

addition, where a member routes an order and has no basis for identifying where the trade was ultimately executed or, in the case of over-the-counter trades, where the trade was ultimately reported, the member will be required to populate the Related Market Center field with a standard indicator: "unknown venue."<sup>10</sup>

### III. Discussion

After careful review, 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 association.<sup>11</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,<sup>12</sup> in that it is 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.

The Commission believes that the proposed rule change will result in a more complete and accurate audit trail and ensure that members are not using non-tape reports to circumvent FINRA or Commission rules. FINRA stated that currently it is difficult to determine with certainty where the associated trade was reported, especially if that trade was reported to an exchange or another FINRA Facility.<sup>13</sup>

As noted above, the Commission received three comment letters in response to the Notice.<sup>14</sup> The three commenters generally oppose the proposal and state that the potential costs, including required system changes, outweigh the benefits of the proposal. In addition, the commenters raise several concerns about the practical difficulties of complying with the proposed rule change. *First*, the commenters indicate it would be difficult (if not impossible) to identify

multiple exchanges and/or FINRA Facilities where a single non-tape report is associated with multiple executions on multiple markets. *Second*, the three commenters point out that when a firm routes an order, it may not know the ultimate execution destination. *Third*, the commenters argue that even if a firm knows that a trade in an NMS stock was executed over-the-counter, the firm may not know where the trade was reported because FINRA's Uniform Service Bureau/Executing Broker Agreement ("USBEBA") allows the reporting party to report to any TRF or ADF, without providing notice to the other party to the trade.<sup>15</sup>

FINRA replied to the comments in Amendment No. 2 and revised and clarified the original proposal to alleviate the commenters' concerns. In particular, FINRA clarified that where a single non-tape report is related to multiple tape reports: (1) If the multiple tape reports were made to a single exchange or, in the case of over-the-counter trades, a single FINRA Facility, that exchange or facility must be reflected on the single non-tape report; and (2) if the multiple tape reports were made to different exchanges and/or FINRA Facilities, the member will be required to populate the Related Market Center field with a standard indicator: "multiple venues."<sup>16</sup> In addition, FINRA provided that where a member routes an order and has no basis for identifying the relevant exchange or FINRA Facility to determine where the trade was ultimately executed or, in the case of over-the-counter trades, where the trade was ultimately reported, the member will be required to populate the Related Market Center field with a standard indicator: "unknown venue."

To the extent technological enhancements are required, FINRA stated that it intends to provide adequate time for members to make the necessary changes and revised the original proposal to provide for the implementation of the proposed rule change at least 90 days following implementation on August 3, 2009, of the amendments to FINRA trade reporting rules adopted pursuant to SR-FINRA-2008-011.<sup>17</sup>

The Commission believes that FINRA's approach that tailors the proposed reporting requirement to reflect informational limitations described by the commenters is reasonable, in that it reflects FINRA's expectation that members provide as

much information as is reasonably available at the time the non-tape report is submitted. Further, the Commission notes that FINRA clarified that where a member routes to an exchange and has a reasonable basis for reporting that the trade was executed on that exchange, FINRA would not consider it a violation if, unbeknownst to the member, the trade is ultimately executed somewhere other than the routed exchange.<sup>18</sup> The Commission also notes that it would expect FINRA to incorporate the proposed changes into its surveillance and examination programs to ensure that members are not improperly using the "multiple venue" or "unknown venue" indications.

### IV. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities association.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>19</sup> that the proposed rule change (SR-FINRA-2007-012), as modified by Amendment Nos. 1 and 2 thereto, be and hereby is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>20</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59915; File No. SR-NASDAQ-2009-040]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to the Nasdaq Listing Rules To Conform Those Rules With the Prior Marketplace Rules and Make Certain Technical Corrections

May 13, 2009.

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 April 27, 2009, The NASDAQ Stock Market LLC ("Nasdaq") filed with the Securities and Exchange Commission ("Commission")

<sup>18</sup> The same approach would apply to reporting to other FINRA Facilities.

