

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 at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-CBOE-2001-60 and should be submitted by May 27, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁸

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47735; File No. SR-NASD-2003-38]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. Clarifying the Operation of the Daily Opening Process in Nasdaq's SuperMontage System

April 24, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4² thereunder, notice is hereby given that on March 13, 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 and II below, which Items have been prepared by Nasdaq. On April 24, 2003, Nasdaq filed Amendment No. 1 to the proposed rule change.³ 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 clarify the current operation of the daily opening process in Nasdaq's Order Display and Collector Facility ("NNMS" or "SuperMontage") when the market is locked and/or crossed immediately prior to 9:30 a.m. Eastern Time.

Below is the text of the proposed rule change, as amended. Proposed new language is *italicized*; proposed deleted language is [bracketed].

* * * * *

4710. Participant Obligations in NNMS

- (a) No Change.
- (b) Non-Directed Orders

(1) General Provisions—A Quoting Market Participant in an NNMS Security, as well as NNMS Order Entry Firms, shall be subject to the following requirements for Non-Directed Orders:

- (A) No Change.

(B) Processing of Non-Directed Orders—Upon entry of a Non-Directed Order into the system, the NNMS will ascertain who the next Quoting Market Participant or NNMS Order Entry Firm in queue to receive an order is (based on the algorithm selected by the entering participant, as described in subparagraph (b)(B)(i)—(iii) of this rule), and shall deliver an execution to Quoting Market Participants or NNMS Order Entry Firms that participate in the automatic-execution functionality of the system, or shall deliver a Liability Order to Quoting Market Participants that participate in the order-delivery functionality of the system. Non-Directed Orders entered into the NNMS system shall be delivered to or automatically executed against Quoting Market Participants' or NNMS Order Entry Firms' Displayed Quotes/Orders and Reserve Size, in strict price/time priority, as described in the algorithm contained in subparagraph (b)(B)(i) of this rule. Alternatively, an NNMS Market Participant can designate that its Non-Directed Orders be executed based on a price/time priority that considers ECN quote-access fees, as described in subparagraphs (b)(B)(ii) of this rule, or executed based on price/size/time priority, as described in subparagraph (b)(B)(iii) of this rule. The individual time priority of each Quote/Order submitted to NNMS shall be assigned by the system based on the date and time such Quote/Order was received.

Remainders of Quote/Orders reduced by execution, if retained by the system, shall retain the time priority of their original entry. For purposes of the execution algorithms described in

paragraphs (i), (ii) and (iii) below, "Displayed Quotes/Orders" shall also include any odd-lot, odd-lot portion of a mixed-lot, or any odd-lot remainder of a round-lot(s) reduced by execution, share amounts that while not displayed in the Nasdaq Quotation Montage, remain in system and available for execution.

(i) through (iii) No Change.

(iv) Exceptions—The following exceptions shall apply to the above execution parameters:

(a) If a Nasdaq Quoting Market Participant enters a Non-Directed Order into the system, before sending such Non-Directed Order to the next Quoting Market Participants in queue, the NNMS will first attempt to match off the order against the Nasdaq Quoting Market Participant's own Quote/Order if the participant is at the best bid/best offer in Nasdaq. Effective February 10, 2003, until March 17, 2003, this processing shall also apply to Non-Directed Orders of NNMS Order Entry Firms. Thereafter, this exception shall not apply to Non-Directed Orders Entered by NNMS Order Entry Firms. Nasdaq Quoting Market Participants may, and NNMS Order Entry Firms must, avoid any attempted automatic system matching permitted by this paragraph through the use of an anti-internalization qualifier (AIQ) quote/order flag containing the following values: "Y" or "I", subject to the following restrictions:

Y—if the Y value is selected, the system will execute the flagged quote/order solely against attributable and non-attributable quotes/orders (displayed and reserve) of *Nasdaq* Quoting Market Participants and NNMS Order Entry Firms other than the party entering the AIQ "Y" flagged quote/order. If the only available trading interest is that of the same party that entered the AIQ "Y" flagged quote/order, the system will not execute at an inferior price level, and will instead return the latest entered of those interacting quote/orders (or unexecuted portions thereof) to the entering party.

I—if the I value is selected, the system will execute against all available trading interest, including the quote/orders of the NNMS Order Entry Firm or Nasdaq Quoting Market Participant that entered the AIQ "I" flagged order, based exclusively on the execution algorithm selected when entering the AIQ I flagged quote/order.

The I value described above shall be available for the use of NNMS Order Entry Firms on March 17, 2003, and available for use by Nasdaq Quoting Market Participants on May 12, 2003.

- (b) through (c) No Change.
- (C) through (D) No Change.

¹⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 replaced the original Rule 19b-4 filing in its entirety. For purposes of determining the effective date of the filing and calculating the 60-day abrogation period, the Commission considers the period to commence on April 24, 2003, the date that Nasdaq filed Amendment No. 1.

