

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-63804; File No. SR-NASDAQ-2010-134)

January 31, 2011

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Instituting Proceedings to Determine Whether to Disapprove Proposed Rule Change to Adopt Additional Criteria for Listing Commodity Stockpiling Companies That Have Indicated Their Business Plan is to Buy and Hold Commodities

I. Introduction

On October 15, 2010, The NASDAQ Stock Market LLC (“Nasdaq” or “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 adopt additional criteria for listing companies that have indicated that their business plan is to buy and hold commodities. The proposed rule change was published for comment in the Federal Register on November 3, 2010.<sup>3</sup> The Commission subsequently extended the time period in which to either approve the proposed rule change, or to institute proceedings to determine whether to disapprove the proposed rule change, to February 1, 2011.<sup>4</sup> The Commission received one comment letter on the proposal.<sup>5</sup> This order institutes proceedings under Section 19(b)(2)(B) of the Act to determine whether to disapprove the proposed rule change.

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<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. 63207 (October 28, 2010), 75 FR 67788.

<sup>4</sup> See Securities Exchange Act Release No. 63508 (December 9, 2010), 75 FR 78300 (December 15, 2010).

<sup>5</sup> See Letter from Edward H. Smith, Jr. to Florence E. Harmon, Deputy Secretary, Commission, dated January 18, 2011.

## II. Description of the Proposal

The Exchange proposes to adopt additional listing standards for companies that have indicated that their business plan is to purchase and stockpile raw materials or other commodities (“commodity stockpiling companies”). Under the proposal, such companies are required to meet all other applicable Nasdaq initial listing requirements, as well as the following additional listing standards. First, within 18 months of the effectiveness of its initial public offering registration statement, or such shorter period as the company specifies in the registration statement, the company would be required to invest at least 85% of the net proceeds of the initial public offering in the raw material or commodity identified in the registration statement, or return the unused amount pro rata to its shareholders.<sup>6</sup>

Second, the company would be required to publish, or facilitate access to, at no cost and in an easily accessible manner, regular pricing information regarding the raw material or other commodity from a reliable, independent source, at least as frequently as current industry practice but no less than twice per week.<sup>7</sup>

Third, the company would be required to publish its net market value on a daily basis, or where pricing information for the raw material or other commodity is not available on a daily basis, no less frequently than twice per week.<sup>8</sup> If the spot price of the raw material or commodity fluctuates by more than 5%, the company shall publish the net market value within one business day of the fluctuation.

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<sup>6</sup> See proposed Nasdaq IM-5101-3(a).

<sup>7</sup> See proposed Nasdaq IM-5101-3(b).

<sup>8</sup> See proposed Nasdaq IM-5101-3(d). Net market value would be determined by multiplying the volume of the raw material or commodity held in inventory by the last spot price published or otherwise relied upon by the company, plus cash and other assets, less any liabilities.

Fourth, the company would be required to publish the quantity of the raw material or other commodity held in inventory, the average price paid, and the company's net market value within two business days of any change in inventory held.<sup>9</sup> Where the company contracts to purchase or sell a material quantity of the raw material or commodity, such information would be required to be disclosed in a Form 8-K filing within four business days.

Fifth, the company would be required to employ the services of one or more independent third party storage facilities to safeguard the physical holdings of the raw material or commodity.<sup>10</sup> Finally, the company would be required to create a committee comprised solely of independent directors who shall consider, at least quarterly, whether the company's purchasing activities have had a measurable impact on the market price of the raw material or other commodity and shall report such determinations and make subsequent recommendations to the company's board of directors.<sup>11</sup>

Nasdaq also is proposing to adopt additional audit committee requirements applicable to commodity stockpiling companies. In addition to the existing audit committee requirements in Nasdaq rules, audit committees for commodity stockpiling companies would be required to

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<sup>9</sup> See proposed Nasdaq IM-5101-3(c).

<sup>10</sup> See proposed Nasdaq IM-5101-3(e). Under the proposed rule language, the facility "should provide services consistent with those provided by custodians and these must include: storage and safeguarding; insurance; transfer of the raw material or other commodity in and out of the facility; visual inspections, spot checks and assays; confirmation of deliveries to supplier packing lists; and reporting of transfers and of inventory to the [commodity stockpiling company] and its auditors." The company must oversee the third party storage facility with its committee of independent directors.

