

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–55862; File No. SR–NASDAQ–2007–053]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Relating to Trading Shares of the PowerShares DB Energy Fund, the PowerShares DB Oil Fund, the PowerShares DB Precious Metals Fund, the PowerShares DB Gold Fund, the PowerShares DB Silver Fund, the PowerShares DB Base Metals Fund, and the PowerShares DB Agriculture Fund Pursuant to Unlisted Trading Privileges

June 5, 2007.

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 May 16, 2007, The NASDAQ Stock Market LLC (“Nasdaq”), 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. This order provides notice of the proposed rule change and approves the proposal on an accelerated basis.

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

Nasdaq proposes to trade, pursuant to unlisted trading privileges (“UTP”), shares (“Shares”) of the PowerShares DB Energy Fund, the PowerShares DB Oil Fund, the PowerShares DB Precious Metals Fund, the PowerShares DB Gold Fund, the PowerShares DB Silver Fund, the PowerShares DB Base Metals Fund, and the PowerShares DB Agriculture Fund (collectively the “Funds”). The text of the proposed rule change is available from Nasdaq’s Web site at <http://nasdaq.complinet.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 III 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 trade the Shares on a UTP basis. The Shares are currently trading on Nasdaq on a three-month pilot basis.<sup>3</sup> Approval of this filing will allow the Shares to continue to trade after the expiration of the pilot. The Commission previously approved a proposal to list and trade the Shares of the Funds by the American Stock Exchange LLC (the “Amex”).<sup>4</sup>

The Shares represent beneficial ownership interests in the corresponding Fund’s net assets, consisting solely of the common units of beneficial interests of the DB Energy Master Fund, the DB Oil Master Fund, the DB Precious Metals Master Fund, the DB Gold Master Fund, the DB Silver Master Fund, the DB Base Metals Master Fund, and the DB Agriculture Master Fund, respectively (collectively, the “Master Funds”). DB Multi-Sector Commodity Master Trust (the “Master Trust”) is organized as a Delaware statutory trust with each of the Master Funds representing a series of the Master Trust. The Master Funds will hold primarily<sup>5</sup> futures contracts<sup>6</sup> on the commodities comprising the Deutsche Bank Liquid Commodity Index—Optimum Yield Energy Excess Return™, Deutsche Bank Liquid Commodity Index—Optimum Yield Crude Oil Excess Return™, Deutsche Bank Liquid Commodity Index—Optimum Yield Precious Metals Excess Return™, Deutsche Bank Liquid Commodity Index—Optimum Yield

Gold Excess Return™, Deutsche Bank Liquid Commodity Index—Optimum Yield Silver Excess Return™, Deutsche Bank Liquid Commodity Index—Optimum Yield Industrial Metals Excess Return™, and Deutsche Bank Liquid Commodity Index—Optimum Yield Agriculture Excess Return™ (collectively, the “Indexes”), as the case may be. The sponsor of the Indexes is Deutsche Bank AG London (the “Index Sponsor”). Each of the Funds and each of the Master Funds are commodity pools operated by DB Commodity Services LLC (the “Managing Owner”).<sup>7</sup>

Nasdaq deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Nasdaq’s existing rules governing the trading of equity securities, including Rule 4630. The Shares will trade on Nasdaq from 9:30 a.m. until 4:15 p.m. Eastern Time (“ET”), except that shares of the PowerShares DB Base Metals Fund will also trade from 4:15 p.m. until 8 p.m. ET, even if the Indicative Fund Value (“IFV”), as discussed below, is not disseminated from 4:15 p.m. until 8 p.m. ET.<sup>8</sup> Nasdaq has appropriate rules to facilitate transactions in the Shares during these trading sessions.

Like other exchange-traded fund products, each of the Funds issues and redeems its Shares on a continuous basis at a price equal to the NAV per Share next determined after an order is received in proper form. Also, each of the Funds issues and redeems its Shares only in aggregations of 200,000 shares (“Basket Aggregations”) and only through qualified market participants that have entered into agreements with the Managing Owner (each, an “Authorized Participant”). Additional information about the creation and redemption process is included in the Amex Order. In summary, to create Shares, an Authorized Participant must properly place a creation order and

<sup>3</sup> Securities Exchange Act Release No. 55386 (March 2, 2007), 72 FR 10801 (March 9, 2007) (SR–NASDAQ–2007–016) (“Pilot Order”).

