

[(d)—Access to the specialist via the Nasdaq System, or electronic access, includes

(i) Orders sent by clients through Nasdaq's ACES Pass Thru capability (which consolidates orders sent by various client systems to the Nasdaq System)

(ii) Orders sent by BSE floor brokers directly through the BSE Nasdaq trading system (currently Nasdaq Tools)

(iii) Orders sent by clients directly into the Nasdaq System and routed to the specialist; and,

(iv) Orders sent by Nasdaq and NASD Market Makers through the Nasdaq System.]

[Sec. 3—All transactions in Nasdaq securities shall be reported through the Automated Confirmation Transaction Reporting Service ("ACT"), in accordance with NASD Rule 4630, et. seq., unless other arrangements are made with, and approved by, the Exchange.]

Secs. 4–5—renumbered to become Sections 3 and 4, no substantive change.

Sec. [6]5—Pre-opening orders in Nasdaq securities must be accepted and filled at the Exchange opening trade price. In trading halt situations, orders will be executed based on the Exchange reopening price. [(Note: In the case of a trading halt in a Nasdaq security, notice will be provided via the Nasdaq "NEWS" frame, in accordance with NASD Rule 4120).]

Secs. 7–30—renumbered to become Sections 6–29, no substantive 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, the BSE included statements concerning the purpose of, and the 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. The BSE 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 Exchange proposes to update, through deletions and minor additions, certain of the Exchange's Nasdaq rules contained in Chapter XXXV ("Nasdaq Rule Set") of the Rules of the Board of Governors of the BSE ("BSE Rules").

The Exchange's Nasdaq Rule Set was implemented in October, 2001, and was designed specifically for Nasdaq trading as it then existed on the Exchange. At the time, the BSE utilized a third-party Nasdaq trading system, and certain of the rules within the Nasdaq Rule Set were specifically designed to address functionalities of that system, and the manner in which BSE specialists were participating in the Nasdaq marketplace at that time.

The Exchange now seeks to make its Nasdaq Rule Set applicable to Nasdaq trading on the BSE in a more general manner, so that BSE specialists will not be limited in the ways that they participate in the Nasdaq marketplace, particularly due to the fact that rules which the Exchange is seeking to delete specifically addressed functionality which the Exchange no longer utilizes. None of the proposed deletions affect the manner in which BSE specialists are obligated to participate in the Nasdaq marketplace under the strictures of the Act or the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation, and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis ("UTP Plan"). Rather, the Exchange is merely deleting inapplicable language and making minor additions. The BSE has therefore designated the rule filing as non-controversial in nature. Moreover, the Exchange is requesting a waiver of both the five-day pre-filing notice and the thirty-day operative delay period.

The majority of the proposed deletions occurs in section 2 of the Exchange's Nasdaq Rule Set, and are with regard to the transmission of orders to a BSE Nasdaq specialist. As previously written, the provisions addressed access to the specialist through means provided as a result of BSE's participation in SuperSoes, a Nasdaq trading system. The BSE is no longer a participant in SuperSoes, or its successor system, SuperMontage, so the access provisions pertaining to such participation are no longer valid. However, the access provisions which remain in the BSE rules, are substantively the same provisions in existence on at least two other exchanges that participate in Nasdaq trading under the UTP Plan. Specifically, the access provisions which remain in the BSE rules after the proposed deletions relating to telephone access (*i.e.*, section 2 (a)) are essentially the same rules in place on the American Stock Exchange LLC ("Amex") and the Cincinnati Stock Exchange, Inc.

("CSE").<sup>3</sup> Moreover, the BSE is leaving in place a provision providing for electronic access to the BSE specialists. Again, such a provision leaves the BSE in a similar position as the Amex and CSE regarding electronic access.<sup>4</sup> Although the Rules of the AMEX and CSE do not specifically state that there shall be electronic access granted to their respective exchange specialists, their rules speak to functionalities of electronic access. The BSE actually goes further in specifically stating that there shall be electronic access to its specialists, while discussing essentially the same functionalities regarding automatic executions and other automated features as set forth in the Amex and CSE rules.

The BSE is also proposing to delete a section of its Nasdaq Rule Set regarding reporting through Nasdaq's Automated Confirmation Transaction ("ACT") system. Again, ACT is a Nasdaq system, formerly utilized by BSE Nasdaq specialists who participated in the Nasdaq marketplace using functionality which enabled them to participate in SuperSoes. The Exchange no longer chooses to use ACT for the reporting of its transactions, and will thereby revert to its clearing rules as set forth elsewhere in its rules, and incorporated by reference. ACT usage was a specific exception to the Exchange's clearing and reporting rules, and that exception is simply being removed.

It is important to note that nothing in the Exchange's proposed deletions and additions will in any way effect the priority or in any other way effect how orders are treated on the Exchange. All other rules of the Nasdaq Rule Set, as well as applicable other sections of the BSE rules, will still apply. All of these provisions have been separately approved by the Commission at different times, and will not change as a result of the deletions and additions proposed herein.

#### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act,<sup>5</sup> in general, and the provisions of section 6(b)(5) of the Act,<sup>6</sup> in particular, which requires, among other things, that the rules of an exchange be designed 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, is

<sup>3</sup> See *e.g.*, Amex Rule 118, Trading in Nasdaq National Market Securities, and CSE Rule 11.9, National Securities Trading System.

<sup>4</sup> *Id.*

<sup>5</sup> 15 U.S.C. 78f(b).

<sup>6</sup> 15 U.S.C. 78f(b)(5).