

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51386; File No. SR-NASD-2005-031)

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

March 16, 2005

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 March 14, 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”) 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) of the Act³ 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.

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).

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 NASD Rule 4704(d)(1) which governs the dissemination of the Order Imbalance Indicator prior to the Nasdaq Opening Cross. The text of the proposed rule change is set forth below. Proposed new language is in *italics*; proposed deletions are in [brackets].⁵

* * * * *

Rule 4704 Opening Process for Nasdaq-listed Securities

(a) – (c) No Change.

(d) Processing of Nasdaq Opening Cross. For certain Nasdaq-listed securities designated by Nasdaq, the Nasdaq Opening Cross shall occur at 9:30, and regular hours trading shall commence when the Nasdaq Opening Cross concludes.

(1) Beginning at 9:25:30 a.m., Nasdaq shall disseminate by electronic means an Order Imbalance Indicator every 15 seconds until 9:28:20[9], and then every 5 seconds until market open. The Order Imbalance Indicator shall contain the following real time information:

(A)- (E) No Change.

(2) – (4) No Change.

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⁵ The proposed rule change is marked to show changes from the rule text appearing in the NASD Manual available at <http://www.nasdaq.com> as amended by SR-NASD-2005-029 (March 4, 2005).

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 is proposing to modify NASD Rule 4704(d)(1) which governs the dissemination of the Order Imbalance Indicator prior to the Nasdaq Opening Cross. NASD Rule 4704(d)(1) currently provides that Nasdaq will disseminate the Order Imbalance Indicator every 15 seconds beginning at 9:25 a.m. and every 5 seconds beginning at 9:29 a.m. until market open. The Order Imbalance Indicator informs market participants about the expected outcome of the Nasdaq Opening Cross and enables them to determine how to participate in it. Nasdaq recently determined that disseminating the Order Imbalance Indicator beginning at 9:25 a.m. will enhance market transparency and encourage increased order interaction during the Nasdaq Opening Cross.

Currently, Nasdaq's system opens all quotes and orders at 9:25 a.m via an unlocking/uncrossing process described in Rule 4704(b). The processing of the unlocking/uncrossing algorithm takes several seconds to complete. Under the recently published rule change,⁶ the first dissemination of the Order Imbalance Indicator at 9:25

⁶ See SR-NASD-2005-029 (March 4, 2005).

a.m. could occur prior to the completion of the unlocking/uncrossing algorithm. This would defeat the transparency that Nasdaq continually strives to create. Accordingly, Nasdaq is proposing to disseminate the Order Imbalance Indicator at 9:25:30 a.m. rather than 9:25 a.m. as recently proposed. In addition, Nasdaq is proposing to increase transparency by disseminating the Order Imbalance Indicator every five seconds beginning at 9:28:20 a.m. rather than at 9:29 a.m.

There would be no changes in the entry, display, processing, or execution of individual orders.

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, among other things, that a national securities association's rules be designed to protect investors and the public interest. Nasdaq believes that its current proposal is consistent with the NASD's obligations under these provisions of the Act because it would result in a more orderly opening for all Nasdaq stocks. The proposed rule change would 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.

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 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

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 Nasdaq has requested that the Commission waive the five-day pre-filing notice requirement and the 30-day operative delay for “non-controversial” proposals, based upon a representation that the proposal is of the utmost importance to the fair and orderly operation of The Nasdaq Stock Market during the pre-opening trading period. The Commission believes that waiver of the five-day pre-filing requirement and the 30-day operative delay is consistent with the

⁹ 15 U.S.C. 78s(b)(3)(A).

¹⁰ 17 CFR 240.19b-4(f)(6).

protection of investors and the public interest because it would allow Nasdaq immediately to implement the proposed rule change which should improve transparency in the pre-opening trading period. For this reason, the Commission designates the proposal to be effective and operative upon filing with the Commission.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.

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-2005-031 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.

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).

All submissions should refer to File Number SR-NASD-2005-031. 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 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-2005-031 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).