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For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>14</sup>

**Margaret H. McFarland,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49842; File No. SR-NASD-2004-071]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. Regarding Improved Nasdaq Opening Process

June 9, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 23, 2004, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. On May 27, 2004, Nasdaq amended the proposed rule change.<sup>3</sup> 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 is filing the proposed rule change to improve the opening process

for Nasdaq securities. There are four components of the proposal: (1) Modification of the pre-market hours trading environment for all Nasdaq securities, including the elimination of the Trade-or-Move process contained in Rule 4613(e) and the opening of quotations at 9:25 a.m. rather than 9:29:30 a.m.; (2) the creation of voluntary On Open, Imbalance Only, and Extended Hours order types ("Nasdaq Opening Orders") and the application of new time-in-force rules for existing orders; (3) the creation of the Nasdaq Opening Cross; and (4) the creation of a Modified Opening Process for Nasdaq-listed securities that do not participate in the Nasdaq Opening Cross. The text of the proposed rule change is set forth below.<sup>4</sup> Proposed new language is in *italics*; deletions are in [brackets].<sup>5</sup>

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#### 4613. Character of Quotations

- (a)-(d) No Change.  
(e) Locked and Crossed Markets.

(1) A market maker shall not, except under extraordinary circumstances, enter or maintain quotations in Nasdaq during normal business hours if:

- (A) No Change.  
(B) No Change.

[(C) Obligations Regarding Locked/Crossed Market Conditions Prior to Market Opening.

(i) Locked/Crossed Market Prior to 9:20 a.m.—For locks/crosses that occur prior to 9:20 a.m. Eastern Time, a market maker that is a party to a lock/cross because the market maker either has entered a bid (ask) quotation that locks/crosses another market maker's quotation(s) or has had its quotation(s) locked/crossed by another market maker ("party to a lock/cross") may, beginning at 9:20 a.m. Eastern Time, send a Directed Order of any size that is at the receiving market maker's quoted price

<sup>4</sup> The Commission made the following corrections to the proposed rule text: (1) Internal cross references in proposed Rule 4704(a)(2)(a)(i) and (iii) were corrected; and (2) the title of Rule 4710 was corrected. Telephone conversation between Jeffrey S. Davis, Associate Vice President and Associate General Counsel, Nasdaq, and Ann E. Leddy, Special Counsel, Division, Commission (June 8, 2004).

<sup>5</sup> The proposed rule change is marked to show changes from the rule text appearing in the NASD Manual available at [www.nasd.com](http://www.nasd.com), as amended by the following: SR-NASD-2003-149 (Securities Exchange Act Release No. 49349 (March 2, 2004), 69 FR 10775 (March 8, 2004)); SR-NASD-2004-046 (Securities Exchange Act Release No. 49547 (April 9, 2004), 69 FR 20091 (April 15, 2004)); SR-NASD-2004-064 (Securities Exchange Act Release No. 49650 (May 4, 2004), 69 FR 25941 (May 10, 2004)); SR-NASD-2004-051 (Securities Exchange Act Release No. 49597 (April 21, 2004), 69 FR 23244 (April 28, 2004)); and SR-NASD-2004-076 (filed on an immediately effective basis on May 5, 2004).

("Trade-or-Move Directed Order"). Exception: A market maker that is a party to a lock/cross may not send such an order to the SIZE MMID.

(ii) Locked/Crossed Market Between 9:20 and 9:29:29 a.m.—

a. Before an ECN enters a quote that would lock or cross the market between 9:20 and 9:29:59 a.m. Eastern Time, the ECN must first send a Trade-or-Move Directed Order to the market maker or ECN whose quote it would lock or cross that is at or superior to the receiving market maker's or ECN's quoted price. An ECN that sends a Trade-or-Move Directed Order during these periods must then wait at least 10 seconds before entering a quote that would lock or cross the market. Exception: An ECN is not required to send such an order to the SIZE MMID.

b. If a market maker enters a quote that would lock or cross the market between 9:20 and 9:29:29 a.m. Eastern Time, the market maker must then immediately send a Trade-or-Move Directed Order to the market maker or ECN whose quote it would lock or cross that is at or superior to the receiving market maker's or ECN's quoted price. Exception: A market maker is not required to send such an order to the SIZE MMID.

c. If any market participant enters a quote that would lock or cross the market between 9:29:30 and 9:29:59, that quote will be processed as set forth in Rule 4710(b)(3)(B).

(iii)

a. In the case of securities included in the Nasdaq 100 Index or the S&P 400 Index, a Trade-or-Move Directed Order must be at least 10,000 shares (if multiple market makers would be locked/crossed, each one must receive a Trade-or-Move Directed Order and the aggregate size of all such messages must be at least 10,000 shares); provided, however, that if a market participant is representing an agency order (as defined in subparagraph (vi) of this rule), the market participant shall be required to send a Trade-or-Move Directed Order(s) in an amount equal to the agency order, even if that order is less than 10,000 shares.

b. In the case of all other securities, a Trade-or-Move Directed Order must be for at least 5,000 shares (if multiple market makers would be locked/crossed, each one must receive a Trade-or-Move Directed Order and the aggregate size of all such orders must be at least 5,000 shares); provided, however, that if a market participant is representing an agency order (as defined in subparagraph (vi) of this rule), the market participant shall be required to send a Trade-or-Move Directed Order(s)

<sup>14</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated May 26, 2004 ("Amendment No. 1"). In Amendment No. 1, Nasdaq restated the proposed rule change in its entirety.

in an amount equal to the agency order, even if that order is less than 5,000 shares.

A market maker that receives a Trade-or-Move Directed Order must, within 10 seconds of receiving such message, either fill the incoming Trade-or-Move Directed Order for the full size of the message, or move its bid down (offer up) by a quotation increment that restores or maintains an unlocked/uncrossed market.

A market maker that sends a Trade-or-Move Directed Order pursuant to subparagraphs (e)(1)(C)(i) or (e)(1)(C)(ii)(b) of this rule, or an ECN that sends a Trade-or-Move Directed Order pursuant to subparagraph (e)(1)(C)(ii)(a) of this rule, must append to the message a Nasdaq-provided symbol indicating that it is a Trade-or-Move Message.

(vi) For the purposes of this rule "agency order" shall mean an order(s) that is for the benefit of the account of a natural person executing securities transactions with or through or receiving investment banking services from a broker/dealer, or for the benefit of an "institutional account" as defined in NASD Rule 3110. An agency order shall not include an order(s) that is for the benefit of a market maker in the security at issue, but shall include an order(s) that is for the benefit of a broker/dealer that is not a market maker in the security at issue.

