

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-53697; File No. SR-NASDAQ-2006-006)

April 21, 2006

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Regarding Restrictions on Affiliation between Nasdaq and its Members

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 5, 2006, The NASDAQ Stock Market LLC (“Nasdaq”), filed with the Securities and Exchange Commission (“Commission” or “SEC”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. On April 12, 2006, Nasdaq filed Amendment No. 1 to the proposed rule change.³ 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 establish a rule to govern affiliations between Nasdaq and its members and to make conforming changes to its disciplinary proceedings. Nasdaq will implement the proposed rule change immediately upon approval by the Commission.

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

2140. Restrictions on Affiliation

(a) Except as provided in paragraph (b):

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ In Amendment No. 1, Nasdaq proposed additional revisions to Nasdaq Rule 9270 regarding settlement procedures.

(1) Nasdaq or any entity with which it is affiliated shall not, directly or indirectly, acquire or maintain an ownership interest in, or engage in a business venture with, a Nasdaq member or an affiliate of a Nasdaq member in the absence of an effective filing under Section 19(b) of the Act; and

(2) a Nasdaq member shall not be or become an affiliate of Nasdaq, or an affiliate of an entity affiliated with Nasdaq, in the absence of an effective filing under Section 19(b) of the Act.

The term “affiliate” shall have the meaning specified in Rule 12b-2 under the Act; provided, however, that for purposes of this Rule, one entity shall not be deemed to be an affiliate of another entity solely by reason of having a common director. The term “business venture” means an arrangement under which (A) Nasdaq or an entity with which it is affiliated, and (B) a Nasdaq member or an affiliate of a Nasdaq member, engage in joint activities with an expectation of shared profit and a risk of shared loss from common entrepreneurial efforts.

(b) Nothing in this rule shall prohibit, or require a filing under Section 19(b) of the Act, for:

(1) a Nasdaq member or an affiliate of a Nasdaq member acquiring or holding an equity interest in The Nasdaq Stock Market, Inc. that is permitted by the ownership limitations contained in Nasdaq Rule 2130, or

(2) Nasdaq or an entity affiliated with Nasdaq acquiring or maintaining an ownership interest in, or engaging in a business venture with, an affiliate of a Nasdaq member if:

(A) there are information barriers between the member and Nasdaq and its facilities, such that the member

(i) will not be provided an informational advantage concerning the operation of Nasdaq and its facilities, and will not be provided changes or improvements to the trading system that are not available to the industry generally or other Nasdaq members;

(ii) will not have any knowledge in advance of other Nasdaq members of proposed changes, modifications, or improvements to the operations or trading systems of Nasdaq and its facilities, including advance knowledge of Nasdaq filings pursuant to Section 19(b) of the Act;

(iii) will be notified of any proposed changes, modifications, or improvements to the operations or trading systems of Nasdaq and its facilities in the same manner as other Nasdaq members are notified; and

(iv) will not share employees, office space, or databases with Nasdaq or its facilities, The Nasdaq Stock Market, Inc., or any entity that is controlled by The Nasdaq Stock Market, Inc.; and

(B) Nasdaq's Regulatory Oversight Committee certifies, on an annual basis, to the Director of the Division of Market Regulation that Nasdaq has taken all reasonable steps to implement the requirements of this rule and is in compliance therewith.

* * * * *

(a) – (d) No change.

(e) Appeal or Review

(1) If not timely appealed pursuant to Rule 9311 or timely called for review pursuant to Rule 9312, the majority decision shall constitute final disciplinary action of Nasdaq for purposes of SEC Rule 19d-1(c)(1).

(2) The majority decision with respect to a Nasdaq member that is an affiliate of Nasdaq within the meaning of Rule 2140 shall constitute final disciplinary action of Nasdaq for purposes of SEC Rule 19d-1(c)(1) and may not be appealed pursuant to Rule 9311 or called for review pursuant to Rule 9312.

9269. Default Decisions

(a) – (c) No change.

