

fund obligation of a significant financial amount for the IDB or its clearing firm.

This proposed rule change modifies the rule language adoption in SR-EMCC-2003-02 to establish a capped, as opposed to a fixed clearing fund obligation of \$50 million to be deposited by special members. Under the proposed rule change, if the calculated clearing fund requirement were less than \$50 million, the special member would only deposit the calculated required amount. If the calculated amount exceeds the \$50 million cap for any day, the other EMCC members are required to deposit the difference between the calculated amount and the capped amount on a pro-rata basis based on their average clearing fund requirements over the previous thirty calendar day period. To have a capped clearing fund obligation of \$50 million for special members was EMCC's intent in File No. SR-EMCC-2003-02.

EMCC believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder because it will permit a more equitable allocation of charges among participants since it will not require a participant to deposit funds greater than the calculated required amount.

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

EMCC does not believe that the proposed rule change will have an impact on or impose a burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments from EMCC members have not been solicited or received on the proposed rule change.

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)(i) of the Act⁴ and Rule 19b-4(f)(1)⁵ thereunder because it constitutes an interpretation with respect to the meaning of an existing rule. At any time within sixty days of the filing of such rule change, the Commission may summarily abrogate such 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 5th Street NW, Washington, DC 20549-0069. Comments may also be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. SR-EMCC-2003-08. This file number should be included on the subject line if e-mail is used. To help the Commission process and review comments your more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the rule filing that are filed with the Commission, and all written communications relating to the rule filing between the Commission and any person, other than those that may be withheld from the public in accordance with provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room in Washington, DC. Copies of such filing will also be available for inspection and copying at EMCC's principal office and on EMCC's Web site at <http://www.e-m-c-c.com/legal/index.html>. All submissions should refer to File No. SR-EMCC-2003-08 and should be submitted within March 11, 2004.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.⁶

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49224; File No. SR-NASD-2003-192]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. Relating to Section 4 of Schedule A to the NASD By-Laws

February 11, 2004.

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 22, 2003, the National Association of Securities Dealers, Inc. ("NASD") 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 NASD. On January 29, 2004, NASD submitted Amendment No. 1 to the proposed rule change.³ NASD has designated the proposed rule change as "establishing or changing a due, fee, or other charge" under section 19(b)(3)(A) of the Act,⁴ and Rule 19b-4(f)(2) thereunder,⁵ which renders the proposal effective upon filing with the Commission. 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 Section 4 of Schedule A to the NASD By-Laws to establish a late fee to be assessed against NASD members that fail timely to pay their yearly renewal fees to the Central Registration Depository ("CRD[®]" or "Web CRDSM").⁶ The

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Shirley H. Weiss, Associate General Counsel, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated January 29, 2004 ("Amendment No. 1"). In Amendment No. 1, NASD amended the discussion of the purpose of the proposed rule change (i) to correct a reference to the NASD By-Laws and (ii) to include a discussion of NASD's multi-pronged program to help ensure that members make required disclosures on Forms U4 and U5 in a timely manner.

⁴ 15 U.S.C. 78s(b)(3)(A).

⁵ 17 CFR 240.19b-4(f)(2).

⁶ The Commission notes that NASD filed the proposed rule change with an incorrect reference to section 4(b) of the Schedule A to the NASD By-Laws. In this instance, because the error was technical in nature, the Commission did not require NASD to file an amendment to the proposed rule

Continued

⁴ 15 U.S.C. 78s(b)(3)(a)(i).

⁵ 17 CFR 240.19b-4(f)(1).

⁶ 17 CFR 200.30-3(a)(12).

proposed late fee would be operative on March 8, 2004. The text of the proposed rule change is set forth below. Proposed new language is in *italics*; proposed deletions are in [brackets].

* * * * *

Schedule A to NASD By-Laws

Assessments and fees pursuant to the provisions of Article VI of the By-Laws of NASD shall be determined on the following basis.

* * * * *

Section 4—Fees

(a) through (l) No change.

