

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-49427; File No. SR-NASD-2004-032)

March 16, 2004

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. to Modify NASD Rule 4619 with Respect to Certain Excused Withdrawal Requests

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder², notice is hereby given that on February 24, 2004, the National Association of Securities Dealers, Inc. (“NASD”), through its subsidiary, The Nasdaq Stock Market, Inc. (“Nasdaq”), submitted to the Securities and Exchange Commission (“Commission” and “SEC”) the proposed rule change as described in Items I, II and III below, which Items have been prepared by Nasdaq. On March 15, 2004, the NASD filed Amendment No. 1 to the proposed rule change.³ Nasdaq filed this proposal pursuant to Section 19(b)(3)(A)(iii) of the Act⁴ and Rule 19b-4(f)(3)⁵ thereunder, as one concerned solely with the administration of the self-regulatory organization, which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons, as amended.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 March 12, 2004 (“Amendment No. 1”). Amendment No. 1 replaces the original filing in its entirety.

⁴ 15 U.S.C. 78s(b)(3)(A)(iii).

⁵ 17 CFR 240.19b-4(f)(3).

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

Nasdaq proposes to modify NASD Rule 4619, which will shift the administration of a limited subset of existing excused withdrawal requests from one department to another department.

Below is the text of the proposed rule change. Proposed new language is italics; proposed deletions are in [brackets].

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4619. Withdrawal of Quotations and Passive Market Making

- (a) [A]Except as provided in paragraph (b) of this Rule, a market maker that wishes to withdraw quotations in a security or have its quotations identified as the quotations of a passive market maker shall contact Nasdaq MarketWatch to obtain excused withdrawal status prior to withdrawing its quotations or identification as a passive market maker. Withdrawals of quotations or identifications of quotations as those of a passive market maker shall be granted by Nasdaq MarketWatch only upon satisfying one of the conditions specified in this Rule.
- (b) A market maker that wishes to obtain excused withdrawal status based on a market maker's systemic equipment problems, such as defects in a market maker's software or hardware systems or connectivity problems associated with the circuits connecting Nasdaq's systems with the market maker's systems, shall contact Nasdaq Market Operations. Nasdaq Market Operations may grant excused withdrawal status based on systemic equipment problems for up to five (5) business days, unless extended by Nasdaq Market Operations.

(c) Excused withdrawal status based on circumstances beyond the market maker's control, other than systemic equipment problems, may be granted for up to five (5) business days, unless extended by Nasdaq MarketWatch. Excused withdrawal status based on demonstrated legal or regulatory requirements, supported by appropriate documentation and accompanied by a representation that the condition necessitating the withdrawal of quotations is not permanent in nature, may, upon notification, be granted for not more than sixty (60) days (unless such request is required to be made pursuant to paragraph (d) below). Excused withdrawal status based on religious holidays may be granted only if written notice is received by the Association one business day in advance and is approved by the Association. Excused withdrawal status based on vacation may be granted only if:

- (1) the written request for withdrawal is received by the Association one business day in advance, and is approved by the Association
- (2) the request includes a list of the securities for which withdrawal is requested; and
- (3) the request is made by a market maker with three (3) or fewer Nasdaq level 3 terminals. Excused withdrawal status may be granted to a market maker that has withdrawn from an issue prior to the public announcement of a merger or acquisition and wishes to re-register in the issue pursuant to the same-day registration procedures contained in Rule 4611 above, provided the market maker has remained registered in one of the affected issues. The withdrawal of quotations because of pending news, a sudden influx of orders or

price changes, or to effect transactions with competitors shall not constitute acceptable reasons for granting excused withdrawal status.