(d) Final Disciplinary Action of Nasdaq; Effectiveness of Sanctions

(1) If a default decision is not appealed pursuant to Rule 9311 or called for review pursuant to Rule 9312 within 25 days after the date the Office of Hearing Officers serves it on the Parties, the default decision shall become the final disciplinary action of Nasdaq for purposes of SEC Rule 19d-1(c)(1). Unless otherwise provided in the default decision, the sanctions shall become effective on a date to be determined by Nasdaq Regulation staff, except that a bar or expulsion shall become effective immediately upon the default decision becoming the final disciplinary action of Nasdaq. The decision shall be served on a Respondent by courier, facsimile or other means reasonably likely to obtain prompt service when the sanction is a bar or an expulsion.

(2) A default decision with respect to a Nasdaq member that is an affiliate of Nasdaq within the meaning of Rule 2140 shall constitute final disciplinary action of Nasdaq for purposes of SEC Rule 19d-1(c)(1) and may not be appealed pursuant to Rule 9311 or called for review pursuant to Rule 9312.

9270. Settlement Procedure

(a) – (d) No change.

(e) If a Respondent makes an offer of settlement and the Department of Enforcement or the Department of Market Regulation does not oppose it, the offer of settlement is uncontested. If an offer of settlement is determined to be uncontested by the Department of Enforcement or the Department of Market Regulation before a hearing on the merits has begun, the Department of Enforcement or the Department of Market Regulation shall transmit the uncontested offer of settlement and a proposed order of acceptance to the Nasdaq Review Council (or to the Office of Disciplinary Affairs, in the case of a Respondent that is an affiliate of Nasdaq within the meaning of Rule 2140) with its recommendation. If an offer of settlement is determined to be uncontested by the Department of Enforcement or the Department of Market Regulation after a hearing on the merits has begun, the Department of Enforcement or the Department of Market Regulation shall transmit the offer of settlement and a proposed order of acceptance to the Hearing Panel or, if applicable, the Extended Hearing Panel for acceptance or rejection. If accepted by the Hearing Panel or, if applicable, Extended Hearing Panel, the offer of settlement and the order of acceptance shall be forwarded to the Nasdaq Review Council (or to the Office of Disciplinary Affairs, in the case of a Respondent that is an affiliate of Nasdaq within the meaning of Rule 2140) to accept or reject.

(1) No change.

(2) Before an offer of settlement and an order of acceptance shall become effective, they shall be submitted to and accepted by the Nasdaq Review Council or the Office of Disciplinary Affairs. The Review Subcommittee [or the Office of Disciplinary Affairs] may accept or reject such offer of settlement and order of acceptance or refer them to the Nasdaq Review Council for acceptance or rejection by the Nasdaq Review Council. [The Review Subcommittee may reject such offer of settlement and order of acceptance or refer them to the Nasdaq Review Council for acceptance or rejection by the Nasdaq Review Council.] In the case of a Respondent that is an affiliate of Nasdaq within the meaning of Rule 2140, the offer of settlement and order of acceptance shall be accepted or rejected by the Office of Disciplinary Affairs and shall not be referred to the Nasdaq Review Council.

(3) No change.

(f) Contested Offers of Settlement

If a Respondent makes an offer of settlement and the Department of Enforcement or the Department of Market Regulation opposes it, the offer of settlement is contested. When the Department of Enforcement or the Department of Market Regulation opposes an offer of settlement, the Respondent's written offer and the Department of Enforcement's or the Department of Market Regulation's written opposition shall be submitted to a Hearing Panel or, if applicable, an Extended Hearing Panel. The Hearing Panel or, if applicable, the Extended Hearing Panel, may order the Department of Enforcement or the Department of Market Regulation and the Respondent to attend a settlement conference.

(1) If a contested offer of settlement is approved by the Hearing Panel or, if applicable, Extended Hearing Panel, the Hearing Officer shall draft an order of acceptance of the offer of settlement. The order of acceptance shall make findings of fact, including a statement of the rule, regulation, or statutory provision violated, and impose sanctions consistent with the terms of the offer of settlement. The offer of settlement, any written opposition thereto, and the order of acceptance shall be forwarded to the Nasdaq Review Council (or to the Office of Disciplinary Affairs, in the case of a Respondent that is an affiliate of Nasdaq within the meaning of Rule 2140) to accept or reject.

