request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than 15 days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If the amendment is issued before the expiration of the 30-day hearing period, the Commission will make a final determination on the issue of no significant hazards consideration. If a hearing is requested, the final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, or may be delivered to the Commission's Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, by the above date. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and to Douglas K. Porter, Esquire, Southern California Edison Company, 2244 Walnut Grove Avenue, Rosemead, California 91770, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(is)–(v) and 2.714(d).

For further details with respect to this action, see the application for amendment dated May 22, 2002, which is available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site *http://www.nrc.gov/reading-rm/ adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr@nrc.gov.*

Dated at Rockville, Maryland, this 24th day of May, 2002.

For the Nuclear Regulatory Commission.

Alan Wang,

Project Manager, Section 2, Project Directorate IV, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 02–13655 Filed 5–30–02; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45983; File No. SR–NASD–2002–60]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Permanent Approval of the Primex Auction System ®

May 23, 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 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'') 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 Substance of the Proposed Rule Change

Nasdaq is seeking permanent approval of its application of the Primex

[1] 15 U.S.C. 78s(b)(1).
[2] 17 CFR 240.19b–4.

Auction System® ("Primex" or "System"). The System began operating as a Pilot Trading System on December 17, 2001, pursuant to Rule 19b–5 of the Act.[3] Pursuant to paragraph (f) of Rule 19b–5 of the Act,[4] Nasdaq has filed a companion proposed rule change to continue operating the System while the Commission considers granting permanent approval.[5] The companion proposed rule change is effective upon filing. The Exchange represents that the proposed rule language contained in the companion filing and set forth below is identical and is the same language that governs use of the System today.

5010. NASDAQ Application of the PRIMEX AUCTION SYSTEM ®

5011. Definitions

For purposes of this Rule Series, unless the context requires otherwise:

(a) "Application" or "Nasdaq Application" as used in this Rule Series, and "Nasdaq Application of the Primex Auction System" as used throughout the NASD Rules means the voluntary Nasdaq trading service facility that permits NASD member firms, among other things, to submit orders in Primex Eligible Securities to be exposed to a Crowd of Participants in an anonymous, electronic auction format for the purpose of obtaining an execution for their own account or the account of a customer; to have required reports of any resulting trades automatically disseminated to the public and the industry; and to "lock in" these trades as necessary by sending both sides to the applicable clearing agency designated by the Participants involved for clearance and settlement, all in accordance with this Rule Series and other applicable rules and policies of Nasdaq.

(b) "Primex Auction System Participant," "Participant," or "Participant Firm" means a broker-dealer registered with the NASD that, when authorized, can access and participate in the Application for its customers or its own account, consistent with this Rule Series. Participants access the Application through one or more Subscribers associated with that Participant within the Application.

(c) "Subscriber" means a user associated with a Participant who, when authorized, can access and participate in the Application on behalf of that Participant, consistent with this Rule Series. A user also can access and participate directly in the Application on its own behalf, but in the name of a Participant, subject to a sponsored arrangement with that Participant, and consistent with these Rules.

(d) "Firm Administrator" means a Subscriber who, for a particular Participant, is authorized among other things to: (1) Monitor and control access to and participation in the Application by all of that Participant's Subscribers, including establishing Credit Limits for each of the Participant's Subscribers who access and participate in the Application on behalf or in the name of that Participant; and (2) view the status of the Clearing Limits applicable to the Participant overall.

(e) "Nasdaq Supervisor" means the Nasdaq staff responsible for establishing and supervising certain operational functions with respect to the operation of the Application.

(f) "Credit Limits" means the dollar amount of aggregated purchases or sales established within the Application by a Participant's Firm Administrator for each of the Participant's Subscribers which, when reached, causes the Application to: (1) Inhibit any future executions or the entry of future interest for that Subscriber; (2) cancel any orders and withdraw any Indications resident within the Application for that Subscriber; and (3) send a notice to that Subscriber, its Firm Administrator, and the Nasdaq Supervisor. Credit Limits may be established, monitored, and modified by the Firm Administrator on a real-time basis directly through the Application.

(g) "Clearing Limits" means the dollar amount of aggregated purchases and sales (calculated separately and not netted) of all Subscribers, collectively for a Participant, effected through or in the name of that Participant, that is established within the Application for that Participant, which, when reached, causes the Application to: (1) Inhibit any future executions for all Subscribers associated with that Participant; (2) cancel any orders and withdraw any Indications resident within the Application for all Subscribers associated with that Participant; and (3) send a notice to that Participant's Firm Administrator, the Nasdaq Supervisor, and to the clearing broker for that Participant provided that the clearing broker also is a Participant. If the clearing broker is not a Participant in the Application, then the Nasdaq Supervisor will notify the clearing broker that the Clearing Limits have been reached as soon as practicable. Clearing Limits for a Participant may be monitored on a real-time basis by the Participant's Firm Administrator and can be established, monitored, and modified by the Firm Administrator of the Participant's clearing broker, provided the clearing broker also is a Participant. Clearing Limits also can be established and modified by the Nasdaq Supervisor on behalf of the clearing broker.

(h) "Crowd," "Primex Crowd" or "Crowd Participant" means Primex Auction System Participants that, when authorized, can access and participate in the Application consistent with this Rule Series by: (1) Submitting orders to be exposed to other Participants; (2) viewing orders submitted by other Participants; and (3) submitting Responses and Indications for the purpose of interacting with the orders of other Participants.

(i) "Watch List" means the list of Primex Eligible Securities identified by a Crowd Participant for which the Crowd Participant will be notified by Nasdaq electronically when one or more orders in such securities is exposed in an Auction and made available for response by the Crowd.

(j) "Primex Auction Market Maker" means a Participant that, when authorized, may participate in the Application: (1) As a Primex Auction Market Maker consistent with Rule 5020 with respect to those Primex Eligible Securities for which the Participant is registered as a Primex Auction Market Maker; and (2) as a Crowd Participant consistent with Rule 5019 with respect to any Primex Eligible Security.

(k) "Primex Eligible Security" means any security listed on the Nasdaq Stock Market and any exchange-listed security eligible for participation in the Intermarket Trading System.

(l) "Mandatory Eligible Order" means a public customer order, as more fully defined in Rule 5020, that a Primex Auction Market Maker must submit to the System for exposure in order for the Primex Auction Market Maker to maintain its status as such, subject to any exclusions or minimum permissible amount provided therein.

(m) "Market Order" means an order submitted to the Application to purchase or sell a security at the most advantageous price(s) obtainable, without a specified, fixed price.

(n) "Fixed Price Order" means an order submitted to the Application to purchase or sell a security at a specified, fixed price or better.

(o) "Minimum Relative Price Improvement" means a condition that a Participant may attach to a market order consistent with Rule 5014(a), expressed in terms of the minimum relative price improvement required to execute the order. This condition is expressed in

terms relative to the best bid (for orders to sell) or best offer (for orders to buy) displayed in the NBBO at the time the order is eligible to be executed against within the Application. Neither the existence nor amount of any Minimum Relative Price Improvement condition is displayed, exposed or communicated to any Participant when attached to an order.

(p) "Response" means an instruction submitted to the Application by a Participant, for the purpose of responding to an order or orders being exposed to the Crowd, consistent with Rule 5018.

(q) "Predefined Relative Indication" or "PRI" means an instruction that a Participant can submit to the Application for the purpose of responding to an order(s) in an Auction, and which does not contain a specific, fixed price, but is expressed in terms relative to the best bid (for PRIs to buy) or offer (for PRIs to sell) publicly displayed for the security, consistent with Rule 5018. While resident within the Application, PRIs are ranked to respond to incoming orders in relative price/time priority, but are not displayed, exposed or communicated to any other Participant.

