Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to section 19(b)(3)(A) of the Act,[8] and subparagraph (f)(6) of Rule 19b–4 thereunder.[9] At any time within 60 days of the filing of the proposed rule change, as amended, 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.

Nasdaq has requested that the Commission waive the 30-day operative delay. Nasdaq believes the proposed rule change clarifies a functionality that is already available to UTP Exchanges. In particular, as already set forth in NASD Rule 4710(e), the proposed rule change makes clear that a UTP Exchange participating in the SuperMontage may enter Non-Attributable Quotes/Orders for their agency customers into the system using the SIZE MMID.[10]

The Commission believes that it is consistent with the protection of investors and the public interest to waive the 30-day operative delay.[11] The Commission notes that this proposal merely clarifies the ability of UTP Exchanges to enter Non-Attributable Quotes/Orders, as currently permitted by the system.

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 NASD. All submissions should refer to file number SR–NASD–2003–05 and should be submitted by March 21, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Margaret H. McFarland,
Deputy Secretary.
[FR Doc. 03–3944 Filed 2–18–03; 8:45 am]
BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47351; File No. SR–NASD–2002–60]

Self-Regulatory Organizations; Order Granting Approval of a Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendment Nos. 1, 2, and 3 to the Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Permanent Approval of the Primex Auction System®

February 11, 2003.

I. Introduction

On May 1, 2002, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') a proposed rule change, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] requesting permanent approval of the Primex Auction System® (''Primex'' or ''System''). The proposed rule change was published for public comment in the **Federal Register** on May 31, 2002.[3] On May 28, 2002, Nasdaq filed Amendment No. 1 to the proposed rule change.[4] The comment period expired

on June 21, 2002.[5] On July 25, 2002, the Commission received one comment letter on the Original Proposal.[6] On October 7, 2002, Nasdaq filed a response to the NYSE Comment Letter.[7] On November 1, 2002, Nasdaq filed Amendment No. 2 to the proposed rule change.[8] On February 4, 2003, Nasdaq filed Amendment No. 3 to the proposed rule change.[9]

This order approves the proposed rule change. In addition, the Commission is publishing this notice to solicit comments on Amendment Nos. 1, 2, and 3 from interested persons, and approving Amendment Nos. 1, 2, and 3 on an accelerated basis.

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forth in proposed NASD Rule 5014(b). Market Orders for at least 10,000 shares or $200,000 in market value are also eligible for a zero second Auction, regardless of whether or not match parameters are attached.''

[5] Nasdaq has granted the Commission several extensions of time to consider Nasdaq's proposal, the most recent extending the time period until February 14, 2003.

[6] *See* letter from Darla C. Stuckey, Corporate Secretary, New York Stock Exchange, Inc. (''NYSE''), to Jonathan G. Katz, Secretary, Commission, dated July 24, 2002 (''NYSE Comment Letter'').

[7] *See* letter from Edward S. Knight, Executive Vice President and General Counsel, Nasdaq, to Jonathan G. Katz, Secretary, Commission, dated October 7, 2002 (''Nasdaq Response Letter'').

[8] *See* letter from Peter R. Geraghty, Associate Vice President and Associate General Counsel, Nasdaq, to Katherine England, Assistant Director, Division, Commission, dated October 31, 2002 (''Amendment No. 2''). In Amendment No. 2, Nasdaq seeks permanent approval of the following changes to Nasdaq's application of Primex: (1) Elimination of the end-of-day anonymity feature; (2) implementation of a system change to prohibit appropriately marked orders from executing in violation of the NASD short sale rule; (3) amendments to proposed NASD Rule 5020 to reflect that Nasdaq delayed for an additional calendar quarter the rule requiring Primex Auction Market Makers (''PAMMs'') to submit a certain percentage of their orders to Primex; (4) amendments to proposed NASD Rule 5016 to reflect that orders not fully executed in Primex can be forwarded to the SuperMontage version (''SuperMontage'') of the Nasdaq National Market Execution System (''NNMS''); and (5) the addition of two new conditions that can be attached to orders submitted to Primex: an Anti-Internalization Qualifier and an All or None condition.

[9] *See* letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine England, Assistant Director, Division, Commission, dated February 3, 2003 (''Amendment No. 3''). In Amendment No. 3, Nasdaq seeks permanent approval to (1) change the minimum size requirement for Predetermined Relative Indications from a tiered structure depending on the amount of price improvement, to a standard minimum size requirement of 100 shares; (2) reprogram the System to reject trading interest marked as ''short'' or ''short exempt'' in any exchange-listed security eligible for participation in the InterMarket Trading System; and (3) modify proposed NASD Rule 5017 to be consistent with the system change relating to short sales set forth in Amendment No. 2. Telephone call among Peter R. Geraghty, Associate Vice President and Associate General Counsel, Nasdaq; Gordon Fuller, Counsel to the Assistant Director, Division, Commission, and Jennifer Lewis, Attorney, Division, Commission, on February 7, 2003.

