rule change, as amended, prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**.

The Commission finds good cause for approving the proposed rule change, as amended, prior to the thirtieth day after publication in the **Federal Register**. The Commission notes that the proposed rule change and Amendment No. 1 were noticed for the full 21-day comment period and the Commission received no comments regarding the proposed rule change, as amended. The Commission believes that granting accelerated approval to the proposed rule change will allow Nasdaq to implement the new fees by January 1, 2002, and will provide issuers with notice and an opportunity to budget for the additional costs. Accordingly, the Commission finds good cause, consistent with

<sup>4</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 letter from Sara Nelson Bloom, Associate General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated November 21, 2001 ("Amendment No. 1").

<sup>4</sup> See Securities Exchange Act Release No. 45101 (November 23, 2001), 66 FR 59827.

<sup>5</sup> See Securities Exchange Act Release No. 30143 (January 2, 1992), 57 FR 726 (January 8, 1992).

<sup>6</sup> See Securities Exchange Act Release No. 28731 (January 2, 1991), 59 FR 906 (January 9, 1991).

<sup>7</sup> See Securities Exchange Act Release No. 39613 (February 2, 1998), 63 FR 6789 (February 10, 1998).

<sup>8</sup> See Amendment No. 1, *supra* note 3.

<sup>9</sup> In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>10</sup> 15 U.S.C. 78o-3(b)(6).

<sup>11</sup> 15 U.S.C. 78o-3(b)(5).

<sup>12</sup> See Amendment No. 1, *supra* note 3.

section 15A(b)<sup>13</sup> and section 19(b)(2) of the Act<sup>14</sup> to approve the proposed rule change, as amended, on an accelerated basis.

#### IV. Conclusion

For the foregoing reasons, the Commission finds that the proposal, as amended, is consistent with the requirements of the Act and rules and regulations thereunder.

*It Is Therefore Ordered*, pursuant to section 19(b)(2) of the Act,<sup>15</sup> that the proposed rule change (SR-NASDA-2001-76), as amended, is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>16</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45184; File No. SR-Phlx-2001-98]

#### Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Order Approving Proposed Rule Change and Amendments No. 1 and 2 Relating to the Establishment of a Remote Specialist Program

December 21, 2001.

On October 22, 2001, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission") 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> a proposed rule change to establish a remote specialist program.

The proposed rule change and Amendment No. 1 were published for comment in the **Federal Register** on November 12, 2001.<sup>3</sup> No comments were received on the proposal. The proposal was amended on November 29, 2001.<sup>4</sup> In this order, the Commission is

approving the proposed rule change, as amended.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange<sup>5</sup> and, in particular, with the requirements of section 6(b)(5).<sup>6</sup>

The Commission finds that the proposed rule change is consistent with section 6(b)(5) of the Act<sup>7</sup> because it is designed to perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest. The Commission believes that a remote specialist program will assist the Exchange in maintaining an efficient and open market.

The Commission approves this proposed rule change provided that the Exchange meet the following conditions: (i) The Exchange shall have place specific information barrier policies and surveillance policies that are consistent with the Exchange's existing rules and that are acceptable to the Commission's Office of Compliance Inspections and Examinations ("OCIE"); (ii) each remote PACE terminal shall be individually identified and associated with (an) authorized and qualified specialist(s) and/or registered clerk(s) and will require a non-transferable Remote Authorization; and (iii) all registered specialists and clerks, except those currently operating as floor specialists and clerks, must complete a floor training program.<sup>8</sup> The training may be waived by the Exchange for people in exceptional circumstances if other arrangements are made with and approved by the Exchange. However, a waiver will only be permitted if the Exchange is assured that the person

to John Riedel, Attorney Adviser, Division of Market Regulation ("Division"), Commission, dated November 28, 2001 ("Amendment No. 2"). In Amendment No. 2, several technical edits are made to subsection (n) of proposed rule 461 that do not need to be published for comment.

<sup>5</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>6</sup> 15 U.S.C. 78f(b)(5).

<sup>7</sup> 15 U.S.C. 78f(b)(5).

<sup>8</sup> The floor training must include, among other things: communication procedures with Floor Brokers, PACE Desk, Surveillance, Systems Support, and ITS coordination with the Floor; remote/competing specialist program and Unlisted Trading Privilege applications and procedures, stock allocation procedures; trading halt procedures; and books and records/reports available.

requesting the waiver has made other arrangements that ensure that the person meet all of the training requirements. The training may not be waived for easily remedied reasons such as geographical location or inconvenience.

The Commission finds good cause for approving Amendment No. 2 prior to the thirtieth day after notice of the publication in the **Federal Register**. Amendment No. 2 makes minor technical changes to the proposed rule language, dealing with non-transferability of the remote authorizations. The Commission therefore finds that acceleration of Amendment No. 2 is appropriate.

#### Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 2, including whether the proposed amendments are 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 amendments that are filed with the Commission, and all written communications relating to the amendments 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 Room. Copies of such filing also will be available for inspection and copying at the principal office of the Phlx. All submissions should refer to File No. SR-Phlx-2001-98 and should be submitted by January 25, 2002.

*It Is Therefore Ordered*, pursuant to section 19(b)(2) of the Act,<sup>9</sup> that the proposed rule change (SR-Phlx-2001-98), as amended, is approved.

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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<sup>9</sup> 15 U.S.C. 78s(b)(2).

<sup>10</sup> 17 CFR 200.30-3(a)(12).

<sup>13</sup> 15 U.S.C. 78o-3(b).

<sup>14</sup> 15 U.S.C. 78s(b)(2).

<sup>15</sup> *Id.*

<sup>16</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 Securities Exchange Act Release No. 45014 (November 2, 2001), 66 FR 56888.

<sup>4</sup> See letter from Carla Behnfeldt, Director, Legal Department New Product Development Group, Phlx