(r) "Go-Along Indication" means an instruction that a Participant can submit to the Application for the purpose of responding to an order(s) in an Auction, and which does not contain a specific, fixed price, consistent with Rule 5018. A Go-Along Indication will be triggered to respond to an Auction at a price equal to the best bid (for Go-Along Indications to buy) or best offer (for Go-Along Indications to sell) publicly displayed whenever there has been at least one contemporaneous Crowd execution at such bid or offer, provided there are no PRIs or other orders available to execute against the order(s) in the Auction. While resident within the Application, Go-Along Indications are not displayed, exposed or communicated to any other Participant.

(s) "Auction" means the automated process through which orders in Primex Eligible Securities are exposed to Crowd Participants. Orders for the same security being exposed simultaneously (i.e. those which have overlapping exposure periods) are available on an aggregate basis, in whole or in part, for interaction with other Crowd participants, but only during the period of overlapping exposure. An Auction begins when an order is accepted by the Application and exposed to the Primex Crowd, and ends whenever such order(s) (including any orders that subsequently join the Auction in progress) are completely executed or their exposure ceases.

(t) "Public Order" or "Public Customer Order" means an order for the account of a customer, and not for the account of a broker-dealer, regardless of whether the customer is that of the Participant entering the order or another firm that has routed the customer order to the Participant.

(u) "Professional Order" means an order for the proprietary account of a broker-dealer, regardless of whether the broker-dealer is a market maker or specialist, and regardless of whether it is the Participant's own order or the proprietary order of another broker-dealer routed to the Participant.

(v) "Market Maker Guarantee" means the feature within the Application that allows a Participant registered as a Primex Auction Market Maker to provide an automatic execution against public customer orders it submits to the Application for exposure in an Auction where such orders are not otherwise subject to an execution. The Application will automatically execute any unexecuted balance of the order against that Primex Auction Market Maker, after the Auction exposure period for the order has expired, consistent with Rule 5020. The Market Maker Guarantee shall be provided at a price equal to the best publicly quoted offer price (for orders to buy) or best publicly quoted bid price (for orders to sell) existing for the security at the time when such exposure period for the order has expired, for any amount of shares established by the Primex Auction Market Maker for the order.

5012. Access

(a) The Application shall be available on a voluntary basis to any NASD member in good standing that chooses to register as a Participant in the Primex Auction System. Such registration shall be conditioned upon the Participant's initial and continuing compliance with the following requirements:

(1) Execution of the necessary agreements with Nasdaq or its affiliate;

(2) Membership in, or access arrangement with, a clearing agency registered with the Commission which maintains facilities through which Primex Auction System compared trades may be settled;

(3) Compliance with all applicable rules and operating procedures of Nasdaq (including these rules) and the Commission;

(4) Maintenance of the physical security of the equipment located on the premises of the Participant to prevent the improper use or access to Nasdaq systems, including unauthorized entry of information into the Primex Auction System; and

(5) Acceptance and settlement of each trade that is executed through the facilities of the Primex Auction System, or if settlement is to be made through another clearing member, guarantee of the acceptance and settlement of such execution by the clearing member on the regularly scheduled clearing date.

(b) Non-NASD members may access the Application in the name of a Participant by becoming a sponsored Subscriber of the Participant, provided the Participant and sponsored Subscriber have executed the necessary agreements with Nasdaq or its affiliate, and the NASD member Participant assumes the responsibilities set forth in paragraph (a) of this Rule 5012 with respect to any activity conducted by the sponsored Subscriber.

(c) The Application may be made available through Nasdaq-provided network(s) via:

(1) Primex Auction System Workstation Service;

(2) An Application Programming Interface ("API"); or

(3) A FIX protocol interface. Certain functionality of the Application also may be made available via Computer to Computer Interface (CTCI).

5013. Order Acceptance and Exposure

(a) Order Types

The Application shall accept the following types of orders in Primex Eligible Securities, subject to any conditions or match parameters attached thereto to the extent permitted by the Application and Rule 5014, and other rules applicable to Participants with respect to the entry of orders. Conditions and match parameters, to the extent attached to an order, are never communicated to any Participant:

(1) Market Orders;

(2) Fixed Price Orders, when the specified price is equal to or between the best bid or offer publicly displayed, or is a buy (sell) order priced higher (lower) than the best offer (bid) publicly displayed. Fixed Price Orders to buy (sell) priced below (above) the best bid (offer) publicly displayed will be rejected.

For example: If the best bid and offer publicly displayed in Nasdaq is $20—$20.10, then the Application will accept orders to buy priced at $20.00 and higher, including orders to buy priced higher than the offer of $20.10 (although no execution can take place outside of the NBBO prevailing at the time of execution). An order submitted to buy at $19.95, however, would not be accepted by the Application in this situation and will be returned to the Participant that entered it.

(b) Order Size

The Application will accept orders that are either round lots, or mixed lots. Odd lot orders will not be accepted.

(c) Exposure Times Available

(1) The Application allows Participants to expose orders to the Primex Crowd. Only the size associated with an order is communicated to the Crowd, and only for the time during which the order is available for execution. Crowd Participants may monitor the availability of orders exposed in an auction through the use of their Watch List.

(2) For each Market Order submitted to the Application, a Participant can specify a maximum exposure time of either 0 (*i.e.*, immediate), 15, or 30 seconds. 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 forth in 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.

(3) Fixed Price Orders that are accepted by the Application can only be exposed for an immediate execution, in whole or in part.

5014. Conditions and Match Parameters

(a) For All Participants

Subject to any other rules applicable to Crowd Participants and Primex Auction Market Makers with respect to the entry of orders, any Participant may enter an order with the following condition attached:

Minimum Relative Price Improvement

Market Orders may be submitted with a condition for Minimum Relative Price Improvement. The Minimum Relative Price Improvement established for an order is the minimum amount of price improvement superior to the best bid or offer publicly displayed (as applicable) that the order must receive before it may be executed against in whole or in part by any interest from the Crowd. This condition must be attached before the order is entered into the Application. Such condition may be expressed only in terms relative to the best bid or offer on the opposite side of the market existing at such time when any Indication, Response, or other order is or becomes available to interact with the order in an Auction, as permitted by the Application and this Rule Series. Neither the existence nor amount of any

Minimum Relative Price Improvement condition is displayed, exposed or communicated to any Participant when attached to an order. This condition shall not be available for orders submitted solely for the proprietary account of a Nasdaq market maker or CQS market maker (including Primex Auction Market Makers) and not involving a customer order.

For example: an order to buy 500 shares entered into the Application may contain a condition for Minimum Relative Price Improvement requiring that any Indication or Response (or sell order exposed in an Auction and which is available for a match) provide to that order at least a certain amount (*e.g.,* 3 cents) of price improvement superior to the best offer publicly displayed at such time the Indication, Response or sell order is available to be matched with the order to buy.

(b) For Primex Auction Market Makers Only

A Participant registered as a Primex Auction Market Maker for a particular security is entitled, but not required, to enter customer orders with any of the following match parameters as discussed below. These allow the Primex Auction Market Maker to provide liquidity in addition to that which may be provided by the Crowd. The match parameters contained in this paragraph are only available to Participants who are Primex Auction Market Makers, and only for those securities for which they are so registered. Neither the existence nor type of any match parameter associated with an order is displayed, exposed or communicated to any other Participant:

(1) Two Cent Match

A Participant registered as a Primex Auction Market Maker for a particular security may enter an order with the Two Cent Match parameter.

