

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-49535; File No. SR-NASD-2004-018)

April 7, 2004

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. to Amend the Procedures for the Review of Nasdaq Listing Determinations

On January 28, 2004, 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"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4² thereunder, a proposal to amend the procedures for the review of Nasdaq listing determinations. On February 20, 2004, Nasdaq submitted Amendment No. 1 to the proposal,³ which replaced the original proposal in its entirety. On March 1, 2004, the Commission published the proposed rule change, as amended, in the Federal Register.⁴ The Commission received no comments on the proposal. This order approves the amended proposal.

The Commission believes that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities association.⁵

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Division of Market Regulation, Commission, dated February 20, 2004 ("Amendment No. 1").

⁴ See Securities Exchange Act Release No. 49306 (February 23, 2004), 69 FR 9662 (March 1, 2004).

⁵ In approving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

In particular, the Commission believes that the proposal is consistent with Section 15A(b)(6) of the Act⁶ which requires, among other things, that the rules of an association be designed to promote just and equitable principles of trade and to protect investors and the public interest. NASD Rule 4830 provides that all hearings before the Nasdaq Listing Qualifications Panel be conducted by at least two persons designated by the Nasdaq board of directors. Nasdaq's practice is to conduct such hearings before panels composed of two members. Currently, NASD Rule 4830 does not make provision for a deadlock between the two members of the panel. Under new paragraph (d) of NASD Rule 4830, in the event of a deadlock, the issuer would be afforded the opportunity for a new hearing before a new Listing Qualifications Panel comprised of three members. The issuer and Nasdaq staff would be afforded the opportunity to supplement the record on review, including any information that was not available at the time of the first hearing before the Listing Qualifications Panel. There would be no fee for the second hearing.

Among other things, the rule change also: (1) allows the Listing Qualifications Panel or the Nasdaq Listing Council to reconsider its decision, but only if there were a mistake of material fact in the decision; (2) clarifies when the Nasdaq Listing Council may assert jurisdiction over a decision or permit the Listing Qualifications Panel to proceed with the reconsideration; and (3) allows documents required by the NASD Rule 4800 process to be delivered by e-mail, if the issuer consents to such method of delivery.

The Commission believes that these proposals will improve the efficiency and fairness of the process by which Nasdaq makes listing determinations and, therefore, are reasonable and consistent with the Act.

⁶ 15 U.S.C. 78o-3(b)(6).

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁷ that the proposed rule change (SR-NASD-2004-018), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁸

Margaret H. McFarland
Deputy Secretary

⁷ 15 U.S.C. 78s(b)(2).

⁸ 17 CFR 200.30-3(a)(12).