

Applicants assert that these circumstances do not exist in the present case.

Applicants' Conditions

Applicants agree that the order granting the requested relief will be subject to the following conditions:

1. If, within three years of the completion of the Transaction, it becomes necessary to replace any director of the Fund, that director will be replaced by a director who is not an "interested person" of LA Capital or ISI within the meaning of section 2(a)(19)(B) of the Act, unless at least 75% of the directors at that time are not interested persons of LA Capital or ISI.

2. Mr. Vogt will not be involved in Fulbright's representation of LA Capital.

3. Fees paid to Fulbright by LA Capital shall not, in the aggregate, exceed 1% of Fulbright's total revenues during any fiscal year.

4. Mr. Vogt will not be compensated in relation to the overall profits of Fulbright and will not receive any economic benefit from legal representation by Fulbright in areas outside of his own personal practice.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 03-23049 Filed 9-9-03; 8:45 am]

BILLING CODE 8010-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48434; File No. SR-NASD-2003-81]

Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change and Amendment No. 1 Thereto by National Association of Securities Dealers, Inc. Relating to Quote Decrementation in SuperMontage

September 3, 2003.

I. Introduction

On May 12, 2003, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its subsidiary the Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² a proposed rule change to amend NASD Rule 4710 and the decrementation of Quotes/Orders of

order delivery Electronic Communication Networks ("Order Delivery ECNs") in Nasdaq's National Market Execution System ("NNMS" or "SuperMontage"). On May 29, 2003, Nasdaq filed Amendment No. 1 to the proposal.³ The proposed rule change, as amended, was published for notice and comment in the **Federal Register** on June 12, 2003.⁴ The Commission received one comment letter on the proposed rule change.⁵ This order approves the proposed rule change, as amended.

II. Description of the Proposed Rule Change

Nasdaq proposes to modify the SuperMontage decrementation process when an Order-Delivery ECN declines, partially-fills, or fails to respond to a non-directed order delivered to it within 30 seconds ("time-out").⁷ Currently, SuperMontage rules provide that when an Order Delivery ECN declines, partially-fills, or times-out, without immediately transmitting a revised attributable Quote/Order at an inferior price, SuperMontage will zero out all of the ECN's Quotes/Orders on the same side of the market at the price of the declined order (or better). Under this proposal, Order Delivery ECNs will not have all of their trading interest at the declined price level (or better) removed from the system. Instead, SuperMontage would only remove the total amount of each individual Quote/Order to which an order was delivered by SuperMontage.

Nasdaq provided the following example of how the proposed modification to the decrementation process would operate for an ECN alone at the inside that elected to enter three separate bid Quotes/Orders at the same price level in SuperMontage: ECN Quote (#1)—1,000 shares @ 20.00 ECN Order (#2)—500 shares @ 20.00

³ See letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated May 29, 2003 ("Amendment No. 1"). In Amendment No. 1, Nasdaq replaced the proposed rule change in its entirety.

⁴ See Securities Exchange Act Release No. 47993 (June 5, 2003), 68 FR 35246 (June 12, 2003).

⁵ See letter from Kim Bang, Bloomberg Tradebook, LLC, to Jonathan G. Katz, Secretary, Office of the Secretary, Commission, dated July 14, 2003 ("Bloomberg Letter").

⁶ An ECN's decline of a delivered order must comply with the Commission's Quote Rule, 17 CFR part 240.11Ac1-1. NASD Regulation surveils for Quote Rule violations.

⁷ See Securities Exchange Act Release No. 48196 (July 17, 2003), 68 FR 43777 (July 24, 2003) (Notice of filing and immediate effectiveness of File No. NASD-2003-108 to temporarily increase the non-directed order maximum response time for Order-Delivery ECNs in Nasdaq's SuperMontage System.)

ECN Order (#3)—300 shares @ 20.00

The inside aggregated bid shows 1,800 shares @ 20.00.

1. SuperMontage receives an 800 share market sell order.

2. In response, SuperMontage sends an 800 share delivery to ECN Quote (#1). Upon dispatch, SuperMontage immediately decrements ECN Quote (#1) by the amount of the delivery (800 shares) leaving a display quote of 1,000 shares in ECN Quote (#1) that remains available for execution.

