implement the technical changes that are contemplated in the proposed rule change.[12] The Commission finds that permitting the proposal to become effective immediately is consistent with the protection of investors and the public interest because it will make Amex's rules more comprehensible.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change 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 Exchange. All submissions should refer to File No. SR–AMEX–2001–79 and should be submitted by February 19, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 02–1956 Filed 1–25–02; 8:45 am]

BILLING CODE 8010–01–M

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

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45319; File No. SR–NASD–2001–69]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change, Amendment No. 1, and Amendment No. 2 Thereto 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

January 18, 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 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'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the NASD. On December 19, 2001, the NASD submitted Amendment No. 1 to the proposed rule change.[3] On January 16, 2002, the NASD submitted Amendment No. 2 to the proposed rule change.[4] 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

The NASD proposes to amend NASD Rule 4720 to delineate the use of SelectNet by UTP Exchanges. Proposed new language is in italics; proposed deletions are in brackets.[5]

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

[2] 17 CFR 240.19b–4.

[3] *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 from the proposed rule change language related to NASDAQ National Market Execution System (''NNMS'') trading through the quotes of UTP exchanges that do not participate in the NNMS.

[4] *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''). In Amendment No. 2, the NASD amended language that: (1) Incorrectly described SelectNet as being included within the rubric of the NNMS; (2) defined the term ''Non-Participating UTP Exchange;'' and (3) ambiguously referenced the ''Nasdaq system.''

[5] The NASD requested that the Commission alter the originally proposed rule language of Rule 4720(c)(i) to reflect the current name of the Nasdaq OTC/UTP Plan. Telephone message left by Katherine England, Assistant Director, Division of Market Regulation, Commission (January 18, 2002) for Jeffrey S. Davis, Assistant General Counsel, Office of General Counsel, Nasdaq (January 18, 2002), and response telephone message left by Jeffrey S. Davis for Katherine England (January 22, 2002).

4720. SelectNet Service

(a)–(b) No Change.

(c) Prohibition Regarding the Entry of Certain Preferenced Orders to Nasdaq National Market Execution System Market [Makers] *Participants*

(i) For purposes of this rule the term ''Participating UTP Exchange'' shall mean any registered national securities exchange that elects to participate in the Nasdaq National Market Execution System (''NNMS'') and that has unlisted trading privileges in Nasdaq-listed securities pursuant to the Joint Self-Regulatory Organization Plan Governing The Collection, Consolidation And Dissemination Of Quotation And Transaction Information For Nasdaq-Listed Securities Traded On Exchanges On An Unlisted Trading Privileges Basis; and

(ii) Non-Participating UTP Exchanges are prohibited from sending SelectNet preferenced orders. No member or Participating UTP Exchange shall direct a SelectNet preferenced order to a Non-Participating UTP Exchange.

(*iii*) *Participating UTP Exchanges must participate in SelectNet and the NNMS under the same conditions that apply to Nasdaq market makers, as set forth herein.*

(*iv*) No member *or Participating UTP Exchange* shall direct a SelectNet preferenced order to *an NNMS* [Nasdaq National Market Execution System (''NNMS'')] market maker (as defined in NASD Rule 4701) [(including that market maker's Agency Quote (as defined in NASD Rule 4613)]*, to an ECN that provides automatic execution against its quote through the NNMS, or to a Participating UTP Exchange,* unless that order is designated as:

(A) A non-liability order that is entered as an ''All-or-None'' order (''AON'') and is at least one normal unit of trading (i.e. 100 shares) in excess of the displayed quote to which the preferenced order is directed; or

(B) A non-liability order that is entered as a ''Minimum Acceptable Quantity'' order (''MAQ''), with a MAQ value of at least one normal unit of trading in excess of the displayed quote to which the preferenced order is directed; or

(C) A non-liability order that is entered at a price that is inferior to the displayed quote to which the preferenced order is directed.

