

proposal does not affect SuperMontage or ITS/CAES, Nasdaq's other trading systems.

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

Nasdaq does not believe that the proposed rule change, as amended, will result in any burden on competition.

*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**

The foregoing rule change has been filed by the NASD as "non-controversial" pursuant to Section 19(b)(3)(A) of the Act<sup>12</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>13</sup> Because the foregoing rule change: (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 thirty days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>14</sup> and Rule 19b-4 thereunder.<sup>15</sup>

The Commission hereby waives the thirty-day operative waiting period. The Commission believes that the waiver would permit Nasdaq to terminate the System promptly, and would not significantly affect the protection of investors because a notice of the termination was issued on December 31, 2003.<sup>16</sup> In addition, the Commission believes that the proposal will not affect Nasdaq's other trading systems, SuperMontage and the InterMarket Trading System/Computer Assisted Execution System. The proposed rule change, as amended, became operative at the close of business on January 16, 2004, pursuant to SEC Rule 19b-4(f)(6).<sup>17</sup>

At any time within sixty days of the filing of such proposed rule change, 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.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal 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-2004-07. The 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 filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to the File No. SR-NASD-2004-07 and should be submitted by February 17, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>18</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-49106; File No. SR-NASD-2004-06]

**Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc. Related to the Entry of Locking or Crossing Bids or Offers by ECNs Participating in Nasdaq's SuperMontage System**

January 20, 2004.

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> notice is hereby given that on January 13, 2004, 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" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

Nasdaq proposes to allow Electronic Communications Networks ("ECNs") voluntarily participating in the Nasdaq National Market Execution System ("NNMS" or "SuperMontage") to post locking or crossing bids, or locking or crossing offers, in other display venues for Nasdaq securities operated by self-regulatory organizations ("SROs"). Nasdaq will implement the proposed rule change immediately.

Below is the text of the proposed rule change. Proposed new language is *italicized*.

\* \* \* \* \*

**4623. Alternative Trading Systems**

(a) The Association may provide a means to permit alternative trading systems ("ATSs"), as such term is defined in Regulation ATS, and electronic communications networks ("ECNs"), as such term is defined in SEC Rule 11Ac1-1(a)(8),

(1) to comply with SEC Rule 301(b)(3);

(2) to comply with the terms of the ECN display alternative provided for in SEC Rule 11Ac1-1(c)(5)(ii)(A) and (B) ("ECN display alternatives"); or

<sup>12</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>13</sup> 17 CFR 240.19b-4(f)(6).

<sup>14</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>15</sup> 17 CFR 240.19b-4.

<sup>16</sup> See *supra* note 8.

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

<sup>18</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.

(3) to provide orders to Nasdaq voluntarily.

In providing any such means, the Association shall establish a mechanism that permits the ATS or ECN to display the best prices and sizes of orders entered into the ATS or ECN by Nasdaq market makers (and other subscribers of the ATS or ECN, if the ECN or ATS so chooses or is required by SEC Rule 301(b)(3) to display a subscriber's order in Nasdaq), and allows any NASD member the electronic ability to effect a transaction with such priced orders that is equivalent to the ability to effect a transaction with a Nasdaq market maker quotation in Nasdaq operated systems.

(b) An ATS or ECN that seeks to utilize the Nasdaq-provided means to comply with SEC Rule 301(b)(3), the ECN display alternatives, or to provide orders to Nasdaq voluntarily shall:

(1) demonstrate to the Association that that it is in compliance with Regulation ATS or it qualifies as an ECN meeting the definition in the SEC Rule;

(2) be registered as a NASD member;

(3) enter into and comply with the terms of a Nasdaq Workstation Subscriber Agreement, as amended for ATSs and ECNs;

(4) agree to provide for Nasdaq's dissemination in the quotation data made available to quotation vendors the prices and sizes of Nasdaq market maker orders (and orders from other subscribers of the ATS or ECN, if the ATS or ECN so chooses or is required by SEC Rule 301(b)(3) to display a subscriber's order in Nasdaq), at the highest buy price and the lowest sell price for each Nasdaq security entered in and widely disseminated by the ATS or ECN, and prior to entering such prices and sizes, register with Nasdaq Market Operations as an ATS or ECN;

(5) provide an automated execution or, if the price is no longer available, an automated rejection of any order routed to the ATS or ECN through the Nasdaq-provided display alternative.

(6) not charge to broker-dealers that access the ATS or ECN through Nasdaq any fee that is inconsistent with the requirements of SEC Rule 301(b)(4).

(c) When a NASD member attempts to electronically access through a Nasdaq-provided system an ATS or ECN-displayed order by sending an order that is larger than the ATS's or ECN's Nasdaq-displayed size and the ATS or ECN is displaying the order in Nasdaq on a reserved size basis, the NASD member that operates the ATS or ECN shall execute such Nasdaq-delivered order:

(1) up to the size of the Nasdaq-delivered order, if the ATS or ECN order (including the reserved size and

displayed portions) is the same size or larger than the Nasdaq-delivered order; or

(2) up to the size of the ATS or ECN order (including the reserved size and displayed portions), if the Nasdaq-delivered order is the same size or larger than the ATS or ECN order (including the reserved size and displayed portions).

No ATS or ECN operating in Nasdaq pursuant to this rule is permitted to provide a reserved-size function unless the size of the order displayed in Nasdaq is 100 shares or greater. For purposes of this rule, the term "reserved size" shall mean that a customer entering an order into an ATS or ECN has authorized the ATS or ECN to display publicly part of the full size of the customer's order with the remainder held in reserve on an undisplayed basis to be displayed in whole or in part as the displayed part is executed.

