Rule 2210 and the creation of IM–2210–7 into the proposed rule text. The Commission believes that these are technical changes, as the proposed changes have already been addressed by the Commission in a separate filing, and therefore do not need to be readdressed here.

Fifth, in Amendment No. 3, the NASD made changes to NASD Rule 2210's disclosure requirements for recommendations. These changes were made to conform the rule to the requirements contained in NASD Rule 2711,[41] which governs research analysts and research reports. Previously, only NASD Rule 2210 imposed disclosure requirements on research reports.

The new disclosure requirements imposed by NASD Rule 2711 differ from those contained in current NASD Rule 2210, therefore, for consistency, the NASD amended NASD Rule 2210 to be more similar to the new requirements imposed by NASD Rule 2711 and to incorporate references to security futures. The Commission believes that coordinating the disclosure requirements contained in NASD Rules 2210 and 2711 is appropriate and will aid members in complying the rules.

VI. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment Nos. 3 and 4, including whether the Amendments are 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 No. SR–NASD–00–12 and should be submitted by June 9, 2003.

[41] See Securities Exchange Act Release No. 45908 (May 10, 2002), 67 FR 34968 (May 16, 2002).

VII. Conclusion

It is therefore ordered pursuant to section 19(b)(2) of the Act,[42] that the proposed rule change (SR–NASD–00–12), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[43]

Margaret H. McFarland

Deputy Secretary

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[42] 15 U.S.C. 78s(b)(2).

[43] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47830; File No. SR–NASD–2003–37]

Self-Regulatory Organizations; Order Granting Approval to Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. to Permanently Expand Order Entry Firm Access to SIZE in Nasdaq's SuperMontage System

May 12, 2003.

I. Introduction

On March 12, 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 (''SEC'' or ''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 for the permanent approval of a pilot program which permits NNMS Order Entry Firms (''OE Firms'') to enter non-marketable limit orders into SuperMontage using the SIZE Marker Maker Identifier (''SIZE MMID'' or ''SIZE'').[3] On March 26, 2003, Nasdaq filed Amendment No. 1 to the proposed rule change.[4] The proposed rule change, as amended, was published for comment in the **Federal Register** on April 3, 2003.[5] The Commission received three comment letters regarding the pilot as originally approved,[6] and the instant proposal, as amended.[7] On May, 2, 2003, Nasdaq submitted a comment response letter.[8] This order approves the proposed rule change, as amended.

II. Description of the Proposed Rule Change

As noted above, this filing seeks the permanent approval of the 90-day pilot program that allows OE Firms [9] to enter non-marketable limit orders into SuperMontage using SIZE. Under the proposal, OE Firms may voluntarily enter non-marketable limit orders into SuperMontage with a Good-till-Cancelled (''GTC'') or ''Day'' designation for display or execution through SIZE.[10] OE Firms may enter multiple orders (with or without reserve size) at single or multiple price levels, use any available execution algorithm (price/time, price/time-with-fee-consideration, or price/size). Non-marketable limit orders entered by OE Firms would be subject to the automatic execution functionality of the system. If elected by the OE Firm, its orders on opposite sides of the market could match off against each other only if such

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

[2] 17 CFR 240.19b–4.

[3] On January 31, 2003, the Commission approved File No. SR–NASD–2002–173 on a 90-day pilot basis, which allowed OE Firms to enter non-marketable limit orders into Nasdaq's SuperMontage system using SIZE. *See* Securities Exchange Act Release No. 47301 (January 31, 2003), 68 FR 6236 (February 6, 2003). The 90-day pilot commenced on February 10, 2003. This filing seeks to make permanent the ability of OE Firms to enter orders into SuperMontage under essentially the same terms and conditions approved in the pilot program.

[4] *See* letter from Thomas Moran, Office of General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation (''Division''), Commission, dated March 25, 2003.

[5] *See* Securities Exchange Act Release No. 47588 (March 28, 2003), 68 FR 16323.