(2) No Change.

(3) Entry of Locking/Crossing Quotes/Orders The system shall process locking/crossing Quotes/Orders as follows:

(A) No Change.

(B) Locked/Crossed Quotes/Orders Immediately Before the Open—If the market is locked or crossed at 9:29:30 a.m., Eastern Time, the NNMS will clear the locked and/or crossed Quotes/Order by executing (or delivering for execution) the highest bid against the lowest offer(s) against which it is marketable, at the price of the newer in time of the two quotes/orders. This process will be repeated until an unlocked and un-crossed market condition is achieved. Between 9:29:30 a.m. and 9:29:59 Eastern Time, once NNMS has cleared a locked or crossed market, or if a newly submitted quote/order would create a locked or crossed market, NNMS will prevent a locked or crossed market from being created by processing such locking or crossing quote/order in a manner consistent with subparagraph (b)(3)(a) of this Rule.

(i) *Exception—The following exception shall apply to the above locked/crossed processing parameters:*

If a Nasdaq Quoting Market Participant has entered a Locking/Crossing Quote/Order into the system that would become subject to the automated processing described in section (B) above, the system shall, before sending the order to any other Quoting Market Participant or NNMS Order Entry Firm, first attempt to match off the order against the locking/crossing Nasdaq Quoting Market Participant's own Quote/Order if that participant's Quote/Order is at the highest bid or lowest offer, as appropriate. A Nasdaq Quoting Market Participant may avoid this automatic matching through the use of anti-internalization qualifier as set forth in Rule 4710 (b) (1)(B)(iv)(a). NNMS Order Entry Firms that enter locking/crossing Quotes/Orders shall have those Quotes/Orders processed as set forth in paragraph (B) above, unless they voluntarily select a "Y" AIQ Value as provided for in Rule 4710 (b) (1)(B)(iv)(a).

(4) through (8) No Change.

(c) through (e) No Change.

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any

comments it received on the proposed rule change. The text of these statements may be examined at 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

On August 23, 2002, the Commission approved SR-NASD-2002-56 establishing a uniform process for opening daily trading in Nasdaq's SuperMontage system.⁴ Part of that filing included a description of how SuperMontage would automatically clear locked or crossed markets immediately prior to the 9:30 a.m. Eastern Time Nasdaq market open. As described, SuperMontage would, commencing at 9:29:30 Eastern Time, match off the most aggressively priced locking and crossing quotes/orders against each other with any price improvement going to the oldest of the pair.

That filing, however, failed to make specific note of SuperMontage's present default programming that, prior to other processing, first attempts to match off any quote/order entered by a Nasdaq Quoting Market Participant against any quotes/order(s) entered by that same Nasdaq Quoting Market Participant on the other side of the market (if those quote/order(s) on the other side of the market are at the best bid or offer). Nasdaq represents that this general default preference in SuperMontage execution and delivery processing is followed both during normal trading⁵ as well as the pre-open unlocking/uncrossing spin. Nasdaq further represents that this filing proposes the addition of language to make that fact clear.

In addition, Nasdaq represents that this filing clarifies that, just like during the normal trading day, the Quotes/Orders of NNMS Order Entry Firms that become subject to the pre-opening unlocking/uncrossing processing will not automatically internalize first against best-priced trading interest entered by that same NNMS Order Entry on the other side of the market. Instead, such interaction will only take place if such Quotes/Orders would match off against each naturally during the unlocking/uncrossing process. NNMS Order Entry Firms may prevent any

interaction between its own buy and sell quotes through the use of the "Y" anti-internalization qualifier as permitted by NASD Rule 4710(b)(1)(B)(iv)(a). Finally, the filing clarifies that the Quoting Market Participants referred to in that part of the rule related to the Y AIQ value are Nasdaq Quoting Market Participants.

2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with the provisions of section 15A of the Act,⁶ in general and with section 15A(b)(6) of the Act,⁷ in particular, in that in that the proposal is designed to prevent fraudulent and manipulative acts and practices, 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. The Nasdaq represents that the processing described in this filing has been previously approved by the Commission, as noted above, and recognizes the liquidity benefits that accrue to all market participants by providing incentives for quoting market participants to enter an expanded universe of quotes/orders on both sides of the market.

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.

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 with respect to the proposed rule change.

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

The foregoing proposed rule change, as amended, has become effective on April 24, 2003, the date of filing of Amendment No. 1 to the proposed rule change, pursuant to section 19(b)(3)(A)⁸ of the Act and Rule 19b-4(f)(6)⁹

⁶ 15 U.S.C. 78o-3.

⁷ 15 U.S.C. 78o-3(6).

⁸ 15 U.S.C. 78s(b)(3)(A).