(vii) The execution of a Trade or Move Directed Order that occurs at or after 9:29:30 may, upon the filing of a complaint by a member or UTP Exchange, be declared null and void in accordance with the procedures set forth in NASD Rule 11890.]

(2) No Change.

(3) [Except as indicated in subsection (1)(C)(ii), f]For purposes of this rule, the term "market maker" shall include:

(A)-(D) No Change.

\* \* \* \* \*

#### 4701. Definitions

(a)-(rr) No Change.

(ss) The term "Total Day" or "X Order" shall mean,

(a) [f]For orders in ITS Securities so designated, that if after entry into the Nasdaq Market Center, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential display between 7:30 a.m. and 6:30 p.m. and for potential execution between 9:30 a.m. and 6:30 p.m., after which it shall be returned to the entering party.

(b) For orders in Nasdaq-listed securities so designated, that if after entry into the Nasdaq Market Center, the order is not fully executed, the order

(or unexecuted portion thereof) shall remain available for potential display between 7:30 a.m. and 4 p.m. and for potential execution between 9:25 a.m. and 4 p.m., after which it shall be returned to the entering party.

(tt) No Change.

(uu) The term "Total Immediate or Cancel" or "IOX Order" shall mean,

(a) [f]For limit orders in ITS Securities so designated, that if after entry into the Nasdaq Market Center a marketable limit order (or unexecuted portion thereof) becomes non-marketable, the order (or unexecuted portion thereof) shall be cancelled and returned to the entering participant. Such orders may be entered between 7:30 a.m. and 6:30 p.m. and are available for potential execution between 9:30 a.m. and 6:30 p.m.

(b) For limit orders in Nasdaq-listed securities so designated, that if after entry into the Nasdaq Market Center a marketable limit order (or unexecuted portion thereof) becomes non-marketable, the order (or unexecuted portion thereof) shall be cancelled and returned to the entering participant. Such orders may be entered and are available for potential execution between 9:25 a.m. and 4 p.m.

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#### 4704. Opening Process for Nasdaq-Listed Securities

(a) Definitions. For the purposes of this rule the term:

(1) "Imbalance" shall mean the number of shares of buy or sell MOO, LOO or Early Regular Hours orders that may not be matched with other MOO, LOO, Early Regular Hours or OIO order shares at a particular price at any given time.

(2) The Order Imbalance Indicator shall disseminate three prices, defined as follows:

(a) "Inside Match Price" shall mean:

(i) The single price that is at or within the current Nasdaq Market Center best bid and offer at which the maximum number of shares of MOO, LOO, OIO and Early Regular Hours orders can be paired.

(ii) If more than one price exists under subparagraph (i), the Inside Match Price shall mean the price that minimizes any Imbalance.

(iii) If more than one price exists under subparagraph (ii), the Inside Match Price shall mean the price that minimizes the distance from the previous Nasdaq official closing price.

(b) "Near Clearing Price" shall mean the price at which both the MOO, LOO, OIO, and Early Regular Hours orders and all executable quotes and orders in the Nasdaq Market Center (excluding

volume that is available only by order delivery) would execute.

(c) "Far Clearing Price" shall mean the price at which the MOO, LOO, OIO, and Early Regular Hours orders in the Nasdaq Opening Book would execute.

(3)(a) "Limit On Open Order" or "LOO" shall mean an order to buy or sell at a specified price or better that is to be executed only during the Nasdaq Opening Cross. LOO orders shall execute only at the price determined by the Nasdaq Opening Cross and shall be available for automatic execution. LOO orders may be entered, cancelled and corrected between 7:30 a.m. and 9:28 a.m. without restriction.

(b) LOO orders entered after 9:28 a.m. shall be price validated as follows:

(i) In the case of a sell imbalance, sell orders shall be priced no lower than the Near Clearing Price or they shall be rejected. Buy orders shall be priced no higher than the Inside Match Price or they shall be rejected.

(ii) In the case of a buy imbalance, buy orders shall be priced no higher than the Near Clearing Price or they shall be rejected. Sell orders shall be priced no lower than the Inside Match Price or they shall be rejected.

(iii) If there is no imbalance, buy orders shall be priced no higher than the Inside Match Price and sell orders shall be priced no lower than the Inside Match Price or they shall be rejected.

(c) After 9:28 a.m., LOO orders may only be modified to improve their price or increase the number of shares available. Modifications to improve the price or number of shares of an existing LOO order shall pass the price validation in Rule 4704 (a)(2)(b) or the modification shall be rejected.

(d) LOO orders shall execute only at the price determined by the Nasdaq Opening Cross and shall be available for automatic execution.

(e) LOO orders may not be cancelled or corrected after 9:28. After 9:28 a.m., LOO orders may only be modified to improve their price or increase the number of shares available.

(4) "Market on Open Order" or "MOO" shall mean an order to buy or sell at the market that is to be executed only during the Nasdaq Opening Cross. MOO orders may be entered, cancelled, and corrected between 7:30 a.m. and 9:28 a.m. and shall execute only at the price determined by the Nasdaq Opening Cross. All MOO orders shall be available for automatic execution.

(5) "Nasdaq Opening Cross" shall mean the process for determining the price at which orders shall be executed at the open and for executing those orders.

(6) "Opening Imbalance Only Order" or "OIO" shall mean an order to buy or sell at a specified price or better that may be executed only during the Nasdaq Opening Cross and only against MOO, LOO or Regular Hours orders. OIO orders may be entered between 7:30 a.m. and 9:29:59 p.m., but they may not be cancelled or modified after 9:28 except to increase the number of shares or to increase (decrease) the buy (sell) limit price. OIO sell (buy) orders shall only execute at or above (below) the 9:30 Nasdaq Market Center offer (bid). All OIO orders shall be available for automatic execution.

(7) "Order Imbalance Indicator" shall mean a message disseminated by electronic means containing information about MOO, LOO, OIO, and Early Regular Hours orders and the price at which those orders would execute at the time of dissemination.

(8) "Regular Hours Orders" shall mean any order that may be entered into the system and designated with a time-in-force of IOC, DAY, or GTC. Regular Hours Orders shall be available for execution only during the opening and then during normal trading hours. Regular Hours Orders shall be designated as "Early Regular Hours Orders" if entered into the system prior to 9:28 a.m. and designated as "Late Regular Hours Orders" if entered into the system at 9:28 a.m. or after.

(b) Trading Prior To Normal Market Hours. The system shall open all eligible Quotes/Orders in Nasdaq-listed securities at 9:25 a.m. in the following manner to prevent the creation of locked/crossed markets.

(1) At 9:25, the system shall open all Quotes and limit priced X Orders in time priority. Quotes and X Orders whose limit price does not lock or cross the book shall be added to the book in strict time priority. Quotes and X Orders whose limit price would lock or cross the book shall be placed in an "In Queue" state.

