

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50897; File No. SR-NASD-2004-169)

December 21, 2004

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change to Adopt Additional Listing Standards Applicable to the Securities of The Nasdaq Stock Market, Inc. or an Affiliate

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 2, 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, II, and III below, which Items have been prepared by Nasdaq. On December 14, 2004, and December 15, 2004, Nasdaq filed Amendments No. 1 and No. 2, respectively.³ On December 15, 2004, Nasdaq filed Amendment No. 3 to the proposal.⁴ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 and Amendment No. 2 were deficient for technical reasons and were withdrawn on December 14 and December 15, 2004, respectively.

⁴ Amendment No. 3 slightly modifies the text of the proposed rule to make clear that the exclusion in the definition of an Affiliate Security would encompass other exchange traded funds listed on The Nasdaq Stock Market. The amendment also further clarifies and explains the proposed rule change. Amendment No. 3 is incorporated into this notice.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

Nasdaq proposes to adopt additional listing standards that would apply to a security listed on Nasdaq by Nasdaq or its affiliate (collectively defined in the proposed rule as "Nasdaq Affiliates").

The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets.⁵

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Rule 4370. Additional Requirements for Nasdaq-Listed Securities Issued by Nasdaq or its Affiliates

(a) For purposes of this Rule 4370, the terms below are defined as follows:

(1) "Nasdaq Affiliate" means Nasdaq and any entity that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with Nasdaq, where "control" means that the one entity possesses, directly or indirectly, voting control of the other entity either through ownership of capital stock or other equity securities or through majority representation on the board of directors or other management body of such entity.

(2) "Affiliate Security" means any security issued by a Nasdaq Affiliate, with the exception of Portfolio Depository Receipts, as defined in Rule 4420(i)(1)(A), and Index Fund Shares as defined in Rule 4420(j)(1)(A).

(b) Upon initial and throughout continued inclusion of the Affiliate Security in The Nasdaq Stock Market, Nasdaq shall:

⁵ Changes are marked to the rule text that appears in the electronic NASD manual found at <http://www.nasd.com>.

(1) file a report each month with the Commission detailing Nasdaq's monitoring of:

(A) the Nasdaq Affiliate's compliance with the provisions of the Rule 4200, 4300 and 4400 Series; and

(B) the trading of the Affiliate Security, which shall include summaries of all related surveillance alerts, complaints, regulatory referrals, trades cancelled or adjusted pursuant to Rule 11890, investigations, examinations, formal and informal disciplinary actions, exception reports and trading data of such security.

(2) engage an independent accounting firm once a year to review and prepare a report on the Affiliate Security to ensure that the Nasdaq Affiliate is in compliance with the Rule 4200, 4300 and 4400 Series and promptly forward to the Commission a copy of the report prepared by the independent accounting firm.

(c) In the event that Nasdaq determines that the Nasdaq Affiliate is not in compliance with any of the Rule 4200, 4300 and 4400 Series, Nasdaq shall file a report with the Commission at the same time that Nasdaq notifies the Nasdaq Affiliate of its non-compliance. The report shall identify the date of non-compliance, type of non-compliance and any other material information conveyed to the Nasdaq Affiliate in the notice of non-compliance. Within five (5) business days of receipt of a plan of compliance from the Nasdaq Affiliate, Nasdaq shall notify the Commission of such receipt, whether the plan of compliance was accepted by Nasdaq or what other action was taken with respect to the plan and the time period provided to regain compliance with the Rule 4200, 4300 and 4400 Series, if any.

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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 is proposing a rule change to adopt a new Rule 4370 that would impose additional reporting requirements on Nasdaq should Nasdaq or an affiliate of Nasdaq list a security on The Nasdaq Stock Market (collectively, the “Nasdaq Affiliates”).⁶ In the event that a Nasdaq Affiliate lists a security on Nasdaq (the “Affiliate Security”), the proposed rule change would require Nasdaq to file a report with the Commission on a monthly basis detailing Nasdaq’s monitoring of (1) the Nasdaq Affiliate’s compliance with the provisions of Rule 4200, 4300 and 4400 Series (which include bid price requirements, and quantitative and qualitative maintenance requirements) and (2) the trading of the Affiliate Security, including summaries of all related surveillance alerts, complaints, regulatory referrals, trades cancelled or adjusted pursuant to NASD Rule 11890, investigations, examinations, formal and informal disciplinary actions, exception reports and trading data.

Nasdaq also would be required to commission an annual review and report by an independent accounting firm of the compliance of the Affiliate Security with Rule 4200, 4300

⁶ The NASD currently would be considered a Nasdaq Affiliate for purposes of the proposed rule change.

and 4400 Series. Nasdaq would be required to furnish promptly a copy of the report to the Commission.

Nasdaq also would be required to notify the Commission at the same time it notifies the Nasdaq Affiliate if Nasdaq determines that the Nasdaq Affiliate was not in compliance with any of its listing standards. The proposed rule change also would require Nasdaq to notify the Commission within five business days of its receipt of a plan of compliance from the Nasdaq Affiliate. Nasdaq's notification also would advise the Commission on whether the plan of compliance was accepted by Nasdaq or what other action was taken with respect to the plan and the time period provided to regain compliance with the Rule 4200, 4300 and 4400 Series, if any. Nasdaq believes that the additional requirements contained in the proposed rule change would provide additional assurance that any Affiliate Securities listed on Nasdaq by a Nasdaq Affiliate comply with Nasdaq's listing standards on an on-going basis. Nasdaq believes that the proposed rule change would eliminate any perception of a potential conflict of interest if a Nasdaq Affiliate seeks to list a security on The Nasdaq Stock Market.

Nasdaq is proposing to exclude from the definition of Rule 4370 – solely for purposes of this rule – securities that meet the definition of “Portfolio Depository Receipts” under NASD Rule 4420(i)(1)(A) and “Index Fund Shares” under NASD Rule 4420(j)(1)(A). These securities, commonly referred to as “exchange traded funds” or “ETFs,” are issued by open-end management investment companies based on a portfolio of securities. Often this portfolio mirrors a foreign or domestic stock index. An ETF is designed to provide investment results that correspond generally to the price and yield performance of the underlying portfolio of securities. Nasdaq believes that such securities do not present the same concerns as other securities, even if issued by a Nasdaq Affiliate. ETFs, which do not represent investments in an individual

company, are already exempt from a number of listing standards including corporate governance rules standards, such as the requirement to have a board of directors comprised of a majority of independent directors and to have a code of conduct applicable to all employees and directors.⁷ Nasdaq does not believe that the additional reporting requirements in the proposed rule change would provide any value in this context because ETFs would not constitute an investment in a Nasdaq Affiliate. Further, these issuers are already subject to a comprehensive scheme of regulation pursuant to the Investment Company Act of 1940.

2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with the provisions of Section 15A of the Act,⁸ in general, and with Section 15A(b)(6) of the Act,⁹ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, remove impediments to a free and open market and a national market system, and, in general, to protect investors and the public interest, and does not permit unfair discrimination among issuers. Specifically, the rule change would provide additional reporting safeguards for certain listed securities where conflicts of interest might arise.

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.

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.

⁷ NASD Rule 4350(a)(2).

⁸ 15 U.S.C. 78o-3.

⁹ 15 U.S.C. 78o-3(b)(6).

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 the self-regulatory organization 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, as amended, 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-2004-169 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-2004-169. 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-2004-169 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.⁶

Margaret H. McFarland

Deputy Secretary

⁶ 17 CFR 200.30-3(a)(12).