choose to test their communication systems interfaces with Nasdaq's central processing facilities over a dedicated circuit or circuits. Nasdaq believes the fees are reasonable in that they have been calculated to recover Nasdaq's actual costs of installation and maintenance of the dedicated circuit(s).

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 foregoing proposed rule change does not:

(i) significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6) thereunder.[11] 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.

Nasdaq has requested that the Commission waive the 30-day operative delay. The Commission believes waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Acceleration of the operative date will allow subscribers to test CTCI and API as well as market data vendor feeds over a dedicated circuit or circuits immediately, thereby allowing firms that have trading environments integrating CTCI, API and Nasdaq vendor data to test their systems more completely. For these reasons, the Commission designates the proposal to be effective and operative upon filing with the Commission.[12]

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. 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. Copies of such filing will also be available for inspection and copying at the principal office of the Association. All submissions should refer to file number SR–NASD–2002–72 and should be submitted by July 9, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–15252 Filed 6–17–02; 8:45 am]

BILLING CODE 8010–01–P

[12] For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46060; File No. SR–NASD–2002–64]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. Amending the Restated Certificate of Incorporation of the Nasdaq Stock Market, Inc.

June 11, 2002.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b-4[2] thereunder, notice is hereby given that on May 16, 2002, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association'') through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), submitted to 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 NASD. Nasdaq filed Amendment No. 1 to the proposed rule change on June 3, 2002.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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

On December 5, 2002, the Commission approved SR–NASD–2001–34,[4] a proposed rule change to amend the Certificate, but the amendment reflected in SR–NASD–2001–34 was not implemented at that time[5] because under the General Corporation Law of the State of Delaware (''Delaware Law''), the amendment must be approved by Nasdaq's stockholders.[6] The proposed rule change contained in this filing—SR–NASD–2002–64—amends the language approved by the Commission in SR–NASD–2001–34. Nasdaq submitted the text approved in SR–NASD–2001–34, as amended by SR–NASD–2002–64, to its stockholders for approval at the 2002 annual meeting of stockholders (the ''Annual Meeting''), which was held on May 22, 2002, and the stockholders voted to approve the changes.[7]

The text of the proposed rule change is set forth below, which includes the amendments approved by the Commission under SR–NASD–2001–34. New text is italicized; deleted text is bracketed.

[3] *See* letter from John M. Yetter, Assistant General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated May 31, 2002 (''Amendment No. 1''). In Amendment No. 1, Nasdaq clarified the proposal to reflect that the proposed amendments to the Nasdaq Restated Certificate of Incorporation (the ''Certificate'') were approved by its shareholders at the May 22, 2002 annual meeting. Because the Form 19b–4 submitted on May 16, 2002 was not complete, the proposed rule change was not considered filed. The proposed rule change became effective on June 3, 2002, the date on which Amendment No. 1 was filed with the Commission.

[4] *See* Securities Exchange Act Release No. 45135 (December 5, 2001), 66 FR 64327 (December 12, 2001).

[5] *See* Amendment No. 1, *supra* note 3.

[6] Del. Code Ann. Tit. 8, § 242(b)(2001).

[7] *See* Amendment No. 1, *supra* note 3.

RESTATED CERTIFICATE OF INCORPORATION OF THE NASDAQ STOCK MARKET, INC.

* * * * *

ARTICLE FOURTH

A. No change.

B. No change.

C. 1. No change.

2. Notwithstanding any other provision of this Restated Certificate of Incorporation, but subject to subparagraph 6 of this paragraph C. of this Article Fourth, in no event shall (i) any record owner of any outstanding Common Stock *or Preferred Stock* which is beneficially owned, directly or indirectly, as of any record date for the determination of stockholders and/or holders of Notes entitled to vote on any matter, or (ii) any holder of any Notes which are beneficially owned, directly or indirectly, as of any record date for the determination of stockholders and/or holders of Notes entitled to vote on any matter, by a person (other than an Exempt Person) who beneficially owns shares of Common Stock, *Preferred Stock* and/or Notes (''Excess Shares and/or Notes'') in excess of five percent (5%) of the then-outstanding shares of [Common Stock] *stock generally entitled to vote as of the record date in respect of such matter,* be entitled or permitted to vote any Excess Shares and/or Notes *on such matter.* For all purposes hereof, any calculation of the number of shares of [Common Stock] *stock* outstanding at any particular time, including for purposes of determining the particular percentage of such outstanding shares of [Common Stock] *stock* of which any person is the beneficial owner, shall be made in accordance with the last sentence of Rule 13d–3(d)(1)(i) of the General Rules and Regulations under the Securities Exchange Act of 1934, as amended (the ''Exchange Act''), as in effect on the date of filing this Restated Certificate of Incorporation.

3. (a)–(c) No change.

