

of the additional liquidity these rejected orders represent and the supply/demand information they provide the market as a whole.

In response to both the negative market impacts rejection of these orders engender, and requests from order entry market participants for enhanced access to the SuperMontage system, Nasdaq proposes that OE Firms be permitted to voluntarily enter non-marketable limit orders into SuperMontage without the IOC designation and have such order retained for potential execution<sup>7</sup> through display under the SIZE MMID<sup>8</sup> on a pilot basis for 90-days commencing February 10, 2003.

With one exception, Non-Attributable Orders entered into the system by OE Firms would be processed in the same manner as other non-attributable orders placed into SIZE by NNMS Market Makers. The only exception would be that, unlike the quotes/orders of Nasdaq Quoting Market Participants, SuperMontage would not first attempt to have Non-Attributable Orders submitted by OE Firms match off against orders entered by the same OE Firm on the other side of the market. Instead, OE Firm orders would execute based solely on the algorithm selected by the entering party (price/time, price/time with fee consideration, or price/size) against the quotes/orders of other SuperMontage users—including orders from the same OE firm entered on the other side of the market. However, the technology to support this functionality will not be available at the start of the pilot program on February 10, 2003. Instead, for a limited period, OE Firms would have their orders processed in a manner similar to Nasdaq Quoting Market Participants in that the system would first attempt to match off OE Firm orders against orders from the same OE Firm on the other side of the market. Nasdaq is working to program its system and formally commits to having the technology in place to inhibit this automatic matching, as proposed in this filing, on or before April 28, 2003.

<sup>7</sup> Under the proposal, OE Firms would be able to designate orders as IOC, "Good-till-Cancelled," or "Day."

<sup>8</sup> The SIZE MMID is the anonymous MMID that represents the aggregate size of all Non-Attributable Quotes and Orders entered by market participants in Nasdaq at a particular price level. Non-Attributable Quotes/Orders are not displayed in the Nasdaq Quotation Montage using the market participant's MMID. Instead, the SIZE MMID is displayed and represents the aggregate, Non-Attributable trading interest at a particular price level in the Nasdaq Quotation Montage. Telephone conversation between Thomas P. Moran, Associate General Counsel, Nasdaq, and Marc F. McKayle, Special Counsel, Division, Commission, on January 30, 2003 (making corrections to the text in the footnote).

Under the proposal, OE Firms would be allowed to enter multiple orders (with or without reserve size) at single or multiple price levels, and such orders would be subject to the automatic execution functionality of the system. If any order entered by an OE Firm would create a locked/crossed market, such orders would be processed like other locking/crossing quotes/orders as set forth in NASD Rule 4710(b)(3).

Nasdaq believes that the above proposal is an important step in its ongoing process to make its systems more accessible to all NASD member firms, while ensuring that market participants who undertake the burdens of continuous liquidity provision are provided benefits commensurate with their activities. Nasdaq believes that most important, however, are the improvements to market quality that can be expected from the proposed rule change's swift implementation. In addition to enhanced liquidity and informational benefits, retention of non-marketable limit orders from OE Firms in SuperMontage can be expected, in Nasdaq's view, to reduce fragmentation of trading interest, thereby improving execution quality and speed and shrinking the costs market participants now incur when searching for trading partners in multiple venues. Finally, to the extent that any currently rejected OE Firm order is retained, Nasdaq believes that it would reduce the potential for locked/crossed markets that can occur if such rejected trading interest is subsequently displayed in an unlinked market center and thus does not benefit from SuperMontage processing that eliminated locks or crosses among all quotes and orders residing in the system.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with Section 15A of the Act<sup>9</sup> in general, and furthers the objectives of Section 15A(b)(6)<sup>10</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, 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, in general, to protect investors and the public interest.

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

Nasdaq does not believe that the proposed rule change, as amended, will impose 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

Written comments were neither solicited nor received.

## III. 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 filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to file number SR-NASD-2002-173 and should be submitted by February 27, 2003.

## IV. Commission Findings and Order Granting Accelerated Approval of the Proposed Rule Change

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association and, in particular, with the requirements of Section 15A(b)(6) of the Act,<sup>11</sup> in that it is designed to prevent fraudulent and manipulative acts and practices, 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, in general, to protect investors and the public interest.<sup>12</sup> The Commission believes that allowing OE Firms to enter non-marketable limit orders into SuperMontage using the SIZE MMID should provide greater

<sup>11</sup> 15 U.S.C. 78o-3(b)(6).

<sup>12</sup> In approving the proposed rule, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>9</sup> 15 U.S.C. 78o-3.

<sup>10</sup> 15 U.S.C. 78o-3(b)(6).