<sup>4</sup> See Securities Exchange Act Release No. 55029 (December 29, 2006), 72 FR 806 (January 8, 2007) (SR–Amex–2006–76) (the “Amex Order”).

<sup>5</sup> Other holdings of the Master Fund will include cash and U.S. Treasury securities for deposit with futures commission merchants as margin, and other high-credit-quality short-term fixed income securities.

<sup>6</sup> The following is a list of futures contracts and other commodity interests in which the respective Master Fund may invest and the exchanges on which they trade: Energy Index—sweet light crude (NYMEX), heating oil (NYMEX), Brent crude oil (ICE Futures), RBOB gasoline (NYMEX), natural gas (NYMEX); Oil Index—sweet light crude (NYMEX); Precious Metals Index—gold (COMEX), silver (COMEX); Gold Index—gold (COMEX); Silver Index—silver (COMEX); Base Metals Index—aluminum (LME), zinc (LME), copper-grade A (LME); Agriculture Index—corn (CBOT), wheat (CBOT), soybeans (CBOT), sugar (NYBOT).

<sup>7</sup> The Managing Owner is registered as a commodity pool operator (“CPO”) and commodity trading advisor (“CTA”) with the Commodity Futures Trading Commission (“CFTC”) and is a member of the National Futures Association (“NFA”). The Managing Owner will serve as the CPO and CTA of each of the Funds and each of the Master Funds.

<sup>8</sup> Because the LME is closed for floor and electronic trading during Nasdaq’s after-hours trading session (from 4:15 p.m. until 8 p.m. ET), an updated IFV for the PowerShares DB Base Metals Fund cannot be calculated during such session. As provided by Rule 4120, Nasdaq may rely on the listing market to monitor dissemination of the IFV during Nasdaq’s regular trading session (9:30 a.m. to 4:15 p.m. ET). Currently the Index Sponsor for the PowerShares DB Base Metals Fund’s index does not calculate updated index values during Nasdaq’s late trading session; however, if the Index Sponsor did so in the future, Nasdaq will not trade shares of the PowerShares DB Base Metals Fund unless such official index value is widely disseminated.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b–4.

deliver the specified "cash deposit amount"<sup>9</sup> and applicable transaction fee to The Bank of New York (the "Fund Administrator"). The Fund Administrator will issue to the Authorized Participant the appropriate number of Basket Aggregations. To redeem Shares, an Authorized Participant must properly place a redemption order and deliver Shares that in the aggregate constitute one or more Basket Aggregations, plus any applicable transaction fee. The Fund Administrator will deliver the appropriate "cash redemption amount"<sup>10</sup> for each Basket Aggregation that an Authorized Participant redeems.

On each business day, the Administrator makes available immediately prior to the opening of trading on Amex, through the facilities of the Consolidated Tape Association ("CTA"), the Basket Amount for the creation of a Basket. According to the Amex Order, Amex disseminates every 15 seconds throughout the trading day, via the facilities of the CTA, an amount representing on a per-Share basis, the current values of the Basket Amounts for each of the Funds.

After 4 p.m. ET each business day, the Administrator determines the NAV for each of the Funds, utilizing the current settlement value of the particular commodity futures contracts. The calculation methodology for the NAV is described in more detail in the Amex Order. After 4 p.m. ET each business day, the Administrator, Amex, and the Managing Owner disseminate the NAVs for the Shares and the Basket Amounts (for orders placed during the day). The Basket Amounts and the NAVs are communicated by the Administrator to all Authorized Participants via facsimile or e-mail, and the NAV is available on the Funds' Web site at <http://www.dbfunds.db.com>.<sup>11</sup>

Quotations for and last-sale information regarding the Shares are disseminated through the Consolidated Tape System ("CTS"). The Index Sponsor publishes the value of each of the Indexes at least once every 15 seconds throughout each trading day on the CTA, Bloomberg, Reuters, and on the Fund's Web site at <http://www.dbfunds.db.com>. The closing Index levels similarly are provided by the Index Sponsor. In addition, any

adjustments or changes to the Indexes are provided by the Index Sponsor and Amex on their respective Web sites.

The Web site for the Funds at <http://www.powershares.com>, which is publicly accessible at no charge, contains the following information: (a) The current NAV per Share daily and the prior business day's NAV and the reported closing price; (b) the mid-point of the bid-ask price in relation to the NAV as of the time the NAV is calculated (the "Bid-Ask Price");<sup>12</sup> (c) the calculation of the premium or discount of such price against such NAV; (d) data in chart form displaying the frequency distribution of discounts and premiums of the Bid-Ask Price against the NAV, within appropriate ranges for each of the four previous calendar quarters; (e) the prospectus; and (f) other applicable quantitative information.

