

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-49576; File No. SR-NASD-2004-048)

April 16, 2004

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. to Create a Pilot Program Modifying SuperMontage Fees and Credits for Orders and Quotes Executed in the Nasdaq Closing Cross

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 March 16, 2004, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), submitted to 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 has designated the proposed rule change as "establishing or changing a due, fee, or other charge" under Section 19(b)(3)(A) of the Act,³ and Rule 19b-4(f)(2) thereunder,⁴ which renders the proposal effective upon filing with the Commission. 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 this proposed rule change to waive, for a pilot period of three months, the Nasdaq National Market Execution System (commonly called SuperMontage) execution fees and credits for those quotes and orders executed in the

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)(2).

Nasdaq Closing Cross. The pilot program will commence when Nasdaq implements the Closing Cross. The text of the proposed rule change is set forth below. Proposed new language is in italics.

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Rule 7010. System Services

(a) – (h) No change.

(i) Nasdaq National Market Execution System (SuperMontage)

(1) The following charges shall apply to the use of the Nasdaq National Market Execution System (commonly known as SuperMontage) by members:

Order Entry

Non-Directed Orders (excluding

| | |
|-------------------|-----------|
| Preferred Orders) | No charge |
|-------------------|-----------|

Preferred Orders:

Preferred Orders that access

a Quote/Order of the member

| | |
|-----------------------------------|-----------|
| that entered the Preferred Order) | No charge |
|-----------------------------------|-----------|

| | |
|------------------------|------------------------|
| Other Preferred Orders | \$0.02 per order entry |
|------------------------|------------------------|

| | |
|-----------------|------------------------|
| Directed Orders | \$0.10 per order entry |
|-----------------|------------------------|

Order Execution

Non-Directed or Preferred Order that

accesses the Quote/Order of a market

participant that does not charge an

access fee to market participants

accessing its Quotes/Orders through
the NNMS:

Charge to member entering order:

Average daily shares of
liquidity provided through
the NNMS by the
member during the month:

400,000 or less \$0.003 per share executed (but no
more than \$120 per trade for trades
in securities executed at \$1.00 or less
per share)

400,001 to 5,000,000 \$0.0027 per share executed (but no
more than \$108 per trade for trades
in securities executed at \$1.00 or less
per share)

5,000,001 or more \$0.0025 per share executed (but no
more than \$100 per trade for trades
in securities executed at \$1.00 or less
per share)

Credit to member providing liquidity \$0.002 per share executed (but no
more than \$80 per trade for trades in
securities executed at \$1.00 or less
per share)

Non-Directed or Preferred Order that accesses the Quote/Order of a market participant that charges an access fee to market participants accessing its Quotes/Orders through the NNMS:

Charge to member entering order:

Average daily shares of liquidity provided through the NNMS by the member during the month:

400,000 or less

\$0.001 per share executed (but no more than \$40 per trade for trades in securities executed at \$1.00 or less per share)

400,001 or more

\$0.001 per share executed (but no more than \$40 per trade for trades in securities executed at \$1.00 or less per share, and no more than \$10,000 per month)

Directed Order

\$0.003 per share executed

Non-Directed or Preferred Order entered by a member that accesses its own Quote/Order submitted under

the same or a different market participant

identifier of the member No charge

Order Cancellation

Non-Directed and Preferred

Orders No charge

Directed Orders \$0.10 per order cancelled

(2) For purposes of assessing NNMS fees and credits hereunder, (A) a Discretionary Order that executes prior to being displayed as a Quote/Order will always be deemed to be accessing liquidity unless it is executed by (or receives delivery of) a displayed Discretionary Order at a price in the discretionary price range of the displayed Discretionary Order, and (B) a Discretionary Order that executes after being displayed as a Quote/Order will always be deemed to be providing liquidity, unless the displayed Discretionary Order executes against (or is delivered to) a Quote/Order or Non-Directed Order that has not been designated “Immediate or Cancel,” at a price in its discretionary price range.

(3) Pilot- Closing Cross

For a period of three months commencing on the date Nasdaq implements its Closing Cross (as described in Rule 4709) members shall not be charged SuperMontage execution fees, or receive SuperMontage liquidity provider credits, for those quotes and orders executed in the Nasdaq Closing Cross.

(j) – (u) No change.

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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

The Commission recently approved the Nasdaq Closing Cross, which is a new process for determining the Nasdaq Official Closing Price for the most liquid Nasdaq stocks.⁵ The Nasdaq Closing Cross is designed to create a more robust close that allows for price discovery, and an execution that results in an accurate, tradable closing price. Nasdaq is proposing a three-month pilot program during which there will be no SuperMontage execution charges, and no SuperMontage liquidity provider credits, for those quotes and orders executed as part of the Nasdaq Closing Cross. The pilot program would enable Nasdaq to evaluate more accurately the effectiveness of the Closing Cross in establishing the NOCP by eliminating any pricing disincentives that could arise as a result of a price schedule not established on the basis of actual trading data. During the pilot program, Nasdaq staff would study the behavior and participation in the Closing

⁵ See Securities Exchange Act Release No. 49406 (March 11, 2004), 69 FR 12879 (March 18, 2004) (SR-NASD-2003-173); see also Securities Exchange Act Release No. 49534 (April 7, 2004), 69 FR 19584 (April 13, 2004) (SR-NASD-2004-060), amending the Closing Cross.

Cross to determine the optimum pricing schedule.⁶

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,⁷ in general, and with Section 15A(b)(5),⁸ in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system that NASD operates or controls. Nasdaq believes that the proposal to create the pilot program is an equitable allocation of fees because the program would apply equally to all members whose quotes and orders are executed as part of the Nasdaq Closing Cross. Furthermore, Nasdaq believes that the program is reasonable because it would allow Nasdaq, for a limited period of time, to analyze participation in the process and use the results to create an optimum fee schedule based on actual trading data.

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.

⁶ Nasdaq would consider extending the pilot if more information is needed at the end of the three-month period.

⁷ 15 U.S.C. 78o-3.

⁸ 15 U.S.C. 78o-3(b)(5).

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

The proposed rule change has become immediately effective pursuant to Section 19(b)(3)(A)(ii) of the Act,⁹ and subparagraph (f)(2) of Rule 19b-4 thereunder,¹⁰ because it establishes or changes a due, fee, or other charge imposed by Nasdaq. At any time within 60 days of the filing of the proposed rule change the Commission may summarily abrogate this proposed rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASD-2004-048 on the subject line.

Paper comments:

Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

⁹ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁰ 17 CFR 240.19b-4(f)(2).

All submissions should refer to File Number SR-NASD-2004-048. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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 Section, 450 Fifth Street, NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available

publicly. All submissions should refer to File Number SR-NASD-2004-048 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Margaret H. McFarland
Deputy Secretary

¹¹ 17 CFR 200.30-3(a)(12).