

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-55669; File No. SR-NASDAQ-2006-065)

April 25, 2007

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change and Amendments No. 1, 2, and 3 Thereto to Reestablish a Quotation and Trading System for Securities That are Designated by The PORTAL® Market as PORTAL Securities

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 December 22, 2006, The NASDAQ Stock Market LLC (“Nasdaq”), 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 substantially prepared by Nasdaq. On March 6, 2007, Nasdaq filed Amendment No. 1 to the proposed rule change.³ On April 3, 2007, Nasdaq filed Amendment No. 3 to the proposed rule change.⁴ 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 the Substance of the Proposed Rule Change

Nasdaq proposes to reestablish a quotation and trading system for securities that are designated by The PORTAL® Market (“PORTAL” or the “PORTAL Market”) as PORTAL securities.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 replaced and superseded the original filing in its entirety.

⁴ Amendment No. 2 was filed and withdrawn on April 3, 2007.

The text of the proposed rule change is available on Nasdaq's Web site at <http://www.nasdaq.com>, at Nasdaq's principal office, and at the Commission's Public Reference Room.

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

Background

Nasdaq currently operates the PORTAL Market for securities that were sold in private placements and are eligible for resale under SEC Rule 144A⁵ adopted under the Securities Act of 1933 ("Securities Act"). The National Association of Securities Dealers, Inc. ("NASD") created the PORTAL Market in 1990,⁶ simultaneously with the

⁵ 17 CFR 230.144A.

⁶ See Securities Exchange Act Release No. 27956 (April 27, 1990), 55 FR 18781 (May 4, 1990) (SR-NASD-88-23). The PORTAL Rules were subsequently amended. See Securities Exchange Act Release Nos. 28678 (December 6, 1990), 55 FR 51194 (December 12, 1990) (SR-NASD-90-50); 33326 (December 13, 1993), 58 FR 66388 (December 20, 1993) (SR-NASD-91-5); 34562 (August 19, 1994), 59 FR 44210 (August 26, 1994) (SR-NASD-94-39); 35083 (December 12, 1994), 59 FR 65104 (December 16, 1994) (SR-NASD-94-65); 40424 (September 10, 1998), 63 FR 49623 (September 16, 1998) (SR-NASD-98-68); 43873 (January 23, 2001), 66 FR 8131 (January 29, 2001) (SR-NASD-99-65); 44042

SEC's adoption of Rule 144A,⁷ for the purposes of quotation, trading, and trade reporting in securities deemed eligible by the NASD for resale under Rule 144A. Rule 144A provides an exemption from registration under Section 5 of the Securities Act⁸ for resales of privately placed securities to investors that meet the eligibility requirements of being a qualified institutional buyer ("QIB") under Rule 144A(a)(1),⁹ i.e., institutional investors that in the aggregate own or invest on a discretionary basis at least \$100 million in securities and broker/dealers that in the aggregate own or invest on a discretionary basis at least \$10 million in securities. The Depository Trust Company ("DTC") can make Rule 144A securities eligible for deposit, book-entry delivery, and other depository services provided that such Rule 144A securities, except in the case of investment grade rated debt,¹⁰ are designated for inclusion in a system of a self-regulatory organization ("SRO") for the reporting, quoting and trading of Rule 144A securities. An issuer of an investment grade rated debt issue can apply directly to DTC for book-entry services under DTC rules ("Rule 144A investment grade rated debt issues") and need not also qualify the security as a PORTAL-designated security.¹¹

(March 6, 2001), 66 FR 14969 (March 14, 2001) (SR-NASD-99-66); NASD Notice to Members 01-19 (March 2001) (the "2001 PORTAL rule filing").

⁷ See Securities Exchange Act Release No. 27928 (April 23, 1990), 55 FR 17933 (April 30, 1990).

⁸ 15 U.S.C. 77e.

⁹ 17 CFR 230.144A(a)(1).

¹⁰ Investment grade rated debt includes nonconvertible debt securities and nonconvertible preferred stock that are rated in one of the top four generic rating categories by a nationally recognized statistical rating organization.