As described above, the respective NAVs for the Funds are calculated and disseminated daily to all market participants at the same time. According to the Amex Order, Amex also intends to disseminate for each of the Funds on a daily basis by means of CTA/CTS High Speed Lines information with respect to the corresponding IFV (as discussed below), recent NAV, and shares outstanding. Amex will also make available on its Web site daily trading volume of the Shares of each of the Funds, closing prices of such Shares, and the corresponding NAV. The closing price and settlement prices of the futures contracts comprising the Indexes and held by the corresponding Master Funds are also readily available from the relevant futures exchanges, automated quotation systems, published or other public sources, or on-line information services such as Bloomberg or Reuters.

Amex has represented that it will disseminate through the facilities of the CTA an updated IFV for each of the Funds. The respective IFVs will be disseminated on a per-Share basis at least every 15 seconds from 9:30 a.m. to 4:15 p.m. ET, according to the Amex Order. The IFVs will be calculated based on the cash required for creations and redemptions for the respective Funds adjusted to reflect the price changes of the corresponding Index commodities through investments held by the Master Funds, *i.e.*, futures contracts. The IFVs will not reflect price changes to the price of an underlying commodity between the close of trading of the futures contract at the relevant

futures exchange and 4:15 p.m. ET. While the Shares will trade on Nasdaq from 9:30 a.m. to 4:15 p.m. ET (and until 8 p.m. ET in the case of the shares of the PowerShares DB Base Metals Fund), regular trading hours for each of the Index commodities on the various futures exchanges vary widely, as set forth in detail in the Amex Order. Therefore, the value of a Share may be influenced by non-concurrent trading hours between the Nasdaq and the various futures exchanges on which the futures contracts based on the Index commodities are traded.

Nasdaq will halt trading in the Shares under the conditions specified in Nasdaq Rules 4120 and 4121. The conditions for a halt include a regulatory halt by the listing market. UTP trading in the Shares will also be governed by provisions of Nasdaq Rule 4120 relating to temporary interruptions in the calculation or wide dissemination of the IFV or the value of the Index. Additionally, Nasdaq may cease trading the Shares if other unusual conditions or circumstances exist which, in the opinion of Nasdaq, make further dealings on Nasdaq detrimental to the maintenance of a fair and orderly market. Nasdaq will also follow any procedures with respect to trading halts as set forth in Nasdaq Rule 4120(c). Finally, Nasdaq will stop trading the Shares if the listing market delists them.

Nasdaq believes that its surveillance procedures are adequate to address any concerns about the trading of the Shares on Nasdaq. Trading of the Shares through Nasdaq facilities is currently subject to NASD's surveillance procedures for equity securities in general and ETFs in particular.<sup>13</sup> Nasdaq is able to obtain information regarding trading in the Shares and the underlying futures contracts through its members in connection with the proprietary or customer trades that such members effect on any relevant market. In addition, Nasdaq may obtain trading information via the Intermarket Surveillance Group ("ISG") from other exchanges who are members or affiliates of the ISG, including the CBOT and the NYBOT, and Nasdaq has Information Sharing Agreements in place with ICE, NYMEX, and LME. Nasdaq has issued an Information Circular to inform its members of the special characteristics and risks associated with trading the Shares.

<sup>13</sup> NASD surveils trading pursuant to a regulatory services agreement. Nasdaq is responsible for NASD's performance under this regulatory services agreement.

<sup>9</sup> The "cash deposit amount" equals the NAV per Share of the applicable Fund times 200,000 (*i.e.*, NAV per Basket Aggregation).

<sup>10</sup> The "cash redemption amount" equals the NAV per Basket Aggregation.

<sup>11</sup> The Funds also maintain information on a Web site at <http://www.powershares.com>. Nasdaq will provide a link from its Web site at <http://www.nasdaq.com> to the Funds' Web sites.

<sup>12</sup> The Bid-Ask Price of Shares is determined using the highest bid and lowest offer as of the time of calculation of the NAV.