(*v*) The prohibition of this paragraph shall not apply to[:] *SelectNet preferenced orders sent by a member, or a Participating UTP Exchange to an ECN that does not provide automatic execution against its quote through NNMS.*

[(A) Preferenced orders sent by a UTP Exchange that does not elect to participate in the automatic execution functionality of the NNMS, to: (1) An NNMS market maker; (2) another UTP Exchange; (3) an ECN, regardless of whether the ECN provides an automatic execution against its quote through NNMS; or]

[(B) Preferenced orders sent by an NNMS market maker to: (1) A UTP Exchange that does not participate in the automatic execution functionality of the NNMS; (2) an ECN that does not provide an automatic execution against its quote through NNMS; or]

[(C) Preferenced orders sent by an ECN that does not provide an automatic execution against its quote through NNMS, to: (1) A UTP Exchange that does not elect to participate in the automatic execution functionality of the NNMS; (2) an ECN that does not provide an automatic execution against its quote through NNMS; or]

[(D) Preferenced orders sent by a UTP Exchange that elects to participate in the automatic execution functionality of the NNMS, to: (1) Another UTP Exchange that does not participate in the automatic execution functionality of NNMS; (2) an ECN that does not provide an automatic execution against its quote through NNMS.]

[(iv) For purposes of this rule the term ''UTP Exchange'' shall mean any registered national securities exchange that elects to participate in the NNMS and that has unlisted trading privileges in Nasdaq-listed securities pursuant to the Joint Self-Regulatory Organization Plan Governing The Collection, Consolidation And Dissemination Of Quotation And Transaction Information For Exchange-Listed Nasdaq/National Market System Securities Traded On Exchanges On An Unlisted Trading Privilege Basis (''Nasdaq UTP Plan''). In additional, participation in the NNMS by UTP Exchanges is voluntary. If a UTP Exchange elects to participate in the NNMS system, the provisions of this subparagraph shall apply to UTP Exchanges that choose to participate in the NNMS.]

* * * * *

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 NASD included statements concerning the purpose of and the 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

Nasdaq is proposing to amend NASD Rule 4720 to specify that a UTP Exchange will be permitted access to SelectNet on a similar basis that it is offered to NASD members. As a result, SelectNet will be available only in connection with participation in the Nasdaq National Market Execution System (''NNMS'') (hereinafter referred to as ''SuperSOES''). The rule change would bring Nasdaq market makers into parity with UTP Exchanges, as well as reduce the risk of dual liability for both Nasdaq market makers and UTP Exchanges participating in SuperSOES. As set forth in more detail below, 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.

The proposal is consistent with Nasdaq's long-standing goal to improve the quality of its market. Establishing SuperSOES as the primary platform for trading Nasdaq-listed securities is a critical step in that respect. 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, SuperSOES has not had a significant negative impact on spreads, depth or volatility. According to Nasdaq, the ease with which the market reopened on September 17 appears to be directly connected to the efficiency of SuperSOES. In addition, SuperSOES has been voluntarily adopted by the Chicago Stock Exchange, Inc. (''CHX'') and the Boston Stock Exchange, Inc. (''BSE''), 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.[6] 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.

Nasdaq states that SuperSOES is improving the operation of the Nasdaq Stock Market, however, Nasdaq has identified two areas of concern that it believes must be addressed immediately to ensure the smooth functioning of Nasdaq's systems. Specifically, permitting UTP Exchanges to participate in Nasdaq without automatic execution functionality perpetuates the potential for ''dual liability'' that Nasdaq designed SuperSOES to eliminate. The potential for dual liability exists when market participants, such as UTP Exchanges, send SelectNet liability messages to Nasdaq market makers that simultaneously receive executions through SuperSOES. Additionally, permitting UTP Exchanges to access Nasdaq via SelectNet could disrupt and slow the market. To improve the trading environment for all of Nasdaq's valued market participants, and to avoid potential significant market disruptions, Nasdaq is proposing to require UTP Exchanges that choose to participate in Nasdaq to accept automatic executions through SuperSOES.

Background. On January 14, 2000, the Commission approved a rule change to establish SuperSOES,[7] which was implemented for all Nasdaq National Market securities on July 30, 2001. SuperSOES is an automated execution system that allows the entry of retail as well as principal orders for up to 999,999 shares.[8] By removing the size and capacity restrictions from its principal automatic execution system, Nasdaq intended for most of the orders executed through Nasdaq's systems to migrate to SuperSOES. Consistent with that approach, access to SelectNet for NASD members was limited to certain types of non-liability orders that require negotiation with the receiving market participant.[9]

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

[7] *See* Exchange Act Release No. 42344 (January 14, 2000), 65 FR 3987 (January 25, 2000).

