

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 CHX. 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-CHX-2005-25 and should be submitted on or before November 14, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>15</sup>

**Jonathan G. Katz,**  
Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-52574; File No. SR-NASD-2005-099]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to Amendments to the Restated Certificate of Incorporation of the Nasdaq Stock Market, Inc.

October 7, 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 August 19, 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, II, and

III below, which Items have been prepared by Nasdaq. On September 30, 2005, Nasdaq submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> The Commission is publishing this notice, as amended, to solicit comments on the proposed rule change from interested persons.

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

Nasdaq proposes to amend its Restated Certificate of Incorporation ("Certificate"). Below is the text of the proposed rule change, as amended. Proposed new language is *italicized*; proposed deletions are in [brackets].

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#### RESTATED CERTIFICATE OF INCORPORATION OF THE NASDAQ STOCK MARKET, INC.

\* \* \* \* \*

#### ARTICLE FOURTH

A. No change.

B. No change.

C. 1. (a) Except as may otherwise be provided in this Restated Certificate of Incorporation (including any Preferred Stock Designation) or by applicable law, each holder of Common Stock, as such, shall be entitled to one vote for each share of Common Stock held of record by such holder on all matters on which stockholders generally are entitled to vote, and no holder of any series of Preferred Stock, as such, shall be entitled to any voting powers in respect thereof.

(b) Except as may otherwise be provided in this Restated Certificate of Incorporation or by applicable law, the holders of the *3.75% Series A Convertible Notes due 2012 (as may be amended, supplemented or otherwise modified from time to time, the "Series A Notes")* and the *3.75% Series B Convertible Notes due 2012 (as may be amended, supplemented or otherwise modified from time to time, the "Series B Notes")* and, together with the *Series A Notes, the "Notes")* [4.0% Convertible Subordinated Notes due 2006 (the "Notes")] which may be issued from time to time by Nasdaq shall be entitled to vote on all matters submitted to a vote of the stockholders of Nasdaq, voting together with the holders of the

<sup>3</sup> Amendment No. 1 made minor edits to the originally filed proposed rule change and clarified the proposed definition of "Broker Affiliate" set forth in Paragraph C.6. of Nasdaq's Restated Certificate of Incorporation to include a broker or dealer or an affiliate thereof. In Amendment No. 1, Nasdaq also reflected approval of the proposal by the Board of Directors of Nasdaq and by its stockholders.

Common Stock (and of any other shares of capital stock of Nasdaq entitled to vote at a meeting of stockholders) as one class. Each principal amount of Notes shall be entitled to a number of votes equal to the number of votes represented by the Common Stock of Nasdaq that could then be acquired upon conversion of such principal amount of Notes into Common Stock, subject to adjustments as provided in the Notes and the Indenture dated as of April 22, 2005 between Nasdaq and Law Debenture Trust Company of New York, as trustee, as such Indenture may be amended, supplemented or otherwise modified from time to time. Holders of the Notes shall be deemed to be stockholders of Nasdaq, and the Notes shall be deemed to be shares of stock, solely for the purpose of any provision of the General Corporation Law of the State of Delaware or this Restated Certificate of Incorporation that requires the vote of stockholders as a prerequisite to any corporate action.

2. Notwithstanding any other provision of this Restated Certificate of Incorporation, but subject to subparagraph 6 of this paragraph C. of this Article Fourth, in no event shall (i) any record owner of any outstanding Common Stock or Preferred Stock which is beneficially owned, directly or indirectly, as of any record date for the determination of stockholders and/or holders of Notes entitled to vote on any matter, or (ii) any holder of any Notes which are beneficially owned, directly or indirectly, as of any record date for the determination of stockholders and/or holders of Notes entitled to vote on any matter, by a person (other than an Exempt Person) who beneficially owns shares of Common Stock, Preferred Stock and/or Notes ["Excess Shares and/or Notes"] in excess of five percent (5%) of the then-outstanding shares of stock generally entitled to vote as of the record date in respect of such matter ("Excess Shares and/or Notes"), be entitled or permitted to vote any Excess Shares and/or Notes on such matter. For all purposes hereof, any calculation of the number of shares of stock outstanding at any particular time, including for purposes of determining the particular percentage of such outstanding shares of stock of which any person is the beneficial owner, shall be made in accordance with the last sentence of Rule 13d-3(d)(1)(i) of the General Rules and Regulations under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), as in effect on the date of filing this Restated Certificate of Incorporation.