(d) ''Exempt Person'' shall mean Nasdaq or any Subsidiary of Nasdaq, in each case including, without limitation, in its fiduciary capacity, or any employee benefit plan of Nasdaq or of any Subsidiary of Nasdaq, or any entity or trustee holding [Common Stock] *stock* for or pursuant to the terms of any such plan or for the purpose of funding any such plan or funding other employee benefits for employees of Nasdaq or of any Subsidiary of Nasdaq.

(e) No change.

(f) The Board shall have the power to construe and apply the provisions of this paragraph C. of this Article Fourth and to make all determinations necessary or desirable to implement such provisions, including, but not limited to, matters with respect to (1) the number of shares of [Common Stock] *stock* beneficially owned by any person, (2) the number of Notes beneficially owned by any person, (3) whether a person is an Affiliate of another, (4) whether a person has an agreement, arrangement or understanding with another as to the matters referred to in the definition of beneficial ownership, (5) the application of any other definition or operative provision hereof to the given facts, or (6) any other matter relating to the applicability or effect of this paragraph C. of this Article Fourth.

4.–5. No change.

6. Notwithstanding anything herein to the contrary, subparagraph 2 of this paragraph C. of this Article Fourth shall not be applicable to any Excess Shares and/or Notes beneficially owned by (a) the NASD or its Affiliates until such time as the NASD beneficially owns five percent (5%) or less of the outstanding shares of [Common Stock] *stock* and/or Notes *entitled to vote on the election of a majority of directors at such time,* (b) any other person as may be approved for such exemption by the Board prior to the time such person beneficially owns more than five percent (5%) of the outstanding shares of [Common Stock] *stock* and/or Notes *entitled to vote on the election of a majority of directors at such time* or (c) Hellman & Friedman Capital Partners IV, L.P., H&F International Partners IV–A, L.P., [Hellman & Friedman] *H&F* International Partners IV–B, L.P., and H&F Executive Fund, L.P. if the Board has approved an exemption for any other person pursuant to Section 6(b) of this paragraph C. of this Article Fourth (other than an exemption granted in connection with the establishment of a strategic alliance with another exchange or similar market). The Board, however, may not approve an exemption under Section 6(b): (i) for a registered broker or dealer or an Affiliate thereof (provided that, for these purposes, an Affiliate shall not be deemed to include an entity that either owns ten percent or less of the equity of a broker or dealer, or the broker or dealer accounts for one percent or less of the gross revenues received by the consolidated entity); or (ii) an individual or entity that is subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act. The Board may approve an exemption for any other stockholder or holder of Notes if the Board determines that granting such exemption would (A) not reasonably be expected to diminish the quality of, or public confidence in, The Nasdaq Stock Market or the other operations of Nasdaq, on the ability to prevent fraudulent and manipulative acts and practices and on investors and the public, and (B) promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to and facilitating transactions in securities or assist in the removal of impediments to or perfection of the mechanisms for a free and open market and a national market system.

7. 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, 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 May 3, 2001, Nasdaq sold $240 million of 4.0% Convertible Subordinated Notes due 2006 (the ''Notes'') to Hellman & Friedman Capital Partners IV, L.P., H&F International Partners IV–A, L.P., H&F International Partners IV–B, L.P., and H&F Executive Fund IV, L.P. (collectively, the ''HFCP IV LPs''). The Notes are convertible at any time during a five-year period into shares of Nasdaq common stock at a conversion price of $20 per share; thus, the Notes purchased by the HFCP IV LPs would be convertible into 12,000,000 shares of Nasdaq common stock. On December 5, 2001, the Commission approved a proposed rule change—SR–NASD–2001–34—to amend the Certificate to afford the holders of the Notes the right to vote with Nasdaq stockholders.[8]

The Certificate amendment approved by the Commission in SR–NASD–2001–34 did not take effect at the time of approval by the Commission, because approval by Nasdaq stockholders at the Annual Meeting was also required. Under the Certificate as in effect prior

[8] *See supra* note 4.

to stockholder approval, a person who beneficially owns shares of common stock in excess of 5% of the outstanding shares of common stock may not vote the excess shares.[9] The 5% voting limitation does not apply, however to (1) the NASD or its affiliates until such time as the NASD beneficially owns 5% or less of Nasdaq's outstanding common stock, or (2) any other person that the Nasdaq Board of Directors (the ''Nasdaq Board'') may exempt prior to the time that such person beneficially owns more than 5% of Nasdaq's outstanding common stock. Under the Certificate, the Nasdaq Board must make certain findings with respect to the effect on an exemption on enumerated aspects of Nasdaq's regulatory obligations. Moreover, the Nasdaq Board may not approve an exemption for a registered broker or dealer or an affiliate thereof or a person that is subject to a statutory disqualification under Section 3(a)(39) of the Act.[10]

Under the amendments approved by the Commission in SR–NASD–2001–34, the Notes will be granted direct voting rights, but the 5% voting limitation will be made applicable to the Notes as well as the common stock. However, the HFCP IV LPs will be exempted from the 5% voting limitation if the Nasdaq Board approves an exemption from the 5% voting limitation for any other person (other than an exemption granted in connection with the establishment of a strategic alliance with another exchange or similar market).

