



November 20, 2003

Via e-mail: rule-comments@sec.gov

U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549-0609

Attention: Mr. Jonathan G. Katz, Secretary

Re: File No. SR-NASD-2003-143

Ladies and Gentlemen:

Bloomberg Tradebook LLC ("Bloomberg Tradebook") wishes to comment on the proposed rule change submitted to the Securities and Exchange Commission (the "Commission") by the National Association of Securities Dealers, Inc. (the "NASD") through its subsidiary, the Nasdaq Stock Market, Inc. ("Nasdaq"), establishing a new "Auto-Ex" order in Nasdaq's National Market Execution System ("SuperMontage"). The Commission published Nasdaq's proposal for public comment in Securities Exchange Act Release No. 48675 (Oct. 21, 2003) (the "Release").

INTRODUCTION

Nasdaq proposes to introduce a new SuperMontage order type, to be designated the Auto-Ex order, that would execute solely against SuperMontage participants that accept automatic executions. In the Release, Nasdaq explains that an exclusive Auto-Ex order type is necessary to ensure that SuperMontage participants can obtain speedy order executions. Nasdaq reports that currently SuperMontage Order-Delivery ECNs are an impediment to the speed and efficiency that would otherwise be available to SuperMontage participants.

THE NASDAQ PROPOSAL DISCRIMINATES UNFAIRLY AGAINST ECNs AND IS ANTICOMPETITIVE

Nasdaq's invocation of the need for speed as a rationale for the instant proposal is unpersuasive at best. As Nasdaq itself concedes in note 5 of the Release, the average ECN response time is one second or less. Nasdaq further acknowledges, in fact, that the opposite may be true, that "many ECNs offer extremely rapid execution speeds to orders submitted to them directly" and that firms seeking rapid execution may avoid using SuperMontage and submit order [sic] directly to ECNs." That does not provide any justification for the deliberately

discriminatory and illegal design of this improper rule proposal. Nor does the fact that ECNs can reject delivered orders support Nasdaq's case. In a race condition, a participant entering an order into SuperMontage also may not see its order filled against an Auto-Ex participant if that participant's trading interest (that is, a bid or an offer) has already been satisfied a split second before. The facts themselves speak against the proposal; they hardly justify creating a back channel to exclude ECNs from SuperMontage order flow.

Section 15A(b)(6) of the Securities Exchange Act of 1934 (the "Exchange Act") requires that NASD rules not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. As we discuss more fully below, Nasdaq's real rationale for its proposed rule change is to penalize ECNs that elect order delivery and that charge access fees. In the absence of any significant public purpose advanced by the discrimination, it is simply unfair and illegal. Nasdaq's designs on crushing ECNs to advance its own agenda as a for-profit enterprise do not provide any legally cognizable support for this improper discrimination. As such, the proposed rule discriminates unfairly against ECNs and contravenes Section 15A(b)(6).

The Commission's judgment that price/time priority should be accorded SuperMontage orders fulfilled, among other things, the requirement in Section 15A(b)(6) that Nasdaq rules be designed to perfect the mechanism of a national market system. This new Auto-Ex back channel in effect is an end run around price/time priority and cuts against that statutory goal. Would such a provision be consistent with the Exchange Act once Nasdaq becomes a national securities exchange?

Section 15A(b)(9) of the Exchange Act requires that NASD rules not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. Nasdaq's proposal specifically targets ECNs, which compete with SuperMontage for order flow. It reduces investor choice, knocks ECNs out of SuperMontage and is inconsistent with the Commission's view that ECNs should be permitted to represent client orders on a level playing field with other market participants, a level playing field based on price/time priority. Unlike the Commission's conclusion regarding automatic executions on SuperSOES, this rule change would marginalize ECNs and would impose unnecessary and inappropriate burdens on competition, in contravention of Section 15A(b)(9). Nasdaq's statement in the Release that the SuperSOES rationale applies here as well is factually inaccurate.

CONCLUSION

The principal objectives driving Nasdaq's proposed rule change seem to be to force ECNs to relinquish access fees and to accept order execution, even at the cost of derogating from the principle of price/time priority. Nasdaq's rule filing is yet another example of the distortions payment for order flow and access fees bring to the market place. This is not the first time that Nasdaq has proposed addressing the problem of payment for order flow and access fees by placing ECNs last in line in the SuperMontage system. The distortions introduced by such payments and fees should not be allowed to distort the price/time priority of the SuperMontage algorithm.

Nasdaq's proposed rule change contravenes provisions of the Exchange Act by discriminating against and imposing unnecessary anticompetitive burdens upon NASD members that elect to receive orders on SuperMontage or that charge access fees to other SuperMontage participants. The Commission should reject Nasdaq's proposed rule change and, at a minimum, prevent Nasdaq from establishing and imposing a mechanism that is both discriminatory and anticompetitive.

Respectfully submitted,

BLOOMBERG TRADEBOOK LLC

By: *Kim Bang* by R.D.B.

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