<sup>15</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.

3. The following definitions shall apply to this paragraph C. of this Article Fourth:

(a) "Affiliate" shall have the meaning ascribed to that term in Rule 12b-2 of the General Rules and Regulations under the Exchange Act, as in effect on the date of filing this Restated Certificate of Incorporation.

(b) A person shall be deemed the "beneficial owner" of, shall be deemed to have "beneficial ownership" of and shall be deemed to "beneficially own" any securities:

(i) Which such person or any of such person's Affiliates is deemed to beneficially own, directly or indirectly, within the meaning of Rule 13d-3 of the General Rules and Regulations under the Exchange Act as in effect on the date of the filing of this Restated Certificate of Incorporation;

(ii) Which such person or any of such person's Affiliates has (A) the right to acquire (whether such right is exercisable immediately or only after the passage of time) pursuant to any agreement, arrangement or understanding (other than customary agreements with and between underwriters and selling group members with respect to a bona fide public offering of securities), or upon the exercise of conversion rights, exchange rights, rights, warrants or options, or otherwise; provided, however, that a person shall not be deemed the beneficial owner of, or to beneficially own, securities tendered pursuant to a tender or exchange offer made by or on behalf of such person or any of such person's Affiliates until such tendered securities are accepted for purchase; or (B) the right to vote pursuant to any agreement, arrangement or understanding; provided, however, that a person shall not be deemed the beneficial owner of, or to beneficially own, any security by reason of such agreement, arrangement or understanding if the agreement, arrangement or understanding to vote such security (1) arises solely from a revocable proxy or consent given to such person in response to a public proxy or consent solicitation made pursuant to, and in accordance with, the applicable rules and regulations promulgated under the Exchange Act and (2) is not also then reportable on Schedule 13D under the Exchange Act (or any comparable or successor report); or

(iii) Which are beneficially owned, directly or indirectly, by any other person and with respect to which such person or any of such person's Affiliates has any agreement, arrangement or understanding (other than customary

agreements with and between underwriters and selling group members with respect to a bona fide public offering of securities) for the purpose of acquiring, holding, voting (except to the extent contemplated by the proviso to (b)(ii)(B) above) or disposing of such securities; provided, however, that (A) no person who is an officer, director or employee of an Exempt Person shall be deemed, solely by reason of such person's status or authority as such, to be the "beneficial owner" of, to have "beneficial ownership" of or to "beneficially own" any securities that are "beneficially owned" (as defined herein), including, without limitation, in a fiduciary capacity, by an Exempt Person or by any other such officer, director or employee of an Exempt Person, and (B) the Voting Trust Agreement by and among Nasdaq, the National Association of Securities Dealers, Inc., a Delaware corporation (the "NASD"), and The Bank of New York, a New York banking corporation, as such may be amended from time to time (the "Voting Trust Agreement"), shall not be deemed, solely by reason of such person's status or authority as such, to be the "beneficial owner" of, to have "beneficial ownership" of or to "beneficially own" any securities that are governed by and held in accordance with the Voting Trust Agreement.

(c) A "person" shall mean any individual, firm, corporation, partnership, limited liability company or other entity.

(d) "Exempt Person" shall mean Nasdaq or any Subsidiary of Nasdaq, in each case including, without limitation, in its fiduciary capacity, or any employee benefit plan of Nasdaq or of any Subsidiary of Nasdaq, or any entity or trustee holding stock for or pursuant to the terms of any such plan or for the purpose of funding any such plan or funding other employee benefits for employees of Nasdaq or of any Subsidiary of Nasdaq.

(e) "Subsidiary" of any person shall mean any corporation or other entity of which securities or other ownership interests having ordinary voting power sufficient to elect a majority of the board of directors or other persons performing similar functions are beneficially owned, directly or indirectly, by such person, and any corporation or other entity that is otherwise controlled by such person.

