

individual registered persons may not even know nor, for privacy reasons, should know, the name of every customer. Thus, in some firms, registered persons would be put in the position of reporting, and getting approval for, every credit card, every mortgage, and every home equity line of credit, in case the banking institution was a firm customer. NASD states that this was not the intent of the rule. Thus, NASD proposes to amend NASD Rule 2370 to indicate that the scope of the rule is limited to lending arrangements between registered persons and their customers, rather than any customer of the firm. It is the member's responsibility to determine whether a particular individual represents or services a customer.

NASD would also like to make clear that the purpose of NASD Rule 2370 is to give members the opportunity to evaluate the appropriateness of particular lending arrangements between their registered persons and customers and the potential for unnecessary and ill-advised conflicts of interest between both the registered person and his customer and the registered person and the member with which he is associated. NASD Rule 2370 does not require that members necessarily have oversight of the terms of the loan, or its execution or administration. However, the absence of such requirements in the rule does not signify the conclusion of NASD that, under certain circumstances, such action by members may be appropriate and necessary in accordance with the member's supervisory obligations. It continues to be the prerogative of member firms to exclude any or all lending arrangements between registered persons and their customers.

(2) Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁶ which requires, among other things, that NASD rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the proposed rule change is designed to accomplish these ends by (1) continuing to prohibit registered persons from borrowing money from or lending money to a customer unless the member has written procedures allowing such lending arrangements consistent with the rule, and the loan falls within one of five permissible types of lending

arrangements and (2) maintaining the notice and approval requirement except where the lending arrangement is between: (a) Registered persons and family members; or (b) between registered persons and lending institutions, provided the terms of such arrangements are those that the customer would also generally make available to members of the general public similarly situated as to need, purpose and creditworthiness.

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

NASD 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

Within 35 days of the date 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 NASD consents, the Commission will:

(A) by order approve such 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 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 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-2004-05. 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 filings will also be available for inspection and copying at the principal office of the Association. All submissions should refer to File No. SR-NASD-2004-05 and should be submitted by February 13, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁷

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49085; File No. SR-NASD-2003-165]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Granting Approval to a Proposed Rule Change and Amendment Nos. 1, 2, 3, and 4 Thereto To Establish a New "Discretionary" Order in Nasdaq's SuperMontage System

January 15, 2004.

On November 7, 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 ("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 adopt a new order type, the discretionary order ("DO"), in Nasdaq's National Market Execution System ("NNMS" or "SuperMontage"). Nasdaq filed Amendment Nos. 1, 2, and 3 to the proposal on November 14, 2003,³ November 21, 2003,⁴ and November 28,

⁷ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from John M. Yetter, Associate General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated November 14, 2003 ("Amendment No. 1").

⁴ See letter from John M. Yetter, Associate General Counsel, Nasdaq, to Katherine A. England,

⁶ 15 U.S.C. 78o-3(b)(6).

2003, respectively.⁵ The proposed rule change, as amended, was published for comment in the **Federal Register** on December 9, 2003.⁶ The Commission received no comment letters on the proposal. Nasdaq also submitted Amendment No. 4 to the proposed rule change on January 9, 2004.⁷ This order approves the proposed rule change, as amended.⁸

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association⁹ and, in particular, the requirements of section 15A of the Act¹⁰ and the rules and regulations thereunder. Specifically, the Commission believes that the proposed rule change is consistent with section 15A(b)(6) of the Act,¹¹ which, among other things, requires that NASD's rules be designed 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. The Commission notes Nasdaq's proposed DOs are substantially similar to an order type approved for the Archipelago Exchange, the trading facility for Pacific

Exchange Equities, Inc.¹² Further, the Commission believes that DOs should provide market participants increased flexibility in expressing their trading interest by allowing them to enter orders with a displayed bid or offer price and a non-displayed discretionary price range within which the participant is also willing to buy or sell. This may, in turn, enhance order interaction in Nasdaq.