<sup>19</sup> 15 U.S.C. 78s(b)(2).

<sup>20</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.

<sup>10</sup> See *id.*

<sup>11</sup> In approving these proposed rule changes, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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

<sup>13</sup> Currently, FINRA must manually match non-tape reports with associated tape reports for purposes of monitoring member compliance with trade reporting rules. FINRA stated that by requiring that firms identify the market center or facility to which the associated tape report was submitted, the universe of tape reports that must be reviewed as part of the matching process will be significantly narrowed, and accordingly, the effectiveness and certainty of the matching process will be enhanced.

<sup>14</sup> See *supra* note 4.

<sup>15</sup> See SIFMA Letter and Citigroup Letter.

<sup>16</sup> See Amendment No. 2.

<sup>17</sup> See FINRA Regulatory Notice 09-08 (January 2009).

the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. Nasdaq has designated the proposed rule change as effecting a change described under Rule 19b-4(f)(6) under the Act,<sup>3</sup> which renders the proposal 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 proposes to modify the Nasdaq Listing Rules to conform those rules with the prior Marketplace Rules and make certain technical corrections. The text of the proposed rule change is available from Nasdaq's Web site at <http://nasdaq.cchwallstreet.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.

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

##### **1. Purpose**

On March 12, 2009, Nasdaq filed a proposed rule change to revise the rules relating to the qualification, listing, and delisting of companies listed on, or applying to list on, Nasdaq to improve the organization of the rules, eliminate redundancies and simplify the rule language.<sup>4</sup> These rules (the "New Listing Rules") were effective April 13, 2009. Nasdaq has observed that the March filing introduced two inadvertent changes in the New Listing Rules. This filing modifies those rules to revert to the requirements as they previously existed<sup>5</sup> and makes other technical and clarifying corrections to the rules.

Specifically, Nasdaq proposes to modify Rule 5405(b)(3)(A) to correct the requirement for companies seeking to list on the Nasdaq Global Market under the Market Value Standard. Previously, under Rule 4420(c)(6)(A), a currently traded company that applied to list under this standard was required to meet the market value of listed securities requirement and the bid price requirement for 90 consecutive trading days prior to applying for listing. As adopted in Rule 5405(b)(3)(A), this requirement was inadvertently changed to 90 consecutive calendar days.

In addition, Nasdaq proposes to modify Rules 5250(d) and 5615 and IM-5615-3 to allow a Foreign Private Issuer to follow its home country practice in lieu of the requirement to distribute interim and annual reports. Previously, the provision allowing Foreign Private Issuers to follow their home country practice applied to all of Rule 4350 (subject to certain specified exceptions), including the requirement to distribute reports set forth in prior Rule 4350(b).<sup>6</sup> In the New Listing Rules, while most of the requirements of Rule 4350 were moved to the Rule 5600 Series, the requirement to distribute reports was moved to Rule 5250(d). However, no corresponding cross-reference was included to specify the ability of a Foreign Private Issuer to follow its home country practice in lieu of this requirement. The proposed rule change would correct that omission.

Nasdaq also proposes to add a new Rule 5250(f), clarifying that companies listed on Nasdaq are required to pay their listing fees as a condition to continued listing.<sup>7</sup> This proposed requirement, which was previously contained in Rules 4310(c)(13) and 4320(e)(11), would be analogous to the requirement contained in Rule 5210(d) applicable to companies applying to list on Nasdaq.

Finally, Nasdaq proposes to make certain technical corrections. First, Nasdaq proposes to modify Rule 5255, relating to Direct Registration Programs, to eliminate a provision that expired on March 31, 2009. In addition, Nasdaq

proposes to correct certain typographical errors, such as adding omitted words, deleting repeated and unnecessary words, renumbering certain provisions, and correcting capitalization, spacing, punctuation and cross references in Rules 5000, 5600, 5615, 5635, 5740, 5820, and 5900, IM-5615-2 and IM-5615-3.