(f) The Board shall have the power to construe and apply the provisions of this paragraph C. of this Article Fourth and to make all determinations necessary or desirable to implement such provisions, including, but not

limited to, matters with respect to (1) the number of shares of stock beneficially owned by any person, (2) the number of Notes beneficially owned by any person, (3) whether a person is an Affiliate of another, (4) whether a person has an agreement, arrangement or understanding with another as to the matters referred to in the definition of beneficial ownership, (5) the application of any other definition or operative provision hereof to the given facts, or (6) any other matter relating to the applicability or effect of this paragraph C. of this Article Fourth.

4. The Board shall have the right to demand that any person who is reasonably believed to hold of record or beneficially own Excess Shares and/or Notes supply Nasdaq with complete information as to (a) the record owner(s) of all shares and/or Notes beneficially owned by such person who is reasonably believed to own Excess Shares and/or Notes, and (b) any other factual matter relating to the applicability or effect of this paragraph C. of this Article Fourth as may reasonably be requested of such person.

5. Any constructions, applications, or determinations made by the Board, pursuant to this paragraph C. of this Article Fourth, in good faith and on the basis of such information and assistance as was then reasonably available for such purpose, shall be conclusive and binding upon Nasdaq, its stockholders and the holders of the Notes.

6. Notwithstanding anything herein to the contrary, subparagraph 2 of this paragraph C. of this Article Fourth shall not be applicable to any Excess Shares and/or Notes beneficially owned by (a) the NASD or its Affiliates until such time as the NASD beneficially owns five percent (5%) or less of the outstanding shares of stock and/or Notes entitled to vote on the election of a majority of directors at such time, (b) any other person as may be approved for such exemption by the Board prior to the time such person beneficially owns more than five percent (5%) of the outstanding shares of stock and/or Notes entitled to vote on the election of a majority of directors at such time or (c) Hellman & Friedman Capital Partners IV, L.P., H&F International Partners IV-A, L.P., H & F International Partners IV-B, L.P., [and] H&F Executive Fund, IV L.P.; *Silver Lake Partners II TSA, L.P.*, *Silver Lake Technology Investors II, L.L.C.*, *Silver Lake Partners TSA, L.P.*, and *Silver Lake Investors, L.P.* or their respective affiliated investment funds that are: (i) Under common management and control, (ii) comprised of members or partners with the same ultimate ownership, and (iii) subject to

*terms and conditions that are substantially identical in all material respects*, if the Board has approved an exemption for any other person pursuant to section 6(b) of this paragraph C. of this Article Fourth (other than an exemption granted in connection with the establishment of a strategic alliance with another exchange or similar market) *provided that in no event shall the exemption contained in Section 6(c) cause a registered broker or dealer or an Affiliate thereof (a "Broker Affiliate," provided that, a Broker Affiliate shall not include an entity that either owns ten percent or less of the equity of a broker or dealer, or for which the broker or dealer accounts for one percent or less of the gross revenues received by the consolidated entity) to receive an exemption for a greater percentage of voting securities than has been granted to another Broker Affiliate by the Board.* The Board, however, may not approve an exemption under section 6(b): (i) For a *Broker Affiliate* [registered broker or dealer or an Affiliate thereof (provided that, for these purposes, an Affiliate shall not be deemed to include an entity that either owns ten percent or less of the equity of a broker or dealer, or the broker or dealer accounts for one percent or less of the gross revenues received by the consolidated entity);] or (ii) an individual or entity that is subject to a statutory disqualification under section 3(a)(39) of the Exchange Act. The Board may approve an exemption for any other stockholder or holder of Notes if the Board determines that granting such exemption would (A) not reasonably be expected to diminish the quality of, or public confidence in, The Nasdaq Stock Market or the other operations of Nasdaq, on the ability to prevent fraudulent and manipulative acts and practices and on investors and the public, and (B) promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to and facilitating transactions in securities or assist in the removal of impediments to or perfection of the mechanisms for a free and open market and a national market system.

7. In the event any provision (or portion thereof) of this paragraph C. of this Article Fourth shall be found to be invalid, prohibited or unenforceable for any reason, the remaining provisions (or portions thereof) of this paragraph C. of this Article Fourth shall remain in full force and effect, and shall be construed as if such invalid, prohibited or unenforceable provision (or portion hereof) had been stricken herefrom or

otherwise rendered inapplicable, it being the intent of Nasdaq, its stockholders and the holders of the Notes that each such remaining provision (or portion thereof) of this paragraph C. of this Article Fourth remains, to the fullest extent permitted by law, applicable and enforceable as to all stockholders and all holders of Notes, including stockholders and holders of Notes that beneficially own Excess Shares and/or Notes, notwithstanding any such finding.

