

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-50602; File No. SR-NASD-2004-152)

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding Minor Modifications to the Nasdaq Opening Process For Nasdaq-Listed Stocks

October 28, 2004

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 October 12, 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”) the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. Nasdaq has designated the proposed rule change as “non-controversial” under Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders the proposed rule change 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 Substance of the Proposed Rule Change

Nasdaq is filing the proposed rule change to modify in four ways the opening process for Nasdaq securities to: (1) open the trading of Nasdaq stocks that have been the subject of a trading halt using the same process by which it will open trading at 9:30 a.m.

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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> 15 U.S.C. 78s(b)(3)(A).

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

for Nasdaq stocks that are not designated to participate in the Opening Cross; (2) amend the last tie-breaker that will be used to determine the price at which the Nasdaq Opening Cross will occur; (3) suspend the cancellation or modification of Regular Hours Orders that are entered into the Nasdaq Market Center at 9:28 a.m.; and (4) modify the process for calculating the Nasdaq Official Opening Price (“NOOP”). The text of the proposed rule change is set forth below.<sup>5</sup> Proposed new language is in italics; proposed deletions are in [brackets].<sup>6</sup>

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#### **4704. Opening Process For Nasdaq-Listed Securities**

(a) **Definitions.** For the purposes of this rule the term:

- (1) No Change.
- (2) The Order Imbalance Indicator shall disseminate three prices, defined as follows:

([a]A) “Inside Match Price” shall mean:

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<sup>5</sup> The Commission made the following corrections on Nasdaq's behalf to the proposed rule text: (1) an internal cross reference in Rule 4704(a)(2)(A)(iii) was corrected; and (2) the current text of Rule 4704(c)(1) was corrected to include omitted punctuation. Telephone conversation between Jeffrey S. Davis, Associate Vice President and Associate General Counsel, Nasdaq, and Ann E. Leddy, Special Counsel, Division of Market Regulation (“Division”), Commission (October 21, 2004).

<sup>6</sup> The proposed rule change is marked to show changes from the rule text approved by the Commission in Securities Exchange Act Release No. 50405 (September 16, 2004), 69 FR 57118 (September 23, 2004) (SR-NASD-2004-071). This sentence was corrected by the Commission to reflect the fact that the NASD Manual available at [www.nasd.com](http://www.nasd.com) has not been updated to include the rule text for NASD Rule 4704. Telephone conversation between Jeffrey S. Davis, Associate Vice President and Associate General Counsel, Nasdaq, and Ann E. Leddy, Special Counsel, Division, Commission (October 18, 2004).

- (i) No Change.
- (ii) No Change.
- (iii) If more than one price exists under subparagraph (ii), the Inside Match Price shall mean the price that minimizes the distance from the bid-ask midpoint of the inside quotation prevailing at 9:30 a.m. [previous Nasdaq official closing price.]

([b]B) No Change.

([c]C) No Change.

(3) – (7) No Change.

(8) “Regular Hours Orders” shall mean any order that may be entered into the system and designated with a time-in-force of IOC, DAY, or GTC.

Regular Hours Orders shall be available for execution only during the opening and then during normal trading hours. Regular Hours Orders shall be designated as “Early Regular Hours Orders” if entered into the system prior to 9:28 a.m. and designated as “Late Regular Hours Orders” if entered into the system at 9:28 a.m. or after. Beginning at 9:28 a.m., requests to cancel or modify Regular Hours Orders shall be suspended until after completion of the Opening Cross at which time such requests shall be processed.

(b) No Change.

