

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549-0004.

Extension:

Rule 3 and Form U-3A3-1, SEC File No. 270-77, OMB Control No. 3235-0160.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget ("OMB") a request for extension of the matters relating to the previously approved collections of information discussed below.

Form U-3A3-1, [17 CFR 259.403] under the Public Utility Holding Company Act of 1935, as amended ("Act"), 15 U.S.C. 79, *et seq.*, is an application for exemption from regulation, under Rule 3 of the Act, filed annually by banks that are incidentally public utility holding companies by virtue of holding utility securities in their capacity as a bank.

Rule 3 requires the information collection prescribed by Form U-3A3-1. The Commission estimates that the total annual reporting and record keeping burden of collections for Form U-3A3-1 is 10 hours (5 responses × 2 hours = 10 hours).

The estimate of average burden hours are made for purposes of the Paperwork Reduction Act and are not derived from a comprehensive or representative survey or study of the costs of complying with the requirements of Commission rules and forms.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Please direct general comments regarding the above information to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503; and (ii) R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549. Comments must

be submitted to OMB within 30 days of this notice.

Dated: February 13, 2004.

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 04-3944 Filed 2-23-04; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:

Rule 95 and Form U-13E-1, SEC File No. 270-74, OMB Control No. 3235-0162.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget ("OMB") a request for extension of the matters relating to the previously approved collections of information discussed below.

Form U-13E-1, [17 CFR 259.213] under the Public Utility Holding Company Act of 1935, as amended ("Act"), 15 U.S.C. 79, *et seq.*, is required to be filed under Rule 95 of the Act by certain companies providing services and selling goods to registered public utility holding companies and their subsidiaries.

Rule 95 under the Act, which implements Sections 12(e) and (f) of the Act, requires the information collection prescribed by Form U-13E-1. The Commission estimates that the total annual reporting and recordkeeping burden of collections for Form U-13E-1 is 2 hours (1 response × 2 hours = 2 hours).

The estimate of average burden hours are made for purposes of the Paperwork Reduction Act and are not derived from a comprehensive or representative survey or study of the costs of complying with the requirements of Commission rules and forms.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Please direct general comments regarding the above information to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and

Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503; and (ii) R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission 450 Fifth Street, NW., Washington, DC 20549-0004. Comments must be submitted within 30 days of this notice.

Dated: February 13, 2004.

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 04-3945 Filed 2-23-04; 8:45 am]

BILLING CODE 8010-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49260]

Order Granting Application for Exemptions Pursuant to Section 36(a) of the Exchange Act by the American Stock Exchange LLC, the International Securities Exchange, Inc., the Municipal Securities Rulemaking Board, the Pacific Exchange, Inc., the Philadelphia Stock Exchange, Inc., and the Boston Stock Exchange, Inc.

February 17, 2004.

I. Introduction

The American Stock Exchange LLC ("Amex"), the International Securities Exchange, Inc. ("ISE"), the Municipal Securities Rulemaking Board ("MSRB"), the Pacific Exchange, Inc. ("PCX"), the Philadelphia Stock Exchange, Inc. ("Phlx"), and the Boston Stock Exchange, Inc. ("BSE"), each have filed with the Securities and Exchange Commission ("Commission"), pursuant to Rule 0-12¹ under the Securities Exchange Act of 1934 ("Exchange Act"), an application for an exemption under section 36(a)(1) of the Exchange Act² from the rule filing requirements of section 19(b) of the Exchange Act³ with respect to certain rules of another self-regulatory organization ("SRO") that each of these SROs has either proposed to incorporate by reference or currently incorporates by reference.

II. Applications for Section 36 Exemption From Section 19(b) Rule Filing Requirements for SRO Rules Incorporated by Reference

Several SROs currently incorporate by reference certain rules of other SROs. Specifically, the Amex, ISE, MSRB, and Phlx incorporate the NASD Code of

¹ See 17 CFR 240.0-12.

² 15 U.S.C. 78mm(a)(1).