\* \* \* \* \*

## **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 states that the purpose of the proposed rule change is to amend the Certificate to afford the holders of 3.75% Series A Convertible Notes due October 2012 ("Series A Notes") and the 3.75% Series B Convertible Notes due 2012 ("Series B Notes" and, collectively with the Series A Notes, the "Notes") the right to vote with Nasdaq stockholders. The Series A Notes and the Series B Notes were issued in connection with Nasdaq's entry into a definitive agreement and plan of merger ("Merger Agreement") with Instinet Group Incorporated ("Instinet"), under which Nasdaq will acquire all outstanding shares of Instinet for an aggregate purchase price of approximately \$1.878 billion in cash and Instinet will merge into a wholly owned subsidiary of Nasdaq ("Merger"). The purchase price is comprised of approximately \$934.5 million from Nasdaq, approximately \$207.5 million from Iceland Acquisition Corp., an affiliate of Silver Lake Partners II, L.P. ("SLP"), a private equity fund, pursuant to the sale of Instinet's institutional brokerage business, and the balance from Instinet's available cash, including approximately \$174 million from the

sale of Instinet's Lynch, Jones & Ryan, Inc. subsidiary ("LJR"). As a result of the Merger, Instinet would become a wholly owned subsidiary of Nasdaq. Nasdaq states that completion of the Merger is subject to Instinet's sale of LJR and customary closing conditions, including regulatory approvals, including approval of the Merger by the Commission and approval under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"). Nasdaq expects the Merger to be completed during the fourth quarter of 2005 or the first quarter of 2006.

Nasdaq concurrently entered into a definitive agreement ("Transaction Agreement") to sell Instinet's institutional brokerage business to Iceland Acquisition Corp., an affiliate of SLP, immediately upon the closing of the Merger for a purchase price of \$207.5 million, subject to certain adjustments. The proposed sale is subject to terms and conditions set forth in the Transaction Agreement. According to Nasdaq, these include, among other things, the closing of the Merger and closing conditions that are similar to the closing conditions contained in the Merger Agreement, including approval under the HSR Act and the obtaining of other required regulatory approvals with respect to the sale of the institutional brokerage business to Iceland Acquisition Corp.

According to Nasdaq, on April 22, 2005, it entered into a Securities Purchase Agreement ("Securities Purchase Agreement") with Norway Acquisition SPV, LLC ("Norway SPV") providing for the sale by Nasdaq to Norway SPV of \$205 million aggregate principal amount of the Series A Notes and warrants ("Series A Warrants") to purchase 2,209,052 shares of Nasdaq's common stock ("Common Stock") at \$14.50 per share. In addition, the Series A Notes will be convertible into Common Stock, subject to certain adjustments and conditions, at a purchase price of \$14.50 per share, which would equal 14,137,931 shares. The Series A Notes and the Series A Warrants purchased by Norway SPV are indirectly owned by Hellman & Friedman Capital Partners IV, L.P., H&F International Partners IV-A, L.P., H&F International Partners IV-B, L.P., and H&F Executive Fund IV, L.P. (collectively, the "H&F Entities") and Silver Lake Partners II TSA, L.P., Silver Lake Technology Investors II, L.L.C., Silver Lake Partners TSA, L.P., and Silver Lake Investors, L.P. (collectively, the "SLP Entities") and Integral Capital Partners VI, L.P. and VAB Investors, LLC, (collectively with the SLP Entities, the "SLP Investors"). Nasdaq will

receive proceeds of \$205.0 million from the sale of the Series A Notes and Series A Warrants, less fees and other expenses.

On April 22, 2005, Nasdaq also entered into a Note Amendment Agreement ("Note Amendment Agreement") with the H&F Entities providing for the exchange by Nasdaq of its \$240 million aggregate principal amount of 4.0% Convertible Subordinated Notes due 2006 ("Old Notes") for \$240 million aggregate principal amount of the Series B Notes and warrants ("Series B Warrants") to purchase 2,753,448 shares of Common Stock at \$14.50 per share. The Series B Notes will be convertible into Common Stock, subject to certain adjustments and closing conditions, at a purchase price of \$14.50 per share, which would equal 16,551,724 shares. The Old Notes had been convertible at any time during a five-year period into 12,000,000 shares of Nasdaq common stock at a conversion price of \$20 per share.

