



Securities Industry Association

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May 19, 2006

Ms. Nancy Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-9303

Re: Commission File Nos. SR-NASDAQ-2006-006

Dear Ms. Morris:

The Securities Industry Association (“SIA”)¹ is writing to request that the Commission, pursuant to Section 19(b)(2) of the Securities Exchange Act of 1934 (the “Exchange Act”), extend to 90 days, or such additional time as to which NASDAQ agrees, the period for considering whether to approve NASDAQ’s proposed rule change set forth in SEC Release No. 34-53679 (April 21, 2006) (the “Release”). That extension will give the SIA and its member firms the necessary additional time to consider carefully and comment to the SEC on the potential self-regulatory and competitive issues raised by NASDAQ’s significant proposal.

With the advent of for-profit exchanges, the potential is great for conflicts of interest relating to how these self-regulatory organizations compete and generate revenue for their shareholders while still upholding the requirements of equal access, equal treatment, and fair access to their markets. Given this and other dramatic changes in our markets, SIA believes strongly that the Commission must continue to scrutinize carefully new exchange proposals –

¹ The Securities Industry Association brings together the shared interests of approximately 600 securities firms to accomplish common goals. SIA’s primary mission is to build and maintain public trust and confidence in the securities markets. SIA members (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs nearly 800,000 individuals, and its personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans. In 2004, the industry generated \$236.7 billion in domestic revenue and an estimated \$340 billion in global revenues. (More information about SIA is available at: www.sia.com.)

including those potentially dealing with SRO lines of business and market data -- to ensure that they further national market system goals. The deadline for comment on the Release is today, May 19, 2006. Given the significance of the issues raised by the Release, and based on SIA's initial analysis below, we believe it is appropriate and in the interests of investors for the Commission to grant itself and the public additional time to consider the proposed rule change.

The proposed rule change includes new provisions for "Restriction on Affiliation," which generally would require Nasdaq to file a rule change with the Commission for approval and public review and comment under Section 19(b) of the Act before entering into a "business venture" with a member firm. "Business venture" would be defined as engaging "in joint activities with an expectation of shared profit and a risk of shared loss from common entrepreneurial efforts."

To Nasdaq's credit, it has recognized the inherent conflicts of interest between its commercial goals and its duties as an SRO, especially when entering a joint venture with a member. In its statement of purpose for the proposed rule change, Nasdaq also notes that "the proposed rule would help implement what Nasdaq perceives to be emerging Commission policy with regard to appropriate activities for member broker-dealers that are affiliated with [SROs]." That "emerging Commission policy," however, is not articulated clearly, so it is difficult to analyze the proposal against that policy.

Moreover, the general rule requiring a filing with the SEC prior to entering into a "business venture" with a member would be subject to a large exception: no filing would be required if "there are information barriers between the member and Nasdaq" so that the member in the venture will not receive "informational advantage," nor "knowledge in advance of other Nasdaq members" of operational or trading system changes, nor share employees or databases with Nasdaq. It is not clear to us how, absent a filing explaining how such conditions would be met in a particular business venture, anyone on the outside could determine in any given instance if Nasdaq and its venture partner in fact meet the requirements.

In its statement of purpose, Nasdaq also declares that business arrangements such as licensing agreements and the provision of transactional services or data to a member would fall

outside the definition of “business venture.” It is unclear whether provisions of agreements that today rise to the level of “SRO rules” subject to the Act’s Section 19(b) safeguards might potentially be avoided by simply shifting them to a new affiliate. In other words, there appears to be a danger that these exceptions could swallow the rule.

The conditions for avoiding a Section 19(b) filing for future business ventures in the proposed rule appear to be a truncated version of the conditions set forth in the Commission’s FSI Exemptive Order,² in which the Commission’s two concerns were: (i) protecting competition in the market for financial services software from being distorted by the advantages enjoyed by a subsidiary of an SRO, and (ii) ensuring that the products of such an SRO subsidiary were not necessary for accessing the facilities of the SRO. Those crucial conditions are missing from the list of conditions Nasdaq offers in the current Filing for relieving Nasdaq business ventures of the obligation to file with the Commission. The Release fails to explain why those conditions are absent from the proposed rule and fails to mention the FSI Order at all.

In sum, it is not clear whether or to what extent Nasdaq’s proposed rule is consistent with the Exchange Act or Commission policy or the extent to which it might dilute fundamental protections for SRO members. It also raises the larger policy questions of the appropriate role of an SRO in relation to its members and, where the SRO is a for-profit entity, the proper balance between its obligations to its shareholders and its obligations as an SRO to its members.

Nasdaq’s filing raises very important issues. With further time to review the filing, other commenters or we may be able to develop suggestions for modifications to the proposal that could address the concerns outlined above. For these reasons, we are requesting that the Commission per Section 19(b)(2) of the Exchange Act designate a 90-day review period and thereby allow SIA, its members, and other members of the public additional time to study and comment on the proposed rule.

² Securities Exchange Act Release No. 42713 (April 24, 2000).

Thank you for your consideration of these views. If you have any questions regarding this letter, please contact either Ann Vlcek or me at 202-216-2000, or avlcek@sia.com or gkramer@sia.com.

Respectfully submitted,

George R. Kramer

Deputy General Counsel

cc: The Hon. Christopher Cox, Chairman
The Hon. Paul S. Atkins, Commissioner
The Hon. Cynthia A. Glassman, Commissioner
The Hon. Roel C. Campos, Commissioner
The Hon. Annette L. Nazareth, Commissioner
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