

Auto-Ex orders will access liquidity available at multiple price levels, but under no circumstances would the order "trade through" the Quote/Order of an Order-Delivery ECN (or an auto-ex participant that charged an access fee). Thus, an Auto-Ex order would automatically be designated "Immediate or Cancel," and the order (or any unexecuted portion thereof) would be cancelled whenever the best price available through SuperMontage solely reflects the Quote/Order of a market participant that is not eligible to receive the Auto-Ex order. Nasdaq believes that this feature of the order will assist market participants using the order in fulfilling their obligations to obtain best execution for their customers, and will also encourage ECNs to continue to offer liquidity through SuperMontage. As is currently the case, NNMS order-delivery participants will be accessible through all other types of non-directed orders, as well as Preferred and Directed Orders. Auto-Ex orders may be either priced limit orders or market orders, and all market participants will be permitted to enter Auto-Ex orders.<sup>8</sup>

Nasdaq believes that the processing of the Auto-Ex order type will be similar to the processing of orders in Nasdaq's SuperSOES system, which was operational in 2001 and 2002.<sup>9</sup> SuperSOES orders executed automatically against the quotes of market participants at the inside market that had agreed to accept automatic executions. The quotes of non-auto-ex market participants, however, were accessible only through Nasdaq's SelectNet system, which operated in a manner similar to the Directed Order functionality of SuperMontage. Nasdaq believes that the proposed Auto-Ex order is also closely aligned in function and purpose to the "fill-or-return" order offered by at least one of the national securities exchanges that trade Nasdaq stocks.<sup>10</sup>

At present, moreover, market participants can attempt to replicate the functionality of an Auto-Ex order by using a Preferred Order, which executes solely against the Quote/Order of a recipient identified by the participant entering the order, and only if the recipient is at the best bid/best

offer. Thus, a market participant seeking to access liquidity offered by an auto-ex participant at the inside market could prefer an order to that market participant. However, in circumstances where a market participant seeks to work a large order by accessing the Quotes/Orders of several auto-ex participants at the best bid/best offer, use of this option would require the use of several orders, and therefore a higher cost. The Auto-Ex order, by contrast, will allow SuperMontage participants to access liquidity at the inside market as quickly and economically as possible.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,<sup>11</sup> in general, and with section 15A(b)(6) of the Act,<sup>12</sup> in particular, in that it is designed to promote just and equitable principles 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 the proposed rule change would provide market participants with a voluntary tool to use on behalf of their customers when seeking to execute transactions as quickly as possible and at the lowest cost possible.

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

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The new order type established by this proposed rule change will allow market participants that opt to use it to access available liquidity almost instantaneously, thereby achieving efficient executions at best available prices for their customers. However, the order will not trade through the Quote/Order of an NNMS order delivery participant (or an auto-ex ECN that charged an access fee), and order-delivery participants will continue to be accessible through all other types of non-directed orders, as well as Preferred and Directed Orders.<sup>13</sup> As the Commission found when it determined that SuperSOES's

comparable order processing functionality was consistent with the Act, "it is not likely that ECNs that choose order entry participation will be marginalized because ECNs are frequently at the best quote in the market."<sup>14</sup> Nasdaq believes that the processing functionality of the Auto-Ex order is no more likely to result in an inappropriate burden on competition than the processing functionality approved by the Commission in 2000.

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

Nasdaq neither solicited nor received written comments.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the NASD consents, the Commission will:

(A) By order approve such proposed rule change; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filings will also be available for inspection and copying at the principal office of the Association.

against the quotes of all of Nasdaq's current automatic execution participants, including the Chicago Stock Exchange.

<sup>8</sup> See Amendment No. 2, *supra* note 4.

<sup>9</sup> See Securities Exchange Act Release No. 42344 (January 14, 2000), 65 FR 3987 (January 25, 2000) (SR-NASD-99-11); Securities Exchange Act Release No. 41296 (April 15, 1999), 64 FR 19844 (April 22, 1999) (SR-NASD-99-11).

<sup>10</sup> See Pacific Exchange Rule 7.31(p) (describing "fill-or-return order" of the Archipelago Exchange facility of the Pacific Exchange, Inc.).

<sup>11</sup> 15 U.S.C. 78o-3.

<sup>12</sup> 15 U.S.C. 78o-3(b)(6).

<sup>13</sup> See Amendment No. 2, *supra* note 4.

<sup>14</sup> See Securities Exchange Act Release No. 42344 (January 14, 2000), 65 FR 3987, 3998 (January 25, 2000) (SR-NASD-99-11).