[6] *See* Securities Exchange Act Release No. 47301 (January 31, 2003), 68 FR 6236 (February 6, 2003).

[7] *See* letters to Jonathan G. Katz, Secretary, Commission, from S. Jeffrey Martin, President, Automated Trading Desk Financial Services, LLC, and Steve Swanson, President, Automated Trading Brokerage Services, LLC, dated February 27, 2003 and March 6, 2003 (''ATD Letter''); from Duncan L. Niederauer, Managing Director and Co-Chief Executive Officer, Spear, Leeds & Kellogg, L.P., dated May 1, 2003 (''SLK Letter''); and from John Hughes, Chairman, and John C. Giesea, President and Chief Executive Officer, Security Traders Association, dated April 9, 2003 (''STA Letter''). The two comment letters from ATD appear to be identical and, therefore, are being treated as one comment letter.

[8] *See* letter from Thomas P. Moran, Office of General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated May 1, 2003 (''Response Letter'').

[9] Nasdaq submitted a letter to clarify that it interprets the term ''NNMS Order Entry Firm'' in a manner that may encompass NNMS Market Makers that are registered market makers in other stocks. In the SuperMontage system, such firms are treated the same as other OE Firms when placing orders into the system for stocks in which they do not make a market. Nasdaq notes that the provision of order-entry system access to firms that elect to register as market makers in less than the total universe of Nasdaq stocks also took place in the systems preceding SuperMontage—SelectNet and SuperSoes. *See* letter from Thomas P. Moran, Office of General Counsel, Nasdaq, to Marc McKayle, Special Counsel, Division, Commission, dated May 8, 2003.

[10] Prior to the pilot, OE Firms were limited to the entry of market orders or limited orders designated as Immediate or Cancel (''IOC''). OE Firms may continue to submit IOC orders under the proposal.

interaction would result based on the execution algorithm selected, [11] but such orders would not be permitted to automatically interact, if at the best price level, like those of Nasdaq Quoting Market Participants.[12] Alternatively, OE Firms may elect to completely avoid interaction with its orders on the opposite side of the market.[13] Quotes/Orders entered by OE Firms that create a locked/crossed market, would be processed like other locking/crossing quotes/orders as set forth in NASD Rule 4710(b)(3).

III. Summary of Comments and Nasdaq's Response

As noted above, the Commission received three comment letters regarding the proposal, as amended.[14] Two of the commenters strongly supported the proposed rule change, as amended.[15] These commenters believed that allowing OE Firms to participate in SIZE enhances the liquidity of SuperMontage by promoting the entry and display of market interest by a greater number of market participants.[16] In addition, both of these commenters believe that OE Firms' participation in SIZE reduces the fragmentation in the Nasdaq market attributable to the absence of linkages between the NASD Alternative Display Facility, the regional exchanges trading Nasdaq securities pursuant to unlisted trading privileges, and SuperMontage. As a result, one of the commenters believed that the ability of OE Firms to use SIZE could reduce the existence of locked/crossed markets.[17] Further, the commenters stated that providing OE Firms with direct participation in SIZE decreases the execution times for customer orders by eliminating the need to interpose an electronic communications network (''ECN'') or market maker between the OE Firm and SuperMontage,[18] as well as credits firms for providing liquidity through SIZE.[19] Finally, the two commenters generally believed that the proposed rule change provides all market participants with a more equal opportunity to interact with other market participants including market makers and other agency orders via SIZE.

Another commenter, however, described the proposed rule change as a significant market structure change, and suggested that Nasdaq's proposal be subject to additional review.[20] Specifically, the commenter opined that because of the complexity of the proposal and the resources required to implement it, the 90 days for a pilot program of this nature was too short a period for full evaluation and implementation by market participants. The commenter recommended that the pilot program be extended an additional 90 days to give OE Firms sufficient time and resources to adapt their systems and procedures to take advantage of the enhanced access provided by the proposed rule change. The commenter opined that the extension of time would allow the NASD and the Commission to thoroughly analyze the effect of the proposed rule change on the marketplace prior to enacting it as a permanent change to SuperMontage.

