

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45444; File No. SR-NASD-2002-17]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Expand Program for Sharing Market Data Revenue With NASD Members, Reduce Charge for Automated Give-Up Trade Reports, and Delete Fee Schedule for the ReSource Service

February 14, 2002.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on February 5, 2002, 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") 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, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

This is a proposed rule change to: (1) Expand Nasdaq's program for sharing market data revenue with NASD members; (2) reduce the charge for automated give-up ("AGU") trade reports submitted to Nasdaq's Automated Confirmation Transaction Service ("ACT"); and (3) delete the fee schedule for the ReSource Service, a service that Nasdaq had proposed to assist NASD member market centers in meeting their reporting obligations under Rule 11Ac1-5,¹ but that Nasdaq has decided not to offer. Pursuant to Section 19(b)(3)(A)(ii) of the Act² and Rule 19b-4(f)(2) thereunder,³ Nasdaq has designated this proposal as one establishing or changing a due, fee, or other charge imposed by a self-regulatory organization, and therefore the proposed rule change is effective upon filing as applied to NASD members. Nasdaq implemented the rule change as of February 11, 2002. The text of the proposed rule change is set forth below. Proposed new language is

italicized; proposed deletions are in brackets.

* * * * *

7010. System Services

(a) (1) No change.
 (2) Market Data Revenue Sharing
 (A) For a pilot period [commencing on February 1, 2002 and] lasting until October 31, 2002, NASD members shall receive a market data revenue sharing credit. The total credit shall be calculated in accordance with the following formula:

$$\text{Credit} = (0.[6]80) \times (\text{Eligible Revenue}) \times (\text{Member's Volume Percentage})$$

(B) Definitions. The following definitions shall apply to this Rule:

(i) "Eligible Revenue" shall mean:
 a. the portion of the net distributable revenues that Nasdaq, through the NASD, is eligible to receive under the Nasdaq UTP Plan, that is attributed to the Nasdaq Level 1 Service for Eligible Securities, minus

b. the portion of the fee charged to Nasdaq by NASD Regulation, Inc. for regulatory services allocated to the Nasdaq Level 1 Service for Eligible Securities.

(ii) "Eligible Securities" shall mean all Nasdaq National Market securities and any other security that meets the definition of "Eligible Security" in the Nasdaq UTP Plan.

(iii) "Member's Volume Percentage" shall mean the average of:

a. the percentage derived from dividing the total number of trades in Eligible Securities [conducted on non-Nasdaq transaction systems] that the member reports in accordance with NASD trade reporting rules to the Automated Confirmation Transaction Service ("ACT") by the total number of trades in Eligible Securities reported to ACT by NASD members, and

b. the percentage derived from dividing the total number of shares represented by trades in Eligible Securities [conducted on non-Nasdaq transaction systems] that the member reports in accordance with NASD trade reporting rules to ACT by the total number of shares represented by all trades in Eligible Securities reported to ACT by NASD members.

(iv) "Nasdaq UTP Plan" shall mean the Joint Self-Regulatory Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis.

(b)—(f) No change.
 (g) Automated Confirmation Transaction Service.

The following charges shall be paid by the participant for use of the

Automated Confirmation Transaction Service (ACT):

Transaction Related Charges:

- Comparison—\$0.0144/side per 100 shares (minimum 400 shares; maximum 7,500 shares)
- Automated Give-Up—\$[0.01]0.029/side [per 100 shares (minimum 400 shares; maximum 7,500 shares)]
- Late Report—T+N—\$0.288/side
- Browse/query—\$0.288/query *
- Terminal fee—\$7.00/month (ACT only terminals)
- CTCI fee—\$575.00/month
- Nasdaq ACT—\$300/month (full functionality) or \$150/month (up to an average of twenty transactions per day each month) **
- Trade reporting—\$0.029/side (applicable only to reportable transaction not subject to trade comparison through ACT) ***
- Risk Management Charges[:]:—\$0.035/side and \$17.25/month per correspondent firm (maximum \$10,000/month per correspondent firm)
- Corrective Transaction[:]:—\$0.25/Cancel, Error, Inhibit, Kill, or "No" portion of Charge—No/Was transaction, paid by reporting side; \$0.25/Break, Decline transaction, paid by each party[:];
- (h)—(p) No change.
- [(q) Nasdaq ReSourceSM Service]
- [(1)(A) Subscribers to the Nasdaq ReSourceSM Service shall be charged an Activation Fee and an Annual Subscription Fee, both of which generally will vary depending upon a subscriber's trading volume, as measured in accordance with paragraphs (B) through (D) below, and corresponding tier classification as follows:]

[Tier]	Average monthly trade volume]
[1	500,000 or greater]
[2	100,000–499,999]
[3	10,000–99,999]
[4	5,000–9,999]
[5	1,000–4,999]
[6	500–999]
[7	0–499]

* Each ACT query incurs the \$0.288 fee; however, the first accept or decline processed for a transaction is free, to insure that no more than \$0.288 is charged per comparison. Subsequent queries for more data on the same security will also be processed free. Any subsequent query on a different security will incur the \$0.288 query charge.