³ 15 U.S.C. 78s(b).

Arbitration Procedure, while the ISE and PCX incorporate by reference the margin rules of the New York Stock Exchange, Inc. ("NYSE") and Chicago Board Options Exchange, Inc. ("CBOE"). The BSE recently filed a prospective request for incorporation by reference. In connection with the proposal by the BSE to establish the Boston Options Exchange ("BOX") as a new exchange facility,⁴ BSE proposes to permit BOX members to choose to comply with the margin requirements of either the CBOE or the NYSE.

All of these SROs have asked the Commission for exemptive relief, subject to certain conditions, from the requirements to file proposed rule changes under Section 19(b) of the Exchange Act⁵ whenever the SRO whose rules are incorporated by reference changes those rules.⁶

A. Amex

In connection with the 1998 merger between NASD and Amex, Amex amended its Constitution to provide that any arbitration filed following the closing of the merger transaction would be conducted pursuant to the NASD Code of Arbitration Procedure using the arbitration facilities of NASD Regulation, Inc. ("NASDR").⁷

On May 2, 2002, Amex submitted a formal request, pursuant to Rule 0-12 under the Exchange Act,⁸ seeking an exemption under Section 36 of the Exchange Act from the rule filing procedures of Section 19(b) of the Exchange Act with respect to changes to the incorporated NASD rules.

B. ISE

On November 20, 2000, the ISE filed with the Commission a proposed rule change incorporating by reference the

NASD Code of Arbitration Procedure.⁹ Specifically, the ISE proposed to repeal its Rules 1800 through 1835 and create new Rule 1800, which would state: (1) that the NASD Code of Arbitration, as the same may be in effect from time to time, shall govern ISE arbitrations; and (2) that the ISE shall retain jurisdiction over its members for failure to honor arbitration awards and any right, action, or determination by the Exchange that it would otherwise be authorized to adopt, administer or enforce is in no way limited or precluded by incorporation of the NASD Code of Arbitration. The proposed rule change was published for comment in the **Federal Register** on July 26, 2001,¹⁰ and approved by the Commission on November 21, 2001.¹¹

According to the ISE, the purpose of this incorporation by reference was to reflect the contractual relationship between ISE and NASDR whereby NASDR¹² is obligated to perform arbitrations under ISE's rules for ISE members. On October 30, 2001, the ISE submitted a formal request, pursuant to Rule 0-12 under the Exchange Act,¹³ seeking an exemption under Section 36 of the Exchange Act from the rule filing procedures of section 19(b) of the Exchange Act with respect to changes to the incorporated NASD rules.¹⁴ In its approval order, the Commission noted that the ISE had submitted to the Commission such an exemption request.

In the same letter, the ISE also requested a Section 36 exemption from section 19(b) of the Exchange Act with respect to changes to the margin rules of the CBOE and NYSE, both of which are incorporated by reference in ISE Rule 1202.

C. MSRB

In December 1997, the Commission approved amendments to Rule G-35 of the MSRB in which the MSRB effectively incorporated by reference the NASD Code of Arbitration Procedure as

of January 1, 1998.¹⁵ The amendments provided that any new arbitration claims filed on or after that date shall be submitted to and administered by the NASD. The amendments provided that, as of January 1, 1998, every bank dealer (as defined in MSRB Rule D-8) shall be subject to the NASD's Code of Arbitration for every claim, dispute, or controversy arising out of or in connection with the municipal securities activities of the bank dealer acting in its capacity as such.¹⁶ The enforcement mechanism for bank dealers was not altered by the amendments; the bank regulatory agencies continue to be responsible for the inspection and enforcement of bank dealers' municipal securities activities, including arbitration.¹⁷

On April 12, 2002, the MSRB submitted a formal request, pursuant to Rule 0-12 under the Exchange Act,¹⁸ seeking an exemption under section 36 of the Exchange Act from the rule filing procedures of section 19(b) of the Exchange Act with respect to changes to the incorporated NASD Code of Arbitration Procedure.¹⁹

