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For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁸

J. Lynn Taylor,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-54221; File No. SR-NASDAQ-2006-005]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of Proposed Rule Change and Amendments No. 1 and 2 Thereto To Modify Nasdaq's Delisting Procedures To Conform to Recent Amendments to Commission Rules Regarding Removal From Listing and Withdrawal From Registration

July 26, 2006.

I. Introduction

On April 4, 2006, The NASDAQ Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend Nasdaq delisting procedures to conform to recent amendments to Commission rules regarding removal from listing and withdrawal from registration. On May 5, 2006, Nasdaq filed Amendment No. 1 to the proposed rule change.³ On May 17, 2006, Nasdaq filed Amendment No. 2 to the proposed rule change.⁴ The proposed rule change, as amended, was published for comment in the **Federal**

Register on June 15, 2006.⁵ No comments were received regarding the proposal. This order approves the proposed rule change, as amended.

II. Description of the Proposed Rule Change

Section 12 of the Act⁶ and Rule 12d2-2 thereunder⁷ ("SEC Rule 12d2-2") govern the process for the delisting and deregistration of securities listed on national securities exchanges. Recent amendments to SEC Rule 12d2-2 ("amended SEC Rule 12d2-2") and other Commission rules require the electronic filing of revised Form 25 on the Commission's Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") system by exchanges and issuers for all delistings, other than delistings of standardized options and securities futures, which are exempted.⁸

Nasdaq proposes to revise Nasdaq Rules 4480, 4804, 4805, 4806, 4807, 4808, 4809, and adopt Interpretative Material 4800 ("IM 4800") with respect to delisting procedural requirements as mandated by amended SEC Rule 12d2-2.

In the case of exchange-initiated delistings, amended SEC Rule 12d2-2(b) states that a national securities exchange may file an application on Form 25 to strike a class of securities from listing and/or withdraw the registration of such securities, in accordance with its rules, if the rules of such exchange, at a minimum, provide for:

- (i) Notice to the issuer of the exchange's decision to delist its securities;
- (ii) An opportunity for appeal to the exchange's board of directors, or to a committee designated by the exchange's board of directors; and
- (iii) Public notice of the national securities exchange's final determination to remove the security from listing and/or registration, by issuing a press release and posting notice on its Web site. Public notice must be disseminated no fewer than 10 days before the delisting becomes effective pursuant to amended SEC Rule 12d2-2(d)(1), and must remain posted on its Web site until the delisting is effective.

Nasdaq's rules currently provide the requisite issuer notice as well as an opportunity for appeal to a committee designated by the Nasdaq's board of

directors.⁹ Nasdaq proposes to adopt IM 4800 to incorporate the requirements of amended SEC Rule 12d2-2. Proposed IM 4800 sets forth the procedures Nasdaq would follow to remove a security from listing. Under proposed IM 4800, Nasdaq would provide public notice of its final determination to remove a security from listing by issuing a press release and posting a notice on its Web site. Nasdaq would disseminate the public notice no fewer than 10 days before the delisting becomes effective. The public notice would remain on Nasdaq's Web site until the delisting is effective. After the public notice, Nasdaq would file a Form 25 with the Commission and would promptly provide a copy of such form to the issuer.

With respect to issuer-initiated delisting procedures, Nasdaq proposes to amend Nasdaq Rule 4480¹⁰ to require the issuer to:

- (i) Comply with all requirements of amended SEC Rule 12d2-2(c);
- (ii) Comply with all applicable laws in effect in the state in which it is incorporated and with applicable Nasdaq rules;
- (iii) Provide notice to Nasdaq no fewer than 10 days before the issuer files the Form 25 with the Commission, including a statement of the material facts relating to the reasons for delisting;
- (iv) Contemporaneous with providing notice to Nasdaq, publish notice of its intent to delist, along with its reasons, via a press release and on its Web site, if it has one (any notice provided on the Web site must remain available until the delisting is effective); and
- (v) Provide a copy of the Form 25 to Nasdaq simultaneously with the filing of the Form 25 with the Commission.

Nasdaq would provide notice on its Web site of the issuer's intent to delist as required by amended SEC Rule 12d2-2(c)(3).