(A) If there is interest from the Crowd that can satisfy the order, the order entered with the Two Cent Match will be executed against such interest by the Crowd during its exposure, provided that such Crowd interest offers to provide price improvement greater than two cents superior to the best quote publicly displayed in the NBBO at the time such Crowd interest is available.

Note: Because the system will never execute an order at a price outside of the NBBO, any Crowd interest offering an amount of price improvement that would potentially be outside of the NBBO will be executed, if matched with an order, at a price bounded by the NBBO, in effect adjusting the execution price to allow for the maximum amount of price improvement within that NBBO without trading through the NBBO at that time. As a result, it is possible that an

order subject to the Two Cent Match parameter may be matched with interest from the Crowd, and not the Primex Auction Market Maker that entered it, notwithstanding the fact that the actual execution price results in price improvement of two cents or less. This can happen, for example, where there is Crowd interest available that is offering three cents of relative price improvement, but the Application causes the actual execution price to be equal to two cents of price improvement, due to a prevailing NBBO spread of two cents at the time of execution.

(B) If there is interest from the Crowd that can satisfy the order but such Crowd interest would only offer price improvement of two cents or less in relation to the best quote publicly available, then this will immediately cause the Application to execute the entire order against the Primex Auction Market Maker that entered it, and not against such Crowd interest, thereby allowing the execution of that order to be retained by the Primex Auction Market Maker. In this situation, the entire order will be executed with that Primex Auction Market Maker at the best price the Crowd interest would have otherwise provided, regardless of the size associated with such Crowd interest.

(C) Any unexecuted balance of the order remaining at the end of its exposure will be executed against the Primex Auction Market Maker. With respect to Market Orders, this execution price will be at the best quote then publicly displayed. With respect to Fixed Price Orders, the execution price will be the price specified in the Fixed Price Order, unless such price is outside the best quote publicly displayed, in which case the execution price will be at the best quote publicly displayed in the NBBO.

(D) A Primex Auction Market Maker may enter customer orders of any size with the Two Cent Match parameter.

(E) A Primex Auction Market Maker that enters a Market Order with the Two Cent Match parameter may elect immediate ("zero seconds"), 15 or 30 second maximum exposure duration for that order. A Fixed Price Order can be exposed only for an immediate "zero second" auction.

(2) 50% Match

A Participant registered as a Primex Auction Market Maker for a particular security may enter an order with a 50% Match parameter.

(A) Orders entered with the 50% Match parameter will be executed against any interest by the Crowd that satisfies the order during its exposure at the price(s) and size of such Crowd interest, for no more than 50% of the

order. Any execution with the Crowd will immediately cause the Application to provide the order with an additional execution of like size and price against the Primex Auction Market Maker that entered the order.

(B) Any unexecuted balance of the order remaining at the end of its exposure will be automatically executed against the Primex Auction Market Maker. With respect to Market Orders, this execution price will be at the best quote then publicly displayed. With respect to Fixed Price Orders, the execution price will be at the price specified in the Fixed Price Order, unless such price is outside the best quote publicly displayed, in which case the execution price will be at the best quote publicly displayed.

(C) A Primex Auction Market Maker may enter customer orders of any size with the 50% Match parameter.

(D) A Primex Auction Market Maker that enters a Market Order with the 50% Match parameter may elect immediate (''zero seconds''), 15 or 30 second maximum exposure duration for that order. A Fixed Price Order can be exposed only for an immediate ''zero second'' auction.

For example: The best bid and offer publicly displayed for a security is $20–20.10. A Primex Auction Market Maker for that security enters into the Application a Market Order to buy 2,000 shares for a customer and selects the 50% Match Parameter. The Participant selects an exposure time of 30 seconds. During its exposure, the order elicits the following executions by other Crowd Participants (which could be in the form of Indications, Responses, or contra-side orders to sell): 500 at $20.04, and 200 at $20.05. The Application will execute these transactions, and immediately match each one as they occur by executing an additional 500 and 200 shares, at $20.04 and $20.05, respectively, against the Primex Auction Market Maker entering the order. If there is no other interest from the Crowd at the end of the 30 second exposure period, the Application will cause the remaining balance of 600 shares to be automatically executed against the Primex Auction Market Maker entering the order at the best offer publicly displayed at that time. Assuming the best offer publicly displayed is still $20.10 at this time, this would result in the Primex Auction Market Maker selling the balance of 600 shares to the customer at $20.10.

(3) Block Facilitation Match

A Participant registered as a Primex Auction Market Maker for a particular security may enter an order with a Block Facilitation match parameter, provided the order is for at least 10,000 shares. The Primex Auction Market Maker may elect to expose the order in an Auction for a maximum of 0, 15, or 30 seconds.

Any Crowd interest that executes against the order during the selected exposure period, up to a maximum of 50% of the order size, will be immediately matched with an execution of like size and price against the entering Participant until the order is fully executed. If any unexecuted portion remains at the end of the exposure period, it will be automatically executed against the entering Participant. With respect to Market Orders, the execution price will be the then existing best offer (for orders to buy) or best bid (for orders to sell) publicly displayed. With respect to a Fixed Price Order, the execution price will be the price specified in the Fixed Price Order, unless such price is outside of the best quote publicly displayed, in which case the execution price will be at the best quote publicly displayed.

For example: The best bid and offer publicly displayed is $20–20.10. A Participant enters into the Application an order to buy a block of 10,000 shares for a customer and selects the Block Facilitation Match Parameter. The Participant selects an exposure time of 15 seconds. During its exposure, the order elicits the following executions by other Crowd Participants (in the form of Indications, Responses, or contra-side orders to sell): 1000 at $20.05, and 2000 at $20.07. The Application will execute these transactions, and immediately match each one as they occur by executing an additional 1000 and 2000 shares, at $20.05 and $20.07, respectively, against the Participant entering the block order. If there is no other interest from the Crowd at the end of the 15 second exposure period, the Application will cause the remaining balance of 4000 shares to be automatically executed against the Participant entering the block order at the best offer publicly displayed at that time. Assuming the best offer publicly displayed is still $20.10 at this time, this would result in the Participant selling the balance of 4000 shares to the customer at $20.10.

(4) Clean Cross

A Participant registered as a Primex Auction Market Maker for a particular security may enter a Clean Cross order for the accounts of two separate customers where the order represents both sides of a cross for at least 10,000 shares to be exposed to the Crowd in an immediate, zero second Auction. The two sides will be executed against each other at the midpoint of the best bid and offer publicly displayed unless superior-priced interest within the Application breaks up one or both sides of the cross. In order to break up a side of the cross, there must be Crowd contra-side interest resident within the Application (e.g., resident PRIs) that totals at least 10,000 shares in the aggregate at a price or prices that are all superior to the bid-ask midpoint by at least the nearest whole

cent. Any portion of a side that is not executed against either the opposite side of the Clean Cross order or contra-side interest resident within the Application will be returned unexecuted.

5015. Public and Professional Orders

All orders submitted to the Application shall be identified as either a Public Order or a Professional Order, as those terms are defined in Rule 5011. This Public or Professional status is not displayed, exposed or communicated to any other Participant in the Application, but is used to determine whether an order is available to interact with the Response or Indication of a Crowd Participant. As indicated in Rule 5018(e), a Participant that responds to orders in an Auction can choose whether its Responses and Indications interact with all orders (both Public and Professional Orders) or just Public Orders. When entering an order, however, a Participant entering an order does not have the ability to select or control whether Public or Professional interest may interact with the order.

