

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 will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-ISE-2002-15 and should be submitted by August 15, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁵

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46232; File No. SR-NASD-2002-94]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 by the National Association of Securities Dealers, Inc. to Reinstate a Transaction Credit Pilot Program for Exchange-Listed Securities

July 19, 2002.

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 July 8, 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. On July 17, 2002, Nasdaq amended the proposal.³ Nasdaq filed the proposal pursuant to section 19(b)(3)(A) of the Act,⁴ and Rule 19b-4(f)(6) thereunder,⁵ which renders the proposal effective

¹⁵ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See July 17, 2002 letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission and attachments ("Amendment No. 1"). In Amendment No. 1, Nasdaq provided clarification as to the procedural history of its transaction credit pilot program, and in particular, with regard to SR-NASD-2002-68. For purposes of calculating the 60-day abrogation period, the Commission considers the period to have commenced on July 17, 2002, the date Nasdaq filed Amendment No. 1.

⁴ 15 U.S.C. 78s(b)(3)(A).

⁵ 17 CFR 240.19b-4(f)(6).

upon filing with the Commission.⁶ 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

As of July 1, 2002, Nasdaq proposes to reinstate its transaction credit pilot program for exchange-listed securities for a six-month pilot period, through December 31, 2002. The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets.⁷

7010. System Services

(a)-(b) No change.

(c)(1) No change.

(2) Exchange-Listed Securities

Transaction Credit.

For a pilot period, qualified NASD members that trade securities listed on the NYSE and Amex in over-the-counter transactions reported by the NASD to the Consolidated Tape Association may receive from the NASD transaction credits based on the number of trades so reported. To qualify for the credit with respect to Tape A reports, an NASD member must account for 500 or more average daily Tape A reports of over-the-counter transactions as reported to the Consolidated Tape during the concurrent calendar quarter. To qualify for the credit with respect to Tape B reports, an NASD member must account for 500 or more average daily Tape B reports of over-the-counter transactions as reported to the Consolidated Tape during the concurrent calendar quarter. If an NASD member is so qualified to earn credits based either on its Tape A activity, or its Tape B activity, or both, that member may earn credits from one or both pools maintained by the NASD, each pool representing 40% of the revenue paid by the Consolidated Tape Association to the NASD for each of Tape A and Tape B transactions. A

⁶ Nasdaq asked the Commission to waive the 5-day pre-filing notice requirement and the 30-day operative delay. See Rule 19b-4(f)(6)(iii). 17 CFR 240.19b-4(f)(6)(iii).

⁷ On July 2, 2002, the Commission abrogated SR-NASD-2002-68. See Securities Exchange Act Release No. 46159 (July 2, 2002), 67 FR 45775 (SR-NASD-2002-61, SR-NASD-2002-68, SR-CSE-2002-06, and SR-PCX-2002-37) (order of summary abrogation). By abrogating SR-NASD-2002-68, the Commission eliminated the pilot program, despite the fact that the NASD Rules still contained NASD Rule 7010(c)(2). Because Nasdaq is reinstating the pilot program at this time, the Commission did not require Nasdaq to file a proposed rule change to eliminate the language of NASD Rule 7010(c)(2). As a result, the only language that appears in italics as new language is the language identifying the expiration date of the newly reinstated pilot program.

qualified NASD member may earn credits from the pools according to the member's pro rata share of the NASD's over-the-counter trade reports in each of Tape A and Tape B for each calendar quarter starting with July 1, 2000 for Tape A reports (April 1, 2000 for Tape B reports) and ending with the calendar quarter starting on [April] *October 1, 2002.*

(d)-(r) No change.

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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 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. 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

Nasdaq proposes to reinstate through December 31, 2002 its pilot program to provide a transaction credit to NASD members that exceed certain levels of trading activity in exchange-listed securities. Nasdaq's InterMarket is a quotation, communication, and execution system that allows NASD members to trade stocks listed on the New York Stock Exchange ("NYSE") and the American Stock Exchange ("Amex").⁸ The InterMarket competes with regional exchanges like the Chicago Stock Exchange ("CHX") and the Cincinnati Stock Exchange ("CSE") for retail order flow in stocks listed on the NYSE and the Amex. The NASD collects trade reports from broker-dealers trading these securities in the over-the-counter ("OTC") market and provides the trade reports to the Consolidated Tape Association ("CTA") for inclusion in the Consolidated Tape. As a participant in the CTA Plan, the NASD is entitled to a portion of the revenue that the CTA generates by selling this market data information. NASD's share of the revenues is based on trades that it reports on behalf of these broker-dealers in NYSE-listed

⁸ Nasdaq's InterMarket formerly was referred to as Nasdaq's Third Market. See Securities Exchange Act Release No. 42907 (June 7, 2000); 65 FR 37445 (June 14, 2002) (SR-NASD-00-323).

securities ("Tape A") and in Amex-listed securities ("Tape B").

