

would be more similar to the manner of financing the distribution of shares of mutual funds that offer shares on a continuous basis.<sup>36</sup> Additionally, NASD Regulation noted that closed-end funds that offer their shares on a periodic basis may decide to finance the distribution in a manner more similar to corporate offerings than the broker/dealer compensation methods used by mutual funds.<sup>37</sup> For these reasons, NASD Regulation does not believe that the ICI's suggested expansion of the scope of the proposal is warranted.

Additionally, NASD Regulation noted that, although some tender offer funds offer their shares continuously and periodically self-tender, these funds do not, as a matter of fundamental policy, establish that they will make periodic repurchases.<sup>38</sup> NASD Regulation explained that the discretion whether to make periodic repurchases allows a tender offer fund the flexibility to determine if it needs to continuously offer shares to replenish fund assets. Were a tender offer fund to decide to offer shares periodically, however, NASD Regulation notes that such a fund could compensate broker/dealers in the same manner as corporate issuers.<sup>39</sup> For these reasons, NASD Regulation does not propose to amend the proposal to extend the exemption to tender offer funds.

#### IV. Discussion

The Commission has reviewed carefully the NASD's proposed rule change and finds, for the reasons set forth below, the proposal is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a registered securities association, and in particular, with the requirements of Section 15A(b)(6) of the Exchange Act.<sup>40</sup>

Section 15A(b)(6) of the Exchange Act<sup>41</sup> requires that rules of a registered securities association be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and, in general, protect investors and the public interest. The proposal would require that certain closed-end funds known as "interval funds" be regulated by NASD Conduct Rule 2830(d), rather than by the limitations on underwriting

compensation in the Corporate Financing Rule. The Commission agrees that interval funds, because their manner of financing the distribution of shares are more similar to that of open-end funds, are more properly regulated by NASD Conduct Rule 2830, which regulates the distribution and sales charges of open-end funds. The proposal is narrowly construed, in that the amendment to subparagraph (b)(8)(C) of the Corporate Financing Rule would restricted to closed-end funds that make periodic repurchase offers pursuant to Rule 23c-3(b)<sup>42</sup> and offer shares on a continuous basis pursuant to Rule 415(a)(1)(xi)<sup>43</sup> under the Securities Act of 1933.<sup>44</sup> Closed-end funds that do not meet these requirements will continue to be subject to the Corporate Financing Rule. The Commission finds that allowing the requested exemption for funds that meet these limited criteria is consistent with the public interest and beneficial to investors because the distribution of interval fund shares is conducted and financed in a manner more similar to that used by open-end management investment companies, which are regulated by NASD Conduct Rule 2830(d).

The Commission has considered carefully the comments raised by the ICI, and is not persuaded that the scope of the proposal should be expanded to include interval funds that offer their shares on a periodic basis, nor that the proposed exemption should be made available to closed-end funds that operate as tender offer funds. The Commission finds that the proposal is reasonably designed to ensure that the exemption applies only to funds whose manner of financing the distribution of shares is more similar to that of mutual funds that offer shares on a continuous basis. The Commission is concerned that tender offer funds and interval funds that offer their shares periodically are marketed, and their distribution financed, in a manner more akin to corporate issuers that are subject to the Corporate Financing Rule. The Commission therefore believes that the exemption should not be expanded at this time to exempt these funds from the requirements of this rule. The Commission notes, however, that NASD Regulation stated that it prefers to gain experience regarding the financing structures of tender offer funds through the exemptive process under the Rule 9600 series, and therefore it will consider individual requests for

exemption from the requirements of the Corporate Financing Rule for these types of funds.<sup>45</sup>

#### V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>46</sup> that the proposed rule change (SR-NASD-99-74), as amended, is hereby approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>47</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-42970; File No. SR-NASD-00-31]

#### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. to Apply Nasdaq's Recently Amended Independent Director and Audit Committee Listing Requirements to Limited Partnerships

June 21, 2000.