¹¹ See Securities Exchange Act Release No. 33327 (December 13, 1993), 58 FR 67878 (December 22, 1993) (SR-DTC-90-06).

The sole current function of Nasdaq related to the PORTAL Market is to review whether an issue of privately placed securities meets the eligibility requirements of Rule 144A,¹² thereby qualifying the securities for DTC book-entry services. The PORTAL Market, as originally approved by the SEC in 1990, was intended to function as a system that would allow NASD members and QIBs to trade PORTAL-designated securities in a closed system in compliance with SEC Rule 144A. Thus, the PORTAL rules included requirements to qualify NASD members and QIBs as “PORTAL Participants” for qualified NASD members to enter quotations in PORTAL securities and to submit trade reports for PORTAL trades to the PORTAL system for comparison, clearance, and settlement.

These market-related functions in PORTAL securities as originally approved by the SEC in 1990 did not, however, develop as anticipated. In particular, Nasdaq believes that the NASD’s adoption of PORTAL rules that imposed trade reporting for all transactions in PORTAL securities, which occurred at a time when no trade reporting requirements applied to privately-placed securities in general, ultimately were not implemented because of: (1) a cumbersome technology for access to the PORTAL Market computer system for reporting purposes, which was a stand-alone computer

¹² Nasdaq staff historically had responsibility for review of PORTAL Market applications to determine the eligibility of securities and, originally, PORTAL Participants (including broker/dealers and investors). Upon the separation of Nasdaq from the NASD and the approval of Nasdaq as a registered national securities exchange under Section 6 of the Act, the review functions for PORTAL Market eligibility were retained by Nasdaq, and the PORTAL Market rules in the NASD Rule 5300 Series became the Nasdaq Rule 6500 Series. See Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006).

system; and (2) resistance to the imposition of trade reporting in Rule 144A equity and in both Rule 144A and SEC-registered debt.

In a continuing effort to encourage trade-reporting in PORTAL-designated securities, the NASD obtained SEC approval in 1998 of an interpretation of the definition of the term “ACT Eligible Security” in NASD Rule 6110(a) for the Automated Confirmation Transaction Service (“ACT”)¹³ to include all securities designated as PORTAL securities pursuant to the PORTAL rules to the extent transactions in such PORTAL-designated securities were voluntarily submitted to ACT solely for reconciliation and comparison.¹⁴ In addition, the NASD submitted a letter to the Divisions of Market Regulation and Corporation Finance of the SEC, dated November 16, 1998, advising that the NASD would eliminate the Stratus computer system that supported the PORTAL Market. On January 23, 2001, the SEC approved the establishment of a corporate bond trade reporting and transaction dissemination facility, known as the Trade Reporting and Compliance Engine or “TRACE,”¹⁵ which required

¹³ ACT is a system owned and operated by Nasdaq that accommodates reporting and dissemination of last sale reports for secondary market transactions in equity securities and can provide automated comparison and confirmation services and can forward confirmed trades to DTC for settlement. The OTC Trade Reporting Facility provides the same functions for reporting trades in PORTAL equity securities as previously performed by ACT.

¹⁴ See Securities Exchange Act Release No. 40424 (September 10, 1998), 63 FR 49623 (September 16, 1998) (SR-NASD-98-68).

¹⁵ TRACE is a system operated by the NASD that facilitates the mandatory reporting of over-the-counter secondary market transactions in eligible fixed income securities. See NASD Rule 6200 Series.

trade reporting in most PORTAL designated securities and investment grade debt Rule 144A securities that are DTC eligible.¹⁶

On March 6, 2001,¹⁷ the SEC approved amendments to the PORTAL rules to require that NASD members submit trade reports of secondary market transactions in PORTAL-designated equity securities through ACT and of most PORTAL-designated debt securities through TRACE.¹⁸ Only trade reporting obligations were imposed with respect to secondary market transactions in PORTAL equity and debt securities.

