

transactions, not just agency crosses, in Nasdaq-listed securities that are based on a weighted average or other special-pricing formulae, to be reported with the .W modifier.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with Section 15A(b)(6)⁷ of the Act. Among other things, Section 15A(b)(6) requires that the rules of a national securities association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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. In addition, the Nasdaq believes that the proposed rule change furthers the objective set forth in Section 11A(a)(1)(C)(iii)⁸ of the Act by ensuring the availability to brokers, dealers and investors of information with respect to quotations for and transactions in securities. Nasdaq believes that reporting transactions in exchange-listed securities that are marked with a special indicator to identify their unique pricing formulae is appropriate for regulatory purposes and reduces investor confusion with regard to these transactions.

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.

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: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days from May 17, 2000, the date on

which it was filed and, since the Exchange provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to the filing date,⁹ the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁰ and subparagraph (f)(6) of Rule 19b-4 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.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule 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 NASD. All submissions should refer to File No. SR-NASD-00-28 and should be submitted by June 29, 2000.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

Margaret H. McFarland,

Deputy Secretary.

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⁹ The Commission notes that Nasdaq gave the Commission notice of its intent to file the proposed rule change through its original filing of the proposal pursuant to Section 19(b)(2) of the Act on May 11, 2000.

¹⁰ 15 U.S.C. 78s(b)(3)(A).

¹¹ 17 CFR 240.19b-4(f)(6).

¹² 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-42876; File No. SR-NASD-99-69]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Clarifying Certain Listing Standards of The Nasdaq Stock Market, Inc.

May 31, 2000.

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 November 22, 1999, the National Association of Securities Dealers, Inc. ("NASD" or "Association") through its wholly owned subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), 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 Nasdaq. The Association submitted Amendments No. 1³ and No. 2⁴ to the proposed rule change on April 10, 2000, and April 27, 2000, respectively. 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

Nasdaq has filed with the Commission a proposed rule change to

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Letter to Jack Drogin, Senior Special Counsel, Division of Market Regulation, Commission, from Robert E. Aber, Senior Vice President and General Counsel, Nasdaq, dated April 7, 2000 ("Amendment No. 1"). Amendment No. 1 clarifies that the proposed time frame for gaining compliance with the continued inclusion market capitalization standards applies to issuers listed on both The Nasdaq SmallCap Market and the Nasdaq National Market. In addition, Amendment No. 1 clarified that the method for regaining compliance with the continued inclusion requirement for the number of market makers set forth in Rule 4310(c)(8)(A) applies to issuers listed on both The Nasdaq SmallCap Market and the Nasdaq National Market. Finally, Amendment No. 1 makes certain technical corrections to the proposed rule change.

⁴ See Letter to Jack Drogin, Senior Special Counsel, Division of Market Regulation, Commission, from Robert E. Aber, Senior Vice President and General Counsel, Nasdaq, dated April 25, 2000 ("Amendment No. 2"). Amendment No. 2 clarifies that Rule 4310(c)(8)(C) is being amended to specify time frames for determining when an issuer is non-compliant or has regained compliance with the Association's market capitalization standards. Amendment No. 2 also clarifies that the NASD's Rule 4300 series contains the qualification requirements for all securities included in The Nasdaq Stock Market while the Rule 4400 Series sets forth additional requirements for those securities designated for the Nasdaq National Market.

⁷ 15 U.S.C. 78o-3(b)(6).

⁸ 15 U.S.C. 78k-1(a)(1)(C)(iii).

clarify certain provisions of its listing standards. Below is the text of the proposed rule change. Proposed new language is italicized; proposed deletions are in brackets.

* * * * *

4200. DEFINITIONS

(a) For purposes of the Rule 4000 Series, unless the context requires otherwise:

(1)–(19) No change

(20) “Market Capitalization” means the closing bid price multiplied by total shares outstanding, including all common and convertible preferred shares (but excluding redeemable convertible preferred shares, other than preferred stock redeemable solely by issuer).

(20)–(36) renumbered as (21)–(37)

(b) No change

4310. Qualification Requirements for Domestic and Canadian Securities

To qualify for inclusion in Nasdaq, a security of a domestic or Canadian issuer shall satisfy all applicable requirements contained in paragraphs (a) or (b), and (c) hereof.