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[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6).

[10] *See* Amendment No. 1, *supra* note 3.

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

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 45983 (May 23, 2002), 67 FR 38152 (''Original Proposal'').

[4] *See* letter from Peter R. Geraghty, Associate Vice President and Associate General Counsel, Nasdaq, to Katherine England, Assistant Director, Division of Market Regulation (''Division''), Commission, dated May 1, 2002 (''Amendment No. 1''). In Amendment No. 1, Nasdaq removed the following language inadvertently included in proposed NASD Rule 5013(c)(2): ''Participants that are Primex Auction Market Makers for a security may submit Market Orders in that security for an immediate (*i.e.,* ''zero second'') Auction, provided the Participant attaches certain match parameters as set

II. Background

Nasdaq has operated Primex as a facility of the NASD since December 17, 2001. Primex operates as a Pilot Trading System pursuant to a temporary, two-year exemption from the rule filing requirements of Section 19(b) of the Act [10] under Rule 19b–5 under the Act.[11] Nasdaq represents that Primex has exceeded the volume threshold required to maintain its status as a Pilot Trading System pursuant to Rule 19b–5 under the Act.[12] Accordingly, Nasdaq now seeks permanent approval of the Primex rules. Pending such approval, the NASD submitted a proposed rule change setting forth the rules governing Primex and permitting Nasdaq to continue to operate Primex on a temporary basis.[13]

III. Brief Description of Primex [14]

Participants

Primex is a voluntary system available to any NASD member and other entities that a member chooses to sponsor. To access the System, a member must be in good standing and have executed the necessary agreements with Nasdaq. Members granted access to the System are referred to as Primex Auction System Participants ("Participants"), and can access Primex for their customers or for themselves. Entities that are not members can access the System by becoming a Sponsored Subscriber of a Participant ("Sponsored Subscriber"). The Participant assumes responsibility for all activity conducted through the System by the Sponsored Subscriber.

There are two categories of Primex Participants: Primex Auction Market Makers ("PAMMs") and Crowd Participants. By becoming a Participant, a member automatically receives the right to trade as a Crowd Participant for any security eligible for trading in the System. In general, Crowd Participants can view all orders exposed in the System; interact with any order in the System; submit orders to the System; and trade as principal, agent, or riskless principal. In addition, PAMMs are entitled to exercise certain matching rights that allow a PAMM to commit

capital to its customer orders in conjunction with the order exposure process; provide execution guarantees for its own customer orders submitted to the System; and use certain types of orders that permit the PAMM to facilitate block trades and "clean crosses." PAMMs are also entitled to share in transaction revenue paid by other Participants when those other Participants execute against a PAMM's customer orders.

To become a PAMM, a member must register as such with Nasdaq for each security in which the member wishes to trade in such capacity. Members that seek to become PAMMs also must be registered as Nasdaq market makers with respect to Nasdaq-listed securities (*i.e.*, Nasdaq National Market® and The Nasdaq SmallCap Market℠ securities) or Consolidated Quotation Services ("CQS") market makers with respect to exchange-listed securities. With respect to any security eligible for which a Participant is registered as a PAMM, such PAMM must submit to the System a minimum percentage [15] of its Mandatory Eligible [16] public customer orders (including customer orders of another broker-dealer that directs such orders to the PAMM) for those securities in which it is registered as a PAMM.

Orders

Participants may submit unpriced market orders, as well as orders that have specified, fixed prices that are marketable or priced between the NBBO. Orders can be submitted in any round lot or mixed lot, but odd lot orders are not accepted. Fixed price orders are eligible only for "immediate or cancel" treatment.

Participants can choose the maximum duration of the exposure for their orders. Unpriced market orders generally have a default maximum broadcast period of 15 seconds, but executions can take place sooner if there are satisfactory responses from the crowd at any time during the exposure of the order. Executions can occur instantaneously when there is crowd trading interest residing in the System. Trading interest can reside in the System when Participants define their interest in advance of an order being placed, or when other, contra side orders are already in the process of being exposed. In addition, Participants also may elect to have the order exposed for an immediate or "zero second" execution, depending on the size of the

order or, as described below, guarantee an execution by committing liquidity in the absence of satisfactory interest from the crowd. Transactions always are executed at or within the NBBO.

An order also can be submitted with a condition attached requiring a minimum amount of price improvement relative to the current NBBO at the time of execution. A Participant utilizing this feature for an order to buy would specify, when entering the order into the System, that the order be executed only if the exposure yields an execution with price improvement of 3 cents below the "Best Offer" as publicly displayed in the NBBO at the time of execution.

PAMMs are entitled to attach certain match parameters to customer orders they submit to the System. For example, a PAMM may submit a customer order with a 50% match parameter. Any interest provided by the crowd is matched in both size and price by a corresponding execution with the PAMM. The PAMM must be willing to execute the entire order when using this match parameter, in the absence of sufficient response from the crowd.