D. PCX

On August 15, 2003, PCX filed with the Commission a proposed rule change to amend PCX Rule 6.47 (Crossing Orders and Stock/Option, SSF/Option Orders) that governs the execution of complex orders involving options and single stock futures. The proposed rule

¹⁵ See Exchange Act Release No. 39378 (December 1, 1997), 62 FR 64417 (December 5, 1997). In its filing, the MSRB stated that it would continue to operate its arbitration program in order to administer its current, open cases and any new claims received prior to January 1, 1998, but would discontinue its program when all such cases have been closed. At such time, the MSRB will submit a filing to the Commission to delete Sections 1 through 37 of Rule G-35, and rescind Rule A-16 on arbitrations fees and deposits. See File No. SR-MSRB-97-4. The MSRB expects to submit such a filing in the near future.

¹⁶ Section 38 of Rule G-35 states as follows:

As of January 1, 1998, every bank dealer (as defined in rule D-8) shall be subject to the Code of Arbitration Procedure of the National Association of Securities Dealers, Inc. ("NASD") for every claim, dispute or controversy arising out of or in connection with the municipal securities activities of the bank dealer acting in its capacity as such. For purposes of this rule, every bank dealer shall be subject to, and shall abide by, the NASD's Code of Arbitration Procedure as if the bank dealer were a "member" of the NASD.

¹⁷ Thus, for example, a bank dealer's refusal to submit to arbitration pursuant to the NASD's Code of Arbitration Procedure, or a bank dealer's failure to pay an arbitration award rendered pursuant to that Code, would constitute a violation of MSRB Rule G-35 since it is this rule that subjects bank dealers to the NASD's Code.

¹⁸ See 17 CFR 240.0-12.

¹⁹ See Letter from Diane G. Klinke, General Counsel, MSRB, to Jonathan G. Katz, Secretary, Commission, dated April 4, 2002.

⁴ The Commission recently approved the BSE's proposal to create BOX as a new electronic options facility of the BSE, operated by Boston Options Exchange Group, LLC, the founding members of which are the BSE, the Bourse de Montreal, and Interactive Brokers Group. See Exchange Act Release No. 49068 (January 13, 2004), 69 FR 2775 (January 20, 2004).

⁵ 15 U.S.C. 78s(b).

⁶ The Commission notes that at the time Amex, MSRB, and Phlx incorporated by reference the NASD Code of Arbitration Procedure and the ISE incorporated by reference the NYSE and CBOE margin rules, the Commission approved rule changes implementing these changes without requiring the SROs to seek an exemption pursuant to Section 36 of the Exchange Act from Section 19(b) with respect to rules incorporated by reference. The Commission has subsequently determined and informed these SROs, however, that such an exemption is necessary for them to continue to operate under incorporated rules of another SRO.

⁷ See Exchange Act Release No. 40622 (October 30, 1998), 63 FR 59819 (November 5, 1998).

⁸ See 17 CFR 240.0-12.

⁹ See Amendments No. 1 and No. 2 to the proposed rule change were filed on March 5, 2001 and July 16, 2001, respectively.

¹⁰ See Exchange Act Release No. 44572 (July 18, 2001), 66 FR 39069 (July 26, 2001).

¹¹ See Exchange Act Release No. 45094 (November 21, 2001), 66 FR 39069 (December 3, 2001).

¹² NASD Dispute Resolution, a wholly owned subsidiary of the NASD, now performs arbitration services for ISE and other SROs. See Exchange Act Release No. 41971 (September 30, 1999), 64 FR 55793 (October 14, 1999) (approving SR-NASD 99-21, as effective on July 9, 2000).

¹³ See 17 CFR 240.0-12.

