

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 NASD. All submissions should refer to File No. SR-NASD-2003-53 and should be submitted by May 5, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

**Margaret H. McFarland,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47645; File No. SR-NASD-2003-58]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by the National Association of Securities Dealers, Inc. Eliminating Certain Eligibility Requirements for Participating in the Primex Auction System as a Primex Auction System Market Maker

April 8, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and rule 19b-4<sup>2</sup> thereunder, notice is hereby given that on March 27, 2003, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, the Nasdaq Stock Market, Inc. ("Nasdaq"), submitted to 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. 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 is filing this proposed rule change in order to eliminate the requirement that Primex Auction System Market Makers ("PAMMs") submit a minimum percentage of certain orders to the Primex Auction System ("Primex" or "System") in order to retain their status as PAMMs.

The text of the proposed rule change appears below. Proposed new language is underlined; proposed deletions are in brackets.

5010. NASDAQ Application of the Primex Auction System

5011. Definitions

For purposes of this Rule Series, unless the context requires otherwise:

\* \* \* \* \*

(a) ["Mandatory Eligible Order" means a public customer order, as more fully defined in rule 5020, that a Primex Auction Market Maker must submit to the System for exposure in order for the Primex Auction Market Maker to maintain its status as such, subject to any exclusions or minimum permissible amount provided therein.] *Reserved.*

\* \* \* \* \*

5020. Market Maker Participation<sup>3</sup>

(a) No Changes.

(b) With respect to each security in which a Participant is registered as a Primex Auction Market Maker, the Participant shall:

(1) if the security is a Nasdaq-listed security, be registered as a Nasdaq market maker (1) if the security is a Nasdaq-listed security, be registered as a Nasdaq market maker in such security (or become so registered), and at all times comply with all applicable NASD rules and interpretations relating to Nasdaq market makers, including the requirement to enter and maintain two-sided quotations in Nasdaq for such security, subject to the excused withdrawal procedures set forth in Rule 4619;

(2) if the security is an ITS/CAES eligible security, be registered as an ITS/CAES Market Maker (or become so registered) in such security, and at all times comply with all applicable NASD

<sup>3</sup> The rule text provided herein includes corrections of typographical errors from the rule text that Nasdaq submitted in Exhibit 1 of the proposed rule change. Telephone conversation between Peter R. Geraghty, Associate Vice President and Associate General Counsel, Office of General Counsel, Nasdaq, and Tim Fox, Attorney, Division of Market Regulation, Commission on April 7, 2003.

rules and interpretations relating to ITS/CAES Market Makers, including the requirement to enter and maintain two-sided quotations in CQS for such security, subject to the excused withdrawal procedures set forth in Rule 6350; and

(3) submit to the Application a minimum of 80%\* of the number of its Mandatory Eligible Orders (including customer orders of another broker-dealer that has directed such orders to the Participant) as soon as practicable upon receipt by the Participant, for the purpose of exposing such orders to the Primex Crowd. Mandatory Eligible Orders do not include:

(A) Any customer order that is greater than 1099 shares at origination, except that nothing in these rules prohibits a Participant from submitting orders of greater size at any time;

(B) Any customer order that, when initially received by the Participant, is a Fixed Price Order with a specified price that is not eligible for acceptance by the Application because it is priced outside the NBBO and is not otherwise marketable pursuant to Rule 5013(a)(2), regardless of whether or not the order

\* The 80% test will be applied on a quarterly basis, and will be phased in as follows: For the calendar quarters commencing on October 1, 2001; January 1, 2002; April 1, 2002; July 1, 2002; and October 1, 2002; any participant may register in any eligible security as a Primex Auction Market Maker and maintain that status during such calendar quarters without regard to the percentage of its orders it submits to the System for such security during that time, provided it also satisfies all other requirements of a Primex Auction Market Maker pursuant to these rules.

Beginning with the calendar quarter that commences on January 1, 2003, a participant previously registered as a Primex Auction Market Maker for a particular security may maintain its status as such until March 30, 2003 only if it submitted at least 50% of its Mandatory Eligible Orders during the calendar quarter that commences on October 1, 2002 (or during such portion of the calendar quarter that commences on October 1, 2002 in which the participant was so registered if the participant registered in mid quarter), provided it also satisfies all other requirements of a Primex Auction Market Maker pursuant to these rules. A participant that is newly registering as a Primex Auction Market Maker for a particular security any time after the start of the calendar quarter that commences on January 1, 2003 may maintain its status as such until the end of the calendar quarter in which it registered without regard to the percentage of its orders it submits to the System for such security during that time.

Beginning with the calendar quarter that commences on April 1, 2003, and each calendar quarter thereafter, a participant previously registered as a Primex Auction Market Maker for a particular security may maintain its status as such until the end of that calendar quarter only if it submitted at least 80% of its Mandatory Eligible Orders during the previous calendar quarter (or during the portion of such previous calendar quarter in which it was so registered if the participant registered in mid quarter), provided it also satisfies all other requirements of a Primex Auction Market Maker pursuant to these rules.]

