

“derivatives clearing organization” registered with the Commodities Futures Trading Commission (“CFTC”), OCC also filed this proposed rule change with the CFTC for prior approval by the CFTC pursuant to provisions of the Commodity Exchange Act (“CEA”) in order to foreclose any potential liability under the CEA based on an argument that OCC’s clearing of such options as securities options or the clearing of such futures as security futures constitutes a violation of the CEA.

The products that are affected by this approval order are essentially the same as the options and security futures on SPDR Gold Shares, iShares COMEX Gold Shares, and iShares Silver Shares that OCC currently clears pursuant to rule changes approved by the Commission last year.<sup>4</sup>

### III. Discussion

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and derivative transactions.<sup>5</sup> By amending its By-Laws to help clarify that options and security futures on ETFS Physical Swiss Gold Shares and ETFS Physical Silver Shares will be treated and cleared as securities options or security futures, OCC’s proposed rule change should help clarify the jurisdictional status of such contracts and accordingly should help to promote the prompt and accurate clearance and settlement of securities transactions and of derivative transactions. In accordance with the Memorandum of Understanding entered into between the CFTC and the Commission on March 11, 2008, and in particular the addendum thereto concerning Principles Governing the Review of Novel Derivative Products, the Commission believes that novel derivative products that implicate areas of overlapping regulatory concern should be permitted to trade in either a CFTC- or Commission-regulated environment or both in a manner consistent with laws and regulations (including the appropriate use of all available exemptive and interpretive authority).

### IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed

rule change is consistent with the requirements of the Act and in particular Section 17A of the Act<sup>6</sup> and the rules and regulations thereunder.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>7</sup> that the proposed rule change (File No. SR–OCC–2009–20) be and hereby is approved.<sup>8</sup>

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.<sup>9</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61594; File No. SR–NASDAQ–2010–024]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt a Round Lot Holder Initial Listing Requirement for Listing of Warrants on the Nasdaq Global and Capital Markets Except for Initial Firm Commitment Underwritten Public Offering

February 25, 2010.

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 February 19, 2010, The NASDAQ Stock Market LLC (“NASDAQ” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been substantially prepared by NASDAQ. NASDAQ has designated the proposed rule change as constituting a non-controversial rule change 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.

<sup>6</sup> 15 U.S.C. 78q–1.

<sup>7</sup> 15 U.S.C. 78s(b)(2).

<sup>8</sup> In approving the proposed rule change, the Commission considered the proposal’s impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

<sup>9</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>3</sup> 17 CFR 240.19b–4(f)(6).

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

NASDAQ is filing this proposed rule change to adopt a round lot holder requirement for listing on the Global and Capital markets, and to make a technical correction to a cross referenced rule.

The text of the proposed rule change is below. Proposed new language is in *italics* and proposed deletions are in [brackets].

#### 5410. Initial Listing Requirements for Rights and Warrants

For initial listing, the rights or warrants must meet all the requirements below:

- (a) No change.
- (b) The underlying security must be listed on the Global Market or be a Covered Security; [and]
- (c) There must be at least three registered and active Market Makers[.] ; and
- (d) *In the case of warrants, there must be at least 400 Round Lot Holders (except that this requirement will not apply to the listing of warrants in connection with the initial firm commitment underwritten public offering of such warrants).*

\* \* \* \* \*

#### 5515. Initial Listing Requirements for Rights, Warrants, and Convertible Debt

The following requirements apply to a Company listing convertible debt, rights or warrants on The Nasdaq Capital Market.

- (a) For initial listing, rights, warrants and put warrants (that is, instruments that grant the holder the right to sell to the issuing company a specified number of shares of the Company’s common stock, at a specified price until a specified period of time) must meet the following requirements:

- (1) No change.
- (2) The underlying security must be listed on Nasdaq or be a Covered Security; [and]
- (3) At least three registered and active Market Makers[.] ; and
- (4) *In the case of warrants, at least 400 Round Lot Holders (except that this requirement will not apply to the listing of rights or warrants in connection with the initial firm commitment underwritten public offering of such warrants).*

- (b)–(c) No change.

\* \* \* \* \*

#### 5730. Listing Requirements for Securities Not Specified Above (Other Securities)

- (a) Initial Listing Requirements

No. 61483 (Feb. 3, 2010), 75 FR 6753 (Feb. 10, 2010).