On April 22, 2005, Nasdaq also entered into an Indenture ("Indenture") with Law Debenture Trust Company of New York, as trustee, governing the terms of the Notes. Nasdaq states that the Notes are senior unsecured obligations of Nasdaq, rank *pari passu* in right of payment with all existing and any future senior unsecured indebtedness of Nasdaq, and are senior in right of payment to any future subordinated indebtedness of Nasdaq. Under the terms of the Indenture, subject to certain exceptions, Nasdaq will be required to redeem the Series A Notes and Series A Warrants if (i) the Merger Agreement is terminated or (ii) the Merger has not closed by April 22, 2006, but in no event earlier than October 24, 2005. The aggregate redemption price for the Series A Notes and Series A Warrants will be \$205.0 million plus any accrued interest on the Series A Notes. Upon the mandatory redemption of the Series A Notes, (i) the Indenture and the Series B Notes will automatically be deemed to be amended to restate, with limited exceptions, the terms of the Old Notes and (ii) the Series B Warrants will be terminated.

#### Article Fourth

*Paragraph C.1.* Nasdaq proposes to amend this paragraph of the Certificate to provide that holders of the Notes would enjoy the same rights that are currently granted to holders of the Old Notes, which are being retired. Specifically, Nasdaq states that holders of the Notes would be entitled to vote on all matters submitted to a vote of the stockholders of Nasdaq, voting together with the holders of the Common Stock

(and of any other shares of capital stock of Nasdaq entitled to vote at a meeting of stockholders) as one class. Each holder of the Notes would be entitled to a number of votes equal to the number of shares of common stock such holder would obtain upon conversion of the principal amount of the Notes held by such person, subject to adjustments as provided in the Notes and the Indenture, dated as of April 22, 2005, between Nasdaq and Law Debenture Trust Company of New York, as trustee, as such Indenture may be amended, supplemented, or otherwise modified from time to time.<sup>4</sup> The amendment would also provide that holders of the Notes shall be deemed to be stockholders and the Notes shall be deemed to be shares of stock solely for the purposes of provisions of the Delaware General Corporation Law and the Certificate that require the vote of stockholders as a prerequisite to corporate action.

*Paragraph C.2.* By virtue of the amendments to Paragraph C.1. set forth above, the current provision of the Certificate that imposes restrictions on stockholders voting shares and/or Old Notes in excess of 5% of outstanding stock and Old Notes would impose the same restrictions on holders of shares and the Series A Notes and Series B Notes. Any person who beneficially owns shares of common stock and/or Notes in excess of 5% of the then-outstanding shares of common stock ("Excess Shares and/or Notes") would not be permitted to vote such Excess Shares and/or Notes. As is true under the current Certificate, the calculation of the number of shares of common stock outstanding at any particular time would be made in accordance with the last sentence of SEC Rule 13d-3(d)(1)(i).<sup>5</sup> As a result, shares of common stock that may be acquired by a holder of the Notes through conversion would be deemed to be outstanding for purposes of calculating the voting power owned by such holder.

*Paragraph C.6.* Currently, this paragraph provides that the 5% voting limitation does not apply to (1) the NASD or its affiliates until such time as the NASD beneficially owns 5% or less of Nasdaq's outstanding common stock, or (2) any other person that the Nasdaq Board of Directors may exempt prior to the time that such person beneficially

owns more than 5% of the outstanding shares of common stock. The paragraph also provides that the H&F Entities will be exempted from the 5% voting limitation if the Nasdaq Board of Directors approves an exemption from the 5% voting limitation for any other person (other than an exemption granted in connection with the establishment of a strategic alliance with another exchange or similar market). This exemption would not apply to any other person to whom the H&F Entities might transfer Notes and/or common stock with the exception of affiliated investment funds under common management and control.<sup>6</sup> The paragraph also provides that the Board may not approve an exemption from the 5% limit for a registered broker or dealer or an affiliate thereof<sup>7</sup> or a person that is subject to a statutory disqualification under section 3(a)(39) of the Act.<sup>8</sup> In addition, before granting an exemption, the Nasdaq Board must make certain findings with respect to