Nasdaq also proposes that an issuer seeking to voluntarily delist a class of securities that has received notice from Nasdaq that the issuer fails to comply with one or more requirements for continued listing, or is aware that it is below such continued listing requirements notwithstanding that it has not received such notice, must disclose this fact (including the specific continued listing requirements that it is below) in: (i) Its statement of all material facts relating to the reasons for withdrawal from listing provided to Nasdaq, along with written notice of its

⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 replaced the original proposed rule change in its entirety.

⁴ In Amendment No. 2, Nasdaq amended the implementation date of the proposed rule change to the later of Commission approval or the date Nasdaq begins to operate as a national securities exchange.

⁵ See Securities Exchange Act Release No. 53964 (June 8, 2006), 71 FR 34656.

⁶ 15 U.S.C. 78l.

⁷ 17 CFR 240.12d2-2.

⁸ See Securities Exchange Act Release No. 52029 (July 14, 2005), 70 FR 42456 (July 22, 2005).

⁹ See Nasdaq Rules 4803(a), 4805, 4806, 4807, 4808, and 4809.

¹⁰ Nasdaq proposes to renumber Nasdaq Rule 4480 to Nasdaq Rule 4380.

determination to withdraw from listing required by amended SEC Rule 12d2-2(c)(2)(ii) and (ii) its press release and Web site notice required by amended SEC Rule 12d2-2(c)(2)(iii).

In addition, Nasdaq proposes to amend Nasdaq Rule 4809 with respect to the Nasdaq board of directors' discretionary review of delisting decision by the Nasdaq Listing Council. Nasdaq proposes to allow its board of directors to withdraw the call for review of a Listing Council decision at any time prior to the issuance of a decision. Further, if the Nasdaq board of directors has conducted a discretionary review of the Listing Council decision, the decision of the Nasdaq board of directors will take immediate effect, unless specified to the contrary.

Finally, Nasdaq proposes to amend Nasdaq Rules 4804(e), 4806(e), and 4807(f) to provide that Nasdaq will follow the proposed delisting procedures in IM-4800.

III. Discussion

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 exchange¹¹ and, in particular, the requirements of Section 6 of the Act.¹² Specifically, as discussed below, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,¹³ which requires, in part, that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, and 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. Further, as noted in more detail below, the changes being adopted by Nasdaq meet the requirements of amended SEC Rule 12d2-2.

A. Exchange Delisting

Amended SEC Rule 12d2-2(b) states that a national securities exchange may file an application on Form 25 to strike a class of securities from listing and/or withdraw the registration of such

securities, in accordance with its rules, if the rules of such exchange, at a minimum, provide for notice to the issuer of the exchange's decision to delist, opportunity for appeal, and public notice of the exchange's final determination to delist. The Commission believes that Nasdaq's current rules and procedures comply with the dictates of amended SEC Rule 12d2-2(b).

Nasdaq rules currently provide the requisite issuer notice as well as an opportunity for appeal to a committee designated by Nasdaq's Board.¹⁴ Specifically, issuers may appeal Nasdaq staff determinations to the Listing Qualifications Panel, which is a panel composed of at least two persons designated by the Nasdaq Board.¹⁵ Adverse decisions by the Listing Qualifications Panel may be appealed to the Listing Council.¹⁶ In addition, the Nasdaq Board may in its discretion call any Listing Council decision for review.¹⁷ Finally, the proposed rule change will provide for public notice of the Exchange's final determination to remove the security from listing and/or registration. This should ensure that investors have adequate notice of an exchange delisting and is consistent with the protection of investors under Section 6(b)(5) of the Act.¹⁸

B. Issuer Voluntary Delisting

In the case of an issuer-initiated delisting, Nasdaq proposes to amend Nasdaq Rule 4380 and IM 4800 to require the issuer to:

- (i) Comply with applicable Exchange Rules and applicable state laws in which it is incorporated;
- (ii) Provide notice to Nasdaq, no fewer than 10 days before the issuer files the Form 25, including a statement of the material facts relating to the reasons for delisting (effectively, the notice to Nasdaq will be provided at least 20 days before the delisting becomes effective); and

(iii) Contemporaneous with providing notice to Nasdaq, publish notice of its intent to delist, along with its reasons, via a press release and on its Web site.

