

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-54451; File No. SR-NASD-2006-104)

September 15, 2006

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change to Reflect Nasdaq's Complete Separation from NASD Upon The NASDAQ Stock Market LLC's Operation as a National Securities Exchange For Non-Nasdaq Exchange-Listed Securities

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 September 5, 2006, the National Association of Securities Dealers, Inc. ("NASD") 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 NASD. On September 14, 2006, NASD submitted Amendment No. 1 to the proposed rule change.³ 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

NASD is proposing to: (1) delete The Nasdaq Stock Market Inc.'s ("Nasdaq") By-Laws and amend the Plan of Allocation and Delegation of Functions by NASD to Subsidiaries ("Delegation Plan"), NASD By-Laws, NASD Regulation, Inc. By-Laws, NASD Dispute Resolution, Inc. By-Laws, and NASD rules to reflect Nasdaq's separation from NASD upon the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ In Amendment No. 1, NASD clarifies that (1) the effective date of the proposed rule change will be the date upon which The NASDAQ Stock Market LLC ("Nasdaq Exchange") operates as an exchange for non-Nasdaq exchange listed securities, which the Nasdaq Exchange anticipates will be in November 2006; (2) the NASD's Market Regulation Committee will perform substantially the same functions as performed by the Nasdaq's Quality of Markets Committee; and (3) the proposed rule change reflects NASD's continued participation in the Intermarket Trading System ("ITS") Plan.

operation of the Nasdaq Exchange as a national securities exchange for non-Nasdaq exchange-listed securities; (2) amend NASD rules relating to quoting and trading otherwise than on an exchange in non-Nasdaq exchange-listed securities to reflect changes in the services provided by NASD in this regard; and (3) expand the scope of the NASD/Nasdaq Trade Reporting Facility rules to include trade reporting in non-Nasdaq exchange-listed securities.

The text of the proposed rule is available on the NASD Web Site (<http://www.nasd.com>), on the Commission's Web Site at (<http://www.sec.gov>), at the NASD Office of Secretary and at the Commission's Public Reference Room. All NASD rules that do not have rule text changes specified remain unchanged and effective for all NASD members.

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

In its filing with the Commission, NASD 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. NASD 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 June 30, 2006, the Commission approved proposed rule change SR-NASD-2005-087, which, among other things, amended NASD's Delegation Plan, By-Laws, and NASD rules to reflect the Nasdaq Exchange's operation as a national securities exchange for purposes of

Nasdaq-listed securities.⁴ Specifically, to facilitate an orderly transition and minimize any potential disruption to the marketplace, for a transitional period that commenced on August 1, 2006, the Nasdaq Exchange has been operating as an exchange for purposes of Nasdaq-listed securities only, while Nasdaq continues to perform its current obligations under the NASD's Delegation Plan with respect to non-Nasdaq exchange-listed securities.⁵ Pursuant to SR-NASD-2005-087 and under the Delegation Plan, Nasdaq, as a subsidiary of NASD, continues to perform during this transitional period only those functions relating to over-the-counter ("OTC") quoting, trading, and execution of non-Nasdaq exchange-listed securities. As such, Nasdaq no longer performs functions relating to Nasdaq-listed securities pursuant to delegated authority from NASD.

The proposed rule change described herein provides amendments to NASD rules to reflect Nasdaq's complete separation from NASD upon the operation of the Nasdaq Exchange as a national securities exchange for purposes of non-Nasdaq exchange-listed securities in addition to Nasdaq-listed securities. In addition, the proposed rule change amends the current NASD rules for quoting and trading otherwise than on an exchange in non-Nasdaq exchange-listed securities to reflect the manner in which NASD would be satisfying its regulatory obligations under the Act and the rules thereunder on a temporary basis until the Alternative Display Facility ("ADF") is able to satisfy those obligations. Further, this proposed rule change reflects NASD's

⁴ See Securities Exchange Act Release No. 54084 (June 30, 2006), 71 FR 38935 (July 10, 2006) (File No. SR-NASD-2005-087).