(m) *NASD shall assess each member a fee of \$10 per day, up to a maximum of \$300, for each day that a new disclosure event or a change in the status of a previously reported disclosure event is not timely filed as required by NASD on an initial Form U5, an amendment to a Form U5, or an amendment to a Form U4, with such fee to be assessed starting on the day following the last date on which the event was required to be reported.*

* * * * *

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

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change, as amended, 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. NASD 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

The purpose of the proposed rule change, as amended, is to amend Section 4 of Schedule A to the NASD By-Laws to establish a late fee of \$10 per day, up to a maximum of \$300, to be assessed against members that fail timely to report a new disclosure event or a change in the status of a disclosure event that was previously reported on an initial Form U5, an amendment to a Form U5, or an amendment to a Form U4. This fee would be assessed starting

change. In the future, the Commission expects that NASD will carefully review proposed rule changes before filing them with the Commission to ensure their accuracy.

on the day following the last day on which the event was required to be reported. As further detailed below, the proposed rule change, as amended, is effective immediately upon filing and would become operative on March 8, 2004. As more fully explained below, NASD proposes to provide a six-month transition period starting on March 8, 2004, and ending on September 10, 2004, during which time NASD would waive the late fee for the first 10 days the filing is late, provided the filing is made during those 10 days. NASD represents that disclosure events, in this context, generally refer to events that require affirmative answers to the questions on Forms U4 ("Uniform Application for Securities Industry Registration or Transfer") and U5 ("Uniform Termination Notice for Securities Industry Registration") that elicit information about criminal actions, regulatory disciplinary actions, civil judicial actions, customer complaints, terminations, and financial matters (currently, Questions 14A–M on Form U4 and Questions 7A–F on Form U5). Disclosure events must be reported either 30 days or 10 days after the member learns of the triggering event, depending on the type of information to be reported. NASD represents that, with respect to the Form U4, Article 5, section 2(c) of the NASD By-Laws requires all Forms U4 filed with NASD to be kept current at all times by supplementary amendments that must be filed with NASD not later than 30 days after learning of the facts or circumstances giving rise to a reporting obligation. If such filing involves a statutory disqualification as defined in section 3(a)(39) and Section 15(b)(4) of the Act, such amendment shall be filed not later than 10 days after such disqualification occurs.

With respect to the Form U5, a member is required under Article V, Section 3(a) of the NASD By-Laws to give notice of the termination of a registered person not later than 30 days following the termination of the person's association with the member. Article V, Section 3(b) requires members to file an amendment to the Form U5 in the event that the member learns of facts or circumstances causing any information in the Form U5 to become inaccurate or incomplete, not later than 30 days after the member learns of the facts or circumstances giving rise to the amendment.⁷

⁷ Examples of events that trigger a reporting requirement include: notice of an NASD decision or order containing findings that a registered person violated NASD rules or receipt of a customer complaint or arbitration claim that meets the reporting criteria on Forms U4 or U5.

Upon submission of a late disclosure filing, CRD® would calculate the late fee and debit the firm's CRD® account \$10 per day, up to a maximum charge of \$300.⁸ NASD represents that the proposed rule change is part of a multi-pronged program to help ensure that members make required disclosures on Forms U4 and U5 in a timely manner. In addition to the proposed late filing fee, NASD represents that it will be issuing a Notice to Members asking members to comment on two proposals. The first proposal concerns amending the Minor Rule Violation Plan to clarify and expand the provisions governing the late filing of required registration information. The second proposal concerns adopting a rule that would enable NASD to place a broker in an inactive status if the broker and his or her firm failed to respond to an NASD notice that a disclosure event is required to be reported or updated. Further, NASD represents that its staff is implementing enhanced internal processes for reviewing all Rule 3070 filings and customer-related arbitration claims to determine whether firms have made required disclosures on Forms U4 and U5 in a timely manner. NASD represents that those firms that have demonstrated a pattern of late filings will be subject to disciplinary actions.

