For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–49603; File No. SR–NASD–2004–062]**

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc. to Modify the Pricing for Trading Nasdaq-Listed Securities on SuperMontage

April 22, 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 April 9, 2004, 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. 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 proposes to modify the pricing for trading Nasdaq-listed securities on Nasdaq's SuperMontage system. 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 [3] and Rule 19b–4(f)(2) thereunder,[4] which renders the rule effective upon Commission receipt of this filing. Nasdaq plans to implement the proposed rule change on April 15, 2004.

The text of the proposed rule change is below.[5] Proposed new language is in italic; proposed deletions are in brackets.

**Rule 7010. System Services**

(a)–(h) No change.

(i) Nasdaq National Market Execution System (SuperMontage)

(1) The following charges shall apply to the use of the Nasdaq National Market Execution System (commonly known as SuperMontage) by members *for Nasdaq-listed securities:*

**Order Entry**

Non-Directed Orders (excluding Preferenced Orders)—No charge.

Preferenced Orders: Preferenced Orders that access a Quote/Order of the member that entered the Preferenced Order)—No charge; Other Preferenced Orders—$0.02 per order entry; Directed Orders—$0.10 per order entry.

**Order Execution**

Non-Directed or Preferenced 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:

Average daily shares of liquidity provided through the NNMS by the member during the month: 400,000 or less—$0.003 per share executed (but no more than $120 per trade for trades in securities executed at $1.00 or less per share); 400,001 to 5,000,000—$0.0027 per share executed (but no more than $108 per trade for trades in securities executed at $1.00 or less per share); 5,000,001 or more—$0.002[5]*6* per share executed (but no more than $10[0]*4* 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)].

*Average daily shares of liquidity provided through the NNMS by the member from April 15 to April 30, 2004, or during any month thereafter: 20,000,000 or less—$0.002 per share executed (but no more than $80 per trade for trades in securities executed at $1.00 or less per share); 20,000,001 or more—$0.0025 per share executed (but no more than $100 per trade for trades in securities executed at $1.00 or less per share*).

Non-Directed or Preferenced 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:

Charge to member entering order:

Average daily shares of liquidity provided through the NNMS by the member during the month: 400,000 or less—$0.001 per share executed (but no more than $40 per trade for trades in securities executed at $1.00 or less per share); 400,001 or more $0.001 per share executed (but no more than $40 per trade for trades in securities executed at $1.00 or less per share, and no more than $10,000 per month).

Directed Order—$0.003 per share executed.

Non-Directed or Preferenced Order entered by a member that accesses its own Quote/Order submitted under the same or a different market participant identifier of the member—No charge.

Order Cancellation

Non-Directed and Preferenced Orders—No charge; Directed Orders—$0.10 per order cancelled

(2)–(3) No change.

(j)–(u) No change.

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### 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 recently implemented reduced pricing for execution of Non-Directed and Preferenced Orders in the Nasdaq National Market Execution System (''NNMS'' or ''SuperMontage''), by reducing order execution fees for members that provide significant liquidity through the NNMS.[6] Under the fee schedule currently in effect, the per share fee charged to a member to access liquidity during a particular month depends on the extent to which such

[5] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] The proposed rule change is marked to show changes from the rule as it appears in the electronic NASD Manual available at *www.nasd.com*, and also reflects the addition of NASD Rule 7010(i)(3) by SR–NASD–2004–048, which was filed on an immediately effective basis. *See* Securities Exchange Act Release No. 49576 (April 16, 2004) (Notice of filing and immediate effectiveness of File No. SR–NASD–2004–048).