⁵ The Commission approved the Nasdaq Exchange application on January 13, 2006. See Securities Exchange Act Release No. 53128 (Jan. 13, 2006), 71 FR 3550 (Jan. 23, 2006) (File No. 10-131). See also Securities Exchange Act Release No. 54085 (June 30, 2006), 71 FR 38910 (July 10, 2006), which modified the conditions set forth in the Nasdaq Exchange Approval Order to allow the Nasdaq Exchange to operate as a national securities exchange solely with respect to Nasdaq-listed securities.

continued participation in the ITS Plan.⁶ This is one of the conditions that must be met before Nasdaq can operate as an exchange for non-Nasdaq exchange-listed securities.⁷ Finally, the proposed rule change expands the scope of the NASD/Nasdaq Trade Reporting Facility rules to include trade reporting in non-Nasdaq exchange-listed securities, as well as other technical and clarifying changes.

Proposed Changes Relating to the Separation of Nasdaq

As described in detail in SR-NASD-2005-087, in 2000, NASD began restructuring its relationship with Nasdaq, which operates as an independent, for-profit company. As the result of a two-phase private placement of Nasdaq shares, a public offering completed in January 2005 and other dispositions of NASD shares, NASD no longer holds a common stock ownership interest in Nasdaq. However, because Nasdaq exercises regulatory authority under the Delegation Plan, NASD retains control of Nasdaq through a single share of Series D Preferred Stock (the “Series D Preferred”) that allows NASD to cast a majority of the votes cast in any matter submitted to Nasdaq’s stockholders, including the election of Nasdaq directors. Once the delegation to Nasdaq is no longer necessary, the share of Series D Preferred Stock would automatically lose its voting rights and would be redeemed by Nasdaq for \$1.00.

Thus, upon the Nasdaq Exchange’s operation as a national securities exchange for non-Nasdaq exchange-listed securities, Nasdaq and NASD would be unaffiliated corporate entities, and thus each will have separate rules applicable to their respective members. Therefore, NASD is proposing to amend its rules to reflect this complete separation of Nasdaq from NASD. These changes include removing references in the Delegation Plan to Nasdaq as a subsidiary and

⁶ See Amendment No. 1.

⁷ See id.

delegation of authority to Nasdaq; revising the NASD By-Laws, NASD Regulation, Inc. By-Laws, and NASD Dispute Resolution, Inc. By-Laws to remove references to Nasdaq as a subsidiary of NASD; deleting the Nasdaq By-Laws and all Nasdaq-specific rules and requirements; replacing references to “Nasdaq” with “NASD” or “exchange,” as applicable; and renaming and renumbering certain rules.⁸ The NASD Rule 11890 Series (Clearly Erroneous Transactions) has been amended to delete those provisions relating to Nasdaq’s current clearly erroneous authority, including the authority to break trades as a result of a complaint. The proposed rule change reallocates to NASD the authority previously delegated to Nasdaq to break trades in non-Nasdaq exchange-listed securities on its own motion.⁹ Finally, the proposed rule change deletes NASD Rule 4400 (Impact of Non-Designation of Certain Dually Listed Securities), which is no longer applicable once Nasdaq is operating as a separate entity.

As part of the proposed amendments to the Delegation Plan, NASD is proposing to delete Section III of the Delegation Plan relating to the Quality of Markets Committee, which was a Committee appointed by the Nasdaq Board. NASD is clarifying that NASD’s Market Regulation Committee will perform substantially the same functions as performed by Quality of Markets Committee. The Supplemental Delegation Regarding the Market Regulation Committee is set forth in Section II.C.1 of the Delegation Plan.

Quoting and Trading of Non-Nasdaq Exchange-listed Securities

As part of the Nasdaq Exchange approval order, the Commission conditioned the operation of Nasdaq as an exchange for non-Nasdaq exchange-listed securities on NASD’s

⁸ This proposed rule change also includes corrections of minor grammatical or typographical errors and other miscellaneous non-substantive changes.

⁹ This is consistent with NASD’s current clearly erroneous authority with respect to Nasdaq and OTC equity securities.

ability to represent to the Commission that control of Nasdaq through the Series D Preferred share is no longer necessary because NASD can fulfill through other means its obligations with respect to non-Nasdaq exchange-listed securities under Section 15A(b)(11) of the Act, Rules 602 and 603 of Regulation NMS, and the national market system plans in which NASD participates.¹⁰

To meet these obligations under the federal securities laws with respect to non-Nasdaq exchange-listed securities, NASD is proposing amendments to provide for the operation of an OTC quoting and trading facility in non-Nasdaq exchange-listed securities on a temporary basis, as well as linkage and communications mechanisms necessary under the Intermarket Trading System (ITS) Plan, as described in more detail below. In doing so, NASD is amending (or deleting as appropriate) those rules relating to Nasdaq and Nasdaq's performance of any functions and operation of any systems relating to OTC trading in non-Nasdaq exchange-listed securities under the current Delegation Plan.¹¹

