

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50537; File No. SR-NASD-2004-143)

October 14, 2004

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change, and Amendment No. 1 thereto, by National Association of Securities Dealers, Inc. Relating to Attributable Summary Orders in the Nasdaq Market Center

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 September 24, 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 October 4, 2004, Nasdaq filed Amendment No. 1 to the proposed rule change.³ 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 the Substance of the Proposed Rule Change

Nasdaq is filing a proposed rule change with the Commission to provide Order Delivery electronic communication networks (“ECNs”) in the Nasdaq Market Center the ability to enter attributable Summary Orders – an order type that rejects back to the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Edward Knight, Executive Vice President, Nasdaq, to Katherine England, Assistant Director, Division of Market Regulation (“Division”), Commission, dated September 29, 2004 (“Amendment No. 1”). In Amendment No. 1, Nasdaq clarified the description of the proposed rule change and provided rationale for its request to waive the 30-day operative delay for the proposed rule change.

entering party if the order would lock or cross the best bid or best offer displayed in the Nasdaq Market Center.⁴ The text of the proposed rule change is below. Proposed deletions are in brackets.⁵

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4700. NASDAQ MARKET CENTER – EXECUTION SERVICES

4701. Definitions

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

(a) – (nn) **No Change.**

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

(pp) – (uu) **No Change.**

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⁴ See Amendment No. 1, note 3 supra.

⁵ The proposed rule change is marked to show changes from the rule as it appears in the electronic NASD Manual available at www.nasdr.com as well as SR-NASD-2004-76 filed on an immediately effective basis on May 5, 2004. See Securities Exchange Act Release No. 50074 (July 23, 2004), 69 FR 45866 (July 30, 2004).

4706. Order Entry Parameters

(a) Non-Directed Orders –

(1) General. The following requirements shall apply to Non-Directed Orders Entered by Nasdaq Market Center Participants:⁶

(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," "Total Immediate or Cancel," or "Summary."

(i) through (xii) No Change.

(xiii) 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 the Nasdaq Market Center shall be rejected and returned to the entering party. If not marketable

⁶ Pursuant to a telephone conversation on October 14, 2004, between Thomas Moran, Office of General Counsel, Nasdaq, and Marc McKayle, Special Counsel, Division, Commission, the Commission corrected the proposed rule text by replacing the term "NNMS" with "National Market Center."

upon receipt by the Nasdaq Market Center, it will be retained by the system. Summary Day and GTC orders shall be executed prior to the market open if required under Rule 4710(b)(3)(B). Summary Orders may only be entered by 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 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 is proposing to allow Order Delivery ECNs participating in the Nasdaq Market Center to enter attributable Summary Orders. Summary Orders, in essence, provide a warning that the price of the order would lock or cross the best prices then displayed in the Nasdaq Market Center by rejecting such an order back to the entering party. If the Summary Order does not lock or cross the best price, it is retained by the system for normal processing. Today, the use of Summary Orders is restricted to Nasdaq Order Delivery ECNs and such orders may only be used to enter Non-Attributable Orders into SIZE.⁷ This proposal will give Nasdaq Order Delivery ECNs the choice to enter such orders as either attributable or non-attributable.

Under current Nasdaq Market Center processing, quotes already provide the lock/cross warning via rejection attributes of the Summary Order. Orders that are not designated as Summary, however, do not provide similar lock/cross warning capabilities and are considered immediately executable indications of trading interest that would be executed by the system if they locked or crossed the Nasdaq inside market. As such, Order Delivery ECNs generally refrain from using orders when displaying trading interest in the Nasdaq Market Center and instead aggregate multiple orders at their best price level and submit them to Nasdaq using a single aggregated quote. In turn, this aggregation increases internal processing complexity for ECNs that must convert and

⁷ SIZE is the anonymous Market Participant Identifier ("MPID") used to display Non-Attributable Quotes/Orders in the Nasdaq Market Center. See NASD Rule 4707(b)(2).

combine individual orders residing in their systems into a single quote and then appropriately parcel out subsequent order deliveries against that quote back to individual subscribers.