5016. Option To Route Orders Outside of the System After Exposure in the Application

(a) All Market Orders submitted to the Application shall include an identifier as to whether any unexecuted balance, after the order is exposed to the Crowd, should be forwarded to SuperSoesSM, in the case of a Nasdaq security, or to ITS/CAES, in the case of an exchange-listed security, or whether the order should be returned to the entering Participant. This option to route orders outside of the Application is available for Market Orders only. Orders submitted to the Application with a specified, fixed price cannot be automatically forwarded to Nasdaq's other execution systems. Routing identifiers are not displayed, exposed or communicated to any other Participant in the Application.

(b) With respect to exchange-listed securities, only Primex Auction Market Makers (which also must be ITS/CAES market makers with respect to these securities, as required by these rules) may elect to have Market Orders in exchange-listed securities routed out to ITS when there is a balance remaining following exposure in the System, provided, however, that customer orders so routed must first be exposed in the Application for at least 15 seconds. In addition, to the extent the best price publicly quoted at that time is available within Nasdaq's CAES system, regardless of whether the same price also is being publicly quoted by another ITS market center, such orders designated for routing to ITS/CAES will

be delivered to CAES for execution up to the size publicly quoted by CAES participants and will not be routed out to another market center through ITS.

5017. Short Sales

Participants are responsible for complying with applicable short sale rules when using the Application. No Participant shall submit to the Application an order for a security that, if executed, would result in a ''short sale'' as that term is defined in Exchange Act Rule 3b-3, unless the transaction would be exempt from, or otherwise permissible under, the requirements of NASD Rule 3350 or Exchange Act Rule 10a-1, as applicable.

5018. Responses and Indications

(a) *General*—Participants may submit Responses and Indications to the Application, consistent with this Rule Series, for the purpose of interacting with orders in an Auction, as described herein. Responses and Indications are not displayed, exposed or communicated to any Participant, except to the extent they result in an execution with an order. Responses and Indications cannot execute against other Responses or Indications.

(b) *Responses*—Responses are instructions submitted to the Application by Participants to interact with available orders exposed in an Auction. Responses may be either a Fixed Price Response (e.g. buy 1000 at $20) or a Relative Priced Response (e.g., buy 1000 at the bid plus 3 cents). All Responses must be entered in an amount of at least one round lot, but also may be for a mixed lot.

(c) *Indications*—Indications are instructions, with the characteristics set forth below, submitted to the Application by Participants to interact with orders exposed in an Auction. An Indication may be a Predefined Relative Indication (''PRI'') or a Go-Along Indication.

(1) Predefined Relative Indications

(A) PRIs can be submitted to the Application for the purpose of automatically responding to an Auction at a point in time when one or more orders becomes available. PRIs have no specific, fixed price, but are expressed at time of entry in terms relative to the best bid or offer publicly displayed at such time when the Application activates the PRI against orders in an Auction. While resident within the Application, PRIs are ranked in relative price/time priority among all other PRIs resident within the Application and any same-side orders currently being exposed in an Auction, as indicated in

paragraph (e) of this Rule. Neither the existence nor terms of a PRI are displayed, exposed or communicated to any other Participant while resident in the Application. When activated by the Application, a PRI will match against orders in an Auction at a price equal to the best bid (for PRIs to buy) or offer (for PRIs to sell) publicly displayed at that time in the NBBO, plus or minus (respectively) the relative price term associated with that PRI; provided that such price also satisfies any applicable condition associated with the order(s) in the Auction to which it is responding.

(B) At the time of its original entry, each PRI submitted to the Application must be for the following share amounts:

(i) NBBO PRIs must be for at least 3000 shares upon entry;

(ii) NBBO ±.01or .02 must be for at least 2000 shares upon entry;

(iii) NBBO ±.03 or greater must be for at least 1000 shares upon entry.

(C) The Application will accept a PRI with the following amounts of relative price improvement:

(i) If the NBBO, at the time the PRI is submitted, has a spread equal to three cents or more, the PRI will be accepted if it offers any amount of price improvement between zero and the actual NBBO spread prevailing at that time;

(ii) If the NBBO, at the time the PRI is submitted, has a spread that is less than three cents, the PRI may offer any amount of price improvement between zero and three cents.

(D) Participants may elect to limit their exposure when using PRIs by entering a Per Auction Maximum size for each PRI submitted. The Per Auction Maximum represents the maximum share amount of a PRI available for a single Auction. It cannot be greater than the size of the PRI, but is subject to the same minimum values applicable to the original entry of a PRI with that relative price term. Once the Per Auction Maximum, if any, for a PRI is exhausted, the Participant will have 15 seconds to withdraw the PRI, during which time no further executions against that PRI will occur. In the absence of a withdrawal during this period, the Application will restore the PRI up to the Per Auction Maximum and the PRI will become available again for any subsequent Auctions to the extent there is an eligible balance remaining for that PRI. For purposes of relative price/time priority, the restored PRI will receive a new timestamp within the Application.

(E) Participants may select a maximum residency period of one (1) or five (5) days, during which time the PRI remains resident within the Application

unless fully executed or withdrawn. The Application will automatically withdraw any PRIs that remain at the end of the applicable residency period.

(2) Go-Along Indications

(A) A Go-Along Indication can be submitted to the Application for the purpose of automatically responding in an Auction at a point in time when one or more orders becomes available in an Auction and there has been at least one other contemporaneous Crowd execution within the Application at the NBBO; provided there are no PRIs available or orders being exposed in an Auction (executions resulting from a Primex Auction Market Maker Guarantee do not trigger Go-Along Indications). Go-Along Indications have no specific, fixed price when entered, but will match against orders at a price equal to the best bid (for Go-Along Indications to buy) or best offer (for Go-Along Indications to sell) that exists at such time the Go-Along Indication is activated. While resident within the Application, Go-Along Indications are not displayed, exposed or communicated to any other Participant.

(B) At the time of its original entry, each Go-Along Indication submitted to the Application must be for at least 10,000 shares.

(C) Participants may select a maximum residency period of one (1) or five (5) days, during which time the Go-Along Indication remains resident within the Application unless fully executed or withdrawn. The Application will automatically withdraw any Go-Along Indications that remain at the end of the applicable residency period.

(d) *Executions Bounded by the NBBO*—Application will never execute an order outside of the NBBO prevailing at the time of execution. Indications such as PRIs that potentially would offer an amount of price improvement that could result in an execution outside of the NBBO will be priced at the NBBO if matched with an order, in effect providing the maximum amount of price improvement permissible within the NBBO at that time.

(e) *Relative Priority Of Predefined Relative Indications and Orders*—(1) While resident within the Application, Predefined Relative Indications are ranked in relative price/time priority while they await activation against incoming orders notwithstanding that PRIs have no specified, fixed price associated with them. For example, among resident PRIs for the same security on the same side of the market, PRIs offering greater relative price improvement are ranked ahead of PRIs

offering less relative price improvement. PRIs offering the same relative amount of price improvement are ranked by time of entry (or the time the Indication was restored after exhausting its Per Auction Maximum).

(2) Market Orders being exposed within the Application also are ranked in relative price/time priority during the life of their exposure, notwithstanding that Market Orders have no specified, fixed price associated with them. For example, among Market Orders in the same security being exposed on the same side of the market, those orders not seeking any relative price improvement are ranked ahead of orders seeking some relative amount of Minimum Relative Price Improvement. Orders seeking a greater relative amount of Minimum Relative Price Improvement are ranked behind orders seeking a lesser relative amount of Minimum Relative Price Improvement. Orders seeking the same relative amount of price improvement are ranked by time of entry.