** For the purposes of this service only, a transaction is defined as an original trade entry, either on trade date or as-of transactions per month.

*** The trade reporting service charge is applicable to those trades input into ACT for reporting purposes only, such as NSCC Qualified Special Representative reports and reports of internalized transactions.

¹ 17 CFR 240.11Ac1-5.

² 15 U.S.C. 78s(b)(3)(A)(ii).

³ 17 CFR 240.19b-4(f)(2).

[(B) During the first year of the ResourceSM Service (i.e., August 2001 through July 2002) Nasdaq will assign subscribers to one of the tiers listed in paragraph (A) above based on their average monthly trading volume reported to the tape, for the period from September 1, 2000, through February 28, 2001, in Nasdaq National Market securities for which the subscriber is registered as a market maker.]

[(C) Members that subscribe to the ResourceSM Service other than at the beginning of a "Subscription Year," as the term is defined below, will be assigned to one of the tiers listed in paragraph (A) above based on their average monthly trading volume reported to the tape, during the six month period preceding the date of their subscription, in Nasdaq National Market securities for which the subscriber is registered as a market maker.]

[(D) Beginning in July of 2002, and on an annual basis thereafter, Nasdaq will review each subscriber's average monthly trading volume and assign the subscriber to one of the tiers listed in paragraph (A) above based on their average monthly trading volume reported to the tape, during the preceding six month period, in Nasdaq National Market securities for which the subscriber is registered as a market maker.]

[(2)(A) Activation Fees and Annual Subscription Fees shall be as follows:]

[Tier	Activation Fee	Annual Subscription Fee]
[1	\$3,000	\$35,000]
[2	3,000	30,000]
[3	2,000	20,000]
[4	1,000	10,000]
[5	1,000	7,500]
[6	1,000	5,000]
[7	1,000	2,500]

[(B) The Activation Fee shall be billed after execution of the Addendum to Nasdaq Workstation II Subscriber Agreement for Nasdaq ResourceSM ("Agreement").]

[(C) The Annual Subscription Fee shall be charged after execution of the Agreement, and at the beginning of each Subscription Year thereafter. A "Subscription Year" shall mean a 12-month period from August 1st to July 31st. The Annual Subscription Fee will be pro-rated on a monthly basis for those firms that subscribe to the Service other than at the beginning of a Subscription Year. Nasdaq will offer no refunds of the Annual Subscription Fee.]

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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 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 below in Sections A, B, and C, 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

On December 27, 2001, Nasdaq filed a proposed rule change to implement a mechanism for market data revenue sharing.⁴ Nasdaq is now proposing amendments to these rules that will have the effect of providing additional market data revenue sharing. In addition, Nasdaq is proposing to lower the charge for AGU trade reports submitted to ACT. Finally, as a "housekeeping" matter, Nasdaq is deleting Rule 7010(q), which contains fees for a proposed service that Nasdaq has decided not to offer.

Market Data Revenue Sharing

Under its market data revenue sharing program, which went into effect on February 1, 2002, Nasdaq shares with NASD members a portion of the market data revenue that it receives, through the NASD, under the Joint Self-Regulatory Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis (the "Nasdaq UTP Plan" or the "Plan"). Under the Plan, Nasdaq, through the NASD as a Plan participant, receives a share of market data revenues distributed by the Plan's securities information processor, based on reported trades attributable to Nasdaq under the Plan. Nasdaq, in turn, makes a portion of the revenue that it receives available to the members whose trade reporting activity generated the revenue. Under the revenue sharing program that went into effect on February 1, Nasdaq shares market data revenue solely on the basis of trades that were not effected through a Nasdaq transaction system, such as internalized trades, but that are

reported to ACT. Nasdaq is now proposing to expand the credit to share a portion of the revenue associated with trades executed through Nasdaq transaction systems, such as SuperSOES and SelectNet.

Under the current program, a member's credit for non-Nasdaq transaction system trades was set at 60% of the net Level 1 revenue attributable to the member's reports of non-Nasdaq transaction system trades in securities covered by the Plan ("Eligible Securities"), with the pool of sharable revenue being comprised of Level 1 revenues distributable to Nasdaq under the Nasdaq UTP Plan minus an allocated portion of the NASDR regulation fee, and the member's non-Nasdaq transaction system trade report activity being measured by total number of trades and share volume. Nasdaq is now proposing to share on the basis of all trades that are reported to ACT and to increase the percentage of the pool of revenue shared to 80%.⁵

The original formula focused on the reporting of non-Nasdaq transaction system trades, such as internalized trades, because Nasdaq expects that members will have increasingly greater options to report such trades to UTP Exchanges in the future. In order to continue to provide an attractive environment for the reporting of these trades, Nasdaq concluded that it is appropriate to share a portion of the data revenue associated with these trades with members that report them to Nasdaq. Although all Nasdaq transaction system trades are automatically reported to Nasdaq through ACT, Nasdaq also faces competition for trade executions. Accordingly, Nasdaq believes that it is also appropriate to share a portion of the market data revenue associated with system trades, as a means of lowering the overall costs incurred by members to execute transactions through Nasdaq systems.