##### **2. Statutory Basis**

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>8</sup> in general and with Sections [sic] 6(b)(5) of the Act,<sup>9</sup> in particular in that it is 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, 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. The proposed rule change is designed to revert to the previously approved requirements of certain listing standards that were inadvertently changed when adopting the New Listing Rules and correct typographical errors in the rules.

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

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

#### **C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others**

Written comments were neither solicited nor received.

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

Because the proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section

<sup>4</sup> available at: <http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2009/SR-NASDAQ-2009-018.pdf>.

<sup>6</sup> See prior Rule 4350(a)(1). Note that under this rule, as with Rule 5615(a)(3), a foreign private issuer was required to comply with the requirement to disclose the receipt of an audit opinion that expresses doubt about the ability of the company to continue as a going concern, which was contained in prior Rule 4350(b)(1)(B).

<sup>7</sup> Although New Listing Rules 5400 and 5500 contain the requirement for listed companies to pay fees, Nasdaq believes it would be more transparent to also include this requirement in the list of obligations for listed companies.

<sup>3</sup> 17 CFR 240.19b-4(f)(6).

<sup>4</sup> Securities Exchange Act Release No. 59663 (March 31, 2009), 74 FR 15552 (April 6, 2009) (SR-NASDAQ-2009-018).

<sup>5</sup> The text of Nasdaq's prior rules is included in Exhibit 5B of SR-NASDAQ-2009-018, *supra* note

<sup>8</sup> 15 U.S.C. 78f.

<sup>9</sup> 15 U.S.C. 78f(b)(5).

19(b)(3)(A) of the Act<sup>10</sup> and Rule 19b-4(f)(6) thereunder.<sup>11</sup>

A proposed rule change filed under Rule 19b-4(f)(6) normally may not become operative prior to 30 days after the date of filing.<sup>12</sup> However, Rule 19b-4(f)(6)(iii)<sup>13</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. Nasdaq has requested that the Commission waive the 30-day operative delay. Nasdaq requests this waiver so that these corrections can be immediately operative, eliminating any potential confusion caused by the unintended changes in the New Listing Rules. Nasdaq further believes that the proposed rule change does not significantly affect the protection of investors or the public interest because it merely conforms the recently adopted Nasdaq listing rules with the previously approved Nasdaq rules and corrects typographical errors.

The Commission notes that the changes being proposed do not present any new regulatory issues. The changes simply conform recently revised listing rules to previously approved rules, correct typographical errors, and make certain clarifying changes. For these reasons, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, and designates the proposed rule change to be operative upon filing with the Commission.<sup>14</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule

change 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-NASDAQ-2009-040 on the subject line.

#### Paper Comments

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

All submissions should refer to File Number SR-NASDAQ-2009-040. 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 on official business days between the hours of 10 a.m. and 3 p.m. 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-NASDAQ-2009-040 and should be submitted on or before June 9, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59912; File No. SR-ISE-2009-26]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by International Securities Exchange, LLC Relating to Changes to the Fee Schedule

May 13, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on May 5, 2009, the International Securities Exchange, LLC (the "Exchange" or the "ISE") 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 the self-regulatory organization. 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 Substance of the Proposed Rule Change

The Exchange is proposing to amend its Schedule of Fees to make clarifying changes. The text of the proposed rule change is available on the Exchange's Internet Web site at <http://www.ise.com>.

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

In its filing with the Commission, the self-regulatory organization 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. The self-regulatory organization 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

(a) *Purpose*—The purpose of this proposed rule change is to make clarifying changes to the Exchange's Schedule of Fees. On April 27, 2009, the Exchange submitted SR-ISE-2009-21, a proposed rule change to eliminate customer fees in multiply-listed

<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>11</sup> 17 CFR 240.19b-4(f)(6).

<sup>12</sup> 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. Nasdaq has satisfied this requirement.

<sup>13</sup> *Id.*

<sup>14</sup> For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<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.