[8] SOES was limited to small agency orders for customers.

[9] As originally developed, SuperSOES allowed market participants to enter into SelectNet only those orders that (1) specify a minimum acceptable quantity for a size that is at least 100 shares greater

As was the case with SOES, Nasdaq market makers are required to participate in SuperSOES and, therefore, to accept automatic execution against their displayed quotations. However, a subset of Nasdaq market participants, Electronic Communications Networks (''ECNs''), as well as UTP Exchanges, continue to have their quotes in Nasdaq accessed through SelectNet and, as such, are not required to accept automatic executions.[10] Whereas Nasdaq can require, by rule, that its member ECNs provide immediate response to an inbound SelectNet order, it has no authority to extend that requirement to a UTP Exchange.[11]

According to Nasdaq, SuperSOES increases the speed of executions and improves the access of all market participants to the full depth of a security's trading interest. The volume and speed at which trading occurs in Nasdaq have increased dramatically from when SuperSOES was first proposed nearly two and a half years ago. Nasdaq states that while SelectNet was adequate as the primary means of UTP Exchange access in the past, this is no longer true. Market participants demand and require the ability to access liquidity at the best prices instantaneously. Because Nasdaq cannot compel UTP Exchanges to provide an automated, immediate response to preferenced SelectNet liability orders, continuing SelectNet liability functionality for UTP Exchanges is not a viable option.

Moreover, under the rules that established the NNMS, SelectNet became primarily a non-liability system for SuperSOES market participants. Nasdaq made SelectNet a non-liability system for SuperSOES market participants to, among other reasons, provide protection for Nasdaq market participants that are required to (*i.e.*, Nasdaq market makers), or chose to (*i.e.*, Full Participant ECNs and participating UTP Exchanges [12]), take automatic execution against their quotes through SuperSOES by limiting the potential for dual liability.[13] The current rules, however, do not offer sufficient protection, because they continue to allow UTP Exchanges that do not participate in SuperSOES to send preferenced SelectNet liability orders to SuperSOES market participants. As a result, dual liability could occur if a SuperSOES market participant receives an order from a UTP Exchange through SelectNet to which it owes an obligation to execute under the NASD's and SEC's firm quote rule, and immediately thereafter receives an execution through SuperSOES against the same quote.

Proposed Amendment. To address these problems, Nasdaq is proposing to amend NASD Rule 4720 to require that UTP Exchanges that voluntarily choose to trade Nasdaq securities through Nasdaq market systems send and accept automatic executions through SuperSOES. A UTP Exchange that does not wish to use a Nadaq market system would be accessible by telephone—the method of access specified in the Nasdaq UTP Plan—or via a mutually agreed upon bilateral link created by the UTP Exchange.[14]

Specifically, Nasdaq proposes to allow UTP Exchanges to choose whether or not they want to access Nasdaq market systems for order processing and execution purposes. If a UTP Exchange elects to participate in SuperSOES, the UTP Exchange, like Nasdaq market makers, will be permitted access to SelectNet in accordance with the proposed changes to paragraph (c) of Rule 4720. Through SuperSOES, UTP Exchanges will make their quotes accessible to other market participants, and will access the quotes of market makers, Full Participant ECNs, and other UTP Exchanges participating in SuperSOES.

Under this option, UTP Exchanges will use SelectNet on the same terms as Nasdaq market makers and ECNs. First, Participating UTP Exchanges may direct non-liability orders (as set forth in subparagraph (c) of Rule 4720) to SuperSOES market participants. Second, Participating UTP Exchanges (similar to Nasdaq market makers) will receive via SelectNet only non-liability orders, in order to limit their potential for dual liability, as noted above.[15] This will limit any potential dual liability. Third, UTP Exchanges may access quotes of Order Entry ECNs with preferenced SelectNet liability orders.