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 26, 2000, 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 ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. 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

Nasdaq has filed with the Commission a proposed rule change to apply its recently amended independent director and audit committee listing requirements to limited partnerships. Below is the text of the proposed rule change. Proposed new language is *italicized* and proposed deletions are in [brackets].

\* \* \* \* \*

<sup>36</sup> See May 15, 2000 letter from Suzanne E. Rothwell, Chief Counsel, Corporate Financing, NASD Regulation to Katherine A. England, Assistant Director, Division, SEC ("NASD Regulation Letter").

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> 15 U.S.C. 78o-3(b)(6).

<sup>41</sup> *Id.*

<sup>42</sup> 17 CFR 270.23c-3(b).

<sup>43</sup> 17 CFR 230.415(a)(1)(xi).

<sup>44</sup> 15 U.S.C. 77a et seq.

<sup>45</sup> See NASD Regulation Letter at page 2.

<sup>46</sup> 15 U.S.C. 78s(b)(2).

<sup>47</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.

**Rule 4470. Non-Quantitative Designation Criteria for Issuers That Are Limited Partnerships**

(a) No change.

(b) No change.

(c) Corporate General Partner/Independent Directors.

Each [NNM] issuer that is a limited partnership shall maintain a corporate general partner or co-general partner, which shall have the authority to manage the day-to-day affairs of the partnership. Such corporate general or co-partner shall maintain [two independent directors on its board of directors] *a sufficient number of independent director son its board of directors to satisfy the audit committee requirements set forth in Rule 4460(d)(2)*. [An issuer that is a limited partnership may be designated for inclusion in the Nasdaq National market upon demonstrating that it has one independent director and undertaking to elect a second such director within 12 month of designation. For purposes of this section, "independent director" shall mean a person other than an officer or employee of the company or its subsidiaries or any other individual having a relationship which, in the opinion of the board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director.]

(d) Audit Committee.

The corporate general partner or co-general partner of each [NNM] issuer that is a limited partnership [shall establish and maintain an Audit Committee, a majority of the members of which shall be independent directors.] *must satisfy the audit committee requirements set forth in Rule 4460(d)*.

(e)-(i) 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**

In 1993, Nasdaq established corporate governance standards, including independent director and audit committee requirements, for limited partnerships that were similar to those for other issuers. Last year, the Commission approved amendments to the independent director and audit committee listing requirements for corporations quoted on Nasdaq.<sup>3</sup> Nasdaq believes that although there are few limited partnerships currently quoted on Nasdaq, the new independent director and audit committee requirements should also be applied to limited partnerships to provide investors with the same protections enjoyed by the shareholders of other issuers. Therefore, Nasdaq is proposing this rule change to extend the recent amendments to its independent director and audit committee listing standards for corporations to limited partnerships.

*Implementation.* In order to minimize disruption to existing limited partnership audit committees, to permit current audit committee members to serve out their terms, and to allow adequate time for the recruitment of the requisite members, Nasdaq proposes to provide limited partnerships eighteen months after the proposed rule change is approved by the Commission to meet the audit committee structure and membership requirements.

Additionally, Nasdaq proposes that limited partnerships listed on the effective date of the rule be provided within six months following the date the proposed rule change is approved by the Commission to adopt a formal written audit committee charter.

Further, for limited partnerships that applied for listing prior to the effective date of the rule, Nasdaq proposes that they be able to qualify for listing under the listing standards in force at the time of their application, and receive the same grace periods provided to current limited partnerships. Also, in order to avoid prejudicing limited partnerships that transfer to Nasdaq from the American Stock Exchange LLC and the New York Stock Exchange, it is proposed that these limited partnerships be afforded the same grace periods they would have received under their previous market's implementation schedule.

<sup>3</sup> See Securities Exchange Act Release No. 42231 (December 14, 1999), 64 FR 71523 (December 21, 1999).

**2. Statutory Basis**

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act<sup>4</sup> because the proposal is designed to prevent fraudulent and manipulative acts and practices, to protect investors and the public interest. As noted above, Nasdaq's proposed rule change is aimed at improving the effectiveness of audit committees of limited partnerships quoted on Nasdaq, which, Nasdaq believes, is consistent with these goals.

