copying at the principal office of CBOE. 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–CBOE–2011–056 and should be submitted on or before July 14, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Cathy H. Ahn,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64700; File No. SR–NASDAQ–2010–134]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Disapproving Proposed Rule Change To Adopt Additional Criteria for Listing Companies That Have Indicated Their Business Plan Is To Buy and Hold Commodities

June 17, 2011.

I. Introduction

On October 15, 2010, The NASDAQ Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''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 adopt additional criteria for listing companies that have indicated their business plan is to buy and hold commodities. The proposed rule change was published for comment in the **Federal Register** on November 3, 2010.[3] On December 9, 2010, the Commission extended the time period in which to either approve the proposed rule change or to institute proceedings to determine whether to disapprove the proposed rule change, to February 1, 2011.[4] The Commission received one comment letter on the proposal.[5] On January 31, 2011, the Commission issued an order instituting proceedings to determine whether to disapprove the proposed rule change (''Order Instituting Disapproval Proceedings'').[6] The Commission received no comments on the proceedings to determine whether to disapprove the proposed rule change, and Nasdaq did not provide a response to the Commission's grounds for disapproval under consideration as set forth in the Order Instituting Disapproval Proceedings. On April 8, 2011, the Commission extended the time period for Commission action on the proceedings to determine whether to disapprove the proposed rule change, to July 1, 2011.[7] This order disapproves the proposed rule change.

II. Description of the Proposal

The Exchange proposes to adopt additional listing standards for companies that have indicated that their business plan is to purchase and stockpile raw materials or other commodities (''commodity stockpiling companies''). Under the proposal, such companies are required to meet all other applicable Nasdaq initial listing requirements, as well as the following additional listing standards. First, within 18 months of the effectiveness of its initial public offering registration statement, or such shorter period as the company specifies in the registration statement, the company would be required to invest at least 85% of the net proceeds of the initial public offering in the raw material or commodity identified in the registration statement, or return the unused amount pro rata to its shareholders.[8]

Second, the company would be required to publish, or facilitate access to, at no cost and in an easily accessible manner, regular pricing information regarding the raw material or other commodity from a reliable, independent source, at least as frequently as current industry practice but no less than twice per week.[9]

Third, the company would be required to publish its net market value on a daily basis, or where pricing information for the raw material or other commodity is not available on a daily basis, no less frequently than twice per week.[10] If the spot price of the raw material or commodity fluctuates by more than 5%, the company shall publish the net market value within one business day of the fluctuation.

Fourth, the company would be required to publish the quantity of the raw material or other commodity held in inventory, the average price paid, and the company's net market value within two business days of any change in inventory held.[11] Where the company contracts to purchase or sell a material quantity of the raw material or commodity, such information would be required to be disclosed in a Form 8–K filing within four business days.

Fifth, the company would be required to employ the services of one or more independent third party storage facilities to safeguard the physical holdings of the raw material or commodity.[12] Finally, the company would be required to create a committee comprised solely of independent directors who shall consider, at least quarterly, whether the company's purchasing activities have had a measurable impact on the market price of the raw material or other commodity and shall report such determinations and make subsequent recommendations to the company's board of directors.[13]

Nasdaq also is proposing to adopt additional audit committee requirements applicable to commodity stockpiling companies. In addition to the existing audit committee requirements in Nasdaq rules, audit committees for commodity stockpiling companies would be required to establish procedures for the identification and management of potential conflicts of interest, and would be required to review and approve any transactions where such

[14] 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. 63207 (October 28, 2010), 75 FR 67788.

[4] *See* Securities Exchange Act Release No. 63508 (December 9, 2010), 75 FR 78300 (December 15, 2010).

[5] *See* Letter from Edward H. Smith, Jr. to Florence E. Harmon, Deputy Secretary, Commission, dated January 18, 2011.

[6] *See* Securities Exchange Act Release No. 63804 (January 31, 2011), 76 FR 6506 (February 4, 2011).

[7] *See* Securities Exchange Act Release No. 64259 (April 8, 2011), 76 FR 20760 (April 13, 2011).