If a UTP Exchange elects not to participate in SuperSOES, the UTP Exchange's quote will not be accessed through SuperSOES or SelectNet. In this case, SuperSOES will not include that UTP Exchange's quotation for order processing and execution purposes. UTP Exchanges that choose this option would be accessible by telephone as contemplated in the Nasdaq UTP Plan,[16] or via a mutually agreed-upon alternative bilateral link created by the UTP Exchange.[17] Nasdaq welcomes the opportunity to explore the possibility of bilateral linkages, which Nasdaq anticipates could be formed via separate agreement between Nasdaq and the exchange(s).

Nasdaq is proposing these amendments for a number of reasons. First, significant changes in market conditions have resulted in the need for Nasdaq, via SuperSOES, to increase the speed of executions and improve the access of all market participants to the full depth of a security's trading interest. According to Nasdaq, the volume and speed at which trading occurs in Nasdaq have increased dramatically from when SuperSOES was first proposed nearly two and a half years ago. Consequently, market

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than the posted quote of the receiving market participant or (2) All-or-None orders that are at least 100 shares in excess of the displayed bid/offer size. Since the original proposal, the SEC has also approved the entry of non-liability, inferior-priced orders through SelectNet.

[10] ECNs may choose whether or not to take automatic executions through SuperSOES. ECNs that choose to take automatic execution against their quotes through SuperSOES are refered to as ''Full Participant ECNs.'' Full Participant ECNs are not required to take liability orders through SelectNet (a ''liability order'' imposes an obligation on the market participant that receives the order to respond to the order in a manner consistent with the Firm Quote Rule (Rule 11Ac1–1 under the Act, 17 CFR 240.11Ac1–1) (*e.g.* by executing the order for that market participant's displayed size). ECNs that choose not to take automatic execution against their quotes through SuperSOES must continue to take delivery of liability orders against their quotes through SelectNet. These ECNs are referred to as ''Order-Entry ECNs.''

[11] The Cincinnati Stock Exchange does not participate in any Nasdaq market systems. Instead, it relies on the language in the UTP Plan and provides only telephone access to its quotes.

[12] Specifically, CHX and BSE have chosen to participate in SuperSOES.

[13] Dual liability may occur when a market participant has simultaneous, multiple obligations with respect to orders that it receives from more than one venure. For instance, if a market maker is preferenced through SelectNet for its displayed size at the same time that it receives an automatic execution order through SuperSOES, that market maker is exposed to dual liability for those orders. Dual liability can result in a market participant risking more capital than it might otherwise desire.

[14] The Nasdaq UTP Plan governs the trading of Nasdaq-listed securities pursuant to unlisted trading privileges. Subsection (b) of Section IX of the Nasdaq UTP Plan states, in pertinent part, that Plan participants ''shall have direct telephone access to the trading desk of each Nasdaq market participant in each [e]ligible [s]ecurity in which the [p]articipant displays quotations.'' *See* Section IX, Market Access, of the Nasdaq UTP Plan.

[15] The rules clarify that if a UTP Exchange participates in SuperSOES, orders preferenced to the UTP Exchange's quotes must meet the Oversized Order Requirement. This restriction is intended to limit the potential for dual liability for UTP Exchanges. In addition, Nasdaq is proposing non-substantive changes to correct drafting errors in the original rule proposal to clarify that orders sent to quotes of Order Entry ECNs are not subject to the Oversized Order Requirement in the rule, while orders sent to Full Participant ECNs are subject to this requirement.

[16] We note this currently is the method that the Cincinnati Stock Exchange has elected to use for trading Nasdaq securities under the Nasdaq UTP Plan.

[17] This proposal would not preclude a UTP Exchange from forming a link with Nasdaq outside Nasdaq's market system or the parameters of the NNMS Plan.

participants demand and require the ability to access liquidity at the best prices instanteously. Nasdaq states that SuperSOES is a significant improvement over prior Nasdaq execution systems, and has become the backbone of its marketplace by providing market participants with a more efficient trading platform as evidenced by faster executions, higher fill rates, larger orders, and prices at the best bid or best offer.

According to Nasdaq, while SelectNet—which requires an affirmative response in order to trade—was adequate as the primary means of UTP Exchange access in the past, this is no longer true. In 1997, when Nasdaq made SelectNet available to UTP Exchanges for liability order processing, Nasdaq (inclusive of the only active UTP Exchange at the time, CHX) processed an average of 417,224 quote updates and 467,914 transactions per day.[18] Over the first seven months of 2001, Nasdaq processed an average of 5,822,474 quote updates and 2,757,556 transactions per day. The need for immediate response by all participants who choose to access the Nasdaq market is very clear. Because Nasdaq cannot compel UTP Exchanges to provide an automated, immediate response to preferenced SelectNet liability orders, it can no longer offer SelectNet liability functionality as an option to UTP Exchanges.

