

prepared by Nasdaq. Nasdaq filed Amendment Nos. 1, 2, and 3 to the proposal on November 14, 2003,³ November 21, 2003,⁴ and November 28, 2003, respectively.⁵ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to adopt a new order type, the discretionary order ("DO"), in Nasdaq's National Market Execution System ("NNMS" or "SuperMontage"). Subject to Commission approval, Nasdaq intends to implement the proposed rule change shortly after December 8, 2003, and will inform market participants of the exact implementation date via a Head Trader alert on www.nasdaqtrader.com. The text of the proposed rule change appears below. New text is in italics. Deleted text is in brackets.⁶

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³ See letter from John M. Yetter, Associate General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated November 14, 2003 ("Amendment No. 1"). In Amendment No. 1, Nasdaq clarified that discretionary orders entered by a market maker with an anti-internalization qualifier value of "Y" (i.e., that may not be internalized) would be cancelled if the only available trading interest is a bid/offer from the same market maker entered automatically by the system under NASD Rule 4710(b)(5). In Amendment No. 1, Nasdaq also clarified the order execution priority for discretionary orders resting on the book.

⁴ See letter from John M. Yetter, Associate General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated November 20, 2003 ("Amendment No. 2"). In Amendment No. 2, Nasdaq reiterated its request for accelerated approval of the proposed rule change pursuant to section 19(b)(2) of the Act.

⁵ See letter from John M. Yetter, Associate General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated November 26, 2003 ("Amendment No. 3"). In Amendment No. 3, Nasdaq amended the description of the proposal to, among other things, explain the treatment of discretionary orders at the opening and DAY order only designation. Nasdaq also amended the proposed rule text to clarify the conditions under which a resting discretionary order would execute at a discretionary price and the price priority of discretionary orders, to replace the phrase "order or Quote/Order" with "Non-Directed Order or Quote/Order," and to reflect the Commission's approval of SR-NASD-2003-134. See Securities Exchange Act Release No. 48821 (November 20, 2003) (Order granting approval of SR-NASD-2003-134).

⁶ The Commission recently published for notice and public comment proposed rule changes filed by Nasdaq that proposes to modify the rules governing the operation of SuperMontage. See Securities Exchange Act Release Nos. 48501 (September 17, 2003), 68 FR 56358 (September 30, 2003) (Notice of Filing of SR-NASD-2003-128); 48671 (October 21, 2003), 68 FR 61531 (October 28, 2003) (Notice of Filing of SR-NASD-2003-135); 48674 (October 21, 2003), 68 FR 61508 (October 28, 2003) (Notice of

4700. NASDAQ NATIONAL MARKET EXECUTION SYSTEM (NNMS)

4701. Definitions

Unless stated otherwise, the terms described below shall have the following meaning:

- (a)-(jj) No Change.
- (kk)-(ll) Reserved.
- (mm) No change.
- (nn) *The term "Discretionary" shall mean, for priced limit orders so designated, an order that when entered into NNMS has both a displayed bid or offer price, as well as a non-displayed discretionary price range in which the participant is also willing to buy or sell, if necessary. The displayed price may be fixed or may be pegged to equal the inside quote on the same side of the market. The pegging of the Discretionary Order may be capped in the same manner as that of a Pegged Order. The discretionary price range of a Discretionary Order that is pegged will be adjusted to follow the pegged displayed price.*

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4706. Order Entry Parameters

(a) Non-Directed Orders—
(1) General. The following requirements shall apply to Non-Directed Orders Entered by NNMS Market Participants:

(A) A NNMS Participant may enter into the NNMS a Non-Directed Order in order to access the best bid/best offer as displayed in Nasdaq.

(B) A Non-Directed Order must be a market or limit order, must indicate whether it is a buy, short sale, short-sale exempt, or long sale, and may be designated as an "Immediate or Cancel", or as a "Day" or a "Good-till-Cancelled" order. If a priced order designated as "Immediate or Cancel" ("IOC") is not immediately executable, the unexecuted order (or portion thereof) shall be returned to the sender. If a priced order designated as a "Day" order is not immediately executable, the unexecuted order (or portion thereof) shall be retained by NNMS and remain available for potential display/execution until it is cancelled by the entering

Filing of SR-NASD-2003-149); 48675 (October 21, 2003), 68 FR 61528 (October 28, 2003) (Notice of Filing of SR-NASD-2003-143); and 48798 (November 17, 2003) (Notice of Filing and Immediate Effectiveness of SR-NASD-2003-150). The text of the proposed rule change is shown as marked against the text of the SuperMontage rules as currently in effect, and therefore reflects the immediate effectiveness of SR-NASD-2003-150, but does not reflect proposed rule changes that are not yet effective. Nasdaq represents that it will file such amendments to SR-NASD-2003-165 or other pending filings as Commission staff may request to reflect the approval, disapproval, immediate effectiveness, or withdrawal of other filings.

party, or until 4 p.m. Eastern Time on the day such order was submitted, whichever comes first, whereupon it will be returned to the sender. If the order is designated as "Good-till-Cancelled" ("GTC"), the order (or unexecuted portion thereof) will be retained by NNMS and remain available for potential display/execution until cancelled by the entering party, or until 1 year after entry, whichever comes first. Starting at 7:30 a.m., until the 4 p.m. market close, IOC and Day Non-Directed Orders may be entered into NNMS (or previously entered orders cancelled), but such orders entered prior to market open will not become available for execution until 9:30 a.m. Eastern Time. GTC orders may be entered (or previously entered GTC orders cancelled) between the hours 7:30 a.m. to 6:30 p.m. Eastern Time, but such orders entered prior to market open, or GTC orders carried over from previous trading days, will not become available for execution until 9:30 a.m. Eastern Time. Exception: Non-Directed Day (other than Pegged and Discretionary Orders) and GTC orders may be executed prior to market open if required under Rule 4710(b)(3)(B). In addition, an order may be assigned the designations described below.

An order may be designated as "Discretionary", in which case the order will also automatically be designated as Day. A Discretionary Order may not be designated as a Preferred Order. The order (or unexecuted portion thereof) shall be displayed in the system, if appropriate, using the displayed price selected by the entering party, with the system also retaining a non-displayed discretionary price range within which the entering party is also willing to execute if necessary. If a Discretionary Order is pegged, its displayed price will be adjusted in response to changes in the Nasdaq inside market. Starting at 7:30 a.m., until the 4 p.m. market close, Discretionary Orders may be entered into NNMS (or previously entered orders cancelled), but such orders entered prior to market open will not become available for execution until 9:30 a.m. Eastern Time. Discretionary Orders whose displayed price or discretionary price range does not lock or cross another Quote/Order will be available for execution at 9:30 a.m. All other Discretionary Orders will be added to the time-priority queue described in Rule 4706(a)(1)(F) and (a)(2)(B) and processed by NNMS at market open.

An order may be designated as "Pegged," in which case the order will also automatically be designated as Day. A Pegged Order may not be designated as a Preferred Order. A Pegged Order