(c) Nasdaq-listed securities that are not designated by Nasdaq to participate in the Nasdaq Opening Cross shall begin trading at 9:30 a.m. or, in the case of Nasdaq-

listed securities in which trading is halted pursuant to Rule 4120(a), at the time specified by Nasdaq pursuant to Rule 4120 in the following manner:

- (1) At 9:30 or at the time specified by Nasdaq pursuant to Rule 4120, the system shall suspend processing as set forth in paragraph (b) in order to open and integrate Regular Hours orders into the book in time priority.
- (2) – (4) No Change.
- (d) Processing of Nasdaq Opening Cross. For certain Nasdaq-listed securities designated by Nasdaq, the Nasdaq Opening Cross shall occur at 9:30, and regular hours trading shall commence when the Nasdaq Opening Cross concludes.
  - (1) No Change.
  - (2)
    - (A) No Change.
    - (B) No Change.
    - (C) If more than one price exists under subparagraph (B), the Nasdaq Opening Cross shall occur at the price that minimizes the distance from the bid-ask midpoint of the inside quotation prevailing at 9:30 a.m. [previous Nasdaq official closing price.]
    - (D) No Change.
  - (3) No Change.
  - (4) No Change.

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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 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

Nasdaq has previously proposed to create two new voluntary opening processes – the Modified Opening Process and the Nasdaq Opening Cross - that together constitute the beginning of the trading day for all Nasdaq-listed securities. The Commission approved that proposal on September 16, 2004.<sup>7</sup> Through quality control and testing, Nasdaq has identified four minor modifications to the operation and rules governing the Nasdaq Opening Cross and Modified Opening Process that it believes would improve the fair and orderly opening of the market in Nasdaq-listed securities.

**First**, Nasdaq proposes to open the trading of Nasdaq stocks that have been the subject of a trading halt using the same process by which it will open trading at 9:30 a.m. for Nasdaq stocks that are not designated to participate in the Opening Cross. NASD Rule 4704(c) specifies that the opening process for stocks that are not included in the Opening Cross will begin at 9:30 a.m. Nasdaq inadvertently failed explicitly to permit

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<sup>7</sup> See, Securities Exchange Act Release No. 50405 (September 16, 2004), 69 FR 57118 (September 23, 2004) (SR-NASD-2004-071).

stocks to open after 9:30 a.m., as can occur when trading has been halted due, for example, to material news or the release of an initial public offering.

Nasdaq believes that the Modified Opening Process (“MOP”), which the Commission has already found to be consistent with the Act should be employed equally for all non-crossing stocks, and that Nasdaq’s rules should explicitly so state. Nasdaq believes that the MOP would improve the opening of trading following a trading halt under NASD Rule 4120. The MOP is designed to create an unlocked and uncrossed bid and offer for the opening of trading, and to execute quotes and orders that would lock or cross the market in a fair and orderly manner. The MOP would work identically and equally well at the open after a trading halt, regardless of whether the halt is initiated under NASD Rule 4120(a)(1), (4), (5), (6), or (7).

**Second**, Nasdaq proposes to amend the last tie-breaker that will be used to determine the price at which the Nasdaq Opening Cross will occur. In its recently-approved proposal, Nasdaq specified that the Nasdaq Opening Cross would occur at the price that maximizes the number of Market on Open (“MOO”), Limit on Open (“LOO”), Opening Imbalance Only (“OIO”), Early Regular Hours orders, and executable quotes and orders in the Nasdaq Market Center to be executed or, if a tie occurs, the price that minimizes any Imbalance or, if another tie occurs, the price that minimizes the distance from the previous Nasdaq official closing price.

Nasdaq has determined that referring to the previous official closing price in this manner could produce an unpredictable Opening Cross Price if there is substantial price fluctuation after the previous day’s close. Nasdaq has determined that the last Opening Cross tie-breaker should instead be the price that minimizes the distance from the bid-ask

midpoint of the inside quotation prevailing at 9:30 a.m. This would minimize price fluctuations and leverage the additional transparency into the opening process that has been created by the Nasdaq Order Imbalance Indicator. Nasdaq believes that this outcome would be consistent with the Act and would serve investors better than the current rule.

**Third**, Nasdaq proposes to suspend at 9:28 a.m. the cancellation or modification of Regular Hours Orders that are entered into the Nasdaq Market Center. Currently, NASD Rule 4704 defines Regular Hours Orders either as “Early Regular Hours Orders” if entered into the system prior to 9:28 a.m. or as “Late Regular Hours Orders” if entered into the system at 9:28 a.m. or after. The current rule does not address the cancellation or modification of Regular Hours Orders as it does with MOO, LOO, and OIO orders.