(2) Before an offer of settlement and order of acceptance shall become effective, they shall be submitted to, and accepted by, the Nasdaq Review Council or the Office of Disciplinary Affairs. The Review Subcommittee may accept or reject such offer of settlement and order of acceptance or refer them to the Nasdaq Review Council for acceptance or rejection by the Nasdaq Review Council. In the case of a Respondent that is an affiliate of Nasdaq within the meaning of Rule 2140, the offer of settlement and order of acceptance shall be accepted or rejected by the Office of Disciplinary Affairs and shall not be referred to the Nasdaq Review Council.

(3) If the offer of settlement and order of acceptance are accepted by the Office of Disciplinary Affairs, the Nasdaq Review Council or the Review Subcommittee, the Chief Regulatory Officer shall issue the order and notify the Office of Hearing Officers.

(g) No change.

(h) Rejection of Offer of Settlement

If an uncontested offer of settlement or an order of acceptance is rejected by the Hearing Panel or, if applicable, the Extended Hearing Panel, the Review Subcommittee, the Office of Disciplinary Affairs, or the Nasdaq Review Council, the Respondent shall be notified in writing and the offer of settlement and proposed order of acceptance shall be deemed withdrawn. If a contested offer of settlement or an order of acceptance is rejected by the Hearing Panel or, if applicable, the Extended Hearing Panel, the Review Subcommittee, the Office of Disciplinary Affairs, or the Nasdaq Review Council, the Respondent shall be notified in writing and the offer of settlement and proposed order of acceptance shall be deemed withdrawn. The rejected offer and proposed order of acceptance shall not constitute a part of the record in any proceeding against the Respondent making the offer.

(i) No change.

(j) No Prejudice from Rejected Offer of Settlement

If an offer of settlement is rejected by a Hearing Panel or, if applicable, an Extended Hearing Panel, the Review Subcommittee, the Office of Disciplinary Affairs, or the Nasdaq Review Council, the Respondent shall not be prejudiced by the offer, which may not be introduced into evidence in connection with the determination of the issues involved in the pending complaint or in any other proceeding.

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9311. Appeal by Any Party; Cross-Appeal

(a) Time to File Notice of Appeal

A Respondent or the Department of Enforcement or the Department of Market Regulation may file a written notice of appeal within 25 days after service of a decision issued pursuant to Rule 9268 or Rule 9269; provided, however, that a decision with respect to a

Respondent that is an affiliate of Nasdaq within the meaning of Rule 2140 may not be appealed to the Nasdaq Review Council.

(b) - (f) No change.

9312. Review Proceeding Initiated By Nasdaq Review Council

(a) Call for Review

(1) Rule 9268 Decision

A decision issued pursuant to Rule 9268 may be subject to a call for review by any member of the Nasdaq Review Council or, pursuant to authority delegated from the Nasdaq Review Council, by any member of the Review Subcommittee. A decision issued pursuant to Rule 9268 shall be subject to a call for review within 45 days after the date of service of the decision. If called for review, such decision shall be reviewed by the Nasdaq Review Council.

(2) Rule 9269 Decision

A default decision issued pursuant to Rule 9269 shall be subject to a call for review by the Chief Regulatory Officer, on his or her own motion within 25 days after the date of service of the decision. If called for review, such decision shall be reviewed by the Nasdaq Review Council.

(3) Decision Regarding Affiliate of Nasdaq

Notwithstanding anything herein to the contrary, a decision with respect to a member that is an affiliate of Nasdaq within the meaning of Rule 2140 may not be called for review by the Nasdaq Review Council.

(b) – (d) No change.

9351. Discretionary Review by Nasdaq Board

(a) Call for Review by Director

A Director may call a disciplinary proceeding for review by the Nasdaq Board if the call for review is made within the period prescribed in paragraph (b); provided, however, that a decision with respect to a member that is an affiliate of Nasdaq within the meaning of Rule 2140 may not be called for review.

(b) - (e) No change.

9360. Effectiveness of Sanctions

Unless otherwise provided in the decision issued under Rule 9349 or Rule 9351, a sanction (other than a bar, an expulsion, or a permanent cease and desist order) specified in a decision constituting final disciplinary action of Nasdaq for purposes of SEC Rule 19d-1(c)(1) shall become effective on a date to be determined by Nasdaq staff (or the Hearing Panel, Extended Hearing Panel, or Office of Disciplinary Affairs in the case of a decision with respect to an affiliate of Nasdaq within the meaning of Rule 2140). A bar, an expulsion, or a permanent cease and desist order shall become effective upon service of the decision constituting final disciplinary action of Nasdaq, unless otherwise specified therein. Nasdaq shall serve the decision on a Respondent by courier, facsimile or other means reasonably likely to obtain prompt service when the sanction is a bar, an expulsion, or a permanent cease and desist order.