(2) Next, the system shall begin processing the In Queue Quotes, IOX Orders, and X Orders in strict time priority against the best bid (ask) if the In Queue order is a sell (buy) order. If an In Queue Quote or X Order is not executable when it is next in time for execution, the system shall automatically add that Quote or X Order to the book.

(3) All Quotes and X Orders that are entered while the system is completing subparagraphs (1) and (2) shall be added to the In Queue file in strict time priority.

(4) Once the process set forth in subparagraphs (1)-(3) is complete, the system shall begin processing Quotes

and X and IOX Orders in accordance with their entry parameters.

(5) All trades executed prior to 9:30 shall be automatically appended with the ".T" modifier.

(6) Notwithstanding subparagraphs (1) through (5), if a Nasdaq Quoting Market Participant has entered a Locking/Crossing Quote/Order into the system that would become subject to the automated processing described above, the system shall, before sending the order to any other Quoting Market Participant or Order Entry Firm, first attempt to match off the order against the locking/crossing Nasdaq Quoting Market Participant's own Quote/Order if that participant's Quote/Order is at the highest bid or lowest offer, as appropriate. A Nasdaq Quoting Market Participant may avoid this automatic matching through the use of anti-internalization qualifier as set forth in Rule 4710(b)(1)(B)(ii)(a). Order Entry Firms that enter locking/crossing Quotes/Orders shall have those Quotes/Orders processed as set forth in subparagraphs (1) through (4), unless they voluntarily select a "Y" AIQ Value as provided for in Rule 4710(b)(1)(B)(ii)(a).

(c) Nasdaq-listed securities that are not designated by Nasdaq to participate in the Nasdaq Opening Cross shall begin trading at 9:30 a.m. in the following manner:

(1) At 9:30, the system shall suspend processing as set forth in paragraph (b) in order to open and integrate Regular Hours orders into the book in time priority.

(2) Limit priced Regular Hours Orders whose limit price does not lock or cross the book shall be added to the book in time priority and limit priced Regular Hours Orders whose limit price does lock or cross the book shall be held In Queue in time priority along with IOC and Regular Hours market orders.

(3) In Queue Orders shall then be executed in strict time priority against the best bid (ask) if the In Queue order is a buy (sell) order. Non-marketable IOC orders shall be cancelled and non-marketable Regular Hours Orders shall be added to the book.

(4) When all In Queue orders have been processed, the system shall resume processing for potential display in conformity with Rule 4707(b) and/or potential execution in conformity with Rule 4710(b)(1)(B).

(d) Processing of Nasdaq Opening Cross. For certain Nasdaq-listed securities designated by Nasdaq, the Nasdaq Opening Cross shall occur at 9:30, and regular hours trading shall commence when the Nasdaq Opening Cross concludes.

(1) Beginning at 9:28 a.m., Nasdaq shall disseminate by electronic means an Order Imbalance Indicator every 15 seconds until 9:29, and then every 5 seconds until market open. The Order Imbalance Indicator shall contain the following real time information:

(A) the Inside Match Price;

(B) the number of shares represented by MOO, LOO, OIO, and Early Regular Hours orders that are paired at the Inside Match Price;

(C) the size of any Imbalance;

(D) the buy/sell direction of any Imbalance; and

(E) indicative prices at which the Nasdaq Opening Cross would occur if the Nasdaq Opening Cross were to occur at that time and the percent by which the indicative prices are outside the then current Nasdaq Market Center best bid or best offer, whichever is closer. The indicative prices shall be:

(i) The Far Clearing Price, and

(ii) The Near Clearing Price.

(iii) If no price satisfies subparagraph (i) or (ii) above, Nasdaq shall disseminate an indicator for "market buy" or "market sell".

(2)(A) The Nasdaq Opening Cross shall occur at the price that maximizes the number of MOO, LOO, OIO, Early Regular Hours orders, and executable quotes and orders in the Nasdaq Market Center to be executed.

(B) If more than one price exists under subparagraph (A), the Nasdaq Opening Cross shall occur at the price that minimizes any Imbalance.

(C) If more than one price exists under subparagraph (B), the Nasdaq Opening Cross shall occur at the price that minimizes the distance from the previous Nasdaq official closing price.

(D) If the Nasdaq Opening Cross price established by subparagraphs (A) through (C) is outside the benchmarks established by Nasdaq by a threshold amount, the Nasdaq Opening Cross shall occur at a price within the threshold amounts that best satisfies the conditions of subparagraphs (A) through (C). Nasdaq management shall set and modify such benchmarks and thresholds from time to time upon prior notice to market participants.

(3) If the Nasdaq Opening Cross price is selected and fewer than all MOO, LOO, OIO and Regular Hours Orders that are available for automatic execution in the Nasdaq Market Center would be executed, all Quotes/Orders shall be executed at the Nasdaq Opening Cross price in the following priority:

(A) MOO and Early Regular Hours market orders, with time as the secondary priority;

(B) LOO orders, Early Regular Hours limit orders, OIO orders, X limit orders, displayed quotes and reserve interest priced more aggressively than the Nasdaq Opening Cross price with time as the secondary priority;

(C) LOO orders, OIO Orders, displayed interest of Early Regular Hours and X limit orders, and displayed interest of quotes at the Nasdaq Opening Cross price with time as the secondary priority;

(D) Reserve interest of quotes and Early Regular Hours and X limit orders at the Nasdaq Opening Cross price with time as the secondary priority; and

(E) Eligible Late Regular Hours orders in strict time priority.

Unexecuted MOO, LOO, and OIO orders shall be cancelled.

(4) All Quotes/Orders executed in the Nasdaq Opening Cross shall be executed at the Nasdaq Opening Cross price, trade reported with SIZE via the contra party, and disseminated via a national market system plan. The Nasdaq Opening Cross price shall be the Nasdaq Official Opening Price for stocks that participate in the Nasdaq Opening Cross.

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#### 4706. Order Entry Parameters

(a) Non-Directed Orders—

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

(A) A Nasdaq Market Center Participant may enter into the Nasdaq Market Center a Non-Directed Order in order to access the best bid/best offer as displayed in Nasdaq.

(B) A Non-Directed Order must be a market or limit order, must indicate whether it is a buy, short sale, short-sale exempt, or long sale, and may be designated as “Immediate or Cancel,” “Day,” “Good-till-Cancelled,” “Auto-Ex,” “Fill or Return,” “Pegged,” “Discretionary,” “Sweep,” “Total Day,” “Total Good till Cancelled,” “Total Immediate or Cancel,” or “Summary.”

(i)–(iii) No Change.

