

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59663; File No. SR-NASDAQ-2009-018)

March 31, 2009

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Revisions and Restructuring of the NASDAQ Listing Rules.

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 March 12, 2009, The NASDAQ Stock Market LLC (“Nasdaq”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. Nasdaq included in its proposed rule change Exhibit 5A, which is the text of the proposed rule change; Exhibit 5B, which is a copy of the current 4000 Series rules as they currently exist which are being proposed for amendment in Exhibit 5A; and Exhibit 5C, which is a table that shows the location of the old rules to where they now reside in the new rule text.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 a rule change to reorganize the rules relating to the qualification, listing, and delisting of companies listed, or applying to list on Nasdaq (“Companies”). Nasdaq is proposing to house these rules, which are currently found in the 4000 Series of the Marketplace Rules, into a clearer and more intuitive structure under a new 5000 Series. In addition, Nasdaq

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Exhibits 5A, 5B, and 5C are available on the Commission’s Web site (<http://www.sec.gov/>).

has taken this opportunity to eliminate redundancies and clarify the language used for the rule text. The text of the proposed rule change is available from Nasdaq's website at <http://nasdaq.cchwallstreet.com>, at Nasdaq's principal office, and at the Commission's Public Reference Room. The new rules shall become operative on April 13, 2009.

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. The text of these statements may be examined at the places specified in Item IV below, and is set forth in Sections A, B, and C below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq proposes to reorganize the rules applicable to the qualification, listing, and delisting of Companies on Nasdaq (the "Listing Rules"), which are found in the Rule 4000 Series of the Nasdaq manual (the "4000 Series"), in an effort to make the rules more transparent and clear.⁴ As these rules have evolved over the last thirty years, they have become very complex and can be difficult to navigate, especially for those who are unfamiliar with their structure. Nasdaq believes that there are opportunities to reduce redundancies and greatly improve the overall organization of the Listing Rules. As such, Nasdaq proposes to remove the listing rules from the 4000 Series and restate them in a simpler, more transparent and reader-friendly format in the proposed Rule 5000 Series (the "5000 Series"), which is presently unused.

⁴ The Listing Rules are divided into different sections within the 4000 Series, with each section numbered as a 100th of 4000 (e.g., 4100 "General", 4200 "Definitions," etc.). Nasdaq also refers to these sections as Series when making reference to all rules that fall under the section. For example, Rule 4310 would be said to reside in the 4300 Series. Nasdaq uses the same convention for referring to sections of the proposed 5000 Series.

Nasdaq represents that it is not making any substantive changes to the Listing Rules in this proposal. Rather, as described in greater detail below, Nasdaq proposes to: (1) reorganize and recast much of the old 4000 Series into a more logical structure; (2) apply plain English principles where needed; (3) add descriptive titles and introductory language; (4) define terms for consistency; (5) delete obsolete or incongruent rules; and (6) add or amend rule text where appropriate to remove ambiguity, to clarify existing practices, and to resolve ongoing questions from the public. To assist with understanding the changes made to the Listing Rules, Nasdaq created a table that maps the location of every existing Listing Rule in the 4000 Series to its place in the proposed new 5000 Series. The table provides both the old rule number and rule text, together with the revised rule text and new rule citation to the rule's location in the proposed 5000 Series. In addition, the table provides a brief description of the changes made to the old rule. Nasdaq also notes in the table rules that have been left in the 4000 Series⁵, rules that have been deleted altogether, and any newly-created rules added to the proposed 5000 Series (such as a new defined term). Nasdaq believes that, when the table is read in conjunction with this filing, readers will have a clear understanding of the changes made to the 4000 Series.

Organization

The current 4000 Series contains the initial and continued listing standards for all three Nasdaq market tiers: The Nasdaq Global Select Market, The Nasdaq Global Market, and The Nasdaq Capital Market. In addition to listing standards, the 4000 Series also contains rules relating to trading of, and market making in, Nasdaq securities, as found in the 4100, 4600 and 4700 Series. The rules relating to the listing of securities are found in the 4200, 4300, 4400, 4500, and 4800 Series. Specifically, the 4200 Series sets forth general definitions; the 4300

⁵ Nasdaq determined to leave certain rules that do not relate to the listing of Company securities in the 4000 Series.

Series sets forth qualitative listing standards for all Nasdaq market tiers, as well as initial and continued listing requirements for the Capital Market; the 4400 Series contains the initial listing requirements for the Global Select Market and Global Market, and the continued listing requirements for the Global Market, including requirements for listing other securities, such as Index Warrants and SEEDS; the 4500 Series contains all the fees required to be paid for listing on Nasdaq; and finally, the 4800 Series contains the requirements and procedures regarding Nasdaq's appellate process for a Company denied initial or continued listing.

Each of Nasdaq's three market tiers has its own specific listing standards that are progressively more stringent than the tier below. Today, the listing rules are all derived from the rules applicable to the Capital Market, so readers must have a working knowledge of the Capital Market rules to understand the listing requirements of the other tiers. The need to reference back to the Capital Market rules when reading the Global Market or Global Select Market rules is often confusing, and is made particularly difficult given that the rules applicable to the Capital Market and the other tiers are located far from each other in the current rules.

Nasdaq proposes to organize the new Listing Rules by placing all quantitative tier-specific initial and continued listing standards within individual rule sections. Thus, the requirements for the Nasdaq Global Select Market will be contained in the proposed 5300 Series, the requirements for the Nasdaq Global Market will be contained in the proposed 5400 Series, and the requirements for the Nasdaq Capital Market will be contained in the proposed 5500 Series. Nasdaq is also proposing to create a new 5000 Series that contains general definitions applicable to Companies, a new 5100 Series that contains a description of Nasdaq's discretionary authority, and a new 5200 Series that contains qualitative requirements relating to all Companies seeking to list or already listed on Nasdaq. Nasdaq is proposing to create a new 5600 Series that

contains a stand-alone rule set dedicated to the corporate governance requirements for all Nasdaq-listed Companies. Last, Nasdaq is proposing a new 5700 Series that contains the requirements for listing other securities, a new 5800 Series that contains the requirements and processes relating to a Company that fails to meet a listing standard, and a new 5900 Series that contains the fees required to be paid for listing on Nasdaq.

