

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

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

Because the foregoing proposed rule change, as amended, does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if the proposal is consistent with the protection of investors and the public interest; and the Exchange has given the Commission written notice of its intention to file the proposed rule change at least five business days prior to filing, or such shorter time as designated by the Commission, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>10</sup> and Rule 19b-4(f)(6)<sup>11</sup> thereunder. 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.<sup>12</sup> The Commission has decided to waive the 30 day operative delay and designates that the proposal become operative upon filing with the Commission because the proposed rule change permits the implementation of all-or-none, stop, and stop limit orders in a manner consistent with the protection of investors and the public interest.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the amended 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 available for inspection and copying at the principal office of the ISE.

All submissions should refer to File No. SR-ISE-2003-25 and should be submitted by December 19, 2003.

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. 34-48812; File No. SR-NASD-2003-160]

**Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc. Regarding Reporting of Transactions Conducted Through Electronic Communications Networks to the Automated Confirmation Transaction Service**

November 20, 2003.

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> notice is hereby given that on October 27, 2003, 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") the proposed rule change as described in Items I, II and III below, which Items have been prepared by Nasdaq. Nasdaq filed the proposal pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the

Commission.<sup>5</sup> The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

Nasdaq proposes to amend NASD Rule 6130 to further clarify the reporting requirements applicable to transactions conducted through electronic communications networks ("ECNs") and reported to the Automated Confirmation Transaction Service ("ACT"). These reporting requirements were recently codified by SR-NASD-2003-98.<sup>6</sup> Nasdaq is also proposing to delay until November 10, 2003 the implementation of rule changes effected by SR-NASD-2003-98.

The text of the proposed rule change is set forth. Proposed new language is in italics; proposed deletions are in brackets.

\* \* \* \* \*

6100. AUTOMATED CONFIRMATION TRANSACTION SERVICE (ACT)

6130. Trade Report Input

(a)-(b) No change.

(c) Which Party Inputs Trade Reports to ACT

ACT Participants shall, subject to the input requirements below, either input trade reports into the ACT system or utilize the Browse feature to accept or decline a trade within the applicable time-frames as specified in paragraph (b) of this Rule. Trade data input obligations are as follows:

(1)-(5) No change.

(6) in transactions conducted through two ACT ECNs or an ACT ECN AND an ECN that is not an ACT ECN, an ACT ENC shall be responsible for complying with the requirements of paragraph (5) above for reporting a transaction executed through its facilities, and an ECN that routed an order to it for execution shall be deemed to be *and Order Entry Firm* [a Market Maker] for purposes of the rules for determining reporting parties reflected in paragraphs (1), [(2),] (3), and (4) above; and

(7) No change.

(d)-(e) No change.

\* \* \* \* \*

<sup>5</sup> 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) and 17 CFR 240.19b-4(f)(6)(iii).

<sup>6</sup> Securities Exchange Act Release No. 48442 (September 4, 2003), 68 FR 53767 (September 12, 2002).

<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>11</sup> 17 CFR 240.19b-4(f)(6).

<sup>12</sup> For purposes of calculating the 60-day abrogation period, the Commission considers the period to have commenced on November 13, 2003, the date the ISE filed Amendment No. 1.

<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> 15 U.S.C. 78s(b)(3)(A).

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

## 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 any 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 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

In SR-NASD-2003-98, Nasdaq recently amended the various NASD rules governing trade reporting to define with greater clarity the reporting obligations applicable to transactions executed through ECNs that are reported to ACT.<sup>7</sup> In general, SR-NASD-2003-98 was not intended to require ECNs to modify their current trade reporting practices. Rather, the purpose of the filing was to codify these practices in the form of clear, enforceable rules to provide greater guidance to market participants.