The use of TRACE and ACT for mandatory trade reporting of secondary market transactions in PORTAL securities was intended to address the technological and cost problems that were associated with the reporting of such trades through the stand-alone PORTAL computer system. The SEC also, as part of the same rule change, approved the

¹⁶ See Securities Exchange Act Release No. 43873 (January 23, 2001), 66 FR 8131 (January 29, 2001) (and related NASD Notice to Members 01-18 (March 2001)). Other changes were subsequently made to the TRACE rules. See Securities Exchange Act Release Nos. 48056 (June 18, 2003), 68 FR 37886 (June 25, 2003) (SR-NASD-2003-78) (and related NASD Notice to Members 03-36 (June 2003)); 48305 (August 8, 2003), 68 FR 48656 (August 14, 2003) (SR-NASD-2003-99) (and related NASD Notice to Members 03-45 (August 2003)); 49854 (June 14, 2004), 69 FR 35088 (June 23, 2004) (SR-NASD-2004-57) (and related NASD Notice to Members 04-51 (July 2004)); 50317 (September 3, 2004), 69 FR 55202 (September 13, 2004) (SR-NASD-2004-94) (and related NASD Notice to Members 04-65 (September 2004)); 50977 (January 6, 2005), 70 FR 2202 (January 12, 2005) (SR-NASD-2004-189) (and related NASD Notice to Members 05-05 (January 2005)); 51611 (April 26, 2005), 70 FR 22735 (May 2, 2005) (SR-NASD-2005-026) (and related NASD Notice to Members 05-37 (May 2005)); 52183 (August 1, 2005), 70 FR 46239 (August 9, 2005) (SR-NASD-2005-63) (and related NASD Notice to Members 05-52 (August 2005)); 53031 (December 28, 2005), 71 FR 634 (January 5, 2006) (SR-NASD-2005-120) (and related NASD Notice to Members 06-01 (January 2006)).

¹⁷ See supra, note 6, the 2001 PORTAL rule filing.

¹⁸ A limited number of PORTAL debt securities are not subject to trade reporting to TRACE, e.g., mortgage or asset backed securities, collateralized mortgage obligations, money market instruments, and municipal and municipal-derivative securities.

elimination of a large number of obsolete provisions in the PORTAL rules, including the registration requirements for NASD members and QIBs to trade in a closed system, rules regulating the quotation and trading of PORTAL securities, and the unsuccessful PORTAL trade reporting requirements.¹⁹

The Current Trading Environment for PORTAL Securities

The market, trading, and technological environments for PORTAL securities have evolved. As stated previously, mandatory trade reporting applies to almost all PORTAL securities. Today, pursuant to NASD Rule 6700 Series, trade reports in all PORTAL-designated equity securities are submitted to the NASD's OTC Reporting Facility ("OTC Reporting Facility")²⁰ and trade reports in most PORTAL-designated debt securities continue to be submitted to TRACE. There is no public dissemination in any form of information in trade reports submitted with respect to PORTAL securities and depository-eligible Rule 144A investment grade rated debt issues. NASD provides ongoing surveillance of the trade reports in PORTAL securities that are submitted through the OTC Reporting Facility and TRACE, including trade reports with respect to PORTAL securities and depository-eligible Rule 144A investment grade rated debt issues.

The existence of mandatory trade reporting for most PORTAL securities has led to an increased interest on the part of the securities industry for greater market transparency in PORTAL securities in the form of centralized quotations and last sale

¹⁹ In another rule change, the NASD amended the Uniform Practice Code to apply to re-sales of restricted securities as defined in Rule 144(a)(3) under the Securities Act. See Securities Exchange Act Release No. 38491 (April 9, 1997), 62 FR 18665 (April 16, 1997) (SR-NASD-97-06); see also Section 11100(a) of the NASD Uniform Practice Code.

²⁰ See NASD Rule 6600 Series.

trade information. In addition, technological advances now allow a quotation, trade negotiation, and reporting system to be more easily integrated into the existing PORTAL Market structure.

Nasdaq's PORTAL Proposal

Nasdaq is proposing to establish an updated version of the PORTAL Market that was originally envisioned when PORTAL was first approved in 1990. The proposed amendments to the PORTAL rules will: (i) establish qualification requirements for brokers and dealers that are Nasdaq members and QIBs that wish to access PORTAL; and (ii) implement quotation, trade negotiation and trade reporting functions in the PORTAL Market with respect to PORTAL-designated securities. Most of the proposed amendments were previously approved by the Commission with respect to the earlier attempt by the NASD to establish PORTAL as a closed trading system for Rule 144A securities. Nasdaq's proposed PORTAL system is summarized below.

