

Plan Participant, the submission of two distinct best bids and offers ("BBOs") could be deemed inconsistent with Section VI.C.1 of the Plan.⁶ Pursuant to the 13th Amendment of the Plan and Rule 11Aa3-2(a),⁷ Nasdaq cannot be granted Plan Participant status until it is registered as a national securities exchange. While Nasdaq submits a distinct BBO from the NASD and until Nasdaq is registered as a national securities exchange, the NASD will submit quotes to the Plan's Securities Information Processor ("SIP") in a manner different than specified in Section VI.C.1. of the Plan and, thus, in conflict with Commission Rule 11Aa3-2(d).⁸

As discussed at length in the notice of the 13th Amendment,⁹ the Commission had determined to relieve the potential conflict among the SuperMontage approval order,¹⁰ Rule 11Aa3-2,¹¹ and the Plan, by granting the NASD an exemption under Rule 11Aa3-2(f)¹² from compliance with Section VI.C.1. of the Plan as required by Rule 11Aa3-2(d)¹³ until such time as Nasdaq is registered as a national securities exchange. The Plan Participants have requested an extension of such exemptive relief.

III. Discussion

The Commission finds that extending the operation of the Plan is consistent with the requirements of the Act and the rules and regulations thereunder, and, in particular, Section 12(f)¹⁴ and Section 11A(a)(1)¹⁵ of the Act and Rules 11Aa3-1 and 11Aa3-2 thereunder.¹⁶

⁶ Section VI.C.1. of the Plan, as approved by the Operating Committee in the 13th Amendment, states that "[t]he Processor shall disseminate on the UTP Quote Data Feed the best bid and offer information supplied by each Participant, including the NASD. * * *

⁷ 17 CFR 240.11Aa3-2(a).

⁸ 17 CFR 240.11Aa3-2(d). Commission Rule 11Aa3-2(d) requires a self-regulatory organization participant of national market system plan to comply with the terms of that plan.

⁹ See Securities Exchange Act Release No. 46139 (June 28, 2001 [sic]), 67 FR 44888 (July 5, 2002).

¹⁰ See Securities Exchange Act Release No. 43863 (January 19, 2001), 66 FR 8020 (January 26, 2001).

¹¹ 17 CFR 240.11Aa3-2.

¹² 17 CFR 240.11Aa3-2(f).

¹³ 17 CFR 240.11Aa3-2(d).

¹⁴ 15 U.S.C. 78l(f). The Commission finds that extending the Plan is consistent with fair and orderly markets, the protection of investors and the public interest, and otherwise in furtherance of the purposes of the Act. The Commission has taken into account the public trading activity in securities traded pursuant to the Plan, the character of the trading, the impact of the trading of such securities on existing markets, and the desirability of removing impediments to, and the progress that has been made toward the development of a national market system.

¹⁵ 15 U.S.C. 78k-1(a)(1).

¹⁶ 17 CFR 240.11Aa3-1 and 17 CFR 240.11Aa3-2.

Section 11A of the Act directs the Commission to facilitate the development of a national market system for securities, "having due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets," and cites as an objective of that system the "fair competition * * * between exchange markets and markets other than exchange markets."¹⁷ When the Commission first approved of the Plan on a pilot basis, it found that the Plan "should enhance market efficiency and fair competition, avoid investor confusion, and facilitate surveillance of concurrent exchange and OTC trading."¹⁸ The Plan has been in existence since 1990 and Participants have been trading Nasdaq securities under the Plan since 1993.

The Commission finds that extending the operation of the Plan for a year furthers the goals described above by preventing the lapsing of the sole effective transaction reporting plan for Nasdaq securities traded by exchanges pursuant to unlisted trading privileges. The Commission believes that the Plan is currently a critical component of the national market system and that the Plan's expiration would have a serious, detrimental impact on the further development of the national market system.

The Commission also finds that it is appropriate to extend the exemption under Rule 11Aa3-2(f)¹⁹ from compliance with Section VI.C.1. of the Plan as required by Rule 11Aa3-2(d).²⁰ The Commission believes that the Plan is a critical component of the national market system and that the requested exemptive relief is necessary to assure the effective operation of the Plan. The Commission believes that the requested exemptive relief extension is consistent with the Act, the Rules thereunder, and, specifically, with the objectives set forth in Sections 12(f) and 11A of the Act²¹ and Rules 11Aa3-1 and 11Aa3-2 thereunder.²²

IV. Conclusion

It is therefore ordered, pursuant to sections 12(f) and 11A of the Act²³ and paragraph (c)(4) of Rule 11Aa3-2²⁴ thereunder, that the operation of the Plan be, and hereby is, extended and

¹⁷ 15 U.S.C. 78k-1(a).

¹⁸ See Securities Exchange Act Release No. 28146 (June 26, 1990), 55 FR 27917 (July 6, 1990).

¹⁹ 17 CFR 240.11Aa3-2(f).

²⁰ 17 CFR 240.11Aa3-2(d).

²¹ 15 U.S.C. 78l(f) and 15 U.S.C. 78k-1.

²² 17 CFR 240.11Aa3-1 and 11Aa3-2.

²³ 15 U.S.C. 78l(f) and 15 U.S.C. 78k-1.

²⁴ 17 CFR 240.11Aa3-2(c)(4).

that certain exemptive relief also be extended until December 15, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁵

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48890; File No. SR-NASD-2003-174]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Amend the Fee Schedule for the Nasdaq National Market Execution System With Respect to Executions Across Multiple MPIDs of the Same Member

December 8, 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 November 26, 2003, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by Nasdaq. Nasdaq has designated this proposal as one establishing or changing a due, fee or other charge imposed by the self-regulatory organization under Section 19(b)(3)(A)(ii) of the Act³ and Rule 19b-4(f)(2) thereunder,⁴ which renders the rule immediately effective upon filing with the Commission. 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 the Substance of the Proposed Rule Change

Nasdaq proposes to amend NASD Rule 7010(i) to modify the fee charged when Quotes/Orders submitted by the same member under different market participant identifiers ("MPIDs") match and execute against each other in the Nasdaq National Market Execution System ("NNMS" or,

²⁵ 17 CFR 200.30-3(a)(27).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).