Within the proposed 5300, 5400 and 5500 Series, which, as noted, are each dedicated to a particular market, Nasdaq has organized all applicable quantitative initial and continued listing standards. Each of these three Series uses a numbering convention whereby the rules applicable to initial listing range from 01 to 49 and the continued listing rule numbers range from 50 to 99. For example, all initial listing rules applicable to the Nasdaq Global Market are housed in Rules 5405 through 5415, while the Global Market continued listing rules are housed in Rules 5450 through 5460. Nasdaq believes that both new readers and those familiar with the current rule structure will find the information they seek much more quickly under the new rule structure.

Nasdaq has also divided the quantitative listing standards in the old rules into two subcategories in the new rules: listing requirements and listing standards. Under the new rules, listing requirements are quantitative metrics, all of which a company must meet for initial or continued listing on a particular tier. Listing standards consist of bundles of quantitative metrics; however, unlike listing requirements, a company must meet at least one listing standard to become listed or to continue listing. For example, the three Entry Standards found in current Rule 4420(a) - (c) contain certain repetitive quantitative requirements relating to bid price, publicly held shares, and round lot shareholders. Nasdaq took these common quantitative metrics and placed them in new Rule 5405(a) as initial listing requirements. For each bundle of quantitative requirements that remained under each old entry standard, Nasdaq created individual

listing standards. It should be noted that, under old Entry Standard 3 found in Rule 4420(c), Nasdaq was able to create two new listing standards in the proposed new 5000 Series, Rules 5405(b)(3) and (4).⁶ Under the old rule, Entry Standard 3 contained an alternative quantitative listing requirement of either a market value of listed securities of \$75 million or total assets and total revenue of \$75 million each.⁷ Nasdaq believes that the two metrics are better understood as separate, stand-alone listing standards. The remaining Entry Standard 3 quantitative metrics are either captured under the new listing requirements or duplicated in each of the newly-created listing standards. Like all changes proposed by Nasdaq in this filing, this new structure is not a substantive change and in no way changes the application of the listing standards under the existing rules.

As noted, Nasdaq has created a stand-alone section in the proposed 5000 Series for rules that apply to all tiers of securities,⁸ which includes an overview of the application process,⁹ prerequisites for applying to list,¹⁰ and other obligations and requirements for listing.¹¹ In addition, Nasdaq has created a stand-alone section for listing standards applicable to “other securities,” which includes listing requirements for Exchange Traded Funds, Index-Linked Securities, Selected Equity-linked Debt Securities, Trust Issued Receipts, and Index Warrants, as

⁶ The new listing standards are titled “Market Value Standard” and “Total Assets/Total Revenue Standard.”

⁷ Rule 4420(c)(6) requires that “The issuer has: (A) a market value of listed securities of \$75 million (currently traded issuers must meet this requirement and the bid price requirement under Rule 4420(c)(3) for 90 consecutive trading days prior to applying for listing); or (B) total assets and total revenue of \$75 million each for the most recently completed fiscal year or two of the last three most recently completed fiscal years.”

⁸ 5200 Series.

⁹ Rule 5205.

¹⁰ Rule 5210.

¹¹ Rules 5215 – 5290.

well as generic standards.¹² Nasdaq's corporate governance standards are also contained in a single, stand-alone section.¹³

Also included in the proposed 5000 Series are the rules relating to fees currently found in the 4500 Series. Nasdaq proposes moving the 4500 Series to the new 5900 Series with only minor non-substantive changes that do not affect the fees charged by Nasdaq. Nasdaq proposes, however, moving Rule 4550, which relates to written interpretations of Nasdaq rules, to the proposed 5600 Series. Nasdaq believes that it is more appropriate to move Rule 4550 to the proposed 5600 Series, which relates to corporate governance requirements, since the vast majority of interpretations are requested for corporate governance rules. Nasdaq has, however, provided a cross-reference to proposed new Rule 5600, which houses Rule 4550, in the introductory paragraph to the proposed 5900 Series.

Nasdaq has sought to clarify the process that applies to companies that fail to meet Nasdaq's listing standards, which is currently found in the 4800 Series. Although the 4800 Series rules are roughly organized chronologically, progressing from the initial identification of a deficiency through the Nasdaq hearings and appeals processes, Nasdaq believes that the individual sections could be reorganized into a more intuitive structure. With respect to the initial identification of deficiencies, Nasdaq has attempted to make clear both what steps Nasdaq will take with respect to particular deficiencies, and what obligations and options deficient companies may have. Nasdaq has also reorganized the rule text relating to the hearings and appellate processes, so that in each section the reader will find all information related to the process for each level of review.

¹² 5700 Series.

¹³ 5600 Series.

Nasdaq also identified instances of unnecessary duplication of rule text found in individual Series of the current rules as well. For example, Rules 4310 and 4320 set forth certain listing requirements applicable to domestic, Canadian, non-Canadian foreign securities, and American Depositary Receipts. Rule 4310 sets forth the listing requirements for domestic and Canadian securities, whereas Rule 4320 sets forth the listing requirements for non-Canadian foreign securities and American Depositary Receipts. Although stand alone rules, there is much duplication of rule text between the two rules. Accordingly, Nasdaq is proposing to combine these rules and any other such duplicative rule text, where possible, throughout the proposed 5000 Series. In combining these two rules, Nasdaq has retained the domestic and Canadian continued listing market maker requirement that allows one market maker entering a stabilizing bid to count toward the total number of market makers required by the rules. Nasdaq notes that the proposed new Capital Market continued listing rules makes it permissive for non-Canadian foreign securities to count a market maker entering a stabilizing bid toward the required number of market makers, which was not explicitly stated in the old rules.