(iv) Starting at 7:30 a.m., until the 4 p.m. market close, IOC and Day Non-Directed Orders may be entered into the Nasdaq Market Center (or previously entered orders cancelled), but such orders entered prior to market open will not become available for execution until 9:30 a.m. Eastern Time. GTC orders may be entered (or previously entered GTC orders cancelled) between the hours 7:30 a.m. to 6:30 p.m. Eastern Time, but such orders entered prior to market open, or GTC orders carried over from previous trading days, will not become available for execution until 9:30 a.m.

Eastern Time. [Exception: For Nasdaq listed securities only, Non-Directed Day (other than Pegged, Postable Auto-Ex, and Discretionary Orders) and GTC orders (other than Postable Auto-Ex Orders) may be executed prior to market open if required under Rule 4710(b)(3)(B).]

(v)–(xii) No Change.

(xiii) An order may be designated as “Summary,” in which case the order can be designated either as Day or GTC. A Summary Order that is marketable upon receipt by [NNMS] the Nasdaq Market Center shall be rejected and returned to the entering party. If not marketable upon receipt by [NNMS] the Nasdaq Market Center, it will be retained by [NNMS] the Nasdaq Market Center. [Summary Day and GTC orders shall be executed prior to the market open if required under Rule 4710(b)(3)(B).] Summary Orders may only be entered by [NNMS] Order-Delivery ECNs. Summary Orders may only be designated as Non-Attributable Orders.

(C) No Change.

(D) No Change.

(E) No Change.

(F) No Change.

(2) No Change.

(b)–(e) No Change.

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

(a) No Change.

(b) Non-Directed Orders

(1)–(2) No Change.

(3) Entry of Locking/Crossing Quotes/Orders. The system shall process locking/crossing Quotes/Orders as follows:

(A) No Change.

[(B) Locked/Crossed Quotes/Orders Immediately Before the Open—If the market in a Nasdaq-listed security is locked or crossed at 9:29:30 a.m., Eastern Time, the Nasdaq Market Center will clear the locked and/or crossed Quotes/Order by executing (or delivering for execution) the highest bid against the lowest offer(s) against which it is marketable, at the price of the newer in time of the two quotes/orders. This process will be repeated until an un-locked and un-crossed market condition is achieved. Between 9:29:30 a.m. and 9:29:59 Eastern Time, once the Nasdaq Market Center has cleared a locked or crossed market, or if a newly submitted quote/order would create a locked or crossed market, the Nasdaq Market Center will prevent a locked or crossed market from being created by processing such locking or crossing quote/order in a manner consistent with subparagraph (b)(3)(a) of this Rule.

(i) Exception—The following exception shall apply to the above locked/crossed processing parameters:

If a Nasdaq Quoting Market Participant has entered a Locking/Crossing Quote/Order into the system that would become subject to the automated processing described in section (B) above, the system shall, before sending the order to any other Quoting Market Participant or Order Entry Firm, first attempt to match off the order against the locking/crossing Nasdaq Quoting Market Participant’s own Quote/Order if that participant’s Quote/Order is at the highest bid or lowest offer, as appropriate. A Nasdaq Quoting Market Participant may avoid this automatic matching through the use of anti-internalization qualifier as set forth in Rule 4710(b)(1)(B)(ii)(a). Order Entry Firms that enter locking/crossing Quotes/Orders shall have those Quotes/Orders processed as set forth in paragraph (B) above, unless they voluntarily select a “Y” AIQ Value as provided for in Rule 4710(b)(1)(B)(ii)(a).]

[(C)] (B) Locked/Crossed Quotes/Orders in ITS Securities at the Open—If the market in an ITS Security is locked or crossed at 9:30 a.m., Eastern Time, the Nasdaq Market Center will clear the locked and/or crossed Quotes/Order by executing (or delivering for execution) the highest bid against the lowest offer(s) against which it is marketable, at the price of the newer in time of the two quotes/orders. This process will be repeated until an un-locked and un-crossed market condition is achieved. While the Nasdaq Market Center is clearing a locked or crossed market, if a newly submitted Quote/Order would create a locked or crossed market, the Nasdaq Market Center will prevent a locked or crossed market from being created by holding such Quotes/Orders in queue.

(i) Exception—The following exception shall apply to the above locked/crossed processing parameters: If an ITS/CAES Market Maker has entered a Locking/Crossing Quote/Order into the system that would become subject to the automated processing described in [section (C)] subparagraph (B) above, the system shall, before sending the order to any other ITS/CAES Market Maker or Order Entry Firm, first attempt to match off the order against the locking/crossing ITS/CAES Market Maker’s own Quote/Order if that participant’s Quote/Order is at the highest bid or lowest offer, as appropriate. An ITS/CAES Market Maker may avoid this automatic matching through the use of anti-internalization qualifier as set forth in

Rule 4710(b)(1)(B)(ii)(a). Order Entry Firms that enter locking/crossing Quotes/Orders shall have those Quotes/Orders processed as set forth in subparagraph (B) above, unless they voluntarily select a "Y" AIQ Value as provided for in Rule 4710(b)(1)(B)(ii)(a). (4)–(8) No Change. (c)–(e) No Change.

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

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change, as amended, and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

#### 1. Purpose

Nasdaq is proposing to improve the pre-open trading environment for Nasdaq-listed securities, and to create two new voluntary opening processes that would together constitute the beginning of the trading day for all Nasdaq-listed securities. The changes to the pre-open environment would eliminate Trade-or-Move, open all market participant quotes at 9:25 a.m., and create new extended hours order types for trading in a firm quote environment beginning at 9:25 a.m. The new 9:30 a.m. opening processes would take one of two forms: the Modified Nasdaq Opening or the Nasdaq Opening Cross. According to Nasdaq, the Modified Nasdaq Opening would integrate quotes and orders entered during pre-market hours with orders designated for execution during the normal trading day (9:30 a.m. to 4 p.m.), create an unlocked inside bid and offer in the Nasdaq Market Center, and facilitate an orderly process for opening trading at 9:30 a.m. For certain stocks designated by Nasdaq, the Opening Cross would include the creation of On Open and Extended Hours order types including Market-on-Open ("MOO"), Limit-on-Open ("LOO"), and Opening Imbalance Only ("OIO") orders, an opening order imbalance indicator to be disseminated via a Nasdaq data feed, and a single-price opening cross that

would execute eligible orders at 9:30 a.m. According to Nasdaq, the proposal is designed to create a more robust opening that allows for price discovery, and executions that result in an accurate, tradable opening price.

#### The Modified Pre-Open Trading Environment

In response to industry demand for improvements to the pre-market trading session, Nasdaq would modify the pre-opening trading environment for all Nasdaq-listed stocks, to improve price discovery, permit executions, and minimize the creation and duration of locked and crossed markets leading into the open of the normal trading day. The modified pre-opening environment would have three components: (1) Elimination of Trade-or-Move; (2) creation of pre-opening eligible orders; and (3) opening quotations and pre-opening eligible orders at 9:25 a.m. rather than 9:29:30. This modified pre-opening process would apply to all Nasdaq-listed securities, including those that will not participate in the Opening Cross.