<sup>10</sup> 17 CFR 200.30-3(a)(12).

<sup>11</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

becomes eligible for acceptance and exposure at a subsequent point in time;

(C) Any customer order placed by a customer who authorizes the Participant to not expose the order, either at the time the order is placed or prior thereto pursuant to an individually negotiated agreement with respect to such customer's orders;

(D) Any customer order that is an odd lot order (e.g., less than 100 shares);

(E) Any customer order to be executed outside of the hours of operation of the Application; or

(F) Any other order that would not fall within the definition of the term "covered order" as defined in Exchange Act Rule 11Ac1-5(a)(8).]

(3[4]) not attach a condition for Minimum Relative Price Improvement to any order submitted to the Application solely for its own principal account and not involving a customer order.

\* \* \* \* \*

## 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

Presently, NASD Rule 5020(b)(3) requires PAMMS to submit 80% of their Mandatory Eligible Orders to Primex in order to retain their status as PAMMs ("Percentage Test").<sup>4</sup> Members registered as PAMMs can utilize certain matching features and are eligible for fee sharing, which are features not available to members that do not participate as PAMMs (i.e., Crowd Participants).<sup>5</sup>

<sup>4</sup> The term "Mandatory Eligible Order" is defined in NASD Rule 5011(l).

<sup>5</sup> PAMMS can enter Clean Cross orders and use the Two Cent Match, 50% Match, and Block Facilitation Match features. These features are described in NASD Rule 5014. In addition, pursuant to NASD Rule 7010(r)(1), a PAMM can share in the Primex fees charged to members when the PAMMs order interacts with crowd interest in Primex.

The purpose of the Percentage Test was to achieve a mix of trading interest that would result in retail orders being exposed to other market participants that would compete for the orders by providing price improvement.

Ultimately, the Percentage Test was a balance between continuing to provide PAMMs flexibility in how they execute their customer orders and the desire to provide a cross section of orders that would generate crowd participation and competition for orders. However, members have indicated that the Percentage Test complicates their order handling decisions, creating a disincentive to participating in Primex. Therefore, Nasdaq is proposing to eliminate the Percentage Test and allow members to participate as PAMMs irrespective of the number of orders they submit to the System.

The proposal to eliminate the Percentage Test does not modify any other aspect of Primex. For example, PAMMs must continue to comply with the other requirements of NASD Rule 5020 that govern PAMM eligibility, and PAMMs will continue to have the right to use the matching features and to participate in the fee sharing arrangements that are not available to Crowd Participants.

#### 2. Statutory Basis

Nasdaq believes the proposed rule change is consistent with section 15A(b)(6) of the Act,<sup>6</sup> which requires that NASD's rules be designed, among other things, to remove impediments to and perfect the mechanism of a free and open market and national market system, and, in general, protect investors and the public interest. Nasdaq believes the proposal to eliminate the Percentage Test is consistent with NASD's obligations under section 15A(b)(6) of the Act because it will remove an impediment to using Primex, which should result in greater participation in the System and increased liquidity and opportunities for price improvement.

When originally implemented, Nasdaq believed the requirement would promote liquidity by ensuring a cross section of order flow from each PAMM, which in turn would encourage non-market makers to participate in Primex and offer opportunities for price improvement. Nasdaq represents that promoting liquidity and price improvement opportunities are consistent with the protection of investors. However, instead of fostering liquidity, members have indicated the requirement is a disincentive to using

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

Primex. Members desire flexibility in making order routing decisions and the rule complicates these decisions. Therefore, Nasdaq staff is proposing to eliminate the Percentage Test, which will eliminate an impediment to using Primex. As a result, Nasdaq expects that more members will participate in Primex, which should increase liquidity and opportunities for price improvement.

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

Nasdaq does not believe that the proposed rule change will impose 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

No written comments were either solicited or received.

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

The foregoing rule change has been designated by NASD as effecting a change in an existing order-entry or trading system of NASD that: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not have the effect of limiting the access to or availability of the system. The proposed rule change has therefore become effective pursuant to section 19(b)(3)(A) of the Act<sup>7</sup> and Rule 19b-4(f)(5)<sup>8</sup> thereunder. The Nasdaq believes that the proposal to eliminate the Percentage Test complies with the requirements of Rule 19b-4(f)(5) under the Act because it effects a change in Primex, an existing trading system. In addition, the proposal does not modify how Primex operates. Therefore, it does not significantly affect the protection of investors or the public interest. Instead, the proposal eliminates a requirement that is viewed as an impediment to using Primex. In this regard, the proposal does not have the effect of limiting the access or availability of the System, but instead should promote access to it, which should increase participation in the System and promote competition for orders exposed in the System.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views and

<sup>7</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>8</sup> 17 CFR 240.19b-4(f)(5).