(a) No change

(b) No change

(c) In addition to the requirements contained in paragraph (a) or (b) above, and unless otherwise indicated, a security shall satisfy the following criteria for inclusion in Nasdaq:

(1)–(7) No change

(8)(A) A failure to meet the continued inclusion requirements for a number of market makers shall be determined to exist only if the deficiency continues for a period of 10 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 30 calendar days from such notification to achieve compliance with the applicable continued inclusion standard. *Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 30 day compliance period.*

(B) No change

(C) *A failure to meet the continued inclusion requirements for market capitalization shall be determined to exist only if the deficiency continues for a period of 10 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 30 calendar days from such notification to achieve compliance with the applicable continued inclusion standard. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 30 day compliance period.*

(9)–(24) No change

(25) Corporate Government Requirements

* * * * *

(A)–(G) No change

(H) Shareholder Approval

(i) Each issuer shall require shareholder approval of a plan or arrangement under subparagraph a. below, or prior to the issuance of designated securities under subparagraph b., c., or d. below:

a. No change

b. when the issuance or potential issuance will result in a change of control of the issuer;

c. No change

d. in connection with a transaction other than a public offering involving:

1. the sale, [or] issuance or potential issuance by the issuer of common stock (or securities convertible into or exercisable for common stock) at a price less than the greater of book or market value which together with sales by officers, directors or substantial shareholders of the company equals 20% or more of common stock or 20% or more of the voting power outstanding before the issuance; or

2. the sale, [or] issuance or potential issuance by the company of common stock (or securities convertible into or exercisable common stock) equal to 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

(ii)–(vi) No change

(26)–(28) No change

(d) No change

4320. Qualification Requirements for Non-Canadian Foreign Securities and American Depositary Receipts

To qualify the inclusion in Nasdaq, a security of a non-Canadian foreign issuer, an American Depositary Receipt (ADR) or similar security issued in respect of a security of a foreign issuer shall satisfy the requirements of paragraphs (a), (b) or (c), and (d) and (e) of this Rule.

(a)–(d) No change

(e) In addition to the requirements contained in paragraphs (a), (b) or (c), and (d), the security shall satisfy the following criteria for inclusion in Nasdaq:

(1) No change

(2)(A) No change

(B) No change

(C) No change

(D) *A failure to meet the continued inclusion requirements for market capitalization shall be determined to exist only if the deficiency continues for a period of 10 consecutive business*

days. Upon such failure, the issuer shall be notified promptly and shall have a period of 30 calendar days from such notification to achieve compliance with the applicable continued inclusion standard. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 30 day compliance period.

(E) *In the case of ADRs, the underlying security will be considered when determining the ADR's qualification for initial or continued inclusion on Nasdaq.*

(3)–(20) No change

(21) Corporate Governance Requirements

* * * * *

(A)–(G) No change

(H) Shareholder Approval

(i) Each issuer shall require shareholder approval of a plan or arrangement under subparagraph a. below, or prior to the issuance of designated securities under subparagraph b., c., or d. below:

a. No change

b. when the issuance or potential issuance will result in a change of control of the issuer;

c. No change

d. in connection with a transaction other than a public offering involving:

1. the sale, [or] issuance or potential issuance by the issuer of common stock (or securities convertible into or exercisable for common stock) at a price less than the greater of book or market value which together with sales by officers, directors or substantial shareholders of the company equals 20% or more of common stock or 20% or more of the voting power outstanding before the issuance; or

2. the sale, [or] issuance or potential issuance by the company of common stock (or securities convertible into or exercisable common stock) equal to 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

(ii)–(vi) No change

(22)–(24) No change

(f) No change

4420. Quantitative Designation Criteria

In order to be designated for the Nasdaq National Market, an issuer shall be required to substantially meet the criteria set forth in paragraphs (a), (b), (c), (d), (e), (f), or (g) below. Initial Public Offerings substantially meeting such criteria are eligible for immediate inclusion in the Nasdaq National Market upon prior application and with the written consent of the managing

underwriter that immediate inclusion is desired. All other qualifying issues, excepting special situations, are included on the next inclusion date established by Nasdaq.