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9523. Acceptance of Member Regulation Recommendations and Supervisory Plans by Consent Pursuant to SEC Rule 19h-1

(a) – (b) No change.

(c) If the disqualified member, sponsoring member, and/or disqualified person execute the letter consenting to the supervisory plan, it shall be submitted to Nasdaq Regulation by the Department of Member Regulation with a proposed Notice under SEC Rule 19h-1, where required. Nasdaq Regulation shall forward the supervisory plan and proposed Notice under SEC Rule 19h-1, if any, to the Chairman of the Statutory Disqualification Committee, acting on behalf of the Nasdaq Review Council (or to the Office of Disciplinary Affairs in the case of a supervisory plan with respect an affiliate of Nasdaq within the meaning of Rule 2140). The Chairman of the Statutory Disqualification Committee may accept or reject the recommendation of the Department of Member Regulation and the supervisory plan or refer them to the Nasdaq Review Council for acceptance or rejection by the Nasdaq Review Council, and the Office of Disciplinary Affairs may accept or reject the recommendation of the Department of Member Regulation and the supervisory plan.

(d) If the recommendation and supervisory plan is accepted by the Nasdaq Review Council, [or] the Chairman of the Statutory Disqualification Committee, or the Office of Disciplinary Affairs, it shall be deemed final and, where required, the proposed Notice under SEC Rule 19h-1 will be filed by Nasdaq. If the recommendation and supervisory plan are rejected by the Chairman of the Statutory Disqualification Committee, [or] the Nasdaq Review Council, or the Office of Disciplinary Affairs, Nasdaq Regulation may take any other appropriate action with respect to the disqualified member, sponsoring member, and/or disqualified person. If the recommendation and supervisory plan are rejected, the disqualified member, sponsoring member, and/or disqualified person shall not be prejudiced by the execution of the letter consenting to the supervisory plan under subparagraph (a) and the letter may not be introduced into evidence in any proceeding.

9524. Nasdaq Review Council Consideration**(a) Hearing Panel Consideration****(1) Appointment of Hearing Panel**

When the disqualified member, sponsoring firm, or applicant requests a hearing, the Nasdaq Review Council or the Review Subcommittee shall appoint a Hearing Panel composed of two or more members, who shall be current or former members of the Nasdaq Review Council or the Statutory Disqualification Committee or former Directors (provided, however, that current members of the Nasdaq Review Council shall not serve on a Hearing Panel with respect to an affiliate of Nasdaq within the meaning of Rule 2140). The Hearing Panel shall conduct a hearing and recommend a decision on the request for relief.

(2) – (9) No change.

(10) Recommendation

On the basis of the record, the Hearing Panel shall present a recommended decision in writing on the request for relief to the Statutory Disqualification Committee. After considering the record and recommendation of the Hearing Panel, the Statutory Disqualification Committee shall present its recommended decision in writing to the Nasdaq Review Council. Notwithstanding the foregoing, with respect to a Nasdaq member that is an affiliate of Nasdaq within the meaning of Rule 2140, the Hearing Panel shall prepare a final decision meeting the requirements of Rule 9524(b)(2), which shall not be reviewed by the Statutory Disqualification Committee or the Nasdaq Review Council, and may not be called for review by the Nasdaq Board pursuant to Rule 9525.

(b) Decision

(1) – (2) No change.

(3) Issuance of Decision After Expiration of Call for Review Period

The Nasdaq Review Council shall provide its proposed written decision to the Nasdaq Board. The Nasdaq Board may call the eligibility proceeding for review pursuant to Rule 9525. If the Nasdaq Board does not call the eligibility proceeding for review, the proposed written decision of the Nasdaq Review Council shall become final, and the Nasdaq Review Council shall serve its written decision on the disqualified member, sponsoring member, and/or disqualified person, as the case may be, and the Department of Member Regulation pursuant to Rules 9132 and 9134. In the case of a decision with respect to a Nasdaq member that is an affiliate of Nasdaq within the meaning of Rule 2140, the decision of the Hearing Panel shall become final without being provided to the Nasdaq Board, and the Hearing Panel shall serve its written decision.