The Transaction Credit Pilot Program (the "Program") began in 1999.⁹ Under the Program, Nasdaq shares a portion of the tape revenues that it receives (through the NASD) from the CTA, by providing a transaction credit to members who exceed certain levels of OTC trading activity in NYSE and Amex securities. The Program helps InterMarket market makers and investors lower costs associated with trading listed securities. The Program is also an important tool for Nasdaq to compete against other exchanges (particularly CSE and CHX) that offer similar programs¹⁰ and thereby maintain market share in listed securities.

Under the Program, Nasdaq calculates two separate pools of revenue from which credits can be earned: one representing 40% of the gross revenues received from the CTA for providing trade reports in NYSE-listed securities executed in the InterMarket for dissemination by the CTA (Tape A), the other representing 40% of the gross revenue received from the CTA for reporting Amex trades (Tape B). Eligibility for transaction credits is based on concurrent quarterly trading activity. For example, an InterMarket participant that enters the market for Tape A or Tape B securities during a particular quarter and prints an average of 500 daily trades of Tape A securities during the time it is in the market, or that averages 500 Tape B prints during such quarter, would be eligible to receive transaction credits based on its trades during that quarter. Only those members that continue to average an appropriate daily execution level are eligible for transaction credits. Eligible members receive a *pro-rata* portion of the Tape A and/or Tape B pool, as applicable.

The Program was scheduled to expire on June 30, 2002. Nasdaq submitted a

⁹ See Securities Exchange Act Release No. 41174 (March 16, 1999), 64 FR 14034 (March 23, 1999) (SR-NASD-99-13). The SEC issued notice of subsequent extensions of the Program. See Securities Exchange Act Release Nos. 42095 (November 3, 1999), 64 FR 61680 (November 12, 1999) (SR-NASD-99-59); 42672 (April 12, 2000), 65 FR 21225 (April 20, 2000) (SR-NASD-00-10); 42907 (June 7, 2000), 65 FR 37445 (June 14, 2000) (SR-NASD-00-32); 43831 (January 10, 2001), 66 FR 4882 (January 18, 2001) (SR-NASD-00-72); 44098 (March 23, 2000), 66 FR 17462 (March 30, 2001) (SR-NASD-01-15); 44734 (August 22, 2001), 66 FR 4537 (August 26, 2001) (SR-NASD-2001-42); and 45273 (January 14, 2002); 67 FR 2716 (January 18, 2002) (SR-NASD-2001-92).

¹⁰ See Securities Exchange Act Release No. 38237 (February 4, 1997), 62 FR 6592 (Feb. 12, 1997) (SR-CHX-97-01) and Securities Exchange Act Release No. 39395 (December 3, 1997), 62 FR 65113 (December 10, 1997) (SR-CSE-97-12).

proposed rule change on June 13, 2002 to extend the Program through December 31, 2002, and to modify the Program by providing transaction credits to the liquidity provider in a transaction rather than the reporting party.¹¹ On July 2, 2002, the Commission summarily abrogated SR-NASD-2002-68 and certain filings of the CSE and The Pacific Exchange, Inc. related to market data revenue sharing.¹² However, revenue sharing programs for Tape A and Tape B offered by the CSE and CHX remain in effect. Accordingly, Nasdaq, after consultation with Commission staff, is reinstating the Program, as it was in effect during the first half of 2002, to prevent competitive disparities from arising.

2. Statutory Basis

Nasdaq believes that the proposal is consistent with the Act, including section 15A(b)(5) of the Act,¹³ 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,¹⁴ which requires rules that are not designed to permit unfair discrimination between customers, issuers, brokers or dealers. By reinstating the Program, the proposed rule change will allow overall fees for InterMarket to remain at the level they were at during the first six months of 2002.

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.

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

Because the foregoing proposed rule change does not:

¹¹ See Securities Exchange Act Release No. 46153 (July 1, 2002), 67 FR 45164 (July 8, 2002) (SR-NASD-2002-68).

¹² See Securities Exchange Act Release No. 46159 (July 2, 2002), 67 FR 45775 (SR-NASD-2002-61, SR-NASD-2002-68, SR-CSE-2002-06, and SR-PCX-2002-37) (order of summary abrogation).

¹³ 15 U.S.C. 78o-3(b)(5).

¹⁴ 15 U.S.C. 78o-3(b)(6).

(i) Significantly affect the protection of investors or the public interest;

(ii) Impose any significant burden on competition; and

(iii) Become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A) of the Act¹⁵ and Rule 19b-4(f)(6) thereunder.¹⁶ At any time within 60 days of the filing of the 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.

Nasdaq has requested that the Commission waive the 5-day pre-filing notice requirement and the 30-day operative delay. The Commission believes waiving the 5-day pre-filing notice requirement and the 30-day operative delay is consistent with the protection of investors and the public interest. Acceleration of the operative date will allow Nasdaq to reinstate the Program effective as of July 1, 2002, thereby eliminating competitive disparities between self-regulatory organizations that offer tape revenue sharing programs. For these reasons, the Commission designates the proposal to be effective and operative upon filing with the Commission.¹⁷

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal 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

¹⁵ 15 U.S.C. 78s(b)(3)(A).

¹⁶ 17 CFR 240.19b-4(f)(6).