NASD proposes to assess late fees against members that fail timely to report a new disclosure event or a change in the status of a previously reported disclosure event on initial Forms U5 and amendments to Forms U4 and U5. With respect to amendments to Forms U4 and U5, NASD would determine whether a disclosure event (or update to a previously reported event) is being reported late by identifying the date on which the disclosure event should have been reported and comparing it to the day on which it was reported. If the event were to be reported after the 10-day or 30-day period established under NASD rules, the late fee would be assessed. In addition, NASD would assess a late fee if a member were to fail to report timely a new disclosure event or a change in the status of a previously reported disclosure event on an initial Form U5.⁹

⁸ NASD recognizes that members may be prevented from filing timely disclosures if their registered persons fail to advise them of certain reportable information to which the registered persons, and not the members, are privy, such as criminal charges or bankruptcies. In such cases, NASD would consider the facts and circumstances in determining whether imposition of a late fee is appropriate.

⁹ For example, NASD would assess a late fee if a member reports on an initial Form U5 a customer complaint that was received by the member three months before the registered person was

Moreover, with respect to Forms U5, a failure to file the initial Form U5 within 30 days after the date of termination would continue to subject members to an \$80 late filing fee under Section 4(b)(2) of Schedule A, in addition to a late fee based on any late reporting of a disclosure event.¹⁰

NASD represents that it currently may bring disciplinary actions for failure to timely file amendments to Forms U4 and U5, and would continue to exercise discretion to bring such actions based on the facts and circumstances of individual cases notwithstanding the establishment of the late fee.¹¹ NASD represents that timely and complete reporting of such information is critical to regulators for registration, investigation and examination purposes, as well as to investors who are or who may be interested in doing business with a registered person and are seeking information through NASD's BrokerCheck Program. NASD represents that the establishment of the late fee is intended to act as a disincentive to late filing and to encourage members to timely update Forms U4 and U5.

NASD proposes to provide a six-month transition period starting on March 8, 2004, and ending on September 10, 2004. During this time, NASD would waive the late fee for the first 10 days the filing is late, provided the filing is made during those 10 days. Accordingly, NASD would not assess the first \$100 (at \$10 per day) if the filing were to be made during those 10 days. Instead, during the six-month transition period, the member's CRD® account would indicate that NASD has waived the late fee, thereby alerting the member it has an issue with timely reporting.

NASD would not waive any portion of the late fee for members making filings that are between 11 and 30 days late during this transition period. Such members would be charged \$10 for each

late day, up to \$300. For example, a member reporting a disclosure event eight days late during the transition period would receive a report showing the number of days late, but would not be assessed a late fee. Conversely, a member reporting a disclosure event 11 days late during these six months would be charged \$10 per late day, for a total of \$110. Starting on September 13, 2004, the end of the six-month transition period, members would be charged the \$10 fee beginning each day the filing is late, up to a maximum of \$300.

2. Statutory Basis

NASD believes that the proposed rule change, as amended, is consistent with the provisions of section 15A of the Act,¹² in general, and with sections 15A(b)(5) and 15A(b)(6) of the Act,¹³ in particular, which require, among other things, that NASD rules provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system that NASD operates or controls, and that NASD rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles 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. NASD believes that the proposed late filing fee would provide an additional incentive to NASD members to file new disclosure events or changes in the status of previously reported disclosure events on or before the date on which the event or status change is required to be reported under NASD rules.

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

NASD does not believe that the proposed rule change, as amended, 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

NASD requested comment on, among other things, a late disclosure filing fee in Notice to Members 02-74 (November

2002). Specifically, NASD advised members that it was considering imposing a late disclosure filing fee as an additional safeguard to ensure data integrity, reduce or eliminate reporting gaps, and ensure that information is timely reported. Of the 58 members and individuals who filed comments, 34 commenters commented on the proposed late fee. The Association of Registration Management ("ARM") found the proposal to be reasonable, but suggested that any late fee be assessed against the responsible party (and further suggested that the registered person may be the responsible party in some cases). The North American Securities Administrators Association ("NASAA") agreed that late fees would provide an incentive to filers that do not make timely reports, and the Public Investors Arbitration Bar Association ("PIABA") supported implementation of additional safeguards to ensure timely reporting of disclosure information. A majority of these commenters believed that members, not individual brokers, should be responsible for any late fees. One commenter viewed the proposed late fee as a punitive tool that should be considered for more egregious offenses, such as failures timely to report customer complaints or regulatory actions. Three commenters expressed concern about NASD's establishing the correct "trigger" date for the reporting requirement.