[8] *See* proposed Nasdaq IM–5101–3(a).

[9] *See* proposed Nasdaq IM–5101–3(b).

[10] *See* proposed Nasdaq IM–5101–3(d). Net market value would be determined by multiplying the volume of the raw material or commodity held in inventory by the last spot price published or otherwise relied upon by the company, plus cash and other assets, less any liabilities.

[11] *See* proposed Nasdaq IM–5101–3(c).

[12] *See* proposed Nasdaq IM–5101–3(e). Under the proposed rule language, the facility ''should provide services consistent with those provided by custodians and these must include: storage and safeguarding; insurance; transfer of the raw material or other commodity in and out of the facility; visual inspections, spot checks and assays; confirmation of deliveries to supplier packing lists; and reporting of transfers and of inventory to the [commodity stockpiling company] and its auditors.'' The company must oversee the third party storage facility with its committee of independent directors.

[13] *See* proposed Nasdaq IM–5101–3(f). The independent directors may rely upon and shall have the authority to engage and pay an industry expert in conducting this review. If the company's board of directors disagrees with or does not accept the recommendations of the committee, the company will be required to file a Form 8–K with the Commission outlining the relevant events, the committee's determinations and recommendations, and the rationale for the board of directors' determination.

potential conflicts have been identified.[14]

III. Comment Letter

The Commission received one comment letter on the proposal.[15] The commenter, a shareholder in SMG Indium Resources Ltd. (''SMG''), supported the proposal and stated, among other things, that approval of the proposal would ''support making the market for commodities, such as [i]ndium, more efficient and transparent by providing investors * * * with an easier and more cost-effective alternative for investing in such commodities.'' This commenter further noted that, unlike commodity-based trust shares, which are designed along the lines of an exchange-traded fund (''ETF'') structure and offer exposure to very liquid and actively-traded commodities, commodity stockpiling companies ''provide investment exposure to select strategic and commercial commodities which do not have substantial liquid and active trading markets nor extensive and well developed derivative and/or spot markets and pricing mechanisms.'' The commenter explained his view that the proposed listing standards would assure appropriate investor protection in connection with the listing of commodity stockpiling companies, and cited particular aspects of the proposal, including the frequency and source of pricing information, the requirement to calculate and disseminate net market value, and the use of third-party storage facilities.

IV. Discussion

Under Section 19(b)(2)(C) of the Act, the Commission shall approve a proposed rule change of a self-regulatory organization if the Commission finds that such proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to such organization.[16] The Commission shall disapprove a proposed rule change if it does not make such a finding.[17] The Commission's Rules of Practice, under Rule 700(b)(3), state that the ''burden to demonstrate that a proposed rule change is consistent with the [Act] * * * is on the self-regulatory organization that proposed the rule change'' and that a ''mere assertion that the proposed rule change is consistent with those requirements * * * is not sufficient.''[18]

After careful consideration, the Commission does not find that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[19] In particular, the Commission does not find that the proposed rule change is consistent with Section 6(b)(5) of the Act,[20] which requires that the rules of a national securities exchange be 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 to protect investors and the public interest.

The development and enforcement of appropriate standards governing the initial and continued listing of securities on an exchange is an activity of critical importance to financial markets and the investing public.[21] Listing standards, among other things, serve as a means for an exchange to screen issuers and to provide listed status only to bona fide companies that have or, in the case of an initial public offering, will have sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets. Adequate listing standards are especially important given the expectations of investors that exchanges will appropriately vet listed companies and effectively monitor the fairness and efficiency of trading in the securities of listed companies on the exchange. A critical aspect of assuring fair and efficient exchange trading is the widespread availability of timely and reliable information that will directly impact the price of the listed security. This is particularly true for derivatives and other similar securities, where the price of the listed security is highly correlated with the price of the underlying securities or commodities.[22] Further, the rules of the exchange should provide appropriate mechanisms to assure effective surveillance of trading in listed companies to deter and detect manipulation, fraud or other illegal practices.