3. The ECN declines to execute the 800 share delivery to ECN Quote (#1).

4. The ECN's decline results only in the immediate removal of ECN Quote (#1), *i.e.*, the 800 shares originally decremented and the 200 share remainder of ECN Quote (#1). Orders (#2) and (#3) remain in the system and continue to be eligible for execution.

The system reallocates the 800 shares from the incoming order in Step 1 against ECN orders (#2) and (#3), if not executed by a subsequent incoming order, before moving, if necessary, to the next best bid.⁸

Thus, under the proposal, only individual Quotes/Orders would be removed in full by a decline, partial-fill, or a time-out when no revised attributable Quote/Order is immediately transmitted at an inferior price; not all trading interest at the declined price level or better. Other ECN Quotes/Orders at a particular price level that are not part of a SuperMontage delivery resulting in a decline, partial-fill, or time-out would be retained in the system and remain available for execution, and are not traded through. Nasdaq represents that locked or crossed markets will not be created as a result of the proposed rule change.

III. Summary of Comments

The Commission received one comment letter from Bloomberg Tradebook, LLC ("Bloomberg") on the proposed rule change.⁹ Bloomberg neither explicitly supported nor opposed the proposed rule change, although it commented on decrementation generally, as well as on the proposed rule change. Bloomberg noted that conceptually, "(d)ecrementation is a design feature of SuperMontage that is intended to preserve the continuity of the market

⁸ Nasdaq clarified under the proposal a subsequent incoming order could potentially execute against an ECN's remaining orders prior to the return of a declined order to the system. Telephone conversation between Thomas P. Moran, Associate General Counsel, Office of the General Counsel, to Marc McKayle, Special Counsel, Division, Commission on August 27, 2003.

⁹ See Bloomberg Letter, *supra* note 5.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

and to prevent locked and crossed markets.” However, Bloomberg also opined that the current decrementation procedures unfairly discriminate against Order Delivery ECNs, cuts squarely against an ECN’s obligations under the Order Display Rule,¹⁰ are subject to being gamed by market participants, and implicate a broker-dealer’s duty of best execution. In Bloomberg’s view, “[t]he problems decrementation has created * * * result from access fees ECNs are permitted to charge and the unwillingness of some market participants to pay those fees.” Bloomberg believed that the Commission should address the access fee issue, and that all access fees, including fees charged by market centers, should be eliminated.

Bloomberg also believed that Nasdaq’s proposed amendment would not reduce the adverse impact of decrementation on Order Delivery ECNs since each ECN’s Quote/Order would still be subject to decrementation. In addition, Bloomberg did not believe that Nasdaq’s proposed amendment would provide any practical benefit since ECNs manage their own internal matching engines and aggregate multiple orders for representation as a single Quote/Order in SuperMontage. Further, Bloomberg believed that the decrementation process could still be gamed since firms seeking to knock an ECN out of the quote in SuperMontage would still be able to do so.

In response to the Bloomberg Letter, Nasdaq stated that many of Bloomberg’s comments extended beyond the narrow scope of the proposed rule change to modify SuperMontage’s decrementation process to decrement only the ECN Quote/Order that an incoming order interacts with at a particular price level, as opposed to all of an ECN’s available trading interest at a particular price level.¹¹ In Nasdaq’s view, Bloomberg’s comments were directed at the decrementation process generally, its impact on ECNs and their customers, and its relationship to ECN access fees. In response, Nasdaq noted that the Commission approved the SuperMontage decrementation process, and that Nasdaq was merely proposing to modify the process. Nasdaq emphasized that its current decrementation process and its proposed modification to the process retain the key component that declining Quotes/Orders be removed from the

system. Further, Nasdaq stated that the only issue presented by the filing is the method of such removal; the proposed rule change does not seek to change ECN access fee standards. Therefore, according to Nasdaq, Bloomberg’s views on eliminating access fees would be more properly expressed in a petition for Commission rulemaking.

