

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-52449; File No. SR-NASD-2005-107)

September 15, 2005

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto Regarding Enhancements to the Nasdaq Market Center Pegged Order Functionality

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 September 8, 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 and II below, which Items have been prepared by Nasdaq. On September 14, 2005, Nasdaq filed Amendment No. 1 to the proposed rule change.<sup>3</sup> Nasdaq filed the proposal as a “non-controversial” rule change pursuant to Section 19(b)(3)(A) of the Act<sup>4</sup> and Rule 19b-4(f)(6)<sup>5</sup> thereunder, which renders the proposed rule change effective upon filing with the Commission.<sup>6</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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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> Amendment No. 1 made technical changes to the rule text of the proposed rule change and requested that the Commission waive the 30-day operative delay.

<sup>4</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>5</sup> 17 CFR 240.19b-4(f)(6).

<sup>6</sup> Nasdaq provided the Commission with written notice of its intention to file the proposed rule change on August 16, 2005.

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

Nasdaq proposes to modify the order-pegging functionality of the Nasdaq Market Center. Nasdaq intends to implement the proposed rule change immediately and will inform market participants of the exact implementation date via a Head Trader Alert on [www.nasdaqtrader.com](http://www.nasdaqtrader.com).

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

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**4700. NASDAQ MARKET CENTER – EXECUTION SERVICES**

**4701. Definitions**

Unless stated otherwise, the terms described below shall have the following meaning:

(a) – (jj) No Change.

(kk) The term “Auto-Ex” shall mean, for orders in Nasdaq listed securities so designated, an order that (except when it is displayed or interacts with a displayed Discretionary Order at a price in its discretionary price range) will execute solely against the Quotes/Orders of Nasdaq Market Center Participants that participate in the automatic execution functionality of the Nasdaq Market Center and that do not charge a separate quote-access fee to Nasdaq Market Center Participants accessing their Quotes/Orders through the Nasdaq Market Center. An Auto-Ex Order may be designated as “Immediate or Cancel” (an “IOC Auto-Ex Order”) or “Day” or “GTC” (a “Postable Auto-Ex Order”). A party entering a Postable Auto-Ex Order may (but is not required to) specify that the order will utilize the functionality associated with Pegged Orders or Discretionary Orders. Auto-Ex orders shall not be eligible for routing as set out in Rule 4714.

(ll) No change.

(mm) The term “Pegged” shall mean, for priced limit orders so designated, that after entry into the Nasdaq Market Center, the price of the order is automatically adjusted by Nasdaq Market Center in response to changes in either the Nasdaq Market Center inside bid or offer or the national best bid or offer, as appropriate. [The] A Nasdaq Market Center Participant may [entering] enter either a Regular Pegged Order or a Reverse Pegged Order. A Nasdaq Market Center Participant entering a Regular Pegged Order may specify that the price of the order will deviate from either [equal] the Nasdaq inside quote on the same side of the market or the national best bid or offer on the same side of the market by an offset amount of \$0 to \$0.99. [(a “Regular Pegged Order”)] A Nasdaq Market Center Participant entering a Reverse Pegged Order may specify that the price of the order will [or equal a price that] deviate[s] from either the Nasdaq inside quote on the contra side of the market or the national best bid or offer on the contra side of the market by an offset amount of \$0.01 to \$0.99[(i.e., \$0.01 less than the inside offer or \$0.01 more than the inside bid) (a “Reverse Pegged Order”)]. The market participant entering a Pegged Order may (but is not required to) specify a cap price, to define a price at which pegging of the order will stop and the order will be permanently converted into an unpegged limit order. Pegged Orders shall not be available for ITS Securities. Pegged orders shall not be eligible for routing as set out in Rule 4714.

(nn) The term “Discretionary” shall mean

(1) for priced limit orders in Nasdaq listed securities so designated, an order that when entered into the Nasdaq Market Center has both a displayed bid or offer price, as well as a non-displayed discretionary price range in which the participant is also willing to buy or sell, if necessary. The displayed price may be fixed or may be pegged to

[equal] deviate from the Nasdaq inside quote or the national best bid or offer on the same side of the market by an offset amount of \$0 to \$0.99. The pegging of the Discretionary Order may be capped in the same manner as that of a Pegged Order. The discretionary price range of a Discretionary Order that is pegged will be adjusted to follow the pegged displayed price. Discretionary Orders for Nasdaq listed securities shall be eligible for routing as set out in Rule 4714.

(2) No change.

(oo) - (uu) No change.

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#### **4706. Order Entry Parameters**

(a) Non-Directed Orders –

(1) General. The following requirements shall apply to Non-Directed Orders Entered by Nasdaq Market Center Participants:

(A) – (B) No change.

(i) – (iv) No change.