Nasdaq determined to leave certain rules that do not relate to the listing of Company securities in the 4000 Series. For example, Rules 4100 through 4120 relate to the trading of listed Company securities on the market. Nasdaq believes these rules are more appropriately left in a stand-alone section, apart from the proposed 5000 Series, which addresses the listing and delisting of Company securities. Likewise, Nasdaq determined to leave certain definitions found in the 4200 Series that do not relate to listed Companies. Nasdaq also determined to leave Rule 4370 in the 4000 Series. Rule 4370 concerns additional requirements for the listing of Nasdaq or Nasdaq affiliate securities on Nasdaq. Because the rule is specific to Nasdaq and does not apply

to Companies generally, Nasdaq determined it would be confusing and add little value if placed in the proposed 5000 Series.

Plain English

Nasdaq's primary goal in reworking the Listing Rules was to make them more clear and transparent. As noted above, the 4000 Series evolved over many years and were drafted by multiple individuals. As a consequence, the 4000 Series was not written with a consistent voice. Nasdaq has taken this opportunity to, where needed, make plain English changes to the 4000 Series and re-write certain rule text with a consistent voice to clarify provisions that have historically caused confusion, while ensuring not to change the meaning of the reworked rules. In some cases, this meant eliminating redundant language throughout the proposed rule text. In other instances, Nasdaq replaced inconsistently used terms with a single term used throughout the new rules.

Descriptive Titles and Introductory Language

Nasdaq renamed many existing rules, using more descriptive titles that provide a better cue as to what follows. Nasdaq has also added descriptive introductory language to many sections of the proposed new 5000 Series, which Nasdaq believes provides readers with a logical roadmap to what follows in each section. For example, Nasdaq has added a new introduction to the Listing Rules titled "5000 Series: The Qualification, Listing, and Delisting of Companies" under which is provided a description of what readers will find under each section of the proposed 5000 Series. Likewise, Nasdaq added descriptive introductory language to the beginning of the proposed 5000, 5400, 5600, and 5700 Series, and added to the proposed 5500 and 5800 Series rewritten introductory language taken from the 4300 and 4800 Series, respectively.

Defined Terms

Nasdaq has created, modified, or deleted several definitions in the process of incorporating the 4000 Series into the proposed new 5000 Series. In certain cases, such as the new definition of “Bid Price,” Nasdaq sought to add certainty to a term that had been used in the Listing Rules, but not defined historically. Nasdaq’s new definition clarifies that the term “Bid Price” is the closing bid price, which Nasdaq has always used as the metric for determining bid price. A common and recurring inquiry by investors and companies alike, Nasdaq believes that the clarifying language will help to answer a common question. In other cases, Nasdaq modified a term or its definition to make it more accurate or precise. As another example, under the old rules the Adjudicatory Body responsible for reviewing decisions of the Listing Qualifications Department was named the Listing Qualifications Panel, notwithstanding that it was in no way associated with the Listing Qualifications Department. When read together with Rule 4815, which generally prohibits ex parte communications between the Listing Qualifications Department and the Listing Qualifications Panel, Nasdaq thought it appropriate to rename the Listing Qualifications Panel the Hearings Panel so that there is no confusion surrounding the independence of the adjudicator.

Nasdaq is proposing to create a new defined term, “Company,” as found in new Rule 5000(a)(6). Both the terms “company” and “issuer” are used synonymously throughout the current 4000 Series, however, neither term is defined. In the proposed new definition, Nasdaq is defining a Company as the issuer of a security listed or applying to list on Nasdaq. Nasdaq is also making it clear that, for purposes of the 5000 Series, the term Company includes an issuer that is not incorporated, such as a limited partnership. Nasdaq notes that the inclusion of issuers

that are not incorporated is consistent with Nasdaq's current rules, as such issuers are able to list on Nasdaq pursuant to specific listing rules.

In a similar regard, Nasdaq is proposing to define a new term, "Shareholder." In the current 4000 Series, there is no single defined term that represents the owner of a security that is listed or that is in the listing application process. Nasdaq is proposing in new Rule 5000(a)(37) to define Shareholder as a record or beneficial owner of a security listed or applying to list. Nasdaq is including in the definition of Shareholder limited partners and owners of depository receipts or units. The inclusive definition of Shareholder does not change in the proposed 5000 Series how the rules applicable to such owners are applied currently under the 4000 Series.

Nasdaq has created new terms "Publicly Held Shares" and "Public Holders" in proposed Rules 5000(a)(33) and (a)(34).¹⁴ The new definition of Publicly Held Shares is derived from Rules 4310(c)(7)(C) and 4420(e). Rule 4310(c)(7)(C) is a Capital Market rule, which states that shares held directly or indirectly by any officer or director of the Company and by any person who is the beneficial owner of more than 10 percent of the total shares outstanding are not considered to be publicly held. Rule 4420(e) is a Global Market rule that provides, among other things, that the method for calculating beneficial ownership when determining publicly held shares shall be made in accordance with Rule 13d-3 under the Act.¹⁵ Nasdaq has historically

¹⁴ The Commission notes that the proposed rule text for new Rule 5000(a)(33) in Exhibit 5A is correct. However, in Exhibit 5C, on page 569, the column in the table setting forth the new rule text does not have the correct definition for "Publicly Held Shares." Specifically, the definition for Publicly Held Shares should read "...means shares not held directly or indirectly by an officer, director or any person who is the beneficial owner of more than 10 percent of the total shares outstanding. Determinations of beneficial ownership in calculating publicly held shares shall be made in accordance with Rule 13d-3 under the Act."

