

whether the modification to the decrementation process, wherein SuperMontage can decrement only the single ECN Quote/Order that declines to trade with an order sent to it by the system, is consistent with the Act.¹⁸ The Commission finds that it is.

The Commission notes that the amendment is essentially identical to the process as originally approved,¹⁹ except that an ECN's Quotes/Orders would be removed from the system on an individual basis. Bloomberg stated that the proposal would not have any practical effect because it is the practice of ECNs to aggregate orders within the quote sent to SuperMontage. The Commission believes that Nasdaq has adequately responded to Bloomberg's comments. Nasdaq has correctly represented that the proposed rule change provides a new option for Order Delivery ECNs. The Commission recognizes that many proposed rule changes relating to a self-regulatory organization's trading system will require the affected market participants to either reprogram their internal trading systems or alter their business practices to ensure system compatibility and compliance. In that regard, this proposed rule change is not unique. The proposed rule change may allow ECNs that opt to change their method of quote management and submit individual orders to SuperMontage to mitigate the impact of access fee disputes on their ability to trade with participants with which no dispute exists. However, ECNs may also choose to continue aggregating multiple orders for representation, and decrementation, as a single Quote/Order in SuperMontage. Thus, while ECNs that do not reconfigure their trading systems or revise their quote management practices would not benefit from this proposed rule change, ECNs that choose to make the necessary operational and technological adjustments may benefit.

The Commission believes that Nasdaq's approach reasonably balances the interests of accommodating Order Delivery ECNs and providing an efficient trading system. Nasdaq represents that SuperMontage

decrementation has eliminated the ECN access fee-related locked or crossed markets which caused the shutdown of Nasdaq's automatic execution functionality, and many internal order-execution systems, until the lock or cross was resolved. The Commission continues to believe that the SuperMontage decrementation process should help to reduce instances of locked and crossed markets and the problems associated with locked and crossed markets, while accommodating ECNs with an alternative to automatic execution.²⁰ The Commission also continues to believe that the reduction of locked and crossed markets in the Nasdaq market should improve market quality and enhance the production of fair and orderly quotations.²¹ In the Commission's view, the NASD's proposal is reasonably designed to maintain the integrity of Nasdaq quotes by reducing the incidence of locking and crossing quotations displayed in Nasdaq. The proposal will continue to reduce locked and crossed markets because a declined order, if necessary, would decrement each ECN's individual Quote/Order. The Commission believes that the proposal, by retaining ECNs' trading interest that is not decremented by the incoming order in the system, could enhance SuperMontage liquidity and transparency, and provide ECN customers with an increased opportunity to have their orders executed by market participants that are willing to pay the ECN access fee.

V. Conclusion

For the foregoing reasons, the Commission finds that the proposal, as amended, is consistent with the requirements of the Act and rules and regulations thereunder.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,²² that the proposed rule change (SR-NASD-2003-81), as amended, is approved.²³

²⁰ The Commission has concluded previously that continued locking and crossing of markets can negatively impact market quality. *Id.* See also Division of Market Regulation, The October 1987 Market Break 9-6 (February 1988) (Stating that the continued existence of locked and crossed markets indicates that the quotations for a security are suspect and may not provide an accurate reflection of the market for a security).

²¹ *Id.*

²² 15 U.S.C. 78s(b)(2).

²³ The proposed rule change will become effective within 60 days of the date of this Order. Telephone conversation between Thomas P. Moran, Associate General Counsel, Office of the General Counsel, to Marc McKayle, Special Counsel, Division, Commission on September 3, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁴

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48429; File No. SR-NYSE-2003-25]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Continuing Annual Fees for "Repackaged" Securities

September 3, 2003.

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 August 28, 2003, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. 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 Substance of the Proposed Rule Change

The NYSE proposes to amend section 902.02 of the Listed Company Manual (the "Manual") to implement certain changes to the continuing fees payable in connection with certain structured products known as "repackaged" securities and to reinstate the Exchange's "15-year" policy with respect to previously listed "repackaged" securities, as more fully described below.

Below is the text of the proposed rule change. Proposed new language is *italicized* and proposed deletions are in brackets.

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Listed Company Manual

902.00 Listing Fees

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902.02 Schedule of Current Listing Fees

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²⁴ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

decisionmaking process concerning the system rules, including decrementation, and the rules finally determined the rights and obligations of the market and of each market participant who traded on the system.

¹⁸ While the Commission acknowledges that ECN access fees maintain a significant tangential relationship to the SuperMontage decrementation process, the abolition of ECN fees is not at issue in this proposed rule change. Nasdaq recently submitted File No. NASD-2003-128 relating to ECN fees.

¹⁹ See Original SuperMontage Approval Order, *supra* note 15.