The decision shall constitute final action of Nasdaq, unless the Nasdaq Review Council remands the eligibility proceeding. A decision to deny re-entry or continued association shall be effective immediately. A decision to approve shall be effective after the Commission issues an acknowledgment letter or, in cases involving Commission ordered sanctions, an order.

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9559. Hearing Procedures for Expedited Proceedings Under the Rule 9550 Series

(a) – (p) No change.

(q) Call for Review by the Nasdaq Review Council

(1) The Nasdaq Review Council's Review Subcommittee may call for review a decision issued under the Rule 9550 Series within 21 days after receipt of the decision from the Office of Hearing Officers; provided, however, that a decision under the Rule 9550 Series with respect to a Nasdaq member that is an affiliate of Nasdaq within the meaning of Rule 2140 shall constitute final disciplinary action of Nasdaq for purposes of SEC Rule 19d-1(c)(1) and may not be called for review pursuant to Rule 9559. Rule 9313(a) is incorporated by reference.

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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 had 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 connection with its registration as a national securities exchange,⁴ Nasdaq has agreed to propose a rule to regulate affiliation between Nasdaq and its members, and to limit in certain respects Nasdaq's regulatory authority with respect to members with which it may become affiliated. The purpose of the rule is to guard against any possibility that Nasdaq may exercise,

⁴ Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (File No. 10-131).

or forebear to exercise, regulatory authority with respect to an affiliated member in a manner that is influenced by commercial considerations, to provide an opportunity for Commission review of certain proposed affiliations, and to ensure that certain affiliated members do not receive advantaged access to information in comparison with unaffiliated members. Nasdaq believes that the proposed rule will provide added assurance of regulatory integrity without subjecting Nasdaq and its affiliates to unwarranted restrictions on their commercial activities.

In general, the proposed rule provides that Nasdaq must file a proposed rule change with the SEC before Nasdaq or an entity with which it is affiliated acquires or maintains an ownership interest in, or engages in a business venture with, a Nasdaq member or an affiliate of a Nasdaq member.⁵ The rule defines “affiliate” with reference to Rule 12b-2 under the Act,⁶ which provides that if one person controls, is controlled by, or is under common control another person, the persons are affiliates. The proposed rule would help to implement what Nasdaq perceives to be emerging Commission policy with regard to appropriate activities for member broker-dealers that are affiliated with self-regulatory organizations (“SROs”). For example, although the Commission’s order to establish the Archipelago Exchange (“ArcaEx”) as a facility of the Pacific Exchange (“PCX”) allowed ArcaEx to affiliate itself with various broker-dealers for the purpose of introducing orders to ArcaEx and routing them to other trading venues,⁷ the Commission’s order with respect to the acquisition of PCX by Archipelago Holdings (“Arca

⁵ As used in the rule, the term “affiliate” includes natural persons, but the term “entity,” when used to describe an affiliate, excludes natural persons.

⁶ 17 CFR 240.12b-2.

⁷ Securities Exchange Act Release No. 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) (SR-PCX-00-25).

Holdings”) mandated that Arca Holdings divest its ownership of PCX members engaged in activities other than outbound routing.⁸

Nasdaq’s proposed rule would make it clear that in a case where Nasdaq proposes an acquisition of, or a merger or business venture with a Nasdaq member, an SEC filing will be required. In order to make it clear that the obligation to avoid affiliations that have not been filed is imposed by the rule both on Nasdaq and its members, moreover, the rule provides that a Nasdaq member shall not be or become an affiliate of Nasdaq, or an affiliate of any entity affiliated with Nasdaq, without an SEC filing.

The term “business venture,” as used in the rule, is defined as an arrangement under which Nasdaq or an entity with which it is affiliated, on the one hand, and a Nasdaq member or affiliate thereof, on the other hand, engage in joint activities with an expectation of shared profit and a risk of shared loss from common entrepreneurial efforts. Thus, the term does not include, and the proposed rule does not regulate, contracts with members or their affiliates to provide goods, products, or services for consideration, including, but not limited to, asset or stock purchase agreements that do not result in ongoing ties with a member or its affiliates,⁹ credit or debt facilities, licenses of intellectual property, contracts for investment banking, financial advisory, or consulting services,¹⁰ or the provision of transaction services or data to a broker-

⁸ Securities Exchange Act Release No. 52497 (September 22, 2005), 70 FR 56949 (September 29, 2005) (SR-PCX-2005-90).

