

choose in the future to lend the proceeds of its MIC offerings to FSA, which, as an insurance company, is excluded from the definition of investment company under section 3(c)(3) of the Act and to any other insurance company subsidiaries now or hereafter controlled by FSAH that derive their non-investment company status under section 3(c)(3) (such insurance companies, including but not limited to FSA, "FSAH's Insurance Company Subsidiaries").

4. Rule 3a-5(a)(1) requires that any debt securities of a finance subsidiary issued to or held by the public be unconditionally guaranteed by the parent company. Rule 3a-5(a)(3) requires that any parent guarantee provide that, in the event of a default in payment of amounts due under such debt securities, the holders of those securities be allowed to proceed directly against the parent company without first having to proceed against the finance company.

5. Applicant states that the Policies to be issued by FSA covering the MICs serve the underlying objectives of the rule 3a-5 guarantee, because the MIC holders will be provided with benefits substantially similar to those provided by the guarantee requirement of rule 3a-5. Each Policy will be an unconditional and irrevocable guarantee of payment of all amounts due under the MICs.

Applicant asserts that there are no differences in the procedures that would be followed by the MIC holders to recover for any loss in the event of Applicant's default on a MIC as compared to the procedures for recovery in the event of a default under a rule 3a-5 guarantee. Applicant further states that FSA is subject to a comprehensive scheme of regulation and supervision under the insurance laws of each U.S. jurisdiction where it is licensed to do business, so that there is higher likelihood that FSA would be able to meet its obligations.

6. Applicant further asserts that the receipt of a Policy from FSA in lieu of an FSAH guarantee increases the likelihood that the MIC holders will be paid in full because creditors of FSAH are in effect structurally subordinated to creditors of FSA (and its subsidiaries). This is because FSAH's equity interest in FSA (including its subsidiaries) is approximately 68% of FSAH's assets and FSAH's only significant source of

company generally is eligible if it meets certain asset and income tests and it is (i) not an investment company as defined in section 3(a) of the Act; (ii) excluded from the definition of investment company by section 3(b) of the Act; or (iii) deemed not to be an investment company under rule 3a-1 under the Act.

funds with which to make payments is dividends or other payments from FSA.

7. Section 6(c) of the Act, in pertinent part, provides that the Commission, by order upon application, may conditionally or unconditionally exempt any person, security or transaction, or any class or classes of persons, securities or transactions, from any provision or provisions of the Act to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicant submits that its exemptive request meets the standards set out in section 6(c).

#### **Applicant's Condition**

Applicant agrees that any order issued on the application shall be subject to the following condition:

Applicant will comply with all of the provisions of rule 3a-5 under the Act, except: (1) In lieu of the parent guarantee requirement in rule 3a-5(a)(1), Applicant's obligations under each MIC will be fully insured by a Policy issued by FSA; (2) FSAH will not meet the portion of the definition of "parent company" under rule 3a-5(b)(2)(i) solely because it is excluded from the definition of investment company under section 3(c)(6) of the Act; (3) Applicant will be permitted to make loans to each of FSAH's Insurance Company Subsidiaries, which do not meet the portion of the definition of "company controlled by the parent company" in rule 3a-5(b)(3)(i) solely because they are excluded from the definition of investment company under section 3(c)(3) of the Act; and (4) Applicant will be permitted to make loans to subsidiaries of FSAH that do not meet the portion of the definition of "company controlled by the parent company" solely because they would be excluded from the definition of investment company by virtue of rule 3a-3 under the Act, but FSAH's status as their parent company.

For the Commission, by the Division of Investment Management, under delegated authority.

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

[FR Doc. 03-8104 Filed 4-2-03; 8:45 am]

**BILLING CODE 8010-01-P**

## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-47588; File No. SR-NASD-2003-37]

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

March 28, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on March 12, 2003, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in items I, II, and III below, which Items have been prepared by Nasdaq. On March 26, 2003, Nasdaq filed Amendment No. 1 to the proposed rule change.<sup>3</sup> The Commission is publishing this notice, as amended, to solicit comments on the proposed rule change from interested persons.

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

Nasdaq proposes to make permanent its current pilot allowing NNMS Order Entry Firms ("OE Firms") to enter non-marketable limit orders into SuperMontage using the SIZE Market Maker Identifier ("SIZE MMID" or "SIZE").<sup>4</sup> In addition, this filing also makes permanent a number of non-substantive corrections to the written rules of the NNMS. The text of the proposed rule change is available at the NASD, the Office of the Secretary, and the Commission.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Letter from Thomas Moran, Office of General Counsel, Nasdaq, to Katherine England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated March 25, 2003 ("Amendment No. 1"). Nasdaq submitted Amendment No. 1 to reflect that File No. NASD-2003-39, relating to anti-internalization qualifier values, had become immediately effective, and to delete dates in the rule text that are no longer applicable.