<sup>4</sup> Securities Exchange Act Release Nos. 57895 (May 30, 2008), 73 FR 32066 (June 5, 2008) and 59054 (Dec. 4, 2008), 73 FR 75159 (Dec. 10, 2008).

<sup>5</sup> 15 U.S.C. 78q–1(b)(3)(F).

(1) Nasdaq will consider listing on the Global Market any security not otherwise covered by the criteria in the Rule 5400 or 5700 Series, provided the instrument is otherwise suited to trade through the facilities of Nasdaq. Such securities will be evaluated for listing against the following criteria:

(A) The Company shall have assets in excess of \$100 million and stockholders' equity of at least \$10 million. In the case of a Company which is unable to satisfy the income criteria set forth in Rule 5405(b)(1)(A)[paragraph (a)(1)], Nasdaq generally will require the Company to have the following:

- (i)–(ii) No change.
- (B)–(D) No change.
- (2)–(3) No change.
- (b) 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

NASDAQ is proposing to adopt a round lot holder requirement for the initial listing of warrants on the Global and Capital Markets, with a limited exemption for companies listing warrants pursuant to a firm commitment underwritten initial public offering.<sup>4</sup> Currently, Listing Rule 5410 provides that to list a warrant on the Global Market a Company must have at least 450,000 warrants issued, the underlying security must be listed on the Global Market or be a Covered Security<sup>5</sup>, and

there must be at least three registered and active Market Makers. To list a warrant on the Capital Market, a Company must have at least 400,000 warrants issued, the underlying security must be listed on NASDAQ or be a Covered Security, and there must be at least three registered and active Market Makers.<sup>6</sup>

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>7</sup> These rules (the "Listing Rules") were operative April 13, 2009. In adopting the new Listing Rules, NASDAQ inadvertently omitted the requirement in the prior rules that a warrant have at least 400 round lot holders for initial listing<sup>8</sup> on the Global Market. NASDAQ is proposing to modify Rule 5410 to add the round lot holder requirement back to the rule.

NASDAQ is also proposing to adopt an identical 400 round lot holder requirement for the initial listing of warrants on the Capital Market. NASDAQ does not currently have a holder requirement for listing warrants on the Capital Market; however, NASDAQ believes that adopting such a requirement will help ensure that warrants listed on the Capital Market will have adequate distribution and a liquid trading market.

NASDAQ is proposing to adopt an exemption from the proposed round lot holder requirements of both the Global and Capital Markets for warrants listed pursuant to a firm commitment underwritten initial public offering. NASDAQ believes that a primary purpose of distribution requirements in listing standards is to ensure a liquid trading market, promoting price discovery and the establishment of an appropriate market price for the listed securities. In the case of warrants, NASDAQ believes that this liquidity concern is partially addressed by the fact that the market price for a warrant is in large part determined by the trading price of the underlying common stock. Warrant values are primarily determined using valuation models that factor in the trading price of the underlying stock, the warrant exercise

price and the expiration date of the right or warrant. NASDAQ believes that the sale of warrants in an underwritten public offering provides an additional basis for believing that a liquid trading market will likely develop for such warrants after listing, since the offering process is designed to promote appropriate price discovery. Moreover, the underwriters in a firm commitment underwritten public offering will also generally make a market in the securities for a period of time after the offering, assisting in the creation of a liquid trading market. For the foregoing reasons, NASDAQ believes that it is consistent with the protection of investors and the public interest to exempt from the proposed holder requirements of Rules 5410 and 5515(a) any series of warrants that is listed in connection with its initial firm commitment underwritten public offering. This proposed exemption is also consistent with a recent change to the listing requirements of the New York Stock Exchange ("NYSE").<sup>9</sup>

NASDAQ is not proposing to require a minimum number of holders for the initial listing of rights, because rights are generally distributed to the holders of an existing security and becomes a part of the realizable value of that security. As such, because the existing security must meet liquidity requirements, including a continued listing holders requirement, there is not a need to require a separate minimum number of holders of the rights to help ensure the liquidity of the rights.<sup>10</sup>

NASDAQ is also making a technical correction to a cross-reference contained in the Listing Rules. Rule 5730(a)(1)(A) was derived from old Rule 4420(d), which contained a cross reference to the Global Market income criteria found under old Rule 4420(a)(1). Rule 4420(a)(1) was moved to new Listing Rule 5405(b)(1)(A), yet the cross reference in Rule 5730(a)(1)(A) was not updated to reflect this new location. Accordingly, NASDAQ proposes to correct the reference in Rule 5730(a)(1)(A).

