harbor from the definition of investment company for certain *bona fide* research and development companies.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 942–7070.

Dated: November 19, 2002.

Jonathan G. Katz,

Secretary.

[FR Doc. 02–29821 Filed 11–19–02; 4:18 pm]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46843; File No. SR–NASD–2002–33]

Self Regulatory Organizations; Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 5 to the Proposed Rule Change by the National Association of Securities Dealers, Inc., Relating to Fees for Nasdaq Data Entitlement Packages

November 18, 2002.

I. Introduction

On March 7, 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 ("SEC" or "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 to establish fees for new Nasdaq market data products. On April 25, 2002, Nasdaq filed Amendment No. 1 that entirely replaced the original rule filing.[3] On July 29, 2002, Nasdaq filed Amendment No. 2 that entirely replaced the original rule filing and Amendment No. 1.[4] On August 23, 2002, Nasdaq filed Amendment No. 3 that entirely replaced the original rule filing and Amendment Nos. 1 and 2.[5] On September 13, 2002,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Letter from Mary M. Dunbar, Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated April 25, 2002.

[4] *See* Letter from Mary M. Dunbar, Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated July 26, 2002.

[5] *See* Letter from Mary M. Dunbar, Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated August 22, 2002.

the Nasdaq submitted Amendment No. 4 that entirely replaced the original rule filing and Amendment Nos. 1, 2, and 3.[6] The proposed rule change, as amended, was published for comment in the **Federal Register** on September 27, 2002.[7] The Commission did not receive any comments on the proposed rule change. On October 3, 2002, Nasdaq filed Amendment No. 5 to the proposed rule change.[8] This order approves the proposed rule change, as amended, and notices and grants accelerated approval to Amendment No. 5.

II. Description of the Proposal

Nasdaq proposes to amend NASD rule 7010 to establish fees for new Nasdaq data entitlement packages. In its rule filings regarding SuperMontage,[9] Nasdaq described its new data feeds and products: the Nasdaq Prime data feed, which will provide the new data for a Nasdaq entitlement package called "TotalView," and the Aggregate Depth at Price ("ADAP") data feed, which will provide the new data entitlement packages called "DepthView" and "PowerView".[10]

A. TotalView

TotalView will provide, on a real-time basis: (1) All individual attributable quote/order information at the five best price levels displayed by the Nasdaq SuperMontage system; (2) the aggregate size of all unattributed quotes or orders at each of the top five price levels, on both sides of the market, that are in the SuperMontage system; (3) the aggregate attributable and unattributable quotes and orders at each of the top five price levels, on both sides of the market, that are in the SuperMontage system; (4) the quote and order data found in the Nasdaq Quotation Dissemination

[6] *See* Letter from Mary M. Dunbar, Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated September 13, 2002.

[7] *See* Securities Exchange Act Release No. 46521 (September 20, 2002), 67 FR 61179 ("notice").

[8] *See* Letter from Mary M. Dunbar, Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated October 3, 2002 ("Amendment No. 5"). In Amendment No. 5, Nasdaq corrected grammatical errors in the rule language text of the proposed rule change; amended a footnote to the rule language text to state that Nasdaq itself is a distributor of its data feed(s); and added a footnote to rule 7010(q)(2)(A) stating that Nasdaq is a distributor of its data feed(s) and will execute a Nasdaq distributor agreement and pay the distributor charge.

[9] These rule filings were approved by the Commission in Securities Exchange Act Release Nos. 43863 (January 19, 2001), 66 FR 8020 (January 26, 2001) and 45790 (April 19, 2002), 67 FR 21007 (April 29, 2002).

[10] As described further below, PowerView includes data from ADAP and the NQDS data feed.

Service ("NQDS")[11] data feed, including the best attributed quotation from each Nasdaq participant, and (5) the Nasdaq Inside Price. Nasdaq proposes to charge distributors[12] of TotalView $7500.00 per month. In addition, Nasdaq proposes to charge $150.00 per month per controlled device.[13] According to Nasdaq, TotalView will use significantly more bandwidth than any Nasdaq data entitlement to date. In addition, Nasdaq believes that this data product is highly specialized and thus has not proposed a non-professional fee at this time.