Specifically, the NASD Rule 4900 (Brut System) and NASD 4950 (INET System) Series have been deleted in their entirety, given that the Brut and Inet Systems will no longer be operating pursuant to NASD Rules. With respect to the NASD Rule 4700 Series (ITS/CAES System – Execution Services), the NASD Rule 5200 Series (Intermarket Trading System/Computer Assisted Execution System) and the NASD Rule 6300 Series (Consolidated Quotation Services (CQS)), the general framework under those rule series would remain

¹⁰ Currently, Nasdaq fulfills these obligations for NASD through the operation of, among other things, its SuperIntermarket (“SiM”) trading platform, pursuant to authority delegated to Nasdaq under the Delegation Plan. NASD fulfills the obligations with respect to Nasdaq-listed securities through the operation of the ADF.

¹¹ With respect to the OTC quoting and trading facility proposed herein, Nasdaq will be acting solely in the capacity of a vendor pursuant to a services agreement.

substantially similar to the rules in place today, including all functionality relating to the outbound and inbound ITS linkage; however the functionality available to users within the ITS/CAES System under those rules, particularly the NASD Rule 4700 Series, would be more limited in nature as described below.

The proposed ITS/CAES System would permit registered ITS/CAES Market Makers to (1) display attributable quotes and orders through the system; (2) access other ITS/CAES Market Makers' bids and offers using the "Preferred Order" functionality described below; and (3) interact with other ITS exchanges' bids and offers via inbound and outbound ITS Commitments. Only ITS/CAES Market Makers can display quotes in the system and send Preferred Orders and ITS Commitments. Non-ITS/CAES Market Makers would not be permitted to display interest on the system or send orders; however, as described in more detail below, non-ITS/CAES Market Makers would be able to report locked-in trades through the system.¹²

Members would be required to register with NASD to become ITS/CAES Market Makers (including ECNs that choose to register as such). Members must meet the minimum requirements to be an ITS/CAES Market Maker, as described in NASD Rules 4705, 5220, 6320, and 6330, and all ITS/CAES Market Makers must display and maintain continuous two-sided quotes.

To comply with its two-sided quotation requirements, an ITS/CAES Market Maker would have the option of entering quotations or summary orders. Specifically, an ITS/CAES Market Maker may enter a bid quotation and an offer quotation, each at a single price level,

¹² By comparison, under current rules, non-ITS/CAES Market Makers (defined as "Order Entry Firms") also are not able to display orders or send or receive ITS Commitments; however, they are able to use the system to send "immediate or cancel" orders to ITS/CAES Market Makers.

and/or it may choose to enter “summary orders” at multiple price levels into the system. All orders and quotes must be in round lots. Both quotations and summary orders would be treated the same for purposes of display and ITS execution purposes. Summary orders may be entered with the following Time in Force (TIF):

(1) “DAY” order type, which means that after entry into the system, the order would remain available for potential display and/or execution until market close (4:00 p.m. Eastern Time), after which it shall be returned to the entering party; and

(2) Total Day (“X”) order type, which means that after entry into the system, the order would remain available for potential display between 7:30 a.m. and 6:30 p.m. and for potential execution between market open (9:30 a.m.) and 6:30 p.m., after which it shall be returned to the entering party.

Where an ITS/CAES Market Maker’s quote is exhausted due to an execution with a commitment to trade, as described in NASD Rule 4710(b)(1)(C) and consistent with current practice, the bid side of the ITS/CAES Market Maker’s quote would be zeroed out and then automatically refreshed to establish a bid of \$0.01 for 100 shares. Similarly, if the offer side of the ITS/CAES Market Maker’s quote is zeroed out, the system would automatically establish an offer of two times the system best bid plus \$0.01 for 100 shares. Although quotes would be refreshed automatically in this manner, NASD Rule 5230(c) would require that the ITS/CAES Market Maker enter quotes promptly, but in no event later than 15 seconds from when the quote(s) were exhausted.

Quotations displayed through the ITS/CAES System would be accessible by other ITS Exchanges through inbound ITS Commitments, which would have a uniform TIF of 5 seconds. The system would not provide auto-execution functionality; therefore ITS Commitments

received by ITS/CAES Market Makers would not be responded to (or executed) unless the ITS/CAES Market Maker provides an affirmative response within 5 seconds. If the ITS Commitment is not responded to within that time period, it would be returned to the sending exchange.