⁹ For example, if Nasdaq acquired a non-member subsidiary of a member in a transaction that did not result in an ongoing affiliation with the member, the transaction would not be regulated by the rule.

¹⁰ In some cases, such contracts may involve sharing of confidential information with a member in circumstances where a member acts as a fiduciary for Nasdaq or one of its affiliates. The member would be required take measures to prevent such information from being misused, and a failure to do so would constitute a violation of Nasdaq rules,

dealer member or products or services to a listed company that is or that owns a member broker-dealer.

The rule limits possible expansive interpretations of the term “affiliate” by stipulating that one entity is not deemed to be an affiliate of another entity solely by virtue of having a common director. For example, if one of the member representative directors of Nasdaq elected by the Nasdaq membership is also a director of a Nasdaq member, that member would not be deemed to be an affiliate of Nasdaq solely because of the common director. In addition, the rule should not be construed to regulate in any manner the selection of directors or standing committee members of Nasdaq, The Nasdaq Stock Market, Inc. (“Nasdaq Holdco”), or their affiliates, provided such selections are conducted in accordance with applicable provisions of governing corporate documents (e.g., Nasdaq’s limited liability company agreement and by-laws or Nasdaq Holdco’s certificate of incorporation and bylaws).

In circumstances where an SEC filing is required, the rule may, in appropriate cases, permit a filing to be submitted on an immediately effective basis under Section 19(b)(3)(A) of the Act¹¹ and Rule 19b-4(f) thereunder.¹² For example, in cases where a proposed affiliation or business venture would not result in the establishment of a “facility” of Nasdaq within the

including, depending on the circumstances, Rule 2110 (Standards of Commercial Honor and Principles of Trade); Rule 2120 (Use of Manipulative, Deceptive, or Other Fraudulent Devices); and Rule 3010 (Supervision). See also NASD Notice to Members 91-45: NASD/NYSE Joint Memo on Chinese Wall Policies and Procedures (June 21, 1991) (describing NASD policies with regard to preventing misuse of confidential information by NASD member firms).

¹¹ 15 U.S.C. 78s(b)(3)(A).

¹² 17 CFR 240.19b-4(f).

meaning of Section 3 of the Act,¹³ a filing to establish rules to govern the operation of the affiliate or business venture would not be required or appropriate. Rather, in such circumstances, Nasdaq would expect to engage in informal consultation with the Division of Market Regulation and/or members of the Commission, and would then submit a filing to amend Rule 2140 itself, to establish that the affiliation or business venture could exist as an exception to the rule.

Depending on the circumstances, such a filing might be submitted on an immediately effective basis.

There are also several important exceptions to the general filing requirement of the rule. First, the rule would not require a filing for transactions that result in a Nasdaq member acquiring or holding an interest in Nasdaq Holdco that is consistent with Nasdaq Rule 2130. Rule 2130 provides that “[n]o member or person associated with a member shall be the beneficial owner of greater than twenty percent (20%) of the then-outstanding voting securities of The Nasdaq Stock Market, Inc.” “Beneficial ownership” is defined with reference to Nasdaq Holdco’s certificate of incorporation, which in turn provides that a person shall be deemed the “beneficial owner” of, shall be deemed to have “beneficial ownership” of and shall be deemed to “beneficially own” any securities: (i) which such person or any of such person’s affiliates is deemed to beneficially own, directly or indirectly, within the meaning of Rule 13d-3 under the Act ...;¹⁴ (ii) subject to certain narrow exceptions described in the certificate of incorporation, which such person or any of such person’s affiliates has the right to acquire or to vote pursuant to

¹³ 15 U.S.C. 78c.