<sup>4</sup> SIZE is an anonymous identifier that represents the aggregate size of all Non-Attributable Quotes and Orders entered by market participants in Nasdaq at a particular price level. Non-Attributable Quotes and Orders are not displayed in the Nasdaq Quotation Montage using the market participant's MMID. Instead, such interest is displayed next to the SIZE MMID.

## **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**

On January 31, 2003, the Commission approved File No. SR-NASD-2002-173 on a 90-pilot basis, which allowed OE Firms to enter non-marketable limit orders into Nasdaq's SuperMontage system using SIZE.<sup>5</sup> This filing seeks to make permanent the ability of OE Firms to enter orders into SuperMontage under essentially the same terms and conditions approved in the pilot program.<sup>6</sup>

Under the pilot, OE Firms are able to voluntarily enter non-marketable limit orders into SuperMontage without an IOC designation and have them be retained for potential execution<sup>7</sup> through display in SIZE. OE Firms may enter multiple orders (with or without reserve size) at single or multiple price levels, use any available execution algorithm (price/time, price/time-with-fee-consideration, or price/size). Non-marketable limit orders entered by OE Firms are subject to the automatic execution functionality of the system. Orders of OE Firms on opposite sides of the market are not permitted to automatically interact, if at the best price level, like those Nasdaq Quoting

<sup>5</sup> See Securities Exchange Act Release No. 47301 (January 31, 2003), 68 FR 6236 (February 6, 2003). The 90-day pilot commenced on February 10, 2003.

<sup>6</sup> Prior to the pilot period, OE Firms were required to designate all limit orders they entered into SuperMontage as Immediate-or-Cancel ("IOC"). This designation, while allowing such orders to potentially execute if marketable when they reached the front of the SuperMontage processing queue, also instructed the system to return them to the OE Firm if their price precluded an immediate execution. In short, OE Firms could enter market orders and marketable limit orders, but could not enter non-marketable limit orders and have them retained in the system for potential display and/or execution.

<sup>7</sup> NNMS Order Entry Firms will be able to designate orders as IOC, "Good-till-Cancelled," or "Day" orders.

Market Participants.<sup>8</sup> If elected by the OE Firm, its quotes/orders on opposite sides of the market will match off against each other only if such interaction would result based on the execution algorithm selected.<sup>9</sup> Alternatively, OE Firms may elect not to interact with its orders on the opposite side of the market.<sup>10</sup> Quotes/Orders entered by OE Firms that create a locked/crossed market, will be processed like other locking/crossing quotes/orders as set forth in NASD rule 4710(b)(3).

As stated in the filing creating the pilot program, Nasdaq believes that the proposal is an important step in Nasdaq's ongoing process to make its systems more accessible to all NASD member firms while ensuring that market participants who undertake the burdens of continuous liquidity provision are provided benefits commensurate with their activities. Nasdaq believes that most important, however, are the improvements to market quality that can be expected from the proposal's permanent approval. Nasdaq believes that in addition to enhanced liquidity and informational benefits, retention of non-marketable limit orders from OE Firms in SuperMontage, the proposal can be expected to reduce fragmentation of trading interest, thereby improving execution quality and speed and shrinking the costs market participants now incur when searching for trading partners in multiple venues. Finally, to the extent that any previously rejected OE Firm order is retained, Nasdaq believes the proposal will reduce the potential for locked/crossed markets that can occur if such rejected trading interest is subsequently displayed in an unlinked market center without the benefit of SuperMontage processing to eliminate locks or crosses among all quotes and orders residing in the system. Nasdaq notes that the permanent change proposed here was originally suggested as part of the original public comment process on the SuperMontage proposal, and believes its adoption should have the effect of reducing barriers to access to the SuperMontage system.

<sup>8</sup> Similarly, OE Firms will not be able to use SuperMontage's self-preferencing feature and have buy and sell interest interact on a basis other than a natural interaction based solely on the selected order execution algorithm.

<sup>9</sup> See Securities Exchange Release Act No. 47554 (March 21, 2003), 68 FR 15024 (March 27, 2003) (Notice of Filing and Immediate Effectiveness of SR-NASD-2003-39).

<sup>10</sup> *Id.* Change made pursuant to March 27, 2003, telephone conversation between Thomas Moran, Office of General Counsel, Nasdaq, and Terri Evans, Assistant Director, Division, Commission.

## **2. Statutory Basis**

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,<sup>11</sup> in general and with section 15A(b)(6) of the Act,<sup>12</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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**

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

<sup>11</sup> 15 U.S.C. 78o-3.

<sup>12</sup> 15 U.S.C. 78o-3(b)(6).