¹⁴ See Letter from Michael Simon, Senior Vice President and General Counsel, ISE, to Jonathan G. Katz, Secretary, Commission, dated October 29, 2001.

change, which was effective upon filing pursuant to Section 19(b)(3)(A) of the Exchange Act,²⁰ allows a PCX member to elect to be bound by the initial and maintenance margin requirements of either the CBOE or NYSE.²¹

On December 2, 2003, the ISE submitted a formal request, pursuant to Rule 0–12 under the Exchange Act,²² seeking an exemption under Section 36 of the Exchange Act from the rule filing procedures of Section 19(b) of the Exchange Act with respect to changes to the incorporated CBOE and NYSE rules.²³

E. Phlx

On October 1, 1998, the Commission granted accelerated approval to a proposal by the Phlx to amend its arbitration rules to incorporate by reference the NASD Code of Arbitration Procedure. Specifically, Phlx amended Phlx Rule 950 to state, in relevant part, that “[e]very member, member organization, member corporation, participant and participant organization . . . shall be subject to the Code for every claim, dispute, or controversy arising out of or in connection with the securities business of any such member of the Exchange. . . . For purposes of Rule 950, each member will be subject to and required to abide by the Code as if such member were a “member” of the NASD.”²⁴

On December 15, 2003, Phlx submitted a formal request, pursuant to Rule 0–12 under the Exchange Act,²⁵ seeking an exemption under Section 36 of the Exchange Act from the rule filing procedures of Section 19(b) of the Exchange Act with respect to changes to the incorporated NASD Code of Arbitration Procedure.²⁶

F. BSE

On January 13, 2004, the Commission approved BSE’s proposal to establish BOX as a new exchange facility.²⁷ BSE proposed, among other things, rules to govern members of BOX, including BOX Rule Chapter 13, Section 3, which

permits BOX members to elect to be bound by the margin rules of either the CBOE or NYSE.

On December 10, 2003, BSE submitted a formal request, pursuant to Rule 0–12 under the Exchange Act,²⁸ seeking an exemption under Section 36 of the Exchange Act from the rule filing procedures of Section 19(b) of the Exchange Act with respect to changes to the incorporated CBOE and NYSE rules.²⁹

III. Order Granting Section 36 Exemption

Section 36 of the Exchange Act³⁰ authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class thereof, from any provision of the Exchange Act or rule thereunder, if necessary or appropriate in the public interest and consistent with the protection of investors. The Commission believes that it is appropriate to issue exemptions, subject to the conditions described below, to allow SROs to incorporate by reference the rules of other SROs without being subject to the rule filing requirements of Section 19(b) of the Exchange Act whenever the SROs’ rules that are incorporated by reference change. Such exemptions will promote more efficient use of Commission and SRO resources by avoiding duplicative rule filings based on simultaneous changes to identical rule text sought by more than one SRO. Where such an exemption is granted, an SRO that incorporates by reference another SRO’s rules would agree to be governed by the incorporated rules, as amended from time to time, but not be required to file a separate proposed rule change with the Commission each time the SRO whose rules are incorporated by reference seeks to modify its rules.

Any such exemption would be subject to certain conditions. Specifically, the SRO requesting the exemption would be required to incorporate by reference only regulatory rules (*i.e.*, margin, suitability, arbitration), not trading rules, and to incorporate by reference whole categories of rules (rather than “cherry-pick” certain individual rules

within a category). The SRO could, however, impose specific additional rules within the incorporated categories, if approved by the Commission pursuant to Section 19(b)(2) of the Exchange Act. In addition, the SRO seeking to incorporate another SRO’s rules would be required to have reasonable procedures in place to provide written notice to its members each time a change is proposed to the incorporated rules of another SRO in order to provide its members with notice of a proposed rule change that affects their interests, so that they would have an opportunity to comment on it.