Nasdaq disagreed with the STA's characterization that the proposal was a significant market structure change that warranted additional consideration by the Commission.[21] According to Nasdaq, since the pilot's inception, the use of SIZE for non-marketable limit orders submitted by pure OE Firms, and by market makers registered in other stocks, has modestly but steadily increased.[22] Nasdaq also stated the expansion has had no apparent negative impact on public investors and has served to bring increased liquidity to the public Nasdaq market. Nasdaq believes that these measurable improvements should take precedence, in the form of a swift and permanent approval of the proposed rule change, over any potential problems with the pilot that have yet to become manifest. Nasdaq also noted that the concept of the proposal is similar to the access granted to registered brokers in other market centers, whose experience gives no indication that such access has had an adverse impact on market quality.

IV. Discussion

After careful review of the proposed rule change, the comment letters, and Nasdaq's response to comments, 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.[23] Specifically, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of Section 15A of the Act in general,[24] and Section 15A(b)(6) of the Act in particular,[25] which provides that the rules of the association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principals of trade, to foster cooperation and coordination with person 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 believes that it is appropriate to permanently approve the pilot. As noted by two of the commenters and Nasdaq, the implementation of the pilot has provided OE Firms with greater access to the system thereby increasing the liquidity of SuperMontage and potentially reducing fragmentation. Further, the Commission is not aware of any problems concerning the pilot since its inception on February 10, 2003.[26]

Also, as previously discussed in the pilot approval order, the Commission believes that the proposal is consistent with the goals of Section 11A(a)(1)(C), particularly Congress' finding that it is

[11] *See* Securities Exchange Release Act No. 47554 (March 21, 2003), 68 FR 15024 (March 27, 2003) (Notice of Filing and Immediate Effectiveness of SR-NASD–2003–39).

[12] Similarly, OE Firms would not be able to use SuperMontage's self-preferencing feature and have buy and sell interest interact on a basis other than a natural interaction based solely on the selected order execution algorithm.

[13] *See supra* note 11.

[14] *See* supra note 7.

[15] *See* ATD Letter and SLK Letter.

[16] *See* ATD Letter and SLK Letter.

[17] *See* ATD Letter.

[18] *See* SLK Letter.

[19] *See* ATD Letter.

[20] *See* STA Letter. The STA also asserted that the pilot should not have been approved on an accelerated basis.

[21] *See* Response Letter, *supra* note .

[22] Nasdaq represents that a recent internal analysis conducted by Nasdaq's Economic Research Department on the use of SIZE during the pilot indicates an increase of approximately 1.5% of total Nasdaq volume is now being executed through SIZE. OE Firms currently represent about ⅓ of the total trading interest being executed through SIZE. Since the launch of the pilot, the number of OE Firms participating in SuperMontage via non-marketable limit orders in SIZE has increased from 0 to roughly 35 firms during the week of April 7, 2003.

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

[24] 15 U.S.C. 78*o*–3.

[25] 15 U.S.C. 78*o*–3(b)(6).

[26] The STA commented that the NASD was not obligated to modify SuperMontage to allow expanded OE Firm access until April 28, 2003. The Commission notes that by April 28, 2003, or an earlier date determined by Nasdaq with appropriate notice for the Commission and market participants, Nasdaq was required to have a programming solution in place to inhibit the automatic matching of an OE Firm order against its own order on the opposite side of the market. The pilot allowing OE Firms access to SIZE began on February 10, 2003. The programming solution to inhibit the automatic matching of OE Firm orders was implemented on March 17, 2003. *See* letter from Jeffrey Davis, Office of General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated February 25, 2003.

in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly market to assure the economically efficient execution of securities transactions. The Commission believes that permanent approval of the proposal would continue to provide OE Firms with greater flexibility to reflect buying and selling interest at various price levels by entering Non-Attributable Orders directly into SuperMontage, instead of relying on ECNs and NNMS Market Makers to post their trading interest.