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-2003-37, and should be submitted by April 24, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

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

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BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47590; File No. SR-NASD-2003-13]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 by the National Association of Securities Dealers, Inc. Relating to Proposed Interpretive Material Regarding the Use of Investment Analysis Tools

March 28, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on February 3, 2003, the National Association of Securities Dealers, Inc. ("NASD") 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 the NASD. On February 27, 2003, the NASD amended the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

<sup>13</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See February 27, 2003 letter from Barbara Z. Sweeney, Senior Vice President and Corporate Secretary, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, and attachments ("Amendment No. 1"). The original proposed rule change was inadvertently submitted without page 5, and contained some technical deficiencies. In Amendment No. 1, the NASD removed pages 1-25 of the original filing and replaced them with new pages 1-25. The Commission did not require the NASD to re-file pages 26-230.

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

The NASD proposes to adopt a new Interpretive Material ("IM") to NASD rule 2210(d)(2)(N), to allow NASD member firms to use certain investment analysis tools that show the probability that investing in specific securities or mutual funds may produce a desired result. The text of the proposed rule change is below. Proposed new language is in italics.<sup>4</sup>

#### IM-2210-6. Requirements for the Use of Investment Analysis Tools

##### (a) General Considerations

This Interpretive Material provides a limited exception to NASD Rule 2210(d)(2)(N).<sup>1</sup>

No member may imply that NASD endorses or approves the use of any investment analysis tool or any recommendation based on such a tool. A member that intends to offer an investment analysis tool under this Interpretive Material (whether customers use the member's tool independently or with assistance from the member) must, at least 30 days prior to first use, (1) provide NASD's Advertising Regulation Department (Department) access to the investment analysis tool and (2) file with the Department any template for written reports produced by, or sales material concerning, the tool.<sup>2</sup> The member also

<sup>4</sup> The Commission notes for purposes of clarification that all of the proposed rule language is new language. While some of the language appears in brackets, this does not signify language that is being removed, as is normally the case in proposed rule language that is published in the *Federal Register*.

<sup>1</sup> NASD rule 2210(d)(2)(N) prohibits NASD member firms from making predictions or projections of specific investment results to the public. In the past, the rule also had been interpreted as prohibiting members from providing customers access to investment analysis tools that show the probability that investing in specific securities or mutual funds will produce a desired result. This Interpretive Material allows member firms to offer such tools (whether customers use the member's tool independently or with assistance from the member), written reports indicating the results generated by such tools and related sales material in certain circumstances.

Rule 2210(d)(2)(N) does not prohibit, and this Interpretive Material does not apply to, automated educational tools that are hypothetical or general in nature. For instance, rule 2210(d)(2)(N) generally does not prohibit, and this Interpretive Material does not cover, portfolio-based planning tools that merely generate a suggested mix of asset classes, broad categories of securities or funds, or probabilities as to how classes of financial assets or styles of investing might perform.

<sup>2</sup> Sales material that members disseminate to the public must be in the same form in which it was submitted to NASD for review and approval. Members cannot redact or alter such sales material after receiving NASD approval and must file with the Department any modified version of the sales material, at least 30 days prior to first use of the modified version of the sales material.

must provide any supplemental information requested by the Department. If the Department requests changes to the investment analysis tool, written-report template or sales material, the member may not offer or use the tool, written-report template or sales material until all changes specified by the Department have been made by the member and approved by the Department. In addition, as in all cases, a member's compliance with this Interpretive Material does not mean that the member is acting in conformity with other applicable laws and rules. A member that offers an investment analysis tool under this Interpretive Material (whether customers use the member's tool independently or with assistance from the member) is responsible for ensuring that use of the investment analysis tool and all recommendations based on the investment analysis tool (whether made via the automated tool or a written report) comply with NASD's suitability rule (rule 2310), the other provisions of rule 2210, and the other applicable federal securities laws and Securities and Exchange Commission and NASD rules.

##### (b) Definition

For purposes of this Interpretive Material and any interpretation thereof, an "investment analysis tool" is an interactive technological tool that produces simulations and statistical analyses that present a range of probabilities that various investment outcomes might occur, thereby serving as an additional resource to investors in the evaluation of the potential risks of and returns on particular investments.

##### (c) Use of Investment Analysis Tools and Related Written Reports and Sales Material

A member may provide an investment analysis tool (whether customers use the member's tool independently or with assistance from the member), written reports indicating the results generated by such tool and related sales material<sup>3</sup> only if:

(1) the tool presents a range of probabilities that various investment outcomes might occur and does not state that a particular investment outcome will, in fact, occur;

(2) the tool prominently presents a fair and balanced representation of the range of possible investment outcomes

<sup>3</sup> Sales material that contains only an incidental reference to an investment analysis tool (e.g., a brochure that merely mentions a member's tool as one of the services offered by the member) does not need to include the disclosures required by this Interpretive Material and does not need to be filed with the Department, unless otherwise required by another rule 2210 provision.