Therefore, the Commission is granting the requests for exemption, pursuant to Section 36 of the Exchange Act, from the rule filing requirements imposed by Section 19(b) of the Exchange Act as set forth above by Amex, ISE, MSRB, PCX, Phlx and BSE, and will consider similar future exemption requests from other SROs, provided that:

(1) An SRO wishing to incorporate rules of another SRO by reference has submitted a written request for an order exempting it from the requirement in section 19(b) of the Exchange Act to file proposed rule changes relating to the rules incorporated by reference, has identified the applicable originating SRO(s), together with the rules it wants to incorporate by reference, and otherwise has complied with the procedural requirements set forth in the Commission’s release governing procedures for requesting exemptive orders pursuant to Rule 0–12 under the Exchange Act;³¹

(2) An incorporating SRO has requested incorporation of categories of rules (rather than individual rules within a category) that are not trading rules (*e.g.*, the SRO has requested incorporation of rules such as margin, suitability, arbitration); and

(3) The incorporating SRO has reasonable procedures in place to provide written notice to its members each time a change is proposed to the incorporated rules of another SRO.

Accordingly, *it is ordered*, pursuant to section 36 of the Exchange Act,³² that the Amex, ISE, MSRB, PCX, Phlx, and BSE, with respect to incorporation by reference of other SROs’ rules as specified above, and subject to the conditions described above, shall be exempt from rule filing requirements specified by section 19(b) of the Exchange Act to the extent that this section would otherwise require

²⁰ 15 U.S.C. 78s(b)(3)(A).

²¹ See Exchange Act Release No. 48894 (December 8, 2003), 68 FR 70328 (December 17, 2003) (File No. SR-PCX-2003-42).

²² See 17 CFR 240.0–12.

²³ See Letter from Mai Sharif Shiver, Senior Attorney, Regulatory Policy, PCX, to Jonathan G. Katz, Secretary, Commission, dated December 2, 2003.

²⁴ See Exchange Act Release No. 40517 (October 1, 1998), 63 FR 54177 (October 8, 1998).

²⁵ See 17 CFR 240.0–12.

²⁶ See Letter from Lanny Schwartz, Executive Vice President and General Counsel, Phlx, to Jonathan G. Katz, Secretary, Commission, dated December 12, 2003.

²⁷ See *supra* Note 4.

²⁸ See 17 CFR 240.0–12.

²⁹ See Letter from George W. Mann, Jr., Executive Vice President and General Counsel, BSE, to Jonathan G. Katz, Secretary, Commission, dated December 9, 2003.

³⁰ 15 U.S.C. 78mm. For example, the Commission issued an order pursuant to Section 36 of the Exchange Act, granting to the NASD a temporary exemption from Section 19(b), relating to the acquisition and operation by Nasdaq of a software development company. See Exchange Act Release No. 42713 (April 24, 2000), 65 FR 25401 (May 1, 2000).

³¹ See 17 CFR 240.0–12; Exchange Act Release No. 39624 (February 5, 1998), 63 FR 8101 (February 18, 1998).

³² 15 U.S.C. 78mm.

submission of a filing with the Commission regarding proposed rule changes.

By the Commission.

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 04-3883 Filed 2-23-04; 8:45 am]
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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49266; File No. SR-NASD-2004-015]

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. To Restore the Pre-Trade Only Anonymity Function for SuperMontage

February 17, 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 January 27, 2004, the National Association of Securities Dealers, Inc. (“NASD”), through its subsidiary, The Nasdaq Stock Market, Inc. (“Nasdaq”), 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 Nasdaq. On February 5, 2004, Nasdaq filed Amendment No. 1 to the proposal.³ 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 the Substance of the Proposed Rule Change

Nasdaq is proposing to restore the pre-trade only anonymity option for orders submitted to the Nasdaq National Market Execution System (commonly known as SuperMontage).

The text of the proposed rule change is below. Proposed new language is italicized; deleted language is bracketed.

* * * * *

4719. Anonymity

(a) Pre-Trade Anonymity.

(1) *With the exception of those transactions described in paragraph (a)(2) below, the identity of the member submitting a Non-Attributable Quote/Orders seeking pre-trade anonymity will remain anonymous until execution, at which time the member’s identity will be revealed to its contra party.*

(2) *A Non-Attributable Quote/Order seeking pre-trade anonymity will be processed on a fully anonymous basis in accordance with paragraph (b) below when it matches and executes against a Non-Attributable Quote/Order seeking full anonymity.*

(b) Full Anonymity.