Moreover, Nasdaq believes that this proposal, requiring a UTP Exchange to participate in SuperSOES if the UTP Exchange wishes to access Nasdaq via Nasdaq's own systems, is consistent with prior SEC statements in the context of alternative trading systems (''ATSs''). In the release adopting Regulation ATS, the Commission stated its concern that an ATS should respond to orders entered by non-participants (*e.g.,* broker-dealers that access the ATS through a linkage like SelectNet) no slower than it responds to orders entered by subscribers.[19] The Commission addressed this concern by establishing a principle that underscores the importance of each market establishing the parameters and automation of its system, specifically the Commission stated ''[a]ny SRO to which alternative trading systems may be linked, may determine that it is necessary for the fair and orderly operation of its market to require that publicly displayed alternative trading system orders be subject to automatic execution.'' [20] Nasdaq believes that the Commission should apply this principle to Nasdaq's current proposal for UTP Exchange participation in SuperSOES.

Second, Nasdaq believes it is appropriate to minimize the potential for dual liability in the Nasdaq market by requiring UTP Exchanges to participate in SuperSOES. The possibility of dual liability arising from a UTP Exchange that accesses the Nasdaq market through SelectNet was not a major concern at the time the SuperSOES rules were adopted. At that time, only CHX traded Nasdaq securities, CHX's volume was minimal, and CHX, in fact, chose to accept automatic execution by participating in SuperSOES. Recently, however, there has been renewed interest by other regional stock exchanges in trading Nasdaq-listed securities on a UTP basis. In fact, a number of new participants joined the Nasdaq UTP Plan subsequent to Nasdaq proposing SuperSOES, and these exchanges have indicated an interest in trading Nasdaq-listed securities in the coming weeks and months. According to Nasdaq, although CHX elected to participate in SuperSOES—temporarily eliminating the potential for dual liability—the imminent entry of other UTP Exchanges trading Nasdaq securities reintroduces the potential of dual liability to all SuperSOES market participants.

Third, participation in SuperSOES by a UTP Exchange is a voluntary action by each exchange. Nasdaq states that it is not obligated to provide UTP Exchanges with access to any of Nasdaq's proprietary systems. Therefore, Nasdaq believes it is entirely appropriate to limit UTP Exchange access to Nasdaq's most efficient system. Nasdaq's voluntary action, designed to improve efficiency and maintain an orderly market, should not become an opportunity for a Nasdaq competitor to harm the ability of Nasdaq to improve its markets.

Overall, Nasdaq believes it is appropriate to alter the terms under which a UTP Exchange participates in the Nasdaq market to address all of the concerns described in this proposal. Nasdaq is committed to operating a fair, orderly, efficient marketplace for the benefit of all investors in Nasdaq-listed securities, and this proposal is essential to Nasdaq's ability to meet that commitment.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) [21] of the Act, which 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. In particular, Nasdaq believes that requiring a UTP Exchange that chooses to participate in the Nasdaq market also to participate in SuperSOES is necessary for the fair and orderly operation of the Nasdaq Stock Market by helping to reduce the potential for order queuing or for system stoppages, when a UTP Exchange's quote is inaccessible and is alone at the best bid or best offer.

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

Written comments were neither solicited nor received.

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 NASD 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 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

[18] Theses figures are based on the average daily quote updates and trades reported over the first seven months (January through July) of 1997.

[19] *Regulation of Exchanges and Alternative Trading Systems,* Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998), at Section IV.2.c.(iii)(A).

[20] *Id.*

[21] 15 U.S.C. 78*o*–3(b)(6).