(a)–(c) No change

(d) *Rights and Warrants*

(1) *Rights or warrants to purchase designated securities may be designated if [the warrants] they substantially meet the above criteria; provided, however, that they shall not be subject to the publicly held shares, market value of publicly held shares, or bid price requirements and shall not be required to meet the criteria set forth in paragraph (a)(2), (b)(2), or (c)(1) if immediately after the distribution, there are at least 450,000 rights or warrants outstanding.*

(2) No change

(e) *Computations*

The computations required by paragraph (a)(1), (a)(5), and (b)(1) shall be taken from the issuer's most recent financial information filed with Nasdaq. The computations required in paragraphs (a)(2), (a)(3), (b)(2), (b)(3), (c)(1), and (c)(2) shall be as of the date of application of the issuer. Determinations of beneficial ownership for purposes of paragraphs (a)(2), (b)(2), and (c)(1) shall be made in accordance with SEC Rule 13d–3. In the case of American Depositary Receipts, the computations required by paragraphs (a)(1), (a)(5), and (b)(1) shall relate to the foreign issuer and not to any depositary or any other person deemed to be an issuer for purposes of Form S–12 under the Securities Act of 1933. *In the case of American Depositary Receipts, the underlying security will be considered when determining the computations required by paragraphs (a)(1), (a)(2), (a)(3), (a)(5), (a)(6), (b)(1), (b)(2), (b)(3), (b)(6), (b)(7), (c)(1), (c)(2), (c)(5), and (c)(6) of this rule.*

(f)–(g) No change

4450. Quantitative Maintenance Criteria

After designation as a Nasdaq National Market security, a security must substantially meet the criteria set forth in paragraphs (a) or (b), and (c), (d), (e), and (f) below to continue to be designated as a national market system security. A security maintaining its designation under paragraph (b) need not also be in compliance with the quantitative maintenance criteria in the Rule 4300 series.

(a)–(f) No change

(g) *American Depositary Receipts*

In the case of American Depositary Receipts, the underlying security will be considered when determining the ADR's qualification for continued inclusion on

Nasdaq under paragraphs (a)(1), (a)(2), (a)(3), (a)(4), (b)(1), (b)(2), (b)(3), and (b)(5) of this rule.

4460. Non-Quantitative Designation Criteria for Issuers Excepting Limited Partnerships

(a)–(h) No change

(i) *Shareholder Approval*

(1) Each NNM issuer shall require shareholder approval of a plan or arrangement under subparagraph (A) below, or prior to the issuance of designated securities under subparagraph (B), (C), or (D) below:

(A) No change

(B) when the issuance or potential issuance will result in a change of control of the issuer;

(C) No change

(D) in connection with a transaction other than a public offering involving:

(i) the sale, [or] issuance or potential issuance by the issuer of common stock (or securities convertible into or exercisable for common stock) at a price less than the greater of book or market value which together with sales by officers, directors or substantial shareholders of the company equals 20% or more of common stock or 20% or more of the voting power outstanding before the issuance; or

(ii) the sale, [or] issuance or potential issuance by the company of common stock (or securities convertible into or exercisable common stock) equal to 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

(2)–(6) No change

(j)–(n) 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 certain clarifying, non-substantive amendments to certain

provisions of its listing standards. Specifically, the proposed changes will: (1) Define market capitalization; (2) codify the time frames for determining compliance with the continued inclusion requirements for market capitalization and number of market makers; (3) clarify the need for shareholder approval for a transaction in which the potential issuance of shares could exceed the applicable threshold; (4) codify the method used to determine whether an American Depositary Receipt complies with the listing standards; and (5) clarify the non-application of the publicly held shares, market value of publicly held shares, and bid price initial inclusion requirements to rights and warrants to be listed on the National Market.

Rule 4310(c)(2)(B)(ii) and 4450(b)(1)(A) set forth the market capitalization standards for continued inclusion on The Nasdaq SmallCap Market and the Nasdaq National Market, respectively. These rules, however, unlike the bid price requirement, do not provide time frames for determining when an issuer is non-compliant or when it has regained compliance with these standards. Accordingly, Nasdaq proposes to amend Rule 4310(c)(8)(C)⁵ to clarify that a failure to meet the market capitalization continued inclusion requirement shall result if the deficiency continues for a period of ten consecutive business days and that compliance may be regained by meeting the applicable standard for a minimum of ten consecutive business days.⁶ Furthermore, NASD rules do not define market capitalization. In making this calculation, Nasdaq has traditionally considered the market value of all common and convertible preferred stock (excluding redeemable convertible preferred shares other than preferred stock redeemable solely by the issuer).

⁵ Although the time frames regarding compliance with the continued inclusion market capitalization standards are proposed to be set forth only in Rule 4310(c)(8)(A), these time frames, like those for the minimum bid price and market value of public float, are applicable to issuers listed on both The Nasdaq SmallCap Market and the Nasdaq National Market. Specifically, the Rule 4300 Series contains the qualification requirements for all securities included in The Nasdaq Stock Market while the Rule 4400 Series sets forth additional requirements for those securities designated for the Nasdaq National Market. See Amendments No. 1 and 2, *supra* notes 3 and 4.