Similarly, ITS/CAES Market Makers would be able to send outbound ITS Commitments to access quotes displayed by other ITS exchanges. All outbound ITS Commitments entered by an ITS/CAES Market Maker would be treated as Immediate or Cancel (“IOC” or “IOX,” if it includes the 4:00 p.m. to 6:30 p.m. session) and would have a TIF of 5 seconds (or 30 seconds in the limited circumstance where the ITS Commitment is sent to an ITS Exchange that can only accept a TIF of 30 seconds). Once an ITS Commitment is entered, it cannot be cancelled by the ITS/CAES market maker.

At the end of each trading day, all quotes/orders would be cleared from the system (returned to the sender). Therefore, at the beginning of each trading day, an ITS/CAES Market Maker must enter new quotes and/or summary orders in each security for which it is a registered market maker.

ITS/CAES Market Makers would be able to access other ITS/CAES Market Maker quotes and ITS Exchanges through the use of “Preferred Orders,” which must be entered using the IOC or IOX TIF. Preferred Orders may only be sent to another ITS/CAES Market Maker when that ITS/CAES Market Maker is at the best bid/best offer in the system and only in an amount equal to or less than the ITS/CAES Market Maker’s displayed quote. The system would reject a Preferred Order sent to an ITS/CAES Market Maker that is not at the best bid/best offer in the system, or where the execution of the Preferred Order would result in the violation of the Trade-Through Rule under NASD Rule 5262.

The proposed rule change deletes all rules relating to functionality not available in the new system, including reserve size, the ability to quote or submit orders on a non-attributable basis and certain order types such as “discretionary,” “non-directed,” “sweep” and “fill or return” orders. In addition, because the system is not an “execution” system (i.e., it does not provide auto-execution functionality, only order delivery requiring user response), all references to auto-execution functionality or execution algorithms have been deleted. Similarly, as noted above, members not registered as ITS/CAES Market Makers can use the system only for trade reporting purposes and therefore, rules relating to order functionality previously available to “order entry firms” have been deleted.

The proposed rule change also deletes all rules relating to the ITS Pre-Opening Application (e.g., current NASD Rules 5240 and 5250) functionality. The Pre-Opening Application is a mechanism designed for use by the primary listing markets for ITS Securities to open their markets at prices that are materially different than the previous day’s closing prices. The Pre-Opening Application is initiated by the New York Stock Exchange LLC (“NYSE”) and the American Stock Exchange LLC (“Amex”) for their securities and today, NASD, through its delegation to Nasdaq, does not provide a mechanism to participate in that process via SiM. Therefore, NASD would not be offering that functionality as part of the proposed ITS/CAES System. The proposed system, however, would provide the ability for ITS/CAES Market Makers to view the Pre-Opening notifications published by other ITS Exchanges.

With respect to locked/crossed markets, the NASD ITS/CAES System would reject all quotes that lock or cross the NASD BBO or the National BBO. Because the system would not permit ITS/CAES Market Makers to initiate a locking or crossing quote, NASD is proposing to

delete NASD Rule 5263, which provides procedures relating to locking and crossing markets, and replace it with a general prohibition of such quoting activities.

With respect to the minimum price variation (MPV), NASD is retaining the current MPV increment (\$0.01 for quotations priced at or above \$1.00 per share and \$0.0001 for quotations priced below \$1.00 per share), but is proposing to amend NASD Rule 6330(d) to prohibit the entry of quotes or orders not in compliance with the MPV. NASD would not adjust or round such quotes or orders, but would reject those not in compliance with the MPV.

If a Preferred Order or ITS Commitment is accepted by an ITS/CAES Market Maker, the ITS/CAES System would lock-in the transaction and report it to the “tape” for dissemination purposes and also would provide the necessary clearing information regarding the transaction to the National Securities Clearing Corporation (“NSCC”).

With respect to non-ITS/CAES transactions (i.e., OTC trades in non-Nasdaq exchange-listed securities that are not effected through the ITS/CAES System), NASD is providing a mechanism by which members (both ITS/CAES Market Makers and non-ITS/CAES Market Makers) may report those trades through the ITS/CAES System. Non-ITS/CAES Market Makers that wish to use this functionality must register as a “Trade Reporting Only Participant,” pursuant to proposed NASD Rule 4705(a).