Since the approval of SR-NASD-2003-98, however, several ECNs have informed Nasdaq that one aspect of the rule change would result in an alternation of current practices (and associated programming costs), and Nasdaq has concluded that this alternation would not result in any offsetting benefit. NASD Rule 6130 provides that where one ECN routes an order to another ECN that executes the order, the ECN that executes the order would be responsible for reporting the transaction, or requiring a subscriber to report the transaction, in accordance with one of the three basic methods for trade reporting established by the rule. For purposes of allocating trade reporting responsibility between ECN subscribers, the routing ECN would be deemed to be a *market maker*. The ECNs that are affected by this rule have informed Nasdaq, however, that in such circumstances they have treated the routing ECN as an *order entry firm*. Thus, where an executing ECN reports trades for its subscribers and identifies a subscriber as the reporting party, when the ECN receives an order from a

routing ECN that is matched against the order of an order entry firm or another ECN, the sell side has generally been identified as the reporting party. If the executing ECN matched the routed order against the order of a market maker, however, the market maker has been identified as the reporting party. The same priority rules would also apply when the executing ECN uses the trade reporting model in which it requires one of its subscribers to report the trade.

The benefit sought to be gained from SR-NASD-2003-98 was to enhance predictability and enforceability by codifying existing practices. In keeping with these goals, Nasdaq believes that it is acceptable for executing ECNs to treat routing ECNs as order entry firms. Thus, Nasdaq proposes to amend NASD Rule 6130(c)(6) accordingly.

In order to allow for adequate notice to market participants of this additional change, Nasdaq is also proposing to delay the effective date of SR-NASD-2003-98 for an additional two weeks, until November 10, 2003. Nasdaq had previously delayed this effective date from October 6, 2003 until October 27, 2003.<sup>8</sup> Nasdaq will inform market participants of the delay and the rule change through a Head Trader Alert posted on [www.nasdaqtrader.com](http://www.nasdaqtrader.com).

#### 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,<sup>9</sup> in general, and with Section 15A(b)(6) of the Act,<sup>10</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and to protect investors and the public interest. The proposed rule change will clarify the trade reporting obligations associated with transactions conducted through ECNs but will minimize the extent to which ECNs will be required to implement non-substantive modifications to existing practices.

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

Nasdaq does not believe that the proposed rule change will 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

The Exchange has neither solicited nor received written comments on the proposed rule change.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate; and the Exchange has given the Commission written notice of its intention to file the proposed rule change at least five business days prior to filing, or such shorter time as designated by the Commission, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>11</sup> and Rule 19b-4(f)(6)<sup>12</sup> thereunder. 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 both the trade reporting rules approved by the Commission in SR-NASD-2003-98 and the minor modification to those rules proposed in SR-NASD-2003-160 to take effect without undue delay, thereby lessening the extent to which ECNs that use ACT would be required to make non-substantive modifications to their existing trade reporting practices.<sup>13</sup>

## 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

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>12</sup> 17 CFR 240.19b-4(f)(6).

<sup>13</sup> 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).

<sup>7</sup> Securities Exchange Act Release No. 48442 (September 4, 2003), 68 FR 53767 (September 12, 2002) (SR-NASD-2003-98) (approval order).

<sup>8</sup> Securities Exchange Act Release No. 48625 (October 10, 2003), 68 FR 59961 (October 20, 2003) (SR-NASD-2003-152).

<sup>9</sup> 15 U.S.C. 78o-3.

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

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 Nasdaq. All submissions should refer to File No. SR-NASD-2003-160 and should be submitted by December 19, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>14</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48816; File No. SR-Phlx-2003-10]

### Self-Regulatory Organizations; Order Granting Approval to Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to Remote Primary Specialists

November 20, 2003.

On February 26, 2003, the Philadelphia Stock Exchange, Inc. ("Phlx") 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 permit "primary specialists" to trade away from the Phlx floor in limited circumstances. The proposed rule change was published for comment in the **Federal Register** on September 29, 2003.<sup>3</sup> The Commission received no comments on the proposal. This order approves the Phlx's proposed rule change.

Under Phlx Rule 460, multiple specialists, one of which is identified as the "primary specialist,"<sup>4</sup> currently may trade a particular security on the equity trading floor of the Phlx.<sup>5</sup> Prior to the adoption of Phlx Rules 460 and 229A, each equity security traded on the floor of the Phlx was allocated to only one specialist unit. Phlx Rule 460 allows approved specialist units to trade one or more securities as "competing specialists."<sup>6</sup> There must be a primary specialist in a particular security in order for there to be competing specialists in that security.<sup>7</sup> Competing specialists have the same affirmative and negative obligations under Phlx Rule 203 as primary specialists.

