

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-52897; File No. SR-NASD-2005-099)

December 6, 2005

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change and Amendment No. 1 Thereto Relating to Amendments to the Restated Certificate of Incorporation of The Nasdaq Stock Market, Inc.

On August 19, 2005, 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”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change relating to amendments to the Restated Certificate of Incorporation of The Nasdaq Stock Market, Inc. (“Certificate”). On September 30, 2005, Nasdaq submitted Amendment No. 1 to the proposed rule change.³ Nasdaq has proposed to amend its Certificate to afford the holders of its 3.75% Series A Convertible Notes due October 2012 (“Series A Notes”) and its 3.75% Series B Convertible Notes due 2012 (“Series B Notes” and, collectively with the Series A Notes, the “Notes”) the right to vote with Nasdaq stockholders. The Series A Notes and the Series B Notes were issued in connection with Nasdaq’s entry into a definitive agreement and plan of merger with Instinet Group Incorporated (“Instinet”), under which Nasdaq will acquire all outstanding shares of Instinet for an aggregate

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 made minor edits to the originally filed proposed rule change and clarified the proposed definition of “Broker Affiliate” set forth in Paragraph C.6. of the Certificate to include a broker or dealer or an affiliate thereof. In Amendment No. 1, Nasdaq also reflected approval of the proposal by the Board of Directors of Nasdaq and by its stockholders.

purchase price of approximately \$1.878 billion in cash and Instinet will merge into a wholly owned subsidiary of Nasdaq.⁴

The proposed rule change, as amended, was published for comment in the Federal Register on October 24, 2005.⁵ The Commission received no comments on the proposal.

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a registered securities association.⁶ In particular, the Commission believes that the proposed rule change, as amended, is consistent with Sections 15A(b)(2) and (6) of the Act,⁷ which require, among other things, that a national securities association be so organized and have the capacity to be able to carry out the purposes of the Act and to comply and enforce compliance with the provisions of the Act, and that its 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.

The Commission notes that the proposed rule change, as amended, provides holders of the Notes the same rights and subjects them to the same restrictions under Paragraphs C.1. and C.2. of the Certificate that currently apply to holders of Nasdaq's 4.0% Convertible Subordinated Notes due 2006, which are being retired. Specifically, the holders will be entitled to vote on all matters submitted to a vote of the stockholders of Nasdaq. The holders' ability to vote is limited

⁴ The Commission notes that Nasdaq has filed a proposed rule change to establish rules governing the operation of the INET system. See Securities Exchange Act Release No. 52723 (November 2, 2005), 70 FR 67513 (November 7, 2005).

⁵ See Securities Exchange Act Release No. 52574 (October 7, 2005), 70 FR 61484 ("Notice").

⁶ The Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

⁷ 15 U.S.C. 78q-3(b)(2) and (6).

in Paragraph C.2. of the Certificate, which provides that holders of the Notes and common stock cannot vote any shares that they own excess of five percent of the then-outstanding shares of stock generally entitled to vote as of the record date in respect of such matter. Paragraph C.6.(b) of the Certificate, however, gives Nasdaq’s Board of Directors (“Board”) the authority to exempt certain persons from the five percent voting restriction. If the Board grants such an exemption to any person, then the holders would be permitted to receive a similar exemption from the voting restriction.⁸ The Board, however, is not permitted to grant exemptions from the five percent voting restriction to any registered broker or dealer or an affiliate thereof (“Broker Affiliate”).⁹ The Commission believes that it would be inconsistent with Nasdaq’s Certificate for the Board to grant an exemption from the five percent voting restriction to any person if, as a consequence, a Broker Affiliate received a similar exemption.¹⁰

The Commission finds that, since this proposal extends the same rights and obligations under the Nasdaq Certificate to certain new holders of the Notes, the proposal is consistent with

⁸ The Commission notes that, currently, one of the holders is a Broker Affiliate. Nasdaq represented in the Notice that if the Board were to consider granting a waiver to any person, it would have to consider that such action would trigger an exemption for the holders that would be deemed inconsistent with the provision in Paragraph C.6. See Notice, supra note 5, at note 9.

⁹ Nasdaq has stated that the definition of “Broker Affiliate” set forth in Paragraph C.6. includes a broker or a dealer or an affiliate thereof. See Notice, supra note 5, at note 11.

¹⁰ Nasdaq states that, if in the future the Board exempts any Broker Affiliate from the five percent voting restriction, the holders of the Notes would automatically receive the same percentage voting rights or the highest percentage voting rights to which their Notes and shares held entitled them at the time. As noted, Paragraph C.6. prohibits the Board from granting any exemption from the five percent voting restriction to a Broker Affiliate. Accordingly, the Board is not permitted to grant such an exemption under its current authority and any change to this authority would have to be filed with, and approved by, the Commission pursuant to Section 19(b) of the Act.

the Act. In addition, the Commission believes that the five percent voting restriction should limit the ability of any entity, particularly a registered broker or dealer, from controlling Nasdaq.¹¹

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹² that the proposed rule change (File No. SR-NASD-2005-099), as amended, be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹³

Jonathan G. Katz
Secretary

¹¹ See Securities Exchange Act Release No. 42983 (June 26, 2000), 65 FR 41116 (July 3, 2000) (SR-NASD-00-27).

¹² 15 U.S.C. 78s(b)(2).

¹³ 17 CFR 200.30-3(a)(12).