

III. 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, N.W., Washington, D.C. 20549. 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 provision 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 number SR-NASD-98-97 and should be submitted by January 26, 1999.

IV. Commission Findings and Order Granting Accelerated Approval of Proposed Rule Change

The NASD Regulation has requested that the Commission find good cause pursuant to Section 19(b)(2) of the Act⁷ for approving the proposed rule change prior to the 30th day after publication in the **Federal Register**. 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 and, in particular, the requirements of Section 15A(b)(6) of the Act.⁸ Rule 10335 is intended to provide a pilot system within the NASD arbitration forum to process requests for temporary injunctive relief. Rule 10335 is intended principally to facilitate the disposition of employment disputes, and related disputes, concerning members who file for injunctive relief to prevent registered representatives from transferring their client accounts to their new firms. The Commission expects that during the pilot's extension the NASD Regulation will consider and respond to the comment letters regarding the proposed rule change to permanently add Rule 10335 to the Code.⁹

The Commission finds good cause for approving the proposed rule change

prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. The Commission believes that accelerated approval of the proposal is appropriate because members will continue to have the benefit of injunctive relief in arbitration without interruption. The Commission is extending the pilot for six months. During that time NASD Regulation will review and respond to comments regarding the proposed rule change to amend and make Rule 10335 a permanent part of the Code. The Commission believes, therefore, that granting accelerated approval of the proposed rule change is consistent with Section 15A of the Act.¹⁰

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹¹ that the proposed rule change be, and hereby is, approved on an accelerated basis for a six month pilot basis through July 3, 1999.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-40835; File No. SR-NASD-98-85]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 to the Proposed Rule Change by the National Association of Securities Dealers, Inc. to Establish the Nasdaq Application of the OptiMark System

December 28, 1998.

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 November 13, 1998, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its wholly-owned 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 11, 1998, the Association 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

Nasdaq is proposing to establish the Nasdaq Application, a new electronic trading system based on the innovative information processing technology provided by OptiMark Technologies, Inc., together with its wholly-owned subsidiary, OptiMark Services, Inc. ("OptiMark"),⁴ as a facility of Nasdaq. In addition, the Association is proposing to adopt NASD Rules 4991-4998 and amend NASD Rule 11890 to govern the use of the Nasdaq Application by its members and non-member Users.

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.

³ See letter from Andrew S. Margolin, Assistant General Counsel, Nasdaq to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated December 11, 1998 ("Amendment No. 1"). In Amendment No. 1, the Association clarifies the definition of the term "Designated Broker" to indicate that, to be considered a Designated Broker, a broker must have an effective clearing arrangement in place with a member of a clearing agency registered pursuant to the Act.

⁴ OptiMark Technologies, Inc. is a computer technology firm that has developed certain patented technology referred to as "OptiMark™." The Nasdaq Application is one of several different trading services based on this technology that may be available for other markets in the future. One such service already has received SEC approval for operation on the Pacific Exchange. See Securities Exchange Act Release No. 39086 (September 17, 1997), 62 FR 50036 (September 24, 1997). While the OptiMark technology is virtually identical to that which has been approved for the PCX Application, the proposed Nasdaq Application and related rules adapts and uses the OptiMark technology within the existing Nasdaq market structure.

⁷ 15 U.S.C. 78s(b)(2).

⁸ 15 U.S.C. 78o(b)(6).

⁹ See *supra*, note 6.

¹⁰ 15 U.S.C. 78o-3.

¹¹ 15 U.S.C. 78s(b)(2).

¹² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Summary of Nasdaq's Application of the OptiMark System

Nasdaq proposes to establish rules for a new Nasdaq facility called the Nasdaq Application ("Application") based on the information processing technology provided by OptiMark Technologies, Inc., together with its wholly-owned subsidiary, OptiMark. The Application is a computerized, screen-based trading service intended for use by NASD members and other non-member users, as described below. The Application provides a computerized mechanism designed to satisfy the trading desires of all market participants, including retail and institutional investors as well as broker-dealers. The Application enables these participants to anonymously represent their trading interest across a full spectrum of prices and sizes, and performs a computer-based optimal search and match for liquidity in securities listed on The Nasdaq Stock Market.⁵ The Application is a new trading service that will be available to market participants in addition to existing Nasdaq trading systems and shall be operated as a new, additional facility of the Nasdaq Stock Market. Because the Nasdaq Application of the OptiMark System is to be operated as a Nasdaq facility, rules relating to its operation are subject to SEC review under Section 19(b) of the Act.⁶

