

submissions should refer to the File No. SR-CBOE-2002-26 and should be submitted by November 27, 2002.

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. 34-46742; File No. SR-NASD-2002-123]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change and Amendment No. 1 by the National Association of Securities Dealers, Inc. Relating to Modification of the Trade or Move Process in the Nasdaq Order Collection and Display Facility ("SuperMontage")

October 30, 2002.

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 September 19, 2002, 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" or "SEC") the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq.³ The Commission is publishing this notice to solicit comments on the proposed rule change and Amendment No. 1 from interested persons and to approve the proposal, as amended, on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to amend NASD Rule 4613, "Character of Quotations," to permit Nasdaq, upon the filing of a complaint by a member or an Unlisted

Trading Privilege ("UTP") Exchange, to declare null and void a Trade-or-Move Directed Order executed at or after 9:29:30 a.m. The text of the proposed rule change appears below. Proposed new language is in italics.

Rule 4613—Character of Quotations

(a)–(d) No Change.

(e) Locked and Crossed Markets.

(1) A market maker shall not, except under extraordinary circumstances, enter or maintain quotations in Nasdaq during normal business hours if:

(A) No Change.

(B) No Change.

(C) Obligations Regarding Locked/Crossed Market Conditions Prior to Market Opening

(i)–(vi) No Change.

(vii) *A Trade or Move Directed Order that is executed at or after 9:29:30 may, upon the filing of a complaint by a member or UTP Exchange, be declared null and void in accordance with the procedures set forth in NASD Rule 11890.*

* * * * *

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 III 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

NASD Rule 4613(e) sets out the obligations of market participants who enter locking/crossing quotations during the pre-market opening period.⁴ The rule requires a market participant that locks or crosses the market between 9:20 a.m. and 9:29:30 a.m. to send a Directed Order(s) with a "Trade-or-Move" designator ("Trade-or-Move Directed Order") to the parties it is locking or crossing. The aggregate size of the Trade-or-Move Directed Order must be at least 10,000 shares for S&P 400 Index

issues and Nasdaq 100 Index issues, and 5,000 shares for other issues.⁵ Within ten seconds of the receipt of a Trade-or-Move Directed Order, the recipient must either trade in full with the incoming Trade-or-Move Directed Order or move its quote to a price that would unlock/cross the market. In essence, the rule prohibits a market participant from locking/crossing the market during the ten minutes prior to the opening, unless the market participant is willing to commit the required number of shares.

Under the SuperMontage opening process, starting at 9:29:30 a.m., Nasdaq will take steps to resolve any outstanding locks/crosses by automatically executing any remaining overlapping buy and sell quotes using the most aggressively priced matching method contained in NASD Rule 4710(b)(3)(B). At the end of this automated process, which should be completed before the 9:30:00 a.m. market open, all locked /crossed markets will be eliminated.

A Trade-or-Move Directed Order has a minimum life of ten seconds by rule before it may be canceled, and the Directed Order process has a built-in five-second minimum life. Therefore, a market participant could receive an execution on a Trade-or-Move Directed Order sent in the final seconds before 9:29:30 a.m. and also receive an execution against its locking/crossing quote in the SuperMontage opening process. Thus, a market participant could be subject to a double execution (*i.e.*, against its quote during the SuperMontage opening process and for the outstanding Trade-or-Move Directed Order).

To address these potential double executions, Nasdaq believes that the recipient of a Trade-or-Move Directed Order should not execute the Trade-or-Move Directed Order after 9:29:30 a.m. and that members should consider Trade-or-Move Directed Orders pending at 9:29:30 a.m. to be null and void. According to Nasdaq, because member firms are concerned that they or others may inadvertently execute a Trade-or-Move Directed Order after 9:29:30 a.m. due to a system malfunction or human error, members have asked that Nasdaq staff be permitted to cancel trades resulting from the improper execution of a Trade-or-Move Directed Order.

NASD Rule 4613(e), as amended, will convey the authority to declare an execution null and void, and is based on the fact of executing a Trade-or-Move Directed Order at or after 9:29:30 a.m.

⁷ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ On October 16, 2002, Nasdaq filed Amendment No. 1 to the proposal. Amendment No. 1 revised the proposal to: (1) provide that Nasdaq may declare null and void a trade resulting from the execution of a Trade-or-Move Directed Order during the SuperMontage pre-opening process only upon the filing of a complaint by a member or by an Unlisted Trading Privilege ("UTP") Exchange; and (2) clarify that Nasdaq may declare null and void the execution of a Trade-or-Move Directed Order, not an execution against a quotation during the SuperMontage opening process.