(3) Among and between Indications and orders on the same side of the market, the relative price/time priorities for each are integrated, based on their respective ranking relative to the best bid and offer publicly displayed. The Application recalculates and maintains these relative priorities whenever there is a change in the best bid or offer prices publicly displayed in the NBBO. Market Orders that are matched with other Market Orders being auctioned are executed at the midpoint of the best bid and offer publicly displayed, provided that such price satisfies any condition for Minimum Relative Price Improvement associated with each order.

(f) *Responding to All Orders or Public Orders Only*—All Responses and Indications shall include an identifier as to whether it may interact with either: (1) All available orders (both Public Orders and Professional Orders); or (2) Public Orders only. Such identifier is not displayed, exposed or communicated to any Participant at any time, but is used by the Application for determining the universe of orders with which the Response or Indication may interact.

5019. Crowd Participation

(a) There are two levels of participation in the Application: Crowd Participant and Primex Auction Market Maker. Becoming a Participant in the Application automatically entitles the Participant to be a Crowd Participant for any security, allowing participation consistent with this Rule 5019. A Crowd Participant may also choose to register

as a Primex Auction Market Maker, but only on a security-by-security basis, as set forth in Rule 5020, and only consistent with the requirements for participation under that Rule.

(b) Unless otherwise specified, a Crowd Participant may enter orders, Indications, and Responses in any Primex Eligible Security at any time, for its own account or for the account of a customer. Crowd Participants have no mandatory obligation to submit to the Application any order at any time.

5020. Market Maker Participation

(a) A Participant may register as a Primex Auction Market Maker in one or more Primex Eligible Securities, and may maintain such registration while in compliance with the requirements of this Rule. Unless otherwise specified, a Primex Auction Market Maker is automatically subject to the same rights and obligations of Crowd Participants pursuant to Rule 5019 with respect to customer orders in any and all Primex Eligible Securities. In addition, a Primex Auction Market Maker is entitled, but not obligated, to use either of the following features of the Application when submitting customer orders, but only with respect to those securities in which it is currently registered as a Primex Auction Market Maker:

(1) A Primex Auction Market Maker, for securities in which it is registered as such, may submit customer orders to the Application with any of the available match parameters that enable the Primex Auction Market Maker to exercise certain matching rights facilitated by the Application, as set forth in Rule 5014(b). When associated with an order, these match parameters are not displayed, exposed or communicated to any other Participant; or

(2) A Primex Auction Market Maker, for securities in which it is registered as such, may submit customer orders to the Application with a Market Maker Guarantee enabling the Primex Auction Market Maker to guarantee an execution within the Application where such orders are not otherwise subject to an execution as a result of either satisfactory Crowd interest or matching rights processing elected by the Primex Auction Market Maker pursuant to Rule 5014(b) for the order.

(i) Public customer orders of any size are eligible for the Market Maker Guarantee. The Application will facilitate the Market Maker Guarantee by automatically executing any unexecuted balance of the order against the Primex Auction Market Maker that submits the order, after the Auction

exposure period for the order has expired.

(ii) The Market Maker Guarantee is automatically provided at a price equal to the best publicly quoted offer price (for orders to buy) or best publicly quoted bid price (for orders to sell) existing for the security at the time when such exposure period for the order has expired (including "zero second" auctions), for any amount of shares established by the Primex Auction Market Maker for the order.

(b) With respect to each security in which a Participant is registered as a Primex Auction Market Maker, the Participant shall:

(1) If the security is a Nasdaq-listed security, be registered as a Nasdaq market maker in such security (or become so registered), and at all times comply with all applicable NASD rules and interpretations relating to Nasdaq market makers, including the requirement to enter and maintain two-sided quotations in Nasdaq for such security, subject to the excused withdrawal procedures set forth in Rule 4619;

(2) if the security is an ITS/CAES eligible security, be registered as an ITS/CAES Market Maker (or become so registered) in such security, and at all times comply with all applicable NASD rules and interpretations relating to ITS/CAES Market Makers, including the requirement to enter and maintain two-sided quotations in CQS for such security, subject to the excused withdrawal procedures set forth in Rule 6350;

(3) Submit to the Application a minimum of 80%* of the number of its

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*The 80% test will be applied on a quarterly basis, and will be phased in as follows: For the calendar quarters commencing on October 1, 2001; January 1, 2002; April 1, 2002; and July 1, 2002, any participant may register in any eligible security as a Primex Auction Market Maker and maintain that status during such calendar quarters without regard to the percentage of its orders it submits to the System for such security during that time, provided it also satisfies all other requirements of a Primex Auction Market Maker pursuant to these rules. Beginning with the calendar quarter that commences on October 1, 2002, a participant previously registered as a Primex Auction Market Maker for a particular security may maintain its status as such until December 31, 2002 only if it submitted at least 50% of its Mandatory Eligible Orders during the calendar quarter that commences on July 1, 2002 (or during such portion of the calendar quarter that commences on July 1, 2002 in which the participant was so registered if the participant registered in mid quarter), provided it also satisfies all other requirements of a Primex Auction Market Maker pursuant to these rules. A participant that is newly registering as a Primex Auction Market Maker for a particular security any time after the start of the calendar quarter that commences on October 1, 2002 may maintain its status as such until the end of the calendar quarter in which it registered without regard to the

Mandatory Eligible Orders (including customer orders of another broker-dealer that has directed such orders to the Participant) as soon as practicable upon receipt by the Participant, for the purpose of exposing such orders to the Primex Crowd. Mandatory Eligible Orders do not include:

(A) Any customer order that is greater than 1099 shares at origination, except that nothing in these rules prohibits a Participant from submitting orders of greater size at any time;

(B) Any customer order that, when initially received by the Participant, is a Fixed Price Order with a specified price that is not eligible for acceptance by the Application because it is priced outside the NBBO and is not otherwise marketable pursuant to Rule 5013(a)(2), regardless of whether or not the order becomes eligible for acceptance and exposure at a subsequent point in time;

(C) Any customer order placed by a customer who authorizes the Participant to not expose the order, either at the time the order is placed or prior thereto pursuant to an individually negotiated agreement with respect to such customer's orders;

(D) Any customer order that is an odd lot order (*e.g.,* less than 100 shares);

(E) Any customer order to be executed outside of the hours of operation of the Application; or

(F) Any other order that would not fall within the definition of the term "covered order" as defined in Exchange Act Rule 11Ac1–5(a)(8).

(4) Not attach a condition for Minimum Relative Price Improvement to any order submitted to the Application solely for its own principal account and not involving a customer order.

5021. Anonymity, Execution, Reporting, and Clearing

(a) *Anonymity*—The Application will process all activity among Participants on an anonymous basis until the end of the day. After facilitating an execution, the Application will send an execution report to all Participants involved as soon as practicable. The execution report will indicate the details of the

transaction, but will not contain the identity of the contra-party. At the end of each trading day, the actual contra-party for executions obtained within the Application will be made available to the Participants involved through Nasdaq's systems. For regulatory and other necessary purposes, the NASD and Nasdaq will have the ability to determine the identity of the actual contra-parties at any time.

(b) *Tape Reporting and Clearing*—Matches within the Application are executed and reported through Nasdaq systems for public tape reporting and forwarding to NSCC for clearing, where necessary. Participants (or their clearing brokers) are the parties responsible for the clearance and settlement of all trades executed through the Application. Once a transaction is executed, Participants do not have the ability within the Application to modify or reallocate any portion of the execution to a clearing broker other than the clearing broker that the Application associates with the Participant at the time of execution. Neither the NASD (and its affiliates) nor any operator or administrator of the Primex Auction System shall be directly or indirectly a party to any transaction entered into, matched, or otherwise effected through the Application, notwithstanding that, for the remainder of the trading day after a transaction, the actual contra-parties have not had their identities disclosed to each other by the Application.