NASD has considered these comments and agrees with the commenters who believe that a late fee can be an effective deterrent to late filing. NASD has also determined that since it is the members' responsibility to file initial Forms U4 and U5 and amendments to those Forms, they should also be responsible for paying late fees when the filings are late. The proposed rule would not alter the date on which disclosure filings are currently required to be made. This rule merely would serve as a further disincentive to late filing. Further, it is NASD's view that all disclosures that would be subject to the proposed rule are important, since they involve an individual's financial, regulatory, and criminal history.

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

The proposed rule change, as amended, has become immediately effective pursuant to section 19(b)(3)(A)(ii) of the Act,¹⁴ and subparagraph (f)(2) of Rule 19b-4

terminated. In this scenario, the member should have reported the customer complaint via an amended Form U4 within 30 days of receiving the customer complaint while the individual was still associated with the member (rather than reporting it for the first time on the Form U5 giving notice of the person's termination).

¹⁰ Timely notice of the termination of a registered person and the reason for that termination is important information for NASD and other regulators. Accordingly, NASD will continue to assess a late fee for full Forms U5 (i.e., Forms U5 giving notice of termination in all capacities with a member) that are filed more than 30 days after the member terminates the registered person. If a full Form U5 is filed late and also reports disclosure information late, NASD also will assess a late disclosure reporting fee.

¹¹ The Commission notes that charging a late fee in no way absolves the NASD of its duty to enforce compliance by its members with the NASD's rules or the Federal Securities laws.

¹² 15 U.S.C. 78o-3.

¹³ 15 U.S.C. 78o-3(b)(5) and 15 U.S.C. 78o-3(b)(6).

¹⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

thereunder,¹⁵ in that it establishes or changes a due, fee, or other charge imposed by NASD. The fee would become operative on March 8, 2004. At any time within 60 days of the filing of the proposed rule change, as amended, the Commission may summarily abrogate this proposed 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.¹⁶

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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 may also be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. SR-NASD-2003-192. 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 hardcopy 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 No. SR-NASD-2003-192 and should be submitted by March 11, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁷

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49220; File No. SR-NASD-2003-128]

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment Nos. 1, 2, and 3 Thereto by the National Association of Securities Dealers, Inc. Relating to the Establishment of a Maximum ECN Access Fee in SuperMontage and the Elimination of SuperMontage's Price/Time With Fee Consideration and Price/Size Execution Algorithms

February 11, 2004.

I. Introduction

On August 11, 2003, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its subsidiary, the Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend NASD Rules 4623 and 4710 to: (1) Establish a maximum level of quote/order access fees for Electronic Communications Networks ("ECNs") that elect to participate in Nasdaq's National Market Execution System ("NNMS" or "SuperMontage"); (2) eliminate SuperMontage's Price/Time with access fee consideration execution algorithm; and (3) eliminate SuperMontage's Price/Size execution algorithm. On September 10, 2003 and September 15, 2003, Nasdaq filed Amendment Nos. 1³ and 2⁴ to the proposed rule change, respectively. The proposed rule change, as amended, was published for comment in the **Federal**

Register on September 30, 2003.⁵ On January 20, 2004, Nasdaq filed Amendment No. 3 to the proposed rule change.⁶ The Commission received seventeen comment letters on the proposal, as amended.⁷ On December 15, 2003, Nasdaq filed a response to the comment letters.⁸ This order approves the proposed rule change, as amended.

⁵ See Securities Exchange Act Release No. 48501 (September 17, 2003), 68 FR 56358 ("Notice").