⁹ 17 CFR 240.19b-4(f)(6).

⁴ See Exchange Act Release No. 46410 (August 23, 2002); 67 FR 55897 (August 30, 2002).

⁵ See NASD Rule 4710(b)(1)(B)(iv)(a).

thereunder because the proposal: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days from the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest; provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the filing date of the proposed rule change.¹⁰

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative prior to 30 days after the date of filing. However, pursuant to Rule 19b-4(f)(6)(iii),¹¹ the Commission may designate a shorter time if such action is consistent with the protection of investors and public interest. Nasdaq has requested that the Commission waive the 30-day pre-operative waiting period because the processing described by this proposal is already operative in SuperMontage during the trading day and Nasdaq believes that designating the proposal as immediately effective and operative will ensure that formal notice of this processing during the SuperMontage opening is provided to market participants as soon as practicable.

The Commission, consistent with the protection of investors and the public interest, has waived the 30-day operative date requirement for this proposed rule change, and has determined to designate the proposed rule change as operative on April 24, 2003, the date of filing of Amendment No. 1 to the proposed rule change, in order to allow Nasdaq to provide notice to its members of this aspect of the Nasdaq opening process immediately.¹² At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.¹³

¹⁰ As required under Rule 19b-4(f)(6)(iii), Nasdaq provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to the filing date.

¹¹ 17 CFR 240.19b-4(f)(6)(iii).

¹² For the purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rules impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f)

¹³ For purposes of determining the effective date of the filing and calculating the 60-day abrogation period, the Commission considers the period to

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 filing will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to File No. SR-NASD-2003-38 and should be submitted by May 27, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47750; File No. SR-Phlx-2003-16]

Self-Regulatory Organizations; Notice of Filing of Amendment No. 2 to Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to Charges to Members for Orders Entered Through the Intermarket Options Linkage

April 28, 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 March 18, 2003, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission") a

commence on April 24, 2003, the date that Nasdaq filed Amendment No. 1.

¹⁴ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

proposed rule change,³ as described in Items I, II, and III below, which Items have been prepared by the Phlx. On March 21, 2003, Phlx filed Amendment No. 1 to the proposed rule change.⁴ The proposed rule change, as amended by Amendment No. 1, was originally published for comment in the **Federal Register** on April 2, 2003.⁵ On April 23, 2003, Phlx filed Amendment No. 2 to the proposed rule change.⁶ On April 23, 2003, Phlx filed a supplementary letter to Amendment No. 2.⁷ The Commission is publishing this notice to solicit comments on Amendment No. 2 to the proposed rule change from interested persons.

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

In the Original Filing, Phlx proposed to amend its fee schedule to set forth charges applicable to Principal Orders sent to the Exchange via the Intermarket Options Linkage ("Linkage"). In the proposed fee schedule attached to the Original Filing, floor brokerage assessments (which do not apply to Linkage orders) were not accurately described.⁸ In addition, in a separate filing, Phlx amended its fee schedule on April 11, 2003 to modify the fees applicable to broker/dealers for non-AUTO-X trades.⁹ Previously, the fee was \$.35 per contract. Now, the fee ranges from \$.35 per contract to \$.20 per contract, depending on the number of contracts.¹⁰ In the Original Filing, Phlx

³ See letter from Richard S. Rudolph, Director and Counsel, Phlx to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated March 17, 2003 ("Original Filing").

⁴ See letter from Richard S. Rudolph, Director and Counsel, Phlx to Jennifer Lewis, Attorney, Division, Commission, dated March 20, 2003 ("Amendment No. 1").

⁵ See Securities Exchange Act Release No. 47561 (March 21, 2003), 68 FR 15250.

⁶ See letter from Richard S. Rudolph, Director and Counsel, Phlx to Jennifer Lewis, Attorney, Division, Commission, dated April 22, 2003 ("Amendment No. 2").

⁷ See letter from Richard S. Rudolph, Director and Counsel, Phlx to Jennifer Lewis, Attorney, Division, Commission, dated April 22, 2003.

⁸ In the Original Filing, the Option Floor Brokerage Assessment was set forth as 5% of net floor brokerage income. The current Option Floor Brokerage Assessment is 5% of net floor brokerage income for brokers with monthly net brokerage income of \$0 to \$300,000; 6.5% of net floor brokerage income for brokers with monthly net brokerage income of \$301,000 to \$500,000; and 7.5% of net floor brokerage income for brokers with monthly net brokerage income of \$500,001 and over.

⁹ See Securities Exchange Act Release No. 47715 (April 23, 2003), 68 FR 22446 (April 28, 2003).

¹⁰ The fee is \$.35 per contract for up to 2,000 contracts, \$.25 per contract for between 2,001 and 3,000 contracts; and \$.20 per contract above 3,001