*Eliminating Trade-or-Move.* The first element of the modified opening environment would be the elimination of the Trade-or-Move process currently set forth in Rule 4613(e)(1)(C). Since its adoption, the Trade-or-Move process has reduced the instances and duration of locked and crossed markets prior to the market open and generally improved the quality of the opening. It is, however, widely regarded as overly complex with respect to programming, administration, and compliance. In addition, the utility of Trade-or-Move has diminished since Nasdaq implemented an automated unlocking and uncrossing process in the Nasdaq Market Center. Because that automated process ensures an unlocked market at or shortly after 9:29:30, the primary function of Trade-or-Move has been reduced to maintaining unlocked markets prior to 9:29:30 when market participants' quotes are still closed. As described in more detail below, Nasdaq believes that moving the unlocking process from 9:29:30 to 9:25 and opening quotations at that time would capture all of the benefits that Trade-or-Move currently offers and improve upon them.

*New Extended Hours Order Types.* Nasdaq would create two new order types for Nasdaq-listed securities: the Extended Hours Day Order ("X Order") and the Extended Hours Immediate or Cancel ("IOX").<sup>6</sup> Members would be

<sup>6</sup> These order types, referred to as Total Day and Total Immediate or Cancel, exist for use in trading

able to enter X Orders beginning at 7:30 a.m. on either an attributable or a non-attributable basis. X Orders would be available for execution beginning at 9:25 and continuing until the end of that trading day, currently 4:00:00 p.m. If not executed by that time, X Orders would be cancelled automatically from the system and returned to the entering party.

IOX Orders would function much as Immediate or Cancel ("IOC") Orders currently function. An IOX Order would be required to be priced and if after entry into the Nasdaq Market Center it were to become non-marketable, the unexecuted portion would be cancelled and returned to the entering party. IOX Orders would only be available for entry and execution between 9:25 a.m. and 4 p.m.

Nasdaq would also modify the time-in-force for Day, IOC, and Good-till-Cancel ("GTC") orders. Today those order types are eligible to participate in the 9:29:30 process for clearing locks and crosses. Nasdaq is proposing to modify those order types to make them ineligible for pre-opening processing. Those orders would still be available for entry at 7:30 but would not be available for execution until 9:30.

Set forth below is a description of how the X and IOX Orders and quotes would function in the new pre-open trading environment.

*The "Wake Up" Process.* As stated above, to preserve and enhance the price discovery process that currently occurs prior to market open, Nasdaq proposes to open all quotes and pre-opening eligible orders at 9:25, making those quotes and orders available for execution. Nasdaq currently employs a similar process, set forth in Rule 4710(b)(3), at 9:29:30 to clear locked or crossed markets remaining at the end of the Trade-or-Move period, and to maintain those markets as unlocked and uncrossed until market open at 9:30. Nasdaq proposes to begin that process at 9:25:00 and to change that process slightly with the same goal of maintaining unlocked and uncrossed markets until the market open at 9:30.

The Nasdaq Market Center would use the following process to "wake up" market participant quotes and X and IOX Orders. All market participant quotes would be woken up in accordance with each firm's instructions to the Nasdaq Market Center. All quotations would be carried over from the previous trading day and, firms would have several options for how

ITS Securities. See NASD Rule 4701(ss) and (uu). They operate under different order entry time parameters for trading ITS Securities.

their carryover quotes are opened at 9:25. First, if the quote is not modified between 7:30 a.m. and 9:25 a.m., the quote would be able to be opened at the last quotation price entered during the previous day. Second, if the firm's quote is modified between 7:30 a.m. and 9:25 a.m., that quote would be able to be opened at the price of the last price change entered after 7:30 a.m. Third, Nasdaq would add a feature that would allow the firm automatically to set the firm's bid and ask at the quote limits for Nasdaq, currently \$.01 (bid) and \$2,000 (ask).

All quotes and limit price X Orders would wake up at 9:25:00. Any order or quote whose limit price does not lock or cross the book would be added to the book in strict time priority. Orders or quotes whose limit price would lock or cross the book would be placed in an "In Queue" state also in time priority. Upon completion of the wake-up process, within seconds after 9:25, the Nasdaq Market Center would begin executing quotes and X Orders that were held In Queue in strict time priority regardless of quote or order type. X orders that are not executable would be added to the book. In Queue quotes and orders that are not executable would be added to the book. All quotes and X or IOX Orders entered while the system is waking up and sorting to clear locks and crosses, would be suspended. Once this process is complete, the system would resume processing the input queue of quotes, X and IOX Orders as needed to maintain an unlocked market.

All trades executed prior to 9:30 would be considered as executed outside of regular trading hours and would be appended automatically with the ".T" modifier, as they are today between 9:29:30 and 9:30.

#### *The Nasdaq Opening Cross*

Certain Nasdaq-listed stocks would be designated to participate in the Nasdaq Opening Cross, which Nasdaq represents it has designed to complement the recently implemented Nasdaq Closing Cross. There would be three components of the Nasdaq Opening Cross: (1) The creation of On Open and Imbalance Only order types; (2) the dissemination of an order imbalance indicator via a Nasdaq proprietary data feed; and (3) opening cross processing in the Nasdaq Market Center at 9:30 that would execute the maximum number of shares at a single, representative price that would be the Nasdaq Official Opening Price. Each component is described in detail below.

*On Open and Opening Imbalance Only Order Types.* The new opening cross would begin with market

participants entering On Open and Opening Imbalance Only order types in the Nasdaq Market Center. These orders would only be accepted for stocks eligible for participation in the Opening Cross process. Opening Orders would be required to be available for automatic execution but all firms, both automatic execution and order delivery participants would be able to enter them into the Nasdaq Market Center. The On Open Orders would not be displayed in the quotation montage or disseminated via any Nasdaq data feeds. On Open orders would only execute at the price determined by the opening Nasdaq cross.

On Open orders would be able to be un-priced and entered as MOO, or priced and entered as LOO. MOO orders would be able to be entered, cancelled, and corrected anytime between 7:30 a.m., when the system would open, until 9:28:00 a.m., when Nasdaq would begin disseminating the opening order imbalance indicator. LOO orders would be able to be entered from 7:30:00 until 9:29:59. LOO orders would be subject to price improvement if the buy (sell) order were to be greater than (less than) the opening price. A LOO order at the opening price would not be filled if there were to be insufficient shares available on the opposite side of the market to fill the LOO order.

