

proposed rule change (SR-NASD-2002-180) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>5</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47344; File No. SR-NASD-2003-05]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendments Nos. 1 and 2 Thereto, by the National Association of Securities Dealers, Inc. To Clarify Rule 4701(o) Regarding the Ability of UTP Exchanges To Enter Non-Attributable Quotes/Orders Into Nasdaq's SuperMontage System

February 11, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 17, 2003, 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. On January 30, 2003, Nasdaq filed Amendment No. 1 to the proposal.<sup>3</sup> On February 6, 2003, Nasdaq filed Amendment No. 2 to the proposal.<sup>4</sup> 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

The NASD proposes to amend NASD Rule 4701(o) to clarify the ability of UTP Exchanges to enter Non-Attributable Quotes/Orders into the Nasdaq National Market Execution System ("NNMS" or "SuperMontage"). The text of the proposed rule change is below.

Proposed new language is *italicized*.

4700. NASDAQ National Market Execution System (NNMS)

4701. Definitions—Unless stated otherwise, the terms described below shall have the following meaning:

(a) through (n) No Change.

(o) The term "Non-Attributable Quote/Order" shall mean a bid or offer Quote/Order that is entered by a Nasdaq Quoting Market Participant or NNMS Order Entry Firm and is designated for display (price and size) on an anonymous basis in the Nasdaq Order Display Facility. *UTP Exchanges may submit Non-Attributable Quote/Order(s) in conformity with Rule 4710(e).*

(p) through (jj) No Change.

#### 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

On July 1, 2002, Nasdaq filed SR-NASD-2002-91 with the Commission setting forth rules governing the entry of orders and quotes by UTP Exchanges into Nasdaq's SuperMontage system.<sup>5</sup> As explained in that filing, UTP Exchanges that elect to participate in the system are allowed to enter a single bid Quote/Order and a single offer Quote/Order representing their principal

trading interest that will displayed along with the UTP Exchange's identifier in the Nasdaq Quotation Montage. If that Attributed Quote/Order falls with the number of price levels subject to aggregation, that UTP Quote/Order will be included in the total aggregated share amounts displayed by the system. For their agency Quotes/Orders, UTP Exchanges that elect to participate in SuperMontage can send one, or multiple, Non-Attributable Quote/Orders to the system. These Quotes/Orders will be displayed under SuperMontage's SIZE MMID. In order to make clear the ability of participating UTP Exchanges to enter Non-Attributable Quotes/Orders for their agency customers, Nasdaq proposes to amend the definition of Non-Attributable Quote/Order in NASD Rule 4701(o) to reference NASD Rule 4710(e) that authorizes and governs UTP Exchange capabilities in SuperMontage.

###### 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,<sup>6</sup> in general, and with section 15A(b)(6) of the Act,<sup>7</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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.

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

Nasdaq believes that the proposed rule change will not impose 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

Nasdaq has not solicited nor received any written comments with respect to the proposed rule change.

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

Because the foregoing proposed rule: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days or such shorter time as the

<sup>5</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See letter from Thomas P. Moran, Associate General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated January 30, 2003 ("Amendment No. 1"). In Amendment No. 1, Nasdaq provided a basis for waiving the 30-day operative delay.

<sup>4</sup> See letter from Thomas P. Moran, Associate General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated February 6, 2003 ("Amendment No. 2"). In Amendment No. 2, Nasdaq amended the proposed rule change language for Rule 4701(o) to reflect changes approved by the Commission in Release No. 34-47301 (January 31, 2003), 68 FR 6236 (February 6, 2003). For the purposes of calculating the 60-day abrogation period, the Commission considers the period to have commenced on February 6, 2003, the date Nasdaq filed Amendment No. 2.

<sup>5</sup> See Securities Exchange Act Release No. 46343 (August 13, 2002), 67 FR 53822 (August 19, 2002) (File No. SR-NASD-2002-91 regarding the voluntary participation of national securities exchanges in the SuperMontage).

<sup>6</sup> 15 U.S.C. 78o-3.

<sup>7</sup> 15 U.S.C. 78o-3(b)(6).

Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to section 19(b)(3)(A) of the Act,<sup>8</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>9</sup> At any time within 60 days of the filing of the proposed rule change, as amended, 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.

Nasdaq has requested that the Commission waive the 30-day operative delay. Nasdaq believes the proposed rule change clarifies a functionality that is already available to UTP Exchanges. In particular, as already set forth in NASD Rule 4710(e), the proposed rule change makes clear that a UTP Exchange participating in the SuperMontage may enter Non-Attributable Quotes/Orders for their agency customers into the system using the SIZE MMID.<sup>10</sup>

The Commission believes that it is consistent with the protection of investors and the public interest to waive the 30-day operative delay.<sup>11</sup> The Commission notes that this proposal merely clarifies the ability of UTP Exchanges to enter Non-Attributable Quotes/Orders, as currently permitted by the system.