¹⁴ SEC Rule 13d-3, 17 CFR 240.13d-3, in turn provides that a beneficial owner of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares voting power or investment power.

any agreement, arrangement, or understanding; or (iii) subject to certain narrow exceptions described in the certificate of incorporation, which are beneficially owned, directly or indirectly, by any other person and with respect to which such person or any of such person's affiliates has any agreement, arrangement or understanding for the purpose of acquiring, holding, voting or disposing of such securities. Thus, although a person may be construed to have an ownership interest in the Nasdaq Holdco under a range of circumstances, a member's ownership interest would be permissible under Rule 2130 and would not require an SEC filing pursuant to Rule 2140 as long as the total ownership interest of the member constituted 20% or less of the then outstanding voting securities of Nasdaq. For example, one of Nasdaq's current investors, Silver Lake Partners, is affiliated with Instinet, LLC ("Instinet"), a registered broker-dealer. If Instinet becomes a Nasdaq member, the rule would not be construed to restrict its activities in any respect as long as (i) the ownership interest of Nasdaq Holdco imputed to it remains under 20%, and (ii) its affiliation with Nasdaq arises from its ownership interest. Nasdaq would, however, be required to submit a filing if Nasdaq itself acquired an ownership interest in Instinet or entered into a business venture with it (unless another exception to Rule 2140 applied). Similarly, the rule would not require a filing with respect to an acquisition of a Nasdaq member by a Nasdaq Holdco stockholder, as long as the Nasdaq member's resulting beneficial ownership interest in Nasdaq Holdco was under 20%.

Finally, the rule provides that no filing is required for Nasdaq or an entity affiliated with Nasdaq acquiring or maintaining an ownership interest in, or engaging in a business venture with, an affiliate of a Nasdaq member if there are information barriers between the member and Nasdaq and its facilities, such that the member (i) will not be provided an informational advantage concerning the operation of Nasdaq and its facilities, and will not be provided changes

or improvements to the trading system that are not available to the industry generally or other Nasdaq members; (ii) will not have knowledge in advance of other members of proposed changes, modifications, or improvements to the operations or trading systems of Nasdaq and its facilities, including advance knowledge of Nasdaq filings pursuant to Section 19(b) of the Act; (iii) will be notified of any proposed changes, modifications, or improvements to the operations or trading systems of Nasdaq and its facilities in the same manner as other Nasdaq members are notified; and (iv) will not share employees, office space, or databases with Nasdaq or its facilities, Nasdaq Holdco, or any entity that is controlled by Nasdaq Holdco.¹⁵ Nasdaq's Regulatory Oversight Committee must certify, on an annual basis, to the Director of the Division of Market Regulation that Nasdaq has taken all reasonable steps to implement the foregoing requirements with respect to any affiliate to which they apply and is in compliance therewith.

This exception is aimed at circumstances in which Nasdaq or an affiliated entity acquires, or enters into a business venture with, an affiliate of a Nasdaq member, and Nasdaq erects information barriers between the member and Nasdaq and its facilities. Thus, Nasdaq ensures that the member does not receive any advantage as a result of its affiliation.

The proposed rule change also modifies Nasdaq's rules regarding disciplinary proceedings to provide that Nasdaq disciplinary actions with regard to a member that is an affiliate of Nasdaq (including litigated and default decisions, contested and uncontested settlements, statutory disqualification proceedings, and expedited proceedings) may not be

¹⁵ Nasdaq will not construe these limitations to bar an employee of an affiliated member from serving on a Nasdaq advisory committee, such as the Quality of Markets Committee, since (i) such committee members are required to sign confidentiality agreements with regard to information received through committee service, and (ii) the committee member employed by the affiliate would receive information provided through committee service at the same time as other committee members.

appealed to the Nasdaq Review Council or called for review by the Nasdaq Review Council or the Nasdaq Board of Directors. Rather, after an initial decision with regard to such members is reached by the NASD under the terms of Nasdaq's regulatory services agreement with NASD, the member could appeal directly to the Commission. These changes to the disciplinary process would apply to all affiliated members, including members whose affiliations did not require a filing pursuant to Rule 2140.

2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with the provisions of Section 6 of the Act,¹⁶ in general, and with Section 6(b)(5) of the Act,¹⁷ in particular, in that it 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 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.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change, as amended, will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

¹⁶ 15 U.S.C. 78f.

¹⁷ 15 U.S.C. 78f(b)(5).

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 Nasdaq 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-NASDAQ-2006-006 on the subject line.

Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2006-006. 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 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 publicly available. All submissions should refer to File Number SR-NASDAQ-2006-006 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.¹⁸

Nancy M. Morris
Secretary

¹⁸ 17 CFR 200.30-3(a)(12).