(v) For Nasdaq listed securities, an order may be designated as “Auto-Ex,” in which case the order may be designated as IOC, Day or GTC. If a Nasdaq Market Center Participant entering a Postable Auto-Ex Order specifies that the order will utilize the functionality associated with Pegged or Discretionary Orders, the order will automatically be designated as Day.

(vi) No change.

(vii) An order may be designated as “Pegged,” in which case the order will also automatically be designated as Day. A Pegged Order may not be designated as a Preferred Order. A Pegged Order (or unexecuted portion thereof) will be retained by the Nasdaq Market Center and its price adjusted in response to changes in the Nasdaq Market Center inside market or the national best bid or offer, as appropriate. A Pegged Order (including [a Discretionary Order] any other order type with a price that is pegged) will be cancelled if there is no displayable Quote/Order to which its price can be pegged. Starting at 7:30 a.m., until the 4:00 p.m. market close, Pegged Orders may be entered into the Nasdaq Market Center (or previously entered orders cancelled), but such orders entered prior to market open will not become available for execution until 9:30 a.m. Eastern Time. The initial price of [Pegged Orders (including Discretionary Orders that are pegged)] any type of order with a price that is pegged entered prior to market open will be established at 9:30 a.m. based on the Nasdaq inside bid or offer or the national best bid or offer at that time, as appropriate. Pegged Orders shall not be available for ITS Securities.

To maintain the capacity and performance of the Nasdaq Market Center, Nasdaq may at any time suspend the entry of [Pegged Orders (including Discretionary Orders that are pegged)] all types of orders with prices that are pegged for all securities or for any security. Pegged Orders

that are in the Nasdaq Market Center at the time of such suspension will continue to be available for adjustment and execution.

(viii) a. An order may be designated as “Discretionary”, in which case the order will also automatically be designated as Day. A Discretionary Order may not be designated as a Preferred Order. The order (or unexecuted portion thereof) shall be displayed in the system, if appropriate, using the displayed price selected by the entering party, with the system also retaining a non-displayed discretionary price range within which the entering party is also willing to execute if necessary. If a Discretionary Order is pegged, its displayed price will be adjusted in response to changes in the Nasdaq inside market or the national best bid or offer, as appropriate. Starting at 7:30 a.m., until the 4:00 p.m. market close, Discretionary Orders may be entered into the Nasdaq Market Center (or previously entered orders cancelled), but such orders entered prior to market open will not become available for execution until 9:30 a.m. Eastern Time. Discretionary Orders whose displayed price or discretionary price range does not lock or cross another Quote/Order will be available for execution at 9:30 a.m. All other Discretionary Orders will be added to the time-priority queue described in Rule 4706(a)(1)(F) and (a)(2)(B) and processed by the Nasdaq Market Center at market open.

b. No change.

(ix) – (xiii) No change.

(C) – (F) No Change.

(2) Entry of Non-Directed Orders by Order Entry Firms – In addition to the requirements in paragraph (a)(1) of this rule, the following conditions shall apply to Non-Directed Orders entered by Order Entry Firms:

(A) (i) All Non-Directed orders in Nasdaq listed securities shall be designated as Immediate or Cancel, GTC or Day but shall be required to be entered as Non-Attributable if not entered as IOC. Order Entry Firms may designate orders as “Pegged” or “Discretionary,” in which case the order will also automatically be designated as Day. Order Entry Firms may also designate orders as “Auto-Ex,” in which case the order may be designated as IOC, Day or GTC. If an Order Entry Firm entering a Postable Auto-Ex Order specifies that the order will utilize the functionality associated with Pegged or Discretionary Orders, the order will automatically be designated as Day. For IOC orders, if after entry into the Nasdaq Market Center of a Non-Directed Order that is marketable, the order (or the unexecuted portion thereof) becomes non-marketable, the system will return the order (or unexecuted portion thereof) to the entering participant.

(ii) No change.

(B) No change.

(b) – (e) No change.

#### **4707. Entry and Display of Quotes/Orders**

(a) Entry of Quotes/Orders – Nasdaq Quoting Market Participants may enter Quotes/Orders into the Nasdaq Market Center, and Order Entry Firms may enter Non-Attributable Orders into the Nasdaq Market Center, subject to the following requirements and conditions:

(1) No change.

(2) Upon entry of a Quote/Order into the system, the Nasdaq Market Center shall time-stamp it, which time-stamp shall determine the ranking of the Quote/Order for purposes of processing Non-Directed Orders as described in Rules 4710(b) and 4714. For each subsequent size increase received for an existing quote at a given price, the system will maintain the original time-stamp for the original quantity of the quote and assign a separate time-stamp to that size increase. When [a Pegged Order (including a Discretionary Order that is pegged)]any type of order with a price that is pegged is displayed as a Quote/Order, its time-stamp will be updated whenever its price is adjusted.