#### 2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the

<sup>4</sup> The Commission notes that the proposed changes to the Global Market warrant holder requirement would apply to the Global Select Market under Nasdaq Rule 5320, which provides that "[i]f the Primary Equity Security of a Company is included in the Global Select Market, any other security of that same Company, such as other classes of common or preferred stock, warrants and units, that qualify for listing on the Global Market shall also be included in the Global Select Market."

<sup>5</sup> Rule 5005(a)(9) defines a Covered Security as a security described in Section 18(b) of the Securities Act of 1933.

<sup>6</sup> Rule 5515(a).

<sup>7</sup> Securities Exchange Act Release No. 59663 (March 31, 2009), 74 FR 15552 (April 6, 2009)(SR-NASDAQ-2009-018).

<sup>8</sup> Former Rule 4420(d)(1) required warrants to substantially meet the requirements of the Global Market listing rules, which included a minimum of 400 round lot shareholders under all three entry standards.

<sup>9</sup> See SR-NYSE-2009-115 (December 2, 2009), 74 FR 64781 (December 8, 2009) (amending Section 703.12 of the NYSE Listed Company Manual to exempt from the 400 holders requirement any series of warrants listed in connection with the initial firm commitment underwritten public offering of such warrants).

<sup>10</sup> This is also consistent with the NYSE's treatment of rights. See Section 703.03(N) of the NYSE Listed Company Manual.

provisions of Section 6 of the Act,<sup>11</sup> in general and with Section 6(b)(5) of the Act,<sup>12</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 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, which imposes a round lot holder requirement applicable to the initial listing of warrants, subject to a limited exception for warrants listed pursuant to firm commitment initial public offerings, will protect investors and the public interest and remove impediments to and perfect the mechanism of a free and open market by helping to assure adequate liquidity, and correcting inadvertent errors in the adoption of the New Listing 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**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>13</sup> and Rule 19b-4(f)(6)<sup>14</sup> thereunder because the proposal does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) by its terms, become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.<sup>15</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. However, Rule 19b-4(f)(6)(iii)<sup>16</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay period.

The Commission believes that waiver of the 30-day operative delay period is consistent with the protection of investors and the public interest. For the Global Market, Nasdaq would require the same 400 round lot warrant holders requirement that was contained in the rules for warrants prior to the reorganization of its Listing Rules. For the Capital Market, Nasdaq is proposing an identical 400 round lot warrant holders requirement as the Global Market. The Commission believes that waiver of the 30-day operative delay period is consistent with the protection of investors and the public interest as the proposed changes should help to enhance liquidity and price discovery for warrants. Further, for both the Global Market and the Capital Market, Nasdaq's proposed exemption from the holder requirement for initial firm commitment underwritten public offerings is identical to the rules of the NYSE, which were published for notice and comment in the **Federal Register**.<sup>17</sup> The Commission did not receive any comments during the public comment period. The Commission further notes that waiving the 30-day operative delay for this provision is consistent with the protection of investors and the public interest as market making by the underwriters in an initial firm commitment public offering of warrants for a period of time after the offering should help alleviate short term liquidity concerns.<sup>18</sup> Finally, Nasdaq proposes to correct inaccurate cross references in the Listing Rules. Based on the above, the Commission believes it is consistent with the protection of investors and the public interest to waive the 30-day operative delay and therefore deems the proposal effective upon filing.<sup>19</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such proposed 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.<sup>20</sup>

### **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. 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-2010-024 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-2010-024. 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 Web site viewing and printing 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 offices of the NASDAQ. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You

<sup>11</sup> 15 U.S.C. 78f.

<sup>12</sup> 15 U.S.C. 78f(b)(5).

<sup>13</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>14</sup> 17 CFR 240.19b-4(f)(6).

<sup>15</sup> 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's 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. The Exchange has satisfied the pre-filing requirement.

<sup>16</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>17</sup> See note 9 *supra*.

<sup>18</sup> As noted by Nasdaq, the price of such warrants would be established by the firm commitment underwritten offering process, in addition to the price of the underlying security, the exercise price of the warrants, and the expiration of the warrants.