Nasdaq also offered general comments regarding the decrementation process. Nasdaq explained that decrementation was proposed as part of the original SuperMontage proposal to address locked and crossed markets that occurred in Nasdaq prior to SuperMontage. Nasdaq noted that access fee disputes could result in locked and crossed markets that would not only shut down Nasdaq’s automatic execution functionality, but also many internal order-execution systems of Nasdaq market participants, until the locks or crosses were resolved. Nasdaq also stated that decrementation allows Nasdaq to fairly balance the needs and desires of a wide variety of users by accommodating ECNs, by allowing them to receive and decline orders (as opposed to receiving executions) while eliminating locked and crossed markets.

With regard to Bloomberg’s specific comments on the proposed rule change, Nasdaq emphasized its proposed modification to the decrementation process is an internal SuperMontage system change that imposes no new obligation on any market participant. Instead, the proposal is intended to make the current decrementation process more discerning and provide options to ECNs that voluntarily elect to change the way they represent their Quotes/Orders in SuperMontage. Nasdaq stated that the proposed rule change gives ECNs the option to mitigate decrementation by providing them, if they enter multiple Quotes/Orders, an increased opportunity for their individualized Quotes/Orders to interact with counterparties with which the ECN is willing to trade. Nasdaq stated it should not be precluded from altering its system to provide options to ECNs that choose to take the initiative to serve their customers better. According to Nasdaq, if an ECN chooses to enter individual representations of trading interest, Nasdaq’s new processing would allow more of the ECN’s customers to remain in the SuperMontage system longer, thereby increasing the potential interaction of those customers with orders from parties that will pay the ECN’s access fee. Those ECNs that do not alter the way they represent their customers in SuperMontage would, in effect, continue to have their single quotes

decremented in the same manner as the current SEC-approved process. According to Nasdaq, Bloomberg opposes a rule that forces them to do nothing, and will have no impact on them if they continue to do business as they do today.

IV. Discussion

The Commission has carefully reviewed the proposed rule change, the Bloomberg Letter, and Nasdaq’s response and 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.¹² In particular, the Commission finds that the proposed rule change, as amended, is consistent with section 15A.¹³ Specifically, the Commission finds that the proposed rule change is consistent with section 15A(b)(6) of the Act because 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.¹⁴ The Commission also finds that the proposed rule change is consistent with section 15A(b)(11) because it is designed to produce fair and informative quotations, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting, distributing, and publishing quotations.¹⁵

While the Commission appreciates and considered Bloomberg’s comments regarding decrementation generally, whether decrementation is consistent with the Act was decided on January 19, 2001, when the Commission approved decrementation in SuperMontage.¹⁶ The ability of SuperMontage to decrement Quotes/Orders of Order Delivery ECNs is not at issue in the proposed rule change.¹⁷ Instead, what is at issue is

¹² In approving this proposal, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹³ 15 U.S.C. 78o-3.

¹⁴ 15 U.S.C. 78o-3(b)(6).

¹⁵ 15 U.S.C. 78o-3(b)(11).

¹⁶ See Securities Exchange Act Release No. 43863 (January 19, 2001), 66 FR 8020 (January 26, 2003) (“Original SuperMontage Approval Order”).

¹⁷ *Id.* See also *Domestic Securities, Inc. v. Securities and Exchange Commission*, 333 F.3d 239 (DC Cir. 2003). The Court found, in pertinent part, that the Original SuperMontage Approval Order marked the consummation of the Commission’s

¹⁰ 17 CFR 240.11Ac1-4.

¹¹ See letter from Thomas P. Moran, Office of General Counsel, to Jonathan G. Katz, Secretary, Office of the Secretary, Commission, dated July 30, 2003.

whether the modification to the decrementation process, wherein SuperMontage can decrement only the single ECN Quote/Order that declines to trade with an order sent to it by the system, is consistent with the Act.¹⁸ The Commission finds that it is.

