

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-53022; File No. SR-NASD-2005-145)

December 23, 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 Relating to a 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 December 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 (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. Nasdaq filed Amendment No. 1 to the proposed rule change on December 21, 2005.³ Nasdaq has designated this proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act⁴ and Rule 19b-4(f)(6) thereunder,⁵ which renders the proposal effective upon filing with the Commission. 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 In Amendment No. 1, Nasdaq modified the basis for summary effectiveness of the filing from Rule 19b-4(f)(3) under the Act to Rule 19b-4(f)(6), which pertains to non-controversial rule changes.

⁴ 15 U.S.C. 78s(b)(3)(A)(iii).

⁵ 17 CFR 240.19b-4(f)(6).

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

Nasdaq proposes to adopt a Certificate of Designation, Preferences and Rights (a "Certificate of Designation") of Series D Preferred Stock ("Series D Preferred"). Nasdaq will implement the proposed rule change as soon as practicable.⁶

The text of the proposed rule change is available on Nasdaq's Internet Web site (<http://www.nasdaq.com>), at NASD's principal office, and at the Commission's Public Reference Room.

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 filing the Certificate of Designation described below. Under Article Fourth 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, as well as any qualifications, limitations, and restrictions upon it. Under Delaware law, the Certificate of

⁶ The Commission notes that on December 14, 2005, Nasdaq filed a certificate of designation for the Series D Preferred with the Secretary of the State of Delaware. On December 20, 2005, Nasdaq and NASD entered into an exchange agreement pursuant to which NASD exchanged one share of Nasdaq's Series B Preferred Stock for one newly issued Series D Preferred. See Nasdaq's Form 8-K, dated December 20, 2005.

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.

In 2002, Nasdaq fixed the designation, powers, preferences, and rights for its Series B Preferred Stock ("Series B Preferred") and issued a single share of the Series B Preferred to its parent corporation, the NASD.⁷ The Series B Preferred holder votes, together as one class with Nasdaq's common stock, on all matters submitted to a vote of holders of common stock. The Series B Preferred has variable voting rights such that the number of votes entitled to be cast by the holder of the Series B Preferred equals that number of votes that, together with votes otherwise entitled to be cast by the holder of the Series B Preferred Stock at a meeting, whether by virtue of share ownership, proxies, voting trust arrangements or otherwise, entitle the holder to exercise one vote more than one-half of all votes entitled to be cast. Thus, by virtue of its ownership of the Series B share, NASD controls Nasdaq, and would continue to control Nasdaq without regard to its level of ownership of Nasdaq common stock.

Nasdaq currently derives its regulatory authority from NASD's registration as a national securities association. Nasdaq exercises its authority by virtue of a delegation from the NASD under the terms of the Commission-approved Plan of Allocation and Delegation of Functions by NASD to Subsidiaries (the "Delegation Plan"), but the Series B Preferred provides a means by which the NASD may assure that Nasdaq operates in accordance with the Delegation Plan. The Series B Preferred provides, however, that it loses its voting rights and will be redeemed by Nasdaq upon Nasdaq "becoming registered with the U.S. Securities and Exchange Commission as a national securities exchange," because Nasdaq would no longer be required to operate under the Delegation Plan if it was authorized by the Commission to operate as an exchange.

⁷ See Securities Exchange Act Release No. 45638 (March 25, 2002), 67 FR 15268 (March 29, 2002).

