

the fair and orderly operation of The Nasdaq Stock Market during the pre-opening trading period. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow Nasdaq to begin disseminating the Order Imbalance Indicator at the earlier 9:25 a.m. time immediately, thereby providing increased information and greater transparency to the market. For this reason, the Commission designates the proposal to be effective and operative upon filing with the Commission.<sup>10</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

#### IV. Solicitation of Comments

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

##### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2005-029 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-2005-029. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the

Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASD-2005-029 and should be submitted on or before April 13, 2005.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51386; File No. SR-NASD-2005-031]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding Modifications to the Nasdaq Opening Process for Nasdaq-Listed Stocks

March 16, 2005.

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 March 14, 2005, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in items I and II below, which Items have been prepared by Nasdaq. Nasdaq has designated the proposed rule change as "non-controversial" under section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders the proposed rule change effective upon

filing with the Commission. 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 a proposed rule change to modify NASD Rule 4704(d)(1) which governs the dissemination of the Order Imbalance Indicator prior to the Nasdaq Opening Cross. The text of the proposed rule change is set forth below. Proposed new language is in *italics*; proposed deletions are in [brackets].<sup>5</sup>

\* \* \* \* \*

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

(a)-(c) No Change.  
(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 9:25:30 a.m., Nasdaq shall disseminate by electronic means an Order Imbalance Indicator every 15 seconds until 9:28:20[9], and then every 5 seconds until market open. The Order Imbalance Indicator shall contain the following real time information:

(A)-(E) No Change.  
(2)-(4) No Change.

\* \* \* \* \*

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

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

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

###### 1. Purpose

Nasdaq is proposing to modify NASD Rule 4704(d)(1) which governs the dissemination of the Order Imbalance Indicator prior to the Nasdaq Opening

<sup>10</sup> For purposes only of waiving the 30-day operative delay of the proposed rule change, the Commission considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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

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

<sup>5</sup> The proposed rule change is marked to show changes from the rule text appearing in the NASD Manual available at <http://www.nasdaq.com> as amended by SR-NASD-2005-029 (March 4, 2005).

Cross. NASD Rule 4704(d)(1) currently provides that Nasdaq will disseminate the Order Imbalance Indicator every 15 seconds beginning at 9:25 a.m. and every 5 seconds beginning at 9:29 a.m. until market open. The Order Imbalance Indicator informs market participants about the expected outcome of the Nasdaq Opening Cross and enables them to determine how to participate in it. Nasdaq recently determined that disseminating the Order Imbalance Indicator beginning at 9:25 a.m. will enhance market transparency and encourage increased order interaction during the Nasdaq Opening Cross.

Currently, Nasdaq's system opens all quotes and orders at 9:25 a.m. via an unlocking/uncrossing process described in Rule 4704(b). The processing of the unlocking/uncrossing algorithm takes several seconds to complete. Under the recently published rule change,<sup>6</sup> the first dissemination of the Order Imbalance Indicator at 9:25 a.m. could occur prior to the completion of the unlocking/uncrossing algorithm. This would defeat the transparency that Nasdaq continually strives to create. Accordingly, Nasdaq is proposing to disseminate the Order Imbalance Indicator at 9:25:30 a.m. rather than 9:25 a.m. as recently proposed. In addition, Nasdaq is proposing to increase transparency by disseminating the Order Imbalance Indicator every five seconds beginning at 9:28:20 a.m. rather than at 9:29 a.m.

There would be no changes in the entry, display, processing, or execution of individual orders.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,<sup>7</sup> in general, and with section 15A(b)(6) of the Act,<sup>8</sup> in particular, in that section 15A(b)(6) requires, among other things, that a national securities association's rules be designed 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 a more orderly opening for all Nasdaq stocks. The proposed rule change would create a fair, orderly, and unified opening for Nasdaq stocks, prevent the occurrence of locked and crossed markets in halted securities, and preserve price discovery and transparency that is vital to an effective opening of trading.

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

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

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

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

### **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 from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to section 19(b)(3)(A) of the Act<sup>9</sup> and Rule 19b-4(f)(6) thereunder.<sup>10</sup> Nasdaq has requested that the Commission waive the five-day pre-filing notice requirement and the 30-day operative delay for "non-controversial" proposals, based upon a representation that the proposal is of the utmost importance to the fair and orderly operation of The Nasdaq Stock Market during the pre-opening trading period. The Commission believes that waiver of the five-day pre-filing requirement and the 30-day operative delay is consistent with the protection of investors and the public interest because it would allow Nasdaq immediately to implement the proposed rule change which should improve transparency in the pre-opening trading period. For this reason, the Commission designates the proposal to be effective and operative upon filing with the Commission.<sup>11</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors,

or otherwise in furtherance of the purposes of the Act.

### **IV. Solicitation of Comments**

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

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2005-031 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-2005-031. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASD-2005-031 and should be submitted on or before April 13, 2005.

<sup>6</sup> See SR-NASD-2005-029 (March 4, 2005).

<sup>7</sup> 15 U.S.C. 78o-3.