¹⁵ 17 CFR 240.13d-3.

used the methodology found in Rule 13d-3 under the Act¹⁶ when determining beneficial ownership for purposes of calculating publicly held shares, regardless of market. By also excluding shares that are indirectly held by officers and directors, the proposed rules would also provide transparency to Nasdaq's view that immediate family members of an Executive Officer, director, or 10 percent holder are also not Public Holders, and the shares they hold are not Publicly Held Shares, to the extent those shares are considered beneficially owned by the Executive Officer, director or 10 percent holder pursuant to Rule 16a-1(a)(2) under the Act.¹⁷

Nasdaq has also created a new definition of "filed with Nasdaq" in proposed Rule 5000(a)(15). The new definition is derived from Rules 4310(c)(14) and 4320(e)(12), which provide that Companies do not have to submit paper copies of filings to Nasdaq if these filings have been filed with the Commission via the EDGAR System. Nasdaq uses the term throughout the 4000 Series and proposed 5000 Series. Nasdaq believes the addition of the new definition will help inform readers of how to satisfy the requirement in the various contexts that it is used in the rules.

Nasdaq is proposing to define a new term, "Other Regulatory Authority" in Rule 5000(a)(31). The new term includes regulators other than the Commission with which certain Companies must file documentation. In particular, certain Companies are regulated by a bank or savings authority identified in Section 12(i) under the Act¹⁸, and others may be subject to an exemption issued by the Commission that permits the listing of the security, notwithstanding its failure to be registered pursuant to Section 12(b) under the Act¹⁹. Nasdaq is proposing to add the

¹⁶ Id.

¹⁷ 17 CFR 240.16a-1(a)(2).

¹⁸ 15 U.S.C. 78l(i).

¹⁹ 15 U.S.C. 78l(b).

new defined term to certain sections of 5000 Series concerning filing obligations to make clear that filing requirements are applicable to Companies that are required to file with the Commission or with an Other Regulatory Authority.²⁰

Nasdaq is proposing to define the term “Public Reprimand Letter” in new Rule 5805(j), which means a letter issued by Staff or an Adjudicatory Body in cases where the Company has violated a Nasdaq corporate governance or notification listing standard (other than one required by Rule 10A-3 of the Act²¹) and Staff or the Adjudicatory Body determines that delisting is an inappropriate sanction. Although not a defined term under the 4000 Series, the term “public reprimand letter” occurs throughout the Listing Rules and was generally described by Rule 4801(k)(2), which provides one of two alternate definitions of the term “Staff Determination,” and also under Rule 4811(e)(3), which describes an Adjudicatory Body’s authority to issue Decisions that are public reprimand letters. In the proposed definition in new Rule 5805(j), Nasdaq combines the concept in the old rules that a public reprimand letter may be issued by the Staff or an Adjudicatory Body into the definition of the new defined term.

Deleted Rules

Nasdaq has found that certain Listing Rules have historically caused confusion. In the majority of cases, such rules required minor clarifying changes or the application of plain English principles. In other cases, however, the confusion was due to a rule that ran contrary to other Listing Rules. For example, Nasdaq proposes deleting the first sentence to Rule 4802(b),

²⁰ The Commission notes that the proposed rule text for new Rule 5205(b) in Exhibit 5A is correct. However in Exhibit 5C, on page 398, the column in the table setting forth the new rule text does not use the new defined term Other Regulatory Authority, and should read “A Company’s compliance with the initial listing criteria will be determined on the basis of the Company’s most recent information filed with the Commission or Other Regulatory Authority and information provided to Nasdaq. The Company shall certify, at or before the time of listing, that all applicable listing criteria have been satisfied.”

²¹ 17 CFR 240.10A-3.

which stated, “An issuer may file a written request for an exception to any of the standards set forth in the Rule 4000 Series at any time during the pendency of a proceeding under the Rule 4800 Series.” Pursuant to Rule 4804, Nasdaq informs a Company of its determination to limit or prohibit the initial or continued listing of a Company’s securities by way of a staff determination letter. Pursuant to Rule 4805, a company may request a hearing within seven calendar days. Once a Company makes a timely appeal, any responses to additional staff deficiency letters must be made within the seven-calendar day timeframe. Nasdaq receives questions surrounding the conflicting meanings of these rules frequently. Nasdaq chose to eliminate the first sentence to Rule 4802(b), because, although a Company may submit a written request for an exception at any time in the hearings process, only a timely submission made pursuant to Rule 4805 is considered. As such, the sentence had little meaning when read together with the other rules.

In the current 4000 Series, Nasdaq’s limited partnership rules incorporated the text from FINRA Rule 2810. As a consequence, much of the language provided in Nasdaq’s limited partnership rules mirror those of the FINRA rule, and required Nasdaq to define several terms used by FINRA. In the proposed new Rule 5210(h), Nasdaq has adopted the approach taken by the American Stock Exchange with respect to limited partnership rules and mirrored Amex Rule 126, which incorporates by reference FINRA Rule 2810. Accordingly, it was not necessary to include in the proposed new 5000 Series certain defined terms, which were provided in the old Listing Rules, due to the inclusion of the FINRA Rule 2810 text. In addition, by referencing FINRA Rule 2810, Nasdaq was able to delete a substantial amount of text from Rule 4430 that mirrored the FINRA rule. This resulted in a much more streamlined presentation of the limited partnerships rules.

Nasdaq identified two rules that, by design, have limited periods of applicability and whose periods have since expired. First, when Nasdaq created the Global Select Market, it adopted a series of new rules applicable exclusively to the new market segment. One such rule, IM-4425 described the initial process that Nasdaq used to determine which Companies would be assigned to the new market segment in conjunction with its launch. As such, the rule has no relevance to Companies going forward and accordingly Nasdaq has deleted it from the proposed new 5000 Series.