¹⁷ For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

available for inspection and copying at the principal office of the Association. All submissions should refer to file number SR-NASD-2002-94 and should be submitted by August 15, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁸

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46234; File No. SR-NASD-2002-73]

Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Nasdaq Testing Facility Fees, and Adding the Ability to Test Computer-to-Computer Interface, Application Programming Interface, and Market Data Vendor Feeds Over Dedicated Circuits

July 19, 2002.

On June 4, 2002, 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"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-thereunder,² a proposed rule change to apply the same schedule of fees in SR-NASD-2002-72³ to non-member subscribers that use a dedicated circuit or circuits to test their communication interfaces and/or market data vendor feeds with Nasdaq's central processing facilities. The fees consist of monthly fees and one-time installation fees, and would be charged in addition to the hourly fees currently charged. The proposed rule change was published for notice and comment in the **Federal Register** on June 18, 2002.⁴ The Commission received no comments on the proposed rule change.

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

association⁵ and, in particular, the requirements of section 15A(b)(5),⁶ which requires the rules of a national securities association to provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility which the association operates or controls. The Commission finds the proposed rule change is consistent with section 15A(b)(5) because the same fees will be charged to member and non-member subscribers that choose to test their communication systems interfaces with Nasdaq's central processing facilities over a dedicated circuit or circuits. The Commission accepts Nasdaq's representation that the fees are reasonable because the fees have been calculated to recover Nasdaq's actual costs of installation and maintenance of the dedicated circuit(s).

It is therefore ordered, pursuant to section 19(b)(2) of the Act⁷, that the proposed rule change (SR-NASD-2001-73) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁸

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02-18843 Filed 7-24-02; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46214; File No. SR-Phlx-2001-63]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Order Approving Proposed Rule Change and Amendment Nos. 1 and 2 Thereto and Notice of Filing of and Order Granting Accelerated Approval to Amendment No. 3 Relating to New Product Allocations

July 16, 2002.

I. Introduction

On June 18, 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"),¹ and Rule 19b-4 thereunder,² a proposed rule change

relating to new product allocations. On February 28, 2002, the Phlx submitted Amendment No. 1 to the proposed rule change.³ On April 5, 2002, the Phlx submitted Amendment No. 2 to the proposed rule change.⁴ On May 2, 2002, notice of the proposed rule change and Amendment Nos. 1 and 2 thereto was published in the **Federal Register**.⁵ The Commission received no comments on the proposed rule change, as amended by Amendment Nos. 1 and 2. On June 25, 2002, the Phlx filed Amendment No. 3 to the proposed rule change with the Commission.⁶ This order approves the proposed rule change, as amended, and grants accelerated approval to Amendment No. 3. The Commission is also soliciting comments on Amendment No. 3 from interested persons.

II. Description of Proposal

The Phlx proposes to amend Phlx Rule 511(b), Allocations, to permit the Equity Allocation, Evaluation and Securities Committee and the Options Allocation, Evaluation and Securities Committee (collectively "Committees") to allocate a new product⁷ to an eligible

³ See letter from Linda C. Christie, Counsel, Phlx, to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated February 26, 2002 ("Amendment No. 1").

⁴ See letter from Linda C. Christie, Counsel, Phlx, to Nancy J. Sanow, Assistant Director, Division, Commission, dated April 4, 2002 ("Amendment No. 2").

⁵ See Securities Exchange Act Release No. 45824 (April 25, 2002), 67 FR 22144.

⁶ See letter from Linda S. Christie, Counsel, Phlx, to Kelly McCormick-Riley, Senior Special Council, Division, Commission, dated June 25, 2002 ("Amendment No. 3"). In Amendment No. 3, the Phlx clarified that the three types of business transactions enumerated in proposed Phlx Rule 511(b)(ii) are not the type of business transactions contemplated under Phlx Rule 1023. The Phlx explained that for purposes of its proposed Rule 511(b)(ii), its Rule 1023 shall be deemed to prohibit only business transactions which are material in value either to the issuer or the specialist, would provide access to material non-public information relating to the issuer, or would provide access to material non-public information relating to the issuer, or would give rise to a control relationship between the issuer and the specialist unit. The receipt of routine business services, goods, materials, insurance, on terms that would be generally available shall not be deemed a business transaction for the purposes of Phlx Rule 1023. The Phlx further elaborated that license agreements, trademarks, tradenames and intellectual property are routine business services that are generally available through an issuer and that these types of transactions do not give rise to the possibility of the specialist unit being controlled an issuer. The Phlx also represented that the transactions contemplated in proposed Phlx Rule 511(b)(ii) do not provide access to non-public information relating to the issuer. Rather, these types of business agreements between the parties are routine in nature and are not deemed prohibited transactions per Phlx Rule 1023.

⁷ Phlx proposes to define a new product for purposes of Phlx Rule 511(b)(i) as anything other

Continued

¹⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 46065 (June 12, 2002), 67 FR 41556 (June 18, 2002).

⁴ Securities Exchange Act Release No. 46066 (June 12, 2002), 67 FR 41554.

⁵ 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).

⁶ 15 U.S.C. 78o-3(b)(5).

⁷ 15 U.S.C. 78s(b)(2).

⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.