Nasdaq represents that integrating OptiMark's technology into Nasdaq will continue Nasdaq's effort to improve opportunities for investors to receive the best available prices in the marketplace and reduce trading costs. Nasdaq states that the proposed Application would match all trading interest on a level playing field and provide an opportunity for individual investors' Profiles⁷ to be aggregated and interact directly with institutional interest on an objective and anonymous basis, thereby benefiting the small investor and facilitating retail order flow. Nasdaq further notes that the proposed Application would provide an alternative method for institutional

investors to transact with minimal market impact and to obtain price improvement. According to Nasdaq, the proposed Application would benefit market makers by providing an additional option to manage inventory risk through fast and efficient executions. Nasdaq believes issuers would also benefit through enhanced liquidity and flexibility available for their shareholders. The proposed Application, Nasdaq states, has the potential to increase liquidity, reduce volatility, and greatly enhance the fairness and efficiency of the Nasdaq market overall.

Application as a Facility of the Nasdaq Stock Market

The Application will be maintained as a facility of The Nasdaq Stock Market, supplementing the existing trading and execution services provided by Nasdaq to all NASD members and their customers. As mentioned above, the Application provides another means for NASD members and their customers to obtain executions of trading interest in Nasdaq securities. As a facility of the Nasdaq Stock Market, the Application allows NASD members to access the new trading facility through the Nasdaq Workstation and the Nasdaq network that connects those workstations. Nasdaq will provide a Graphical User Interface ("GUI") that permits NASD members that are subscribers to Nasdaq Workstation Service and have signed appropriate User Agreements to transmit Profiles from their Workstations to the OptiMark Matching Module that will conduct Cycles⁸ on a periodic basis. The facility also allows the use of other networks and access devices to transmit Profiles to the OptiMark Matching Module, as long as such access is properly authorized.

The Application, as a facility of the Nasdaq Stock Market, shall be subject to NASD Rules and oversight by NASD Regulation. Information regarding all Profiles submitted to the Application, whether executed or not, is subject to review by NASD Regulation and the SEC, and may be used for the purpose of ensuring that any activity conducted through the Application is consistent with NASD Rules and the federal securities laws. Thus, although the Profiles entered into the facility may be anonymous with respect to other users and the operators of the system itself, regulatory authorities have full access to all information entered.

Access to the Application

The Application is available to any NASD member that chooses to become a User and complies with all applicable rules. A User is a subscriber who has entered into an agreement with OptiMark Services, Inc. to access the Application. In addition, a non-member may become a User, provided it is authorized in advance by one or more NASD members who are Designated Brokers.⁹ A non-member can be authorized by one or more NASD members in accordance with a Supplemental Account Agreement and Designated Broker Consent Agreement. The Supplemental Account Agreement, between the Designated Broker and the non-member, enables Profiles of the non-member to be executed, cleared, and settled through the use of the Designated Broker's name within the Application. The Designated Broker Consent Agreement, between the Designated Broker and OptiMark Services, Inc., provides the Designated Broker's authorization for Profiles of a non-member User to be routed, executed, and reported in the Designated Broker's name. These agreements include any applicable credit limits imposed by the Designated Broker on the non-member User.¹⁰ The Designated Broker is responsible for all of its non-member Users' Orders and resulting transactions.

Users that are NASD members may access the Application from the Nasdaq Workstation through the Nasdaq-provided network(s). Non-member Users sponsored by NASD members (subject to the applicable agreements referenced above), as well as any interested NASD members, may obtain access to the Application from the telecommunications access services through the OptiMark-provided network(s), which may include appropriate access provided through third parties.

⁹The term *Designated Broker* is defined in proposed Rule 4991(c) as "an NASD member who has been designated by a non-member User to execute, clear, and settle transactions resulting from the Application." Rule 4991(c) further provides that "[p]articipation as a Designated Broker shall be conditioned upon the Designated Broker's membership in, or maintenance of, an effective clearing arrangement with a member of a clearing agency registered pursuant to the Act." See Amendment No. 1, *supra* note 3.