PAMMs also can submit customer orders with a Two Cent Match parameter. This function allows the PAMM entering the order to execute the customer order, provided it is willing to match the price established by the crowd for the entire order to the extent the price offered by the crowd is within two cents of the NBBO. If there is crowd interest willing to provide more than two cents of price improvement, the PAMM loses that portion of the order to the crowd.

PAMMs also are entitled to provide execution guarantees within the System. This feature ensures that any balance of an order remaining after exposing it to the crowd will receive a liquidity guarantee, established by the PAMM for each order submitted, at a price at least as good as the NBBO at that time.

Any condition, match parameter, or guarantee must be attached to an order at the time it is submitted to the System. The existence of any condition, match parameter, or guarantee that may be attached to an order is never communicated or displayed to the crowd.

The System also provides participants the option of having the balance of an unexecuted order returned to them or forwarded to other Nasdaq systems for execution. Participants must indicate their preference upon submission of an order to the System. For example, a Participant can submit an order with an indication that it should be forwarded to another Nasdaq system if the order is

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[10] 15 U.S.C. 78s(b).

[11] 17 CFR 240.19b–5.

[12] 17 CFR 240.19b–5. *See* Securities Exchange Act Release No. 45983 (May 23, 2002), 67 FR 38152 ("Original Proposal").

[13] Notice of the filing and the immediate effectiveness of the proposed rule change was published on May 31, 2002 in the **Federal Register.** *See* Securities Exchange Act Release No. 45982 (May 23, 2002), 67 FR 38163.

[14] *See* the Original Proposal for a more detailed description of Primex and the NASD Rules governing Primex.

[15] *See* proposed NASD Rule 5020.

[16] *See* proposed NASD Rule 5011 (definition of "Mandatory Eligible Order") and proposed NASD Rule 5020.

not completely executed in Primex. To the extent the exposure concludes and there is a portion of the order remaining, that balance will be converted by the System to an order that is forwarded to SuperSoes (for Nasdaq National Market securities), SuperMontage, or ITS/CAES (for exchange-listed securities, provided the participant also is an ITS/CAES market maker). A Participant's preference is not displayed, exposed or communicated to any other Participant.

Responses and Indications

Participants may submit Responses and Indications to the System, for the purpose of interacting with orders on Primex. Responses and Indications are not communicated to any Participant, except to the extent they result in an execution with an order. Responses and Indications cannot execute against other Responses and Indications. Responses are instructions submitted to the System by Participants to interact with available orders exposed on Primex. Responses may be either a Fixed Price Response (*e.g.*, buy 1,000 at $20) or a Relative Priced Response (*e.g.*, buy 1,000 at the bid plus 3 cents).

Indications are instructions submitted to the System to interact with future orders exposed on Primex by either the next day or the next five days, as selected by the Participant. An Indication may be a Predefined Relative Indication ("PRI") or a Go-Along Indication. PRIs have no specific fixed price, but are expressed at time of entry in terms relative to the best bid or offer publicly displayed at such time when the System activates the PRI against orders on Primex. PRIs are ranked in relative price/time priority among all other PRIs and any same-side orders currently being exposed. When activated by the System, a PRI will match against orders at a price equal to the best bid (for PRIs to buy) or offer (for PRIs to sell) publicly displayed at that time in the NBBO, plus or minus (respectively) the relative price term associated with that PRI; provided that such price also satisfies any applicable condition associated with the order to which it is responding. All PRIs must be for at least 100 shares. The System will only accept PRIs that meet the required amounts of price improvement (set forth in proposed NASD Rule 5018(c)(1)(C)). Participants may associate a Per Auction Maximum size with a PRI, which will provide the Participant with an opportunity to withdraw the PRI once the Per Auction Maximum is exhausted.

Go-Along Indications also have no specific fixed price, and are also expressed at time of entry in terms relative to the best bid or offer publicly displayed at such time when the System activates the PRI against orders on Primex. Go-Along Indications are only activated when there has been at least one other contemporaneous Crowd execution at the NBBO, provided there are no PRIs available or orders being exposed. Each Go-Along Indication is required to be for at least 10,000 shares.

All orders submitted to the System are identified as either a Public Order (in general, an order for the account of a customer) or a Professional Order (in general, an order for the proprietary account of a broker-dealer). This status is not communicated to any other Participant, but is used to determine whether an order is available to interact with the Response or Indication of a Crowd Participant. A Participant that responds to orders on Primex can choose whether its Responses and Indications interact with both Public and Professional Orders, or just Public Orders. However, a Participant entering an order does not have the ability to select or control whether public or professional interest may interact with the order.

IV. NYSE Comment Letter and Nasdaq Response

In the NYSE Comment Letter, the NYSE argued against the Commission granting permanent approval to Primex. The NYSE argued that the Commission must evaluate whether Primex complies with Nasdaq's regulatory obligations as an exchange pursuant to Section 6 of the Act,[17] even though Nasdaq's exchange application is pending with the Commission. The NYSE argued, among other things, that Primex's true character is not that of an auction, but rather, an anti-competitive dealer internalization system. For example, the NYSE argued that Primex's "match mechanism" for dealer guarantees allows dealers to jump ahead of pre-existing customer orders.

