

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50823; File No. SR-NASD-2004-168)

December 8, 2004

Self-Regulatory Organizations; Notice of Filing of and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Certificate of Designation for Preferred Stock of The Nasdaq Stock Market, Inc.

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 November 1, 2004 the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. Pursuant to Rule 19b-4(f)(3),³ Nasdaq has designated this filing as one solely concerned with the administration of the self-regulatory organization, and as such, the filing is immediately effective. 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 with the Commission a Certificate of Designations, Preferences and Rights ("Certificate of Designation") of Series C Cumulative Preferred Stock ("Series C Preferred") authorized to be issued to the NASD. The issuance of the Series C Preferred is part of a transaction between the NASD and Nasdaq whereby 1,338,402 shares of Nasdaq's Series A Cumulative Preferred Stock ("Series A Preferred") owned by the NASD (representing all of the outstanding shares of Series A Preferred) will be exchanged for 1,338,402 shares of Nasdaq's

1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

Series C Preferred. The exchange of the Series A Preferred for the Series C Preferred is designed, among other things, to reduce Nasdaq's current dividend obligations to the NASD since the Series C Preferred has a lower initial dividend rate than the Series A Preferred, subject to payment of an additional dividend in certain circumstances.

Under Section 151(g) of the General Corporation Law of the State of Delaware ("Delaware Law"), such Certificate of Designation is deemed to be an amendment to Nasdaq's Restated Certificate of Incorporation. Pursuant to Exchange Act Rule 19b-4(f)(3),⁴ Nasdaq has designated this filing as one solely concerned with the administration of the self-regulatory organization because the authorization and issuance of the Series C Preferred results in no substantive change in the NASD's control of Nasdaq, and as such, the filing is immediately effective.

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.

1. Purpose

Nasdaq is filing the Certificate of Designation described below. Under Article Fourth, Paragraph B of Nasdaq's Restated Certificate of Incorporation, Nasdaq's Board of Directors may authorize the issuance of preferred stock and fix its designation, powers, preferences and rights,

3 17 CFR 240.19b-4(f)(3).

as well as any qualifications, limitations, and restrictions on it. Under Delaware Law, such Certificate of Designation is deemed to be an amendment to Nasdaq's Restated Certificate of Incorporation, and as such, Nasdaq is filing the Certificate of Designation with the Commission.

The issuance of the Series C Preferred is part of a transaction between the NASD and Nasdaq whereby 1,338,402 shares of Series A Preferred owned by the NASD (representing all of the outstanding shares of Series A Preferred) will be exchanged for 1,338,402 shares of Nasdaq's Series C Preferred. The principal differences between the Series A Preferred and the Series C Preferred concern the amount and timing of dividend payments by Nasdaq to the NASD. The Series A Preferred carries an annual dividend rate of 7.6% for the year commencing March 2003, increasing to 10.6% for years thereafter. The Series C Preferred carries an annual dividend rate of 3.0% for the first two years from the applicable calculation date, increasing to 10.6% for periods thereafter. The Certificate of Designation sets forth certain situations in which the NASD will be entitled to an additional dividend amount upon redemption of the outstanding Series C Preferred, which Nasdaq may elect to pay in cash or shares of its common stock. Both the Series A Preferred and C Preferred are non-voting unless Nasdaq fails to pay a timely dividend. Thus, as in the case of the Series A Preferred, if Nasdaq fails to pay a timely dividend on the Series C Preferred, Nasdaq must increase the size of its Board to add two directors elected by the holders of the Series C Preferred.⁵ Also, as in the case of the Series A Preferred, such

4 17 CFR 240.19b-4(f)(3).

5 Nasdaq continues to discuss with the Commission staff how Nasdaq intends to meet its obligation for fair representation of members on its Board under Section 6(b)(3) of the Act if Nasdaq obtains approval of its exchange registration application. As a result of these discussions, Nasdaq may submit to the Commission amendments to its By-Laws with respect to its Board composition. The potential By-laws amendments under discussion could require the election of additional Board members if the Series C Preferred holder's right to elect Board members is triggered to ensure that the fair

directors would be required to resign upon the payment of the dividend or the redemption of the Series C Preferred. The NASD may not transfer the Series C Preferred without the prior written consent of Nasdaq for a period of one year from its issuance, which is the same initial transfer restriction period as was contained in the Series A Preferred.

The exchange of Series A Preferred for Series C Preferred and the issuance of the Series C Preferred will result in no substantive change in NASD's control of Nasdaq since neither series of preferred stock has voting rights, except in the limited circumstances discussed above. The Series C Preferred also will have no effect on the voting trust that governs the warrants to purchase Nasdaq common stock that were sold by the NASD in two private placements that closed in June 2000 and January 2001.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A(b)(2) and (6) of the Act⁶, which require, among other things, that the Association be so organized and have the capacity to be able to carry out the purposes of the Act and to comply with and enforce compliance with the provisions of the Act, and that the Association's rules be 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. Nasdaq believes that the issuance of this preferred stock will result in no substantive change in its current

representation obligation is met at all times. December 1, 2004 telephone conference between John Zecca, Associate General Counsel, Nasdaq, and Geoff Pemble, Special Counsel, Division of Market Regulation, Commission. In addition, the Commission recently proposed rules that pertain to the governance, administration, transparency and ownership of self-regulatory organizations, which include compositional requirements for the board of directors of self-regulatory organizations. See Securities Exchange Act Release No. 50699 (November 18, 2004), 69 FR 71126 (December 8, 2004).

6 15 U.S.C. 78o-3(b)(2) and (6).

relationship to the NASD; as under the current ownership structure, the NASD will continue to control Nasdaq until exchange registration.

3. 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.

4. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Nasdaq neither solicited nor received comments on the proposed rule change.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act⁷ and subparagraph (f)(3) of Securities Exchange Act Rule 19b-4 thereunder because it is concerned solely with the administration of the self-regulatory organization.⁸ At any time within 60 days of the filing of such 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.

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:

7 15 U.S.C. 78s(b)(3)(A).

8 17 CFR 240.19b-4(f)(3).

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-2004-168 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-2004-168. 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 Section, 450 Fifth Street, NW, Washington, DC 20549. 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-2004-168 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.⁹

Margaret H. McFarland
Deputy Secretary

⁹ 17 CFR 200.30-3(a)(12).