<sup>6</sup> Nasdaq states that the Amended and Restated Limited Partnership or Limited Liability Company Agreement (each, an "Agreement") of each H&F Entity and each SLP Entity provides for the establishment of "Alternative Investment Structures" or "Alternative Investment Vehicles" for legal, tax, regulatory or other reasons deemed by the General Partner or Manager, as applicable, to be in the best interests of the partnership or company, as applicable. According to Nasdaq, under the Agreements, such alternative structures are required to be substantially identical in all material respects to the funds themselves (*i.e.*, common management and control, common ultimate membership, and substantially identical terms and conditions). Nasdaq states that, in other words, the alternative investment structures or vehicles would have limited partners or members of the same ultimate ownership, including those that are registered broker/dealers, and the partners/members would have the same ultimate interest in portfolio investments in registered broker/dealers. Nasdaq states that, as such, a transfer of Notes or Common Stock between an H&F Entity or an SLP Entity and an alternative investment structure or vehicle would have no meaningful effect in the event the Nasdaq Board grants a waiver under Article Fourth, paragraph C.6.

<sup>7</sup> Nasdaq states that a small number of the limited partners of the H&F Entities are registered broker/dealers or affiliates of registered broker/dealers ("H&F Broker/Dealer investors"). The Certificate provides that Nasdaq may not exempt a registered broker/dealer or an affiliate thereof from the 5% voting limitation. The Certificate defines "affiliate" with reference to SEC Rule 12b-2, 17 CFR 240.12b-2, which in turn defines an "affiliate" of a specified person as "a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified." Nasdaq states that the interests of the H&F Broker/Dealer Investors in the H&F Entities are minimal. Moreover, according to Nasdaq, the limited partnership agreements that govern the H&F Entities provide that the limited partners shall take no part in the control or management of the business or affairs of the limited partnership, nor shall they have any authority to act for or on behalf of the limited partnership, nor shall they have any authority to act for or on behalf of the limited partnership.

<sup>8</sup> 15 U.S.C. 78c(a)(39).

<sup>4</sup> The conversion rate of the Notes may be adjusted, for example, in the event of a distribution of Nasdaq common stock as a dividend, and in the event of a stock split, reverse split or share combination. See Indenture Agreement, Paragraph 15.05, attached as Exhibit 4.3 to Nasdaq's Form 8-K dated April 28, 2005.

<sup>5</sup> 17 CFR 240.13d-3(d)(1)(i).

the effect of an exemption on enumerated aspects of Nasdaq's regulatory obligations.

The proposed rule amendment would add conforming references to the SLP Entities and would provide that the SLP Entities, along with the H&F Entities, would be exempted from the 5% voting limitation if the Nasdaq Board approves an exemption from the 5% voting limitation for any other person (other than an exemption granted in connection with the establishment of a strategic alliance with another exchange or similar market).<sup>9</sup> Nasdaq states that this exemption would not apply to any other person to whom the SLP Entities might transfer Notes and/or common stock, with the exception of affiliated investment funds under common management and control.<sup>10</sup> Nasdaq states that, in the event that the Board determines to grant an exemption from the 5% voting restriction under subparagraph (b) of paragraph 6, such exemption shall not trigger an exemption under subparagraph (c) for the benefit of a broker/dealer. Finally, Nasdaq states that the proposed amendment is designed to ensure that, if in the future the Board raises the voting restriction above 5% for any

<sup>9</sup> Nasdaq states that, under the terms of the Transaction Agreement, SLP will acquire the institutional brokerage business ("VAB") of Instinet, a registered broker/dealer. According to Nasdaq, during the time that SLP continue to own the VAB, the SLP Entities would be deemed to be affiliates of the VAB. Nasdaq states that, in the unlikely event that the Nasdaq Board were considering granting a waiver under Article Fourth, C.6.b, of the Certificate, the Board would be required to consider that such action would trigger an exemption under Article Fourth, C.6.c to the benefit of SLP that would be deemed inconsistent with the provision of the Certificate barring an affiliate of a registered broker or dealer from voting Excess Shares and/or Notes. Nasdaq notes that, in connection with its application for registration as a national securities exchange, Nasdaq filed (i) an amendment to the By-Laws stating that a resolution of the Nasdaq Board to approve an exemption for any person from the five percent voting limitation shall not be permitted to become effective until such resolution has been filed with and approved by the Commission under section 19 of the Act, and (ii) a rule to provide that no member of the Nasdaq exchange or person associated with such a member may beneficially own more than 20% of the outstanding shares of Nasdaq's common stock or Notes. See Securities Exchange Act Release No. 52559 (October 4, 2005).