⁴ A locked market occurs when the quoted bid price is the same as the quoted ask price. A crossed market occurs when the quoted bid price is greater than the quoted ask price.

⁵ See Securities Exchange Act Release No. 45990 (May 28, 2002), 67 FR 38535 (June 4, 2002) (order approving File No. SR-NASD-00-76).

Under the proposal, Nasdaq seeks the authority to declare null and void only the execution of the Trade-or-Move Directed Order, and not an execution against a quotation during the SuperMontage opening process. The execution of a market participant's Trade-or-Move Directed Order and against that market participant's locking/crossing quotation would constitute a double execution and, under the proposal, could trigger the filing of a complaint asking Nasdaq to declare null and void the Trade-or-Move Directed Order.

The procedures to declare an execution null and void are those contained in NASD Rule 11890, "Clearly Erroneous Transactions." While the execution of a Trade-or-Move Directed Order is not "clearly erroneous" as ordinarily used in the context of NASD Rule 11890, Nasdaq believes that the procedures contained in that rule are particularly well suited to resolving the improper execution of a Trade-or-Move Directed Order. Thus, Nasdaq staff will be required only to determine that a Trade-or-Move Directed Order was executed at or after 9:29:30 a.m. to declare that execution null and void after following the complaint procedures set forth in NASD Rule 11890.

In particular, NASD Rule 11890 provides Nasdaq with the authority to receive petitions from market participants requesting that designated officers of Nasdaq review the terms of a transaction and nullify or modify it if the transaction is found to be clearly erroneous. Under subsections (a) and (b) of current NASD Rule 11890, a market participant may seek review by submitting a written complaint to Nasdaq Market Operations within specified time parameters. Subsection (c) of current NASD Rule 11890 sets forth the procedures for designated Nasdaq officers to review transactions on their own motion. In this proposal, Nasdaq seeks the authority to declare transactions null and void in accordance with current subsections (a) and (b) of NASD Rule 11890, but not with current subsection (c) of that rule.⁶

⁶ On September 23, 2002, Nasdaq filed proposed rule change SR-NASD-2002-127 to amend NASD Rule 11890 to clarify the scope of its authority to declare trades null and void. That proposal combines subsections (a) and (b) of current NASD Rule 11890 into a single subsection (a), and re-letters current subsection (c) as new subsection (b). If the Commission approves SR-NASD-2002-127, Nasdaq would have authority to review Trade-or-Move transactions only under new subsection (a) of NASD Rule 11890.

(2) Basis

Nasdaq believes that the proposed rule change is consistent with section 15A of the Act,⁷ and, in particular with section 15A(b)(6),⁸ which requires, among other things, that a registered national securities association's 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. Nasdaq believes that the proposed rule change is consistent with these requirements because the amendment will enhance the interaction of the Trade-or-Move rule with the SuperMontage opening, thereby ensuring a smooth opening of daily trading for the ultimate benefit of investors.

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. 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. 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

⁷ 15 U.S.C. 78o-3.

⁸ 15 U.S.C. 78o-3(b)(6).

SR-NASD-2002-123 and should be submitted by November 27, 2002.

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

Nasdaq has asked the Commission to approve the proposal on an accelerated basis to allow the implementation of SuperMontage, which began on October 14, 2002, to proceed smoothly. Nasdaq notes that market participants are familiar with the procedures used to declare a trade null and void, and that those procedures provide substantial protections to all parties.

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, with the requirements of section 15A(b)(6) of the Act⁹ in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest.¹⁰ The Commission believes that the proposal will contribute to an orderly opening by facilitating the effective interaction of the Trade-or-Move requirements and the SuperMontage opening process. Specifically, the proposal will allow a member or UTP Exchange to file a complaint asking Nasdaq to declare null and void the execution of a Trade-or-Move Directed Order executed at or after 9:29:30 a.m., thereby providing a means to address the double execution that would result from the execution of a market participant's Trade-or-Move Directed Order at or after 9:29:30 a.m. and an execution against that market participant's locking/crossing quotation during the SuperMontage opening process. According to Nasdaq, market participants are concerned that a Trade-or-Move Directed Order pending at 9:29:30 a.m. could be executed inadvertently due to a system malfunction or human error. The Commission believes that the proposal provides a means to eliminate the double execution that could result from the inadvertent execution of a Trade-or-Move Directed Order during the SuperMontage opening process.

Under the proposal, a market participant must follow the procedures set forth in NASD Rule 11890 to ask Nasdaq to declare null and void a

⁹ 15 U.S.C. 78o-3(b)(6).

