

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50930; File No. SR-NASD-2004-182)

December 27, 2004

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change Regarding Minor Modifications to the Nasdaq Opening Process For Nasdaq-Listed Stocks

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 13, 2004, the National Association of Securities Dealers, Inc. (“NASD”), through its subsidiary, The Nasdaq Stock Market, Inc. (“Nasdaq”), filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. Nasdaq has designated the proposed rule change as “non-controversial” under Section 19(b)(3)(A)³ of the Act and Rule 19b-4(f)(6) thereunder,⁴ which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

Nasdaq is filing a proposed rule change to modify the process for calculating the Nasdaq Official Opening Price (“NOOP”). There is no new proposed rule language for this proposal.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

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

Nasdaq previously proposed to create two new voluntary opening processes – the Modified Opening Process and the Nasdaq Opening Cross - that together constitute the beginning of the trading day for all Nasdaq-listed securities. The Commission approved that proposal on September 16, 2004.⁵ Nasdaq has identified a minor modification to the operation of the Nasdaq Opening Cross and Modified Opening Process that will improve the fair and orderly opening of the market in Nasdaq listed securities.

Specifically, Nasdaq proposes to modify the process for calculating the NOOP. Currently, the NOOP is equal to the reported price of the first trade executed by the execution functionality of the Nasdaq Market Center based upon orders that are in queue when Nasdaq

⁵ Securities Exchange Act Release No. 50405 (September 16, 2004), 69 FR 57118 (September 23, 2004) (approving SR-NASD-2004-071). The Commission notes that Nasdaq made minor amendments to the Modified Opening Process and the Nasdaq Opening Cross as of October 12, 2004, which were not reflected in this filing. The Commission has made changes to the filing to correct this oversight. See Securities Exchange Act Release No. 50602 (October 28, 2004), 69 FR 64350 (November 4, 2004) (SR-NASD-2004-152).

begins trading at 9:30 a.m. (“Opening Match”).⁶ If there is no Opening Match within fifteen seconds after the system opens at 9:30, the NOOP is based upon the first, last sale eligible trade that is submitted to the trade reporting functionality of the Nasdaq Market Center.

Nasdaq proposes to change from fifteen to sixty seconds the length of time Nasdaq will wait for an Opening Match within Nasdaq’s execution functionality before looking for a last sale eligible trade submitted to Nasdaq’s trade reporting functionality. If the system executes a trade sooner than sixty seconds, the NOOP will be calculated at that time rather than waiting the full sixty seconds. By waiting up to sixty seconds, Nasdaq increases the likelihood that, in non-cross eligible stocks, a Nasdaq market center execution as opposed to an internalized trade will serve as the NOOP. Nasdaq believes that this outcome is consistent with the Act, more consistently fulfills the purpose of adopting the NOOP, and better serves investors.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,⁷ in general, and with Section 15A(b)(6) of the Act,⁸ in particular, in that Section 15A(b)(6) requires the NASD’s rules to be designed, among other things, to protect investors and the public interest. Nasdaq’s current proposal is consistent with the NASD’s obligations under these provisions of the Act because it will result in a more orderly opening for all Nasdaq stocks. The proposed rule change will create a fair, orderly, and unified opening for Nasdaq stocks, prevent the occurrence of locked and crossed markets in halted securities, and preserve price discovery and transparency that is vital to an effective opening of trading.

⁶ Securities Exchange Act Release No. 48997 (December 29, 2003), 69 FR 716 (January 6, 2004) (approving SR-NASD-2003-161).

⁷ 15 U.S.C. 78o-3.

⁸ 15 U.S.C. 78o-3(b)(6).

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

Nasdaq neither solicited nor received written comments with respect to the proposed rule change.

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

Because the foregoing proposed rule change does not:

(i) significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act⁹ and Rule 19b-4(f)(6), thereunder.¹⁰ At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

Nasdaq has requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow Nasdaq to implement the proposed rule

⁹ 15 U.S.C. 78o-3.

¹⁰ 15 U.S.C. 78o-3(b)(6). Nasdaq provided written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change at least five business days before the date of filing of the proposed rule change.

change which should help Nasdaq to maintain a fair and orderly market at the critical period of opening of trading. For this reason, the Commission designates the proposal to be effective and operative upon filing with the Commission.¹¹

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-NASD-2004-182 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-NASD-2004-182. 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

¹¹ For purposes only of waiving the 30-day operative delay of the proposed rule change, the Commission considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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 the filing also will be available for inspection and copying at the principal office of the NASD. 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-NASD-2004-182 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.¹²

Margaret H. McFarland
Deputy Secretary

¹² 17 CFR 200.30-3(a)(12).