¹⁰A non-member User's credit limits, as they may be established from time to time by a Designated Broker (or its clearing broker), will be programmed into the OptiMark System. The Designated Broker will be alerted as its potential exposure to its customers, individually or in the aggregate, approaches the established credit limits ("Alarm Threshold") or reaches the limit at which the Designated Broker will no longer permit a customer to submit Profiles ("Trading Limit").

⁵The Application would be available for securities listed on Nasdaq, including securities listed on the Nasdaq SmallCap market. The Application would not be available to securities not listed on Nasdaq, such as those which may be quoted in the OTC Bulletin Board.

⁶15 U.S.C. 78s(b).

⁷For a description of a Profile, see Section II. *Entry of Profiles and Incorporation of the Nasdaq Quote Montage.*

⁸For a description of a Cycle, see Section II. *Central Processing Cycles—OptiMark's Matching Algorithm.*

Entry of Profiles and Incorporation of the Nasdaq Quote Montage

Users would access the proposed Application by submitting customized expressions of trading interest called Profiles. Profiles enable Users to visually depict complex trading strategies by not only reflecting an investor's willingness to trade at a variety of prices and sizes, but also enabling an investor to add a third dimension to its trading strategy. This third dimension is the level of satisfaction, on a sliding scale, of trading at a given price and size. For example, an investor may be 100% satisfied to buy 100,000 shares at a price up to \$1.00 above the current market price, but only 50% satisfied to buy that number of shares at a price \$1.50 above it and not satisfied at all to pay more than \$2.00 above it. The satisfaction levels are expressed as a number between zero and one for each coordinate on a price/size grid.

These User-defined Profiles, which are represented by graphical user interface software, are not disclosed to other Users or market participants, including any Designated Broker through whom a non-member User is authorized to submit Profiles and obtain executions.¹¹ The Profiles are received and logged in by the OptiMark Matching Module for the purpose of obtaining the optimal outcome of matching buyers and sellers at the best prices possible.

In addition to Profiles submitted directly by Users, the Nasdaq Application will include certain system-generated Profiles known as the "Nasdaq Quote Montage Profiles," which reflect the national best bid and offer quotes from Nasdaq Market Makers, electronic communications networks ("ECNs"), and UTP Exchange Plan Specialists as displayed in the Nasdaq Quote Montage at the time a matching Cycle begins (described more fully below). In this way, the expressions of interests of all Users are reflected in the Application, as are the publicly displayed quotes comprising the national best bid and offer.

Central Processing Cycles—OptiMark's Matching Algorithm

At one or more times throughout the trading day, all Profiles (including the Nasdaq Quote Montage Profiles) will be centrally processed by the OptiMark Matching Module operated by OptiMark Services, Inc. to obtain the optimal matches among Users. The maximum frequency with which these "Cycles"

may take place will be every 90 seconds, with no Cycle taking place prior to 9:45 a.m. EST or after 3:45 p.m. EST. The exact frequency of Cycles for any given Nasdaq security will be determined by Nasdaq, in consultation with OptiMark, based on the general characteristics of the security, the robustness of the associated Profile flow over a period, and the current level of interest expressed by Users.

The OptiMark Matching Module employs a sophisticated computer algorithm that measures and ranks all relevant mutual satisfaction outcomes by matching individual coordinates from intersecting buy Profiles with those of sell Profiles for a particular stock. The OptiMark System matches these intersecting Profiles in accordance with the following eligibility restrictions and priority principles:

1. *Eligibility Restrictions*—At commencement of a Cycle, each individual coordinate with a non-zero satisfaction value from all buy Profiles and all sell Profiles received by the OptiMark System in a given eligible security would be grouped into the Buy Profile Data Base or the Sell Profile Data Base, respectively. Each individual coordinate, no matter how small or large in the corresponding size, from either profile Data Base would be eligible to be matched with one or more coordinates from the other Profile Data Base and would result in one or more Orders,¹² provided that:

1.1. no buy and see coordinates could be matched in violation of any applicable User instructions for the respective Profiles including: (a) the maximum quantity associated with the Profile; or (b) any boundary conditions restricting the aggregate number of shares that may be bought or sold at a particular price or size range; and

1.2. no buy and sell coordinates could be matched at a price inferior to that of another coordinate with Standing (as defined below) that is eligible for matching. A buy (sell) coordinate has Standing if: (a) it has a satisfaction value of 1, and (b) all coordinates having the same price and a smaller size, down to

¹² The term *Orders[s]* means one or more order[s] generated from a Cycle at specific prices and sizes at which execution immediately may occur. Orders in Eligible Securities for execution shall be in round lots equal to or greater than 1,000 shares, except for Orders resulting from processing the Nasdaq Quote Montage Profiles which may be in any round lot size. Orders must be in price increments conforming to the requirements of Nasdaq trading system rules and system requirements applicable to all Orders executed in Nasdaq. Such Orders shall include the following information: (1) the stock ticker symbol; (2) a designation as "buy," "sell long," "sell short," or "sell short exempt"; and (3) such other information as may be required by the Board of the Nasdaq Stock Market.

and including the minimum trading increment (100 shares), are included in the associated Profile at a satisfaction value of 1. Also, each coordinate from a Nasdaq Quote Montage Profile would have Standing. Alternatively, no coordinate from a Profile containing any boundary conditions restricting the aggregate number of shares that may be bought or sold at a particular size range shall have Standing. For example, no coordinate from a Profile submitted by a User on an "all-or-none" basis would have Standing.

2. *Priority Principles*—The methods for considering potential matches between buy and sell coordinates in the Profile Data Bases would vary, depending on whether both coordinates represent satisfaction values of 1 or less than 1. As a result, these would be two separate stages of a Cycle:

2.1 *Aggregation Stage*. The OptiMark System initially would process eligible buy and sell coordinates in the Profile Data Bases, each with the full satisfaction value of 1 only. At this stage of calculation ("Aggregation Stage"), smaller-sized coordinates may be aggregated to build sufficient size to be matched with larger-sized coordinates to generate Orders in accordance with the following rules of priority, subject to the applicable eligibility restrictions:

(A) *Price aggressiveness*. A coordinate with a more aggressive price (*i.e.*, a higher price for a buy coordinate and a lower price for a sell coordinate) would have priority over coordinates with less aggressive prices.

(B) *Standing*. Among the coordinates with the same price, a coordinate with Standing would have priority over all other coordinates without Standing.

(C) *Time of entry*. Among the coordinates with the same price and Standing, the time of the entry of the associated Profile would determine relative priority, with earlier submissions having priority. All Profiles submitted by Users would be appropriately time-stamped with a unique serial number when received by the OptiMark System. Because each Nasdaq Quote Montage Profile would be generated from the most current quotation prevailing at the time of commencement of a Cycle, the effective time of entry of a Nasdaq Quote Montage Profile would be later than that of any other Profile submitted by a User.

(d) *Size*: Among the coordinates with the same price, Standing and time of entry, priority would be determined by size, with larger sizes having higher priority.

2.2. *Accumulation Stage*. Upon completion of the Aggregation Stage, the

¹¹ Profiles entered into the Application are contingent expressions of interest to trade at a range of prices and sizes.

OptiMark System would consider potential matches between eligible buy coordinates and sell coordinates in the Profile Data Bases where one or both parties have a satisfaction value of less than 1 but greater than 0. At this stage of calculation ("Accumulation Stage"), only those buy and sell coordinates with the same associated price and size would be matched to generate Orders in accordance with the following rules of priority, subject to the applicable eligibility restrictions.

(A) *Mutual satisfaction.* A potential match with a higher mutual satisfaction value (the product of the two satisfaction values) would take precedence over other potential matches with lower mutual satisfaction values.

(B) *Time of entry (based on the earlier Profile).* Among the potential matches with the same mutual satisfaction, the match with the earlier time of entry, as determined initially by the effective time of entry assigned to the earlier of the buy and sell Profiles involved (the "earlier Profile"), would have priority over other potential matches.

(C) *Size.* Among the potential matches with the same mutual satisfaction and time of entry for the earlier Profile, priority would be given to the one with a larger size.