5022. Credit Limits and Clearing Limits

(a) *Credit Limits*—The Application shall allow a Participant's Firm Administrator to establish Credit Limits for each of its associated Subscribers, including sponsored Subscribers, on an individual Subscriber basis. The limits are established as a dollar amount of aggregated purchases or sales which, when reached, causes the Application to: (1) Inhibit any future executions or the entry of future interest for that Subscriber; (2) cancel any orders and withdraw any Indications resident within the Application for that Subscriber; and (3) send a notice to that Subscriber, its Firm Administrator, and the Nasdaq Supervisor. Credit Limits may be monitored and modified by the Firm Administrator on a real-time basis directly through the Application.

(b) *Clearing Limits*—The Application shall allow a Participant's clearing broker to establish Clearing Limits within the Application for the Participant on a firm-wide basis. The limits are established as a dollar amount of both purchases and sales (calculated separately, and not netted) of all

Subscribers, collectively for a Participant, effected within the Application through or in the name of that Participant. When the Clearing Limits for a Participant are reached, the Application will: (1) Inhibit any future executions for all Subscribers associated with that Participant; (2) cancel any orders and withdraw any Indications resident within the Application for all Subscribers associated with that Participant; and (3) send a notice to that Participant's Firm Administrator, the Nasdaq Supervisor, and to the clearing broker for that Participant provided that the clearing broker also is a Participant. Clearing Limits for a Participant may be monitored on a real-time basis by the Participant's Firm Administrator and can be established, monitored, and modified by the Firm Administrator of the Participant's clearing broker, provided the clearing broker also is a Participant. If the clearing broker is not a Participant in the Application, then the Nasdaq Supervisor will notify the clearing broker that the Clearing Limits have been reached as soon as practicable. Clearing Limits also can be established and modified by the Nasdaq Supervisor on behalf of the clearing broker.

5023. Hours of Operation

(a) The Application is available for executing securities transactions during regular Nasdaq trading hours whenever there is a free and open quote (*i.e.,* not locked or crossed), subject to the general authority and regulatory responsibilities of Nasdaq or its affiliates in operating the Application as a facility of Nasdaq or its affiliate (including but not limited to its authority to implement trading halts in one or more securities due to regulatory reasons, market-wide emergencies, and system malfunctions).

(b) Nasdaq may permit certain functionality of the Application to be available outside of the time period during which securities transactions may be effected through the Application, including but not limited to, the monitoring, entering, canceling, withdrawing, or modifying resident Indications, Credit Limits, or Clearing Limits.

5024. Limitation of Liability

(a) Neither Nasdaq, the NASD (including their affiliates), Primex Trading N.A., L.L.C. (including its affiliates) nor any other operator, licensor, or administrator (including their affiliates) of the Nasdaq Application of the Primex Auction System shall have any liability for any loss, damages, claim or expense arising from or occasioned by any inaccuracy,

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percentage of its orders it submits to the System for such security during that time.

Beginning with the calendar quarter that commences on January 1, 2003, and each calendar quarter thereafter, a participant previously registered as a Primex Auction Market Maker for a particular security may maintain its status as such until the end of that calendar quarter only if it submitted at least 80% of its Mandatory Eligible Orders during the previous calendar quarter (or during the portion of such previous calendar quarter in which it was so registered if the participant registered in mid quarter), provided it also satisfies all other requirements of a Primex Auction Market Maker pursuant to these rules.

error or delay in, or omission of or from: (1) The Nasdaq Application; or (2) the collection, processing, reporting or dissemination of any information derived from the Nasdaq Application, resulting either from any act or omission by Nasdaq or any affiliate, or any operator, licensor, or administrator of the Nasdaq Application or from any act, condition or cause beyond the reasonable control of Nasdaq or any affiliate, operator, licensor or administrator of the Nasdaq Application, including, but not limited to, flood, extraordinary weather conditions, earthquake or other act of nature, fire, war, insurrection, riot, labor dispute, accident, action of government, communications or power failure, or equipment or software malfunction. If a Participant that enters, authorizes its Subscribers (including sponsored Subscribers) to enter, or is authorized by other Participants to enter orders, Responses, or Indications that result in a transaction through the Application fails to perform its settlement or other obligations under the terms of such transaction, the NASD (and its affiliates) and Primex Trading N.A., L.L.C. (and its affiliates) shall have no liability for such failure to settle.

(b) Neither Nasdaq, the NASD (including their affiliates), Primex Trading N.A., L.L.C. (including its affiliates) nor any other operator, licensor, or administrator (including their affiliates) of the Nasdaq Application of the Primex Auction System makes any express or implied warranties or conditions to Participants or their associated Subscribers (including sponsored Subscribers) as to results that any person or party may obtain from the Nasdaq Application for trading or for any other purpose, and all warranties of merchantability or fitness for a particular purpose or use, title, and non-infringement with respect to the Nasdaq Application are hereby disclaimed.

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

Pilot Trading System

The Primex Auction System is a facility of Nasdaq that has been operating as a Pilot Trading System, as defined in paragraph (c)(2) of Rule 19b–5 of the Act.[6] As such, Nasdaq was not required to file a proposed rule change pursuant to Rule 19b–4 of the Act[7] as long as the System maintained its status as a Pilot Trading System. Under paragraph (c)(2) of Rule 19b–5 of the Act, a system must comply with three criteria to maintain its status as a Pilot Trading System.[8] One such criteria is that, for each security traded in the System, the System cannot trade more than one percent of the average daily consolidated trading volume of any such security, during at least two of the last four consecutive calendar months. Nasdaq represents that Primex has exceeded this threshold for many securities. Nasdaq also represents that while not all eligible securities have been phased in as of this date, the Primex Auction System has already executed approximately 1.7 million trades representing almost 500 million shares since it began operation just over four months ago. Therefore, Nasdaq is seeking permanent approval of the System pursuant to Section 19(b) of the Act[9] and Rule 19b–4 under the Act.[10]

Background

Nasdaq represents that as market structure continues to evolve, Nasdaq is committed to providing its participants with a variety of sophisticated execution services to automate the trading process in the most efficient manner possible. The Primex Auction System is a hybrid that combines an extended, electronic auction mechanism with the speed and liquidity of Nasdaq's competing market maker environment. By incorporating an

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[6] 17 CFR 240.19b–5(c)(2).

[7] 17 CFR 240.19b–4.

[8] Pursuant to Rule 19b–5(c)(2), to qualify as a Pilot Trading System, a system must: (1) be in operation for less than two years; (2) with respect to each security traded on such Pilot Trading System, during at least two of the last four consecutive calendar months, has traded no more than one percent of the average daily trading volume in the United States; and (3) with respect to all securities traded on such Pilot Trading System, during at least two of the last four consecutive calendar months, has traded no more than 20 percent of the average daily trading volume of all trading systems operated by the self-regulatory organization. 17 CFR 240.19b–5(c)(2).

[9] 15 U.S.C. 78s(b).

[10] 17 CFR 240.19b–4.

automated auction process into Nasdaq's existing multi-dealer environment, the System allows participants to facilitate the exposure of their customer orders to the entire market while still allowing these participants to commit liquidity and execution guarantees to their customers. Nasdaq believes that as a consequence, the Primex Auction System can provide increased opportunities for price improvement, enhanced liquidity, and order interaction.