In the Nasdaq Response Letter, Nasdaq stated that it would respond to all of the comments raised by the NYSE Comment Letter, even though it is only required to comply with the requirements of Section 15A of the Act[18] because of its current status as a registered securities association. Nasdaq further stated that Primex is fully consistent with these statutory obligations.

The NYSE argued that the requirement that PAMMs submit 80% of their order flow is anti-competitive and compromises the ability of broker-dealers to comply with their best

[17] 15 U.S.C. 78f.
[18] 15 U.S.C. 78o-3.

execution obligations. The NYSE further stated that the 80% requirement is an off-board trading restriction which conditions the ability of any member to effect any transaction otherwise than on Primex. The NYSE also believes the requirement unfairly discriminates against members with high volume of order flow.

Nasdaq responded that the 80% delivery requirement applies only to those dealers who wish to take advantage of the benefits of certain rebates and features available to PAMMs. Nasdaq stated that the only penalty for not meeting the 80% delivery requirement is to be ineligible for PAMM status; there are no disciplinary sanctions for failing to meet the 80% requirement, and such dealers will still have access to the other features of Primex. Nasdaq contended that the requirement does not place participant in a position where it must choose between violating a NASD rule and its duty of best execution; rather, each participant is free to execute its orders in whichever manner it believes can obtain best execution. Finally, Nasdaq stated that all orders that are exposed in Primex are eligible for the 80% test, even if they are executed elsewhere.

Nasdaq further argued that the 80% requirement is designed to encourage dealers with customer order flow to expose customer's orders to the public. It asserted that, without the 80% requirement, the market would believe that dealers were only posting unwanted orders.

NYSE argued that Primex allows participating dealers to provide customers with trade prices no better than if their orders had been internalized, and therefore should not claim to offer an auction-type execution. NYSE contended that there are no true market makers on Primex because no participant has an affirmative obligation to provide the liquidity of continuous two-sided quotations. NYSE further argued that Primex does not display quotes or even the existence of any trading interest in the "virtual" trading crowds that Nasdaq claims exists as a source of liquidity, nor does it display most orders entered onto the system to interact with the putative trading crowd. NYSE stated that customer orders may be entered for immediate auction, which it argued would not provide any opportunity for participants to respond.

Nasdaq responded that Primex is designed to expose to a broader audience orders that might otherwise be internalized. Moreover, Nasdaq stated that even if such orders are internalized, federal securities laws do not prohibit

internalization. In addition, some customers value speed more than other factors. Speed has become an indication of execution quality. Nasdaq characterized Primex's use of PRIs as designed to ensure that notwithstanding the need for speed on the order entry side, there would still remain a fair and reasonable opportunity for any and all crowd participants to respond to such order flow if they choose to do so, regardless of the auction selected. Nasdaq argued that Primex's technology allows this immediate interaction.

The NYSE argued that Primex artificially limits the ability of dealers to enter PRIs below established minimum sizes, thereby discouraging trading interest and constraining liquidity. As a result of consultation with members, Nasdaq has modified the minimum size requirements for PRIs to a less burdensome standard requirement of 100 shares.

The NYSE argued that Primex participants may selectively trade against agency orders alone by using a mechanism to screen out professional orders. NYSE contends that this is discriminatory, not an auction, and acts as a disincentive to participation.

Nasdaq responded that this feature ensures that any price improvement or enhanced liquidity opportunities be reserved for public customers, and not necessarily professional traders who could otherwise take advantage of the System's benefits and "pre-empt" the ability of a public customer to receive such benefits.

The NYSE argued that Primex's fee structure penalizes liquidity providers. Fees are charged to liquidity providers, and rebates are given when PRIs result in a trade. The NYSE believes the fee structure formalizes a payment for order flow arrangement to compensate PAMMs when they are displaced from internalizing their own customer orders.

Nasdaq stated that even though the fee structure is not included in the proposed rule change and thus not before the Commission for review, it would respond to the NYSE's arguments. Nasdaq explained that orders exposed in Primex are not charged for an execution so as to avoid any penalty that would discourage participants, particularly dealers, from exposing customer order flow to others. A fee is charged only to those who choose to respond to such order flow with Primex's unique bidding tools. Nasdaq also responded that it is not required to have a uniform pricing principle for all of its systems. The only requirement is an equitable allocation of reasonable fees among members, and

the fees for Primex comply with this standard.