B. DepthView

DepthView will provide the aggregated size at each of the top five price levels, both on the bid and the ask, within the Nasdaq SuperMontage system. Nasdaq proposes to charge $50.00 per month for each controlled device and $25.00 per month for each controlled device of a non-professional.[14] According to Nasdaq,

[11] The NQDS data feed currently consists of: (1) Real-time quotes for each Market Maker and Electronic Communication Network ("ECN") in NASDAQ National Market and SmallCap issues; (2) real-time best bid or offer ("BBO") quotes for each regional UTP exchange that quotes in NASDAQ-listed issues; and (3) real-time National BBO quote appendages for NASDAQ National Market and SmallCap issues. Telephone conversation between Eleni Constantine, Associate General Counsel, Office of General Counsel, Nasdaq and Susie Cho, Special Counsel, Division, Commission, September 19, 2002.

[12] Nasdaq proposes that a "distributor" be defined as any firm that receives a Nasdaq data feed directly from Nasdaq or indirectly through another vendor and then distributes it either internally or externally. Further, Nasdaq proposes that all distributors execute a Nasdaq distributor agreement. Nasdaq itself is a distributor if its data feeds. Accordingly it must execute an agreement and pay the distributor fee.

[13] Nasdaq proposes that a "controlled device" be defined as any device that a distributor of the Nasdaq Data Entitlement Package(s) permits to: (a) Access the information in the Nasdaq Data Entitlement Package(s); or (b) communicate with the distributor so as to cause the distributor to access the information in the Nasdaq Data Entitlement Package. If a controlled device is part of an electronic network between computers used for investment, trading or order routing activities, the burden will be on the distributor to demonstrate that the particular controlled device should not have to pay for an entitlement. For example, in some display systems the distributor gives the end user a choice to see the data or not'a user that chooses not to see it would not be charged. Similarly, in a non-display system, users of controlled devices may have a choice of basic or advanced computerized trading or order routing services, where only the advanced version uses the information. Customers of the basic service would be excluded from the entitlement requirement.

[14] Nasdaq proposes that a "non-professional" be defined as a natural person who is neither: (a) Registered or qualified in any capacity with the Commission, the Commodity Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (b) engaged as an "investment advisor"

Continued

DepthView requires more processing capacity to calculate its five aggregated price levels on each side of the market. Nasdaq represented that the price for DepthView was based on the increased processing capacity needed and a review of the prices charged by other major exchanges for aggregated order data.

C. PowerView

PowerView will include both the data available through DepthView and the data available in the NQDS data feed,[15] including the best-attributed quotation from each Nasdaq participant in each Nasdaq National Market and Small Cap Market stock. Nasdaq proposes to charge $75.00 per month per controlled device and $29.00 per month per controlled device of non-professionals.

III. Discussion

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association,[16] and in particular, the requirements of section 15A(b)(5) of the Act,[17] which requires that the rules of an association 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 association operates or controls. Specifically, the Commission believes that the NASD's proposed charges for these new data products are reasonable when compared to similar types of services provided by other markets.[18] Further, Nasdaq has represented that these new data products will provide more market data than currently provided and will require significantly more bandwidth and systems capacity.

Nasdaq has proposed lower fee charges for non-professionals for DepthView and PowerView. The Commission believes that should

provide an opportunity for many investors to have access to the enhanced data provided by these services, which should help to increase transparency. Nasdaq represented that it may consider a non-professional fee for TotalView in the future.

Nasdaq has proposed a new definition for controlled devices. With this new definition, Nasdaq will impose charges on all devices that have the capacity to either access or to utilize a particular data feed, whether the controlled device displays the data, ''receives'' the data, or has the ability to utilize the data even though the data remains on another device. A distributor is required to pay the controlled device fee for all such devices that are part of a network that receives a particular data feed. Nasdaq has proposed, however, that distributors that can demonstrate that a particular controlled device in fact has no capacity to access or use the data will not be charged the controlled device fee. The Commission believes that the proposed definition of controlled device is consistent with the requirements of the Act, which permits an association to impose reasonable fees on persons who are using a facility or system of such association.