The Commission also notes that Nasdaq will, as required by amended SEC Rule 12d2-2(c)(3), post notice of issuer-initiated delistings on Nasdaq's Web site beginning on the next business day following receipt of notice from the issuer, and Nasdaq will keep the notice

posted until the delisting becomes effective. The Commission believes that the amendment will better inform issuers of the requirements for voluntary delisting of their securities under Nasdaq rules and Federal securities laws.

The proposal also sets forth a new requirement not in amended SEC Rule 12d2-2 that would require the issuer to notify Nasdaq that it has filed a Form 25 with the Commission contemporaneously with such filing. The Commission believes that this requirement will allow Nasdaq to be fully informed of the filing of a Form 25 and be prepared to take timely action to delist the security in accordance with the filing of the Form 25.

In addition, Nasdaq proposes that an issuer seeking to voluntarily delist a class of securities that has received a notice from Nasdaq that the issuer fails to comply with one or more requirements for continued listing, or that the issuer is aware that it is below such continued listing requirements notwithstanding that it has not received such notice from Nasdaq, must disclose this fact, including the specific continued listing requirements that it is below, in: (i) Its statement of all material facts relating to the reasons for withdrawal from listing provided to Nasdaq along with written notice of the issuer's determination to withdraw from listing required by amended SEC Rule 12d2-2(c)(2)(ii) and (ii) its press release and Web site notice required by amended SEC Rule 12d2-2(c)(2)(iii). The Commission believes that this requirement will allow shareholders to be informed and aware that the issuer has failed to meet Nasdaq continued listing requirements and is voluntarily delisting. Issuers will therefore not be permitted to delist voluntarily without public disclosure of their noncompliance with Nasdaq continued listing requirements.

C. Implementation

The Commission notes that Nasdaq will implement this proposal when it becomes a national securities exchange. This will ensure that the new procedures will be in place when Nasdaq begins operating as a national securities exchange, as required by amended SEC Rule 12d2-2.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁹ that the proposed rule change (SR-Nasdaq-2006-005), as amended, is approved.

¹¹ In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹² 15 U.S.C. 78f.

¹³ 15 U.S.C. 78f(b)(5).

¹⁴ See Nasdaq Rules 4804 (Written Notice of Staff Determination) and 4805 (Request for Hearing).

¹⁵ See Nasdaq Rules 4801(h) and 4806 (The Listing Qualifications Panel).

¹⁶ See Nasdaq Rule 4806(b).

¹⁷ See Nasdaq Rule 4807(e).

¹⁸ 15 U.S.C. 78f(b)(5).

¹⁹ 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁰

J. Lynn Taylor,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-54217; File No. SR-NASD-2006-011]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving a Proposed Rule Change and Amendment Nos. 1 and 2 Thereto Relating to Principal Pre-Use Approval of Member Correspondence to 25 or More Existing Retail Customers Within a 30 Calendar-Day Period

July 26, 2006.

I. Introduction

On January 27, 2006, the National Association of Securities Dealers, Inc. ("NASD"), filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend NASD Rule 2211 ("Institutional Sales Material and Correspondence") to require principal pre-use approval of member correspondence to 25 or more existing retail customers within a 30 calendar-day period. On February 13, 2006, NASD filed Amendment No. 1 to the proposed rule change. The proposed rule change was published for comment in the *Federal Register* on February 28, 2006.³ The Commission received five comments on the proposal, as amended.⁴ On June 29, 2006, NASD submitted a response to the comments⁵

and filed Amendment No. 2 to the proposed rule change.⁶ This order approves the proposed rule change, as amended.

II. Description of the Proposed Rule Change

In 2003, as part of NASD's modernization of its advertising rules, the SEC approved the adoption of NASD Rule 2211, which included an amended definition of "correspondence."⁷ The definition of correspondence includes any written letter or electronic mail message distributed by a member to one or more of its existing retail customers and to fewer than 25 prospective retail customers within a 30 calendar-day period.⁸ Previously, "correspondence" included any written or electronic communication prepared for delivery to a single current or prospective customer, and not for dissemination to multiple customers or the general public.