(D) *Time of entry (based on the later Profile).* Among the potential matches with the same mutual satisfaction, time of entry (for the earlier Profile), and size, the match with the earlier time of entry, as determined this time by the effective time of entry assigned to the later of the buy and sell Profiles involved (the "later Profile"), would have priority over other potential matches.

(E) *Price assignment.* In regard to all remaining ties between potential matches, which would consist solely of the coordinates for a single pair of buy and sell Profiles from two Users that may be matched with the same mutual satisfaction, time of entry and size, but at different prices, priority would be given to the match at a price more favorable to the User whose Profile has the earlier time of entry. For example, among the last potential matches remaining at the price of 10 and at 10¹/₈, if the sell Profile is the earlier Profile, then the match would take place at the price of 10¹/₈. Two or more Profiles that are entered into the OptiMark System representing the same number of shares may result in executions at differing prices depending on the other information and conditions entered into the OptiMark System.

Generation of Orders Resulting From OptiMark Cycles

Any Orders generated from a Cycle at specific prices and sizes that involve the matching of any two User-submitted Profiles, in whole or in part, will be immediately executed. The trade between the matched Users will be transmitted automatically through Nasdaq's Automated Confirmation Transaction Service ("ACT") for trade reporting and clearing purposes (discussed more fully below).

Orders generated from a Cycle at specific prices and sizes that involve the matching of any Nasdaq Quote Montage Profile, in whole or in part, will be immediately delivered to the relevant participant through Nasdaq's existing delivery and execution systems, which will be adapted for this purpose. Currently, this means Nasdaq's SOES and SelectNet Systems. Nasdaq has already filed a proposed rule change with the SEC that would, among other things, integrate SOES and SelectNet into one trading system.¹³ To facilitate the delivery and execution of any Orders resulting from the Nasdaq Quote Montage Profiles, Nasdaq intends to employ these evolving trading systems in the form that they exist in at the time the Application begins operations. Any Order transmitted through these means to the participant's quote will be executed, unless the quote has been executed or canceled, in whole or in part, prior to delivery from the Application. If the quotation against which the contra Profile was matched has been executed or canceled, in whole or in part prior to delivery from the Application, the Orders generated by the Application shall be canceled without imposing any liability against the displayed quotation. In the case of any Orders delivered from the Application to any UTP Plan Exchange Specialist, those executed by the Exchange shall be considered executed and reported on such Exchange.¹⁴

Clearance and Settlement

As indicated above, transactions that result from matches through the Application will be cleared using Nasdaq's post-execution service, ACT. Accordingly, final locked-in trades will be forwarded to the National Securities Clearing Corporation ("NSCC") in the ordinary course, and will clear and settle regular way through NSCC as would any other Nasdaq transaction. All Users will receive a report of any

execution resulting from processing the Profiles submitted by them (including any execution resulting against a displayed quotation) as soon as possible after the executive takes place. Non-member Users will have the option of re-allocating for clearing purposes all or a portion of any execution to another broker by the end of the trading day. A Designated Broker generally will be notified promptly after the close of the trading day to the extent it has been allocated for clearing purposes any transaction resulting from a Profile submitted by a non-member User sponsored by that Designated Broker.

In the comparison, clearance and settlement process, although the specific identify of the counterparties to a particular trade will be temporarily masked until 4:30 p.m. of the trade day, the Designated Broker that agreed to sponsor a User in the Application is fully responsible for the clearance and settlement of that trade. Nasdaq and the operator of the Application are not responsible for either the User or another Designated Broker failing to pay for or to deliver the securities traded through this facility. Further, the NASD, Nasdaq and any other NASD subsidiary or affiliate, and the operator of the OptiMark Matching Module are not deemed parties to or participants in, as principal or as agent, any trade that may occur through the Application. In proposed NASD Rule 4998(a), the Association states that neither Nasdaq, the NASD, nor any affiliate, operator, licensor, or administrator of the OptiMark Matching Module may be held responsible for any damages arising from the use of the Application. In addition, proposed NASD Rule 4998(b) states that neither Nasdaq, the NASD, nor any affiliate, operator, licensor, or administrator of the Application makes any express or implied warranties with respect to any results that a User or Designated Broker using the Application may expect. Paragraph (b) of proposed NASD Rule 4994 clearly states that responsibility for clearance and settlement remains with the Designated Broker. The User and Supplemental Account Agreements that each party must sign prior to entering a Profile into the Application likewise make clear that the responsibility for clearance and settlement lies with the Designated Broker, and that the Designated Broker must evaluate the ability of Users to settle trades when it authorizes a User to submit Profiles under its sponsorship.