Similarly, in conjunction with Nasdaq's registration as a national securities exchange Nasdaq adopted Rule 4305, which described the process for transitioning securities to the new Nasdaq exchange from the Nasdaq market. In particular, the rule made clear that securities listed on the old market's Global Market or Capital Market will be listed on the respective Global Market or Capital Market of the new Nasdaq exchange. The rule also clarified that all notices and deficiencies existing at the time of the transfer to the Nasdaq exchange would continue to be recognized as proper notices and deficiencies. Nasdaq notes that Rule 4305 is no longer relevant to Companies given that any notices or deficiencies received by Companies while listed on the old Nasdaq market have since been resolved, either by such Companies regaining compliance with listing standards or by exhausting any available appellate remedy. Accordingly, Rule 4305 no longer serves a purpose and has not been included in the proposed new 5000 Series.

Added or Amended Rule Text

Nasdaq also proposes to amend rule text to clarify the current application of existing rules. For example, Rule 4310(c) provides a list of criteria that a Company or its security must meet in order to list on Nasdaq. Rule 4310(c)(11) requires, among other things, that Companies

shall not currently be suspended from trading by the Commission pursuant to Section 12(k) under the Act²². Companies must also be current in filing required reports when listing on Nasdaq, and remain current while listed on Nasdaq pursuant to Rules 4310(c)(14) and 4320(e)(12). Nasdaq has combined these requirements in proposed new Rule 5210(e), which also clarifies that suspensions by appropriate regulatory authorities of a Company's country of domicile are covered by the rule.

Rules 4310(c)(14) and 4320(e)(12) require Companies applying to list on Nasdaq to provide three copies of all reports and other documents filed or required to be filed with the Commission. Companies that file using the Commission's EDGAR System are exempted from this requirement. Rule 4310(c)(14) further requires Companies that are not required to file reports with the Commission to provide three copies of reports required to be filed with its appropriate regulatory authority to Nasdaq in connection with its application to list its securities. Nasdaq proposes to require only one copy of required reports for these Companies in proposed Rule 5205(d). Nasdaq believes that, for the few Companies that must provide copies of reports to Nasdaq, a single copy is sufficient for Nasdaq's purposes.

Nasdaq proposes combining Rule 4310(c)(15) with Rule 4330, which describes a Company's obligation to provide information to Nasdaq, into new Rule 5250(a). Rule 4310(c)(15) requires Companies to provide full and prompt responses to requests by Nasdaq for information related to unusual market activity or to events that may have a material impact on trading of its securities in Nasdaq. Rule 4330 sets forth Nasdaq's general authority to request any additional information or documentation, public or non-public, deemed necessary to make a determination regarding a security's initial or continued listing. In new Rule 5250(a) Nasdaq

²² 15 U.S.C. 78l(k).

clarifies that the responsibility to respond promptly to requests for information applies to requests both from Nasdaq, and from FINRA, acting on behalf of Nasdaq. FINRA provides certain regulatory services to Nasdaq and must have access to information to adequately perform such services.

Rule 4310(c)(16) requires Companies to promptly disclose to the public any material information that would reasonably be expected to affect the value of its securities or influence investors' decisions. Pursuant to the rule, if the information involves certain events set forth in IM-4120-1, Companies must provide prior notice of the disclosure to Nasdaq's MarketWatch Department. Nasdaq is moving Rule 4310(c)(16) to proposed new Rule 5250(b)(1) with only minor changes. Nasdaq has, however, added clarifying language regarding the method by which notices to the MarketWatch Department should be made. As described in IM-4120-1, and proposed new IM-5250-1, prior notice of a required disclosure should be made through Nasdaq's Web-based electronic disclosure system.

Rule 4310(c)(23)(A), which applies to all Nasdaq tiers, was modified in the new rules to make clear that all securities listed on both the Capital Market and Nasdaq Global Market must have a Committee on Uniform Securities Identification Procedures number (a "CUSIP number") or foreign equivalent. Currently, Rule 4310(c)(23)(A) requires that domestic securities have a CUSIP number; however, the rule does not require Canadian securities to have a CUSIP. Rule 4320, which applies to non-Canadian Foreign securities and American Depositary Receipts, also does not have a similar identification assignment requirement. A CUSIP number is a security-specific number that identifies stocks of all registered U.S. and Canadian companies, and U.S. government and municipal bonds. Historically, Nasdaq has not explicitly required Canadian securities listed on Nasdaq to follow the general requirement that Nasdaq-listed securities have a

CUSIP number; however, as a practical matter, all Canadian securities listed on Nasdaq have a CUSIP number. Likewise, although Nasdaq has not historically required an equivalent to the CUSIP number for non-Canadian foreign securities, all such securities currently listed on Nasdaq have an identifier. The use of a CUSIP number or foreign equivalent facilitates efficient clearing and settlement processes. Nasdaq believes that all securities listed on Nasdaq should have such a number to facilitate a fair and orderly market, and to date, all listed Companies have such a number. As such, Nasdaq is explicitly requiring all Nasdaq-listed securities to have a CUSIP number or equivalent, as denoted in proposed new Rule 5210(g)(2).

Rule 4320(e)(1) sets forth the Capital Market non-Canadian foreign securities and American Depository Receipt initial and continued listing requirements regarding market makers. Nasdaq is moving a part of Rule 4320(e)(1), which discusses how such a deficiency is determined and the timeframe in which to regain compliance, to proposed new Rule 5810(c)(3)(B). Unlike Rule 4310(c)(8)(A), which is the Capital Market Domestic and Canadian Company continued listing requirement for Market Makers, Rule 4320(e)(1) is silent on how a Company can regain compliance with the non-Canadian foreign securities and American Depository Receipt continued listing Market Maker requirement. As a matter of practice, Nasdaq has applied the same test to non-Canadian foreign securities and American Depository Receipts as Domestic and Canadian issues. As such, proposed new Rule 5810(c)(3)(B) applies both to Domestic and Canadian Companies, as well as non-Canadian foreign securities and American Depository Receipts, and includes a description of how compliance can be achieved based on Rule 4310(c)(8)(A).