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 NASD. All submissions should refer to File No. SR–NASD–2001–69 and should be submitted by February 19, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[22]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 02–1957 Filed 1–25–02; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45322; File No. SR–Phlx–2001–115]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 thereto by the Philadelphia Stock Exchange, Inc. Relating to the Volume Thresholds for the Options Specialist Shortfall Fee and Corresponding Shortfall Credit

January 22, 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 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 Exchange. On January 15, 2002, the Exchange filed Amendment No. 1 to the proposed rule change.[3] 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

The Exchange proposes to amend its schedule of dues, fees and charges to increase the requisite volume thresholds associated with the options specialist 10 percent deficit fee (''shortfall fee'')[4] and corresponding options specialist 10 percent shortfall credit (''shortfall credit'').[5] The Exchange also proposes to amend the definition of a Top 120 Option, clarify who is eligible to receive the shortfall credit and make other minor, technical amendments to its fee schedule. The Exchange intends to implement the proposed volume thresholds retroactively for transactions settling on or after January 2, 2002.[6]

The text of the proposed rule change appears below. New text is in italics; deletions are in brackets.

Summary of Equity Option Charges (P. 1/2)

SPECIALIST [10%] DEFICIT (*Shortfall*) FEE I

$.35 per contract for specialists trading any Top 120 Option if [at least 10% of] *the following* total national monthly contract volume for such Top 120 Option is not effected on the PHLX*: 11 percent for the period January through March 2002; 12 percent for the period April through June 2002; 13 percent for the period July through September 2002; and 14 percent for the period October through December 2002.*

Summary of Equity Option Charges (P. 2/2)

[OPTIONS] SPECIALIST [10%] DEFICIT (Shortfall) FEE CREDIT

A credit of $.35 per contract may be earned by options specialists for all contracts traded in excess of the [10%] *following* volume threshold*s* in eligible issues for the monthly periods commencing September 1, 2001. These credits may be applied against previously imposed ''shortfall fees'' for the preceding six months for issues that in the month the deficit occurred, the equity option traded in excess of 10 million contracts per month*: 11 percent for the period January through March 2002; 12 percent for the period April through June 2002; 13 percent for the period July through September 2002; and 14 percent for the period October through December 2002.*

* * * * *

I denotes fee eligible for monthly credit of up to $1,000.

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 IV 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

According to the Exchange, the purpose of the proposed rule change is to increase the volume thresholds related to the options specialist shortfall fee and corresponding shortfall credit in order to encourage specialists to compete for order flow in the national market. The options traded by the specialist unit, and the transactions related thereto, may be especially valuable to that specialist unit and the Exchange due to their potential profitability. Therefore, the Exchange believes that the specialist should compete for order flow in the national market, because that specialist unit is the key party responsible for marketing and receiving order flow in that particular option.

Currently, the Exchange imposes a fee of $0.35 per contract to be paid by the specialist trading any Top 120 Option if at least 10 percent of the total national monthly contract volume (''total volume'') for such Top 120 Option is not effected on the Exchange in that

[22] 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 Cynthia K. Hoekstra, Counsel, Phlx, to Kelly Riley, Senior Special Counsel, Division of Market Regulation, Commission, dated January 14, 2002 (''Amendment No. 1''). In Amendment No. 1, the Exchange clarified the statutory basis of the proposed rule change to include Section 6(b)(4) of the Act. In addition, the Exchange requested that, rather than being filed pursuant to Section 19(b)(3)(A)(ii) of the Act, under which it was originally filed, that the proposed rule change now be filed pursuant to Section 19(b)(2) of the Act. Finally, the Exchange requested that the proposed fee be approved as of January 2, 2002 and that the proposed rule change be approved on an accelerated basis in order to permit the Exchange to invoice its January fees in a timely manner by the middle of February.

[4] *See* Securities Exchange Act Release No. 43201 (August 23, 2000), 65 FR 52465 (August 29, 2000) (SR–Phlx–00–71).

[5] *See* Securities Exchange Act Release No. 44892 (October 1, 2001), 66 FR 51487 (October 9, 2001) (SR–Phlx–2001–83).

[6] *See* Amendment No. 1, *supra* note 3. The Exchange states that the shortfall fee will continue to be eligible for the monthly credit of up to $1,000 to be applied against certain fees, dues and charges and other amounts owed to the Exchange by certain members. *See* Securities Exchange Act Release No. 44292 (May 11, 2001), 66 FR 27715 (May 18, 2001) (SR–Phlx–2001–49).