Finally, trades executed through the Application will not be subject to NASD Rule 11890, regarding clearly erroneous trades. Due to the complexity of Profile

¹³ See Securities Exchange Act Release No. 39718 (March 4, 1998) 63 FR 12124 (March 12, 1998).

¹⁴ See proposed NASD Rule 4994(a), *Order Execution, Reporting and Clearing*.

matches, it would be very difficult to allow a single party to request that its part of a matched set of Profiles be withdrawn from a match after the fact. Attempting to delete a Profile that is part of a match could require an entire match to be re-constructed and create a chain reaction of broken matches. The Application will require parties entering Profiles to agree that once matched, their Profiles cannot be deemed to be erroneously entered. Consequently, Nasdaq seeks to amend Rule 11890 to make clear that the Rule cannot be used by any Application User as a means to break a trade resulting from an OptiMark match.¹⁵

Trade Reporting, Short Sales, and Halts

Like other executive services provided by Nasdaq, a public trade report will be immediately disseminated by Nasdaq for any executions resulting from the Nasdaq Application. These trade reports will be reported on behalf of the sell side party to the trade. The report for any resulting transaction will not be distinguished on the public tape from any other trade reported through Nasdaq. SEC Transaction Fees (Section 31 Fees)¹⁶ apply and will be charged against the seller(s).

With respect to the NASD' short sale rule, Rule 3350, which applies to Nasdaq National Market securities, the OptiMark Match Module will be programmed to capture the bid price direction at the commencement of every Cycle, as well as the short sale status of every Profile entered (*i.e.*, whether it is marked short, and whether or not it is exempt). It will exclude any Profile that could result in a match and execution of any transaction in a Nasdaq National Market security that would be prohibited by the short sale rule.¹⁷

Nasdaq will suspend within the Application any activity in any security that is subject to a trading halt or suspension pursuant to NASD or SEC rules, Nasdaq Market Emergency Rules, or if deemed necessary for the protection of investors or to preserve system capacity and integrity.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6)¹⁸ and Section 11A¹⁹ of the Act. Section

15A(b)(6) requires that the rules of a registered national securities association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principals 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 system, and, in general, to protect investors and the public interest. Section 15A(b)(6) further requires that such rules not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Section 11A(a)(1) sets forth findings of Congress that new data processing and communications techniques create the opportunity for more efficient and effective market operations. Section 11A(a)(1)(C) states that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure: (1) economically efficient execution of securities transactions; (2) fair competition among brokers and dealers; (3) the availability to brokers, dealers, and investors of information with respect to securities; (4) the practicability of brokers executing investors' orders in the best market; and (5) an opportunity for investors orders to be executed without the participation of a dealer.

The Application takes advantage of new data processing and communications techniques to create the opportunity for a more efficient market in the trading of Nasdaq securities. It will enhance opportunities for investors by providing an alternative method to receive the best available price in the marketplace, obtain price improvement, and reduce trading costs.

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, as amended.

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 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 self-regulatory organization consents, the Commission will:

(A) by order approve the 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 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. 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-98-85 and should be submitted by January 26, 1999.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁰

Margaret H. McFarland,

Deputy Secretary.

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¹⁵ Telephone conversation between Eugene Lopez, Vice President, Trading and Market Services, Nasdaq and David Sieradzki, Special Counsel, Division, Commission, on December 22, 1998.

¹⁶ 15 U.S.C. 78ee.

¹⁷ See proposed NASD Rule 4995, *Short Sale In the Nasdaq Application*.

¹⁸ 15 U.S.C. 78o-3(b)(6).

¹⁹ 15 U.S.C. 78k-1.

²⁰ 17 CFR 200.30-3(a)(12).