<sup>19</sup> For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>20</sup> 15 U.S.C. 78s(b)(3)(C).

should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-NASDAQ-2010-024, and should be submitted on or before March 25, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>21</sup>

**Florence E. Harmon,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61582; File No. SR-NASDAQ-2010-025]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change To Amend the By-Laws of The NASDAQ OMX Group, Inc.

February 25, 2010.

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 February 24, 2010, The NASDAQ Stock Market LLC (the "Exchange" or "NASDAQ") 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 Exchange. 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 NASDAQ Exchange is filing this proposed rule change relating to the By-Laws of its parent corporation, The NASDAQ OMX Group, Inc. ("NASDAQ OMX"). The text of the proposed rule change is available at <http://nasdaqomx.cchwallstreet.com>, at the Exchange's principal office, on the Commission's Web site at <http://www.sec.gov>, 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, the NASDAQ Exchange 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 NASDAQ Exchange 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

NASDAQ OMX is proposing to make certain amendments to its By-Laws to make improvements in its governance. Currently, NASDAQ OMX By-Laws provide that each director receiving a plurality of the votes at any election of directors at which a quorum is present is duly elected to the Board.<sup>3</sup> Under Corporate Governance Guidelines adopted by the Board, however, any director in an uncontested election who receives a greater number of votes "withheld" from his or her election than votes "for" such election is required to tender his or her resignation promptly following receipt of the certification of the stockholder vote. The NASDAQ OMX Nominating & Governance Committee then considers the resignation offer and recommends to the Board whether to accept it. Within 90 days after the certification of the election results, the Board will decide whether to accept or reject the resignation. Promptly thereafter, the Board will announce its decision by means of a press release. In a contested election (i.e., where the number of nominees exceeds the number of directors to be elected), the unqualified plurality standard controls.

##### Uncontested Election

NASDAQ OMX proposes the adoption of a majority voting standard by amending Article IV, Section 4.4 of the By-Laws to provide that, in an uncontested election, directors shall be elected by holders of a majority of the votes cast at any meeting for the election

of directors at which a quorum is present. Under the majority voting standard, a nominee who fails to receive the requisite vote would not be duly elected to the Board; however, because a director holds office until his or her successor is duly elected and qualified, any incumbent director-nominee who fails to receive the requisite vote does not automatically cease to be a director. Instead, such director continues as a "holdover director" until such director's death, resignation or removal, or until his or her successor is duly elected and qualified. For this reason, the majority voting standard under consideration requires that any incumbent nominee, as a condition to his or her nomination for election, must submit in writing an irrevocable resignation, the effectiveness of which is conditioned upon the director's failure to receive the requisite vote in any uncontested election and the Board's acceptance of the resignation. The resignation would be considered by the Nominating & Governance Committee and acted upon by the Board in the same manner as a resignation tendered under current rules.<sup>4</sup> Acceptance of that resignation by the Board shall be in accordance with the policies and procedures adopted by the Board for such purpose. NASDAQ OMX specifies its policies and procedures pertaining to the election of its directors in its By-Laws. Specifically, the policies and procedures for the acceptance of the resignation of a director, by the Board, are proposed to be specified in By-Law Article IV, Section 4.4. There are no additional policies and procedures other than what is indicated in the By-Laws. In the event that NASDAQ OMX proposes to further amend its By-Laws with respect to the election of directors, including the adoption of any policies and procedure with respect to such election, NASDAQ OMX shall file a proposed rule change with the Commission to seek approval of those amendments.

##### Contested Election

The Exchange is codifying its process for a contested election. The directors shall continue to be elected by a plurality vote in a contested election. There is no change to the process for contested elections because if a majority voting standard were to apply in a contested election, the likelihood of a "failed election" (i.e., a situation in which no director receives the requisite vote) would be more pronounced. Moreover, the rationale underpinning the majority voting policy does not

<sup>3</sup> Section 216 of the General Corporation Law of the State of Delaware provides that in the absence of the specification in the certificate of incorporation or bylaws of a Delaware corporation, directors of the Delaware corporation shall be elected by a plurality of the shares present in person or represented by proxy at the meeting and entitled to vote on the election of directors. Since the Certificate of Incorporation and By-Laws of NASDAQ OMX do not specify the voting standard for the election of NASDAQ OMX's directors, the Section 216 default standard applies to NASDAQ OMX and, therefore, elections of NASDAQ OMX's directors are currently governed by a plurality vote standard.

<sup>4</sup> See NASDAQ OMX By-Law Article IV, Section 4.5.

<sup>21</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.