To reduce price volatility in the Opening Cross, LOO orders submitted after 9:28:00 a.m. would be treated differently than those submitted before 9:28:00. LOO orders entered prior to 9:28:00 would be able to have any limit price and would be able to be cancelled anytime prior to 9:28:00 a.m. Late LOO Orders would be able to be submitted only within a specified price range based on the last calculated Nasdaq Order Imbalance Indicator. Late LOO Orders submitted outside the prescribed price range would be rejected. If there were to be a sell imbalance, Late LOO Orders to sell would be required to be priced no lower than the "near clearing price" (described below) or they would be rejected. Late LOO Orders to buy would be required to be priced no higher than the "inside match price" (also described below) or they would be rejected. If there were to be a buy imbalance, Late LOO Orders to buy would be required to be priced no higher than the near clearing price and Late LOO Orders to sell would be required to be priced no lower than the inside match price or they would be rejected. Finally, if there were to be no imbalance, Late LOO Orders to buy would be required to be priced no higher than the inside match price and Late LOO Orders to sell would be

required to be priced no lower than the inside match price or they would be rejected. Late LOO orders would not be able to be cancelled at any time for any reason, although their price would be able to be improved or their share size increased.

In order to add sufficient liquidity to the market at and prior to the open, Nasdaq would enable market participants to enter OIO orders. OIO orders would be required to be priced as limit orders and would not be displayed or disseminated. These orders would provide supplemental liquidity and would execute only on the opening cross against any imbalance, similar to imbalance only orders on the closing cross. OIO orders priced more aggressively than the Nasdaq Market Center Inside ask (bid) before the open would be re-priced to the ask (bid) both for the purposes of the imbalance dissemination message and for executing on the opening cross. In this regard, they would allow market participants to add liquidity to the market and help to ensure the execution of MOO and marketable LOO orders. OIO orders would be able to be entered beginning at 7:30 a.m. until immediately before the market open. The entering firm would not be able to cancel these orders after a predetermined time, currently planned for 9:28:00. Imbalance orders would be able to be improved after the cancellation threshold and if improved would receive a new timestamp.

*Additional Opening-Eligible Quotes/Orders.* In addition to MOO, LOO, and OIO Orders, the Opening Cross would include: (1) Market participant quotations, both displayed and reserve size; (2) orders entered with a time-in-force of Day, GTC or IOC prior to 9:28:00 (collectively "Early Regular Hours Orders"), which would fully participate in the Opening Cross; (3) Day, GTC, and IOC orders entered after 9:28:00 (collectively "Late Regular Hours Orders"), which would participate in the Opening Cross only to the extent that there were to be available liquidity on the other side at the Crossing Price; and (4) Extended Hours Orders. Additionally, after 9:28, all requests to cancel and cancel/replace Regular Hours Orders would be suspended. If those orders were to not be executed during the Opening Cross, the requests for cancellation would be processed.

*Nasdaq Order Imbalance Indicator ("NOII").* At 9:28 a.m. Nasdaq would begin disseminating an opening order imbalance indicator on one or more Nasdaq proprietary data feeds. Although the Opening Cross would occur at 9:30,

the order imbalance indicator would be disseminated to give participants insight into the state of the book and the opening cross if it were to take place at that time. This message would add transparency to the market and encourage market participants to add liquidity to the market prior to the open.

Similar to the closing order imbalance indicator, the opening imbalance information would include several pieces of information regarding the cross: (1) The Inside Match Price, which would be designed to maximize the number of paired shares of MOO, LOO, OIO and Early Regular Hours orders and minimize any imbalance and divergence from the previous official closing price; (2) the number of shares represented by

MOO, LOO, OIO and Early Regular Hours orders paired at the Inside Match Price; (3) the MOO, LOO, and Early Regular Hours orders imbalance at the Inside Match Price; (4) the buy/sell direction of that imbalance at the Inside Match Price; (5) an indicative clearing price range at which the Nasdaq Opening Cross would occur if the Nasdaq Opening Cross were to occur at that time; and (6) the percent by which that indicative price would vary from the Inside Match Price. The indicative clearing price range would be bounded on the far side by the price at which all MOO, LOO, OIO, and Early Regular Hours orders would cross with only each other. It would be bounded on the near side by the price at which the

MOO, LOO, OIO Early Regular Hours orders, Extended Hours Orders and Quotes would clear. Where no clearing price would exist, Nasdaq would disseminate an indicator for "market buy" or "market sell."

Nasdaq would disseminate the NOII via Nasdaq proprietary data feeds at no additional charge to subscribers. The indicator would be disseminated beginning at 9:28:00 and then at more frequent intervals as the time to market open decreases: every 15 seconds beginning at 9:28 and every 5 seconds beginning at 9:29 until market open.

For example, if the Nasdaq Market Center Opening Book were to contain the following orders:

**BUY ORDERS**

Entry Time	Type	Size	Price
9:24:00	IOC	8000	Market
9:24:00	OO	1000	19.99
8:40:00	OO	4000	19.97
9:22:00	IO	500	19.97
9:22:00	Quote	2000	19.97

**SELL ORDERS**

Entry Time	Type	Size	Price
8:29:00	OO	1000	19.99
9:18:00	Quote	5000	20.01
8:40:00	OO	1000	20.02
8:30:00	Quote	10000	20.04

The NOII information disseminated would be: 1,000 shares paired, 7,000 share buy imbalance at \$20.01.

Indicative Prices: MKT BUY far clearing price, \$20.04 near clearing price.

Similarly, if the Nasdaq Market Center were to contain the following orders:

**BUY ORDERS**

Entry Time	Type	Size	Price
9:24:00	IOC	8000	Market
9:28:20	OO	5000	20.04
9:24:00	OO	1000	19.99
8:40:00	OO	4000	19.97
9:22:00	IO	500	19.97
9:22:00	Quote	2000	19.97

**SELL ORDERS**

Entry Time	Type	Size	Price
8:29:00	OO	1000	19.99
9:18:00	Quote	5000	20.01
8:40:00	OO	1000	20.02
8:30:00	Quote	10000	20.04
9:28:10	OO	10000	20.05

The NOII information disseminated would be: 1,000 shares paired, 12,000 share buy imbalance at \$20.01.

Indicative Prices: 20.05 far clearing price, \$20.04 near clearing price.

Nasdaq Opening Cross. The Nasdaq Opening Cross, like the Closing Cross,

would be designed to accomplish three goals in decreasing priority: (1) Maximize the MOO, LOO, OIO, and Early Regular Hours orders and

executable quotes and orders in the Nasdaq Market Center to be executed; (2) minimize the Imbalance of such shares; and (3) minimize the distance from the previous Nasdaq official closing price. In other words, Nasdaq's matching engine would algorithmically evaluate all eligible prices at which an Opening Cross would be able to occur and identify the price or prices at which the maximum shares would be executed. If more than one price would result in the same number of shares being executed, the matching engine would evaluate those prices only and determine which price would minimize the imbalance of on open orders. If more than one price would still qualify, the matching engine would identify the single price that would minimize the distance from a crossing price to the previous Nasdaq official closing price.