Nasdaq's proposal would authorize a national securities exchange, for the first time, to list the securities of an operating company that simply plans to buy and hold a commodity or other raw material. A liquid market may not exist for the underlying commodity or other raw material to be held by the commodity stockpiling company. Indeed, the commenter, an SMG shareholder, noted that commodity stockpiling companies ''provide investment exposure to select strategic and commercial commodities which do not have substantial liquid and active trading markets nor extensive and well developed derivative and/or spot markets and pricing mechanisms,'' but believed that the proposed listing standards would provide adequate investor protections.

In the Order Instituting Disapproval Proceedings, however, the Commission noted several concerns that raised questions as to whether the Nasdaq proposal is consistent with the requirements of Section 6(b)(5) of the Act, including whether the nature of the required pricing information, and the frequency and manner of its dissemination, would prevent manipulation, promote just and

[14] *See* proposed Nasdaq Rule 5605(c)(3) and IM–5605. Under the proposal, the procedures should include any material amendment to the management agreement, including any change with respect to the compensation of the manager.

[15] *See,* note 5, *supra.*

[16] 15 U.S.C. 78s(b)(2)(C)(i).

[17] 15 U.S.C. 78s(b)(2)(C)(ii); *see also* 17 CFR 201.700(b)(3) and note 18 *infra,* and accompanying text.

[18] 17 CFR 201.700(b)(3). The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding. *See id.* Any failure of a self-regulatory organization to provide the information solicited by Form 19b–4 may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder that are applicable to the self-regulatory organization. *Id.*

[19] In disapproving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[20] 15 U.S.C. 78f(b)(5).

[21] *See, e.g.,* Securities Exchange Release Act No. 58228 (July 25, 2008), 73 FR 44794 (July 31, 2008).

[22] *See, e.g.,* Securities Exchange Act Release No. 50603 (October 28, 2004), 69 FR 64614 (November 5, 2004) (SR–NYSE–2004–22) (approving the New York Stock Exchange's (''NYSE'') proposal for the listing and trading of streetTRACKS Gold Shares (''Gold Shares'')). In its approval order, the Commission noted that the gold spot market is extremely deep and liquid, and that reliable gold price information is available to investors in the Gold Shares. Further, the trustee for the Gold Shares agreed to provide on its public Web site continuously updated information, from an unaffiliated source, with respect to the spot price of gold, as well as the intraday indicative value (the estimated net asset value) of a Gold Share on an essentially real-time basis. In its approval order, the Commission found that the dissemination of this information would facilitate transparency with respect to the Gold Shares and diminish the risk of manipulation or unfair informational advantage. The Commission also found that the unique liquidity and depth of the gold market, together with an intermarket surveillance sharing agreement with a futures market related to gold financial instruments and the adoption of specific NYSE rules to address and monitor dealings by Gold Share market makers and their member firms in the underlying gold market, would create the basis for NYSE to monitor for fraudulent and manipulative practices in the trading of the Gold Shares. *Id.*

equitable principles of trade, perfect the mechanism of a free and open market and the national market system, or protect investors and the public interest.[23] Specifically, the Commission stated that the proposal raises issues as to: (1) Whether the dissemination of up-to-date pricing information twice per week about the sole asset of an operating company would be sufficient to support the fair and efficient exchange trading of its securities; (2) in the absence of a liquid and transparent market for the commodity or other raw material held by the company, whether the pricing information from the ''independent source'' would in fact have sufficient reliability and integrity, or whether there are risks that information could be manipulated; (3) whether there would be risks such pricing information may be available to some market participants sooner than others, thereby giving the former an unfair trading advantage; and (4) whether Nasdaq's proposal adequately addresses any special risks to investors that might be presented by the exchange trading of an operating company in the business solely of stockpiling an illiquid commodity.

The Commission invited interested persons to submit written views with respect to these or other concerns with the Nasdaq proposal. Neither Nasdaq nor any other person submitted comments in response to the Commission's request.