## 2. Statutory Basis

Nasdaq believes that the proposal is consistent with Section 6(b) of the Act<sup>14</sup> in general and Section 6(b)(5) of the Act<sup>15</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, remove impediments to a free and open market and a national market system, and, in general, to protect investors and the public interest. In addition, Nasdaq believes that the proposal is consistent with Rule 12f-5 under the Act<sup>16</sup> because it deems the Shares to be an equity securities, thus rendering trading in the Shares subject to Nasdaq's existing rules governing the trading of equity securities.

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

Nasdaq does not believe that the proposed rule change will impose 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*

Written comments on the proposed rule change were neither solicited nor received.

## III. 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-2007-053 on the subject line.

### *Paper Comments*

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2007-053. 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. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. 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-2007-053 and should be submitted on or before July 3, 2007.

## IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

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 exchange.<sup>17</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>18</sup> which requires that an exchange have rules designed, among other things, 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 this proposal should benefit investors by increasing competition among markets that trade the Shares.

In addition, the Commission finds that the proposal is consistent with Section 12(f) of the Act,<sup>19</sup> which permits an exchange to trade, pursuant to UTP, a security that is listed and registered on

another exchange.<sup>20</sup> The Commission notes that it previously approved the listing and trading of the Shares on Amex.<sup>21</sup> The Commission also finds that the proposal is consistent with Rule 12f-5 under the Act,<sup>22</sup> which provides that an exchange shall not extend UTP to a security unless the exchange has in effect a rule or rules providing for transactions in the class or type of security to which the exchange extends UTP. The Exchange has represented that it meets this requirement because it deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities.

The Commission further believes that the proposal is consistent with Section 11A(a)(1)(C)(iii) of the Act,<sup>23</sup> which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. Quotations for and last-sale information regarding the Shares are disseminated through the facilities of the CTA and the Consolidated Quotation System. Furthermore, the IFV of each Fund is disseminated every 15 seconds throughout the trading day by the national securities exchange on which the Fund is listed or by other information providers or market data vendors.

The Commission also believes that the Exchange's trading halt rules are reasonably designed to prevent trading in an ETF when transparency is impaired. Nasdaq will halt trading in the Shares under the conditions specified in Nasdaq Rules 4120 and 4121. The conditions for a halt include a regulatory halt by the listing market. UTP trading in the Shares will also be governed by provisions of Nasdaq Rule 4120 relating to temporary interruptions in the calculation or wide dissemination of the IFV or the value of the Index. Additionally, Nasdaq may cease trading the Shares if other unusual conditions

<sup>20</sup> Section 12(a) of the Act, 15 U.S.C. 78l(a), generally prohibits a broker-dealer from trading a security on a national securities exchange unless the security is registered on that exchange pursuant to Section 12 of the Act. Section 12(f) of the Act excludes from this restriction trading in any security to which an exchange "extends UTP." When an exchange extends UTP to a security, it allows its members to trade the security as if it were listed and registered on the exchange even though it is not so listed and registered.

<sup>21</sup> See *supra* note 4.

<sup>22</sup> 17 CFR 240.12f-5.

<sup>23</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

<sup>14</sup> 15 U.S.C. 78f(b).

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

<sup>16</sup> 17 CFR 240.12f-5.

<sup>17</sup> In approving this rule change, the Commission notes that it has considered the proposal's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>18</sup> 15 U.S.C. 78f(b)(5).

<sup>19</sup> 15 U.S.C. 78l(f).

or circumstances exist which, in the opinion of Nasdaq, make further dealings on Nasdaq detrimental to the maintenance of a fair and orderly market. Nasdaq will also follow any procedures with respect to trading halts as set forth in Nasdaq Rule 4120(c).

The Commission notes that, if the Shares should be delisted by the listing exchange, the Exchange would no longer have authority to trade the Shares pursuant to this order.

In support of this proposal, the Exchange has represented that its surveillance procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules. This approval order is conditioned on the Exchange's adherence to this representation.

In addition, the Commission recently approved the trading of the Shares on the Exchange pursuant to UTP for a pilot period of three months.<sup>24</sup> In the Pilot Order, the Commission noted that exchanges that trade commodity-related securities generally have in place surveillance arrangements with markets that trade the underlying securities. In its proposal to trade the Shares for a pilot period, the Exchange represented that it was in the process of completing these surveillance arrangements and expected to do so "in the near future." The Exchange recently provided the Commission with evidence that it has completed these surveillance arrangements.