To report transactions through the ITS/CAES System, members must comply with the requirements of NASD Rule 4720, including that members that are parties to the trade must agree to all trade details prior to submitting the report to the system and have in effect, and on file with NASD, an NASD Service Bureau/Executing Broker Supplement to the NASD Services Agreement (“Attachment C Agreement”) and an NASD Give-Up Addendum to the NASD Services Agreement (“NASD Give-Up Agreement”). In the event that the parties do not have

such agreements in effect and on file with NASD, NASD would only facilitate the reporting of the transaction pursuant to an effective transaction reporting plan; the parties must use an alternative mechanism for clearing and comparing the transaction, as necessary.

NASD also is proposing to amend NASD Rule 4720 to require that all transaction reports submitted to the system via NASD Rule 4720 comply with the requirements contained in the NASD Rule 6400 Series, which are substantially similar to the non-Nasdaq exchange-listed trade reporting requirements in place today. NASD is also proposing to amend Rule 6400 (Reporting Transactions in Listed Securities) to clarify that transactions required or eligible to be reported under the Rule 6400 Series must be reported through the ITS/CAES System pursuant to the provisions of Rule 4720.

Proposed Changes Relating to the NASD/Nasdaq Trade Reporting Facility Rules

Pursuant to SR-NASD-2005-087, NASD established the NASD/Nasdaq Trade Reporting Facility, which provides members another mechanism for reporting transactions effected otherwise than on an exchange. The NASD/Nasdaq Trade Reporting Facility is a facility of NASD and subject to NASD's registration as a national securities association. As such, NASD has regulatory responsibility for the trades reported to the NASD/Nasdaq Trade Reporting Facility, while Nasdaq pays for the cost of regulation and provides the systems to enable broker-dealers to report trades to the NASD/Nasdaq Trade Reporting Facility.

Currently, the NASD/Nasdaq Trade Reporting Facility rules apply only to reporting transactions in Nasdaq-listed securities. The proposed rule change amends the NASD Rule 4100, 4200, 4600, and 6100 Series to combine with those provisions the trade reporting

requirements for exchange-listed securities currently found in the NASD Rule 6400 Series.¹³ As a result, the trade reporting requirements for Nasdaq and other exchange-listed securities reported through the NASD/Nasdaq Trade Reporting Facility would be uniform and found in these rule series.¹⁴ In this regard, current NASD Rules 6420(e)(6) and (7) provide exclusions to the trade reporting requirements for non-Nasdaq exchange-listed securities; these exclusions were specific to exchange trading and therefore did not apply to trade reporting in Nasdaq securities. They have now been incorporated into proposed subparagraphs (7) and (8) of NASD Rule 4632(e) and would apply to all exchange-listed securities reported to the NASD/Nasdaq Trade Reporting Facility, including Nasdaq securities.

The NASD/Nasdaq Trade Reporting Facility permits participants to enter into “give-up” arrangements whereby one member reports to the NASD/Nasdaq Trade Reporting Facility on behalf of another member. Participants must complete and submit to the NASD/Nasdaq Trade Reporting Facility the appropriate documentation reflecting the arrangement. Proposed NASD Rule 4632(h) codifies this process and provides that the member with the reporting obligation remains responsible for the transaction submitted on its behalf. Further, both the member with the reporting obligation and the member submitting the trade to the NASD/Nasdaq Trade

¹³ NASD also is proposing technical changes to the NASD Rule 4000 and 6000 Series to replace the term “Trade Reporting Facility” with the “NASD/Nasdaq Trade Reporting Facility” to make it clear that these rules apply to the Trade Reporting Facility operated by the Nasdaq Exchange.

¹⁴ NASD will have an integrated audit trail of non-Nasdaq exchange-listed securities transactions from the ITS/CAES system and the NASD/Nasdaq Trade Reporting Facility and will have integrated surveillance capabilities. Based on the structure and functionality of the system and rules proposed herein, NASD expects that comprehensive audit trail and surveillance integration on an automated basis will be completed by the end of fourth quarter 2006. Prior to that time, NASD staff will be able to create an integrated audit trail on a manual basis as needed for regulatory purposes.

Reporting Facility are responsible for ensuring that the information submitted is in compliance with all applicable rules and regulations.