In its notice, Nasdaq represented that it will not impose any restrictions on redistribution of the data products to qualified vendors and broker-dealers that have entered into Distributor Agreements with Nasdaq. According to Nasdaq, its display requirements are covered by the Distributor Agreements. The Commission notes that this order only approves the fees proposed by Nasdaq for the data products and therefore, the Commission is not approving or disapproving the terms of Nasdaq's Distributor Agreements.

Finally, the Commission notes that Nasdaq has acknowledged that persons who subscribe to receive the new data products, to the extent that they act as a vendor, must comply with the requirements of the Vendor Display rule.[19] Specifically, the Vendor Display rule establishes minimum requirements governing the manner in which transaction, quotation, and other market information is displayed in certain exchange-listed and Nasdaq-listed securities (''subject securities''). Generally, under the rule, vendors that provide quotation information with respect to subject securities must provide a consolidated display of quotation information from all reporting

market centers for that security. Because DepthView, PowerView, and TotalView do not, individually, satisfy the consolidated display requirement of the rule, vendors, including Nasdaq itself to the extent it acts as a vendor, will need to disseminate additional quotation information along with these data products to comply with the rule. In this connection, the Commission notes that Nasdaq has put statements to this effect on its website description of these services and it its subscription contracts.

The Commission finds good cause for approving Amendment No. 5 to the proposed rule change prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. Amendment No. 5 merely provides technical corrections and clarification to the proposed rule text, which was reflected in the notice of the proposed rule change. The Commission, therefore, believes that granting accelerated approval of Amendment No. 5 is appropriate and consistent with section 15A(b)(6)[20] and section 19(b)[21] of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 5, 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 20549–0609. 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 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 NASD. All submissions should refer to File No. SR–NASD–2002–33 and should be submitted by December 13, 2002.

V. Conclusion

For the reasons discussed above, the Commission finds that the proposal, as amended, is consistent with the Act and the rules and regulations thereunder. It is therefore ordered, pursuant to section

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as that term is defined in section 201(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); nor (c) employed by a bank or other organization exempt from registration under federal or state securities law to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt.

[15] *See note 11, supra.*

[16] 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).

[17] 15 U.S.C. 78o–3(b)(5).

[18] For example, the New York Stock Exchange's OpenBook service has a monthly charge of $5000.00 for receipt of the data feed and $50.00 for each end-user terminal. *See* Securities Exchange Act Release No. 45138 (December 7, 2001), 66 FR 64895 (December 14, 2001).

[19] 17 CFR 240.11Ac1–2. Vendors purchasing data feeds from Nasdaq are likewise responsible for their compliance with the Vendor Display rule. *See also* notice, *supra* note 7.

[20] 15 U.S.C. 78o–3(b)(6).
[21] 15 U.S.C. 78s(b).

19(b)(2) of the Act,[22] that the proposed rule change (SR–NASD–2002–33), as amended, be and hereby is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[23]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 02–29761 Filed 11–21–02; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46840; File No. SR–Phlx–2002–59]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. To Extend Its Pilot Program To Disengage Its Automatic Execution System (''AUTO–X'') for a Period of Thirty Seconds After the Number of Contracts Automatically Executed in a Given Option Meets the AUTO–X Minimum Guarantee for That Option

November 15, 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 October 2, 2002, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in items I and II 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 and to approve the proposal, on an accelerated basis, for an additional six-month pilot, to expire on May 30, 2003.

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

The Phlx proposes to extend, for an additional six months, its pilot program effecting a systems change to AUTO–X, the automatic execution feature of the Exchange's Automated Options Market System (''AUTOM''),[3] that would

disengage AUTO–X for a period of thirty seconds after the number of contracts automatically executed in a given option meets the AUTO–X minimum guarantee for that option. The pilot program was originally approved on a six-month basis for a limited number of eligible options,[4] and subsequently extended for an additional six-month period.[5] Subsequently, the number of options eligible for the pilot was expanded to include all Phlx-traded options.[6] The pilot has since been extended twice for additional six-month periods, the latest extension is scheduled to expire November 30, 2002.[7]

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 III 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 Phlx proposes to extend the pilot program for an additional six-month period. On December 1, 2000, the Initial Pilot Program became effective.[8] The pilot program was then extended several times and is currently scheduled to end on November 30, 2002.[9] The pilot program includes the following features:

AUTOM's automatic execution feature, AUTO–X. Equity option and index option specialists are required by the Exchange to participate in AUTOM and its features and enhancements. Option orders entered by Exchange members into AUTOM are routed to the appropriate specialist unit on the Exchange's trading floor.