If the Nasdaq Opening Cross price were to be selected and fewer than all quotes and orders that are available for automatic execution in the Nasdaq

Market Center would be executed, the system would execute quotes and orders in the following priority:

- (A) MOO and Early Regular Hours market orders, with time as the secondary priority;
- (B) LOO orders, Early Regular Hours limit orders, OIO orders, X limit orders, displayed quotes and reserve interest priced more aggressively than the Nasdaq Opening Cross price with time as the secondary priority;
- (C) LOO orders, OIO orders, displayed interest of Early Regular Hours and X limit orders, displayed interest of limit orders, and displayed interest of quotes at the Nasdaq Opening Cross price with time as the secondary priority;
- (D) Reserve interest of quotes and Early Regular Hours and X limit orders at the Nasdaq Opening Cross price with time as the secondary priority;
- (E) Late Regular Hours orders in strict time priority; and
- (F) Unexecuted MOO, LOO, and OIO orders would be cancelled.

The Opening Cross would occur at 9:30. All orders that are executable would be executed at the Nasdaq Opening Cross price, reported to Nasdaq's trade reporting system with SIZE as the contra party on both sides of the trade, and then transmitted to the consolidated tape. The Nasdaq Opening Cross price and the associated paired volume would then be disseminated via the UTP Trade Data Feed ("UTDF") as a bulk print and on the Nasdaq Index Dissemination Service ("NIDS") and the Nasdaq Application Program Interface as the Nasdaq Official Opening Price ("NOOP").

While the Opening Cross occurs, all entry of quotes and orders would be suspended. When the Opening Cross concludes, normal trading would commence just as it does today.

To illustrate the Opening Cross, if the Nasdaq Market Center were to contain the following orders at 9:30:

BUY ORDERS

Entry time	Type	Size	Price
9:24:00 .....	IOC .....	8000 .....	Market
9:28:20 .....	OO .....	5000 .....	20.04
9:29:57 .....	Quote .....	5000 .....	20.03
9:24:00 .....	OO .....	1000 .....	19.99
8:40:00 .....	OO .....	4000 .....	19.97
9:22:00 .....	OIO .....	500 .....	19.97
9:22:00 .....	Quote .....	2000 .....	19.97

SELL ORDERS

Entry time	Type	Size	Price
8:29:00 .....	OO .....	1000 .....	19.99
9:29:54 .....	OO .....	20000 .....	19.99
9:29:58 .....	OO .....	10000 .....	19.99
8:40:00 .....	OO .....	1000 .....	20.02
8:30:00 .....	Quote .....	10000 .....	20.04
9:28:10 .....	OO .....	10000 .....	20.05

The Opening Cross would occur at \$19.99 with 19,000 shares crossed. The inside market after the cross would be 19.97 by 20.04.

*Opening Cross Circuit Breaker.* As it did with the Nasdaq Closing Cross, Nasdaq would establish a circuit breaker for the Opening Cross to protect against unusual occurrences where the price discovery mechanism at the open did not function as expected. Nasdaq has selected as a benchmark values representing market conditions approximately five seconds prior to the open the Volume Weighted Average Price ("VWAP") based upon the Nasdaq Market Center executions over the

period from 9:29:55 to 9:30.<sup>7</sup> After the selection of the Opening Cross price but before execution, Nasdaq would compare the selected price to the benchmark. If the expected Opening Cross price would be within a preset boundary of the VWAP, the cross would occur at the expected Opening Cross price.

If the expected Opening Cross price would be outside a preset boundary ("Threshold Percentage") of the benchmark, Nasdaq would change the Opening Cross price such that it is

<sup>7</sup> If there are no transactions from which to calculate a VWAP, Nasdaq will use the 9:30 SuprerMontage bid-ask midpoint to determine the circuit breaker.

within the threshold percentage. This change would happen automatically prior to execution of the Opening Cross, and would not involve any human intervention. The modified price would then follow the principles for ordinary crosses: Maximizing volume executed, minimizing the imbalance of On Open orders, and minimizing the distance from the previous Nasdaq official closing price. All unexecuted shares from On Open orders would be cancelled.

The Threshold Percentage would be set by Nasdaq officials in advance and communicated to members. Nasdaq would be able to adjust the Threshold Percentage based on Nasdaq's

experience with the Opening Cross and on unusual market conditions, such as certain options and derivatives expiration days that are heavily affected by the opening price of Nasdaq securities. The threshold would be set so the use of the bounds is very rare. Such changes would occur in advance and would be communicated to members. Nasdaq would publish the Threshold Percentages via its public NasdaqTrader Web site.<sup>8</sup>

#### *Modified Opening Process*

Not all Nasdaq securities would participate in the Nasdaq Opening Cross. For those that do not, Nasdaq has developed an improved procedure to ensure that all stocks open with an unlocked inside market. Like the process that Nasdaq applies today at 9:29:30 to clear locks and crosses, the improved process would “wake up” orders that are eligible for execution beginning at 9:30, and process them in an orderly fashion to prevent the creation of locks and crosses.

The process would have several steps, each of which occur in strict time priority. First, limit orders that have a time-in-force of Day or GTC would wake-up. Of those, orders whose limit price would not lock or cross the book would be added to the book. Orders whose limit price would lock or cross the book would be placed in an “In Queue” state in strict time priority. Second, reverse Pegged orders would wake up. If the price created by the reverse Pegged order would not lock or cross the book, the order would be placed on the book. If the price created by the reverse Pegged order would lock or cross the book, the order would be placed in “In Queue” status. Third, regular Pegged orders would wake up in strict time priority. Since these orders can only join the current highest bid or lowest offer price level, they would simply add depth to the book at that price. The In Queue orders also would include market and IOC orders in strict time priority. At this point, all eligible orders that would not lock or cross the market would be on the Nasdaq Market Center book and all other eligible orders would be In Queue.

After the wake-up process has been completed, the system would process the “In Queue” orders, including market orders, in strict time priority order regardless of order type. IOC orders that would not be executable would be cancelled as is currently done. Orders

with a time in force of DAY and GTC that would not be executable would be added to the book in strict time priority. Once this process is complete, the system would resume processing the input queue as normal.