The NYSE argued that Primex fails to provide a market structure that ensures its participants comply with Rule 10a–1 under the Act (the "Short Sale Rule").[19] As a result of consultation with members, Nasdaq has implemented a system modification that will prohibit appropriately marked orders from executing in violation of NASD Rule 3350, the NASD short sale rule.[20] In addition, Nasdaq has reprogrammed the System to reject trading interest marked as "short" or "short exempt" in any exchange-listed security eligible for participation in the InterMarket Trading System.[21]

The NYSE argued that Nasdaq has not provided any market data or analysis regarding its trading history for public evaluation. In addition, individual market makers have opted to include Primex executions within their own "market center" reports, rather than as orders routed to and executed on another market system. Primex includes these trades in statistics used in its advertising and press releases.

The Nasdaq responded that it has been working closely with SEC staff to confirm how Rule 11Ac1–5 will be applied to Primex.

V. Amendment No. 2

In Amendment No. 2, Nasdaq seeks permanent approval of the following changes to Nasdaq's application of Primex: (1) Elimination of the end-of-day anonymity feature; (2) implementation of a system modification that will prohibit appropriately marked orders from executing in violation of NASD Rule 3350, the NASD short sale rule; (3) amendments to proposed NASD Rule 5016 to reflect that orders not fully executed in Primex can be forwarded to SuperMontage once it is available for a particular security; (4) the addition of two new conditions that can be attached to orders submitted to Primex, the Anti-Internalization Qualifier ("AIQ") and the All or None ("AON") condition; and (5) amendments to proposed NASD Rule 5020 to reflect that Nasdaq delayed for an additional calendar quarter the rule requiring PAMMs to submit a certain percentage of their orders to the System. The amended rule text follows. New

[19] 17 CFR 240.10a–1.

[20] Telephone call among Peter R. Geraghty, Associate Vice President and Associate General Counsel, Nasdaq, Gordon Fuller, Counsel to the Assistant Director, Division, Commission, and Jennifer Lewis, Attorney, Division, Commission, on October 24, 2002. *See* Amendment No. 2, *supra* note 8.

[21] *See* Amendment No. 3, *supra* note 9.

language is italicized; deleted language is in brackets.

5011. Definitions

For purposes of this Rule Series, unless the context requires otherwise:

(a) "Application" or "Nasdaq Application" as used in this Rule Series, and "Nasdaq Application of the Primex Auction System" as used throughout the NASD Rules means the voluntary Nasdaq trading service facility that permits NASD member firms, among other things, to submit orders in Primex Eligible Securities to be exposed to a Crowd of Participants in an [anonymous,] electronic auction format for the purpose of obtaining an execution for their own account or the account of a customer; to have required reports of any resulting trades automatically disseminated to the public and the industry; and to "lock in" these trades as necessary by sending both sides to the applicable clearing agency designated by the Participants involved for clearance and settlement, all in accordance with this Rule Series and other applicable rules and policies of Nasdaq.

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5016. Option to Route Orders Outside of the System After Exposure in the Application

(a) *(1)* All Market Orders submitted to the Application shall include an identifier as to whether any unexecuted balance, after the order is exposed to the Crowd, should be forwarded to *the* SuperSoes℠ *version of the Nasdaq National Market Execution System,* in the case of a Nasdaq security, or to ITS/CAES, in the case of an exchange-listed security, or whether the order should be returned to the entering Participant. This option to route orders outside of the Application to *SuperSoes or ITS/CAES* is available for Market Orders only. Orders submitted to the Application with a specified, fixed price cannot be automatically forwarded to *SuperSoes or ITS/CAES* [Nasdaq's other execution systems].

Routing identifiers are not displayed, exposed or communicated to any other Participant in the Application.

(2) For securities eligible for the SuperMontage version of the Nasdaq National Market Executions System, all orders submitted to the Application shall include an identifier as to whether any unexecuted balance, after the order is exposed to the Crowd, should be forwarded to SuperMontage, or whether the order should be returned to the entering Participant. Orders forwarded to SuperMontage will be treated as

immediate or cancel orders. Routing identifiers are not displayed, exposed or communicated to any other Participant in the Application.

(b) No changes.

5020. Market Maker Participation

(a) No Change.

(b) With respect to each security in which a Participant is registered as a Primex Auction Market Maker, the Participant shall:

(1) No Change.

(2) No Change.

(3) submit to the Application a minimum of 80%* of the number of its Mandatory Eligible Orders (including customer orders of another broker-dealer that has directed such orders to the Participant) as soon as practicable upon receipt by the Participant, for the purpose of exposing such orders to the Primex Crowd. Mandatory Eligible Orders do not include:

*   *   *   *   *

5021. [Anonymity, Execution,] Reporting[,] and Clearing

(a) [Anonymity—The Application will process all activity among Participants

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*The 80% test will be applied on a quarterly basis, and will be phased in as follows: For the calendar quarters commencing on October 1, 2001; January 1, 2002; April 1, 2002; [and] July 1, 2002, *and October 1, 2002,* any participant may register in any eligible security as a Primex Auction Market Maker and maintain that status during such calendar quarters without regard to the percentage of its orders it submits to the System for such security during that time, provided it also satisfies all other requirements of a Primex Auction Market Maker pursuant to these rules.