*Nothing in this Rule shall require the provision to Nasdaq of a locking or crossing bid or offer, if such locking or crossing bid or offer is instead provided to another display alternative operated by a national securities exchange or national securities association.*

## **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**

NASD Rule 4623 requires ECNs quoting a security in Nasdaq to provide to Nasdaq their best-priced buy and sell prices in that security for dissemination to data vendors. This obligation creates issues for ECNs when those best prices would lock or cross either the inside bid or inside offer then being displayed in Nasdaq. In that situation, an ECN's re-entry of the locking or crossing quote/order subjects it to special SuperMontage processing that makes the ECN's quote/order eligible for automatic execution to ensure that a locked or crossed market in the Nasdaq

system does not occur. Such processing contrasts with NNMS' normal method of interacting with ECNs in which Nasdaq delivers orders to the ECN for execution. The change in order processing to automatic execution from order delivery also impacts access fee and rebate arrangements between the submitting ECN and its subscribers as well as complicating the ECN's ability to avoid dual liability for executions simultaneously taking place in Nasdaq and the ECN's internal systems.

The above combination of the Nasdaq best-price rule requirement and the NNMS system's locked and crossed processing provides a disincentive to non-NNMS ECNs or ATSs to participate in the system and unduly restricts the ability of participating ECNs to manage their most aggressively priced subscriber orders. In response, Nasdaq is proposing a modification to its best-price rule requirement to provide ECNs with a limited exception that gives ECNs the option of posting locking or crossing trading interest (individual bids or offers) in other display trading venues operated by either a national securities association or a national securities exchange.<sup>3</sup> This modification will provide ECNs greater flexibility and choice in managing subscriber orders and enhance the voluntary nature of the SuperMontage system, while ensuring that the system continues to operate without locked or crossed markets. In addition, this limited exception to the best price requirement is consistent with other SuperMontage participants' ability to place locking or crossing quotes/orders in other display venues and Nasdaq's planned approach to linkage agreements with other markets that trade Nasdaq securities. As such, the proposal will increase competition among association and exchange quote display venues. Finally, Nasdaq notes that the requirement to display any locking or crossing bid or offer in a display venue for Nasdaq securities operated by an association or exchange will ensure that such bids or offers continue to be widely disseminated to data vendors.

#### **2. Statutory Basis**

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,<sup>4</sup> in

<sup>3</sup> Nasdaq will continue to require the submission of best-priced bids and offers that do not lock or cross the Nasdaq inside. It will be the obligation of an ECN electing to post a locking or crossing bid or offer in another venue to ensure that its activities are consistent with its obligations to display orders under Regulation ATS, SEC Rule 11Ac1-1, and any SEC no-action letter the ECN operates under.

<sup>4</sup> 15 U.S.C. 78o-3.

general and with section 15A(b)(6) of the Act,<sup>5</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, remove impediments to 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 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, as amended.

#### *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**

The foregoing rule change has been filed by Nasdaq as a "non-controversial" rule change pursuant to section 19(b)(3)(A) of the Act<sup>6</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>7</sup> Consequently, because the foregoing rule change: (a) Does not significantly affect the protection of investors or the public interest; (b) does not impose any significant burden on competition; and (c) does not become operative for thirty days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to section 19(b)(3)(A) of the Act and Rule 19b-4 thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)<sup>8</sup> normally does not become operative prior to thirty days after the date of filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>9</sup> the Commission may designate a shorter operative date if such action is consistent with the protection of investors and the public interest. In addition, Rule 19b-4(f)(6)(iii) requires Nasdaq to provide the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the

proposed rule change, or such shorter time as designated by the Commission. Nasdaq seeks to have the proposed rule change become immediately operative and to waive the pre-filing notice requirement.

The Commission, consistent with the protection of investors and the public interest, has determined to waive the 30 day operative date.<sup>10</sup> As the entry of quotes that lock or cross another market already takes place in several venues that trade Nasdaq securities, the proposal does not significantly affect current levels of investor protection or harm the public interest. The proposal may also increase competition among market centers by allowing ECNs to choose among competing venues, including Nasdaq, to display bids or offers. The Commission also waives the requirement that Nasdaq provide the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change.

At any time within 60 days of the filing of a rule change the Commission may summarily abrogate the 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.

### **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](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-NASD-04-006. 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 filing will also be available for inspection and copying at the principal office of Nasdaq. All submissions should refer to file number SR-NASD-2004-06 and should be submitted by February 17, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>8</sup>

**Margaret H. McFarland,**  
*Deputy Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-49109; File No. SR-NASD-2003-23]

### **Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Granting Approval to Proposed Rule Change To Clarify the Applicability of the Nasdaq Corporate Governance Requirements During the Listing Review Process**

January 21, 2004.

On February 26, 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"), 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> a proposed rule change to clarify the applicability of its corporate governance requirements during the listing review process. On October 10, 2003, NASD, through Nasdaq, submitted Amendment No. 1 to the proposed rule change.<sup>3</sup>

The proposed rule change, as amended, was published for comment in the **Federal Register** on October 23, 2003.<sup>4</sup> The Commission received no comments on the proposal.

The proposed rule change would amend NASD Rule 4810, concerning procedures for review of Nasdaq listing

<sup>8</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 Mary M. Dunbar, Vice President and Deputy General Counsel, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated October 9, 2003. Amendment No. 1 replaced the original filing in its entirety.

<sup>4</sup> See Securities Exchange Act Release No. 48646 (October 16, 2003), 68 FR 60747.

<sup>5</sup> 15 U.S.C. 78o-3(b)(6).

<sup>6</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>7</sup> 17 CFR 240.19b-4(f)(6).

<sup>8</sup> 17 CFR 240.19b-4(f)(6).

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

<sup>10</sup> For purposes of 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).