The Commission finds good cause for approving this proposal before the thirtieth day after the publication of notice thereof in the **Federal Register**. As noted previously, the Commission previously found that the listing and trading of the Shares on Amex is consistent with the Act. The Commission presently is not aware of any regulatory issue that should cause it to revisit that finding or would preclude the trading of the Shares on the Exchange pursuant to UTP. Therefore, accelerating approval of this proposal should benefit investors by creating, without undue delay, additional competition in the market for the Shares.

## V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>25</sup> that the proposed rule change (SR-NASDAQ-2007-053) thereto, be and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>26</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-55856; File No. SR-NASDAQ-2007-029]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, To Require Nasdaq-Listed Issuers To Submit Material News to Nasdaq Using Nasdaq's Electronic Disclosure Submission System

June 4, 2007.

#### I. Introduction

On March 27, 2007, The NASDAQ Stock Market LLC ("Nasdaq") filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change to require Nasdaq-listed issuers to submit material news to Nasdaq through Nasdaq's electronic disclosure submission system, except in emergency situations. Nasdaq filed Amendment No. 1 to the proposal on April 25, 2007. The proposed rule change, as amended, was published for comment in the **Federal Register** on May 2, 2007.<sup>3</sup> The Commission received no comments regarding the proposed rule change, as amended. This order approves the proposed rule change, as amended.

#### II. Description of the Proposal

Nasdaq Rules 4310(c)(16) and 4320(e)(14) require a Nasdaq-listed issuer, except in unusual circumstances, to make prompt disclosure to the public through any Regulation FD compliant method (or combination of methods) of any material information that would reasonably be expected to affect the value of its securities or to influence investors' decisions. These rules also require the issuer to provide notice of certain disclosures to Nasdaq's MarketWatch Department ("Nasdaq MarketWatch") prior to the release of the information. Nasdaq reviews these disclosures to determine whether a trading halt is appropriate. Issuers

currently provide material news notifications to Nasdaq MarketWatch electronically through Nasdaq's electronic disclosure submission system, or via fax or telephone. Nasdaq does not disseminate this information.

Although Nasdaq introduced the electronic disclosure submission system in 2004, most issuers continue to provide material news notifications to Nasdaq MarketWatch by fax.<sup>4</sup> According to Nasdaq, the material information from fax-delivered documents and telephone notifications must be retyped manually into Nasdaq MarketWatch's database systems, a process that uses staff time, introduces error risk, and results in a less robust audit trail. To reduce this administrative burden, Nasdaq proposes to amend Nasdaq Rule 4120, "Trading Halts," and IM-4120-1, "Disclosure of Material Information," to require issuers to submit material news notifications to Nasdaq through Nasdaq's electronic disclosure submission system, except in emergency situations.<sup>5</sup> In an emergency, an issuer would continue to be required to notify Nasdaq prior to disseminating material news, but Nasdaq would accept notification by telephone or fax.

Under the proposal, Nasdaq may issue a Staff Determination that is a public reprimand letter or, in extreme circumstances, a Staff Determination to delist an issuer's securities, if an issuer repeatedly fails to notify Nasdaq prior to the distribution of material news, or repeatedly fails to use the electronic disclosure submission system in the absence of an emergency.<sup>6</sup> In determining whether to issue a public reprimand letter, Nasdaq will consider whether the issuer has demonstrated a pattern of failures, whether the issuer has been contacted concerning previous violations, and whether the issuer has taken steps to assure that future violations will not occur.<sup>7</sup>

Nasdaq proposes to implement the proposal approximately 90 days after the proposal is approved.

#### III. Discussion

The Commission finds that the proposed rule change is consistent with

<sup>4</sup> Nasdaq notes, for example, that of approximately 4,200 material news notifications submitted to Nasdaq MarketWatch in January 2007, over 70% were submitted by fax.

<sup>5</sup> Nasdaq defines emergency situations to include: lack of computer or internet access; a technical problem on either the issuer or Nasdaq system, or an incompatibility between those systems; and a material development such that no draft disclosure document exists, but immediate notification to Nasdaq MarketWatch is important based on the event. See Nasdaq IM-4120-1.

<sup>6</sup> See Nasdaq IM-4120-1.

<sup>7</sup> See Nasdaq IM-4120-1.

<sup>24</sup> See *supra* note 3.

<sup>25</sup> 15 U.S.C. 78s(b)(2).

<sup>26</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> See Securities Exchange Act Release No. 55672 (April 26, 2007), 72 FR 24349.