Thus, prior to the Annual Meeting, holders of the Notes did not have the right to vote with Nasdaq stockholders. They could become stockholders (with voting rights) by paying the conversion price and converting the Notes into common stock, but would, like other stockholders, be subject to the 5% voting limitation. As a result of stockholder approval of the proposed rule change approved by the Commission in SR–NASD–2001–34, the Notes have been given direct voting rights, but are also subject to the 5% voting limitation.[11]

On March 8, 2002, Nasdaq completed a two-stage repurchase of Nasdaq common stock owned by the NASD, in exchange for cash, 1,338,402 shares of Series A Cumulative Preferred Stock (''Series A Preferred''), and one share of Series B Preferred Stock (''Series B Preferred''). Under Delaware Law and the Certificate, the Nasdaq Board may issue up to 30,000,000 shares of preferred stock in one or more series, and may establish the designation, powers, preferences and rights of each series of preferred stock at the time of issuance, without stockholder approval. However, under Delaware Law, the instrument by which the Nasdaq Board establishes the designation, powers, preferences, and rights of a series of preferred stock has the effect of an amendment to the Certificate.[12] Accordingly, on March 8, 2002, Nasdaq filed with the Commission an immediately effective proposed rule change, comprised of Certificates of Designation, Preferences and Rights for the Series A Preferred and Series B Preferred.[13]

The Series B Preferred is a single share designed to ensure that the NASD maintains voting control over Nasdaq until Nasdaq is registered as a national securities exchange. Accordingly, it confers upon the NASD the right to cast a number of votes that, together with other votes entitled to be cast by the NASD, constitute a majority of the total votes entitled to be cast at a particular time. The Series B Preferred is not transferable and must be redeemed if Nasdaq is registered as a national securities exchange. The Series A Preferred pays a dividend and is generally non-voting, although it conveys limited voting rights in the event of the failure to pay a timely dividend.

Under the Certificate as amended under SR–NASD–2001–34, voting preferred stock is not subject to the 5% voting limitation that applies to common stock and that also applies to the Notes following stockholder approval of voting rights for the Notes.[14] This gap in the coverage of the 5% limitation does not pose regulatory issues with respect to the NASD's ownership of the Series A Preferred and Series B Preferred because the NASD is *required* to control Nasdaq until Nasdaq is registered as a national securities exchange, a fact that is reflected in the automatic exemption from the 5% limitation that the NASD receives under the Certificate (until such time as its voting interest falls below 5%). Nevertheless, Nasdaq believes that the Certificate should be amended to provide that voting preferred stock is subject to the same limitations as common stock (and the Notes). Under this proposed rule change,[15] Nasdaq would be unable to issue any form of *voting* securities that are not subject to the 5% limitation, unless the Nasdaq Board either (i) adopted an amendment to its Certificate that was filed with, and if necessary, approved by, the Commission and approved by Nasdaq's stockholders, or (ii) waived the application of the 5% limitation to a particular security holder prior to the time that such person acquired a 5% interest.[16]

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the Act, including Sections 15A(b)(2)[17] and 15A(b)(6) of the Act,[18] which require, among other things, that the NASD be so organized and have the capacity to be able to carry out the purposes of the Act and to comply with and enforce compliance with the provisions of the Act, and that the Association's rules are 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. Nasdaq believes that the changes proposed to its Certificate are consistent with the intent of the 5% voting limitation that is currently contained in the Certificate, which serves the public interest by ensuring that certain individuals and entities cannot gain undue influence over the operations of Nasdaq. In its orders relating to the Certificate, the Commission found that the 5% voting limitation and other limitations affecting the control of Nasdaq fulfill the obligations arising under the Act.[19]

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

Nasdaq believes that the proposed rule change will not 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

The Exchange neither solicited nor received written comments.

[9] *See* Amendment No. 1, *supra* note 3.

[10] 15 U.S.C. 78c(a)(39).

[11] *See* Amendment No. 1, *supra* note 3.

[12] Del. Code Ann. Tit. 8, § 151(g)(2001).

[13] *See* Securities Exchange Act Release No. 45638 (March 25, 2002), 67 FR 15268 (March 29, 2002).

[14] *See* Amendment No. 1, *supra* note 3.

[15] *Id.*

[16] As noted above, the Nasdaq Board must make certain findings before granting a waiver and may not grant a waiver to a broker or dealer or an affiliate thereof or a person that is subject to a statutory disqualification.