In 2000 and 2001, Nasdaq filed an application to register as a national securities exchange. Earlier this year, Nasdaq filed substantial amendments to its exchange registration application, under which Nasdaq would become a holding company and a newly formed subsidiary, The NASDAQ Stock Market LLC (“NASDAQ LLC”), would become registered as a national securities exchange. Nasdaq is optimistic that its amended exchange registration application will be approved in the near future. However, it is likely that NASDAQ LLC would not operate as an exchange until some date after the issuance of an order approving its exchange registration application. Accordingly, in the event of the issuance of such an approval order, it is likely that Nasdaq would still need to continue to operate pursuant to the Delegation Plan until such time as NASDAQ LLC begins to operate as an exchange (the “Operational Date”). During this transitional period, NASD would need to continue to exercise control with respect to Nasdaq. The terms of the Series B Preferred, however, are not well suited to possible scenarios under which exchange registration may be implemented, such as in this case, exchange registration would occur in advance of the Operational Date, and NASDAQ LLC, rather than Nasdaq, would be the entity registered as an exchange.⁸

Accordingly, Nasdaq proposes to adopt the Certificate of Designation and issue one share of Series D Preferred to the NASD in exchange for the cancellation of the outstanding share of Series B Preferred. The terms and conditions of the Series D Preferred are identical in all respects to those of the Series B Preferred, except that the triggering event for a loss of voting rights and redemption of the Series D Preferred would be “the first date on which [Nasdaq] and all subsidiaries thereof are no longer operating in any respect pursuant to authority delegated by”

⁸ Earlier this year, Nasdaq stockholders approved an amendment to the Series B Preferred that would result in the termination of voting rights upon the registration of Nasdaq or a subsidiary thereof as an exchange. The amendment, however, did not address ambiguity occasioned by a delay in time between the approval of Nasdaq’s exchange registration and the Operational Date

NASD under the Delegation Plan. Thus, if exchange registration is granted to NASDAQ LLC, the Series D Preferred would lose its voting rights on the Operational Date.⁹ NASD has also filed a proposal that would remove Nasdaq from the Delegation Plan,¹⁰ and Nasdaq expects that if the proposal is approved by the Commission, it will be implemented on the Operational Date.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,¹¹ in general, and with Sections 15A(b)(2) and (b)(6) of the Act,¹² in particular, which require, among other things, that the NASD 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 the NASD'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. The issuance of the Series D Preferred will ensure that NASD continues to control Nasdaq until NASDAQ LLC operates as an exchange and Nasdaq is no longer operating pursuant to the Delegation Plan.

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.

⁹ In the unlikely event that there is a transitional period during which NASDAQ LLC operates as an exchange for certain stocks while Nasdaq continues to operate as a facility of the NASD for other stocks, the Series D Preferred would remain until Nasdaq had ceased to operate in that capacity.

¹⁰ See Securities Exchange Act Release No. 52049 (July 15, 2005), 70 FR 42398 (July 22, 2005).

¹¹ 15 U.S.C. 78o-3.

¹² 15 U.S.C. 78o-3(b)(2) and (b)(6).

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

The Exchange has designated the proposed rule change, as amended, as a “non-controversial” rule change pursuant to Section 19(b)(3)(A)(iii) of the Act¹³ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹⁴ Nasdaq represents that the foregoing rule change: does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) 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 five-day pre-filing requirement and the 30-day operative delay period for “non-controversial” proposals and make the proposed rule change, as amended, effective and operative upon filing.

The Commission has determined to waive the five-day pre-filing requirement and the 30-day operative delay period.¹⁵ The Commission notes that accelerating the operative date will allow Nasdaq to exchange the Series B Preferred for the Series D share with NASD. Therefore, the foregoing rule change has become immediately effective and operative upon filing pursuant to Section 19(b)(3)(A)(iii) of the Act¹⁶ and Rule 19b-4(f)(6) thereunder.¹⁷

¹³ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁴ 17 CFR 240.19b-4(f)(6).

¹⁵ For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁶ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁷ 17 CFR 240.19b-4(f)(6).

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, 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 No. SR-NASD-2005-145 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-2005-145. 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 the

filing also will be available for inspection and copying at the principal office of 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-2005-145 and should be submitted on or before [insert date 21 days from the date of publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁸

Jonathan G. Katz
Secretary

¹⁸ 17 CFR 200.30-3(a)(12).