

Plan Participant, the submission of two distinct best bids and offers ("BBOs") could be deemed inconsistent with Section VI.C.1 of the Plan.<sup>6</sup> Pursuant to the 13th Amendment of the Plan and Rule 11Aa3-2(a),<sup>7</sup> Nasdaq cannot be granted Plan Participant status until it is registered as a national securities exchange. While Nasdaq submits a distinct BBO from the NASD and until Nasdaq is registered as a national securities exchange, the NASD will submit quotes to the Plan's Securities Information Processor ("SIP") in a manner different than specified in Section VI.C.1. of the Plan and, thus, in conflict with Commission Rule 11Aa3-2(d).<sup>8</sup>

As discussed at length in the notice of the 13th Amendment,<sup>9</sup> the Commission had determined to relieve the potential conflict among the SuperMontage approval order,<sup>10</sup> Rule 11Aa3-2,<sup>11</sup> and the Plan, by granting the NASD an exemption under Rule 11Aa3-2(f)<sup>12</sup> from compliance with Section VI.C.1. of the Plan as required by Rule 11Aa3-2(d)<sup>13</sup> until such time as Nasdaq is registered as a national securities exchange. The Plan Participants have requested an extension of such exemptive relief.

### III. Discussion

The Commission finds that extending the operation of the Plan is consistent with the requirements of the Act and the rules and regulations thereunder, and, in particular, Section 12(f)<sup>14</sup> and Section 11A(a)(1)<sup>15</sup> of the Act and Rules 11Aa3-1 and 11Aa3-2 thereunder.<sup>16</sup>

<sup>6</sup> Section VI.C.1. of the Plan, as approved by the Operating Committee in the 13th Amendment, states that "[t]he Processor shall disseminate on the UTP Quote Data Feed the best bid and offer information supplied by each Participant, including the NASD. \* \* \*

<sup>7</sup> 17 CFR 240.11Aa3-2(a).

<sup>8</sup> 17 CFR 240.11Aa3-2(d). Commission Rule 11Aa3-2(d) requires a self-regulatory organization participant of national market system plan to comply with the terms of that plan.

<sup>9</sup> See Securities Exchange Act Release No. 46139 (June 28, 2001 [sic]), 67 FR 44888 (July 5, 2002).

<sup>10</sup> See Securities Exchange Act Release No. 43863 (January 19, 2001), 66 FR 8020 (January 26, 2001).

<sup>11</sup> 17 CFR 240.11Aa3-2.

<sup>12</sup> 17 CFR 240.11Aa3-2(f).

<sup>13</sup> 17 CFR 240.11Aa3-2(d).

<sup>14</sup> 15 U.S.C. 78l(f). The Commission finds that extending the Plan is consistent with fair and orderly markets, the protection of investors and the public interest, and otherwise in furtherance of the purposes of the Act. The Commission has taken into account the public trading activity in securities traded pursuant to the Plan, the character of the trading, the impact of the trading of such securities on existing markets, and the desirability of removing impediments to, and the progress that has been made toward the development of a national market system.

<sup>15</sup> 15 U.S.C. 78k-1(a)(1).

<sup>16</sup> 17 CFR 240.11Aa3-1 and 17 CFR 240.11Aa3-2.

Section 11A of the Act directs the Commission to facilitate the development of a national market system for securities, "having due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets," and cites as an objective of that system the "fair competition \* \* \* between exchange markets and markets other than exchange markets."<sup>17</sup> When the Commission first approved of the Plan on a pilot basis, it found that the Plan "should enhance market efficiency and fair competition, avoid investor confusion, and facilitate surveillance of concurrent exchange and OTC trading."<sup>18</sup> The Plan has been in existence since 1990 and Participants have been trading Nasdaq securities under the Plan since 1993.

The Commission finds that extending the operation of the Plan for a year furthers the goals described above by preventing the lapsing of the sole effective transaction reporting plan for Nasdaq securities traded by exchanges pursuant to unlisted trading privileges. The Commission believes that the Plan is currently a critical component of the national market system and that the Plan's expiration would have a serious, detrimental impact on the further development of the national market system.

The Commission also finds that it is appropriate to extend the exemption under Rule 11Aa3-2(f)<sup>19</sup> from compliance with Section VI.C.1. of the Plan as required by Rule 11Aa3-2(d).<sup>20</sup> The Commission believes that the Plan is a critical component of the national market system and that the requested exemptive relief is necessary to assure the effective operation of the Plan. The Commission believes that the requested exemptive relief extension is consistent with the Act, the Rules thereunder, and, specifically, with the objectives set forth in Sections 12(f) and 11A of the Act<sup>21</sup> and Rules 11Aa3-1 and 11Aa3-2 thereunder.<sup>22</sup>

### IV. Conclusion

*It is therefore ordered*, pursuant to sections 12(f) and 11A of the Act<sup>23</sup> and paragraph (c)(4) of Rule 11Aa3-2<sup>24</sup> thereunder, that the operation of the Plan be, and hereby is, extended and

<sup>17</sup> 15 U.S.C. 78k-1(a).