Beginning with the calendar quarter that commences on [October 1, 2002] *January 1, 2003,* a participant previously registered as a Primex Auction Market Maker for a particular security may maintain its status as such until [December 31, 2002] *March 30, 2003* only if it submitted at least 50% of its Mandatory Eligible Orders during the calendar quarter that commences on [July] *October* 1, 2002 (or during such portion of the calendar quarter that commences on [July] *October* 1, 2002 in which the participant was so registered if the participant registered in mid quarter), provided it also satisfies all other requirements of a Primex Auction Market Maker pursuant to these rules. A participant that is newly registering as a Primex Auction Market Maker for a particular security any time after the start of the calendar quarter that commences on [October 1, 2002] *January 1, 2003* may maintain its status as such until the end of the calendar quarter in which it registered without regard to the percentage of its orders it submits to the System for such security during that time.

Beginning with the calendar quarter that commences on [January] *April* 1, 2003, and each calendar quarter thereafter, a participant previously registered as a Primex Auction Market Maker for a particular security may maintain its status as such until the end of that calendar quarter only if it submitted at least 80% of its Mandatory Eligible Orders during the previous calendar quarter (or during the portion of such previous calendar quarter in which it was so registered if the participant registered in mid quarter), provided it also satisfies all other requirements of a Primex Auction Market Maker pursuant to these rules.

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on an anonymous basis until the end of the day.] After facilitating an execution, the Application will send an execution report to all Participants involved as soon as practicable. The execution report will indicate the details of the transaction, and [but will not] contain the identity of the contra-party. [At the end of each trading day, the actual contra-party for executions obtained within the Application will be made available to the Participants involved through Nasdaq's systems. For regulatory and other necessary purposes, the NASD and Nasdaq will have the ability to determine the identity of the actual contra-parties at any time.]

(b) [Tape Reporting and Clearing—]Matches within the Application are executed and reported through Nasdaq systems for public tape reporting and forwarding to NSCC for clearing, where necessary. Participants (or their clearing brokers) are the parties responsible for the clearance and settlement of all trades executed through the Application. Once a transaction is executed, Participants do not have the ability within the Application to modify or reallocate any portion of the execution to a clearing broker other than the clearing broker that the Application associates with the [Participant] transaction at the time of execution. Neither the NASD (and its affiliates) nor any operator or administrator of the Primex Auction System shall be directly or indirectly a party to any transaction entered into, matched, or otherwise effected through the Application[, notwithstanding that, for the remainder of the trading day after a transaction, the actual contra-parties have not had their identities disclosed to each other by the Application].

*   *   *   *   *

Nasdaq represents that it eliminated the end-of-day anonymity feature to respond to concerns raised by clearing firms, and to harmonize the anonymity features of Primex and SuperMontage. Nasdaq represents that Primex continues to offer pre-trade anonymity, which also is a feature of SuperMontage.

Nasdaq states that Primex originally was designed with an anonymity feature that masked until the end of the day the identity of parties trading in the System. When a match occurred in Primex, the parties would be notified that they executed a trade, but they would not know the identity of their counterparty until the end of the day.[22] At the end of the day, the System would send

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[22] The anonymity feature only masked the identity from the parties to the trade. Nasdaq staff could obtain the identity of the parties immediately.

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messages to the parties revealing the identities of their counterparties. A participant would receive a message for each trade executed in the System. Nasdaq represents that the messages formats were unique to Primex, which required Primex users to program their internal systems to recognize the messages. Nasdaq believes this additional programming requirement created a disincentive for firms to participate in Primex. Nasdaq states that, in particular, clearing firms expressed a concern about the additional programming requirements, and some chose not to make the changes and thus not participate in Primex. Nasdaq states that when a clearing firm chose not to participate, its correspondent firms also could not participate.

Nasdaq represents that it eliminated the anonymity feature to remove this disincentive. With the end-of-day anonymity feature removed, the parties to a trade will be informed of their counterparty's identity immediately upon a match. Therefore, the need for the messages at the end of the day is eliminated. Nasdaq expects this change will result in greater participation in Primex.

To further encourage participation in Primex, Nasdaq represents that it added a feature to assist members in complying with the NASD short sale rule. Specifically, Nasdaq represents that the System has been reprogrammed to prevent appropriately marked orders from executing in violation of this rule. An order that is marked to indicate that it is short sale, for which no exemption from the short sale rule is available (*e.g.*, the market maker exemption), will not execute at or below the current best bid when the current best bid as displayed by Nasdaq is below the preceding best bid in the security.

