

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51626; File No. SR-NASD-2005-054)

April 28, 2005

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change Relating to Certain Amendments to the Restated Certificate of Incorporation and the By-Laws 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 April 19, 2005, the National Association of Securities Dealers, Inc. (“NASD”), 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. 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 filed this proposed rule change to make certain amendments to the Nasdaq Restated Certificate of Incorporation (the “Certificate”) and the Nasdaq By-Laws (the “By-Laws”) to phase out the current classified board structure and provide for the annual election of all members of the Nasdaq Board of Directors (the “Nasdaq Board”). Under the General Corporation Law of the State of Delaware (“Delaware law”), the proposed amendments to the Certificate must be approved by Nasdaq’s stockholders. Nasdaq has submitted the text of the proposed amendments to the Certificate to its stockholders for approval at the 2005 annual meeting of stockholders (the “Annual Meeting”), which will be held on May 25, 2005. After

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Nasdaq's stockholders approve the proposed amendments to the Certificate, Nasdaq will immediately amend this rule filing to indicate such approval. In order to allow the amendment to take effect as approved by the stockholders, Nasdaq requests that, if the Commission finds that the proposed rule change is consistent with the Act, immediately after Nasdaq's stockholders approve of the proposed amendments to the Certificate, then the proposed rule change will be approved on May 25, 2005.³ Below is the text of the revised rule change. Proposed new language is in *italics*; proposed deletions are in [brackets].

RESTATED CERTIFICATE OF INCORPORATION

OF

THE NASDAQ STOCK MARKET, INC.

* * * * *

ARTICLE FIFTH

A. No change.

B. [The] Subject to the provisions of this paragraph B, the Board (other than those directors elected by the holders of any series of Preferred Stock provided for or fixed pursuant to the provisions of Article Fourth hereof, (the "Preferred Stock Directors")) shall be divided into three classes, as nearly equal in number as possible, designated Class I, Class II and Class III. [Class I directors shall initially serve until the first] Each director elected or appointed prior to the effectiveness of this Certificate of Amendment under the General Corporation Law of the State of Delaware shall serve for his or her full term, such that the term of each Class I director

³ Telephone conversation between John Yetter, Associate General Counsel, Nasdaq, and Mia Zur, Attorney, Division of Market Regulation ("Division"), Commission (April 28, 2005).

shall expire at the 2007 annual meeting of stockholders [following the effectiveness of this Restated Certificate of Incorporation; Class II directors shall initially serve until]; the term of each Class II director shall expire at the [second] 2005 annual meeting of stockholders [following the effectiveness of this Restated Certificate of Incorporation]; and the term of each Class III [directors shall initially serve until the third] director shall expire at the 2006 annual meeting of stockholders [following the effectiveness of this Restated Certificate of Incorporation. Commencing with the first annual meeting of stockholders following the effectiveness of this Restated Certificate of Incorporation, directors of each class the term of which shall then expire shall be elected to hold office for a three-year term and until the election and qualification of their respective successors in office]. In case of any increase or decrease, from time to time, in the number of directors (other than Preferred Stock Directors), the number of directors in each class shall be apportioned as nearly equal as possible. The term of each director elected at the 2005 annual meeting of stockholders and at each subsequent annual meeting of stockholders shall expire at the first annual meeting of stockholders following his or her election. Commencing with the 2007 annual meeting of stockholders, the foregoing classification of the Board shall cease, and the directors, other than the Preferred Stock Directors, shall be elected by the holders of the Voting Stock (as hereinafter defined) and shall hold office until the next annual meeting of stockholders and until their respective successors shall have been duly elected and qualified, subject, however, to prior death, resignation, retirement, disqualification or removal from office.

C. Subject to the rights of the holders of any one or more series of Preferred Stock then outstanding, newly created directorships resulting from any increase in the authorized number of directors or any vacancies in the Board resulting from death, resignation, retirement,

disqualification, removal from office or other cause shall only be filled by the Board. [Any director so chosen shall hold office until the next election of the class for which such directors shall have been chosen and until his successor shall be elected and qualified.] No decrease in the number of directors shall shorten the term of any incumbent director.

D. Except for Preferred Stock Directors, any director, or the entire Board, may be removed from office at any time, but only [for cause and only] by the affirmative vote of at least 66 2/3% of the total voting power of the outstanding shares of capital stock of Nasdaq entitled to vote generally in the election of directors ("Voting Stock"), voting together as a single class.