(3) – (4) No change.

(b) – (f) No change.

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#### **4710. Participant Obligations in the Nasdaq Market Center**

(a) No change.

(b) Non-Directed Orders

(1) No change.

(A) No change.

(B) No change.

(i) No change.



(ii) Exceptions – The following exceptions shall apply to the above execution parameters:

a. – c. No change.

d. An Auto-Ex Order in a Nasdaq listed security that is designated IOC will interact solely with the Quotes/Orders of Nasdaq Market Center Participants that participate in the automatic execution functionality of the Nasdaq Market Center and that do not charge a separate quote-access fee to Nasdaq Market Center Participants accessing their Quotes/Orders through the Nasdaq Market Center (“Auto-Ex Eligible Participants”). An IOC Auto-Ex Order will not interact with the Quote/Order of an Auto-Ex Eligible Participant if the Quote/Order of a Nasdaq Market Center Participant that is not an Auto-Ex Eligible Participant is priced better than the Quote/Order of any Auto-Ex Eligible Participant at that time. An IOC Auto-Ex Order (or an unexecuted portion thereof) will be cancelled if it cannot be immediately executed.

Upon entry into the Nasdaq Market Center, a Postable Auto-Ex Order will be processed in the same manner as an IOC Auto-Ex Order; provided, however, that if the Nasdaq Market Center Participant entering the Postable Auto-Ex Order [includes discretionary prices] specifies that the order will utilize the

functionality associated with Pegged Orders or Discretionary Orders (including pegged Discretionary Orders), the order will be processed in the same manner as a Pegged Order or a Discretionary Order, but will interact solely with the Quotes/Orders of Auto-Ex Eligible Participants and will not interact with the Quote/Order of an Auto-Ex Eligible Participant if the Quote/Order of a Nasdaq Market Center Participant that is not an Auto-Ex Eligible Participant is priced better than the Quote/Order of any Auto-Ex Eligible Participant at that time. Any portion of a Postable Auto-Ex Order that cannot be immediately executed will be displayed, unless it would lock or cross the Quote/Order of a Nasdaq Market Center Participant that is not an Auto-Ex Eligible Participant, in which case the Postable Auto-Ex Order (or any unexecuted portion thereof) will be cancelled. Depending on the functionality specified by the Nasdaq Market Center Participant entering the order, a Postable Auto-Ex Order that is displayed will have the same characteristics and be subject to the same rules as a regular limit order, a Pegged Order, or a Discretionary Order.

For purposes of this subclause d., any displayed Discretionary Order that may be executed against (or delivered to) an Auto-Ex Order at a price in the Discretionary Order's discretionary price

range will be deemed to have been entered by an Auto-Ex Eligible Participant.

e. – f. No change.

(C) – (D) No change.

(2) – (8) No change.

(c) – (e) 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

In the past several years, Nasdaq has introduced numerous new order types for use in the Nasdaq Market Center.<sup>7</sup> A Pegged Order is a limit order, the price of which is automatically adjusted to follow the price movements of the inside market. A Regular Pegged Order pegs to

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<sup>7</sup> See Securities Exchange Act Release Nos. 48798 (November 17, 2003), 68 FR 66147 (November 25, 2003) (SR-NASD-2003-150) (Pegged Orders); 49085 (January 15, 2004), 69 FR 3412 (January 23, 2004) (SR-NASD-2003-165) (Discretionary Orders); 49020 (January 5, 2004), 69 FR 1769 (January 12, 2004) (SR-NASD-2003-143) (IOC Auto-Ex Orders); 49547 (April 9, 2004), 69 FR 20091 (April 15, 2004) (SR-NASD-2004-046 (Postable Auto-Ex Orders)).

the same side of the market it is entered on, while a Reverse Pegged Order pegs to a price that deviates from the opposite side of the market by \$0.01. A Discretionary Order allows a market participant to specify both a displayed price and one or more undisplayed discretionary prices at which it is willing to trade. The displayed price can be pegged to follow the inside price on the same side of the market as the order, with discretionary price(s) adjusted to follow changes in the displayed price. Upon entry, the Auto-Ex Order executes solely against the Quotes/Orders of Nasdaq Market Center participants that participate in the system's automatic execution functionality and that do not charge a separate quote-access fee to participants accessing their Quotes/Orders through the Nasdaq Market Center ("Auto-Ex Eligible Participants"). Auto-Ex Orders either cancel after accessing available liquidity ("IOC Auto-Ex Orders") or post to the Nasdaq Market Center book after accessing available liquidity ("Postable Auto-Ex Orders").<sup>8</sup>

Currently, market participants using Pegged Orders or Pegged Discretionary Orders have the option only of pegging to the best bid or offer in Nasdaq. To provide market participants with added flexibility in the use of pegged order types, however, Nasdaq is modifying its system to provide the option of pegging orders to the national best bid or offer. In addition, the proposal creates a wider range of offset amounts for use in connection with pegged orders, with a range \$0.00 to \$0.99 for orders pegged to the same side of the market and \$0.01 to \$0.99 for orders pegged to the opposite side of the market. Finally, the proposal makes several non-substantive rule-text changes to remove extraneous language relating to pegging functionality being available for discretionary orders, and to make clear the general availability of pegging functionality for orders, including Postable Auto-Ex Orders.

