

• For incoming buy quotes/orders, the break price will be the current Inside Offer plus 10% plus \$.01.⁷

For example, in a stock with a current Inside Bid of \$10.00, the maximum or break price at which a single sell order could be executed would be \$8.99 calculated as follows: (\$10.00 – (\$10.00 × .10 e.g. \$1) – \$.01 = \$8.99). In turn, this price determines how many shares of a particular quote/order can be executed based on the trading interest on the other side of the market residing in SuperMontage. For example, if the sell order discussed here was for 10,000 shares and there was only a total of 6,000 shares available between the current inside bid price of \$10.00 and the threshold price of \$8.99, SuperMontage would execute a total of 6,000 shares and reject the remaining 4,000 back to the entering party. Market participants receiving such a reject would be able to re-enter the rejected portion of their original order, if desired, with a new maximum break-point for that quote/order being calculated using the current inside price at the time of re-entry.

Nasdaq believes that the above approach best balances the goals of rapid execution and price discovery while protecting market participants, and the public investors they represent, from excessive volatility and market confusion that can result from the entry and execution of a grossly mis-priced or mis-sized quotes/orders in an automated and linked trading environment.

2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with the provisions of Section 15A of the Act,⁸ in general and with Section 15A(b)(6) of the Act,⁹ 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 and perfect the mechanism of a free and open market and a national market

system, and, in general, to protect investors and the public interest.

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

Nasdaq does not believe that the proposed rule change, as amended, 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

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 foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to file number SR–NASD–2002–142 should be submitted by November 12, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁰

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46645; File No. SR–NASD–2002–144]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Directed Orders in the Nasdaq Order Collection and Display Facility (“NNMS” or “SuperMontage”)

October 10, 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 October 9, 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 (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. Nasdaq filed the proposal pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b–4(f)(6) thereunder,⁴ which renders the proposal effective upon filing with the Commission.⁵ 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 filing a proposed rule change to modify the Directed Order process in Nasdaq's future Order Display and Collector Facility (“SuperMontage”). The text of the proposed rule changes follows.

Proposed new language is underlined; proposed deletions are in brackets.

* * * * *

4706. Order Entry Parameters

- (a) No Change.

¹⁰ 17 CFR 200.30–3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b–4(f)(6).

⁵ Nasdaq asked the Commission to waive the 5-day pre-filing notice requirement and the 30-day operative delay. See Rule 19b–4(f)(6)(iii). 17 CFR 240.19b–4(f)(6)(iii).

⁷ When approving this formula, the Nasdaq Board of Directors also authorized the Chief Executive Officer of Nasdaq and/or the President of Nasdaq to alter the base percentages used in the threshold formula by 10% in either direction for a particular security or securities if its trading activity or share price warrants it. If Nasdaq Senior Management determines to alter this standard, Nasdaq will submit a proposed rule change to the Commission and alert market participants by posting the new percentages on NasdaqTrader.com. Telephone conversation between Thomas P. Moran, Associate General Counsel, Nasdaq, and Terri Evans, Assistant Director, Division, Commission, October 10, 2002.

⁸ 15 U.S.C. 78o–3.

⁹ 15 U.S.C. 78o–3(b)(6).

(b) Directed Orders: A participant may enter a Directed Order into the NNMS to access a specific Attributable Quote/Order displayed in the Nasdaq Quotation Montage, subject to the following conditions and requirements:

(1) Unless the Quoting Market Participant to which a Directed Order is being sent has indicated that it wishes to receive Directed Orders that are Liability Orders, a Directed Order must be a Non-Liability Order, and as such, at the time of entry must be designated as:

(A) An "All-or-None" order ("AON") that is at least one normal unit of trading (e.g. 100 shares) in excess of the Attributable Quote/Order of the Quoting Market Participant to which the order is directed; or

(B) A "Minimum Acceptable Quantity" order ("MAQ"), with a MAQ value of at least one normal unit of trading in excess of Attributable Quote/Order of the Quoting Market Participant to which the order is directed. [Nasdaq will append an indicator to the quote of a Quoting Market Participant that has indicated to Nasdaq that it wishes to receive Directed Orders that are Liability Orders.]

(C) A Directed Order that is entered at a price that is inferior to the Attributable Quote/Order of the Quoting Market Participant to which the order is directed.

Nasdaq will append an indicator to the quote of a Quoting Market Participant that has indicated to Nasdaq that it wishes to receive Directed Orders that are Liability Orders.

(2) No Change.

(3) No Change.

(c) through (f) No Change.

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

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and statutory 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

Nasdaq has long intended the SuperMontage Directed Order process to perform essentially the same function that SelectNet performs today. Accordingly, Nasdaq designed the SuperMontage Directed Order process to be a negotiation process primarily for non-liability orders, with the exception of Nasdaq market makers that affirmatively opt to accept Directed Orders on a liability basis. For example, SuperMontage participants will be required to designate Directed Orders as "All-or-None" or Minimum Acceptable Quantity" and to enter such orders for 100 shares greater than the receiving Quoting Market Participant's displayed quote, just as they must do in SelectNet today. Nasdaq has repeatedly stated its intention that SuperMontage Directed Orders mirror SelectNet preferred orders, as evidenced by how closely it modeled future NASD Rule 4706(b) governing SuperMontage on current NASD Rule 4720(c) governing SelectNet.