[6] *See* Securities Exchange Act Release No. 48972 (December 22, 2003), 68 FR 75301 (December 30, 2003) (Notice of filing and immediate effectiveness of File No. SR–NASD–2003–185) (''December 2003 Notice'').

member provided liquidity through the NNMS during that month. Liquidity provision is measured by adding the number of shares executed through transactions in which the member's Quote/Order was accessed by another market participant.[7]

Thus, if a member provides a daily average of more than 5,000,000 shares of liquidity through the NNMS during a month, the member currently pays $0.0025 per share executed in trades during that month in which the member accesses liquidity provided by a market participant that does not charge an access fee (*i.e.*, in which the member's Non-Directed or Preferenced Orders access the Quotes/Orders of other market participants).[8] If a member provides a daily average of 400,001 to 5,000,000 shares of liquidity during a month, the member pays $0.0027 per share executed in trades executed during the month in which the member accesses liquidity provided by a market participant that does not charge an access fee.[9] Finally, if a member provides a daily average of 400,000 or fewer trades during a month, the member pays $0.003 per share executed during the month.[10] Nasdaq also currently provides a $0.002 per share credit to a member that provides the liquidity for an execution and does not charge an access fee.[11]

Similarly, the fee paid by a member to access the Quote/Order of a market participant that charges an access fee depends upon the shares of liquidity provided by the member during that month. If a member provides a daily average of more than 400,000 shares of liquidity during a month, the member will pay $0.001 per share executed for trades during the month in which the member accesses liquidity provided by a market participant that charges an access fee;[12] however, the member's total charge for that month will be capped at $10,000. If a member provides a daily average of 400,000 shares of liquidity or less during a month, the member will also pay $0.001 per share, but no monthly cap will be applicable.[13]

As Nasdaq noted in SR–NASD–2003–185,[14] it believes that it is appropriate and equitable to allocate SuperMontage's operational and regulatory costs in a manner that takes account of the economies of scope and lower per share costs associated with higher volumes of liquidity provision. Nasdaq believes that the extent to which members provide liquidity through SuperMontage is the single most important factor in determining whether SuperMontage provides an attractive destination for routing orders, and in turn, whether SuperMontage will generate sufficient revenues to cover the costs of operating and regulating a market. According to Nasdaq, a member that offers significant liquidity at prices that establish, or that are near, the national best bid/best offer makes SuperMontage a more attractive destination for market participants seeking to access liquidity by enhancing the likelihood that they will be able to execute orders at favorable prices.

Nasdaq notes that the costs of operating SuperMontage and regulating the Nasdaq market are largely fixed, rather than variable, costs. As SuperMontage's volume increases (*i.e.*, as more and more liquidity is provided through SuperMontage), Nasdaq's costs, on a per share basis, decrease. Accordingly, Nasdaq believes that it is appropriate and equitable to allocate these costs in a manner that takes account of the lower per share costs associated with higher volumes of liquidity provision. Nasdaq believes that lower volumes would translate into higher per share costs for market participants; higher volumes reduce per share costs, and Nasdaq believes that the benefits of these reduced costs can and should be made available to those market participants that make the higher volumes possible in the first place. Moreover, Nasdaq believes that there are economies of scope associated with higher volumes of liquidity provision, because trades executed through SuperMontage also have market data revenue and (in some cases) trade reporting fees associated with them.

Nasdaq notes that several of the electronic communications networks (''ECNs'') that compete with Nasdaq to offer liquidity have implemented increases in the credits they offer to major liquidity providers.[15] Although Nasdaq had hoped that charging reduced fees for liquidity accessing to firms that provided significant liquidity would obviate the need to increase credits to liquidity providers, Nasdaq has now concluded that an increase in credits will be necessary to remain competitive. Accordingly, Nasdaq is proposing that during a month in which a member that does not charge an access fee provides a daily average of more than 20,000,000 shares of liquidity, the credit for transactions in which the member provided liquidity would be $0.0025 per share executed.[16] For firms providing lower levels of liquidity, the credit will remain $0.002 per share executed.[17] Because the change is being implemented in the middle of a month, the higher credit will be provided for trades beginning on April 15, 2004, for firms with an average daily volume of more than 20,000,000 shares during the period from April 15 to April 30, 2004, and thereafter will be provided to firms with an average daily volume of more than 20,000,000 shares during a particular month.