Security Designation: Nasdaq will continue to qualify "restricted securities," as that term is defined in SEC Rule 144(a)(3)²¹ and securities that are restricted pursuant to contract or through the terms of the security for designation as PORTAL securities based on, among other things, the security and information requirements for the resale of a security under Rule 144A(d)(3) and (d)(4).²² Thus, PORTAL securities must not be, or have been when issued, of the same class as securities listed on a national securities exchange or quoted in a U.S. automated inter-dealer quotation system, nor be securities of an open-end investment company, unit investment trust or face-amount certificate company that is or is required to be registered under Section 8 of the Investment

²¹ 17 CFR 230.144(a)(3).

²² 17 CFR 230.144A(d)(3) and (d)(4).

Company Act of 1940. With respect to the information requirements under Rule 144A(d)(4), an issuer of a PORTAL-designated security must be subject to reporting under Section 13 of the Act²³ or Section 15(d) of the Act,²⁴ a foreign private issuer that is exempt from reporting pursuant to Rule 12g3-2(b) under the Act,²⁵ a foreign government eligible to register securities under Schedule B of the Securities Act, or include disclosure in the private placement memorandum that the issuer agrees to provide to a holder of a Rule 144A security and a prospective purchaser designated by the holder reasonably current information about the issuer's business and financial statements.

As a matter of practice, PORTAL designation is limited to those Rule 144A securities that are initially sold to QIBs by a broker/dealer acting as initial placement agent or initial purchaser.²⁶ Moreover, Nasdaq will continue to have authority under PORTAL rules to suspend or terminate the designation of a PORTAL security if Nasdaq determines that the security is not in compliance with PORTAL rules, a holder or prospective purchaser that requested information pursuant to Rule 144A(d)(4) did not receive the information, any application or other document relative to such securities

²³ 15 U.S.C. 78m.

²⁴ 15 U.S.C. 78o(d).

²⁵ 17 CFR 240.12g3-2(b).

²⁶ Current Rule 6522(a)(4) requires that a PORTAL security be assigned a CUSIP number that is different than the identification number assigned to any unrestricted securities of the same class. As a matter of practice by PORTAL and Standard & Poor's ("S&P"), the CUSIP number assigned to those securities that are initially sold to QIBs pursuant to Rule 144A is different than the CUSIP numbers assigned to those securities that are part of the same offering that are sold to accredited investors pursuant to SEC Regulation D and to non-U.S. investors under SEC Regulation S. Thus, PORTAL-designation is limited to those securities that have initially been sold to QIBs. Nasdaq is proposing to amend this rule, which will be renumbered Rule 6502(b)(1)(D), to reflect this policy.

submitted to Nasdaq contained an untrue statement of material fact or omitted to state a material fact necessary to make the statements therein not misleading, or failure to withdraw designation of such securities would for any reason be detrimental to the interests and welfare of Nasdaq, Nasdaq members, or investors.

Broker/Dealer Access: Similar to NASD's original PORTAL system approved by the SEC, Nasdaq members that meet the PORTAL qualification requirements will be designated as "PORTAL Dealers" and "PORTAL Brokers." The purpose of distinguishing between Nasdaq members that qualify as "PORTAL Dealers" and "PORTAL Brokers" is to identify in PORTAL those Nasdaq members that qualify as a QIB under Rule 144A to purchase Rule 144A securities on a principal basis. To qualify as a PORTAL Broker, a Nasdaq member will be required by PORTAL rules to execute a subscriber agreement with PORTAL, be a member of Nasdaq, be qualified to do business as a general securities firm, and agree to comply with the PORTAL rules. Pursuant to Rule 144A(a)(1)(iii), a dealer registered under Section 15 of the Act²⁷ is authorized to act as an agent for a QIB on a non-discretionary basis pursuant to Rule 144A or to act in a riskless principal capacity on behalf of a QIB. To qualify as a PORTAL Dealer, a Nasdaq member will be required by PORTAL rules to meet these same requirements and also to demonstrate to the satisfaction of Nasdaq that it is eligible to purchase securities under the financial criteria of SEC Rule 144A. Under Rule 144A(a)(1)(ii), a dealer so registered will qualify as a QIB if the dealer in the aggregate owns and invests on a discretionary basis at least \$10 million of securities of issuers that are not affiliated with the dealer and may act for its own account or the accounts of other QIBs. Nasdaq