Automated Give-Up Fee

ACT is the Nasdaq system used by members to report and compare trades for clearance and settlement, and transmit trade reports for regulatory purposes and public dissemination. In a "give-up" arrangement, a member reports or accepts a trade in ACT on behalf of another member by identifying in the ACT screen give-up box the member on whose behalf the trade is being reported or accepted. The

⁴ See Securities Exchange Act Release No. 45342 (Jan. 28, 2002), 67 FR 10109 (Feb. 1, 2002) (SR-NASD-2001-96).

⁵ Nasdaq represents that it may file a proposed rule change with the Commission to increase this percentage further, as warranted by market conditions.

Automated Give-Up ("AGU") feature allows a broker to enter and lock-in a trade when it is responsible for both sides of the trade. This occurs when two of its "give-ups" trade with each other or the broker trades with one of its own give-up firms. Without AGU, the broker would be required to submit an entry for one side and either accept the trade or submit an entry for the other side. By using AGU, the broker avoids the need to accept the trade or submit the second entry. Accordingly, use of AGU substantially reduces the use of Nasdaq system resources. The fee for AGU reports is currently \$0.01 per side per 100 shares, with a minimum of 400 shares and a maximum of 7,500 shares (*i.e.*, \$0.04 to \$0.75 per side). In an effort to encourage greater use of ACT, Nasdaq is reducing the fee to a flat \$0.029 per side, the same fee that is charged for ACT's basic trade report, and is eliminating the minimum and maximum restrictions.

Nasdaq ReSourceSM Service

As a "housekeeping" matter, Nasdaq is deleting Rule 7010(q), which contains fees for the Nasdaq ResourceSM Service, a service that Nasdaq had proposed to assist NASD member market centers in meeting their reporting obligations under SEC Rule 11Ac1-5,⁶ but that Nasdaq has decided not to offer.

Nasdaq believes that the proposed rule change is consistent with the Act, including Section 15A(b)(5) of the Act,⁷ which requires that the rules of the NASD provide for the equitable allocation of reasonable fees, dues, and other charges among members and issuers and other persons using any facility or system which the NASD operates or controls, and Section 15A(b)(6) of the Act,⁸ which requires rules that are not designed to permit unfair discrimination between customers, issuers, brokers or dealers. Nasdaq believes that the fee reduction and revenue sharing credit increase implemented by this filing are allocated in an equitable fashion and will result in lower charges for members.

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

Nasdaq believes that the proposed rule change will not 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 on the proposed rule change contained in this filing.

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)(ii) of the Act⁹ and subparagraph (f) of Rule 19b-4,¹⁰ thereunder because it establishes or changes a due, fee or other charge imposed by the self-regulatory organization. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the 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 the proposed rule change, as amended, 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 the 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-2002-17 and should be submitted by March 14, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45440; File No. SR-PHLX-2001-109]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Clarifying the Applicability of Phlx Rule 606 to Tethered Communication Devices

February 13, 2002.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), and Rule 19b-4 thereunder,² notice is hereby given that on December 20, 2001, the Philadelphia Stock Exchange, Inc. ("Phlx" 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 Phlx. The Phlx submitted an amendment to the proposed rule change on February 7, 2002.³ 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 Substance of the Proposed Rule Change

The Phlx proposes to add new Supplementary Material .03 to Phlx Rule 606 (Wire and Other Connections, Communications and Equipment) to clarify that the rule and relevant policies apply to users of all communication and other electronic devices on the floors of the Exchange, including, but not limited to, tethered⁴ as well as, wireless, wired, voice, and

¹¹ 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 Jurij Trypupenko, Esquire, Phlx, to Sharon M. Lawson, Senior Special Counsel, Division of Market Regulation, Commission, dated February 6, 2002 ("Amendment No. 1"). Amendment No. 1 deletes the second sentence of proposed Supplementary Material .03 to Phlx Rule 606.

⁴ A tether is a hardwire connection to an existing Exchange communication network. It augments the current wireless network on the options floor and allows users to connect their handheld devices to the existing Exchange communication network and thereby interface with member firm communication networks.

⁶ 17 CFR 240.11Ac1-5.

⁷ 15 U.S.C. 78o-3(b)(5).

⁸ 15 U.S.C. 78o-3(b)(6).

⁹ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁰ 17 CFR 240.19b-4(f).