The Commission remains concerned about the issues raised in the Order Instituting Disapproval Proceedings. Under the Nasdaq proposal, the business plan of a ''commodity stockpiling company'' that could be listed on Nasdaq would simply be to purchase and stockpile raw materials or other commodities, with the result that the sole asset of the listed company could be a relatively illiquid commodity. Accordingly, the value of the equity securities of the commodity stockpiling company would depend almost exclusively on the value of the underlying commodity.

The Commission is concerned that Nasdaq's proposal, to permit dissemination of up-to-date pricing information on the commodity stockpiled as infrequently as twice per week, would be inadequate for market participants to fairly and efficiently assess the value of the listed company and trade its securities on the exchange.[24] In addition, the Commission is concerned that, if the market for the commodity stockpiled is illiquid and opaque, the pricing information disseminated at least biweekly by the ''independent source'' may in fact not be reliable, despite the best efforts of the pricing service. The Commission notes that the proposal does not define what would constitute a ''reliable, independent source'' and does not set forth any standards to ensure the reliability and integrity of the pricing information of the underlying commodity or other raw material. Finally, the Commission is concerned that, because of the potential infrequency and irregularity of pricing information on the underlying commodity, and its consequent importance, there is a risk that some market participants—perhaps those party to, or with knowledge of, the transaction in the underlying commodity—would have access to price-moving market information before it is reported to the pricing service and publicly disseminated in accordance with the Nasdaq proposal. This could provide an opportunity for an unfair trading advantage in the securities of the commodity stockpiling company to those with advance access to any information that affects pricing. In addition, there might be the potential for manipulation through the reporting of false or misleading transaction information to the pricing service. This type of activity could be facilitated by the fact that transactions in illiquid markets are infrequent and often self-reported by the parties in the trade. The incentive to utilize an unfair trading advantage or to manipulate prices in this way could be magnified by the exchange listing of an investment vehicle that allowed someone to profit from such an advantage or manipulation.

Because of these issues with respect to the nature of the required pricing information, and the frequency and manner of its dissemination, the Commission is concerned the proposal is not designed, among other things, to prevent manipulation, promote just and equitable principles of trade, perfect the mechanism of a free and open market and a national market system, and to protect investors and the public interest, as required by Section 6(b)(5) of the Exchange Act. Nasdaq did not respond to, or otherwise address, any of these concerns, which were articulated by the Commission in the Order Instituting Disapproval Proceedings. As noted above, Rule 700(b)(3) of the Commission's Rules of Practice states that the ''burden to demonstrate that a proposed rule change is consistent with the [Act] * * * is on the self-regulatory organization that proposed the rule change'' and that a ''mere assertion that the proposed rule change is consistent with those requirements * * * is not sufficient.''[25]

For the reasons set forth above, the Commission does not believe that the Exchange has met its burden to demonstrate that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder.

V. Conclusion

For the foregoing reasons, the Commission does not find that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, Section 6(b)(5) of the Act.

It Is Therefore Ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR–NASDAQ–2010–134) be, and it hereby is, disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[26]

Cathy H. Ahn,

Deputy Secretary.

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[23] *See supra* note 6.

[24] The sole comment letter stated that Nasdaq's proposal would allow companies such as SMG to list its securities on Nasdaq. The commenter states that indium does not ''have substantial liquid and active trading markets nor extensive and well developed derivative and/or spot markets and pricing mechanisms.'' *See* note 5, *supra.* The commenter notes that SMG has engaged Metal Bulletin PLC to be the pricing source of indium. According to the commenter, Metal Bulletin publishes indium prices twice per week, on Wednesdays and Fridays, and the source of the price information can be any entity regularly involved in buying or selling indium (currently five producers, four consumers, and three large traders). The commenter notes that Metal Bulletin requests trade information from these sources (such as price, quantity, date of transactions and location or origin of material), and then publishes the final price after adjustment for outliers, provided that a minimum of six sources provided trading information.

[25] 17 CFR 201.700(b)(3).

[26] 17 CFR 200.30–3(a)(12).