

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-52899; File No. SR-NASD-2005-136)

December 6, 2005

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Allow Nasdaq to Issue Public Reprimand Letters

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 November 17, 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 (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. Nasdaq filed this proposal pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder<sup>4</sup> as non-controversial, and therefore the proposed rule change is effective immediately upon filing. 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 proposes to modify NASD Rules 4801, 4803, 4804 and 4811 to permit Nasdaq to issue public reprimand letters to listed companies for certain rule violations when a determination is made that delisting is not an appropriate sanction. Nasdaq would implement the proposed rule change upon notice by the Commission.

---

<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).

The text of the proposed rule change is below. Proposed new language is underlined; proposed deletions are in brackets.<sup>5</sup>

\* \* \* \* \*

4801. Definitions

(a) – (j) No change.

(k) The term “Staff Determination” shall mean either:

(1) a written determination by the Listing Department to limit or prohibit the initial or continued listing of an issuer's securities pursuant to Rule 4804[.]; or

(2) a public reprimand letter in a case where the Listing Department has determined that the issuer has violated a Nasdaq corporate governance or notification listing standard (other than one required by Rule 10A-3 of the Securities Exchange Act of 1934) and that delisting is not an appropriate sanction. In determining whether to issue a public reprimand letter, the Listing Department shall consider whether the violation was inadvertent, whether the violation materially adversely affected shareholders’ interests, whether the violation has been cured, whether the issuer reasonably relied on an independent advisor and whether the issuer has demonstrated a pattern of violations.

\* \* \* \* \*

---

<sup>5</sup> The proposed rule change is marked to show changes from the rules as they appear in the electronic NASD Manual available at <http://www.nasd.com>.

#### 4803. Staff Review of Deficiency

(a) Whenever staff of the Listing Department determines that an issuer does not meet a listing standard set forth in the Rule 4000 Series, staff shall immediately notify the issuer. The issuer shall make a public announcement through the news media disclosing the receipt of this notice, including the Rule(s) upon which it was based. Prior to the release of the public announcement, the issuer shall provide such disclosure to Nasdaq's MarketWatch Department, the Listing Department, and the Hearings Department. The public announcement shall be made as promptly as possible, but not more than four business days following receipt of the notice from the Listing Department.

(1) In the case of

(A) all quantitative deficiencies from standards that do not provide a compliance period;

(B) deficiencies from the standards of Rules 4350(c) or (d) or 4360(c) or (d) where the cure period of the Rule is not applicable; or

(C) deficiencies from the standards of Rules 4350(f), (h), (i), (k), or (n), 4360(f) or (i), or 4351;

staff's notice shall provide the issuer with fifteen calendar days to submit a plan to regain compliance with the listing standard; provided, however, that the issuer shall not be provided with an opportunity to submit such a plan if review under the Rule 4800 Series of a prior Staff Determination (other than a Staff Determination that serves as a public reprimand letter as described in Section 4801(k)(2)) with respect to the issuer is already pending. Subject to the restrictions of paragraph (b), staff may extend this deadline upon good cause shown. Upon receipt of the issuer's plan, staff in the Listing Department may request such additional

information from the issuer as is necessary to make a determination regarding the likelihood that the plan will allow the issuer to meet the listing standard at issue.

(2) – (3) No change.

(b) Unless review under the Rule 4800 Series of a prior Staff Determination (other than a Staff Determination that serves as a public reprimand letter as described in Section 4801(k)(2)) with respect to the issuer is already pending, the Listing Department may grant the issuer additional time to regain compliance with a listing standard described in paragraph (a)(1); provided, however, that the additional time provided by all such exceptions shall not exceed 105 calendar days from the date of staff's notification pursuant to paragraph (a). The Listing Department shall prepare a written record describing the basis for granting any exception, and shall provide the issuer with written notice as to the terms of the exception. If the issuer does not regain compliance within the time period provided by all applicable exceptions, the Listing Department shall immediately issue a Staff Determination pursuant to Rule 4804(a). If the Listing Department determines not to grant the issuer additional time to regain compliance, the Listing Department shall immediately issue a Staff Determination pursuant to Rule 4804(a) that includes a description of the basis for denying the exception.

