

all of the series of any options class in which it chooses to make a market. If an SMCMM chooses to make markets in one or more options classes in the Second Market, it must participate in the opening rotation and make markets and enter into any resulting transactions on a continuous basis in all series of the options class until the close of trading that day. SMCMMs may not initiate quoting in an options class intraday. In addition, an SMCMM would undertake all the obligations that a Competitive Market Maker in the First Market assumes in appointed option classes for any option class(es) in which the SMCMM elects to make a market on a given day. SMCMMs will be permitted to execute no more than 25% of their volume in Second Market option classes in which they are not contemporaneously making markets.

### C. Proposed Fees in the Second Market

The Exchange proposes several changes to its fee schedule to accommodate introduction of the Second Market as follows: (1) Members would be charged an execution fee of \$.05 per contract for public customer orders; (2) a \$.10 per contract surcharge would be applied to transactions executed by market makers that do not own or lease an ISE market maker membership (*i.e.*, EAMs that make markets in the Second Market); (3) market makers would be excluded from the \$.05 per contract payment for order flow fee for Second Market options; (4) all market makers in the Second Market would be charged a \$2,000 per month access fee (there would be no additional access fee for EAMs to send orders to the Second Market); and (5) firms that are only market makers in the Second Market (*i.e.*, EAMs that make markets in the Second Market) would be charged the same \$5,000 annual regulatory fee paid by Competitive Market Makers in the First Market.

### III. Discussion

After careful consideration, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange<sup>6</sup> and, in particular, the requirements of Section 6 of the Act.<sup>7</sup> Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>8</sup> which

requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission believes that the ISE proposed market maker obligations for SMPMMs and SMCMMs are consistent with the Act. Market Makers are accorded certain benefits under the securities laws and ISE rules. The Commission believes the obligations of Market Makers in the Second Market justify these benefits.

The Commission also believes that the proposal is consistent with Section 6(b)(4) of the Act,<sup>9</sup> which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among the Exchange's members and issuers and other persons using its facilities. The Exchange currently assesses no execution fee for public customer order, but proposes to assess a \$.05 per contract execution fee for public customer orders executed in the Second Market. The Commission believes that this assessment is reasonable. The proposed rule change also appears to be reasonably designed to avoid duplicative charges to market makers already assessed certain fees, such as transaction and regulatory fees. The surcharge for Second Market transactions and the market maker regulatory fee will apply only to SMCMMs that are not also Market Makers in the First Market.

### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>10</sup> that the proposed rule change (File No. SR-ISE-2006-40), as amended, is hereby approved.

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

**Nancy M. Morris,**  
Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-54583; File No. SR-NASDAQ-2006-021]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval to Proposed Rule Change and Amendment No. 1 Thereto to Modify Certain of Nasdaq's Corporate Governance Standards, Including the Definition of Independent Director

October 6, 2006.

On July 28, 2006, The NASDAQ Stock Market LLC ("Nasdaq" or "the Exchange") filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change to amend Nasdaq Rules 4200(a)(15), IM-4200, and 4350, which pertain to Nasdaq's corporate governance standards for listed companies. On August 7, 2006, Nasdaq filed Amendment No. 1 to the proposed rule change. The proposed rule change, as amended, was published for comment in the **Federal Register** on August 28, 2006.<sup>3</sup> The Commission received no comment letters on the proposal. This order approves the proposed rule change, as amended.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange,<sup>4</sup> and, in particular, Section 6(b)(5) of the Act.<sup>5</sup> The Commission believes that the proposed rule change would provide clarity and guidance to listed companies, particularly with respect to the determination of whether a director is independent. In particular, the proposed rule change would preclude a finding of independence if a director accepts any compensation from the company or its affiliates in excess of \$60,000 during the prescribed time period.<sup>6</sup> This proposed change would

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

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

<sup>3</sup> See Securities Exchange Act Release No. 54333 (August 18, 2006), 71 FR 50955 ("Notice").

<sup>4</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>5</sup> 15 U.S.C. 78f(b)(5).

<sup>6</sup> Under current Nasdaq Rule 4200(a)(15)(B), a director of a listed company would not be considered independent if the director or a family member of the director has accepted more than \$60,000 in payments from the company or its parent or subsidiary during the time period set forth in the rule. The proposed rule change would amend the rule to refer to compensation in excess of

<sup>6</sup> In approving this proposed rule change, as amended, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>7</sup> 15 U.S.C. 78f.

<sup>8</sup> 15 U.S.C. 78f(b)(5).

<sup>9</sup> 15 U.S.C. 78f(b)(4).

<sup>10</sup> 15 U.S.C. 78s(b)(2).