⁶ See letter from Thomas P. Moran, Associate General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated January 16, 2004 ("Amendment No. 3"). In Amendment No. 3, Nasdaq made technical changes to the rule text to reflect the approval of or the immediate effectiveness of other Nasdaq proposals. The Commission notes that this is a technical, non-substantive amendment and not subject to notice and comment.

⁷ See letters to Jonathan G. Katz, Secretary, Commission, from Kim Bang, Bloomberg Tradebook LLC, dated October 21, 2003 ("Bloomberg Letter"); William O'Brien, Chief Operating Officer, BRUT, LLC, dated October 24, 2003 ("BRUT Letter"); Linda Lerner, General Counsel, Domestic Securities, Inc., dated October 24, 2003 ("Domestic Letter"); Gregg A. Dudzinski, Head of Equity Trading, Wm. V. Frankel & Co., dated, October 21, 2003 ("Dudzinski Letter"); Frederic Leslie, General Counsel, Hill, Thompson, Magid, L.P., dated November 7, 2003 ("Hill Thompson Letter"); Harvey Houtkin, Chief Executive Officer, dated October 22, 2003 ("Houtkin Letter"); Alex Goor, Executive Vice President, Instinet Corporation (on behalf of Instinet Corp. and the Island ECN, Inc.), dated October 22, 2003 ("Instinet/Island Letter"); Samuel F. Lek, Chief Executive Officer, Lek Securities Corp., dated December 16, 2003 ("LSC Letter"); Mark E. Yegge, Chief Executive Officer, NexTrade Holdings, Inc., dated October 13, 2003 ("NexTrade Letter"); Stephen Massocca, President & Director of Trading, Pacific Growth Equities, LLC, dated October 20, 2003 ("PGE Letter"); Josef Schaible, dated August 19, 2003 ("Schaible Letter"); Ann L. Vlcek, Vice President & Associate General Counsel, Securities Industry Association, dated October 31, 2003 ("SIA Letter"); John P. Hughes *et al.*, Chairman, Securities Traders Association, dated October 20, 2003 ("STA Letter"); Martin Cunningham, President, Security Traders Association of New York, Inc., dated October 21, 2003 ("STANY Letter"); Roderick Covlin, Executive Vice President, Track ECN, dated October 17, 2003 ("Track Letter"); and Scott W. Anderson, Director and Counsel, Region Americas Legal, UBS Securities LLC, dated October 16, 2003 ("UBS Letter"); and letter to Margaret H. McFarland, Deputy Secretary, Commission, from John H. Bluher, Executive Vice President & General Counsel, Knight Trading Group, Inc., dated, October 21, 2003 ("Knight Letter"). The Commission notes that several commenters raised issues, such as the elimination of access fees entirely, the payment and collection of access fees, and decrementation within SuperMontage, that are not at issue in the proposed rule change. At issue in the proposed rule change, in part, is whether the access fee cap being proposed is consistent with the Act. A more detailed summary of the comment letters received by the Commission is available for public inspection in the Public Reference Room at the Commission.

⁸ See letter from Thomas P. Moran, Associate General Counsel, Nasdaq, to Terri L. Evans, Assistant Director, Division, Commission, dated December 12, 2003 ("Nasdaq Response Letter").

¹⁵ 17 CFR 240.19b-4(f)(2).

¹⁶ For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change, as amended, under Section 19(b)(3)(C) of the Act, the Commission considers the period to commence on January 29, 2004, the date on which NASD filed Amendment No. 1. See 15 U.S.C. 78s(b)(3)(C).

¹⁷ 17 CFR 200.30-3(a)(12).

¹⁵ U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Edward S. Knight, Executive Vice President and General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated September 9, 2003, replacing Nasdaq's original Form 19b-4 filing in its entirety ("Amendment No. 1").

⁴ See letter from Thomas P. Moran, Associate General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated September 12, 2003 ("Amendment No. 2"). In Amendment No. 2, Nasdaq made technical corrections to its rule text.