²⁷ 15 U.S.C. 78o.

proposes to qualify a Nasdaq member as a PORTAL Dealer based on the member's Audited Financial Statements filed with the SEC pursuant to Rule 17a-5(d) under the Act.²⁸ Nasdaq would annually update its qualification of PORTAL Dealers.

PORTAL Dealers and PORTAL Brokers would be permitted to post anonymous one- or two-sided indicative quotations in PORTAL securities that may be accessed by other PORTAL Dealers and Brokers and QIBs qualified as "PORTAL Qualified Investors."²⁹ In addition, PORTAL Dealers and Brokers will be permitted to negotiate anonymously, execute trades in PORTAL securities, and submit trade reports in PORTAL-negotiated trades that will be forwarded to TRACE and the OTC Reporting Facility for comparison and confirmation.

Investor Access: Like the original PORTAL system approved by the SEC, an institution that executes a subscriber agreement, agrees to comply with the PORTAL rules and meets the \$100 million standard of being a QIB under Rule 144A would be qualified by Nasdaq as a "PORTAL Qualified Investor" to access the PORTAL Market through a password protected linkage and view quotations by PORTAL Dealers and PORTAL Brokers, and confirm transactions where the investor uses a PORTAL Dealer or Broker to execute a trade in PORTAL. In addition, in order to comply with the requirement of Rule 144A(d)(2) that the seller of Rule 144A securities take reasonable steps to ensure that the purchaser is aware that the seller may rely on Rule 144A, the subscriber agreement will include an undertaking that the PORTAL Qualified Investor is

²⁸ 17 CFR 240.17a-5(d).

²⁹ The SEC noted that pursuant to Rule 144A, broker/dealers are permitted to enter quotations in an inter-dealer quotation system so long as the offer is made to QIBs or persons whom dealers reasonably believe to be QIBs. See supra, note 6, the 2001 PORTAL rule filing.

aware that it may purchase a PORTAL security from another qualified investor who may rely on an exemption from the provisions of Section 5 of the Securities Act.³⁰

Trade Negotiation/Execution: Unlike the original PORTAL system, the reestablished PORTAL system would use electronic negotiation features in order to allow PORTAL Dealers and PORTAL Brokers to negotiate both openly and anonymously and execute trades in PORTAL securities. All quotes in the PORTAL system will be indicative, not firm. Once an anonymous trade is negotiated in the PORTAL system, the identity of the counter-parties will be revealed to each other for purposes of comparison, confirmation, and settlement.

Trade Reporting: Trade reports in reportable PORTAL debt and equity securities will continue to be submitted to the TRACE and the OTC Reporting Facility, respectively. In addition, PORTAL-negotiated trades will be submitted through the PORTAL System to TRACE and the OTC Reporting Facility. Nasdaq also intends to provide the ability to forward PORTAL trades to an appropriate subsidiary of Depository Trust and Clearing Corporation for settlement.

Dissemination of PORTAL Trade Report Information: All trade report information for trades that are negotiated via the PORTAL system will be disseminated in PORTAL to PORTAL Brokers, Dealers and Qualified Investors (“PORTAL Participants”), but would not include the identity of the parties and, in the case of PORTAL debt, would not aggregate or otherwise follow the dissemination protocols applicable to debt trades reported to TRACE.³¹ PORTAL Participants would be

³⁰ 15 U.S.C. 77(e).

³¹ Trade report information on Rule 144A investment grade debt that is not a PORTAL security would not be disseminated in PORTAL. To the extent that

prohibited from disclosing any PORTAL Market information, including quotations, transactions and other information displayed in the PORTAL Market (“PORTAL Market Information”), to any party other than another PORTAL Participant. Nasdaq will not disseminate PORTAL Market Information to the public.