Pursuant to Phlx Rule 461, the Phlx also operates a program whereby competing Phlx specialist units conduct specialist trading activities off the Phlx trading floor using PACE<sup>8</sup> terminals and related equipment. The Commission granted approval of the Phlx's remote competing specialist program subject to the condition that the Phlx "have in 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")."<sup>9</sup>

The Phlx now proposes to establish a similar program whereby primary specialists would be permitted to conduct specialist trading activities off

the Phlx trading floor.<sup>10</sup> The Phlx has represented that its current rules, policies, and practices with respect to information barriers and surveillance are adequate to support remote trading by primary specialists at the Phlx.<sup>11</sup> Moreover, the Phlx has represented that it will examine remote primary specialist locations to ensure adequate compliance with Phlx rules.<sup>12</sup> Thus, the Commission believes that Phlx has addressed confidentiality issues associated with allowing remote primary specialists to trade from remote locations in proximity to a diversified broker-dealer's other off-floor operations. Member firms' traders should not get a market advantage because of their physical proximity to a specialist trading unit, and *vice versa*. Based, in part, on the Phlx's representation that it has in place adequate information barrier policies and surveillance procedures, the Commission is approving the Phlx's remote primary specialist proposal.

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>13</sup> Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>14</sup> which requires, among other things, that the Phlx's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in, securities, to remove impediments to and perfect the mechanism of a free and open market and a national market

<sup>4</sup> Phlx Rule 229A(b)(5) defines "primary specialist" as follows:

"Primary Specialist" shall mean the primary specialist identified as such by the Equity Allocation, Evaluation, and Securities Committee. The Primary Specialist may be either the Directed Specialist or the Non-Directed Specialist in the case of any particular Directed Order. The Primary Specialist shall be deemed to be the Directed Specialist with respect to any Non-Directed Order.

<sup>5</sup> See Securities Exchange Act Release No. 45183 (December 21, 2001), 67 FR 118 (January 2, 2002) (order approving establishment of a competing specialist program at the Phlx) (SR-Phlx-2001-97).

<sup>6</sup> Phlx Rule 229A(b)(6) defines "competing specialist" as follows:

"Competing Specialist" shall mean any competing specialist identified as such by the Equity Allocation, Evaluation, and Securities Committee pursuant to [Phlx] Rule 460. A Competing Specialist may be either the Directed Specialist or the Non-Directed Specialist in the case of any particular Directed Order.

<sup>7</sup> A Phlx specialist may trade some securities on a primary basis and other securities on a competing basis, or made trade all its securities on either a primary or a competing basis.

<sup>8</sup> PACE is the electronic order routing, delivery execution, and reporting system used to access the Phlx Equity Floor. See Phlx Rules 229 and 229A.

<sup>9</sup> Securities Exchange Act Release No. 45184 (December 21, 2001), 67 FR 622 (January 4, 2002) (order approving the establishment of the Phlx's remote specialist program) (SR-Phlx-2001-98).

<sup>10</sup> The Commission reiterates that while the remote specialist program, which now includes primary specialists, may have the effect of attracting additional order flow to the Phlx, this must occur consistent with best execution principles. Accordingly, the broker-dealer must rigorously and regularly examine the executions likely to be obtained for customer orders in the different markets trading the security, in addition to any other relevant considerations in routing customer orders.

<sup>11</sup> Telephone conversation between Carla Behnfeldt, Director, Legal Department New Product Development Group, Phlx, and Patrick M. Joyce, Special Counsel, Division of Market Regulation, Commission, on November 19, 2003.

<sup>12</sup> Telephone conversation between Edith Hallahan, Deputy General Counsel, Phlx, and Florence Harmon, Senior Special Counsel, Division of Market Regulation, Commission, on November 20, 2003.

<sup>13</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>14</sup> 15 U.S.C. 78f(b)(5).

<sup>14</sup> 17 CFR 200.30-3(a)(12).

<sup>15</sup> 15 U.S.C. 78s(b)(1).

<sup>17</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 48515 (September 22, 2003), 68 FR 56031 (September 29, 2003).