

Applicants assert that these circumstances do not exist in the present case.

### Applicants' Conditions

Applicants agree that the order granting the requested relief will be subject to the following conditions:

1. If, within three years of the completion of the Transaction, it becomes necessary to replace any director of the Fund, that director will be replaced by a director who is not an "interested person" of LA Capital or ISI within the meaning of section 2(a)(19)(B) of the Act, unless at least 75% of the directors at that time are not interested persons of LA Capital or ISI.

2. Mr. Vogt will not be involved in Fulbright's representation of LA Capital.

3. Fees paid to Fulbright by LA Capital shall not, in the aggregate, exceed 1% of Fulbright's total revenues during any fiscal year.

4. Mr. Vogt will not be compensated in relation to the overall profits of Fulbright and will not receive any economic benefit from legal representation by Fulbright in areas outside of his own personal practice.

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

Margaret H. McFarland,  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48434; File No. SR-NASD-2003-81]

### Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change and Amendment No. 1 Thereto by National Association of Securities Dealers, Inc. Relating to Quote Decrementation in SuperMontage

September 3, 2003.

#### I. Introduction

On May 12, 2003, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its subsidiary the Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("SEC" or "Commission"), 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> a proposed rule change to amend NASD Rule 4710 and the decrementation of Quotes/Orders of

order delivery Electronic Communication Networks ("Order Delivery ECNs") in Nasdaq's National Market Execution System ("NNMS" or "SuperMontage"). On May 29, 2003, Nasdaq filed Amendment No. 1 to the proposal.<sup>3</sup> The proposed rule change, as amended, was published for notice and comment in the **Federal Register** on June 12, 2003.<sup>4</sup> The Commission received one comment letter on the proposed rule change.<sup>5</sup> This order approves the proposed rule change, as amended.

#### II. Description of the Proposed Rule Change

Nasdaq proposes to modify the SuperMontage decrementation process when an Order-Delivery ECN declines,<sup>6</sup> partially-fills, or fails to respond to a non-directed order delivered to it within 30 seconds ("time-out").<sup>7</sup> Currently, SuperMontage rules provide that when an Order Delivery ECN declines, partially-fills, or times-out, without immediately transmitting a revised attributable Quote/Order at an inferior price, SuperMontage will zero out all of the ECN's Quotes/Orders on the same side of the market at the price of the declined order (or better). Under this proposal, Order Delivery ECNs will not have all of their trading interest at the declined price level (or better) removed from the system. Instead, SuperMontage would only remove the total amount of each individual Quote/Order to which an order was delivered by SuperMontage.

Nasdaq provided the following example of how the proposed modification to the decrementation process would operate for an ECN alone at the inside that elected to enter three separate bid Quotes/Orders at the same price level in SuperMontage: ECN Quote (#1)—1,000 shares @ 20.00 ECN Order (#2)—500 shares @ 20.00

<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 May 29, 2003 ("Amendment No. 1"). In Amendment No. 1, Nasdaq replaced the proposed rule change in its entirety.

<sup>4</sup> See Securities Exchange Act Release No. 47993 (June 5, 2003), 68 FR 35246 (June 12, 2003).

<sup>5</sup> See letter from Kim Bang, Bloomberg Tradebook, LLC, to Jonathan G. Katz, Secretary, Office of the Secretary, Commission, dated July 14, 2003 ("Bloomberg Letter").

<sup>6</sup> An ECN's decline of a delivered order must comply with the Commission's Quote Rule, 17 CFR part 240. 11Ac1-1. NASD Regulation surveils for Quote Rule violations.

<sup>7</sup> See Securities Exchange Act Release No. 48196 (July 17, 2003), 68 FR 43777 (July 24, 2003) (Notice of filing and immediate effectiveness of File No. NASD-2003-108 to temporarily increase the non-directed order maximum response time for Order-Delivery ECNs in Nasdaq's SuperMontage System.)

ECN Order (#3)—300 shares @ 20.00

The inside aggregated bid shows 1,800 shares @ 20.00.

1. SuperMontage receives an 800 share market sell order.

2. In response, SuperMontage sends an 800 share delivery to ECN Quote (#1). Upon dispatch, SuperMontage immediately decrements ECN Quote (#1) by the amount of the delivery (800 shares) leaving a display quote of 1,000 shares in ECN Quote (#1) that remains available for execution.

3. The ECN declines to execute the 800 share delivery to ECN Quote (#1).

4. The ECN's decline results only in the immediate removal of ECN Quote (#1), i.e., the 800 shares originally decremented and the 200 share remainder of ECN Quote (#1). Orders (#2) and (#3) remain in the system and continue to be eligible for execution.

The system reallocates the 800 shares from the incoming order in Step 1 against ECN orders (#2) and (#3), if not executed by a subsequent incoming order, before moving, if necessary, to the next best bid.<sup>8</sup>

Thus, under the proposal, only individual Quotes/Orders would be removed in full by a decline, partial-fill, or a time-out when no revised attributable Quote/Order is immediately transmitted at an inferior price; not all trading interest at the declined price level or better. Other ECN Quotes/Orders at a particular price level that are not part of a SuperMontage delivery resulting in a decline, partial-fill, or time-out would be retained in the system and remain available for execution, and are not traded through. Nasdaq represents that locked or crossed markets will not be created as a result of the proposed rule change.

#### III. Summary of Comments

The Commission received one comment letter from Bloomberg Tradebook, LLC ("Bloomberg") on the proposed rule change.<sup>9</sup> Bloomberg neither explicitly supported nor opposed the proposed rule change, although it commented on decrementation generally, as well as on the proposed rule change. Bloomberg noted that conceptually, "(d)ecrementation is a design feature of SuperMontage that is intended to preserve the continuity of the market

<sup>8</sup> Nasdaq clarified under the proposal a subsequent incoming order could potentially execute against an ECN's remaining orders prior to the return of a declined order to the system. Telephone conversation between Thomas P. Moran, Associate General Counsel, Office of the General Counsel, to Marc McKayle, Special Counsel, Division, Commission on August 27, 2003.

<sup>9</sup> See Bloomberg Letter, *supra* note 5.

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

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