

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50087; File No. SR-NASD-2004-090)

July 26, 2004

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 thereto Relating to the Nasdaq Closing Cross

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on June 9, 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, II, and III below, which Items have been prepared by Nasdaq. On July 23, 2004, Nasdaq amended the proposed rule change.³ 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 proposes an amendment to NASD Rule 4709 to establish auxiliary procedures for administering the Nasdaq Closing Cross on certain significant trading days. Nasdaq intends to implement the proposed rule change immediately upon approval by the Commission.⁴ The text

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 July 22, 2004 (“Amendment No. 1”). In Amendment No. 1, Nasdaq restated the proposed rule change in its entirety.

⁴ The Commission revised this sentence to reflect the fact that Nasdaq intends to implement the proposed rule change immediately upon approval by the Commission. Telephone conversation between Jeffrey S. Davis, Associate Vice President and Associate General Counsel, Nasdaq, and Ann E. Leddy, Special Counsel, Division, Commission (July 23, 2004).

of the proposed rule change is set forth below. Proposed new language is in italics; deletions are in [brackets].⁵

* * * * *

4709. Nasdaq Closing Cross

- (a) **No Change.**
- (b) **No Change.**
- (c) Processing of Nasdaq Closing Cross.
- (1) – (4) **No Change.**

(5) Auxiliary Procedures. When significant trading volume is expected at the close of regular hours, Nasdaq may apply auxiliary procedures for the Closing Cross to ensure a fair and orderly market. The determination to implement auxiliary procedures for the Closing Cross shall be made by the President of Nasdaq or any Executive Vice President designated by the President. Nasdaq shall inform market participants of such auxiliary procedures as far in advance as practicable. Auxiliary procedures shall include:

(i) Setting an earlier time or times for the end of the order entry periods set forth in paragraph (a) for IO, MOC, and LOC orders. Nasdaq may end the order entry period as early as 3:40 p.m.

(ii) Setting an earlier time for the order modification and cancellation periods in paragraph (a) for IO, MOC, and LOC orders. Nasdaq may end the order modification and cancellation periods as early as 3:40 p.m.

⁵ The proposed rule change is marked to show changes from the rule text appearing in the NASD Manual available at www.nasd.com. There are no other pending or approved rule filings that would affect NASD Rule 4709(c).

(iii) Setting an earlier time for the dissemination times and frequencies set forth in paragraph (b) for the Order Imbalance Indicator. Nasdaq may begin disseminating the Order Imbalance Indicator as early as 3:40 p.m. and may increase or decrease the frequency with which the Order Imbalance Indicator is disseminated.

(iv) Adjusting the threshold values set forth in subparagraph (c)(2)(D) to no greater than 20 percent.

* * * * *

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, as amended, 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

On March 11, 2004, the Commission approved Nasdaq's proposal to create a Closing Cross.⁶ The Closing Cross is designed to create a robust close that allows for price discovery, and an execution that results in an accurate, tradable closing price. There are three components of the Nasdaq Closing Cross: (1) the creation of Market On Close ("MOC"), Limit on Close ("LOC") and Imbalance Only ("IO") order types; (2) the dissemination of an order imbalance

⁶ See, Securities Exchange Act Release No. 49406 (Mar. 11, 2004), 69 FR 12879 (Mar. 18, 2004) (SR-NASD-2003-173).

indicator; and (3) Closing Cross processing in the Nasdaq Market Center at 4:00:00 that executes the maximum number of shares at a single, representative price that is the Nasdaq Official Closing Price.

In order to maintain a fair and orderly market on significant trading days, such as the reconstitution of indices administered by Standard and Poors and the Russell Investment Group and various options expiration days, it is necessary for Nasdaq to adjust certain aspects of the Closing Cross. These significant trading days are characterized by high volume during a limited period of time around the close due to market participants' desire to execute trades at the closing price used by various index providers. On such days, the effort required to maintain a fair and orderly market and the potential cost of not maintaining a fair and orderly market are both increased. Therefore, Nasdaq believes it is prudent to maintain flexibility to adjust certain aspects of the Closing Cross for these significant trading days.

2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, 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 that the rules of self-regulatory organizations be designed, among other things, to protect investors and the public interest. Nasdaq believes that its current proposal is consistent with the obligations under these provisions of the Act because it would result in the public dissemination of information that more accurately reflects the trading in a particular security at the close. Furthermore, to the extent a security is a component of an index, the index would more accurately reflect the value of the market, or segment of the market,

⁷ 15 U.S.C. 78q-3.

⁸ 15 U.S.C. 78q-3(b)(6).

the index is designed to measure. The corresponding result should be trades executed at prices more reflective of the current market.

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

Nasdaq does not believe that the proposed rule change, as amended, would 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 the self-regulatory organization consents, the Commission will:

A. by order approve such proposed rule change, as amended, or

B. institute proceedings to determine whether the proposed rule change, as amended, 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, as amended, 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-2004-090 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-2004-090. 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 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-2004-090 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.⁹

Margaret H. McFarland
Deputy Secretary

⁹ 17 CFR 200.30-3(a)(12).