<sup>18</sup> See Securities Exchange Act Release No. 28146 (June 26, 1990), 55 FR 27917 (July 6, 1990).

<sup>19</sup> 17 CFR 240.11Aa3-2(f).

<sup>20</sup> 17 CFR 240.11Aa3-2(d).

<sup>21</sup> 15 U.S.C. 78l(f) and 15 U.S.C. 78k-1.

<sup>22</sup> 17 CFR 240.11Aa3-1 and 11Aa3-2.

<sup>23</sup> 15 U.S.C. 78l(f) and 15 U.S.C. 78k-1.

<sup>24</sup> 17 CFR 240.11Aa3-2(c)(4).

that certain exemptive relief also be extended until December 15, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>25</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48890; File No. SR-NASD-2003-174]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Amend the Fee Schedule for the Nasdaq National Market Execution System With Respect to Executions Across Multiple MPIDs of the Same Member

December 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 November 26, 2003, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by Nasdaq. Nasdaq has designated this proposal as one establishing or changing a due, fee or other charge imposed by the self-regulatory organization under Section 19(b)(3)(A)(ii) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the rule immediately effective upon filing with the Commission. 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 the Substance of the Proposed Rule Change

Nasdaq proposes to amend NASD Rule 7010(i) to modify the fee charged when Quotes/Orders submitted by the same member under different market participant identifiers ("MPIDs") match and execute against each other in the Nasdaq National Market Execution System ("NNMS" or,

<sup>25</sup> 17 CFR 200.30-3(a)(27).

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

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

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

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

“SuperMontage”).<sup>5</sup> Nasdaq implemented the revised fee schedule on December 1, 2003. The text of the proposed rule change appears below. New text is italicized.

\* \* \* \* \*

7000. CHARGES FOR SERVICES AND EQUIPMENT  
 7010. System Services  
 (a)–(h) No change.  
 (i) Nasdaq National Market Execution System (SuperMontage)

The following charges shall apply to the use of the Nasdaq National Market Execution System (commonly known as SuperMontage) by members:

Order Entry:

Non-Directed Orders (excluding Preferred Orders) .....	No charge.
Preferred Orders:	
Preferred Orders that access a Quote/Order of the member that entered the Preferred Order).	No charge.
Other Preferred Orders .....	\$0.02 per order entry.
Directed Orders .....	\$0.10 per order entry.

Order Execution:

Non-Directed or Preferred Order that accesses the Quote/Order of a market participant that does not charge an access fee to market participants accessing its Quotes/Orders through the NNMS:	
Charge to member entering order .....	\$0.003 per share executed (but no more than \$120 per trade for trades in securities executed at \$1.00 or less per share).
Credit to member providing liquidity .....	\$0.002 per share executed (but no more than \$80 per trade for trades in securities executed at \$1.00 or less per share).
Non-Directed or Preferred Order that accesses the Quote/Order of a market participant that charges an access fee to market participants accessing its Quotes/Orders through the NNMS.	\$0.001 per share executed (but no more than \$40 per trade for trades in securities executed at \$1.00 or less per share).
Directed Order .....	\$0.003 per share executed.
Non-Directed or Preferred Order entered by a member that accesses its own Quote/Order <i>submitted under the same or a different market participant identifier of the member.</i>	No charge.

Order Cancellation:

Non-Directed and Preferred Orders .....	No charge.
Directed Orders .....	\$0.10 per order cancelled.

(j)–(s) No change.

\* \* \* \* \*

**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

Nasdaq proposes to amend NASD Rule 7010(i) to modify the fee charged when multiple Quotes/Orders submitted by the same member under different MPIDs match and execute against each other in SuperMontage. Currently, Nasdaq does not charge a fee when a

member executes a trade against itself in SuperMontage and the Quotes/Orders are submitted under the same MPID (“single MPID execution”). However, when the same scenario occurs but the Quotes/Orders are submitted by a member under different MPIDs (“multiple MPID execution”), Nasdaq charges the standard SuperMontage execution fee that applies when trading interest of different members matches and executes.