Nasdaq is proposing to divide Rules 4310(c)(14) and 4320(e)(12), which set forth the requirement that Companies provide Nasdaq with three copies of all reports and other documents

filed or required to be filed with the Commission, into two new rules. Proposed Rule 5205(d) applies to Companies seeking initial listing, and in which Nasdaq has proposed reducing the number of paper copies of required reports and documents that must be provided to Nasdaq by Companies that do not file through the EDGAR System from three to one. Proposed Rule 5250(c)(1) applies to the continued listing of securities and allows Companies that do not file through the Commission's EDGAR System to comply with the rule by providing Nasdaq two copies of required reports and documents, which can be provided by e-mail. Nasdaq has also added a requirement to both of the proposed new rules not found in Rule 4320(e)(12) that requires annual reports to contain audited financial statements. Rule 4310(c)(14) requires that Domestic and Canadian Companies have audited financial statements in their annual reports; however, there is not an analogous requirement for securities listed pursuant to Rule 4320, notwithstanding that Companies listing non-Canadian foreign securities or American Depositary Receipts must have audited financial statements in their annual reports pursuant to Rule 4350(b)(1)(A). Accordingly, Nasdaq is adding clarifying language to make it clear that the audited financial statement requirement applies equally to all Companies.

Rules 4310(c)(22) and 4420(h)(3) set forth the specific disclosure requirements for Companies applying to list units on the Capital Market and Global Market, respectively. Nasdaq proposes moving Rules 4310(c)(22) and 4420(h)(3) to new Rules 5225(b) and 5225(a), respectively. Although, no changes are made to the rule text in the new proposed rules, Nasdaq is making clear that when determining eligibility for listing units, all components of the unit must meet Nasdaq initial listing standards, including Rule 4310(a)(1), as found in proposed Rule 5210(a)(1), which require securities to be registered pursuant to Section 12(b) under the Act²³.

²³ 15 U.S.C. 78l(b).

Nasdaq has combined Rules 4340(b) and 4450(f), which concern Nasdaq's process with respect to Companies in bankruptcy or the liquidation process. Under Rule 4300, Nasdaq has broad discretionary authority over the initial and continued listing of securities on all Nasdaq market tiers, including using such authority when a Company files for protection under any provision of the federal bankruptcy laws or comparable foreign laws. Rule 4340(b) details Nasdaq's discretionary authority to delist a Company should it file for bankruptcy protection and describes further a Company's obligations should Nasdaq not exercise its discretion to delist. Rule 4450(f) is a Global Market rule that restates Nasdaq's authority to delist a Company should it file for bankruptcy stated in Rule 4340(b), but also provides that Nasdaq may delist a Company's securities if it has announced that liquidation has been authorized by its board of directors and that it is committed to proceed. Although it has been a long-standing practice of Nasdaq to exercise its discretionary authority to delist a Company from any market tier should such a Company announce that liquidation has been authorized by its board, Rule 4340(b) was silent on how Nasdaq would proceed in cases involving Capital Market Companies. Accordingly, Nasdaq is combining Rule 4340(b) and 4450(f) into new Rule 5110(b) so that it is clear that any Nasdaq Company, regardless of tier, may be delisted should it announce that its board determined to liquidate the Company.

Rule 4350(i)(3) describes what shares are considered for calculations involving shareholder approval. Often confusing to Companies, Nasdaq has rewritten the rule in proposed new Rule 5635(e)(1) to clarify the application of the old rule by providing additional detail on the method used to calculate shares issued in a transaction, and the method to determine the number of shares outstanding. The new rule, however, does not change the application or calculation found in Rule 4350(i)(3).

Nasdaq proposes combining part of Rule 4410(a) and Rule 4330 into new Rule 5205(e). Rule 4410(a) is a Global Market rule that requires, in part, Companies to provide Nasdaq information relevant to an initial listing determination upon Nasdaq's request. Rule 4330 sets forth Nasdaq's general authority to request any additional information or documentation, public or non-public, deemed necessary to make a determination regarding a security's initial or continued listing. Under the new combined Rule 5205(e), Nasdaq is applying the broader authority to request any information or documentation to make a an initial listing determination found in Rule 4330, which currently applies to all market tiers. As a result, the new Rule will be a more accurate reflection of the already existing authority to request information found under Rule 4330.

Nasdaq has made clarifying changes to Rule 4426(f), which explains what type of securities other than common stock may be included in the Global Select Market, as found under proposed new Rule 5320. Nasdaq has clarified the type of securities that may be listed on the Global Select Market by using the defined term Primary Equity Security to replace the term "common stock" and by noting the types of securities that are not eligible to be listed with a cross reference to the rule governing such securities' listing. The defined term Primary Equity Security includes common stock in addition to Ordinary Shares, Shares or Certificates of Beneficial Interest of Trust, Limited Partnership Interests or American Depositary Receipts or American Depositary Shares, all of which are eligible for listing on the Global Select Market under the current rules.

Nasdaq has expanded the scope of the 4800 Series, now found in the 5800 Series, to include details on deficiency processing. In the 4800 Series, for example, a description of the compliance periods available to a Company that failed to meet the bid price requirement was

located in the 4310, 4320 and 4450 Series. In the new rules, Nasdaq proposes consolidating all these descriptions into the 5800 Series. As a consequence, Nasdaq has changed the introductory language to the 4800 Series that was previously contained in Rule 4802(a) and now found in the introduction to the 5800 Series to include more than procedures for the independent review of Nasdaq determinations. The new 5800 Series introduction describes all the procedures for Companies found to be deficient in Nasdaq listing requirements.