#### 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. 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 SR-NASD-2003-05 and should be submitted by March 21, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47351; File No. SR-NASD-2002-60]

#### Self-Regulatory Organizations; Order Granting Approval of a Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendment Nos. 1, 2, and 3 to the Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Permanent Approval of the Primex Auction System®

February 11, 2003.

#### I. Introduction

On May 1, 2002, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> requesting permanent approval of the Primex Auction System® ("Primex" or "System"). The proposed rule change was published for public comment in the *Federal Register* on May 31, 2002.<sup>3</sup> On May 28, 2002, Nasdaq filed Amendment No. 1 to the proposed rule change.<sup>4</sup> The comment period expired

on June 21, 2002.<sup>5</sup> On July 25, 2002, the Commission received one comment letter on the Original Proposal.<sup>6</sup> On October 7, 2002, Nasdaq filed a response to the NYSE Comment Letter.<sup>7</sup> On November 1, 2002, Nasdaq filed Amendment No. 2 to the proposed rule change.<sup>8</sup> On February 4, 2003, Nasdaq filed Amendment No. 3 to the proposed rule change.<sup>9</sup>

This order approves the proposed rule change. In addition, the Commission is publishing this notice to solicit comments on Amendment Nos. 1, 2, and 3 from interested persons, and approving Amendment Nos. 1, 2, and 3 on an accelerated basis.

forth in proposed NASD Rule 5014(b). Market Orders for at least 10,000 shares or \$200,000 in market value are also eligible for a zero second Auction, regardless of whether or not match parameters are attached."

<sup>5</sup> Nasdaq has granted the Commission several extensions of time to consider Nasdaq's proposal, the most recent extending the time period until February 14, 2003.

<sup>6</sup> See letter from Darla C. Stuckey, Corporate Secretary, New York Stock Exchange, Inc. ("NYSE"), to Jonathan G. Katz, Secretary, Commission, dated July 24, 2002 ("NYSE Comment Letter").

<sup>7</sup> See letter from Edward S. Knight, Executive Vice President and General Counsel, Nasdaq, to Jonathan G. Katz, Secretary, Commission, dated October 7, 2002 ("Nasdaq Response Letter").

<sup>8</sup> See letter from Peter R. Geraghty, Associate Vice President and Associate General Counsel, Nasdaq, to Katherine England, Assistant Director, Division, Commission, dated October 31, 2002 ("Amendment No. 2"). In Amendment No. 2, Nasdaq seeks permanent approval of the following changes to Nasdaq's application of Primex: (1) Elimination of the end-of-day anonymity feature; (2) implementation of a system change to prohibit appropriately marked orders from executing in violation of the NASD short sale rule; (3) amendments to proposed NASD Rule 5020 to reflect that Nasdaq delayed for an additional calendar quarter the rule requiring Primex Auction Market Makers ("PAMMs") to submit a certain percentage of their orders to Primex; (4) amendments to proposed NASD Rule 5016 to reflect that orders not fully executed in Primex can be forwarded to the SuperMontage version ("SuperMontage") of the Nasdaq National Market Execution System ("NNMS"); and (5) the addition of two new conditions that can be attached to orders submitted to Primex: an Anti-Internalization Qualifier and an All or None condition.

<sup>9</sup> See letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine England, Assistant Director, Division, Commission, dated February 3, 2003 ("Amendment No. 3"). In Amendment No. 3, Nasdaq seeks permanent approval to (1) change the minimum size requirement for Predetermined Relative Indications from a tiered structure depending on the amount of price improvement, to a standard minimum size requirement of 100 shares; (2) reprogram the System to reject trading interest marked as "short" or "short exempt" in any exchange-listed security eligible for participation in the InterMarket Trading System; and (3) modify proposed NASD Rule 5017 to be consistent with the system change relating to short sales set forth in Amendment No. 2. Telephone call among Peter R. Geraghty, Associate Vice President and Associate General Counsel, Nasdaq; Gordon Fuller, Counsel to the Assistant Director, Division, Commission, and Jennifer Lewis, Attorney, Division, Commission, on February 7, 2003.

<sup>8</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>9</sup> 17 CFR 240.19b-4(f)(6).

<sup>10</sup> See Amendment No. 1, *supra* note 3.

<sup>11</sup> For purposes of only accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

<sup>12</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 45983 (May 23, 2002), 67 FR 38152 ("Original Proposal").

<sup>4</sup> See letter from Peter R. Geraghty, Associate Vice President and Associate General Counsel, Nasdaq, to Katherine England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated May 1, 2002 ("Amendment No. 1"). In Amendment No. 1, Nasdaq removed the following language inadvertently included in proposed NASD Rule 5013(c)(2): "Participants that are Primex Auction Market Makers for a security may submit Market Orders in that security for an immediate (i.e., "zero second") Auction, provided the Participant attaches certain match parameters as set