In July of 2001, Nasdaq filed, on an immediately effective basis, a proposal that allows for the entry of preferred SelectNet orders to NNMS market makers if such orders are entered containing prices that are inferior to the quoted bid and/or offers to which they are directed.⁶ For example, in the situation where an NNMS market maker is quoting 20.00 bid and 20.03 offer, a market participant would be allowed to preference that market maker with either an order to sell at 20.01 or more, or an order to buy at 20.02 or less. These orders are priced at levels that would not obligate the receiving market maker to execute them under current firm quote standards. Therefore, NNMS market makers may choose to either ignore such orders or negotiate with the sending party to reach an agreement that would allow a trade to take place.⁷

The concept of entering preferred orders at prices inferior to the recipient's quoted price was not controversial when filed for implementation with SuperSOES in July of 2001. Market participants are accustomed to this functionality and have used it in compliance with current

NASD Rule 4720. Nasdaq proposes to incorporate the same functionality into the SuperMontage Directed Order process, which will essentially mirror the current functionality of SelectNet.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,⁸ in general and with section 15A(b)(6) of the Act,⁹ in particular, in that in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

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.

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

Because the foregoing proposed rule change does not:

(i) Significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A)¹⁰ of the Act and Rule 19b-4(f)(6) thereunder.¹¹ At any time within 60 days of the filing of the 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,

⁶ See Exchange Act Release No. 44506 (July 3, 2001), 66 FR 36020 (July 10, 2001).

⁷ Market participants executing transactions as the result of such messages remain obligated to protect customer limit orders they hold in conformity with NASD IM-2110-2 (Trading Ahead of Customer Limit Orders).

⁸ 15 U.S.C. 78o-3.

⁹ 15 U.S.C. 78o-3(b)(6).

¹⁰ 15 U.S.C. 78s(b)(3)(A).

¹¹ 17 CFR 240.19b-4(f)(6).

or otherwise in furtherance of the purposes of the Act.

Nasdaq has requested that the Commission waive the 5-day pre-filing notice requirement and the 30-day operative delay. The Commission believes waiving the 5-day pre-filing notice requirement and the 30-day operative delay is consistent with the protection of investors and the public interest. In particular, the proposed rule change provides functionality for the SuperMontage Directed Order process that is equivalent to functionality currently available in SelectNet. In addition, acceleration of the operative date will allow the proposed rule change to become operative with Nasdaq's implementation of the SuperMontage on October 14, 2002. For these reasons, the Commission waives both the 5-day pre-filing requirement and the 30-day operative waiting period.¹²

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. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR-NASD-2002-144 should be submitted by November 12, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹³

Margaret H. McFarland,

Deputy Secretary.

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¹² For purposes only 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).

¹³ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46654; File No. SR-NYSE-2002-01]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Approving Proposed Rule Change and Amendment No. 1 Thereto Relating to Removal of Separate Exchange Requirements Regarding the Use of Consent Solicitations

October 11, 2002.

On January 3, 2002, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² a proposed rule change to remove separate NYSE requirements regarding the use of consent solicitations. The NYSE submitted Amendment No. 1 to the proposed rule change on May 23, 2002.³ The proposed rule change was published for comment on June 26, 2002.⁴ The Commission received no comments on the amended proposal. This order approves the proposed rule change, as amended.

The proposed rule change would amend Section 306 of the NYSE Listed Company Manual ("NYSE Manual") to remove separate NYSE requirements regarding the use of consent solicitations. Currently, Section 306 of the NYSE Manual requires NYSE listed companies to obtain NYSE's permission to use consents in lieu of special meetings as proper authorization for shareholder approval of corporate action. In addition, Section 306 of the NYSE Manual currently sets forth the following guidelines that NYSE listed companies must follow in order to receive NYSE's permission: (1) A record date must be used; (2) consent material must be sent to all shareholders; (3) corporate action can not be taken until the solicitation period has expired—even if the required vote is received earlier; (4) a 30-day solicitation period

is recommended and a minimum of 20 days is required; and (5) consent material must conform to normal proxy statement disclosure standards. In effect, these guidelines require corporations to solicit the consent of all shareholders.

Under the federal securities laws, when a corporation is permitted under state law to take corporate action without a shareholder meeting upon the written consent of a specified percentage of shareholders, such corporation is not required to solicit the consent of all shareholders. Instead, under certain circumstances, under Section 14(c) of the Exchange Act and Regulation 14C thereunder, the corporation is required to furnish to all shareholders an information statement that contains the same disclosure as a proxy or consent solicitation at least 20 days prior to the earliest date the corporate action can be taken.⁵ The NYSE believes that under certain circumstances, the current requirements of Section 306 of the NYSE Manual are more onerous than those of the federal securities laws. Accordingly, the Exchange proposes to modify Section 306 of the NYSE Manual to eliminate the separate Exchange requirements with respect to use of consents in lieu of special meetings. Under the proposal, NYSE listed companies will no longer be required to obtain Exchange approval before using consents in lieu of special meetings as proper authorization for shareholder approval of corporate action. NYSE listed companies will be permitted to either: (1) Hold a special meeting of shareholders, or (2) use consents in lieu of special meetings when and as permitted by applicable law.⁶

The Exchange represents that it would, however, retain its traditional policy that listed companies may not use written consents in lieu of the annual meeting of shareholders at which directors are to be elected.⁷

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange⁸ and, in particular, the requirements of section 6 of the

⁵ See 15 U.S.C. 78n(c) and 17 CFR 240.14C.

⁶ As amended, Section 306 of the NYSE Manual specifically states that listed companies must comply with "applicable state and federal law and rules (including interpretations thereof), including, without limitation, SEC Regulations 14A and 14C."

⁷ See Section 306 of the NYSE Manual.

⁸ In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated May 22, 2002 ("Amendment No. 1"). In Amendment No. 1, the Exchange: (1) Added the following language to the proposed rule text: "(including interpretations thereof), including, without limitation," and (2) added language to the purpose section clarifying the two options available to listed companies for obtaining shareholder approval.

⁴ See Securities Exchange Act Release No. 46092 (June 19, 2002), 67 FR 43199.