<sup>8</sup> 15 U.S.C. 78o-3(b)(6).

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>10</sup> 17 CFR 240.19b-4(f)(6).

<sup>11</sup> For purposes only of waiving the 30-day operative delay of the proposed rule change, the Commission considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51372; File No. SR-NYSE-2004-62]

### Self-Regulatory Organizations; New York Stock Exchange Inc.; Notice of Filing of Proposed Rule Change To Eliminate Rule 496 and To Amend the Listed Company Manual Relating to Transfer Agents

March 15, 2005.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on October 29, 2004, the New York Stock Exchange Inc. ("NYSE") filed with the Securities and Exchange Commission ("Commission") and on December 3, 2004, and February 9, 2005, amended the proposed rule change as described in items I, II, and III below, which items have been prepared primarily by the NYSE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

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

The NYSE proposes to: (i) Eliminate Rule 496; (ii) amend the Listed Company Manual ("LCM") to remove references to the current requirement of Rule 496 that transfer agents for listed companies maintain an office or an agent in Manhattan below Chambers Street; (iii) incorporate in the LCM certain other requirements currently in Rule 496; and (iv) codify exceptions to the transfer agent provisions that the NYSE has historically applied.

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

In its filing with the Commission, the NYSE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. The NYSE has

prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.<sup>2</sup>

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

The NYSE proposes to eliminate Rule 496 and proposes to amend its LCM to retain and to continue to impose certain current significant requirements of Rule 496 with respect to entities acting as transfer agents for listed companies. The NYSE believes it is appropriate that the transfer agent requirements be set forth solely in the LCM due to the fact that its rules are generally applicable to members rather than listed companies. In addition, the current requirements of Rule 496 are referred to, and to some extent, repeated in various sections of the LCM. Accordingly, the NYSE believes that the transfer agent requirements are more properly contained in the LCM.

Rule 496 requires, among other things, that transfer agents for listed companies maintain an office or obtain an agent located south of Chambers Street in the Borough of Manhattan, City of New York, where securities can be delivered in person for registration of transfer and can be picked up after completion of such registration (often referred to in the industry as a "drop"). The current requirement was implemented when most securities traded on the NYSE were held in certificated form and were settled with physical delivery. The transfer agents' presence in lower Manhattan, where the brokers were also concentrated, facilitated the speedy settlement of transactions and processing of securities transfers. However, most securities are now held in "street name" at The Depository Trust Company ("DTC"), a securities depository registered as clearing agency under section 17A of the Exchange Act,<sup>3</sup> and transfers of such securities occur through automated book-entry systems at DTC without the need for transfer of physical certificates. As a result, very few transfers are facilitated any longer by the drop in lower Manhattan. The NYSE believes that marketplace participants, including securityholders, would not be harmed by elimination of the drop requirement in Rule 496.

Rule 496 also requires transfer agents to record the transfer of securities received at the transfer agent's drop

before the close of business on a record date as being transferred on the record date in order to establish the transferee's rights on the record date. As revised, the LCM will provide the same protection for securities mailed by the close of business on a record date by a registered clearing agency (*i.e.*, DTC). Because the vast majority of securities are now held in "street name," the NYSE believes that securityholders will not be disadvantaged by providing this record date protection only to registered clearing agencies.

Rule 496 also requires transfer agents to meet certain capital and insurance standards. Currently under the rule, transfer agents are required to (i) have capital, surplus (both capital and earned), undivided profits, and capital reserves aggregating at least \$10,000,000 and (ii) maintain blanket bond insurance coverage of at least \$25,000,000 to protect securities while in transit or being processed. The proposed revisions to the LCM will retain the capital and insurance requirements of current Rule 496 and will codify several long-standing policies and practices of the NYSE by providing for the qualification of certain transfer agents that do not otherwise meet the capital and insurance requirements of Rule 496. Accordingly, the LCM will specify that a bank, trust company, or other qualified organization acting as transfer agent may:

1. Act in a dual capacity as transfer agent/co-transfer agent and registrar if (i) a majority of its equity is owned by an entity that meets the standard capital requirements, (ii) its parent guarantees the subsidiary's performance, and (iii) the subsidiary maintains the \$25,000,000 blanket bond insurance coverage or the parent maintains the coverage for the benefit of the subsidiary;

2. Act in dual capacity as transfer agent/co-transfer agent and registrar if it (i) has capital of at least \$2,000,000 and errors and omissions insurance which, taken together with its capital, equals at least \$10,000,000 and (ii) maintains the standard \$25,000,000 blanket bond insurance coverage; or

3. Act as co-transfer agent or co-registrar (but not in a dual capacity) for securities listed on the NYSE if it has capital equal to at least \$2,000,000 without maintaining the \$25,000,000 blanket bond insurance coverage.

Additionally a listed company may act as its own transfer agent provided that it complies with all the requirements applicable to transfer agents not affiliated with the listed company apart from the capital and

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

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

<sup>2</sup> The Commission has modified the text of the summaries prepared by the NYSE.

<sup>3</sup> 15 U.S.C. 78q-1(b).