Nasdaq believes that the System can improve upon the traditional auction market model, where market participants gather in a "crowd" at a physical location to bid for incoming orders. The crowd sometimes improves the best bid or offer, enhances the liquidity otherwise available, or validates the current quoted prices in the absence of any improvement to the published quotations. Most auction markets employ a single specialist that manages trading in a security and supplies liquidity when there is no buying or selling interest in the crowd.

The Primex Auction System automates many of these elements. By facilitating an "electronic crowd," not bound by the physical limitations of space or the number of persons that can be at any one place at a given time, the System can provide the benefits of an auction model on a larger and more efficient scale. By further combining this within a competitive, multi-dealer structure that has been Nasdaq's hallmark, Nasdaq believes it can make available a greater amount of liquidity than would be available in a market with only one provider of capital. Nasdaq believes the result of this combination and automation is a market-based solution for providing price improvement opportunities and enhanced liquidity.

System Overview

The following is a brief overview of how the System typically will operate. Additional details on the System and its tools can be found within the rules of the System and the Form PILOT.[11]

A customer sends an order to his or her broker, who, in turn, can forward it to the System. The System is voluntary. Once an order is submitted, an auction for that order commences. Through a unique mechanism, the order is exposed to the System's electronic crowd, which can be composed of market makers, proprietary traders, institutions, ECNs and even the orders of other customers. The System's electronic crowd is open to any NASD member (or their

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[11] *See supra* note 3.

customers, through a sponsored arrangement), and thus the universe of participants who may have access to these orders is very broad. Using the System's auction response tools, crowd participants anonymously bid for the order at prices at or within the parameters of the National Best Bid and Offer ("NBBO"). The order will be executed if an appropriate match is found in the electronic crowd or if the participant submitting the order provided an execution guarantee. The types of orders that can be submitted and the System's response tools are specified in the attached rules and generally are described below.

Participation in the System

Primex is a voluntary System available to any NASD member and other entities that a member chooses to sponsor. To access the System, a member must be in good standing and have executed the necessary agreements with Nasdaq. Members granted access to the System are referred to as Primex Auction System Participants ("Participants"), and can access the facility for their customers or for themselves. Participants in the System are classified as either Primex Auction Market Makers ("PAMMs") or Crowd Participants.

Entities that are not members can access the System by becoming a Sponsored Subscriber of a Participant ("Sponsored Subscriber"). The Participant assumes responsibility for all activity conducted through the System by the Sponsored Subscriber and will have the ability to monitor and control such activity, including the ability to monitor and establish credit limits for each Sponsored Subscriber. Participants and their Sponsored Subscribers must have the necessary agreements executed with Nasdaq with respect to these sponsored arrangements.

As mentioned above, there are two categories of Primex Participants: PAMMS and Crowd Participants. By becoming a Participant, a member automatically receives the right to trade as a Crowd Participant for any security eligible for trading in the System. To become a PAMM, a member must register as such with Nasdaq for each security in which the member wishes to trade in such capacity. Members that seek to become PAMMs also must be registered as Nasdaq market makers with respect to Nasdaq-listed securities (*i.e.,* Nasdaq National Market® and The Nasdaq SmallCap Market℠ securities) or Consolidated Quotation Services ("CQS") market makers with respect to exchange-listed securities. Because

Primex is a voluntary service, however, Nasdaq and CQS market makers, or other members for that matter, are neither required to become Participants in the System, nor are they required to become PAMMs.

The rights and obligations of each class of Participant are specified in the rules. Generally, however, for any security eligible for trading in the System, Crowd Participants can do the following: view all orders exposed in the System; interact with any order put to auction in the System by responding to auctions; submit orders to be put to auction; and trade as principal, agent, or riskless principal.

PAMMS have certain obligations when they participate in the System. With respect to any security eligible for trading in the System for which a Participant is registered as a PAMM, it must: maintain a two-sided quote in Nasdaq (or Nasdaq's InterMarket for CQS securities) with respect to any security for which it is registered as a PAMM, and otherwise be in compliance with all applicable NASD rules; and submit to the System a minimum percentage [12] of its Mandatory Eligible [13] public customer orders (including customer orders of another broker-dealer that directs such orders to the PAMM) for those securities in which it is registered as a PAMM.

PAMMs have the same privileges as Crowd Participants, but because they have certain obligations, PAMMs also have additional privileges. PAMMs are entitled but not obligated to: exercise certain matching rights that allow a PAMM to commit capital to its customer orders in conjunction with the auction exposure process; provide execution guarantees for its own customer orders submitted to the System; and use certain types of orders that permit the PAMM to facilitate block trades and "clean crosses." PAMMs also are entitled to share in transaction revenue paid by other Participants when those other Participants execute against a PAMM's customer orders.

System Features

The System is designed to be highly flexible in the types of orders it accepts, how orders are auctioned, and how PAMMs and Crowd Participants can respond to auctions. As such, the System accepts unpriced market orders, as well as orders that have specified, fixed prices that are marketable or priced between the NBBO. Orders can be submitted in any round lot or mixed

lot, but odd lot orders are not accepted. The System is not an "ECN Display Alternative" under the Order Handling Rules [14] because it does not display limit orders. Fixed price orders are eligible only for "immediate or cancel" treatment.

The System also provides a variety of features that allow participants to control the manner in which their orders are exposed for auction. For example, Participants can choose the maximum duration of the exposure for their orders. PAMMs can submit orders with match parameters, or execution guarantees. An order also can be submitted with a condition attached requiring a minimum amount of price improvement relative to the current NBBO at the time of execution. A participant utilizing this feature for an order to buy would specify, when entering the order into the System, that the order be executed only if the auction yields an execution with price improvement of 3 cents below the "Best Offer" as publicly displayed in the NBBO at the time of execution.

PAMMs are entitled to attach certain match parameters to customer orders they submit to the System. This feature provides PAMMs the ability to provide additional liquidity to their customer orders, in conjunction with the exposure process. For example, a PAMM may submit a customer order with a 50% match parameter. Any interest provided by the crowd is matched in both size and price by a corresponding execution with the PAMM. This function effectively can double the amount of liquidity otherwise available from the crowd, at prices established by the crowd, for a customer order. It also ensures that the PAMM will participate in no less than 50% of the order. The PAMM must be willing to execute the entire order when using this match parameter, in the absence of sufficient response from the crowd.

PAMMs also can submit customer orders with a Two Cent Match parameter. This function allows the PAMM entering the order to execute the customer order, provided it is willing to match the price established by the crowd for the entire order to the extent the price offered by the crowd is within two cents of the NBBO. If there is crowd interest willing to provide more than two cents of price improvement, the

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[12] *See* NASD Rule 5020.
[13] *See* NASD Rule 5011 (definition of "Mandatory Eligible") and NASD Rule 5020.

[14] Commission Rules 11Ac1–1 (Quote Rule), and 11Ac1–4 (Limit Order Display Rule), together are commonly referred to as the Order Handling Rules. Specifically, the System is not an ECN Display Alternative under paragraph (c)(5)(ii) of Rule 11Ac1–1 and paragraph (c)(5) of Rule 11Ac1–5.

PAMM loses that portion of the order to the crowd.

PAMMs also are entitled to provide execution guarantees within the System. This feature ensures that any balance of an order remaining after exposing it to the crowd will receive a liquidity guarantee, established by the PAMM for each order submitted, at a price at least as good as the NBBO at that time.

Nasdaq believes the match parameter and execution guarantee features will encourage market maker participation by providing PAMMs the opportunity to continue to commit capital to their own customer orders, in conjunction with a broad exposure process. The process ensures that the PAMM submitting a customer order and the Participants in the electronic crowd both have opportunities to interact with orders in the System in a fair and balanced manner. In all cases, customers receive the benefit of any improved prices generated by the auction process.

