

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-54558; File No. SR-NASD-2006-076)

October 2, 2006

Self-Regulatory Organizations: National Association of Securities Dealers, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change to Exempt all Securities Included in the Nasdaq-100 Index from the Price Test Set Forth in NASD Rule 5100

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on June 15, 2006, the National Association of Securities Dealers, Inc. (“NASD”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. On August 18, 2006, NASD filed Amendment No. 1 to the proposed rule change.³ On September 20, 2006, NASD filed Amendment No. 2 to the proposed rule change, as amended.⁴ The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons. In addition, the Commission is granting accelerated approval of the proposed rule change, as amended.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ In Amendment No. 1, which supplemented the original filing, NASD modified the scope of the proposed rule change and made certain technical and clarifying changes following discussions with Commission staff.

⁴ After discussions with Commission staff, NASD filed Amendment No. 2 to modify its discussion of the purpose of the proposed rule filing and to make other technical and clarifying rule changes. Amendment No. 2 replaced and superseded the original filing in its entirety.

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

NASD is proposing to exempt all securities included in the Nasdaq-100 Index from the price test set forth in NASD Rule 5100.

Below is the text of the proposed rule change, as amended. Proposed new language is underlined.

* * * * *

5100. Short Sale Rule

(a) – (b) No Change.

(c) The provisions of paragraph (a) shall not apply to:

(1) – (9) No Change.

(10) Sales of securities included in the Nasdaq-100 Index.

(d) – (l) 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, NASD 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, as amended. The text of these statements may be examined at the places specified in Item III below. NASD 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

(a) Rule Filing History

On June 15, 2006, NASD, through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Commission proposed rule change SR-NASD-2006-076 which proposed to exempt all securities included in the Nasdaq-100 Index from the price test set forth in NASD Rule 3350(a) (the "Original Proposal").

On June 30, 2006, the Commission approved SR-NASD-2005-087, which amended certain NASD rules to reflect the separation of Nasdaq from NASD upon the operation of Nasdaq as a national securities exchange.⁵ Among other amendments, SR-NASD-2005-087 amended Rule 3350 to renumber it as Rule 5100 and apply it uniformly to short sales of over-the-counter ("OTC") transactions reported to the Alternative Display Facility ("ADF") or the Trade Reporting Facility ("TRF"). SR-NASD-2005-087 became effective on August 1, 2006, the date upon which Nasdaq began operation as an exchange for Nasdaq-listed securities.

Given the Commission's approval of SR-NASD-2005-087, NASD assumed direct responsibility for all rulemaking functions related to Rule 5100 (formerly Rule 3350). As such, NASD filed Amendment No. 1 to SR-NASD-2006-076, which amended the

⁵ See Securities Exchange Act Release No. 54085 (June 30, 2006), 71 FR 38910 (July 10, 2006).

Original Proposal to reflect the renumbering of Rule 3350 as Rule 5100 in the proposed rule text, among other technical and clarifying changes.

NASD filed Amendment No. 2 to SR-NASD-2006-076 to revise the basis upon which NASD is filing the proposed rule change herein and to make additional technical and clarifying changes.

(b) Rationale

Rule 5100 provides that, with respect to trades reported to the ADF or the TRF no member shall effect a short sale in a National Global Market (“NGM”) security otherwise than on an exchange at or below the current national best (inside) bid when the current national best (inside) bid is below the preceding national best (inside) bid.⁶ NASD states that the price test contained in Rule 5100 is designed to prevent the market price of NGM securities from being manipulated downward by unrestricted short selling. In addition, NASD notes that all short sales in NGM securities effected otherwise than on an exchange must comply with Rule 5100 or qualify for an exception to, or exemption from, the rule.

On August 21, 2006, The NASDAQ Stock Market LLC (“Nasdaq Exchange”) filed proposed rule change SR-NASDAQ-2006-031 to exempt all securities included in the Nasdaq-100 Index from Nasdaq Exchange Rule 3350, which governs short sales in

⁶ NASD recently amended Rule 5100 to allow members to use, for a transitional period ending on November 3, 2006, the Nasdaq Exchange best (inside) bid rather than the national best (inside) bid for the purposes of the application of the rule. See Exchange Act Release No. 54203 (July 25, 2006), 71 FR 43256 (July 31, 2006) (SR-NASD-2006-089).

NGM securities executed on or reported to the Nasdaq Exchange.⁷ NASD states that NASD is filing the proposed rule change, as amended, to create a similar exemption from Rule 5100 for securities included in the Nasdaq-100 Index. NASD believes that, with respect to securities included in the Nasdaq-100 Index, short sales in NGM securities executed otherwise than on an exchange should be subject to the same exemption as short sales in NGM securities executed on or reported to the Nasdaq Exchange. Accordingly, NASD states that it is filing the proposed rule change, as amended, to amend Rule 5100 to create an exemption for all securities included in the Nasdaq-100 Index, consistent with the approved exemption in SR-NASDAQ-2006-031 for short sales in NGM securities executed on or reported to the Nasdaq Exchange.

