

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-61371; File No. SR-NASDAQ-2010-005)

January 15, 2010

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change to Amend Rules 3330 and 9810 To Reflect Changes to Corresponding FINRA Rules

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 13, 2010, The NASDAQ Stock Market LLC (the “Exchange” or “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 the Exchange. The Exchange has designated the proposed rule change as constituting a non-controversial rule change under Rule 19b-4(f)(6) under the Act,<sup>3</sup> which renders the proposal 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 the Substance of the Proposed Rule Change

The Exchange is filing this proposed rule change to amend NASDAQ Rules 3330 (Payment Designed to Influence Market Prices, Other than Paid Advertising) and 9810 (Initiation of Proceeding) to reflect recent changes to corresponding rules of the Financial Industry Regulatory Authority (“FINRA”). The text of the proposed rule change is

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 17 CFR 240.19b-4(f)(6).

available at <http://nasdaqomxbx.cchwallstreet.com>, at the Exchange's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange 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. The Exchange 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

Many of NASDAQ's rules are based on rules of FINRA (formerly the National Association of Securities Dealers ("NASD")). During 2008, FINRA embarked on an extended process of moving rules formerly designated as "NASD Rules" into a consolidated FINRA rulebook. In most cases, FINRA has renumbered these rules, and in some cases has substantively amended them. Accordingly, NASDAQ also proposes to initiate a process of modifying its rulebook to ensure that NASDAQ rules corresponding to FINRA/NASD rules continue to mirror them as closely as practicable. In some cases, it will not be possible for the rule numbers of NASDAQ rules to mirror corresponding FINRA rules, because existing or planned NASDAQ rules make use of those numbers. However, wherever possible, NASDAQ plans to update its rules to reflect changes to corresponding FINRA rules.

This filing addresses NASDAQ Rules 3330 (Payment Designed to Influence Market Prices, Other than Paid Advertising) and 9810 (Initiation of Proceeding) to update cross-references to corresponding rules of FINRA.

In SR-FINRA-2009-078,<sup>4</sup> FINRA made changes that reflected, among other things, incorporation into the consolidated FINRA rulebook of NASD Rule 3330 as FINRA Rule 5230 (Payments Involving Publications that Influence the Market Price of a Security)<sup>5</sup> and NASD Rule 2330 as FINRA Rule 2150 (Improper Use of Customers' Securities or Funds; Prohibition Against Guarantees and Sharing in Accounts).<sup>6</sup>

NASD Rule 3330 prohibits a member from giving, or offering to give, anything of value to any person for the purpose of influencing or rewarding the action of such person in connection with the publication or circulation in any newspaper, investment service, or similar publication, of any matter that has, or is intended to have, an effect upon the market price of any security; and provides an exception for any matter that is clearly distinguishable as paid advertising. As part of transferring NASD Rule 3330 into the consolidated FINRA rulebook as FINRA Rule 5230, FINRA proposed two changes to the rule to modernize its terms and clarify its scope by: a) updating the list of media to which the rule refers to include electronic and other types of media, including magazines,

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<sup>4</sup> See Securities Exchange [sic] Release No. 61087 (December 1, 2009), 74 FR 65190 (December 9, 2009)(SR-FINRA-2009-078)(notice of filing and immediate effectiveness).

<sup>5</sup> See Securities Exchange Act Release No. 60648 (September 10, 2009), 74 FR 47837 (September 17, 2009)(SR-FINRA-2009-048)(order approving adoption of FINRA Rule 5230).

<sup>6</sup> See Securities Exchange Act Release No. 60701 (September 21, 2009); 74 FR 49425 (September 28, 2009)(SR-FINRA-2009-014)(order approving adoption of FINRA Rule 2150).

Web sites, and television programs; and b) expanding the exceptions in the rule beyond paid advertising to also include compensation paid in connection with research reports and communications published in reliance on Section 17(b) of the Securities Act of 1933 (the "1933 Act").

NASDAQ is, by this filing, re-numbering its Rule 3330 to Rule 5230A and upgrading its rule by clarifying that the media the rule refers to includes electronic and other types of media and expanding the exceptions in the rule beyond paid advertising.

NASD Rule 2330 prohibits members and associated persons from: (a) making improper use of a customer's securities or funds; (b) guaranteeing a customer against loss in connection with any securities transaction or in any securities account of the customer; and (c) sharing in the profits or losses in the customer's account except under certain limited conditions specified in the Rule. As part of transferring NASD Rule 2330 into the consolidated FINRA rulebook as FINRA Rule 2150, FINRA proposed minor changes to Rule 2150(c) and added Supplementary Information to the rule that codified existing staff guidance in respect of when a guarantee is not subject to prohibition, when a member can reimburse for transaction losses, correction of *bona fide* errors, and preservation of written authorizations.<sup>7</sup>

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<sup>7</sup> Supplementary Material to FINRA Rule 2150 states: (i) a "guarantee" extended to all holders of a security by an issuer as part of that security generally would not be subject to the prohibition against guarantees and that a permissible sharing arrangement remains subject to other applicable FINRA rules; (ii) the rule does not preclude a member from determining on an after-the-fact basis, to reimburse a customer for transaction losses, provided however that the member shall comply with all reporting requirements that may be applicable to such payment; (iii) the rule does not preclude a member from correcting a *bona fide* error; and (iv) the required written authorization(s) shall be preserved for a period of at least six years after the date the account is closed, which is consistent with the retention period under the Act for similar records.

NASDAQ has proposed, in a recent immediately effective filing,<sup>8</sup> to re-number its Rule 2330 and IM-2330 to Rule 2150 and IM-2150, respectively; clarify cross-references in its rule and IM; and reflect the changes to FINRA Rule 2150. NASDAQ is, by this filing, clarifying the cross-reference in its Rule 9810 to NASDAQ Rule 2150.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>9</sup> in general, and with Sections 6(b)(5) of the Act,<sup>10</sup> in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed changes will conform NASDAQ Rules 3330 and 9810 to recent changes made to several corresponding FINRA rules, to promote application of consistent regulatory standards.

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

The Exchange 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, as amended.

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<sup>8</sup> See Securities Exchange [sic] Release No. 61128 (December 8, 2009), 74 FR 66191 (December 14, 2009)(SR-NASDAQ-2009-106)(notice of filing and immediate effectiveness).

<sup>9</sup> 15 U.S.C. 78f.

<sup>10</sup> 15 U.S.C. 78f(b)(5).

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<sup>11</sup> and Rule 19b-4(f)(6) thereunder.<sup>12</sup>

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

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<sup>11</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>12</sup> 17 CFR 240.19b-4(f)(6).

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2010-005 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2010-005. 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 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of NASDAQ. 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-NASDAQ-2010-005 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>13</sup> 17 CFR 200.30-3(a)(12).