

### *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.

### *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**

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 Exchange 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, 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 such filing will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to File No. SR-Amex-2001-74 and should be submitted by May 6, 2002.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-45704; File No. SR-NASD-2001-69]**

### **Self-Regulatory Organizations; Order Approving Proposed Rule Change by the National Association of Securities Dealers, Inc. Amending NASD Rule 4720 Relating to the Inclusion of UTP Exchanges in the Nasdaq National Market Execution System**

April 8, 2002.

#### **I. Introduction**

On October 5, 2001, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, the Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("SEC" or "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 amending NASD Rule 4720, SelectNet Service, relating to the inclusion of exchanges trading Nasdaq securities pursuant to unlisted trading privileges ("UTP Exchanges") in the Nasdaq National Market Execution System ("NNMS"). On December 19, 2001, the NASD submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> On January 16, 2002, the NASD submitted Amendment No. 2 to the proposed rule change.<sup>4</sup> The proposed rule change, as amended, was published for comment in the **Federal Register** on January 28, 2002.<sup>5</sup> The Commission received two comments on the proposal.

<sup>13</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 Mary M. Dunbar, Vice President, Office of General Counsel, Nasdaq, to Katherine England, Assistant Director, Division of Market Regulation, SEC, dated December 18, 2001 ("Amendment No. 1"). In Amendment No. 1, the NASD removed language that was subsequently incorporated into a different NASD rule change. See Securities Exchange Act Release No. 45057 (November 8, 2001), 66 FR 57496 (November 15, 2001).

<sup>4</sup> See letter from Mary M. Dunbar, Vice President, Office of General Counsel, Nasdaq, to Katherine England, Assistant Director, Division of Market Regulation, SEC, dated January 16, 2002 ("Amendment No. 2").

<sup>5</sup> See Securities Exchange Act Release No. 45319 (January 18, 2002), 67 FR 3923.

## **II. Description of the Proposal**

In SR-NASD-2001-69, Nasdaq is proposing to amend NASD Rule 4720 to specify that a UTP Exchange will be permitted access to SelectNet on a basis similar to that which is offered to NASD members. As a result, SelectNet will be available only in connection with participation in the NNMS (hereinafter referred to as "SuperSOES"). Nasdaq believes that the rule change will bring UTP Exchanges into parity with Nasdaq market makers, as well as reduce the risk of dual liability for both Nasdaq market makers and UTP Exchanges participating in SuperSOES. Nasdaq believes that the rule would also limit the possibility of backing away from quotes by UTP Exchanges and would limit the instances of locked/crossed markets among market participants that participate in a Nasdaq execution system.

Nasdaq believes establishing SuperSOES as the primary platform for trading Nasdaq-listed securities is a critical step in improving the quality of its market. Nasdaq believes that implementation of SuperSOES has significantly improved the Nasdaq Stock Market. In particular, Nasdaq's initial assessment based on preliminary data shows that SuperSOES orders are processed quickly, enjoy high fill rates, and execute at the current market price. Moreover, according to Nasdaq, SuperSOES has not had a significant negative impact on spreads, depth or volatility. In addition, SuperSOES has been voluntarily adopted by the Chicago Stock Exchange, Inc. ("CHX") and the Boston Stock Exchange, Inc., which currently represent the vast majority of the trading volume in Nasdaq-listed stocks by UTP Exchanges. CHX has participated in SuperSOES since it was implemented in July 2001.<sup>6</sup> As SuperSOES becomes a more familiar feature in the Nasdaq market place, Nasdaq believes it will benefit Nasdaq market participants and public investors by making the operation of Nasdaq more efficient.

According to Nasdaq, permitting UTP Exchanges to participate in Nasdaq without automatic execution functionality perpetuates the potential for "dual liability" that Nasdaq designed SuperSOES to eliminate. Nasdaq represents that the potential for dual liability exists when market participants, such as UTP Exchanges, send SelectNet liability messages to

<sup>6</sup> In July 2001, the Commission approved a rule change to permit UTP Exchanges to participate on a voluntary basis in SuperSOES. See Securities Exchange Act Release No. 44526 (July 6, 2001), 66 FR 36814 (July 13, 2001).

Nasdaq market makers that simultaneously receive executions through SuperSOES. Additionally, according to Nasdaq, permitting UTP Exchanges to access Nasdaq via SelectNet could disrupt and slow the market. To improve the trading environment for all of Nasdaq's market participants, and to avoid potential market disruptions, Nasdaq is proposing to require UTP Exchanges that choose to participate in Nasdaq to accept automatic executions through SuperSOES.