The definition of correspondence is significant in several respects. Firms generally are not required to have a registered principal approve correspondence prior to use, nor are they required to file correspondence with the NASD Advertising Regulation Department ("Department").⁹ In addition, correspondence is subject to fewer content restrictions than advertisements and sales literature. NASD noted that it amended the definition in order to provide firms with more flexibility regarding the supervision of certain emails and form letters. NASD further noted, however, that it understands that many firms continue to require registered principal pre-use approval of some correspondence.

⁶ Amendment No. 2 made clarifying changes to the proposed rule text, thus it is a technical amendment and is not subject to notice and comment.

⁷ See Securities Exchange Act Release No. 47820 (May 9, 2003), 68 FR 27116 (May 19, 2003).

⁸ NASD has clarified that, for purposes of its rules governing member communications with the public, it views instant messaging in the same manner in which it views traditional electronic mail messages. Accordingly, instant messaging may qualify as correspondence or sales literature, depending upon the facts and circumstances. See *Notice to Members* 03-33 (July 2003).

⁹ NASD Rule 3010(d)(2) requires each member to develop written procedures that are appropriate to its business, size, structure, and customers for the review of incoming and outgoing correspondence with the public relating to its investment banking or securities business. Where such procedures do not require review of all correspondence prior to use or distribution, they must provide for the education and training of associated persons as to the firm's procedures governing correspondence, documentation of the education and training, and surveillance and follow-up to ensure that the procedures are implemented and adhered to.

Proposed Amendment

NASD indicated that it has found that some member correspondence to multiple existing customers raises the same regulatory concerns as member advertisements and sales literature. However, members are not currently required to have such correspondence approved by a principal prior to use or to file it with the Department. As a result, NASD is proposing to amend Rule 2211 to require registered principal pre-use approval of any non-clerical correspondence¹⁰ sent to 25 or more existing retail customers within any 30 calendar-day period. NASD stated that non-clerical correspondence with such a wide distribution often will constitute a solicitation to purchase or sell a security or to use a brokerage service.

NASD is not proposing to require that this correspondence be filed with the Department or that it be subject to all of the content standards of the advertising rules. A firm may, however, choose to file this correspondence with the Department to better ensure that it complies with applicable standards, particularly when the correspondence promotes the firm's products or services.

NASD indicated that it will announce the effective date of the proposed rule change in a *Notice to Members* to be published no later than 30 days following Commission approval. The effective date will be 90 days following publication of the *Notice to Members* announcing Commission approval.

III. Summary of Comments and NASD's Response

As noted above, the Commission received five comments on the proposal,¹¹ to which NASD has filed a response letter.¹² Two commenters supported the proposal, without reservation.¹³ One of these commenters, in expressing its "unqualified support" for the proposal, noted that the proposal is consistent with recently-announced NASD communications policies, as well as the policies of other self-regulatory organizations, and that the proposal gives firms discretion with regard to their internal supervisory procedures "without sacrificing customer

¹⁰ In Amendment No. 2, in response to comments on the original proposal, NASD clarified that registered principal pre-use approval would only be required for correspondence that "makes any financial or investment recommendation or otherwise promotes a product or service of the member."

¹¹ 11 See *supra* note 4.

¹² 12 See NASD Response Letter, *supra* note 5.

¹³ 13 See Edward D. Jones Letter and ICI Letter, *supra* note 4.

²⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 53333 (February 17, 2006), 71 FR 10090.

⁴ See comment letters to Nancy M. Morris, Secretary, Commission, from Caroline B. Austin, CEO, Evolve Securities, Inc., dated March 7, 2006 ("Evolve Letter"); Dorothy M. Donohue, Associate Counsel, Investment Company Institute, dated March 17, 2006 ("ICI Letter"); Tim Kelly, Partner, Field Supervision, Edward D. Jones & Co., LP, dated March 20, 2006 ("Edward D. Jones Letter"); Jack R. Handy, Jr., President and CEO, Financial Network Investment Corporation, dated March 21, 2006 ("FNIC Letter"); and Dale E. Brown, CAE, Executive Director & CEO, Financial Services Institute, dated March 21, 2006 ("FSI Letter").

⁵ See letter from Philip A. Shaikun, Associate Vice President and Associate General Counsel, NASD, to Katherine England, Assistant Director, Division, Commission, dated June 29, 2006 ("NASD Response Letter").