In addition, effective April 15, 2004, Nasdaq will increase the liquidity-accessing fee for members providing a daily average of more than 5,000,000 shares of liquidity, from $0.0025 to $0.0026 per share executed in trades in which the member accesses liquidity provided by a market participant that does not charge an access fee.[18] Thus, a firm providing an average daily volume of more than 5,000,000 shares during the month of April would pay $0.0025 per share for its liquidity accessing trades prior to April 15 and $0.0026 for its trades from April 15 through April 30. A firm providing an average daily volume of more than 5,000,000 shares during any subsequent month would pay $0.0026 for all of its trades during that month. In the proposed rule change, Nasdaq is also modifying the lead-in text of NASD Rule 7010(i) to make it clear that the rule applies to

[7] If a particular corporate entity has multiple market participant identifiers (''MPIDs'') associated with the Central Registration Depository (''CRD'') number under which it conducts business, Nasdaq aggregates shares of liquidity provided through all of its MPIDs. However, Nasdaq does not aggregate one corporate entity's trade reports with those associated with MPIDs assigned to subsidiaries or other affiliates with a different CRD number.

[8] Transactions in a security priced under $1.00 (''low-priced trades'') are subject to fee caps applicable to trades in excess of 40,000 shares. Accordingly, when the fee that the member pays is $0.0025, the maximum per transaction charge for a low-priced trade is $100.

[9] When the fee that the member pays is $0.0027, the maximum per transaction charge for a low-priced trade is $108.

[10] When the fee that the member pays is $0.003, the maximum per transaction charge for a low-priced trade is $120.

[11] The maximum credit for a low-priced trade is currently $80.

[12] The maximum per transaction charge for a low-priced trade is $40.

[13] The maximum per transaction charge for a low-priced trade is $40.

[14] *See* December 2003 Notice, *supra* note 6.

[15] *See, e.g., www.island.com/prodserv/bd/fee/fee.asp.* Nasdaq understands that another major ECN is also offering similarly higher credits to major liquidity providers on an *ad hoc* basis and therefore has not made details on these credits publicly available.

[16] When the credit is $0.0025, the maximum credit for a low-priced trade would be $100.

[17] When the credit is $0.002, the maximum credit for a low-priced trade would be $80.

[18] When the fee that the member pays is $0.0026, the maximum per transaction charge for a low-priced trade would be $104.

trades in Nasdaq-listed securities through the NNMS. Although ITS Securities are now traded on SuperMontage, the fees for trades in these securities continue to be governed by NASD Rule 7010(d).

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,[19] in general, and with section 15A(b)(5) of the Act,[20] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the NASD operates or controls. According to Nasdaq, the proposed rule change bases the level of credits for providing liquidity through SuperMontage on the extent to which a member provides liquidity during the month, thereby taking account of the lower per share costs and the economies of scope associated with higher volumes of liquidity provision.

*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.

*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

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act[21] and Rule 19b–4(f)(2) thereunder,[22] because it establishes or changes a due, fee, or other charge imposed by the self-regulatory organization. At any time within 60 days of the filing of the proposed 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.

[19] 15 U.S.C. 78*o*–3.

[20] 15 U.S.C. 78*o*–3(b)(5).

[21] 15 U.S.C. 78s(b)(3)(a)(ii).

[22] 17 CFR 240.19b–4(f)(2).

## 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. Comments may be submitted by any of the following methods:

*Electronic comments:*

- Use the Commission's Internet comment for (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASD–2004–062 on the subject line.

*Paper comments:*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NASD–2004–062. 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, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). 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 Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASD–2004–062 and should be submitted on or before May 21, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[23]

**Margaret H. McFarland,**

*Deputy Secretary.*

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[23] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–49582; File No. SR–OCC–2004–02]**

## Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Clearing Member Accounts

April 19, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on March 11, 2004, The Options Clearing Corporation (''OCC'') 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 primarily by OCC. 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

The proposed rule change amends OCC's by-laws and rules to permit clearing members to open and maintain with OCC two new types of accounts and to clarify that clearing members may carry multiple combined market makers' accounts that are separate from one another.

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

In its filing with the Commission, OCC 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. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.[2]

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

The purpose of the proposed rule change is twofold. First, the rule change permits clearing members to open and maintain with OCC two new types of accounts: (1) A segregated futures professional account, in which a clearing member may carry the

[1] 15 U.S.C. 78s(b)(1).

[2] The Commission has modified parts of these statements.