

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-49597; File No. SR-NASD-2004-051)

April 21, 2004

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change and Amendments No. 1 and No. 2 Thereto by the National Association of Securities Dealers, Inc. Relating to the Use of Summary Orders for NNMS Order-Delivery ECNs Using the SIZE MPID in SuperMontage

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 23, 2004, the National Association of Securities Dealers, Inc. (“NASD”), through its subsidiary, The Nasdaq Stock Market, Inc. (“Nasdaq”), filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. On April 9, 2004, Nasdaq filed Amendment No. 1 to the proposed rule change,<sup>3</sup> and on April 19, 2004, Nasdaq filed Amendment No. 2 to the proposed rule change.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

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

<sup>3</sup> See letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation (“Division”), Commission, dated April 8, 2004 (“Amendment No. 1”). Amendment No. 1 replaced the originally filed proposal in its entirety. This Amendment No. 1 also replaced and superceded an earlier Amendment filed by Nasdaq, also marked Amendment No. 1, dated March 26, 2004. Telephone conversation between Thomas P. Moran, Associate General Counsel, Nasdaq, and A. Michael Pierson, Attorney, Division, Commission on March 26, 2004.

<sup>4</sup> See letter from Edward S. Knight, Executive Vice President and General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated April 16, 2004 (“Amendment No. 2”). Amendment No. 2 replaced Amendment No. 1 in its entirety.

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

Nasdaq proposes to provide those NNMS Order-Delivery ECNs participating in SuperMontage with an order type (Summary Orders) that will generate a warning message if an un-attributed order they enter into the system would lock or cross the best bid or best offer displayed in Nasdaq. Pursuant to Section 19(b)(3)(A) of the Act<sup>5</sup> and Rule 19b-4(f)(6) thereunder,<sup>6</sup> Nasdaq has designated the proposed rule change as non-controversial and one effecting a change that: (1) does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) will not become operative for at least thirty days after the date of this filing.<sup>7</sup> Nasdaq intends to implement the proposed rule change on or about July 17, 2004,<sup>8</sup> and will inform market participants of the exact implementation date via a Head Trader Alert on [www.nasdaqtrader.com](http://www.nasdaqtrader.com).

Below is the text of the proposed rule change, as amended. Proposed new language is in italics; proposed deletions are in [brackets].

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**4700. NASDAQ NATIONAL MARKET EXECUTION SYSTEM (NNMS)**

**4701. Definitions**

Unless stated otherwise, the terms described below shall have the following meaning:

(a) – (nn) No Change.

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<sup>5</sup> 15 U.S.C. 78s(b)(3)(A).

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

<sup>7</sup> On March 9, 2004, Nasdaq provided Commission staff with a description and text of the proposed rule change.

<sup>8</sup> Telephone conversation between Thomas P. Moran, Associate General Counsel, Nasdaq, and A. Michael Pierson, Attorney, Division, Commission on April 21, 2004.

(oo) [Reserved] The term “Summary” shall mean, for priced limit orders so designated, that if an order is marketable upon receipt by NNMS, it shall be rejected and returned to the entering party. Summary Orders may only be entered by NNMS Order Delivery ECNs. Summary Orders may only be designated as Non-Attributable Orders.

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#### **4706. Order Entry Parameters**

(a) Non-Directed Orders –

(1) General. The following requirements shall apply to Non-Directed Orders Entered by NNMS Market Participants:

(A) No Change.

(B) A Non-Directed Order must be a market or limit order, must indicate whether it is a buy, short sale, short-sale exempt, or long sale, and may be designated as “Immediate or Cancel,” “Day,” “Good-till-Cancelled,” “Auto-Ex,” “Fill or Return,” “Pegged,” “Discretionary,” “Sweep,” “Total Day,” “Total Good till Cancelled,” [or] “Total Immediate or Cancel<sub>2</sub>” or “Summary.”

(1) through (12) No Change.

(13) An order may be designated as “Summary,” in which case the order shall be designated either as Day or GTC. A Summary Order that is marketable upon receipt by NNMS shall be rejected and returned to the entering party. If not marketable upon receipt by NNMS, it will be retained by NNMS. Summary Day and GTC orders may be executed prior to the market open if required under Rule 4710(b)(3)(B). Summary

Orders may only be entered by NNMS Order Delivery ECNs. Summary

Orders may only be designated as Non-Attributable Orders.

(C) – (F) No Change.

(2) No Change.

(A) through (B) No Change.

(b) – (e) 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, as amended, and discussed any comments it received on the proposed rule change, as amended. 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 is proposing the adoption of a new voluntary order type for the use of NNMS Order-Delivery ECNs participating in SuperMontage. Called a Summary Order (“SO”), the order type is intended to provide NNMS Order-Delivery ECNs the ability to receive a warning message if an un-attributed order entered by them for display under the SIZE MPID in the montage is marketable and would lock or cross the best bid or best offer in NNMS. NNMS Order-Delivery ECNs already receive such lock/cross warnings when they enter attributable quotes/orders into the system and the proposed order type is designed to provide the same

functionality for un-attributed orders that NNMS Order-Delivery ECNs enter into SIZE.<sup>9</sup> As such, the order type should give NNMS Order-Delivery ECNs an equal ability to manage risk when using either attributed or un-attributed orders. SOs, which may only be designated as DAY or Good-Till-Cancelled (“GTC”) would be retained by the system and processed in the normal course if they would not lock/cross the best bid or offer in NNMS. Retained SOs would be made available for execution, if required, as part of Nasdaq’s pre-opening unlocking and uncrossing process.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with the provisions of Section 15A of the Act,<sup>10</sup> in general, and Section 15A(b)(6) of the Act,<sup>11</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, as amended, 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.

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<sup>9</sup> SuperMontage’s SIZE feature only accepts orders.

<sup>10</sup> 15 U.S.C. 78q-3.

<sup>11</sup> 15 U.S.C. 78q-3(b)(6).

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act,<sup>12</sup> and subparagraph (f)(6) of Rule 19b-4,<sup>13</sup> thereunder because it does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; (iii) become operative for 30 days from the date on which it was filed. 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, or otherwise in furtherance of the purposes of the Act.<sup>14</sup>

### 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. 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 E-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number NASD-2003-051 on the subject line.

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

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

<sup>14</sup> For purposes of calculating the 60-day abrogation period, the Commission considers the proposed rule change to have been filed on April 19, 2004, the date Nasdaq filed Amendment No. 2.

Paper comments:

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

All submissions should refer to File Number NASD-2003-051. 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 NASD-2003-051 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.<sup>15</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>15</sup> 17 CFR 200.30-3(a)(12).