

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

The rules of Nasdaq's SuperMontage system allow the participation of ECNs. Many of these ECNs charge, as permitted by the Securities and Exchange Commission, a separate fee to other market participants that access the ECN's quote/order. There is, however, substantial disparity in the level of these fees among ECNs participating in SuperMontage, with some ECNs charging access fees, in some instances, three times as high as other participating ECNs.

Nasdaq believes that these gross fee disparities are of particular concern in a system like SuperMontage that extensively automates the matching of buy and sell trading interest using neutral execution algorithms that limit the ability of users to select or anticipate exactly who their counter-party, or counter-parties, to particular trade will be. The result is that users enter orders into SuperMontage and end up executing against a variety of market participants including, in some cases, ECNs that charge access fees significantly higher than others. In turn, Nasdaq believes that the inability of system users to reasonably anticipate their trading costs, due to these large access fee disparities, discourages those users from entering their quote/orders into the SuperMontage system thereby depriving all SuperMontage participants of beneficial liquidity.

In response to the above, Nasdaq has determined to establish, as explicitly permitted by Rule 301(b)(4) of Regulation ATS,<sup>5</sup> a maximum permissible quote/order access fee amount for ECNs that elect to participate and execute transactions in the SuperMontage system. Nasdaq proposes to establish the maximum SuperMontage ECN access fee amount at \$0.003 (three mils) per share. Participating ECNs will be free to charge quote/order access fees less than the \$0.003 maximum. Nasdaq notes that the \$0.003 maximum proposed here is equivalent to the execution fee Nasdaq imposes on parties automatically executing against quotes/orders through SuperMontage. Nasdaq believes that this

access fee level is also generally in keeping with the level of access fee imposed by most ECNs today. In addition, Nasdaq believes that the \$0.003 access fee cap retains transparency in the system by maintaining a reasonable nexus between displayed prices in the montage and actual execution prices obtained by market participants that interact with fee-charging ECNs. As such, Nasdaq believes that \$0.003 maximum access fee is designed to maintain consistency in Nasdaq's market and provide equivalent and fair access to available quotes/orders.

ECNs that desire to charge more than \$0.003 amount for access to its quote/orders will not be permitted to post liquidity in SuperMontage as an NNMS ECN. They will, however, be permitted to continue to participate in SuperMontage as NNMS Order Entry Firms as a method to access or post liquidity in the system. As NNMS Order Entry Firms, those ECNs will have any quotes/orders entered into the system displayed and processed in the same manner as other NNMS Order Entry Firms. This will include having such quote/orders be represented only via the SIZE MMID and also making them subject to automatic execution. As NNMS Order Entry Firms, these ECNs will not be allowed to impose any fee on a broker-dealer that accesses them through the SuperMontage system. As NNMS Order Entry Firms, such ECNs will be eligible for Nasdaq's liquidity provider rebate.

In concert with establishing a maximum ECN quote access fee amount, Nasdaq has also determined to eliminate the Price/Time with fee consideration execution algorithm currently available in SuperMontage. Nasdaq believes that, having rationalized ECN access fees through the establishment of a maximum fee amount, it is also now appropriate to eliminate the Price/Time with fee consideration execution algorithm within the system for all ECNs that have agreed to participate in SuperMontage and comply with the ECN \$0.003 maximum fee standard. Nasdaq views the proposals to establish a maximum ECN quote/order access fee in SuperMontage and to eliminate the above execution algorithm as linked and will implement them at the same time.

Finally, Nasdaq has also determined to eliminate SuperMontage's Price/Size execution algorithm. This algorithm is rarely used in SuperMontage, with a recent analysis indicating that it accounts for less than 7% of orders entered into the system. In addition, elimination of the Price/Size algorithm reduces system complexity within

SuperMontage. In order to efficiently manage Nasdaq programming resources, elimination of the Price/Size execution algorithm will take place on the same date as the elimination of the Price/Time with fee consideration algorithm.

2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with the provisions of Section 15A of the Act,<sup>6</sup> in general, and with Section 15A(b)(6) of the Act,<sup>7</sup> in particular, in that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principals of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Nasdaq believes that the creation of a maximum ECN access fee put forth in this proposal is explicitly permitted by Regulation ATS' Rule 301(b)(4) which provides in relevant part " \* \* \* if the national securities exchange or national securities association to which an alternative trading system provides the prices and sizes of orders \* \* \* establishes rules designed to ensure consistency with standards for access to the quotations displayed on such national securities exchange, or the market operated by such national securities association, the alternative trading system shall not charge any fee to members that is contrary to, that is not disclosed in the manner required by, or that is inconsistent with any standard of equivalent access established by such rules."

*B. Self-Regulatory Organization's Statement on Burden on Competition*

Nasdaq does not believe that the proposed rule change, as amended, will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others*

The Exchange neither solicited nor received written comments with respect to the proposed rule change, as amended.

<sup>6</sup> 15 U.S.C. 78o-3.

<sup>7</sup> 15 U.S.C. 78o-3(b)(6).

<sup>5</sup> 17 CFR 242.301(b)(4).