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 NASD. All submissions should refer to File No. SR-NASD-2003-58 and should be submitted by May 5, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47646; File No. SR-Phlx-2003-18]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the Philadelphia Stock Exchange, Inc. Relating to Equal Firm Quotation Size and AUTO-X Guarantees for Customer and Broker-Dealer Orders

April 8, 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 March 20, 2003, the Philadelphia Stock Exchange, Inc. ("Exchange" or "Phlx") 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 Phlx. The proposed rule change has been filed by the Phlx as a "non-controversial" rule change under Rule 19b-4(f)(6) under the

Act.<sup>3</sup> On April 7, 2003, the Phlx filed Amendment No. 1 to the proposed rule change.<sup>4</sup> 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

The Phlx proposes to implement an options program to be firm for, and to automatically execute eligible orders against, the Exchange's disseminated size for both customer and broker-dealer orders. Specifically, the Exchange proposes to amend Exchange Rule 1082, Firm Quotations, to provide that all Phlx options quotations would be firm for all incoming customer and broker-dealer orders for their full disseminated size.

The Exchange further proposes to amend Exchange Rule 1080, Philadelphia Stock Exchange Automated Options Market (AUTOM) and Automatic Execution System (AUTO-X),<sup>5</sup> to provide automatic executions for eligible customer and off-floor broker-dealer orders up to the Exchange's disseminated size, subject to a maximum guaranteed AUTO-X size of 250 contracts. Options on the Nasdaq-100 Index Tracking Stock ("QQQ"<sup>SM</sup>)<sup>6</sup>

<sup>3</sup> 17 CFR 240.19b-4(f)(6).

<sup>4</sup> See letter from Richard S. Rudolph, Director and Counsel, Phlx, to Deborah Lassman Flynn, Assistant Director, Division of Market Regulation, Commission, dated April 4, 2003 ("Amendment No. 1"). In Amendment No. 1, Phlx deleted certain proposed language stating that "[t]he minimum guaranteed AUTO-X size is 1 contract, and the current maximum AUTO-X size is 250 contracts, except for QQQ options"; retained current language that the minimum and maximum guaranteed AUTO-X sizes for each option will be posted in the Phlx's website; and retained current language that there be a minimum guaranteed AUTO-X size and maximum guaranteed AUTO-X size, as determined by the specialist and subject to approval of the Options Committee.

<sup>5</sup> AUTOM is the Exchange's electronic order delivery, routing, execution 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 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 trading floor. See Exchange Rule 1080.

<sup>6</sup> The Nasdaq-100®, Nasdaq-100 Index®, Nasdaq®, The Nasdaq Stock Market®, Nasdaq-100 Shares<sup>SM</sup>, Nasdaq-100 Trust<sup>SM</sup>, Nasdaq-100 Index Tracking Stock<sup>SM</sup>, and QQQ<sup>SM</sup> are trademarks or service marks of Nasdaq and have been licensed for use for certain purposes by the Philadelphia Stock Exchange pursuant to a License Agreement with Nasdaq. The Nasdaq-100 Index® (the Index) is determined, composed, and calculated by Nasdaq without regard to the Licensee, the Nasdaq-100 Trust<sup>SM</sup>, or the beneficial owners of Nasdaq-100

would continue to have a maximum guaranteed AUTO-X size of 2,000 contracts in the first two near term expiration months, and 1,000 contracts for all other expiration months.<sup>7</sup>

Below is the text of the proposed rule change. Proposed new language is in *italics*; proposed deletions are in brackets.

\* \* \* \* \*

#### Firm Quotations

Rule 1082. (a) No change.

(b) Except as provided in paragraph (c) of this Rule, all quotations made available by the Exchange and displayed by quotation vendors shall be firm for customer *and broker-dealer* orders at the disseminated price in an amount up to the disseminated size. Responsible brokers or dealers bidding (or offering) at the disseminated price shall be collectively required to execute orders presented to them at such price up to the disseminated size in accordance with Rule 1015, or, if the responsible broker or dealer is representing (as agent) a limit order, such responsible broker or dealer shall be responsible (as agent) up to the size of such limit order, but may be responsible as principal for all or a portion of the excess of the disseminated size over the size of such limit order to the extent provided in Rule 1015.

(c) No change.  
(d) [In accordance with paragraph (d)(1)(ii) of the SEC Quote Rule, the quotation size for a disseminated price with respect to an order for the account of a broker or dealer ("broker-dealer order") shall be one (1) contract ("quotation size"), and all quotations made available by the Exchange and displayed by quotation vendors shall be firm for broker-dealer orders at the disseminated price in an amount up to the quotation size. The quotation size for broker-dealer orders provided in this paragraph (d) shall be periodically published by the Exchange. Responsible brokers or dealers bidding (or offering) at the disseminated price shall be collectively required to execute broker-dealer orders at such price up to the quotation size. (e)] If responsible brokers or dealers receive an order to buy or sell a listed option at the disseminated price in an amount greater than the disseminated size [(for customer orders)

Shares<sup>SM</sup>. Nasdaq has complete control and sole discretion in determining, comprising, or calculating the Index or in modifying in any way its method for determining, comprising, or calculating the Index in the future.

<sup>7</sup> See Securities Exchange Act Release No. 46531 (September 23, 2002), 67 FR 61370 (September 30, 2002) (SR-Phlx-2002-47).

<sup>9</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.