Any condition, match parameter, or guarantee must be attached to an order at the time it is submitted to the System. The existence of any condition, match parameter, or guarantee that may be attached to an order is never communicated or displayed to the crowd.

The System also provides participants the option of having the balance of an unexecuted order returned to them or forwarded to other Nasdaq systems for execution. Participants must indicate their preference upon submission of an order to the System. For example, a Participant can submit an order with an indication that it should be forwarded to another Nasdaq system if the order is not completely executed in Primex. To the extent the auction concludes and there is a portion of the order remaining, that balance will be converted by the System to an order that is forwarded to SuperSoes (for Nasdaq National Market securities), SuperMontage (when implemented), or ITS/CAES (for exchange-listed securities, provided the participant also is an ITS/CAES market maker). A Participant's preference is not displayed, exposed or communicated to any other Participant.

The entire auction process is designed to give participants maximum flexibility and choice in how their orders are exposed while allowing for the fastest execution possible. For example, although unpriced market orders generally have a default *maximum* broadcast period of 15 seconds, executions can take place sooner if there are satisfactory responses from the crowd at any time during the exposure of the order. In addition, executions can occur instantaneously when there is

crowd trading interest residing in the System. Trading interest can reside in the System when Participants define their interest in advance of an order being auctioned, or when other, contra side orders are already in the process of being exposed in an auction. In addition, participants also may elect to have the order exposed for an immediate or ''zero second'' auction, depending on the size of the order or, as described above, guarantee an execution by committing liquidity in the absence of satisfactory interest from the crowd. Transactions always are executed at or within the NBBO.

Another feature of the System is that it processes all activity among Participants on an anonymous basis until the end of the trading day. After facilitating an execution, the System sends an execution report to all Participants involved. The execution report indicates the details of the transaction, but the identity of the counterparty is withheld. At the end of each trading day, the counterparties' identities are revealed to each other. Nasdaq, however, has the ability to determine the identity of the parties at any time.

Trades executed within the System are reported and settled through the same process as trades executed using other Nasdaq systems. Through ACT, trades are reported to the public tape and forwarded to DTCC for clearing, if necessary. Participants (or their clearing brokers) are the parties responsible for clearing and settling all trades executed through the System. Once a transaction is executed, Participants do not have the ability within the System to modify or reallocate any portion of the execution to a clearing broker other than the clearing broker that the System associates with the participant at the time of execution. Neither the NASD (and its affiliates), Primex Trading, N.A., LLC (and its affiliates) nor any operator or administrator of the System will be directly or indirectly a party to any transaction entered into, matched, or otherwise effected through the System, notwithstanding that, for the remainder of the trading day after a transaction is executed, the identities of the counterparties will not be disclosed to each other by the System.

Trades executed within the System are subject to several levels of risk management. All trades are included in the existing risk management feature of ACT, which allows firms to rely on ACT to monitor all trading activity of executing brokers that clear through them, even when those firms use the System to effect trades.

The System itself provides additional risk management controls. Participants and their clearing firms can closely monitor and control their exposure specifically with respect to System activity, both at an individual subscriber/user level, as well as across an entire firm. Specifically, through the System, supervisory personnel at a Participant firm have the ability to establish credit limits applicable to each individual subscriber/user authorized by that firm to access the System (including any Sponsored Subscriber). The limits are established as a dollar amount of aggregated purchases or sales within the System, which, when reached, cause the System to: (1) Inhibit any future executions or the entry of future interest for that subscriber; (2) cancel any orders and withdraw any indications resident within the System for that subscriber; and (3) send a notice to that subscriber, its firm administrator, and the Nasdaq supervisor. Credit limits can be monitored and modified by the Participant on a real-time basis directly through the System. As a backup, clearing limits also can be established and modified by the Nasdaq supervisor on behalf of the Participant firm.

The System also allows a Participant (or its clearing firm) to establish clearing limits within the System for that Participant on a firm-wide basis. The limits are established as a dollar amount of both purchases and sales (calculated separately, and not netted) of all subscribers of the Participant. When the clearing limits for a Participant are reached, the System will: (1) Inhibit any future executions for all subscribers associated with that Participant; (2) cancel any orders and withdraw any indications resident within the System for all subscribers associated with that Participant; and (3) send a notice to that Participant's firm administrator, the Nasdaq supervisor, and to the clearing firm for that Participant provided that the clearing firm also is a Participant. Clearing limits for a Participant can be monitored on a real-time basis by the Participant's firm administrator, and can be established, monitored, and modified by the firm administrator of the Participant's clearing firm, provided the clearing firm also is a Participant. If the clearing firm is not a Participant, the Nasdaq supervisor, as soon as practicable, will notify the clearing firm that the clearing limits have been reached. Clearing limits also can be established and modified by the Nasdaq supervisor on behalf of the clearing firm.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A(b) of the Act,[15] in general, and furthers the objectives of Section 15A(b)(6),[16] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principals of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open market and a national market system, protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Nasdaq also believes that the proposed rule change is consistent with Section 11A(a)(1) of the Act,[17] which sets forth findings of Congress that new data processing and communications techniques create opportunity for more efficient and effective market operations. Nasdaq believes its application of Primex is consistent with the NASD's obligations under the Act, as well as the finding of Congress, because the System provides members with an additional electronic, execution system, which is designed to provide members with flexibility in executing orders and the opportunity to obtain price improvement. Nasdaq believes the System is a hybrid that combines an extended, electronic auction mechanism with the speed and liquidity of Nasdaq's competing market maker environment. Nasdaq believes the System can improve on the traditional auction market model by automating many of its elements, including the trading crowd, but will not be bound by physical limitations of space or the number of persons that can be in one physical location at any given time. Nasdaq believes this attribute, combined with a multiple market maker structure provides an opportunity for enhanced liquidity.

Another attribute of the System is that all orders may be exposed to a wider audience and thus have the opportunity to obtain price improvement. Nasdaq believes this provides for order interaction and can facilitate best execution. At the same time, however, the System continues to provide PAMMs with incentives to expose orders and provide liquidity to those orders. To ensure the protection of

investors, orders will not be executed at prices inferior to the NBBO.

Nasdaq believes the System also is designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities. Trades executed using the System will be processed through ACT in the same manner as trades executed using other Nasdaq systems. As such, information on these trades will be incorporated in Nasdaq's audit trail, ACT's risk management function, and forwarded to DTCC for clearance and settlement, if necessary. Trades executed in the System also will be disseminated on the public tape.

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

Prior to filing the Form PILOT, Nasdaq published a Notice to Members describing the operation of the System.[18] One letter was received in response thereto.[19] A copy of the Notice to Members is attached as Exhibit 2 to Nasdaq's proposal. A copy of the comment letter is attached as Exhibit 3 to Nasdaq's proposal.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change, 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 SR–NASD–2002–60 and should be submitted by June 21, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[20]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–13623 Filed 5–30–02; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45982; File No. SR–NASD–2002–58]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Temporary Approval of the Primex Auction System®

May 23, 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 April 30, 2002, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its wholly owned 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

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[15] 15 U.S.C. 78o–3(b).

[16] 15 U.S.C. 78o–3(b)(6).

[17] 15 U.S.C. 78k–1(a)(1).

[18] NASD Notice to Members 00–65 (September 2000).

[19] *See* letter from Antonio Cecin, Managing Director, Director of Equity Trading, U.S. Bancorp Piper Jaffray Inc., to Eugene Lopez, Senior Vice President, Nasdaq, dated January 2, 2001.

[20] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.