

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-54085; File No. 10-131)

June 30, 2006

Order Modifying a Condition to Operation as a National Securities Exchange of the
Nasdaq Stock Market LLC

I. Introduction

On January 13, 2006, the Securities and Exchange Commission (“Commission”) granted registration of the Nasdaq Stock Market LLC (“Nasdaq Exchange”) as a national securities exchange.¹ At the same time, the Commission conditioned the Nasdaq Exchange’s operation as an exchange on the satisfaction of six specific requirements. The Commission is modifying in this Order the condition requiring the NASD to represent to the Commission that it no longer needs to control the Nasdaq Stock Market, Inc. (“Nasdaq”), the Nasdaq Exchange’s parent company, through the Preferred D share because the NASD can fulfill through other means its obligations with respect to non-Nasdaq exchange listed securities under Section 15A(b)(11) of the Securities Exchange Act of 1934 (“Exchange Act”),² Rules 602 and 603 of Regulation NMS,³ and the national market system plans in which it participates (the “Control Share Condition”). This condition reflected the Nasdaq Exchange’s intent to begin trading at the same time Nasdaq UTP Plan Securities and CTA Plan Securities.⁴

¹ See Exchange Act Release No. 53128, 71 FR 3550 (January 23, 2006) (“Nasdaq Exchange Order”).

² 15 U.S.C. 78o-3(b)(11).

³ 17 CFR 242.602 and 603.

⁴ Transactions are reported pursuant to two national market system plans: Nasdaq-listed securities are reported to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an

The Nasdaq Exchange would now prefer to commence trading Nasdaq UTP Plan Securities and CTA Plan Securities in two separate phases. Accordingly, by letter dated March 31, 2006, the Nasdaq Exchange requested that the Commission modify the Control Share Condition to allow it to begin operating as an exchange with regard to Nasdaq UTP Plan Securities before the Control Share Condition is satisfied.⁵ As discussed further below, the Commission is granting the Nasdaq Exchange's request. Until the Control Share Condition is satisfied, however, the NASD must retain control of Nasdaq through the Preferred D share, and Nasdaq must continue to perform obligations under the NASD's Plan of Allocation and Delegation of Functions by NASD to Subsidiaries ("Delegation Plan") with respect to CTA Plan Securities. Satisfaction of the condition would continue to be a prerequisite to the Nasdaq Exchange trading CTA Plan Securities.

II. Discussion

As discussed in the Nasdaq Exchange Order,⁶ the NASD plans to remain a member of the Intermarket Trading System ("ITS Plan") for the purpose of providing access to over-the-counter ("OTC") quotes in CTA Plan Securities communicated by its members through NASD facilities and to provide its members access to exchanges' quotes in such securities. The Control Share Condition is necessary because the NASD

Unlisted Trading Privileges Basis ("Nasdaq UTP Plan Securities"); securities listed on other national securities exchanges are reported to the Consolidated Transaction Association Plan ("CTA Plan Securities"). Approximately 40 securities are dually-listed on Nasdaq and the New York Stock Exchange LLC. Transactions in these securities are reported to the CTA Plan and thus are CTA Plan Securities.

⁵ See letter to Nancy M. Morris, Secretary, Commission, from Edward S. Knight, Executive Vice President and General Counsel, Nasdaq, dated March 31, 2006.

⁶ See Nasdaq Exchange Order, supra note 1.

and its members currently comply with their obligations under the ITS Plan through the NASD's Nasdaq Market Center facility.

In addition, with respect to CTA Plan Securities, NASD facilities owned by Nasdaq currently are the NASD's only means available to fulfill its obligations under Exchange Act Rules 602 and 603,⁷ the CTA Plan, CQ Plan, and Section 15A(b)(11) of the Exchange Act.⁸ Therefore, the NASD must have the means to satisfy these obligations prior to relinquishing control of Nasdaq.