¹⁰ In approving the proposed rule, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

Trade-or-Move Directed Order.¹¹ The Commission concluded previously that the procedures in NASD Rule 11890 promote the fair and efficient resolution of disputes involving clearly erroneous transactions.¹² Similarly, the Commission believes that the procedures in NASD Rule 11890 will provide a fair and efficient means for addressing a double execution resulting from the execution of a market participant's Trade-or-Move Directed Order and an execution against that market participant's locking/crossing quotation during the SuperMontage opening process.

The Commission finds good cause for approving the proposed rule change and Amendment No. 1 prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. Specifically, the Commission finds that the proposal will contribute to an orderly opening by facilitating the effective interaction of the Trade-or-Move requirements and the SuperMontage opening process. The Commission finds that Amendment No. 1 clarifies the proposal by indicating that Nasdaq will declare null and void the execution of a Trade-or-Move Directed Order only after a member or UTP Exchange files a complaint regarding the execution, and by specifying that Nasdaq would declare null and void the execution of a Trade-or-Move Directed Order rather than an execution against a locking/crossing quotation during the SuperMontage opening process. Accordingly, the Commission believes that there is good cause, consistent with sections 15A(b)(6) and 19(b)(2) of the Act,¹³ to approve the proposal, as amended, on an accelerated basis.

It is therefore Ordered, pursuant to section 19(b)(2) of the Act, that the proposed rule change (SR-NASD-2002-123), as amended, is approved.

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

Margaret H. McFarland,

Deputy Secretary.

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¹¹ As discussed more fully above, the proposal does not authorize Nasdaq on its own motion to declare null and void the execution of a Trade-or-Move Directed Order.

¹² See Securities Exchange Act Release No. 39550 (January 14, 1998), 63 FR 4333 (January 28, 1998) (order approving File No. SR-NASD-96-51).

¹³ 15 U.S.C. 78o-3(b)(6) and 78s(b)(2).

¹⁴ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46744; File No. SR-NASD-2002-150]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. to Extend the Pilot Nasdaq Transaction Services Pricing Package

October 30, 2002.

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 October 18, 2002, 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") the proposed rule change as described in items I and II below, which items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to extend, through March 31, 2003, three components of the pilot Nasdaq Transaction Services pricing package currently in effect ("pricing pilot").³ The components of the pricing pilot extended by this proposal include: (1) The \$0.002 order execution fee for Nasdaq National Market Execution System ("NNMS" or "SuperSoes") orders; (2) the \$0.001 per share rebate for liquidity providers on SuperSoes executions; and (3) the \$0.01 quote update fee. Without such an extension, these pricing standards would terminate on October 31, 2002. The text of the proposed rule change is set forth below. Proposed new language is *italicized*; proposed deletions are in brackets.

* * * * *

7010. System Services

(a)-(i)(1) No change.

(i)(2) Nasdaq National Market Execution System (SuperSoes)

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The pricing pilot components to be extended by this proposal were established by Securities Exchange Act Release No. 44910 (Oct. 5, 2001), 66 FR 52167 (Oct. 12, 2001) (SR-NASD-2001-67); No. 45342 (Jan. 28, 2002), 67 FR 5019 (Feb. 1, 2002) (SR-NASD-2001-96); and No. 45379 (Jan. 31, 2002), 67 FR 5867 (Feb. 7, 2002) (SR-NASD-2001-64 and SR-NASD-2001-68).

The following charges shall apply to the use of the Nasdaq National Market Execution System:

Order Entry Charge—\$0.10 per order entry (entering party only)
Per share Charge—\$0.001 per share executed for all fully or partially executed orders (entering party only)
Cancellation Fee—\$0.25 per order cancelled (canceling party only)⁴

For a pilot period commencing on November 1, 2001 and lasting until [October] March 31, 200[2]3, the per share charge will be \$0.002 per share executed for all fully or partially executed orders (entering party only).

(3) No change.

(4) Liquidity Provider rebate

For a pilot period commencing on November 1, 2001 and lasting until [October] March 31, 200[2]3:

(A) No change.

(B) No change.

(5) Quotation Updates

(A) Except as provided in subparagraph (B), for a pilot period commencing on February 1, 2002 and lasting until [October] March 31, 200[2]3, a fee of \$0.01 per quotation update will be charged to NASD members that post quotations in the Nasdaq quotation montage. A "quotation update" includes any change to the price or size of a displayed quotation or reserve size.

(B) 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 proposes to extend to March 31, 2003, three components of the pricing pilot. The components of the

⁴ Nasdaq corrected a typographical error that appeared in the proposed rule language. Telephone conversation between Teri Nelson Jacoby, Assistant General Counsel, Nasdaq and Susie Cho, Special Counsel, Division of Market Regulation, Commission, October 23, 2002.