Nasdaq is proposing to add new clarifying language to Rule 4802(c), found in proposed new Rule 5840(b). The proposed new rule clarifies that information compiled under the rule will be made part of the record, which includes any written notice provided by the Adjudicator requesting information, responses to the notice, and the information considered. Although this authority is also stated in Rule 4811, which concerns the record on review in a proceeding and can be found under Rule 5840, Nasdaq believes that it is appropriate to make this authority clear under proposed Rule 5840(b) as well.

Nasdaq is proposing to make clarifying changes to Rule 4803, as found in new Rule 5810. Rule 4803(a) requires, among other things, staff of the Listing Qualifications Department to immediately notify a Company once the staff has determined that the Company does not meet a listing standard. This requirement is found in proposed new Rule 5810, which also provides additional clarifying information regarding the types of notifications sent by staff to Companies that fail to meet a listing standard. Nasdaq believes such clarifying information is helpful to Companies in understanding Nasdaq's deficiency notice process.

Nasdaq is proposing to make clarifying changes to Rule 4803(a)(3), which sets forth the process that Nasdaq Listing Qualifications Department staff will follow when it determines that a Company does not meet a listing standard that provides for a compliance period or certain

standards that provide a cure period. The requirements of Rule 4803(a)(3) are found in proposed new Rule 5810(c)(3). Proposed Rule 5810(c)(3) also provides greater detail about the compliance periods and cure periods afforded under the rules implicated by Rule 4803(a)(3), since the relevant language formerly located in Rules 4310, 4320, 4350, 4360, and 4450 has been incorporated into proposed new Rule 5810(c)(3). Nasdaq believes that consolidating the applicable rules under the new rule provides a more useful format, and that providing more descriptive information will help the reader to better understand the deficiency process.

Nasdaq is proposing to make clarifying changes to Rule 4803(a)(4), which states that Nasdaq will issue a Staff Determination letter in all cases not noted in Rules 4803(a)(1)-(3). This requirement is found in proposed new Rule 5810(c), but because the new rule is structured as the introductory paragraph for various types of notices provided by staff, Nasdaq has added new descriptive information to Rule 5810(c) that explains that the type of deficiency identified by Listing Qualifications Department staff will determine whether the Company will receive immediately a delisting determination resulting in the suspension of the Company's securities unless appealed, or if the Company will be afforded the opportunity to provide staff with a compliance plan, or receive a cure period or compliance period prior to receiving a delisting determination.

Nasdaq proposes clarifying changes to Rule 4804(a), as found in proposed new Rules 5810(a)(1)-(3). The old rule was significantly expanded to provide greater detail on the types of letters issued by Staff, and the effects of these letters. Rule 4804(a) only specifies what is contained in a Staff Delisting Determination. Proposed Rules 5810(a)(1)-(3) provide detail on what is contained in each type of deficiency letter. Similarly, Nasdaq has added clarifying language to Rules 4804(c)-(d), as found in proposed new Rule 5810(d). Rules 4804(c)-(d)

discuss the written notices of additional deficiencies from Staff to Companies under the review of an Adjudicatory Body. New Rule 5810(d) provides more clarity on notifications of additional deficiencies that are identified by Staff for a Company under the review of an Adjudicatory Body.

Nasdaq Rule 4805 concerns requests for hearings before the Hearings Panel. Pursuant to the rule, a Company must request a hearing within seven calendar days of the Staff Determination. The rule, however, is unclear on the form that the request must be made (i.e., oral or written). In contrast, Rule 4807 explicitly states that Companies requesting a review by the Nasdaq Listing and Hearing Review Council must do so in writing. Rule 4808 concerns the reconsideration of both Hearings Panel and Nasdaq Listing and Hearing Review Council decisions. Pursuant to Rule 4808(a), a Company may request the Hearings Panel reconsider a Hearings Panel Decision upon the basis that a mistake of material fact existed at the time of the Decision. A similar provision applicable to Nasdaq Listing and Hearing Review Council Decisions is found in Rule 4808(b). Rules 4808(a) and (b), however, are silent on the form that such requests must be made. Although it is common practice for Companies to submit requests pursuant to Rules 4805 and 4808(a) and (b) in writing, Nasdaq believes that such a practice should be codified in the proposed 5800 Series. Written requests not only provide documentation of such requests, they also become part of the written record on review. Accordingly, Nasdaq is taking this opportunity to harmonize the process for these rules by requiring all such request to be in writing, as provided by proposed new Rules 5815, 5820(a), 5815(d)(5), and 5820(e)(4).

Nasdaq also proposes combining, in part, Rules 4804(e) and 4805(a). Rule 4804 concerns written notices of staff determinations, and paragraph (e) states that a Company that

fails to request a Panel hearing timely after receiving a Staff Determination, other than a Public Reprimand, will be subject to suspension and delisting. Rule 4805 concerns requests for Panel hearings, and paragraph (a), among other things, sets forth the process for requesting a Panel hearing timely, yet does not mention that failure to request a hearing timely will result in suspension and delisting as discussed in Rule 4804(e). Nasdaq is proposing to combine the two rules into new Rule 5815(a)(2), which will provide a central location for all consequences resulting from failing to request a Panel hearing timely, and will make clear that such a failure will result in the immediate suspension and delisting.