*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 to 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 self-regulatory organization 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, 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

<sup>4</sup> 15 U.S.C. 78o(b)(6).

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-00-31 and should be submitted by July 18, 2000.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>5</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-42971; File No. SR-NYSE-00-24]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Revisions to the Exchange's FORM AP-1 Application

June 21, 2000.

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 25, 2000, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") 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 Exchange proposed to revise its FORM AP-1 (Approved Person Application Form). The text of the proposed rule change is available upon request from the Office of the Secretary, the Commission or the NYSE.

#### 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 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 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

NYSE Rule 304(h) requires that "[a]ny person who controls a member or member organization, or who engages in a securities or kindred business and is controlled by or under common control with a member or member organization but is not a member or allied member or an employee of a member organization shall apply for approval by the Exchange as an approved person. \* \* \* The approval process requires that certain pertinent information about the approved person Applicant be provided to the Exchange for review. FORM AP-1 is used by Applicants who are entities and FORM U-4 is completed by natural person Applicants.

The Exchange is proposing several revisions to FORM AP-1, which will require additional information and otherwise enhance its effectiveness for reviewing, approving, and monitoring Approved Persons.

The proposed substantive revisions to FORM AP-1:

- Require greater detail regarding both the nature of an Applicant's business and the Applicant's relationship with the member organization (items 7A and 9A-C of the Form);
- Require the Applicant, promptly upon request, to provide the Exchange with updated financial and other information (Instruction Sheet, No. 12);
- Require the Applicant, if a registered broker/dealer, to submit a copy of its most recent FOCUS Report (Instruction Sheet, No. 10);
- Continue the effectiveness of the Applicant's FORM AP-1 agreements with the Exchange notwithstanding that the named member or member organization has changed its name or legal form (p. 4 of the Form, 5th paragraph); and
- Require that a copy of a complete organization chart of Applicant and its affiliates be provided Instruction Sheet, No. 9).

The proposed revisions (Form items 7A and 9A-C) will provide Exchange staff with more detailed information

regarding the relationship between the member organization and approved person, enabling a more thorough evaluation of the Applicant (e.g., the Form asks for a general description of the Applicant's business and requires Applicant to indicate specifically how it controls, is controlled by or under common control with the member or member organization).

The proposed revisions clarify circumstances under which an Applicant must file financial statements (Instruction Sheet, No. 8). Item 12 of the Form asks the Applicant to submit to the Exchange its most recent balance sheet and income or profit and loss statement if the Applicant: (a) Controls the member organization; (b) is a subsidiary of the member organization for purposes of NYSE Rule 321 or its obligations or liabilities are guaranteed, endorsed or assumed by the member organization (under NYSE Rule 322); or (c) is a "Material Associated Person" as the term is used in Rule 17h-1T under the Act. The Exchange believes that in most cases there is no regulatory purpose served by requiring submission of financial statements of persons under common control unless, as previously indicated, the person is a "Material Associated Person." The Exchange, however, reserves the right to request current financial statements from applicants under common control. The Form also provides clarification that when financial statements are required to be submitted, they must be current, and clarification of the Exchange's right to request updated financial and other information. Approved person Applicants that are registered broker-dealers must submit copies of their most recent FOCUS report (Instruction Sheet, No. 10).

The revised Form contains a new provision which states that the Applicant agrees that the statements, warranties, representations and undertakings [in the Form] will continue to apply notwithstanding a change to the member organization's name, form of organization, or legal status (but retains same SEC B/D number). This will eliminate the need for more frequent refilings of FORM AP-1 (see page 4 of the Form, 5th paragraph).

To clarify the relationship between the Applicant and the member organization, a complete organization chart of the Applicant and its affiliates must be submitted with the Form (Instruction Sheet, No. 9). An organization chart may also identify other entities which should be approved persons.

<sup>5</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.