Regulatory Surveillance: NASD currently provides and would continue to provide surveillance of the trade reports in PORTAL securities that are submitted through TRACE and the OTC Reporting Facility. Real-Time Surveillance of quoting and trading activity in the PORTAL system will be conducted by Nasdaq’s MarketWatch Department.

SEC Exemptions

As part of its original review and approval of a PORTAL trading system, the Commission and its staff granted several exemptions and no-action requests to the NASD as the then-operator of the PORTAL Market and made other related determinations. Nasdaq, through letter requests to be separately submitted to the Commission, will seek the issuance of similar and new exemptions so as to allow the operation of the PORTAL trading system as described in this filing. In summary, Nasdaq is seeking Commission exemptions in following areas:

SEC Rule 15c2-11: Through a separate letter request, Nasdaq is seeking an exemption from Rule 15c2-11 under the Act³² with respect to the gathering and furnishing of the prescribed information by PORTAL Dealers and PORTAL Brokers that

Nasdaq members desire to quote, execute, and view trade report information on any Rule 144A investment grade debt security in PORTAL, the security must be qualified as a PORTAL security.

³² 17 CFR 240.15c2-11.

intend to publish, or submit for publication, quotations for PORTAL-designated securities through the PORTAL system.

Registration Under Section 12(g) of the Act: Through a separate letter request, Nasdaq is seeking an exemption from the provisions of Section 12(g) of the Act³³ to permit Nasdaq members and brokers and dealers to trade PORTAL-designated equity securities that are not registered under Section 12(g) of the Act.³⁴

Registration Under Section 12(b) of the Act: Through a separate letter request, Nasdaq is seeking an exemption from the provisions of Section 12(a) of the Act³⁵ to permit Nasdaq members and brokers and dealers to trade PORTAL securities that are not registered under Section 12(b) of the Act.³⁶

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,³⁷ in general and with Section 6(b)(5) of the Act,³⁸ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, remove impediments to a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, the proposal can be expected to enhance the efficiency and transparency of trading Rule 144A securities.

In addition, Nasdaq believes that the proposed rule change is consistent with

³³ 15 U.S.C. 78l(g).

³⁴ Id.

³⁵ 15 U.S.C. 78l(a).

³⁶ 15 U.S.C. 78l(b).

³⁷ 15 U.S.C. 78f.

³⁸ 15 U.S.C. 78f(b)(5).

Section 11A(a)(1) of the Act.³⁹ Section 11A(a)(1) articulates the Congressional findings and policy goals and objectives respecting the development of a national market system. Essentially, Congress found that new data processing and communication techniques should be applied to improve the efficiency of market operations, broaden the distribution of market information, enhance opportunities to achieve best execution and promote competition among market participants. That provision stresses the importance of implementing communication enhancements that will advance the efficiency and effectiveness of a securities market in servicing the needs of investors. Currently, the secondary placement market in unregistered securities is a traditional over-the-counter market, in which negotiations are conducted over the phone without the benefit of a quotation or last sale trade information dissemination system. Nasdaq believes that the proposed amendments to the PORTAL Market will provide these benefits and, thus, will enhance the efficiency of the market's operation in Rule 144A-eligible securities.

Rule 144A Under the Securities Act: Because Nasdaq has designed the amendments to the PORTAL Market to facilitate compliance with Rule 144A, Section 6(b)(1) of the Act⁴⁰ also requires a determination as to whether it is reasonably designed to accomplish this purpose.⁴¹ Nasdaq believes that the PORTAL system is designed to provide that participants who comply with its requirements will also be in compliance

³⁹ 15 U.S.C. 78k-1(a)(1).

⁴⁰ 15 U.S.C. 78f(b)(1).

⁴¹ Section 6(b)(1) of the Act requires that Nasdaq, as a national securities exchange, be so organized and have the capacity to enforce compliance with, among other things, the federal securities laws. See 15 U.S.C. 78f(b)(1).

with the requirements of Rule 144A, except where information is not provided upon request in compliance with Rule 144A(d)(4).