[4] *See* Securities Exchange Act Release No. 43652 (December 1, 2000), 65 FR 77059 (December 8, 2000) (SR–Phlx–00–96) (''Initial Pilot Program'').

[5] *See* Securities Exchange Act Release No. 44362 (May 29, 2001), 66 FR 30037 (June 4, 2001) (SR–Phlx–2001–56).

[6] *See* Securities Exchange Act Release No. 44760 (August 31, 2001), 66 FR 47253 (September 11, 2001) (SR–Phlx–2001–79).

[7] *See* Securities Exchange Act Release Nos. 45862 (May 1, 2002), 67 FR 30990 (May 8, 2002) (SR-Phlx-2002–22) (''Last Extension''); and 45090 (November 21, 2001), 66 FR 59834 (November 30, 2001) (SR–Phlx–2001–100).

[8] *See supra* note 4.

[9] *See* Last Extension, *supra* note 7.

• Once an automatic execution occurs in an option via AUTO–X, the system would begin a ''counting'' program, which would count the number of contracts executed automatically for that option, up to the maximum guaranteed AUTO–X size,[10] regardless of the number of executions.

• When the number of contracts executed automatically for that option meets the maximum guaranteed AUTO–X size within a fifteen second time frame, the system would cease to automatically execute for that option, and would drop all AUTO–X eligible orders in that option for manual handling by the specialist for a period of thirty seconds to enable the specialist to refresh quotes in that option.[11]

• Upon the expiration of thirty seconds, automatic executions would resume and the ''counting'' program would be set to zero and begin counting the number of contracts executed automatically within a fifteen second time frame again, up to the maximum guaranteed AUTO–X size.

• Again, when the number of contracts automatically executed meets the maximum guaranteed AUTO–X size within a fifteen second time frame, the system would drop all subsequent AUTO–X eligible orders for manual handling by the specialist for a period of thirty seconds.

A significant purpose of this pilot program is to enable the Exchange to move towards the dissemination of

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[10] Recently, the Exchange filed proposed amendments to Exchange Rule 1080(c) to provide automatic executions for eligible orders at the Exchange's disseminated size, subject to a minimum and maximum AUTO–X eligible size range, on an issue-by-issue basis. *See* SR–Phlx–2002–39 (submitted July 2, 2002), and Amendment No. 1 thereto (submitted August 23, 2002). Under that proposal, the maximum guaranteed AUTO–X size may be for a different number of contracts for customer orders than for broker-dealer orders. Upon implementation of that proposal, subject to Commission approval, when the maximum guaranteed AUTO–X size in an option is for a different number of contracts for customer orders than for broker-dealer orders, AUTO–X would be disengaged when the larger of the two maximum guaranteed AUTO–X sizes for the particular option is exhausted.

[11] Any orders delivered in excess of the minimum AUTO–X guarantee will be executed to the guaranteed amount and the excess will be dropped to the specialist for manual execution. *See* Initial Pilot Program, *supra* note 4. The Exchange has represented that, for the thirty seconds that AUTO–X is disengaged, the specialist will be required to honor the disseminated quote unless the specialist is in the process of refreshing his or her quote. The Exchange has further represented that, generally, it should not take the specialist the full thirty seconds to update his or her quote, and that the Exchange will surveil for any potential abuse. Telephone conversation between Richard S. Rudolph, Counsel, Phlx, and Sonia Patton, Special Counsel, Division of Market Regulation (''Division''), Commission, on November 7, 2002.

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[22] 15 U.S.C. 78s(b)(2).

[23] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] AUTOM is the Exchange's electronic order delivery and reporting system, which provides for the automatic entry and routing of equity option and index option orders to the Exchange trading floor. Orders delivered through AUTOM may be executed manually, or certain orders are eligible for