[(c)] (d) Excused withdrawal status may be granted to a market maker that fails to maintain a clearing arrangement with a registered clearing agency or with a member of such an agency and is withdrawn from participation in the Automated Confirmation Transaction service, thereby terminating its registration as a market maker in Nasdaq issues. Provided however, that if the Association finds that the market maker's failure to maintain a clearing arrangement is voluntary, the withdrawal of quotations will be considered voluntary and unexcused pursuant to Rule 4620 and the Rule 4700 Series governing the Nasdaq National Market Execution System. Market makers that fail to maintain a clearing relationship will have their NNMS system status set to "suspend" and be thereby prevented from entering, or executing against, any quotes/orders in the system.

[(d)] (e) Excused withdrawal status or passive market maker status may be granted to a market maker that is a distribution participant (or, in the case of excused withdrawal status, an affiliated purchaser) in order to comply with SEC Rule 101, 103, or 104 under the Act on the following conditions:

- (1) A member acting as a manager (or in a similar capacity) of a distribution of a Nasdaq security that is a subject security or reference security under SEC Rule 101 and any member that is a distribution participant or an affiliated purchaser in such a distribution that does not have a manager shall provide written notice to Nasdaq MarketWatch and the Market Regulation

D[d]epartment of NASD Regulation, Inc. no later than the business day prior to the first entire trading session of the one-day or five-day restricted period under SEC [r]Rule 101, unless later notification is necessary under the specific circumstances.

- (A) [t]The notice required by subparagraph [(d)](e)(1) of this Rule shall be provided by submitting a completed Underwriting Activity Report that includes a request on behalf of each market maker that is a distribution participant or an affiliated purchaser to withdraw the market maker's quotations, or that includes a request on behalf of each market maker that is a distribution participant (or an affiliated purchaser of a distribution participant) that its quotations be identified as those of a passive market maker and includes the contemplated date and time of the commencement of the restricted period.
- (B) The managing underwriter shall advise each market maker that it has been identified as a distribution participant or an affiliated purchaser to Nasdaq MarketWatch and that its quotations will be automatically withdrawn or identified as passive market maker quotations, unless a market maker that is a distribution participant (or an affiliated purchaser of a distribution participant) notifies Nasdaq MarketWatch as required by subparagraph [(d)](e)(2), below.

- (2) A market maker that has been identified to Nasdaq MarketWatch as a distribution participant (or an affiliated purchaser of a distribution participant) shall promptly notify Nasdaq MarketWatch and the manager of its intention not to participate in the prospective distribution or not to act as a passive market maker in order to avoid having its quotations withdrawn or identified as the quotations of a passive market maker.
- (3) If a market maker that is a distribution participant withdraws its quotations in a Nasdaq security in order to comply with the net purchases limitation of SEC Rule 103 or with any other provision of SEC Rules 101, 103, or 104 and promptly notifies Nasdaq MarketWatch of its action, the withdrawal shall be deemed an excused withdrawal. Nothing in this subparagraph shall prohibit the Association from taking such action as is necessary under the circumstances against a member and its associated persons for failure to contact Nasdaq MarketWatch to obtain an excused withdrawal as required by subparagraphs (a) and ~~[(d)](e)~~ of this Rule.
- (4) The quotations of a passive market maker shall be identified on Nasdaq as those of a passive market maker.
- (5) A member acting as a manager (or in a similar capacity of a distribution subject to subparagraph ~~[(d)](e)~~(1) of this R[r]ule shall submit a request [a] to Nasdaq MarketWatch and the M[m]arket

Regulation Department of NASD Regulation, Inc. to rescind the excused withdrawal status or passive market making status of distribution participants and affiliated purchasers, which request shall include the date and time of the pricing of the offering, the offering price, and the time the offering terminated, and, if not in writing, shall be confirmed in writing no later than the close of business the day the offering terminates. The request by this subparagraph may be submitted on the Underwriting Activity Report.

[(e)] (f) The Market Operations Review Committee shall have jurisdiction over proceedings brought by [M]market [M]makers seeking review of the denial of an excused withdrawal pursuant to this Rule 4619, or the conditions imposed on their reentry.