The Commission notes that the amendment is essentially identical to the process as originally approved,¹⁹ except that an ECN's Quotes/Orders would be removed from the system on an individual basis. Bloomberg stated that the proposal would not have any practical effect because it is the practice of ECNs to aggregate orders within the quote sent to SuperMontage. The Commission believes that Nasdaq has adequately responded to Bloomberg's comments. Nasdaq has correctly represented that the proposed rule change provides a new option for Order Delivery ECNs. The Commission recognizes that many proposed rule changes relating to a self-regulatory organization's trading system will require the affected market participants to either reprogram their internal trading systems or alter their business practices to ensure system compatibility and compliance. In that regard, this proposed rule change is not unique. The proposed rule change may allow ECNs that opt to change their method of quote management and submit individual orders to SuperMontage to mitigate the impact of access fee disputes on their ability to trade with participants with which no dispute exists. However, ECNs may also choose to continue aggregating multiple orders for representation, and decrementation, as a single Quote/Order in SuperMontage. Thus, while ECNs that do not reconfigure their trading systems or revise their quote management practices would not benefit from this proposed rule change, ECNs that choose to make the necessary operational and technological adjustments may benefit.

The Commission believes that Nasdaq's approach reasonably balances the interests of accommodating Order Delivery ECNs and providing an efficient trading system. Nasdaq represents that SuperMontage

decisionmaking process concerning the system rules, including decrementation, and the rules finally determined the rights and obligations of the market and of each market participant who traded on the system.

¹⁸ While the Commission acknowledges that ECN access fees maintain a significant tangential relationship to the SuperMontage decrementation process, the abolition of ECN fees is not at issue in this proposed rule change. Nasdaq recently submitted File No. NASD-2003-128 relating to ECN fees.

¹⁹ See Original SuperMontage Approval Order, *supra* note 15.

decrementation has eliminated the ECN access fee-related locked or crossed markets which caused the shutdown of Nasdaq's automatic execution functionality, and many internal order-execution systems, until the lock or cross was resolved. The Commission continues to believe that the SuperMontage decrementation process should help to reduce instances of locked and crossed markets and the problems associated with locked and crossed markets, while accommodating ECNs with an alternative to automatic execution.²⁰ The Commission also continues to believe that the reduction of locked and crossed markets in the Nasdaq market should improve market quality and enhance the production of fair and orderly quotations.²¹ In the Commission's view, the NASD's proposal is reasonably designed to maintain the integrity of Nasdaq quotes by reducing the incidence of locking and crossing quotations displayed in Nasdaq. The proposal will continue to reduce locked and crossed markets because a declined order, if necessary, would decrement each ECN's individual Quote/Order. The Commission believes that the proposal, by retaining ECNs' trading interest that is not decremented by the incoming order in the system, could enhance SuperMontage liquidity and transparency, and provide ECN customers with an increased opportunity to have their orders executed by market participants that are willing to pay the ECN access fee.

V. Conclusion

For the foregoing reasons, the Commission finds that the proposal, as amended, is consistent with the requirements of the Act and rules and regulations thereunder.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,²² that the proposed rule change (SR-NASD-2003-81), as amended, is approved.²³

²⁰ The Commission has concluded previously that continued locking and crossing of markets can negatively impact market quality. *Id.* See also Division of Market Regulation, The October 1987 Market Break 9-6 (February 1988) (Stating that the continued existence of locked and crossed markets indicates that the quotations for a security are suspect and may not provide an accurate reflection of the market for a security).

²¹ *Id.*

²² 15 U.S.C. 78s(b)(2).

²³ The proposed rule change will become effective within 60 days of the date of this Order. Telephone conversation between Thomas P. Moran, Associate General Counsel, Office of the General Counsel, to Marc McKayle, Special Counsel, Division, Commission on September 3, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁴

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03-22983 Filed 9-9-03; 8:45 am]

BILLING CODE 8010-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48429; File No. SR-NYSE-2003-25]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Continuing Annual Fees for "Repackaged" Securities

September 3, 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 August 28, 2003, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. 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 Substance of the Proposed Rule Change

The NYSE proposes to amend section 902.02 of the Listed Company Manual (the "Manual") to implement certain changes to the continuing fees payable in connection with certain structured products known as "repackaged" securities and to reinstate the Exchange's "15-year" policy with respect to previously listed "repackaged" securities, as more fully described below.

Below is the text of the proposed rule change. Proposed new language is *italicized* and proposed deletions are in brackets.

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Listed Company Manual

902.00 Listing Fees

* * * * *

902.02 Schedule of Current Listing Fees

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²⁴ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.