The effective date of the proposed rule change, as amended, will be announced in a Notice to Members.

2. Statutory Basis

NASD believes that the proposed rule change, as amended, is consistent with the provisions of Section 15A(b)(6) of the Act,⁸ which requires, among other things, that NASD rules must be 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. NASD believes that the proposed rule change, as amended, will provide a uniform exemption for NGM securities included in the Nasdaq-100 Index,

⁷ The SEC approved SR-NASDAQ-2006-031 on September 13, 2006. See Securities Exchange Act Release No. 54435 (September 13, 2006), 71 FR 55042 (September 20, 2006).

⁸ 15 U.S.C. 78o-3(b)(6).

consistent with the changes in SR-NASDAQ-2006-031.

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

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

Written comments on the Original Proposal were solicited by the Commission.⁹

As noted above, the Original Proposal was a substantially similar rule filing to the proposed rule change, as amended, that proposed to exempt all securities in the Nasdaq-100 Index from the price test in former NASD Rule 3350. The Original Proposal was filed by Nasdaq when it was a subsidiary of NASD and prior to Nasdaq commencing operations as a national securities exchange.¹⁰ The Commission did not receive any comment letters in response to the Federal Register publication of the Original Proposal.

III. 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:

⁹ See Exchange Act Release No. 54010 (June 16, 2006), 71 FR 35964 (June 22, 2006).

¹⁰ See supra note 5.

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASD-2006-076 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NASD-2006-076. 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, as amended, that are filed with the Commission, and all written communications relating to the proposed rule change, as amended, 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 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-2006-076 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

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 association¹¹ and, in particular, the requirements of Section 15A of the Act¹² and the rules and regulations thereunder. The Commission finds specifically that the proposed rule change, as amended, is consistent with Sections 15A(b)(6) and 15A(b)(9) of the Act¹³ in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of

¹¹ In approving this proposed rule change, as amended, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹² 15 U.S.C. 78o-3.

¹³ 15 U.S.C. 78o-3(b)(6) and (9).

any authority conferred by the Act matters not related to the purposes of the Act or the administration of the exchange.

NASD Rule 5100 provides that, with respect to trades reported to the ADF or the TRF, no member shall effect a short sale in a NGM security otherwise than on an exchange at or below the current national best (inside) bid when the current national best (inside) bid is below the preceding national best (inside) bid. NASD Rule 5100 is inapplicable to National Capital Market securities. The proposed rule change, as amended, amends NASD Rule 5100 to exempt from its price test securities included in the Nasdaq-100 Index.

The Commission is currently conducting the Pilot to study and evaluate the overall effectiveness and necessity of short sale prices tests.¹⁴ On April 20, 2006, we extended the Pilot in order to maintain the status quo for price tests of Pilot securities while we complete our analysis of the results of the Pilot and conduct any additional rulemaking that we determine may be warranted.¹⁵ We have not reached any conclusions regarding price tests. However, we believe that this proposed rule change is consistent with the statute.

¹⁴ See Securities Exchange Act Release No. 50104 (July 28, 2004), 69 FR 48032 (August 6, 2004) (“First Pilot Order”). The Pilot suspended price tests for the following: (1) short sales in the securities identified in Appendix A to the First Pilot Order; (2) short sales in the securities included in the Russell 1000 index effected between 4:15 p.m. EST and the open of the effective transaction reporting plan of the Consolidated Tape Association (“consolidated tape”) on the following day; and (3) short sales in any security not included in paragraphs (1) and (2) effected in the period between the close of the consolidated tape and the open of the consolidated tape on the following day.

¹⁵ See Order Extending Term of Short Sale Pilot, Release No. 34-53684 (April 20, 2006), 71 FR 24765 (April 26, 2006).

Currently, securities in the Nasdaq-100 Index are subject to a price test only if they are traded OTC and reported to a NASD facility. NASD's proposed rule change, as amended, would provide a uniform exemption for securities included in the Nasdaq-100 Index so that such securities would not be subject to a price test in any market.

NASD has requested that the Commission find good cause for approving the proposed rule change prior to the 30th day after publication of notice thereof in the Federal Register. The Commission notes that it previously solicited comments on the Original Proposal, a substantially similar proposal to the proposed rule change. The Original Proposal would have exempted all securities included in the Nasdaq-100 Index from the price test in former NASD Rule 3350. The Original Proposal was published for comment in the Federal Register on June 22, 2006. The Commission received no comments on the Original Proposal. Accordingly, the Commission finds good cause exists, consistent with Sections 15(A)(b)(6) and 19(b)(2) of the Act,¹⁶ to approve the proposed rule change, as amended, on an accelerated basis, prior to the 30th day after the date of publication of the notice of filing thereof in the Federal Register.

¹⁶ 15 U.S.C. 78o-3(b)(6); 15 U.S.C. 78s(b)(2).

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act that the proposed rule change (SR-NASDAQ-2006-076), as amended, is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁷

Nancy M. Morris
Secretary

¹⁷ 17 CFR 200.30-3(a)(12).