Nasdaq proposes to amend NASD Rule 7010(i) so single MPID executions and multiple MPID executions are treated the same—there will be no charge. Therefore, Nasdaq proposes, beginning on December 1, 2003, that there will be no charge when a Non-Directed Order or Preferred Order submitted under one MPID of a member accesses the member’s own Quote/Order submitted under a different MPID.<sup>6</sup> Nasdaq states that its policy for not charging a fee when Quotes/Orders submitted by a member match and execute in SuperMontage is based on an expectation that, in its absence, members would internalize a greater percentage of orders through their own

proprietary systems, rather than exposing them to the full market.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,<sup>7</sup> in general and with Section 15A(b)(5) of the Act,<sup>8</sup> in particular, in that it provides for the equitable allocation of reasonable fees among members. Nasdaq believes the proposal harmonizes its fee structure for trades that are “internalized” by members through SuperMontage, irrespective of whether the trade is the result of a single MPID execution or multiple MPID execution.

*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.

<sup>5</sup> “Quotes/Orders” is defined under NASD Rule 4701(bb).

<sup>6</sup> Non-Directed Order and Preferred Order are defined under NASD Rule 4701(p) and (aa), respectively.

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

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

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>9</sup> and Rule 19b-4(f)(2) thereunder<sup>10</sup> because it establishes or changes a due, fee or other charge. At any time within 60 days after filing of this proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

### 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. Comments should be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. SR-NASD-2003-174. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hard copy or by e-mail but not by both methods. 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 number SR-NASD-2003-174 should be submitted by January 5, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48880; File No. SR-NASD-2003-145]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto To Give Authority to a 3-Member Subcommittee of NASD's Market Regulation Committee to Review Alternative Display Facility System Outage and Denial of Excused Withdrawal Determinations

December 4, 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 September 25, 2003, the National Association of Securities Dealers, Inc. ("NASD") 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 NASD. On November 24, 2003, and December 2, 2003, NASD filed Amendment Nos. 1<sup>3</sup> and 2<sup>4</sup> to the proposed rule change, respectively. 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

NASD is proposing to amend NASD Rules 4300A and 4619A(g) to give jurisdiction to a 3-member subcommittee of NASD's Market Regulation Committee ("MRC") to review system outage determinations

<sup>11</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> NASD filed a new Form 19b-4, which replaces and supersedes the original filing in its entirety.

<sup>4</sup> Letter from Philip A. Shaikun, Office of General Counsel, Regulatory Policy and Oversight, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated December 2, 2003 ("Amendment No. 2"). Amendment No. 2 deletes the following sentence from Exhibit 1 to the Form 19b-4: "NASD has designated the proposed rule change as concerned solely with administration of the self-regulatory organization under Section 19(b)(3)(A)(iii) of the Act and Rule 19b-4(f)(3) thereunder, which renders the proposal effective upon receipt of this filing by the Commission."

under Rule 4300A(f) and excused withdrawal denials under Rule 4619A, respectively.

The proposed rule change would apply during the time that the NASD Alternative Display Facility operates on a pilot basis. The Commission previously approved the ADF as a nine-month pilot to quote and trade only Nasdaq-listed securities.<sup>5</sup> The Commission subsequently approved an extension of the pilot until January 26, 2004.<sup>6</sup> The text of the proposed rule is set forth below. Proposed new language is italicized; proposed deletions are in brackets.

\* \* \* \* \*

4300A. Quote and Order Access Requirements.

(a) through (e) No change.

(f) Procedures for Reviewing System Outages

(1) through (4) No change.

(5) A Market Participant may appeal a determination made under paragraph (e)(3) to a *three-member subcommittee comprised of current or former industry members of NASD's Market Regulation [Alternative Display Facility Market Operations Review] Committee* in writing, via facsimile or otherwise, by the close of business on the day a determination is rendered pursuant to paragraph (e)(3). An appeal to the *subcommittee [Committee]* shall operate as a stay of the determination made pursuant paragraph (e)(3). Once a written appeal has been received, the Market Participant may submit any additional supporting written documentation, via facsimile or otherwise, up until the time the appeal is considered by the *subcommittee [Committee]*. The *subcommittee [Committee]* shall render a determination by the close of business following the day a notice of appeal is received. The *subcommittee's [Committee's]* determination shall be final and binding.

\* \* \* \* \*

4619A. Withdrawal of Quotations and Passive Market Making

(a) through (f) No Change.

(g) *A three-member subcommittee comprised of current or former industry members of NASD's [Alternative Display Facility Operations Review] Market Regulation Committee* shall have jurisdiction over proceedings brought by market makers seeking review of a denial of an excused withdrawal

<sup>5</sup> Securities Exchange Act Release No. 46249 (July 24, 2002), 67 FR 49822 (July 31, 2002).

<sup>6</sup> Securities Exchange Act Release No. 47633 (April 10, 2003), 68 FR 19043 (April 17, 2003).

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>10</sup> 17 CFR 240.19b-4(f)(2).