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<sup>8</sup> A Postable Auto-Ex Order that would lock or cross the Quote/Order of a participant that is not an Auto-Ex Eligible Participant is cancelled, however.

As is currently the case, an order may not be pegged to prices away from the inside market. Thus, by entering a Regular Pegged Order pegged to the national best bid or offer, the market participant would indicate its willingness to provide liquidity at the best price established by any participant in any market trading the stock. By entering a Reverse Pegged Order pegged to the national best bid or offer, the market participant would indicate its willingness to provide liquidity at a price \$0.01 - \$0.99 away from the best price on the opposite side of the market established by any participant in any market trading the stock. As a result, in circumstances where the spread between the national best bid and best offer is greater than \$0.01, the entry of a Reverse Pegged Order would establish a new national best price. All other features of these order types, including the ability to place a cap on an order's pegging function, would remain unchanged.

In addition, Nasdaq will allow market participants entering Postable Auto-Ex Orders to specify that an order will use the pegging functionality. An Auto-Ex Order pegged to the Nasdaq inside would function in the same manner as a Pegged Order, since the order would either join the existing Nasdaq inside, establish a new Nasdaq inside, or be executed by (or receive delivery from) a displayed Discretionary Order at its discretionary price. However, an Auto-Ex Order that is pegged to the national best bid or offer may interact with prices already displayed in Nasdaq, in which case the order's Auto-Ex functionality would become relevant. For example, if the Nasdaq inside was \$20.00 - \$20.01, but the national best offer \$20.00, an Auto-Ex Order to sell that used regular pegging functionality would initially be priced at \$20.00 and would therefore potentially be eligible for execution against the Nasdaq best bid of \$20.00. The order would access all liquidity offered by Auto-Ex Eligible Participants at \$20.00, and if there was no bid at that price level from a market participant that was not an Auto-Ex Eligible

Participant, the order (or unexecuted portion thereof) would be displayed at \$20.00. However, if an Order-Delivery ECN (or an auto-ex ECN that charges an access fee) had a bid at \$20.00 displayed in the Nasdaq Market Center, the Auto-Ex Order (or unexecuted portion thereof) would be cancelled, because it would lock the ECN's offer if it were displayed.<sup>9</sup>

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,<sup>10</sup> in general, and with Section 15A(b)(6) of the Act,<sup>11</sup> in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions

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<sup>9</sup> Similarly, an Auto-Ex Order to sell that used reverse pegging functionality would initially be priced at \$19.99 and would therefore access liquidity from Auto-Ex Eligible Participants at \$20 and possibly also \$19.99.

<sup>10</sup> 15 U.S.C. 78o-3.

<sup>11</sup> 15 U.S.C. 78o-3(b)(6).

in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change will provide market participants with a voluntary tool to use to offer liquidity at the inside market. Nasdaq notes that the Commission has found similar orders offered by at least one other market center to be consistent with the Act.<sup>12</sup>

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, as amended.

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

Because the foregoing proposed rule change, as amended: (1) does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A)<sup>13</sup> of the Act and Rule 19b-4(f)(6) thereunder.<sup>14</sup>

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<sup>12</sup> Securities Exchange Act Release No. 47467 (March 7, 2003), 68 FR 12134 (March 13, 2003) (SR-PCX-2002-75).

<sup>13</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>14</sup> 17 CFR 240.19b-4(f)(6).

Nasdaq has requested that the Commission waive the 30-day operative delay, as specified in Rule 19b-4(f)(6)(iii),<sup>15</sup> and designate the proposed rule change to become operative upon filing with the Commission. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because the proposed rule change is similar to order types already in use in the marketplace. Therefore the Commission designates the proposal to be effective and operative upon filing with the Commission.<sup>16</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.<sup>17</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

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<sup>15</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>16</sup> For purposes of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>17</sup> The effective date of the original proposed rule is September 8, 2005. The effective date of Amendment No. 1 is September 14, 2005. For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers the period to commence on September 14, 2005, the date on which Nasdaq submitted Amendment No. 1. See 15 U.S.C. 78s(b)(3)(C).



- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2005-107 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number SR-NASD-2005-107. 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 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-2005-107 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>18</sup>

Jonathan G. Katz  
Secretary

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<sup>18</sup> 17 CFR 200.30-3(a)(12).