E. No change.

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BY-LAWS OF THE NASDAQ STOCK MARKET, INC.

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ARTICLE IV

BOARD OF DIRECTORS

Sec. 4.1 – Sec. 4.3 No change.

Election

Sec. 4.4 Except as otherwise provided by law, these By-Laws, or the Delegation Plan, after the first meeting of Nasdaq at which Directors are elected, [a class of] Directors of Nasdaq shall be elected each year at the annual meeting of the stockholders, or at a special meeting called for such purpose in lieu of the annual meeting. If the annual election of Directors is not held on the date designated therefore, the Directors shall cause such election to be held as soon thereafter as convenient.

Sec. 4.5 No change.

Removal

Sec. 4.6 Any or all of the Directors may be removed from office at any time[, but only for cause,] by the affirmative vote of at least 66 2/3 percent of the total voting power of the outstanding shares of capital stock of Nasdaq entitled to vote generally in the election of directors, voting together as a single class.

Sec. 4.7 – Sec. 4.16 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 seeks to phase out its current classified board structure and provide for the annual election of the entire Nasdaq Board. The Certificate provides in Article Fifth, paragraph B that the Nasdaq Board be divided into three classes, with one class elected at each annual meeting and members of each class serving three-year terms. The Certificate and Nasdaq's By-Laws provide, in accordance with Delaware law applicable to classified boards of directors, that directors may be removed only for cause. This system for electing directors was established in June 2000 while Nasdaq was still a wholly-owned subsidiary of NASD in anticipation of

NASD's sale of a portion of its interest in Nasdaq in 2000 and 2001 that led to Nasdaq becoming a publicly traded corporation.

Nasdaq believes that the determination of whether a classified board of directors serves the interests of stockholders of a corporation requires an examination of all relevant factors by the directors and stockholders of the corporation. In light of Nasdaq's particular situation, including its unique role as regulator and operator of a securities market, Nasdaq believes that the annual election of directors may better serve its investors by enhancing accountability through more frequent elections. Nasdaq also believes that the size and diversified experience of the Nasdaq Board are likely to assist Nasdaq in retaining seasoned directors despite more frequent election. While a classified board generally may discourage takeover attempts because the extended terms of directors can delay a change in control of the board of directors, Nasdaq does not believe that there is a clear consensus on whether this is a positive or negative result for stockholders.

In order to ensure a smooth transition to the system of annual election of the entire Nasdaq Board, the proposed rule change would not shorten the terms of directors elected prior to the Annual Meeting. As a result, the terms of Class 2 directors, who are up for election at the Annual Meeting, would be for one year and would expire at the 2006 annual meeting if the amendment is approved by stockholders and the Commission. Class 1 and Class 3 directors would continue to serve until their current terms expire in 2007 and 2006, respectively, and annual election would apply to these directors thereafter. Directors elected by the Nasdaq Board to fill vacancies that may arise will serve for the remainder of the term of the class to which the director was elected. Beginning in 2007, the classification of the Nasdaq Board would end and all directors would be subject to annual election.

The proposed amendments to the Certificate also would delete the existing requirement which provides, in accordance with the provisions of Delaware law applicable to classified boards of directors, that directors may be removed only for cause. Under Delaware law, directors of companies that do not have classified boards may be removed by stockholders with or without cause. The Nasdaq Board has approved conforming amendments to the By-Laws that would be effective only in the event the proposed amendment is approved by the stockholders at the Annual Meeting and by the Commission. The conforming amendments are also included as proposed rule changes in this filing.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the Act, including Section 15A(b)(2) and (6) of the Act,⁴ which require, among other things, that Nasdaq 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 Nasdaq's rules are 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 changes proposed to the Certificate and By-Laws will serve the public interest by enhancing the accountability of board members through more frequent elections. Nasdaq also believes that enhancing the accountability of its board members will also help Nasdaq fulfill its obligations arising under the Act.

⁴ 15 U.S.C. 78o-3(b)(2) and (6).

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.

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 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-2005-054 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-2005-054. 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 the Nasdaq. 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-2005-054 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.⁵

Margaret H. McFarland
Deputy Secretary

⁵ 17 CFR 200.30-3(a)(12).