

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-54203; File No. SR-NASD-2006-089)

July 25, 2006

Self-Regulatory Organizations: National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to NASD Rule 5100 (Short Sale Rule)

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 July 21, 2006, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by NASD. NASD has designated the proposed rule change as constituting a "non-controversial" rule change under paragraph (f)(6) of Rule 19b-4 under the Act,³ which renders the proposal effective upon receipt of this filing by the Commission. NASD proposes to implement the proposed rule change on the date on which The Nasdaq Stock Market LLC (the "Nasdaq Exchange") commences operation as a national securities exchange for Nasdaq-listed securities. 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

NASD is proposing to amend NASD Rule 5100 to allow members to use, for a transitional period only, the Nasdaq Exchange best (inside) bid rather than the national

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 17 CFR 240.19b-4(f)(6).

best (inside) bid for purposes of application of the rule. Pursuant to SR-NASD-2005-087, Rule 5100 will become effective on the date upon which the Nasdaq Exchange operates as a national securities exchange for Nasdaq-listed securities.⁴ Currently, that date is projected to be August 1, 2006.

Below is the text of the proposed rule change. Proposed new language is underlined.

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5000. TRADING OTHERWISE THAN ON AN EXCHANGE

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5100. Short Sale Rule

(a) With respect to trades reported to the ADF or the Trade Reporting Facility, no member shall effect a short sale in a Nasdaq Global Market Security (as that term is defined in Rule 4200) otherwise than on an exchange for the account of a customer or for its own account at or below the current national best (inside) bid when the current national best (inside) bid is below the preceding national best (inside) bid in the security. In addition, for a transitional period ending on November 3, 2006, members may use the Nasdaq Exchange best (inside) bid rather than the national best (inside) bid for purposes of the application of this rule, provided that the member has submitted prior written notification to NASD of this selection. Members are required to use the same bid tick

⁴ NASD filed SR-NASD-2005-087 on July 11, 2005 and Amendment No. 1 on June 15, 2006. The Commission approved SR-NASD-2005-087, as amended, on June 30, 2006. See Exchange Act Release No. 54084 (June 30, 2006), 71 FR 38935 (July 10, 2006).

test on a firm-wide basis. A member using the Nasdaq Exchange best (inside) bid may not use the national best (inside) bid prior to the end of the transitional period unless the member submits prior written notification to NASD of this change. For the purposes of this rule, the term “customer” includes a non-member broker-dealer.

(b) through (l) No Change.

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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, NASD 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. NASD 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

On June 30, 2006, the Commission approved SR-NASD-2005-087.⁵ Among other things, SR-NASD-2005-087 proposed (1) amendments to the NASD Delegation Plan, NASD By-Laws and NASD rules to reflect a proposed phased implementation strategy for the operation of the Nasdaq Exchange as a national securities exchange with respect to Nasdaq-listed securities during a transitional period, and (2) rules for reporting

⁵ Id.

transactions effected otherwise than on an exchange to the new Trade Reporting Facility.

NASD is filing this proposed rule change in anticipation of SR-NASD-2005-087 becoming effective to amend Rule 5100 to allow members to use, for a transitional period only, the Nasdaq Exchange best (inside) bid rather than the national best (inside) bid for purposes of application of the rule.

Proposed Amendment to Rule 5100

Pursuant to SR-NASD-2005-087, NASD proposed to renumber Rule 3350 (Short Sale Rule) as Rule 5100 under the Rule 5000 Series (Trading Otherwise Than On An Exchange). Rule 5100 provides that, with respect to trades reported to NASD's Alternative Display Facility or the Trade Reporting Facility, no member shall effect a short sale in a Nasdaq Global Market Security otherwise than on an exchange at or below the current national best (inside) bid when the current national best (inside) bid is below the preceding national best (inside) bid.

Pursuant to current Rule 3350(a)(2), with respect to trades in Nasdaq Global Market securities reported to Nasdaq, the application of the rule is based on the best (inside) bid displayed in the Nasdaq Market Center. Thus, some members are currently using the Nasdaq best bid for purposes of the application of this rule and may need additional time to revise their systems to use the national best bid for purposes of over-the-counter trading reported to the Trade Reporting Facility. Accordingly, NASD is proposing to amend Rule 5100 to provide that, for a transitional period ending on

November 3, 2006,⁶ members may use the Nasdaq Exchange best (inside) bid rather than the national best (inside) bid for purposes of application of the rule. Members must submit prior written notice to NASD of this selection and will be required to use the same bid tick test on a firm-wide basis. The proposed rule change would also expressly provide that a member using the Nasdaq Exchange best (inside) bid may not use the national best (inside) bid prior to the end of the transitional period on November 3, 2006 unless the member submits prior written notice to NASD of this change.

As noted in Item 2 of this filing, NASD has filed the proposed rule change for immediate effectiveness. The effective date will be the date upon which the Nasdaq Exchange operates as a national securities exchange for Nasdaq-listed securities, which is the effective date of SR-NASD-2005-087.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁷ which requires, among other things, that NASD rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the proposed rule change will protect investors because it will afford members sufficient time to make necessary systems adjustments to ensure compliance with the Short Sale Rule.

⁶ NASD contemplates that when the transitional period expires on November 3, 2006, this amendment will be automatically deleted from the NASD Manual without submission of another proposed rule change.

⁷ 15 U.S.C. 78o-3(b)(6).

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

NASD 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

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, it has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6) thereunder.⁸ A proposed rule change filed under 19b-4(f)(6) normally may not become operative prior to 30 days after the date of filing.⁹ However, Rule 19b-4(f)(6)(iii)¹⁰ permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest.

NASD has requested that the Commission waive the 30-day pre-operative delay

⁸ 17 CFR 240.19b-4(f)(6).

⁹ 17 CFR 240.19b-4(f)(6)(iii).

¹⁰ *Id.*

and the five-day pre-filing notice requirement and designate the proposed rule change, as amended, to become effective upon filing. NASD believes that the waiver of the five-day pre-filing requirement is necessary so that members will have certainty with respect to this change and can be formally notified immediately. NASD believes that the waiver of the 30-day operative requirement is necessary so that the proposed rule change can become effective on the same date that SR-NASD-2005-087 becomes effective. As noted above, it is currently anticipated that the effective date will be August 1, 2006. The Commission believes that waiving the 30-day pre-operative delay and the five-day pre-filing notice requirement is consistent with the protection of investors and the public interest because it will maintain the status quo for NASD members while they revise their systems. For the reasons stated above, the Commission designates the proposal to become effective and operative on the same date that SR-NASD-2005-087 becomes effective, currently anticipated to be August 1, 2006.¹¹

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.¹²

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

¹² For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposal, the Commission considers the period to commence on July 21, 2006, the date on which the Exchange submitted this filing.

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-2006-089 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NASD-2006-089. 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 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-2006-089 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.¹³

Nancy M. Morris

Secretary

¹³ 17 CFR 200.30-3(a)(12).