#### 4804. Written Notice of Staff Determination

(a) If the Listing Department reaches a determination to limit or prohibit the initial or continued listing of an issuer's securities or to issue a public reprimand letter, it shall prepare and provide to the issuer a Staff Determination that shall describe the specific grounds for the determination, identify the quantitative standard or qualitative consideration set forth in the Rule 4000 Series that the issuer has failed to satisfy, and provide notice that upon request the issuer shall be provided an opportunity for a hearing under this Rule 4800 Series.

(b) An issuer that receives a Staff Determination [to prohibit continued listing of the issuer's securities] under Rule 4804(a) shall make a public announcement through the news media disclosing the receipt of the Staff Determination, including the Rule(s) upon which the Staff Determination was based. Prior to the release of the public announcement, an issuer shall provide such disclosure to Nasdaq's MarketWatch Department, the Listing Department, and the Hearings Department. The public announcement shall be made as promptly as possible, but not more than four business days following receipt of the Staff Determination.

(c) If review under the Rule 4800 Series of a Staff Determination described in Rule 4801(k)(1) is pending and the Listing Department identifies the existence of one or more additional deficiencies with respect to the issuer, the Listing Department shall prepare and provide to the issuer a Staff Determination with respect to such additional deficiencies. If the new Staff Determination is issued prior to a Panel hearing with respect to the original Staff Determination, the new Staff Determination shall notify the issuer that it should present its views with respect to the additional deficiencies at the Panel hearing. If the new Staff Determination is issued after a Panel hearing with respect to the original Staff Determination, the new Staff Determination shall inform the issuer that it should present its views with respect to the additional deficiencies in writing within the period specified in the Staff Determination, to allow review of the additional deficiencies as provided under Rule 4802(d).

(d) If review under the Rule 4800 Series of a public reprimand letter is pending and the Listing Department identifies the existence of one or more additional deficiencies with respect to the issuer, the Listing Department shall review the additional deficiencies as provided in Rule 4803.

\* \* \* \* \*

4811. Record on Review; Contents of Decisions

(a) – (d) No change.

(e) If a Panel Decision, Listing Council Decision, or decision of the NASD Board concludes that the issuer has failed to satisfy the quantitative standards or qualitative considerations set forth in the Rule 4000 Series, the decision shall either:

- (1) grant an exception to the Rule 4000 Series as permitted by Rule 4802(b);
- (2) limit or prohibit the initial or continued listing of the issuer's securities; or
- (3) serve as a public reprimand letter in a case where the Adjudicatory Body determines that the issuer has violated a Nasdaq corporate governance or notification listing standard (other than one required by Rule 10A-3 of the Securities Exchange Act of 1934) and that delisting is not an appropriate sanction. In determining whether to issue a public reprimand letter, the Adjudicatory Body shall consider whether the violation was inadvertent, whether the violation materially adversely affected shareholders' interests, whether the violation has been cured, whether the issuer reasonably relied on an independent advisor and whether the issuer has demonstrated a pattern of violations.

(f) An issuer that receives an Adjudicatory Body decision that serves as a public reprimand letter as described in Rule 4811(e)(3) shall make a public announcement through the news media disclosing the receipt of the decision, including the Rule(s) upon which the decision was based. Prior to the release of the public announcement, an issuer shall provide such disclosure to Nasdaq's MarketWatch Department, the Listing Department, and the Hearings

Department. The public announcement shall be made as promptly as possible, but not more than four business days following receipt of the decision.