In order to preserve the stability and predictability of the Nasdaq Opening Cross, Nasdaq proposes to suspend, as opposed to prohibit, the cancellation or modification of all Regular Hours Orders beginning at 9:28 a.m. As with MOO, LOO, and OIO Orders, the late cancellation or modification of a large Regular Hours Order that would otherwise participate in the Opening Cross could substantially impact the Opening Cross Price, surprising market participants, diminishing market quality and potentially harming investors.

Nasdaq would not prohibit the cancellation or modification of Regular Hours Orders, but rather would suspend the effectiveness of such cancellation and modification requests until after the completion of the Nasdaq Opening Cross. If a Regular Hours Order is not executed in the Nasdaq Opening Cross, the cancellation or modification

request would immediately be processed in accordance with its terms and the order modified or returned to the entering party.

**Fourth**, Nasdaq proposes to modify the process for calculating the Nasdaq Official Opening Price (“NOOP”). Currently, the NOOP is equal to the reported price of the first trade executed by the execution functionality of the Nasdaq Market Center based upon orders that are in queue when Nasdaq begins trading at 9:30 a.m. (“Opening Match”). If there is no Opening Match within five seconds after the system opens at 9:30 a.m., the NOOP is based upon the first, last sale eligible trade that is submitted to the trade reporting functionality of the Nasdaq Market Center.

Nasdaq proposes to change from five to fifteen seconds the length of time Nasdaq would wait for an Opening Match within Nasdaq’s execution functionality before looking for a last sale eligible trade submitted to Nasdaq’s trade reporting functionality. Nasdaq believes that this additional ten seconds is needed due to the added time that may elapse while Nasdaq’s execution functionality is processing the Nasdaq Opening Cross. In other words, if Nasdaq were to apply the current five-second standard and the Nasdaq’s Opening Cross were to take more than five seconds to process, the Opening Cross price would not qualify as the NOOP. If the Opening Cross were to be processed sooner than fifteen seconds or, in the case of non-crossing stocks, the system were to execute a trade sooner than fifteen seconds, the NOOP would be calculated at that time rather than waiting the full fifteen seconds.



## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,<sup>8</sup> in general, and with Section 15A(b)(6) of the Act,<sup>9</sup> in particular, in that Section 15A(b)(6) requires, among other things, that a national securities association's rules be designed to protect investors and the public interest. Nasdaq believes that its current proposal is consistent with the NASD's obligations under these provisions of the Act because it would result in a more orderly opening for all Nasdaq stocks. The proposed rule change would create a fair, orderly, and unified opening for Nasdaq stocks, prevent the occurrence of locked and crossed markets in halted securities, and preserve price discovery and transparency that is vital to an effective opening of trading.

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

Nasdaq does not believe that the proposed rule change would 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

Nasdaq neither solicited nor received written comments with respect to the proposed rule change.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

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<sup>8</sup> 15 U.S.C. 78o-3.

<sup>9</sup> 15 U.S.C. 78o-3(b)(6).

(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, if consistent with the protection of investors and the public interest,<sup>10</sup> 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.

Nasdaq has requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow Nasdaq to conduct its planned testing and roll-out schedule for the modified opening without delay. For this

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<sup>10</sup> The Commission revised this section to add the representations on Nasdaq's behalf that the proposed rule change does not significantly affect the protection of investors or the public interest and does not impose any significant burden on competition. Telephone conversation between Jeffrey S. Davis, Associate Vice President and Associate General Counsel, Nasdaq, and Ann E. Leddy, Special Counsel, Division, Commission (October 21, 2004).

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

<sup>12</sup> 17 CFR 240.19b-4(f)(6). The Commission notes that Nasdaq provided written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change at least five business days prior to the date of filing of the proposed rule change.

reason, the Commission designates the proposal to be effective and operative upon filing with the Commission.<sup>13</sup>

#### 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2004-152 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-NASD-2004-152. 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

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<sup>13</sup> For purposes only of waiving the 30-day operative delay of the proposed rule change, the Commission considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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 available publicly. All submissions should refer to File Number SR-NASD-2004-152 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.<sup>14</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>14</sup> 17 CFR 200.30-3(a)(12).