[17] 15 U.S.C. 78o–3(b)(2).

[18] 15 U.S.C. 78o–3(b)(6).

[19] *See supra* note 4; Securities Exchange Act Release No. 42983 (June 26, 2000), 65 FR 41116 (July 3, 2000).

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[20] and subparagraph (f)(3) of Rule 19b–4[21] thereunder because it is concerned solely with the administration of the self-regulatory organization. At any time within 60 days of the filing of such 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.[22]

IV. 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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. 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. Copies of the filing will also be available for inspection and copying at the principal office of the Association. All submissions should refer to File No. SR–NASD–2002–64 and should be submitted by July 9, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[23]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–15256 Filed 6–17–02; 8:45 am]

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[20] 15 U.S.C. 78s(b)(3)(A).

[21] 17 CFR 240.19b–4(f)(3).

[22] Because the Form 19b–4 submitted on May 16, 2002 was not complete, the proposed rule change was not considered filed. The proposed rule change became effective on June 3, 2002, the date on which Amendment No. 1 was filed with the Commission. In addition, for purposes of calculating the 60-day abrogation date, the Commission considers the 60-day period to have commenced on June 3, 2003, the date Nasdaq filed Amendment No. 1.

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46067; File No. SR–NASD–2002–04]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Amendments to Rule 3010(b)(2) and IM–8310–2

June 12, 2002.

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 January 7, 2002, the National Association of Securities Dealers, Inc. (''NASD''), through its wholly owned subsidiary, NASD Regulation, Inc. (''NASD Regulation'') 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 Regulation. On May 31, 2002, NASD filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

NASD Regulation is proposing to amend NASD Rule 3010(b)(2), also known as the ''Taping Rule,'' and NASD IM–8310–2. The proposed amendments to the Taping Rule generally would: (1) Permit firms that become subject to the Taping Rule a one time opportunity to adjust their staffing levels to fall below the prescribed threshold levels and thus avoid application of the Rule; (2) revise the criteria by which firms become subject to the Taping Rule by not including certain short-term employees of disciplined firms into the calculations of the Taping Rule threshold levels; (3) expand the compliance deadline from 30 to 60 days for firms subject to the Taping Rule to install taping systems; (4) clarify the staff's authority to grant exemptions from the Rule pursuant to the Rule 9600 Series only in exceptional cases; and (5) extend the taping requirements from two years to three years to eliminate conflicting time periods in the Taping Rule. In addition, NASD Regulation proposes amendments to NASD IM–8310–2 to permit, upon request, public disclosure of whether a particular firm is subject to the Taping Rule. Below is the text of the proposed rule change. Proposed new language is in *italics;* proposed deletions are in [brackets].

* * * * *

3010. Supervision

(a) No Change.

(b) Written Procedures.

(1) No Change.

(2) Tape recording of conversations.

(A) [(i)] Each member that either is notified by NASD Regulation or otherwise has actual knowledge that it meets one of the criteria in paragraph (b)(2)*(H)*[(viii)] relating to the employment history of its registered persons at a Disciplined Firm as defined in paragraph (b)(2)*(J)*[(x)] shall establish, maintain, and enforce special written procedures for supervising the telemarketing activities of all of its registered persons.

(B)[(ii)] The member must establish *and implement* the supervisory procedures required by this paragraph within [30] *60* days of receiving notice from NASD Regulation or obtaining actual knowledge that it is subject to the provisions of this paragraph.

A member that meets one of the criteria in paragraph (b)(2)(H) for the first time may reduce its staffing levels to fall below the threshold levels within 30 days after receiving notice from NASD Regulation pursuant to the provisions of paragraph (b)(2)(A) or obtaining actual knowledge that it is subject to the provisions of the paragraph, provided the firm promptly notifies the Department of Member Regulation, NASD Regulation, in writing of its becoming subject to the Rule. Once the member has reduced its staffing levels to fall below the threshold levels, it shall not rehire a person terminated to accomplish the staff reduction for a period of 180 days. On or prior to reducing staffing levels pursuant to this paragraph, a member must provide the Department of Member Regulation, NASD Regulation with written notice, identifying the terminated person(s).

(C) [(iii)] The procedures required by this paragraph shall include tape-recording all telephone conversations between the member's registered persons and both existing and potential customers.

(D) [(iv)] The member shall establish reasonable procedures for reviewing the tape recordings made pursuant to the requirements of this paragraph to ensure compliance with applicable securities laws and regulations and applicable rules of [this] *the* Association. The procedures must be appropriate for the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Grace Yeh, Assistant General Counsel, NASD Regulation, to Katherine England, Assistant Director, Division of Market Regulation, Commission, dated May 31, 2002.