Rule 144A is available only to institutional investors meeting the definition of “qualified institutional buyer” under Rule 144A(a)(1). A seller is required to form a reasonable belief that a purchaser is a “qualified institutional buyer” as the term is defined in Rule 144A(a)(1). With the exception of broker-dealers, a qualified institutional buyer is required to in the aggregate own and invest on a discretionary basis at least \$100 million in securities of non-affiliated issuers. The proposed amendments to the PORTAL rules require that any investor applying to qualify as a PORTAL Qualified Investor meet the Rule 144A standards for qualified institutional buyers.

Rule 144A(d)(2) requires that the seller of 144A securities take reasonable steps to ensure that the purchaser is aware that the seller may rely on Rule 144A. To meet this requirement of Rule 144A, the proposed amendments to the PORTAL rules also provide in the designation requirements for PORTAL Qualified Investors that applicants sign an undertaking in a subscriber agreement that states that they are aware that they may purchase a PORTAL security from another qualified investor who may rely on an exemption from the provisions of Section 5 of the Securities Act⁴² pursuant to Rule 144A.

The PORTAL rules also have current eligibility requirements for admitting securities into the PORTAL system that parallel the Rule 144A eligibility requirements for securities. The PORTAL rules require, therefore, that the security be eligible to be sold pursuant to Rule 144A under the Securities Act. The application for designation of a

⁴² 15 U.S.C. 77(e).

PORTAL security requires the submission of specific information necessary to support the applicant's claim that the security meets the requirements of Rule 144A. In addition, the current PORTAL Rules provide Nasdaq with the authority to request any additional information that Nasdaq believes is necessary to make a determination of whether a security is eligible under Rule 144A.⁴³

Furthermore, Rule 144A conditions the eligibility of certain securities under Rule 144A on certain information being available to holders and prospective purchasers. Rule 144A(d)(4) provides that, with respect to securities of an issuer that is neither subject to Section 13 of the Act⁴⁴ nor Section 15(d) of the Act,⁴⁵ nor exempt from reporting pursuant to Rule 12g3-2(b) under the Act,⁴⁶ nor a foreign government eligible to register securities under Schedule B of the Securities Act, the holder and a prospective purchaser designated by the holder must have the right to obtain from the issuer, upon request of the holder, and the purchaser must have received at or prior to the time of sale, upon such purchaser's request to the holder, certain information about the issuer. Because the PORTAL rules currently require that a security meet the Rule 144A security eligibility requirements and that the issuer undertake to provide the information required by Rule 144A(d)(4), where applicable, Nasdaq must, as part of the PORTAL security designation process, assess whether the issuer is required to provide such information to holders and prospective purchasers.

⁴³ See Nasdaq Rules 6521(a) and 6522(a)(5).

⁴⁴ 15 U.S.C. 78m.

⁴⁵ 15 U.S.C. 78o(d).

⁴⁶ 17 CFR 240.12g3-2(b).

In addition to structuring the PORTAL rules to provide that participants who comply with its requirements also are in compliance with the requirements of Rule 144A, the proposed rule change would structure PORTAL to limit the possibility that unregistered securities enter the U.S. retail market by requiring that PORTAL-designated securities be assigned a CUSIP or CINS security identification number that is different than the identification number assigned to any securities of the same class that do not satisfy the eligibility requirements for PORTAL securities. Since the original approval of the PORTAL Market, the security explanation protocol employed by S&P related to the CUSIP number assigned to PORTAL securities specifically distinguishes those securities from all other publicly-traded and restricted securities by using the words “Rule 144A” and “PORTAL.” For these reasons, Nasdaq believes that the PORTAL system, as proposed, is reasonably designed to facilitate compliance with Rule 144A, so long as there is compliance with the PORTAL rules and procedures, except where information is not provided on request pursuant to Rule 144A(d)(4).

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.

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

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which Nasdaq consents, the Commission will:

- (A) by order approve such proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2006-065 on the subject line.

Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2006-065. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The

Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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 also will be available for inspection and copying at the principal office of the Nasdaq. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to

File Number SR-NASDAQ-2006-065 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁴⁷

Florence E. Harmon
Deputy Secretary

⁴⁷ 17 CFR 200.30-3(a)(12).