[(a)](1) Transactions executed in NNMS in which at least one member submits a Non-Attributable Quote/Order seeking full anonymity will be processed anonymously. The transaction reports will indicate the details of the transactions, but will not reveal contra party identities.

[(b)(1)](2)(A) The processing described in paragraph [(a)](b)(1) shall not apply to transactions executed in NNMS when the member whose Quote/Order is decremented is an Order-Delivery ECN that charges an access fee.

[(2)](B) Except as required to comply with the request of a regulator, or as ordered by a court or arbitrator, Order-Delivery ECNs shall not disclose the identity of the member that submitted a Non-Attributable Quote/Order that decremented the Order-Delivery ECN’s Quote/Order.

[(c)](3) The Association will reveal a member’s identity in the following circumstances:

[(1)](A) when the National Securities Clearing Corporation (“NSCC”) ceases to act for a member, or the member’s clearing firm, and NSCC determines not to guarantee the settlement of the member’s trades;

[(2)](B) for regulatory purposes or to comply with an order of an arbitrator or court; or

[(3)](C) on risk management reports provided to the member’s contra parties each day after 4:00 p.m., which disclose trading activity on an aggregate dollar value basis.

[(d)](4) The Association will reveal to a member, no later than the end of the day on the date an anonymous trade was executed, when the member’s Quote/Order has been decremented by another Quote/Order submitted by that same member.

[(e)(i)](5)(A) In order to satisfy members’ record keeping obligations under SEC Rules 17a-3(a)(1) and 17a-4(a), Nasdaq shall, with the exception of

those circumstances described in subparagraph [(ii)](B) below, retain for the period specified in Rule 17a-4(a) the identity of each member that executes [an] a fully anonymous transaction described in paragraph [(a)](b) of Rule 4719. The information shall be retained in its original form or a form approved under Rule 17a-6.

[(ii)](B) In the situations described in paragraphs [(b)(1)](b)(2) or [(d)](b)(4) of Rule 4719, and solely with respect to the member that submits, and receives an execution of, a fully anonymous Non-Attributable Quote/Order that is a Preferred Order, the member retains the obligation to comply with Rules 17a-3(a)(1) and 17a-4(a) because it possesses the identity of its contra party.

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

In response to requests from members, Nasdaq is proposing to restore the pre-trade only anonymity option for orders submitted to SuperMontage. Pre-trade anonymity will be an option in addition to the full anonymity feature.⁴ With respect to anonymity, members will now have the choice to submit orders that will preserve their anonymity on a pre-trade basis only or through

⁴ An attributable Quote/Order is the default for a market maker or Electronic Communication Network (“ECN”). If a market maker or ECN wants to trade in anonymous fashion (i.e., a non-attributable Quote/Order), it must indicate either pre-trade anonymity or full anonymity. The default for Order Entry (“OE”) Firms is different because an OE Firm is not allowed to display Quote/Orders under its own market participant identification. If an OE Firm submits an Immediate or Cancel (“IOC”) order (i.e., no chance of the order being displayed on the book), the default is no anonymity. However, if the OE Firm submits something other than an IOC order, the default is full anonymity. An OE Firm must affirmatively choose pre-trade anonymity. See e-mails from Peter Geraghty, Associate Vice President and Associate General Counsel, Nasdaq, to Marc McKayle, Special Counsel, Division, Commission, dated February 4 and February 12, 2004.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Peter Geraghty, Associate Vice President and Associate General Counsel, Nasdaq, to Marc McKayle, Special Counsel, Division of Market Regulation (“Division”), Commission, dated February 4, 2004 (“Amendment No. 1”). In Amendment No. 1, Nasdaq amended the proposal rule change for consideration under Section 19(b)(3)(A) of the Act, and Rule 19b-4(f)(6) thereunder, as opposed to Rule 19b-4(f)(5).