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

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The proposed rule change seeks to reflect the administrative shift of certain responsibilities under NASD Rule 4619 from Nasdaq MarketWatch to Nasdaq Market Operations. NASD Rule 4619 identifies Nasdaq MarketWatch as the Nasdaq department responsible for administration of this rule. Nasdaq has determined that, in order to ensure continued and effective administration of NASD Rule 4619, it would be appropriate and desirable to transfer responsibility of handling excused withdrawal requests based on systemic equipment problems that prevent a market maker from meeting its obligations from Nasdaq MarketWatch to Nasdaq Market Operations. Systemic equipment problems include, but are not limited to, defects in the software or hardware of a market maker's systems or connectivity problems associated with the circuits connecting Nasdaq's systems with a market maker's systems. Nasdaq believes that excused withdrawal requests based on systemic equipment problems are more appropriately handled by Nasdaq Market Operations because of that department's particular expertise in technology and connectivity related issues. The proposed rule change does not create a new basis for excused withdrawals. Excused withdrawals based on systemic equipment problems are currently granted under existing NASD Rule 4619. The proposed rule change is only intended to separate out a limited subset of current excused withdrawal requests for administration by Nasdaq Market Operations.

The transfer of the administration of excused withdrawal requests based on systemic equipment problems from Nasdaq MarketWatch to Nasdaq Market Operations will not adversely impact Nasdaq's record keeping and surveillance efforts with respect to excused withdrawals. Both Nasdaq MarketWatch and Nasdaq Market Operations maintain detailed databases of all

excused withdrawals. The databases for excused withdrawals tracks detailed information of each excused withdrawal, including the reason for the excused withdrawal, the date an excused withdrawal is requested, the name of the requester, the firm name, the security or securities involved, the date for the excused withdrawal, and the date reinstated. Nasdaq MarketWatch and Nasdaq Market Operations review the excused withdrawal databases on a periodic basis and have begun to develop procedures for inter-departmental communications and reviews of these databases, which are expected to be implemented by the end of April. All excused withdrawals granted by Nasdaq Market Operations are communicated to Nasdaq MarketWatch through same-day announcements made over Nasdaq's internal intercom system. Finally, additional surveillance is provided by the NASD, which receives a copy of the excused withdrawal databases from Nasdaq MarketWatch and Nasdaq Market Operations on a quarterly basis.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with Section 15A of the Act,⁶ in general, and with Section 15A(b)(6) of the Act,⁷ in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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. Because Nasdaq Market Operations has particular expertise in technology and connectivity issues, Nasdaq believes that this department, rather than Nasdaq MarketWatch, is the most appropriate department to handle excused withdrawal requests based on a market maker's systemic equipment problems. As such, the organizational realignment and the corresponding proposed rule change are consistent with the requirements of the Act.

⁶ 15 U.S.C. 78q-3.

⁷ 15 U.S.C. 78q-3(b)(6).

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will impose 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

No written comments were solicited or received with respect to the proposed rule change.

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

The foregoing proposal has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act⁸ and Rule 19b-4(f)(3)⁹ thereunder as one concerned solely with the administration of the self-regulatory organization. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.¹⁰

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. Comments may also be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. SR-NASD-2004-032. The file number should be

⁸ 15 U.S.C. 78s(b)(3)(A)(iii).

⁹ 17 C.F.R. 240.19b-4(f)(3).

¹⁰ For purposes of calculating the sixty-day abrogation period, the Commission considers the abrogation period to have begun on March 15, 2004, the date Nasdaq submitted Amendment No. 1. See 15 U.S.C. 78s(b)(3)(C).

included on the subject line if e-mail is used. To help the Commission process and review comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change, as amended, that are filed with the Commission, and all written communications relating to the proposed rule change, as amended, 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 Exchange. All submissions should refer to the File No. SR-NASD-2004-032 and should be submitted by [insert date 21 days from date of publication].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Jill M. Peterson
Assistant Secretary

¹¹ 17 CFR 200.30-3(a)(12).