Primex also has been modified to account for Nasdaq simultaneously operating SuperSoes and SuperMontage. Primex always provided members an option to have certain orders routed to other Nasdaq execution systems after exposure in Primex.[23] Nasdaq represents that, when Primex began operation, the SuperSoes version of NNMS was the only system to which orders in Nasdaq-listed stocks could be forwarded. Recently, however, Nasdaq began to phase in the SuperMontage version of NNMS on a security-by-security basis. As such, until the phase-in is complete, Nasdaq simultaneously will operate SuperSoes and SuperMontage. Accordingly, Primex has the functionality to route orders to

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[23] *See* proposed NASD Rule 5016.

either of these systems, depending on whether the security is eligible for SuperSoes or SuperMontage. Nasdaq states that the functionality for routing orders to either SuperSoes or SuperMontage generally is the same. Only orders that are marked for routing outside Primex will be routed to SuperSoes or SuperMontage, and only after the order has been exposed in Primex and an unexecuted balance remains. While only Market Orders can be routed to SuperSoes, both Fixed Price Orders [24] and Market Orders will be eligible for routing to SuperMontage. Orders routed to SuperMontage will be considered as immediate or cancel orders.

To permit Primex to operate more efficiently with SuperMontage, Nasdaq also modified the System to allow it to accept orders with AIQ and AON conditions. These conditions can be attached to orders submitted to SuperMontage, but Primex originally was not designed to accept these types of orders. The AIQ functionality, when selected, can preclude an order from executing against proprietary interest from the same firm. The AIQ condition may be applied to orders, responses and indications. The function is designed to prevent intra-firm trades that may not be permissible for certain types of accounts, such as those subject to ERISA or an investment advisory relationship.

The AON functionality allows Primex subscribers to place a condition on certain orders that ensures the order will be executed in its entirety or not at all. The AON condition can be used for orders that the subscriber exposes for a "zero-second" auction.

Finally, Nasdaq is modifying the language in proposed NASD Rule 5020 to reflect that it has delayed for an additional calendar quarter the rule implementing the requirement that PAMMs submit a certain percentage of Mandatory Eligible Orders [25] to the System to be eligible for certain features of the System (the "percentage test"). Some firms, especially those that are now expected to participate in Primex because the anonymity feature has been removed, need to reprogram their internal systems to make Primex an order routing destination. Nasdaq believes delaying the percentage test will allow firms to make these changes and gain experience with the System. The percentage test will continue to be measured on a quarterly basis. However,

the phase-in schedule was amended to implement the test starting with the calendar quarter that begins on January 1, 2003, instead of October 1, 2002. Specifically, beginning on January 1, 2003, a participant previously registered as a PAMM can retain this status if it submitted to the System 50% of its Mandatory Eligible Orders during the calendar quarter that commences on October 1, 2002. Beginning on April 1, 2003, and every calendar quarter thereafter, a PAMM can retain its status if it submits 80% of its Mandatory Eligible Orders during the previous calendar quarter.

VI. Amendment No. 3

In Amendment No. 3, Nasdaq seeks permanent approval to (1) change the minimum size requirement for Predetermined Relative Indications from a tiered structure depending on the amount of price improvement, to a standard minimum size requirement of 100 shares, regardless of the amount of price improvement offered; (2) reprogram the System to reject trading interest marked as "short" or "short exempt" in any exchange-listed security eligible for participation in the InterMarket Trading System; and (3) modify proposed NASD Rule 5017 to be consistent with the system change relating to short sales set forth in Amendment No. 2. The amended rule text follows. New language is italicized; deleted language is in brackets.

5017. Short Sales

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(a) Participants [are responsible for] *must properly identify trading interest as a long sale, short sale, or short sale exempt.* [complying with applicable short sale rules when using the Application. No Participant shall submit to the Application an order for a security that, if executed, would result in a "short sale" as that term is defined in Exchange act Rule 3b–3, unless the transaction would be exempt from, or otherwise permissible under, the requirements of NASD Rule 3350 or Exchange Act Rule 10a–1, as applicable.]

(b) The Application will not process trading interest to sell short a Nasdaq-listed security if the execution of such trading interest will violate Rule 3350.

(c) The Application will reject trading interest identified as a short sale or short sale exempt in any exchange-listed security eligible for participation in the InterMarket Trading System.

5018. Responses and Indications

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(c) Indications—Indications are instructions, with the characteristics set forth below, submitted to the Application by Participants to interact with orders exposed in an Auction. An Indication may be a Predefined Relative Indication ("PRI") or a Go-Along Indication.

(1) Predefined Relative Indications
(A) No changes.
(B) At the time of its original entry, each PRI submitted to the Application must be for *at least 100 shares.* [the following share amounts:
(i) NBBO PRIs must be for at least 3000 shares upon entry;
(ii) NBBO +/-.01 or .02 must be for at least 2000 shares upon entry;
(iii) NBBO +/-.03 or greater must be for at least 1000 shares upon entry.]
(C) No changes.
(D) No changes.
(E) No changes.