<sup>11</sup> See proposed Nasdaq IM-5101-3(f). The independent directors may rely upon and shall have the authority to engage and pay an industry expert in conducting this review. If the company's board of directors disagrees with or does not accept the recommendations of the committee, the company will be required to file a Form 8-K with the Commission outlining the relevant events, committee's determinations and recommendations, and rationale for the board of directors' determination.

establish procedures for the identification and management of potential conflicts of interest, and would be required to review and approve any transactions where such potential conflicts have been identified.<sup>12</sup>

### III. Comment Letter

The Commission received one comment letter on the proposal.<sup>13</sup> The commenter, a shareholder in SMG Indium Resources Ltd. (“SMG”), supported the proposal and stated, among other things, that approval of the proposal would “support making the market for commodities, such as Indium, more efficient and transparent by providing investors . . . with an easier and more cost-effective alternative for investing in such commodities.” This commenter further noted that, unlike commodity-based trust shares, which are designed along the lines of an exchange-traded fund (“ETF”) structure and offer exposure to very liquid and actively-traded commodities, commodity stockpiling companies “provide investment exposure to select strategic and commercial commodities which do not have substantial liquid and active trading markets nor extensive and well developed derivative and/or spot markets and pricing mechanisms.” The commenter explained his view that the proposed listing standards would assure appropriate investor protection in connection with the listing of commodity stockpiling companies, and cited particular aspects of the proposal, including the frequency and source of pricing information, the requirement to calculate and disseminate net market value, and the use of third-party storage facilities.

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<sup>12</sup> See proposed Nasdaq Rule 5605(c)(3) and IM-5605. Under the proposal, the procedures should include any material amendment to the management agreement, including any change with respect to the compensation of the manager.

<sup>13</sup> See, note 4, supra.

IV. Proceedings to Determine Whether to Disapprove SR-NASDAQ-2010-134 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act to determine whether the proposed rule change should be disapproved. Institution of such proceedings appears appropriate at this time in view of the legal and policy issues raised by the proposal, discussed below. Institution of disapproval proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described in greater detail below, the Commission seeks and encourages interested persons to comment on the proposed rule change.

Pursuant to Section 19(b)(2)(B), the Commission is providing notice of the grounds for disapproval under consideration. In particular, Section 6(b)(5) of the Act<sup>14</sup> requires that the rules of an exchange be designed, among other things, 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.

Nasdaq's proposal would authorize a national securities exchange, for the first time, to list an operating company that simply plans to buy and hold a commodity or other raw material. A liquid market may not exist for the commodity or other raw material to be held by the commodity stockpiling company. Despite the commenter's view that the proposal would provide appropriate investor protections for the listing of commodity stockpiling companies such as SMG, the Commission believes that the proposal raises issues, among other things, as to (1) whether the dissemination of up-to-date pricing information twice per week about the sole asset of an operating company would be sufficient to support the fair and efficient exchange trading of

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<sup>14</sup> 15 U.S.C. 78f(b)(5).

its equity securities; (2) in the absence of a liquid and transparent market for the commodity or other raw material held by the company, whether the pricing information from the “independent source” would in fact have sufficient reliability and integrity, or whether there are risks that information could be manipulated; (3) whether there would be risks such pricing information may be available to some market participants sooner than others, thereby giving the former an unfair trading advantage; and (4) whether Nasdaq’s proposal adequately addresses any special risks to investors that might be presented by the exchange trading of an operating company in the business solely of stockpiling an illiquid commodity. The Commission believes these concerns raise questions as to whether Nasdaq’s proposal is consistent with the requirements of Section 6(b)(5) of the Act, including whether the nature of the required pricing information, and the frequency and manner of its dissemination, would prevent manipulation, promote just and equitable principles of trade, perfect the mechanism of a free and open market and the national market system, or protect investors and the public interest.

V. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data and arguments with respect to the concerns identified above, as well as any others they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change is inconsistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulation thereunder. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by

an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.<sup>15</sup>

Interested persons are invited to submit written data, views and arguments regarding whether the proposed rule change should be disapproved by [insert date 45 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 60 days from publication in the Federal Register].

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-NASDAQ-2010-134 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NASDAQ-2010-134. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the

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<sup>15</sup> Section 19(b) (2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess. 30 (1975).

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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. 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-NASDAQ-2010-134 and should be submitted on or before [insert date 45 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 60 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

Elizabeth M. Murphy  
Secretary

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<sup>16</sup> 17 CFR 200.30-3(a)(57).