The Nasdaq Exchange represented that the technology solutions to allow the NASD to fulfill its obligations with respect to CTA Plan Securities through means that would not involve a delegation of regulatory authority to Nasdaq are not completed.⁹ In addition, the Nasdaq Exchange represented that many of its prospective members have indicated that a phased-in approach to the Nasdaq Exchange's operation would be preferable. Specifically, according to the Nasdaq Exchange, these firms believe that a single-day transition would entail unnecessary costs and administrative burdens and pose transition risks that could be mitigated through a phased approach.

The Commission believes that a phased-in implementation of the operation of the Nasdaq Exchange is consistent with the Exchange Act and may allow for a more smooth transition. Accordingly, the Commission believes that it is necessary or appropriate in the public interest, consistent with the protection of investors and consistent with the requirements of Exchange Act, and the rules and regulations thereunder applicable to

⁷ 17 CFR 242.602 and 603.

⁸ 15 U.S.C. 78q-3(b)(11).

⁹ The Commission notes that the NASD operates the Alternative Display Facility ("ADF"), which currently collects quotes and trades for Nasdaq UTP Plan Securities, but not for CTA Plan Securities.

Nasdaq Exchange to modify the Control Share Condition to the Nasdaq Exchange Order as follows:

First, the requirement that the NASD represent that “control of Nasdaq through the Preferred D share is no longer necessary because the NASD can fulfill through other means its obligations with respect to [CTA Plan Securities] under Section 15A(b)(11) of the Exchange Act,¹⁰ Rules 602 and 603 of Regulation NMS,¹¹ and the national market system plans in which the NASD participates” is modified so as to be a condition only with respect to the Nasdaq Exchange commencing to trade CTA Plan Securities. This will allow the Nasdaq Exchange to begin operations as a national securities exchange solely for Nasdaq UTP Plan securities before the Control Share Condition is satisfied.

Second, the Control Share Condition is modified to permit the Nasdaq Exchange to commence trading Nasdaq UTP Plan Securities once Nasdaq is no longer delegated regulatory authority under the Delegation Plan with respect to such securities. The modification of the Control Share Condition described above means that the Nasdaq Exchange would commence trading in Nasdaq UTP Plan Securities while the NASD controls Nasdaq. The Commission believes, however, that it would be inappropriate for the Nasdaq Exchange to commence trading in Nasdaq UTP Plan Securities while its parent company continued to be delegated regulatory authority by the NASD with respect to the same activities. Accordingly, the Commission would have to approve an amendment to the NASD’s Delegation Plan to reflect that Nasdaq would no longer be delegated regulatory authority with regard to Nasdaq UTP Securities prior to the Nasdaq Exchange commencing to trade Nasdaq UTP Plan Securities.

¹⁰ 15 U.S.C. 78o-3(b)(11).

¹¹ 17 CFR 242.602 and 603.

III. Modification of Conditions to Operation

The Commission notes that all of the other conditions set forth in the Nasdaq Exchange Order remain and must be satisfied before the Nasdaq Exchange can begin operations as an exchange.

The Commission hereby replaces the Control Share Condition to operation of the Nasdaq Exchange as a national securities exchange as follows:

B. The NASD's Ability to Fulfill its Statutory and Regulatory Obligations.

(1) With respect to the Nasdaq Exchange commencing to trade securities reported pursuant to the Nasdaq UTP Plan, the NASD's Delegation Plan is amended to eliminate Nasdaq's exercise of regulatory authority with respect to such securities.

(2) With respect only to the Nasdaq Exchange commencing to trade securities reported pursuant to the CTA Plan, the NASD must represent to the Commission that control of Nasdaq through the Preferred D share is no longer necessary because the NASD can fulfill through other means its obligations with respect to securities reported to the CTA Plan under Section 15A(b)(11) of the Exchange Act, Rules 602 and 603 of Regulation NMS, and the national market system plans in which the NASD participates.

IV. Conclusion

IT IS ORDERED that the Control Share Condition to operation for the Nasdaq Exchange is modified as described herein.

By the Commission.

J. Lynn Taylor
Assistant Secretary