⁶ Although this proposed rule, like the minimum bid price requirement, states that compliance may be regained by meeting the applicable standard for a minimum of ten consecutive business days, issuers are also required to demonstrate more than mere temporary compliance in order to protect the interests of prospective investors. See, e.g., *Ryan-Murphy, Inc.*, Securities Exchange Act Rel. No. 38999 (Sept. 2, 1997).

As such, Nasdaq proposes to codify this definition in proposed Rule 4200(a)(20).

Rule 4310(c)(8)(A) provides that an issuer that fails to meet the continued inclusion requirements for the number of market makers has 30 calendar days to regain compliance. The rule, however, does not indicate how the issuer can regain compliance. Consequently, Nasdaq proposes to amend this rule to provide that compliance is achieved by meeting the applicable standard for a minimum of ten consecutive business days, which is similar to the method for determining compliance with the bid price requirement.⁷

Rules 4310(c)(25)(H)(i)(b) and (d), 4320(e)(21)(H)(i)(b) and (d), and 4460(i)(1)(B) and (D) refer only to the issuance of shares in conjunction with the requirement for shareholder approval, while Rules 4310(c)(25)(H)(i)(c)(2), 4320(e)(21)(H)(i)(c)(2), and 4460(i)(1)(C)(ii), require shareholder approval based on the present or potential issuance of shares. Nevertheless, Nasdaq has consistently interpreted the former shareholder approval rules as including potential issuances in order to protect shareholders' right to vote on significant corporate transactions. The proposed rule changes would therefore conform the language of these rules.

Historically, Nasdaq has looked to the underlying security of an American Depositary Receipt (ADR) for determining compliance with certain standards (e.g., round lot shareholders, number of shares in the public float, market value of public float, and market capitalization). Rule 4320 provides the initial and continued listing standards for ADRs, but does not make clear whether the underlying security should be considered when determining compliance. The proposed rule change would clarify the continued inclusion time frame requirements for market capitalization purposes, and the fact that the underlying security should be

considered when determining compliance in the case of ADRs.

Rule 4420(d)(1) does not currently reference the initial listing of rights on the Nasdaq National Market. Specifically, although the Nasdaq National Market continued listing standards address both warrants and rights, the initial listing standards mention only warrants. This Rule also states that warrants to purchase designated securities may be listed on the Nasdaq National Market provided that they substantially meet the initial inclusion requirements applicable to common stock. Consistent with the industry practices for pricing this type of security, Nasdaq has not historically required issuers to satisfy the publicly held shares, market value of publicly held shares, or bid price initial inclusion standards. As such, Nasdaq proposes to amend this rule to clarify that the initial inclusion rules apply to rights as well as warrants and that issuers are not required to satisfy the publicly held shares, market value of publicly held shares, or bid price initial inclusion standards with respect to rights or warrants.⁸

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act⁹ which requires, among other things, the Association's rules to be designed to prevent fraudulent and manipulative acts and practices and, in general, to protect investors and the public interest. As noted above, Nasdaq's proposed rule changes are aimed at clarifying certain listing standards, thus providing greater transparency in the rules for issuers and investors.

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.

⁸ Issuers, however, must continue to comply with the requirement that there be at least 450,000 warrants outstanding immediately after the public distribution as set forth in existing NASD Rule 4420(d)(1). This rule is also being amended to clarify existing Nasdaq policy that there must be 450,000 rights outstanding immediately after the public distribution.

⁹ 15 U.S.C. 78o-3(b)(6).

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate, up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the Association consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. 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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 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 NASD. All submissions should refer to the File No. SR-NASD-99-69 and should be submitted by June 29, 2000.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁰

Margaret H. McFarland,

Deputy Secretary.

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⁷ Although the method of regaining compliance with the continued inclusion requirement for the number of market makers is proposed to be set forth only in Rule 4310(c)(8)(A), the method for regaining compliance is applicable to issuers listed on both The Nasdaq SmallCap Market and the Nasdaq National Market. As stated previously, the Rule 4300 Series contains the qualification requirements for all securities included in The Nasdaq Stock Market while the Rule 4400 Series sets forth additional requirements for those securities designated for the Nasdaq National Market. See Amendments No. 1 and 2, *supra* notes 3 and 4.

¹⁰ 17 CFR 200.30-3(a)(12).