\* \* \* \* \*

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 to allow the issuance of a public reprimand letter to a listed company upon a determination that the company has violated a Nasdaq corporate governance or notification listing standard and that delisting is not an appropriate sanction. The Commission recently approved a proposed rule change to Nasdaq's procedures associated with denying or limiting companies' initial or continued listing on Nasdaq.<sup>6</sup> Under these new procedures, the staff of Nasdaq's Listing Qualifications Department ("Listing Department") provides written notice to an issuer of a deficiency when a determination has been made that a listing requirement has not been satisfied. Depending upon the nature of the deficiency, the notice takes the form of a Staff Determination, which initiates proceedings to deny or limit listing, or a deficiency letter that provides the issuer with 15 days to submit a plan to regain compliance with the listing

---

<sup>6</sup> See Securities Exchange Act Release No. 52342 (August 26, 2005), 70 FR 52456 (September 2, 2005) (SR-NASD-2004-125).

standard.<sup>7</sup> If an issuer receives a Staff Determination, it may then request a hearing before a Listing Qualifications Panel (“Panel”). Upon receiving a decision from the Panel (“Panel Decision”), the issuer may appeal the decision to the Nasdaq Listing and Hearing Review Council (“Listing Council”). The final decision of the Listing Council (“Listing Council Decision”) is subject to review by the NASD Board of Directors and the Commission.

Under the current rules, a Staff Determination initiates proceedings to deny or limit listing. In monitoring the compliance of listed companies with Nasdaq’s corporate governance rules, Nasdaq has identified circumstances where delisting would be disproportionate to the underlying deficiency. Nasdaq believes that the availability of a lesser sanction in the form of a public reprimand letter would ensure that investors are not harmed by the premature delisting of companies in certain limited situations where violations involve a relatively minor infraction of certain Nasdaq corporate governance standards or notice requirements.<sup>8</sup>

The proposed rule change, thus, would modify NASD Rule 4801(k) to provide that, depending on the nature of the deficiency, a Staff Determination may take the form of either: (1) a written determination to limit or prohibit the initial or continued listing of an issuer’s securities or (2) a public reprimand letter. Under the proposed rule change, the Listing Department could

---

<sup>7</sup> Under NASD Rule 4803, upon the expiration of the 15 day period provided in a deficiency notice, the staff is required either to initiate delisting proceedings or grant an issuer up to 105 days to regain compliance with the listing standard. The staff’s authority to grant an exception does not apply to quantitative listing standards that, by their terms, specify a cure period.

<sup>8</sup> Examples of some circumstances where Nasdaq could determine to issue a public reprimand letter include those where: (1) the staff determines that a company engaged in a pattern of failing to provide advance notice of press releases to the Nasdaq StockWatch department; (2) the staff becomes aware that a company with a December 31 fiscal year end has not held an annual meeting for the prior year as of early January, but the company has filed a proxy to hold the meeting in the next few weeks; or (3) the staff determines that an independent director resigned from the company and was replaced with another independent director, but the company did not provide prior notice to Nasdaq.



issue a public reprimand letter to an issuer only upon a determination that the issuer violated a Nasdaq corporate governance or notification listing standard (other than one required by Rule 10A-3 under the Act<sup>9</sup>) and that delisting is not an appropriate sanction. In determining whether to issue a public reprimand letter, the Listing Department would consider whether the violation was inadvertent, whether the violation materially adversely affected shareholders' interests, whether the violation has been cured, whether the issuer reasonably relied on an independent advisor, and whether the issuer has demonstrated a pattern of violations.

Because a public reprimand letter would be considered a Staff Determination, it would be subject to appeal in the same manner as a notice to deny or limit listing. The proposed rule change also would modify NASD Rule 4804(b) to clarify that once a public reprimand letter is issued, a company would be required to make a public announcement through the news media disclosing the receipt of the letter, including the basis for the staff's determination. The timetable for the public announcement would be the same as for a deficiency or delisting letter – as promptly as possible, but not later than four business days following receipt of the public reprimand letter.