In addition, Nasdaq states that a small number of the limited partners of the SLP Entities are registered broker/dealers or affiliates of registered broker/dealers ("SLP Broker/Dealer Investors"). According to Nasdaq, the interests of the SLP Broker/Dealer Investors in the SLP Entities are minimal. Moreover, Nasdaq states that the limited partnership agreements that govern the SLP Entities provide that the limited partners shall take no part in the control or management of the business or affairs of the limited partnership, nor shall they have any authority to act for or on behalf of the limited partnership.

<sup>10</sup> See *supra* note 6.

Broker Affiliate, the H&F Entities and the SLP Entities would automatically receive the same percentage voting rights or the highest percentage voting rights to which their Notes and shares held entitled them at the time.<sup>11</sup>

## 2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with the provisions of sections 15A(b)(2) and (6) of the Act,<sup>12</sup> which require, among other things, that the it be so organized and have the capacity to be able to carry out the purposes of the Act and to comply and enforce compliance with the provisions of the Act, and that its rules are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. Nasdaq believes that the changes proposed to the Certificate are consistent with maintaining the 5% voting limitation that is currently contained in the Certificate, which Nasdaq believes serves the public interest by ensuring that certain individuals and entities cannot gain undue influence over the operations of Nasdaq. Nasdaq states that, in its order previously approving the Certificate, the Commission found that this 5% voting limitation and other limitations affecting the control of Nasdaq fulfill the obligations arising under Sections 15A(b)(2) and (6).<sup>13</sup>

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

Nasdaq does not believe that the proposed rule change, as amended, will impose 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

No written comments were either solicited or received.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such

longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which Nasdaq consents, the Commission will:

(A) By order approve such proposed rule change, 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-2005-099 on the subject line.

### Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-9303.

All submissions should refer to File Number SR-NASD-2005-099. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of Nasdaq. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASD-2005-099 and

<sup>11</sup> Nasdaq states that the definition of "Broker Affiliate" set forth in paragraph C.6. includes a broker or a dealer or an affiliate thereof.

<sup>12</sup> 15 U.S.C. 78o-3(b)(2) and (6).

<sup>13</sup> See Securities Exchange Act Release No. 34-42983 (June 26, 2000), 65 FR 41116 (July 3, 2000) (SR-NASD-00-27).

should be submitted on or before November 14, 2005.

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

**J. Lynn Taylor,**

*Assistant Secretary.*

[FR Doc. E5-5843 Filed 10-21-05; 8:45 am]

BILLING CODE 8010-01-P

## UNITED STATES SENTENCING COMMISSION

### Sentencing Guidelines for United States Courts

**AGENCY:** United States Sentencing Commission.

**ACTION:** Notice of temporary, emergency amendments to sentencing guidelines, policy statements, and commentary.

**SUMMARY:** Pursuant to (A) section 105 of the Family Entertainment and Copyright Act of 2005, Pub. L. 109-9 (the "FECA"); and (B) the United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, Pub. L. 109-76 (pertaining to the directive in section 6703 of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458), the Commission hereby gives notice of temporary, emergency amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the temporary, emergency amendments and the reason for each amendment.

**DATES:** The Commission has specified an effective date of October 24, 2005, for the emergency amendments.

**FOR FURTHER INFORMATION CONTACT:** Michael Courlander, Public Affairs Officer, Telephone: (202) 502-4590.

**SUPPLEMENTARY INFORMATION:** The Commission must promulgate temporary, emergency amendments to implement the FECA directives by October 24, 2005, and to implement the directive in United States Parole Commission Extension and Sentencing Commission Authority Act of 2005 by November 27, 2005. The statutory deadlines for the promulgation of the temporary, emergency amendments, in conjunction with the Commission's public meeting schedule (the promulgation of such amendments must occur in a public meeting) and pressing needs of other Commission business, made it impracticable to publish proposed temporary, emergency amendments in the **Federal Register** in order to provide an opportunity for

public comment. The Commission therefore had good cause not to publish proposed amendments before their effective date. See 5 U.S.C. 553(b), (d)(3).