* * * * *

Nasdaq represents that the graduated PRI size requirement was intended to make it less expensive to offer greater price improvement by requiring less of a share commitment as more price improvement was offered. Discussion with current and prospective users of Primex indicated to Nasdaq that the minimum size requirements are a disincentive to using PRIs because many of the trading strategies that would employ PRIs are most effective if the user has flexibility in the number of shares that must be committed. Nasdaq therefore proposes to eliminate the graduated, minimum size requirement and instead require a commitment of 100 shares, regardless of the amount of price improvement offered. With this change, Primex users would be able to enter PRIs for any round or mixed lot greater than 100 shares. Nasdaq believes this modification will encourage more users to submit PRIs, thus increasing the liquidity in Primex and the opportunities for price improvement.

VII. Discussion

After careful consideration, the Commission finds, for the reasons discussed below, that the proposed rule change, as amended, is consistent with the Act and the rules and regulations applicable to the NASD, a registered securities association.[26] We do not believe, as the NYSE suggests, that the

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[24] The term Fixed Price Order is defined in proposed NASD Rule 5011(n) as an order submitted to Primex to purchase or sell a security at a specified, fixed price or better.

[25] The term "Mandatory Eligible Order" is defined in proposed NASD Rules 5011 and 5020.

[26] In this regard, the Commission disagrees with NYSE's argument that it must apply statutory requirements applicable to registered exchanges to Primex. The Commission notes that Nasdaq operates Primex as a facility of the NASD. The NASD is a registered securities association under Section 15A of the Act and is not a registered exchange under Section 6 of the Act. Nasdaq's application for registration as an exchange is pending with the Commission.

fact that Primex allows dealers to internalize customer orders should be viewed as a reason to deny permanent approval of Primex. The Commission believes that Primex may provide an opportunity for customer orders to receive price improvement, even if the customer order is internalized. In addition, the Commission believes that Primex may provide an opportunity for customer orders to be exposed to possible execution by market participants other than the Primex participant that brought the order to Primex. The Commission notes that its analysis of these issues may change in the context of Nasdaq's exchange application.

In addition, the Commission believes the proposal is consistent with Rule 19b–5(f)(1) under the Act,[27] because it has been submitted within two years after commencement of the operation of the System.

The Commission finds good cause for approving Amendment No. 1 of the proposed rule change prior to the thirtieth day after notice of the publication in the **Federal Register**. The language to be deleted by the amendment was inadvertently included; Amendment No. 1 reflects the current rules governing Primex's operation. The Commission also finds good cause for approving Amendment No. 2 of the proposed rule change prior to the thirtieth day after notice of the publication in the **Federal Register.** Amendment No. 2 also reflects the current rules governing Primex's operation. In addition, Amendment No. 2 removes a disincentive to participation in Primex by deleting a programming requirement associated with an end-of-day anonymity feature; assists participants in complying with the Short Sale Rule by adding a useful feature that prevents violative orders from executing on the System; promotes opportunities for greater order interaction and possible price improvement by allowing unexecuted Primex orders to be routed to SuperMontage; and enhances Primex as a potential order-routing destination by providing firms with additional time to program their internal systems to accommodate Primex. The Commission also finds good cause for approving Amendment No. 3 of the proposed rule change prior to the thirtieth day after notice of the publication in the **Federal Register.** Amendment No. 3 also reflects the current rules governing Primex's operation. In addition, Amendment No. 3 assists participants in complying with the Short Sale Rule and removes a

disincentive to participation in Primex by implementing a less restrictive minimum size requirement for PRIs. The Commission believes Amendment Nos. 1, 2, and 3 are consistent with Sections 15A(b)(6) and (11), and 11A(a)(1)(C) of the Act,[28] and Rule 19b–5 under the Act,[29] and therefore the approval of Amendment Nos. 1, 2, and 3 on an accelerated basis is appropriate.

Interested persons are invited to submit written data, views, and arguments concerning Amendment Nos. 1, 2, and 3, including whether the proposed amendments are 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 amendments that are filed with the Commission, and all written communications relating to the amendments 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 also will be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR–NASD–2002–60 and should be submitted by March 12, 2003.

VIII. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[30] that the proposed rule change (SR–NASD–2002–60) is approved and Amendment Nos. 1, 2, and 3 are approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[31]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–3945 Filed 2–18–03; 8:45 am]

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[28] 15 U.S.C. 78*o*–3(b)(6) and (11), and 15 U.S.C. 78k–1(a)(1)(C).

[29] 17 CFR 240.19b–5.

[30] 15 U.S.C. 78s(b)(2).

[31] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47350; File No. SR–NASD–2003–16]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Listing and Trading of the Dreyer's Grand Ice Cream Holdings, Inc. Callable Puttable Common Stock

February 11, 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 February 6, 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 (''Commission'' or ''SEC'') the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and to approve the proposal on an accelerated basis.

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

Nasdaq proposes to list and trade the Dreyer's Grand Ice Cream Holdings, Inc. (''New Dreyer's'') class A callable puttable common stock (''Common Stock'').

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 III below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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[27] 17 CFR 240.19b–5(f)(1).