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

align the Nasdaq rule with a corresponding rule of the New York Stock Exchange LLC ("NYSE") relating to corporate governance standards of listed issuers.<sup>7</sup> The proposal also would revise various other provisions of Nasdaq's corporate governance standards, including by amending several provisions to conform more closely with the NYSE's corporate governance standards for its listed issuers.<sup>8</sup>

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>9</sup> that the proposed rule change (File No. SR-NASDAQ-2006-021), as amended, be, and hereby is, approved.<sup>10</sup>

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

**Jill M. Peterson**

*Assistant Secretary.*

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\$60,000 from the company, rather than payments. Nasdaq believes that, based on its experience, a revised rule based on compensation rather than payments more directly bears upon a director's independence.

<sup>7</sup> See Section 303A.02(b)(ii) of the NYSE Listed Company Manual. Proposed changes to Nasdaq's IM-4200 would provide examples of non-compensatory payments, such as interest related to banking services, insurance proceeds, and non-preferential loans from financial institutions. At the same time, the proposed changes to IM-4200 would make clear that payments made by the company for the benefit of the director—such as political contributions to the campaign of a director or a family member and loans to a director or family member that are on terms not generally available to the public—could be considered indirect compensation so as to preclude a finding that the director was independent.

<sup>8</sup> See Notice, *supra* note 3. These other changes relate to: status of independent directors who served as interim officers for a maximum one-year period; the definition of "non-executive employee;" inclusion of parent and subsidiary within the meaning of "company;" and an exception in Nasdaq's standards relating to audit committees for certain issuers that have a listed parent, consistent with a similar exception contained in Rule 10A-3 under the Act, 17 CFR 240.10A-3.

<sup>9</sup> 15 U.S.C. 78s(b)(2).

<sup>10</sup> Nasdaq advised that it will implement the proposed rule change immediately upon approval by the Commission. Nasdaq represented that, to facilitate the transition to the new rules, any director that would be considered independent under the existing rules prior to the rule change, but that no longer would be considered independent under the new rules, would be permitted to continue to serve on the issuer's Board of Directors as an independent director until no later than 90 days after the approval of this rule filing. The Commission notes that this transition period does not affect an issuer's obligation to comply with the requirements of Rule 10A-3 under the Act relating to audit committees.

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

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-54581; File No. SR-NASDAQ-2006-039]

### Self-Regulatory Organizations; NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify the Reporting Required When Nasdaq Lists the Security of an Affiliate

October 6, 2006.

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 September 28, 2006, the NASDAQ Stock Market LLC ("Nasdaq" or "Exchange") 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. Pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> Nasdaq has designated this proposal as "non-controversial," 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 the Substance of the Proposed Rule Change

Nasdaq is proposing a proposed rule change to modify the reporting required when Nasdaq lists the security of an affiliate. The text of the proposed rule change is available on Nasdaq's Web site (<http://www.nasdaq.com>), at Nasdaq's principal office, and at the Commission's Public Reference Room.

#### 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.

<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).

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

##### 1. Purpose

Nasdaq is proposing to revise Rule 4370 to file on a quarterly basis, rather than on a monthly basis, the report detailing Nasdaq's monitoring of (1) the Nasdaq Affiliate's compliance with the provisions of Rule 4200, 4300 and 4400 Series (which include quantitative and qualitative listing requirements) and (2) the trading of the Affiliate Security, including summaries of all related surveillance alerts, complaints, regulatory referrals, busted or adjusted trades, investigations, examinations, formal and informal disciplinary actions, exception reports and trading data.

The proposed rule change is similar to a recent New York Stock Exchange rule filing.<sup>5</sup> Additionally, Nasdaq notes that providing these reports on a quarterly rather than monthly basis will not affect the compliance monitoring done by Nasdaq and NASD, but will make the reporting less burdensome.<sup>6</sup> Further, by adopting a quarterly reporting cycle, the reports will be more closely aligned with the issuer's financial reporting cycle and NASD's review and surveillance cycle.

In addition, the proposed rule change would permit Nasdaq to file a report with the Commission within five business days of providing notice to the Nasdaq Affiliate of its non-compliance with Nasdaq's listing requirements rather than at the same time that Nasdaq notifies the Nasdaq Affiliate. This proposed change is also similar to language in the recent New York Stock Exchange rule filing referenced above.

Finally, the proposed rule change would clarify that the applicable provisions of the Rule 4200, 4300, and 4400 Series that are the subject of Nasdaq's reports are those related to the listing requirements.

Nasdaq will implement the proposed rule change 30 days after filing.

##### 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act<sup>7</sup> in

<sup>5</sup> See Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11270 (March 6, 2006) (SR-NYSE-2005-77), adopting NYSE Rule 497.

<sup>6</sup> The NASD performs regulatory services on behalf of Nasdaq pursuant to a regulatory services contract. Telephone conversation between Jonathan Cayne, Associate General Counsel, Nasdaq, and Rebekah Liu, Special Counsel, Division of Market Regulation, Commission, on October 6, 2006.

<sup>7</sup> 15 U.S.C. 78f.