### III. Summary of Comments

The Commission received two comment letters on the proposal: One from the Knight Trading Group, Inc. ("Knight"),<sup>7</sup> and one from the Philadelphia Stock Exchange, Inc. ("Phlx").<sup>8</sup> In Knight's letter, Knight expresses general support for Nasdaq's proposal and agrees with the reasons set forth by Nasdaq as the basis for the proposed amendment.<sup>9</sup>

In the Phlx letter, the Phlx argues generally that the proposed rule change is an anti-competitive attempt to require UTP Exchanges to be subject to automatic execution in Nasdaq's NNMS. Phlx contends that such participation would have an adverse effect on the attractiveness of UTP Exchanges as alternative trading venues for Nasdaq securities.

Specifically, the Phlx believes that forcing UTP Exchanges to accept automatic executions will make it difficult for UTP Exchanges to attract Electronic Communication Networks ("ECNs") as direct participants, impose per share trade execution fees on the UTP Exchanges for their orders executed through NNMS, and force the UTP Exchanges to relinquish any claim over inter-market trades executed through the NNMS (either as indications of the UTP Exchange's liquidity or to receive market data revenues).

The Phlx states that Nasdaq's justifications for the proposed rule change are without merit. The Phlx believes that imposing a short time window within which Nasdaq market

makers would be required to respond could solve Nasdaq's dual liability concern. Furthermore, the Phlx states that Nasdaq has offered no empirical data to substantiate the claim that non-automatic execution participation by UTP Exchanges results in deleterious order queuing.

Finally, the Phlx asserts that requiring UTP Exchanges to participate in NNMS will funnel trading activity away from the UTP Exchanges, and, thus, remove the opportunity for price improvement, the hallmark of an auction market. The Phlx notes that requiring UTP Exchange participation in NNMS will expose UTP Exchange specialists to the same dual liability that Nasdaq currently seeks to avoid for its market makers. The Phlx proposes that an inter-market linkage plan for Nasdaq securities be developed, and, until such a plan is developed, the Phlx proposes that the status quo be maintained by allowing UTP Exchanges access to Nasdaq markets via SelectNet.

### IV. 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,<sup>10</sup> and, in particular, the requirements of Section 15A of the Act<sup>11</sup> and the rules and regulations thereunder. The Commission finds specifically that the proposed rule change is consistent with Section 15A(b)(6) of the Act.<sup>12</sup> Section 15A(b)(6)<sup>13</sup> requires, among other things, that the NASD's rules be designed to facilitate transactions in securities, to remove impediments to and perfect the mechanism 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 the proposed rule change is not inconsistent with the objectives of this section of the Act. Specifically, requiring UTP Exchanges that choose to participate in the Nasdaq market also to participate in SuperSOES could help reduce the potential for order queuing and for system stoppages within the Nasdaq Stock Market, when a UTP Exchange's quote is alone at the best bid or best offer.

Moreover, the Commission notes that Nasdaq is not required to grant competitors access to Nasdaq's proprietary systems. To the extent

Nasdaq chooses to grant access to its proprietary systems, Nasdaq may impose reasonable terms and conditions, such as requiring use of SuperSOES for access to SelectNet. Nasdaq may not impose terms and conditions that place an unfair burden on competition or impose terms and conditions that result in unfair discrimination. Finally, UTP Exchanges may choose to participate in SuperSOES on a voluntary basis; nothing in this rule change would require them to accept automatic executions from Nasdaq.

### V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>14</sup> that the proposed rule change (File No. SR-NASD-2001-69) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>15</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45702; File No. SR-NASD-2002-35]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Amending NASD Rules 6110 and 6120 Relating to UTP Exchange Usage of ACT

April 5, 2002.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 under,<sup>2</sup> notice is hereby given that on March 7, 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" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

<sup>15</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>7</sup> See letter from Michael T. Dorsey, Senior Vice President, General Counsel and Secretary, Knight, to Jonathan G. Katz, Secretary, Commission, dated February 21, 2002.

<sup>8</sup> See letter from Meyer S. Frucher, Chairman and Chief Executive Officer, Phlx, to Jonathan G. Katz, Secretary, Commission, dated February 25, 2002.

<sup>9</sup> Knight incorporated by reference the comment letters it submitted in connection with the following releases: Securities Exchange Act Release Nos. 45182 (December 20, 2001), 66 FR 67609 (December 31, 2001); and 45081 (November 19, 2001), 66 FR 59273 (November 27, 2001). The Commission notes that the comments incorporated by reference were addressed in the approval orders in the respective releases.

<sup>10</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>11</sup> 15 U.S.C. 78o-3.

<sup>12</sup> 15 U.S.C. 78o-3(b)(6).

<sup>13</sup> *Id.*