

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-53362; File No. SR-NASD-2006-028)

February 24, 2006

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change to Allow Nasdaq to Take Certain Actions on behalf of Its Issuers in Connection with Nasdaq's Transition to a National Securities Exchange

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 February 23, 2006, 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. 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 to adopt NASD Rule 4130 to allow Nasdaq to file an application with the Commission or another appropriate regulator on behalf of its issuers to register their listed securities under Section 12(b) of the Act, or seek a temporary exemption from Section 12, in connection with Nasdaq's transition to one of its subsidiaries operating as a national securities exchange. Nasdaq will implement the proposed rule upon approval. The text of the proposed rule change is below. Proposed new language is underlined.³

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Changes are marked to the rule text that appears in the electronic NASD Manual found at www.nasd.com. No pending rule filings would affect the text of this rule. Because of the nature of this rule, no conforming change will be made to the rules of The NASDAQ Stock Market LLC. See Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006).

4130. Permission to Act on Behalf of Issuer

In connection with The NASDAQ Stock Market LLC (the “Nasdaq Exchange”) commencing operations as a national securities exchange, each issuer authorizes Nasdaq and the Nasdaq Exchange to file an application to register under Section 12(b) of the Act any class of the issuer’s securities that is listed on Nasdaq on the day immediately preceding the day the Nasdaq Exchange commences such operations; provided, however, that this provision shall not be applicable to any security that the issuer informs Nasdaq, pursuant to procedures set forth by Nasdaq, should not be so registered. The application to register under Section 12(b) of the Act will be filed with the Commission or, for those securities subject to Section 12(i) of the Act, with the appropriate banking regulator specified in Section 12(i). The authorization in this paragraph includes allowing Nasdaq and the Nasdaq Exchange to request any appropriate regulatory relief from the provisions of Section 12.

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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 had 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 January 13, 2006, the Commission approved Nasdaq's application to register one of its subsidiaries, The Nasdaq Stock Market LLC ("Nasdaq Exchange"), as a national securities exchange.⁴ Once the Nasdaq Exchange begins operation, securities listed on Nasdaq will need to have been registered under Section 12(b) of the Act so that brokers and dealers may effect transactions in these securities on the Nasdaq Exchange consistent with Section 12(a) of the Act.⁵ Accordingly, absent relief from the Commission and other regulators, Nasdaq's transition to the Nasdaq Exchange beginning operations as a national securities exchange would require approximately 3,200 Nasdaq National Market and Capital Market issuers to register their Nasdaq-listed securities under Section 12(b) of the Act. This process would require each issuer to file a registration statement with the Commission or other appropriate regulator.⁶ The Nasdaq Exchange would then be required to certify to the Commission and the Banking Regulators that each issuer's securities are approved for listing and registration.

Nasdaq believes that this registration process would be confusing and would place an unnecessary cost and administrative burden on issuers, on the Commission and Banking

⁴ Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006).

⁵ Section 12(a) of the Act, 15 U.S.C. 78l(a). As discussed in footnote 10, Nasdaq anticipates that it will seek relief from the Section 12(b) registration requirement during a limited transition period for certain securities that are currently exempt from registration under Section 12(g).

⁶ Section 12(i) of the Act requires filings relating to certain financial institutions to be made with the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, or the Office of Thrift Supervision (collectively, the "Banking Regulators"). 15 U.S.C. 78l(i).