The temporary, emergency amendments set forth in this notice also may be accessed through the Commission's Web site at <http://www.ussc.gov>.

**Authority:** 28 U.S.C. 994(a), (o), (p), (x); section 105 of Pub. L. 109-9; and Pub. L. 109-76.

**Ricardo H. Hinojosa,**  
*Chair.*

1. *Amendment:* Section 2B5.3(b) is amended by redesignating subsections (b)(2) through (b)(4) as subsections (b)(3) through (b)(5), respectively; and by inserting after subsection (b)(1) the following:

"(2) If the offense involved the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution, increase by 2 levels."

The Commentary to § 2B5.3 captioned "Application Notes" is amended in Note 1 by striking "'Uploading'" and all that follows through "the infringing item." and inserting the following:

"'Uploading' means making an infringing item available on the Internet or a similar electronic bulletin board with the intent to enable other persons to (A) download or otherwise copy the infringing item; or (B) have access to the infringing item, including by storing the infringing item in an openly shared file. 'Uploading' does not include merely downloading or installing an infringing item on a hard drive on a defendant's personal computer unless the infringing item is placed in an openly shared file.

'Work being prepared for commercial distribution' has the meaning given that term in 17 U.S.C. 506(a)(3)."

The Commentary to § 2B5.3 captioned "Application Notes" is amended in Note 2 in subdivision (A) by inserting after subdivision (v) the following:

"(vi) The offense involves the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution. In a case involving such an offense, the 'retail value of the infringed item' is the value of that item upon its initial commercial distribution."

and by inserting after subdivision (D) the following:

"(E) Indeterminate Number of Infringing Items.—In a case in which the court cannot determine the number of infringing items, the court need only make a reasonable estimate of the infringement amount using any relevant information, including financial records."

The Commentary to § 2B5.3 captioned "Application Notes" is amended by striking Note 3; and by redesignating Notes 4 and 5 as Notes 3 and 4, respectively.

Appendix A (Statutory Index) is amended by inserting after the line reference to "18

U.S.C. 2319(A)" the following: "18 U.S.C. 2319B 2B5.3".

*Reason for Amendment:* This proposed amendment implements the directive in section 105 of the Family Entertainment and Copyright Act of 2005, Pub. L. 109-9. The directive, which requires the Commission to promulgate an amendment under emergency amendment authority by October 24, 2005, instructs the Commission to "review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of intellectual property rights crimes \* \* \*"

"In carrying out [the directive], the Commission shall—

(1) Take all appropriate measures to ensure that the Federal sentencing guidelines and policy statements \* \* \* are sufficiently stringent to deter, and adequately reflect the nature of, intellectual property rights crimes;

(2) Determine whether to provide a sentencing enhancement for those convicted of the offenses [involving intellectual property rights], if the conduct involves the display, performance, publication, reproduction, or distribution of a copyrighted work before it has been authorized by the copyright owner, whether in the media format used by the infringing party or in any other media format;

(3) Determine whether the scope of 'uploading' set forth in application note 3 of section 2B5.3 of the Federal sentencing guidelines is adequate to address the loss attributable to people who, without authorization, broadly distribute copyrighted works over the Internet; and

(4) Determine whether the sentencing guideline and policy statements applicable to the offenses [involving intellectual property rights] adequately reflect any harm to victims from copyright infringement if law enforcement authorities cannot determine how many times copyrighted material has been reproduced or distributed."

### Pre-Release Works

The proposed amendment provides a separate two-level enhancement if the offense involved a pre-release work. The enhancement and the corresponding definition use language directly from 17 U.S.C. 506(a) (criminal infringement). The amendment adds language to Application Note 2 that explains that in cases involving pre-release works, the infringement amount should be determined by using the retail value of the infringed item, rather than any premium price attributed to the infringing item because of its pre-release status. The proposed amendment addresses concerns that distribution of an item before it is legally available to the consumer is more serious conduct than distribution of other infringing items and involves a harm not addressed by the current guideline.

### Uploading

The concern underlying the uploading directive pertains to offenses

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