

automatically executed through MAX, whether orders are given the NBBO shown at the time the order is received or the NBBO posted at the time the order is executed, and what explanations are available for price disimprovement. The Commission is extending the pilot program for one year so that the Exchange may continue to compile this data for the Commission's review.

The Commission also requests that the Exchange continue its effort to rewrite Article XX, Rule 37 and Article XX, Rule 43 of the Exchange's rules so these rules clearly explain the difference between how listed (or dually traded) securities and over-the-counter (or Nasdaq/NM) securities are routed and executed by the Exchange, and submit the new proposed language to the Commission for review and approval. Additionally, the Commission requests that the Exchange include in its rules an explanation of how the provisions of the Exchange's Best Rule interact with the Exchange's Rules governing automatic execution of orders.

The Commission does not want to interrupt the current operations of the Exchange while the above-described issues are being addressed. Therefore, the Commission finds that it is appropriate to accelerate the operative date of the proposed rule change.

#### 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 CHX. All submissions should refer to File No.

SR-CHX-2002-34 and should be submitted by December 30, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>27</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46938; File No. SR-NASD-2002-149]

### Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change by the National Association of Securities Dealers, Inc. to Make Permanent Nasdaq's Transaction Credit Pilot Program for Exchange-Listed Securities, and To Increase the Percentage of Revenue Available for Distribution From 40% to 50%

December 3, 2002.

On October 18, 2002, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to codify on a permanent basis Nasdaq's InterMarket Transaction Credit Pilot Program ("Program"), and to raise the percentage of revenue available for distribution under the Program from 40% to 50%. The proposed rule change was published for notice and comment in the **Federal Register** on October 29, 2002.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

Nasdaq proposes to make the Program permanent, and to raise the percentage of revenue available for distribution under the Program from 40% to 50%. As set forth in its July 2, 2002 Order of Summary Abrogation ("Abrogation Order"),<sup>4</sup> the Commission will continue to examine the issues surrounding

market data fees, the distribution of market data rebates, and the impact of market data revenue sharing programs on both the accuracy of market data and on the regulatory functions of self-regulatory organizations. In the interim, the Commission believes it is reasonable to allow Nasdaq to make its Program permanent, and increase the revenue available for distribution, because these changes to the Program leave Nasdaq on substantially similar footing as other self-regulatory organizations.<sup>5</sup>

Thus, 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 association<sup>6</sup> and, in particular, the requirements of Section 15A of the Act<sup>7</sup> and the rules and regulations thereunder. The Commission finds specifically that the proposed rule change is consistent with Section 15A(b)(5) of the Act,<sup>8</sup> in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating securities transactions, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

The decision to allow Nasdaq to make permanent its Program, and to increase the percentage of revenue available for distribution, however, is narrowly drawn, and should not be construed as resolving the issues raised in the Abrogation Order, and does not suggest what, if any, future actions the Commission may take with regard to market data revenue sharing programs.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act<sup>9</sup>, that the proposed rule change (SR-NASD-2002-149) be, and it hereby is, approved.

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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<sup>5</sup> See e.g., Securities Exchange Act Release No. 41238 (March 31, 1999), 64 FR 17204 (April 8, 1999) (SR-CSE-99-03).

<sup>6</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>7</sup> 15 U.S.C. 78o-3.

<sup>8</sup> 15 U.S.C. 78o-3(b)(5).

<sup>9</sup> 15 U.S.C. 78s(b)(2).

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

<sup>27</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> See Securities Exchange Act Release No. 46712 (October 23, 2002), 67 FR 66031.

<sup>4</sup> Securities Exchange Act Release No. 46159 (July 2, 2002), 67 FR 45775 (July 10, 2002) (File Nos. SR-NASD-2002-61, SR-NASD-2002-68, SR-CSE-2002-06, and SR-PCX-2002-37) (Order of Summary Abrogation).