Regulators, and on Nasdaq, and would not be in the public interest. For the great majority of issuers whose securities are currently listed on Nasdaq, this additional registration process would not result in any significant benefit to the marketplace or investors because they would not receive any additional information regarding the security. Nasdaq issuers whose securities are registered under Sections 12(b) or 12(g) of the Act would have already filed a registration statement pursuant to the Act to register those securities. Similarly, issuers registered under the Investment Company Act of 1940 (the “1940 Act”) will have filed detailed information with the Commission.⁷ There are also no material differences in the regulatory requirements for issuers whose securities are registered under Section 12(b) and those whose securities are registered under Section 12(g) or are exempted pursuant to Section 12(g)(2)(B) of the Act that would negatively impact investors or place additional burdens on the issuers.⁸

As a result, Nasdaq proposes to file a single application for registration on behalf of these issuers by means of a letter to the Commission and Banking Regulators. To provide notice of Nasdaq’s plan to seek Section 12(b) registration on behalf of its issuers and to assure sufficient authority for Nasdaq to make this application, however, Nasdaq has proposed adopting a rule specifically permitting Nasdaq and the Nasdaq Exchange to take this action.

⁷ In particular, each registered investment company has filed a registration statement with the Commission under the 1940 Act and has made periodic filings under the 1940 Act identical in form to those required of investment companies that have registered their securities under Section 12(b) of the Act.

⁸ Nasdaq believes that the only differences relate to how the issuer identifies itself on the cover of its periodic reports (e.g., as registered under Section 12(b) instead of Section 12(g)) and the process surrounding a decision to delist or deregister. Nasdaq also notes that an issuer registered under the 1940 Act will satisfy its obligation to file reports under the Act through the filing of reports that it is already required to make under the 1940 Act.

Prior to filing this application, Nasdaq will provide notice to each issuer and will allow any issuer that does not wish to register under Section 12(b) the ability to opt-out of Nasdaq's request to the Commission and Banking Regulators.⁹ Nasdaq expects to provide companies 10 business days to request to opt-out of Nasdaq's application on their behalf under Section 12(b). The result of an issuer choosing to opt-out would be that the issuer's securities would be ineligible to be listed and traded on the Nasdaq Exchange as of the operational date; such issuers would instead trade on the pink sheets or OTC Bulletin Board unless the issuer filed a Section 12(b) registration statement with the Commission in connection with listing on the Nasdaq Exchange or on another national securities exchange. Following this opt-out period, Nasdaq will submit a letter to the Commission and Banking Regulators requesting that such letter serve as the application for registration under Section 12(b), as well as the Nasdaq Exchange's certification of such application, for all those issuers with securities registered under Section 12(b) or 12(g) or exempt from registration under Section 12(g)(2)(B) and listed on Nasdaq on the day immediately preceding Nasdaq Exchange's operation as a national securities exchange.¹⁰ Nasdaq will notify issuers when this relief is granted.¹¹

⁹ Nasdaq will make this notification via e-mail to the issuer's e-mail address on file with Nasdaq, or, if no e-mail address is available, via facsimile. Nasdaq will also issue a press release describing this process and post information about this process to its website.

¹⁰ Nasdaq also anticipates that this letter will seek relief from the registration requirement for securities currently exempt from registration under Section 12(g)(2)(G) of the Act and Rule 12g3-2(b) thereunder to allow these securities to trade on the Nasdaq Exchange during a limited transition period. The proposed rule would specifically permit Nasdaq to request such regulatory relief. Nasdaq would follow the same notice and opt-out procedures for these companies.

¹¹ Nasdaq will make this notification in the same manner as the earlier notification, including the issuance of a press release. See footnote 9, supra.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,¹² in general, and furthers the objectives of Section 15A(b)(6),¹³ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market, and to protect investors and the public interest. The proposed rule change would allow Nasdaq's issuers to seamlessly transition to the Nasdaq Exchange, thus removing a potential impediment to the mechanism of a free and open market and protecting the public interest.

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

Nasdaq 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.

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 NASD consents, the Commission will:

- (A) by order approve such proposed rule change; or

¹² 15 U.S.C. 78o-3.

¹³ 15 U.S.C. 78o-3(b)(6).

- (B) institute proceedings to determine whether the proposed rule change 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 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-2006-028 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NASD-2006-028. 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 publicly available. All submissions should refer to File Number SR-NASD-2006-028 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.¹⁴

Nancy M. Morris
Secretary

¹⁴ 17 CFR 200.30-3(a)(12).