Finally, NASD is also proposing an amendment to NASD Rule 4632(d)(3)(B) relating to requirements for reporting “riskless principal” transactions to the NASD/Nasdaq Trade Reporting Facility.¹⁵ The proposed rule change would clarify that where the media leg of the riskless principal transaction is reported to the NASD/Nasdaq Trade Reporting Facility, the second, non-media leg must also be reported to the NASD/Nasdaq Trade Reporting Facility. However, where the media leg of the riskless principal transaction was previously reported by an exchange, the member would be permitted, but not required, to report the second, non-media leg to the NASD/Nasdaq Trade Reporting Facility.¹⁶ Members that choose to report such transactions to the NASD/Nasdaq Trade Reporting Facility must include all data elements required under the rules. Members should note, however, that transactions reported by an exchange should not be reported to NASD/Nasdaq Trade Reporting Facility for media purposes, as that would result in double reporting of the same transaction.¹⁷

¹⁵ A riskless principal transaction is a transaction in which a member, after having received a customer order, executes an offsetting transaction, as principal, with another customer or broker-dealer to fill that customer order and both transactions are executed at the same price.

¹⁶ NASD is proposing a similar amendment to NASD Rule 6420(d)(3)(B) to clarify that members can report the second non-media leg of a riskless principal transaction to NASD, but should not report the first media leg, where such leg has been reported by an exchange.

¹⁷ See NASD Rule 4632(e)(6), which has been amended to provide that transactions reported on or through the facilities of an exchange shall not be reported to the NASD/Nasdaq Trade Reporting Facility for purposes of publication. See Securities Exchange Act Release Nos. 54084 (June 30, 2006), 71 FR 38935 (July 10, 2006) (File No. SR-NASD-2005-087); 53977 (June 12, 2006), 71 FR 34976 (June 16, 2006) (File No. SR-NASD-2006-055); and 54318 (August 15, 2006), 71 FR 48959 (August 22, 2006) (File No. SR-NASD-2006-098).

Finally, NASD is proposing to amend the definition of “Reporting ECN” in NASD Rule 6110(i) to clarify that the term includes alternative trading systems, as well as electronic communications networks, as those terms are defined in Rule 600 of Regulation NMS, for purposes of reporting transactions to the System.¹⁸ Pursuant to NASD Rule 6130(c)(5), a Reporting ECN must ensure that transactions are reported in accordance with one of three methods and must provide written notice to NASD of the method of trade reporting for each of its subscribers.

Other Related Changes

Certain trading practice requirements relating to exchange-listed securities currently found in NASD Rule 6440 have been moved to NASD Rule 5120 and would apply to all trading otherwise than on an exchange.

In addition, NASD is proposing to add a new NASD Rule 5130 (Obligation to Provide Information) to require explicitly that members participating in any NASD system or facility provide information orally, in writing, or electronically (if such information is, or is required to be, maintained in electronic form) to the staff of NASD when NASD staff makes an oral, written or electronically communicated request for information relating to a specific NASD rule, Commission rule, or provision of a joint industry plan (e.g., UTP, CTA, CQA and ITS). A failure to comply in a timely, truthful and/or complete manner with a request for information made pursuant to proposed NASD Rule 5130 may be deemed conduct inconsistent with just and equitable principles of trade.¹⁹

¹⁸ As defined in NASD Rule 6110(m), “System” includes, inter alia, the NASD/Nasdaq Trade Reporting Facility and the trade reporting service of the ITS/CAES System.

¹⁹ Proposed NASD Rule 5130 is substantially similar to former NASD Rule 4625 (Obligation to Provide Information), which imposed obligations on members relating to

Proposed Implementation

The effective date of the proposed rule change will be the date upon which the Nasdaq Exchange operates as an exchange for non-Nasdaq exchange-listed securities, which Nasdaq currently anticipates will be in November 2006.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,²⁰ in general, and Section 15A(b)(6) of the Act,²¹ in particular, in that the proposal is 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. NASD believes that the proposed rule change will provide an effective mechanism and regulatory framework for quoting and trading activities otherwise than on an exchange in non-Nasdaq exchange-listed securities upon Nasdaq's complete separation from NASD.

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

NASD believes that the proposed rule change will not 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

Written comments on this proposed rule change 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

requests from Nasdaq MarketWatch and Nasdaq Market Operations staff. NASD Rule 4625 was inadvertently deleted as part of SR-NASD-2005-087.

²⁰ 15 U.S.C. 78o-3.

²¹ 15 U.S.C. 78o-3(b)(6).

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

(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-2006-104 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NASD-2006-104. 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 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 the File Number SR-NASD-2006-104 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.²²

Nancy M. Morris
Secretary

²² 17 CFR 200.30-3(a)(12).