The ability to receive a warning via order rejection when entering a locking or crossing order is an important component in providing Nasdaq Order Delivery ECNs control over how their orders are processed in the Nasdaq Market Center so as to manage executions taking place in their own systems as well in the Nasdaq Market Center. This control is particularly important to ECNs that act exclusively as agents and seek to avoid dual liability for multiple executions against the same single share amount displayed simultaneously, and potentially accessible, in the Nasdaq Market Center as well as the ECNs own internal book. As noted above, lock or cross warnings are available today to ECNs when they represent trading interest in Nasdaq using quotes. Nasdaq believes that the current limitation on using Summary Orders only to place Non-Attributable Orders in SIZE restricts the ability of Nasdaq Order Delivery ECNs that, in lieu of quotes, may desire to provide multiple orders at the same price level to Nasdaq and have such orders attributed to them through a displayed MPID. Expansion of the Summary Order to allow the entry of attributable orders by ECNs that desire to enter multiple orders at multiple price levels into the Nasdaq Market Center ensures that such orders behave in a manner similar to quotes by providing for the rejection of locking or crossing trading interest as well as having that trading interest associated with the identity of the entering ECN via an attributable MPID. For ECNs that currently aggregate their customers' trading interest and submit it combined in a single quote, Summary Orders can provide a simplified, and less technologically burdensome, method to pass such orders individually to the Nasdaq

Market Center and thereafter track and reconcile any resulting transactions with their own internal execution and order management systems while continuing to have such orders publicly associated with the entering ECN via attribution similar to quotes.

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 it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, remove impediments to a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, Nasdaq believes that the increased control given to all market participants through the use of Summary Orders will assist in improving execution quality for themselves and their customers. In addition, to the extent that expansion of the Summary Order to attributable orders encourages the submission of greater amounts of trading interest in the form of such orders into the Nasdaq Market Center all market participants can be expected to benefit from such increased system liquidity.

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

Written comments were neither solicited nor received.

⁸ 15 U.S.C. 78o-3.

⁹ 15 U.S.C. 78o-3(b)(6).

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

The proposed rule change has been designated by Nasdaq as a “non-controversial” rule change pursuant to Section 19(b)(3)(A) of the Act¹⁰ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹¹

The foregoing rule change: (1) does not significantly affect the protection of investors or the public interest, (2) does not impose any significant burden on competition, and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, and the NASD gave the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change. Consequently, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act,¹² and Rule 19b-4(f)(6) thereunder.¹³

Pursuant to Rule 19b-4(f)(6)(iii),¹⁴ a proposed “non-controversial” rule change does not become operative for 30 days after the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. Nasdaq has requested that the Commission waive the 30-day operative delay.

¹⁰ 15 U.S.C. 78s(b)(1).

¹¹ 17 CFR 240.19b-4(f)(6).

¹² 15 U.S.C. 78s(b)(1).

¹³ 17 CFR 240.19b-4(f)(6).

¹⁴ 17 CFR 240.19b-4(f)(6)(iii).

Nasdaq believes that adoption of this proposal will encourage the submission of greater liquidity in the form of multiple attributable orders at multiple price levels. Nasdaq believes that the benefits of this liquidity should be made available to all market participants as soon as practicable, and respectfully requests that the Commission waive the 30-day pre-operative period contained in Rule 19b-4(f)(6)(iii) of the Act.¹⁵ Nasdaq notes that the functionality proposed here is already available to Order-Delivery ECNs using Non-Attributable Orders. The Commission believes that this proposal may encourage greater liquidity and transparency and that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest.¹⁶ Accordingly, the Commission has determined to waive the operative delay.

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.

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:

¹⁵ See Amendment No. 1, note 3 *supra*.

¹⁶ For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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-2004-143 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.

All submissions should refer to File No. SR-NASD-2004-143. 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 Room. 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-2004-143 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.¹⁷

Margaret H. McFarland
Deputy Secretary

¹⁷ 17 CFR 200.30-3(a)(12).