The Commission notes that DOs may be entered, but not displayed or executed, prior to the market open. Under the proposal, DOs entered prior to the market open that would create locked or crossed markets if they were displayed will be held in a time-priority queue (along with Immediate-or-Cancel orders) for processing at 9:30 a.m. If a DO locks or crosses the market after the opening it would be processed quickly and automatically pursuant to NASD Rule 4710(b)(3)(A). As a result, DOs entered prior to the open should not increase the frequency of locked and crossed markets at the open.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,¹³ that the proposed rule change and Amendment Nos. 1, 2, 3, and 4 thereto (File No. SR-NASD-2003-165) are approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

Margaret H. McFarland,

Deputy Secretary.

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Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² to rename the Nasdaq Prime data feed as the TotalView Data Feed, to expand it to include quotes and orders at all price levels associated with an individual issue traded on Nasdaq, and to discontinue the Nasdaq Aggregated Depth at Price ("ADAP") data feed. On December 5, 2003, Nasdaq submitted Amendment No. 1 to the proposed rule change.³ The proposed rule change, as amended, was published for comment in the **Federal Register** on December 17, 2003.⁴ The Commission received no comments on the proposal. This order approves the proposed rule change, as amended.⁵

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association,⁶ and, in particular, with the requirements of section 15A of the Act.⁷ Specifically, the Commission finds that the proposal is consistent with sections 15A(b)(5)⁸ and 15A(b)(6)⁹ of the Act in that the proposal 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, promotes just and equitable principles of trade, fosters cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, removes impediments to and perfects the mechanism of a free and open market and a national market

Assistant Director, Division, Commission, dated November 20, 2003 ("Amendment No. 2").

⁵ See letter from John M. Yetter, Associate General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated November 26, 2003 ("Amendment No. 3").

⁶ See Securities Exchange Act Release No. 48868 (December 3, 2003), 68 FR 68677.

⁷ See letter from John M. Yetter, Associate General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated January 8, 2004 ("Amendment No. 4"). In Amendment No. 4, Nasdaq amended the proposed rule text to reflect the Commission's approval of SR-NASD-2003-143. See Securities Exchange Act Release No. 49020 (January 5, 2004) 69 FR 1769 (January 12, 2004). The Commission notes that this is a technical, non-substantive amendment and not subject to notice and comment.

⁸ Nasdaq intends to implement the DO within three weeks of Commission approval, and will inform market participants of the exact implementation date via a Head Trader alert on <http://www.nasdaqtrader.com>. Telephone conversation between John Yetter, Assistant General Counsel, Nasdaq, and Marc McKayle, Special Counsel, Division, Commission on January 15, 2004.

⁹ In approving this proposed rule change, the Commission notes that it has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁰ 15 U.S.C. 78o-3.

¹¹ 15 U.S.C. 78o-3(b)(6).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49088; File No. SR-NASD-2003-162]

Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. Relating to Prime and ADAP Data Feeds in NASD Rule 7010(q)

January 16, 2004.

On October 29, 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 ("Commission") a proposed rule change pursuant to section 19(b)(1) of the

¹² See Securities Exchange Act Release No. 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) (Order approving SR-PCX-00-25).

¹³ 15 U.S.C. 78s(b)(2).

¹⁴ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated December 4, 2003.

⁴ See Securities Exchange Act Release No. 48902 (December 10, 2003), 68 FR 70324.

⁵ Nasdaq intends to expand the TotalView Data Feed on or after April 1, 2004 and to discontinue the ADAP data feed on or after February 16, 2004. In each case, Nasdaq will issue a vendor alert announcing the actual date of the change at least three days before it is implemented. Nasdaq has represented that if it eliminates the ADAP data feed prior to the expansion of the TotalView Data Feed, distributors that wish to continue to distribute only the aggregate data (*i.e.*, the aggregate size of attributable and non-attributable quotes and orders at five price levels) may do so by using the aggregate data available from the current Nasdaq Prime data feed.

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

⁷ 15 U.S.C. 78o-3.

⁸ 15 U.S.C. 78o-3(b)(5).

⁹ 15 U.S.C. 78o-3(b)(6).