Nasdaq is proposing to make clarifying changes to Rule 4805(c), as found in new Rule 5815(a)(5). Rule 4805(c) describes the nature of the written submission that a Company may provide as part of the hearings process, which could state the specific grounds for the Company's contention that the Staff Determination was in error, or could request that the Hearings Panel grant the Company an exception to the listing standards, as permitted by Rule 4802. Proposed new Rule 5815(a)(5) provides a more detailed description of the submission that a Company may submit to the Hearings Panel when seeking an exception to the listing standards. In particular, the new rule provides that a Company's submission may be in the form of a written plan to regain compliance with Nasdaq listing standards together with a request that the Panel grant the Company an exception to the listing standards to regain compliance, as permitted by proposed new Rule 5815(c)(1)(A). Although not stated in the old rule, the ability to provide a plan of compliance and request an exception is implied by the fact that the Hearings Panel may grant exceptions to the listing standards. Nasdaq is also proposing to add further clarifying language that makes clear that the Hearings Panel will review the written record prior to the hearing,

consistent with proposed new Rule 5840(a), which addresses the record on review and captures much of the current rule that addresses the record on review, Rule 4811.

Nasdaq is proposing clarifying changes to Rule 4806(a), which sets forth the Panel Hearing process. Rule 4806(a) provides, among other things, that a Company may make a presentation as it deems appropriate to the Hearings Panel. Rule 4806(a) does not make a distinction between an oral hearing and a written hearing. Much of Rule 4806(a) is conveyed in new Rule 5815(a)(6), which concerns presentations at Panel Hearings. In the proposed new rule, Nasdaq is making it clear that presentations by Companies are allowed only at oral hearings. The limitation to oral hearings is consistent with Nasdaq's long-standing practice.

Nasdaq is proposing to add clarifying language to Rule 4811(b), which concerns additional documents considered as part of the written record in a proceeding. Rule 4811(b) provides that if any additional information is considered as permitted by Rule 4802(c), that information and any written submission addressing the significance of that information, shall be made part of the record. Rule 4802(c) provides, among other things, that an Adjudicator may request additional information from the Company or Listing Qualifications Department, and may consider information from any source it deems relevant. Rule 4802(c)(2) provides that the Listing Qualifications Department and Company will be afforded written notice and an opportunity to address the significance of information from any source the Adjudicatory Body deems relevant to consider. Rule 4802(c)(2) does not, however, note that the information considered by Adjudicatory Body and any written submissions addressing the significance of such information by the Listing Qualifications Department or Company will be made part of the record. Nasdaq proposes combining Rules 4802(c)(2) and 4811(b) into new Rule 5840(b)(2),

which will provide a single location for the rules applicable to information from sources other than the Listing Qualifications Department and Company considered by an Adjudicatory Body.

Nasdaq is proposing clarifying changes to Rule 4811(e), which sets forth the scope of what action an Adjudicatory Body Decision may direct if it is determined that a Company failed to satisfy the quantitative standards or qualitative considerations set forth in the 4000 Series. Currently, Rule 4811(e) applies equally to the Hearings Panel, Listing Council and the Board. Nasdaq is proposing to house rules generally applicable to the review by the Hearings Panel, Listing Council, and Board under proposed new Rule Series 5815, 5820, and 5825, respectively. Proposed Rules 5815(c)(1) and (2) address the scope of the Hearings Panel's discretion, and contains the requirements found in Rule 4811(e). Unlike Rule 4811(e), which describes only the action a Hearings Panel may take in issuing a decision if it concludes that a Company has failed to satisfy a qualitative or quantitative listing standard, proposed Rules 5815(c)(1) and (2) describe the possible action the Hearings Panel may take in issuing a decision and is not limited to a determination that a Company has failed to meet a listing standard. As such, proposed Rules 5815(c)(1) and (2) provide significantly greater clarity on the options available to the Hearings Panel when issuing a decision by including the alternatives should a Company regain compliance with an applicable standard during the Hearings process. In that regard, the new rule includes in Rule 5815(c)(1)(E) the Panel's options when determining that a Company has evidenced compliance with all the applicable listing standards.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 under the Act,²⁴ in general and with Section 6(b)(5) under the Act,²⁵ in particular. Section

²⁴ 15 U.S.C. 78f.

6(b)(5)²⁶ requires that Nasdaq's rule be designed 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. Nasdaq believes that reorganizing the Listing Rules into a new, more intuitive structure will help avoid investor confusion and foster better understanding of Nasdaq's listing requirements among both investors and companies alike. Nasdaq also believes that the use of plain English and descriptive language will help make the Listing Rules more accessible to the investing public. As such, Nasdaq believes the proposed rule change will promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and 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 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

On December 3, 2007, Nasdaq solicited comment from issuers on the impact of the revisions to the rules. Nasdaq received three responses to this solicitation, two from representatives of companies and one from a law firm. One of the commentators voiced support for the rule change. Two commentators suggested minor changes to enhance the readability and

²⁵ 15 U.S.C. 78f(b)(5).

²⁶ Id.

ease of use of the new rules. Specifically, one commentator suggested clarifying the meaning of a particular sentence, and the other suggested that Nasdaq use hyperlinks throughout the rule text to help readers navigate to rules or interpretive material referenced in the rule text. In response, Nasdaq has amended the sentence consistent with the comment. Nasdaq also plans on using hyperlinks within its on-line manual to simplify navigation.

The third commentator requested clarification on Nasdaq's changes so that he could more fully reply. This commentator did not provide a follow-on submission to Nasdaq.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act²⁷ and Rule 19b-4(f)(6) thereunder.²⁸

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.

²⁷ 15 U.S.C. 78s(b)(3)(A).

²⁸ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the self-regulatory organization to give the Commission notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. Nasdaq has satisfied this requirement.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2009-018 on the subject line.

Paper comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2009-018. 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, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. Copies of such filing also will be available for inspection and copying at the principal office of the Nasdaq Exchange. 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-NASDAQ-2009-018 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁹

Florence E. Harmon
Deputy Secretary

²⁹ 17 CFR 200.30-3(a)(12).