The Commission notes that STA suggested that the pilot be extended for an additional 90 days to provide the Commission as well as other market participants greater opportunity to study the potential impact of the pilot. However, Nasdaq represented that there has been no apparent negative market impact on public investors during the pilot, and in fact, the pilot has proven to be a catalyst for additional liquidity in SuperMontage. Further, the Commission notes that the pilot has been in place since February 10, 2003, that 35 OE Firms are currently participating in the pilot, and that the Commission is not aware of any problems with the pilot. Accordingly, the Commission does not believe that an extension of the pilot program is warranted in lieu of granting permanent approval.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[27] that the proposed rule change and Amendment No. 1 (SR–NASD–2003–37) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[28]

Margaret H. McFarland,

Deputy Secretary.

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[27] 15 U.S.C. 78s(b)(2).

[28] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47825; File No. SR–NFA–2003–03]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Futures Association Regarding the Interpretive Notice to NFA Compliance Rules 2–7 and 2–24 and Registration Rule 401: Proficiency Requirements for Security Futures Products

May 9, 2003.

Pursuant to Section 19(b)(7) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–7 under the Act,[2] notice is hereby given that on April 22, 2003, the National Futures Association (''NFA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule changes described in Items I, II, and III below, which Items have been prepared by the NFA. The Commission is publishing this notice to solicit comments on the proposed rule changes from interested persons. NFA also has filed the proposed rule change with the Commodity Futures Trading Commission (''CFTC'').

On April 22, 2003, NFA requested that the CFTC make a determination that review of the proposed rule change is not necessary. The CFTC made such a determination on May 2, 2003.

I. Self-Regulatory Organization's Description of the Proposed Rule Change

Currently, the Interpretive Notice to NFA Compliance Rules 2–7 and 2–24 and Registration Rule 401: Proficiency Requirements for Security Futures Products provides that new registrants can satisfy their proficiency requirements for security futures through training if they are registered no later than six months after the first retail, exchange-traded contract begins trading. The proposed rule change eliminates the six-month distinction and extends the training option to all new registrants who take the Series 3 examination and apply for registration before the revised examination becomes available. The proposed rule change also makes similar changes regarding the proficiency requirements for designated security futures principals.

Section 15A(k) of the Exchange Act [3] makes NFA a national securities association for the limited purpose of regulating the activities of Members who are registered as brokers or dealers in security futures products under Section 15(b)(11) of the Act.[4] The interpretive notice regarding proficiency requirements for security futures products applies to these Members.

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

NFA has prepared statements concerning the purpose of, and basis for, the proposed rule change, burdens on competition, and comments received from members, participants, and others. The text of these statements may be examined at the places specified in Item IV below. These statements are set forth in Sections A, B, and C below.

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

1. Purpose

While the Interpretive Notice to NFA Compliance Rules 2–7 and 2–24 and Registration Rule 401: Proficiency Requirements for Security Futures Products applies to all current registrants, it presently states that new registrants can qualify by training only if they are registered within six months after the first retail, exchange-traded security futures contract begins trading. At the time the interpretive notice was adopted, NFA staff assumed that six months, or until May 8, 2003, would provide adequate time to update both the futures and the securities examinations. NASD, however, has recently informed NFA that its examinations will not be available until January 2004.

Although NFA is prepared to meet the May 8 deadline, a regulatory disparity may occur if NFA incorporates security futures questions into its proficiency examinations before the securities industry does. For that reason, NFA proposes to postpone the use of the revised exams until NASD's examinations are ready.

The current version of the interpretive notice incorporates the May 8 deadline through its references to a date six months after security futures begin trading. The revised interpretive notice extends the training option to all new registrants who take the Series 3 and apply for registration before the revised examination becomes available. The revised interpretive notice was similarly changed for designated security futures principals.

[1] 15 U.S.C. 78s(b)(7).

[2] 17 CFR 240.19b-7.

[3] 15 U.S.C. 78o–3(k).

[4] 15 U.S.C. 78o(b)(11).