*Implementation.* Upon initial implementation, Nasdaq plans to apply the opening cross process to securities included in the Nasdaq 100 Index, the S&P 500 Index, and the Nasdaq Biotech Index. Nasdaq would have the authority to apply the Opening Cross to any and all Nasdaq NMS securities. For those securities, the Nasdaq Opening Cross price would be the NOOP. Issues that are not subject to the Opening Cross would be subject to the Modified Opening Process, and would continue to have their NOOP value calculated and disseminated as today.

#### 2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with the provisions of section 15A of the Act,<sup>9</sup> in general, and with section 15A(b)(6) of the Act,<sup>10</sup> in particular, in that section 15A(b)(6) requires the NASD’s rules to be designed, among other things, to protect investors and the public interest. Nasdaq believes that its current proposal is consistent with the NASD’s obligations under these provisions of the Act because it would result in the public dissemination of information that more accurately reflects the trading in a particular security at the open. Furthermore, to the extent a security is a component of an index, Nasdaq believes the index would more accurately reflect the value of the market, or segment of the market, the index is designed to measure. Nasdaq believes the corresponding result should be trades, or other actions, executed at prices more reflective of the current market when the price of an execution, or other action, is based on the last sale, the high price or low price of a security, or the value of an index.

#### *B. Self-Regulatory Organization’s Statement on Burden on Competition*

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

#### *C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

Nasdaq neither solicited nor received written comments with respect to the proposed rule change, as amended.

#### **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 the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change, as amended, or

B. Institute proceedings to determine whether the proposed rule change, as amended, 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](mailto:rule-comments@sec.gov). Please include File Number SR–NASD–2004–071 on the subject line.

##### *Paper Comments*

Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NASD–2004–071. 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

<sup>8</sup> Nasdaq may also employ the Benchmark Value and Threshold Percentages for determining the Nasdaq Official Opening Price for stocks that are not included in the Nasdaq Opening Cross.

<sup>9</sup> 15 U.S.C. 78o–3.

<sup>10</sup> 15 U.S.C. 78o–3(b)(6).

Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASD-2004-071 and should be submitted on or before July 8, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

**Margaret H. McFarland,**  
Deputy Secretary.

[FR Doc. 04-13639 Filed 6-16-04; 8:45 am]

BILLING CODE 8010-01-P

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-49844; File No. SR-NASD-2004-021]

**Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. Relating to Reporting of Cancelled Trades**

June 10, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on February 4, 2004, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. On May 19, 2004, Nasdaq filed an amendment to the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule

change, as amended, from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change Regarding Reporting of Cancelled Trades**

Nasdaq proposes to require members to report the cancellation of any trades previously submitted to the Nasdaq Market Center. The text of the proposed rule change is below. Proposed new language is *italicized*.<sup>4</sup>

\* \* \* \* \*  
4630. Reporting Transactions in Nasdaq National Market Securities  
\* \* \* \* \*

4632. Transaction Reporting  
\* \* \* \* \*

*(g) Reporting Cancelled Trades*

*(1) Obligation and Party Responsible for Reporting Cancelled Trades*

*With the exception of trades cancelled by Nasdaq staff in accordance with Rule 11890, members shall report to the Nasdaq Market Center the cancellation of any trade previously submitted to the Nasdaq Market Center. The member responsible under Rule 5430(b) for submitting the original trade report shall submit the cancellation report in accordance with the procedures set forth in paragraph (g)(2). For trades executed through a Nasdaq system that automatically reports trades to the Nasdaq Market Center, the member that would have been required by Rule 5430(b) to report the trade (but for the trade being reported automatically by the Nasdaq system) shall submit the cancellation report in accordance with the procedures set forth in paragraph (g)(2).*

*(2) Deadlines for Reporting Cancelled Trades*

*(A) For trades executed between 9:30 a.m. and 4 p.m. Eastern Time and for which the decision to cancel occurs before 5:13:30 p.m. on the date of execution, the member responsible under paragraph (g)(1) shall report the cancellation within 90 seconds of the decision to cancel the trade.*

*(B) For trades executed between 9:30 a.m. and 4 p.m. Eastern Time and for which the decision to cancel occurs after 5:13:30 p.m., but before 5:15 p.m. on the date of execution, the member*

*responsible under paragraph (g)(1) shall use its best efforts to report the cancellation not later than 5:15 p.m. on the date of execution, and otherwise it shall report the cancellation on the following day by 6:30 p.m.*

*(C) For trades executed between 9:30 a.m. and 4 p.m. Eastern Time and for which the decision to cancel occurs after 5:15 p.m. on the date of execution, the member responsible under paragraph (g)(1) shall report the cancellation on the following day by 6:30 p.m.*

*(D) For trades executed outside the hours of 9:30 a.m. to 4 p.m. Eastern Time and for which a decision to cancel is made prior to 6:30 p.m. on the date of execution, the member responsible for reporting under paragraph (g)(1) shall report the cancellation by 6:30 p.m.*

*(E) For trades executed outside the hours of 9:30 a.m. to 4 p.m. Eastern Time and for which the decision to cancel occurs after 6:30 p.m. on the date of execution, the member responsible under paragraph (g)(1) shall report the cancellation on the following day by 6:30 p.m.*

*(F) For any trade for which the decision to cancel occurs on any date after the date of execution, the member responsible under paragraph (g)(1) shall report the cancellation (i) if the decision to cancel occurs before 6:30 p.m., then by 6:30 p.m. on the date when the decision to cancel occurs, or (ii) if the decision to cancel occurs at or after 6:30 p.m., then by 6:30 p.m. on the following day.*

\* \* \* \* \*

4640. Reporting Transactions in Nasdaq SmallCapSM Market Securities  
\* \* \* \* \*

4642. Transaction Reporting  
\* \* \* \* \*

*(g) Reporting Cancelled Trades*  
*(1) Obligation and Party Responsible for Reporting Cancelled Trades*

*With the exception of trades cancelled by Nasdaq staff in accordance with Rule 11890, members shall report to the Nasdaq Market Center the cancellation of any trade previously submitted to the Nasdaq Market Center. The member responsible under Rule 5430(b) for submitting the original trade report shall submit the cancellation report in accordance with the procedures set forth in paragraph (g)(2). For trades executed through a Nasdaq system that automatically reports trades to the Nasdaq Market Center, the member that would have been required by Rule 5430(b) to report the trade (but for the trade being reported automatically by*

<sup>11</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Commission, dated May 18, 2004 ("Amendment No. 1"). Amendment No. 1 replaced Nasdaq's February 4, 2004 filing in its entirety. Amendment No. 1 is incorporated into this notice.

<sup>4</sup> The proposed rule change is marked to show changes from the rule as it appears in the electronic NASD Manual available at www.nasd.com, and also reflects a proposal to rename the Automated Confirmation Transaction Service to the Nasdaq Market Center as contained in proposed rule change filing SR-NASD-2004-076.