Nasdaq also proposes to amend NASD Rules 4803, 4804(c), and 4804(d) to clarify that if an appeal of a public reprimand letter is pending, an issuer would not be disqualified from receiving an exception with respect to any additional deficiencies under NASD Rule 4803. If a Staff Determination is under review when the staff issues an additional deficiency notice, the current rules do not permit the staff to provide additional time to the issuer to cure the violation or to submit a plan to regain compliance with the listing standards. Instead, staff must issue a new Staff Determination with respect to the additional deficiencies under NASD Rule 4804(c)

---

<sup>9</sup> 17 CFR 240.10A-3.

and notify the issuer that it should present its views with respect to the new deficiencies at the Panel hearing or, if the Panel hearing has occurred, in writing. Because public reprimand letters generally would involve minor rule violations and are intended to be a lesser sanction than delisting, Nasdaq believes it would not be appropriate to deny issuers that appeal such a letter the benefit of the exception provided by NASD Rule 4803 in the event an additional deficiency is identified.

Nasdaq also proposes to modify NASD Rule 4811 to provide that a Panel Decision, Listing Council Decision, or decision of the NASD Board could, in addition to granting an exception or limiting or prohibiting the initial or continued listing of an issuer's securities, serve as a public reprimand letter. Under the proposed rule change, like the Listing Department, the appropriate Adjudicatory Body<sup>10</sup> could issue a public reprimand letter to an issuer only upon a determination that the issuer violated a Nasdaq corporate governance or notification listing standard (other than one required by Rule 10A-3 under the Act<sup>11</sup>) and that delisting is not an appropriate sanction. In determining whether to issue a public reprimand letter, the Adjudicatory Body would be required to consider the same criteria as the Listing Department. As in the case of a public reprimand letter issued by the staff, an issuer that receives a public reprimand letter issued by an Adjudicatory Body would be required to make a public announcement through the news media disclosing receipt of the letter.

Nasdaq continues to believe that delisting is the appropriate sanction for companies that fall below the quantitative listing requirements, violate Nasdaq listing standards, or raise public interest concerns. Nasdaq believes, however, that the authority to issue public reprimand letters

---

<sup>10</sup> NASD Rule 4801(b) defines "Adjudicatory Body" to mean a Panel, the Listing Council, or the NASD Board

<sup>11</sup> 17 CFR 240.10A-3.

would provide Nasdaq with the ability to impose lesser sanctions on issuers in limited circumstances, when delisting is not appropriate.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,<sup>12</sup> in general, and with Section 15A(b)(6) of the Act,<sup>13</sup> 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. Nasdaq believes that this proposed rule change would increase the objectivity and transparency of its process of sanctioning companies for violations of listing standards and would promote public confidence in Nasdaq and the quality of Nasdaq's listed companies.

### 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.

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

This proposal has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>14</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder<sup>15</sup> because the proposal: (1) does not significantly affect the protection of investors or the public interest, (2) does not impose any significant

---

<sup>12</sup> 15 U.S.C. 78o-3.

<sup>13</sup> 15 U.S.C. 78o-3(b)(6).

<sup>14</sup> 15 U.S.C. 78s(b)(3)(A).

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

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. Nasdaq has requested that the Commission waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing. The Commission notes that the proposed rule change is substantially similar to New York Stock Exchange Rule 303A.13,<sup>16</sup> which was previously approved by the Commission after notice and comment and, therefore, does not raise any new regulatory issues.<sup>17</sup> For this reason, the Commission designates the proposal to be effective and operative upon filing with the Commission.<sup>18</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.

#### 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:

---

<sup>16</sup> See Securities Exchange Release No. 48745 (November 4, 2003), 68 FR 64154 (November 12, 2003) (SR-NYSE-2002-33).

<sup>17</sup> Rule 19b-4(f)(6) also requires a self-regulatory organization to give written notice of a proposed rule change filed pursuant to this subsection at least five business days prior to filing. Nasdaq complied with this requirement.

<sup>18</sup> For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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-2005-136 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NASD-2005-136. 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-2005-136 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>19</sup>

Jonathan G. Katz  
Secretary

---

<sup>19</sup> 17 CFR 200.30-3(a)(12).