

impediments to a free and open market and to protect investors and the public interest.

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

The CBOE does not believe that the proposed rule change will impose any burden on competition.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

**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 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 CBOE. All submissions should refer to File No. SR-CBOE-00-21 and should be submitted by November 9, 2000.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>6</sup>

**Jonathan G. Katz,**  
Secretary.

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-43435; File No. JR-NASA-99-69]

**Self-Regulatory Organizations; Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 3 Thereto by the National Association of Securities Dealers, Inc. Amending Certain Listing Standards of the Nasdaq Stock Market, Inc.**

October 11, 2000.

**I. Introduction**

On November 22, 1999, the National Association of Securities Dealers, Inc. ("NASA" or "Association"), through its wholly owned subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), submitted to the Securities and Exchange Commission ("SEC" or "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 amending certain Nasdaq listing standards. The Association submitted Amendments No. 1<sup>3</sup> and No. 2<sup>4</sup> to the

proposed rule change on April 10, 2000, and April 27, 2000, respectively. The proposed rule change was published in the **Federal Register** for comment on June 7, 2000.<sup>5</sup> The Association submitted Amendment No. 3 to the proposed rule change on October 5, 2000.<sup>6</sup> This order approves the proposed rule change, as amended by Amendments No. 1 and 2, and grants accelerated approval to Amendment No. 3.

**II. Description of the Proposed Rule Change**

Nasdaq is proposing to amend its listing standards to: (1) Codify the time frames for determining compliance with the continued inclusion requirements for market capitalization and number of market makers; (2) clarify the need for shareholder approval for a transaction in which the *potential* issuance of shares could exceed the applicable threshold; (3) codify the method used to determine whether an American Depository Receipt complies with the listing standards; (4) clarify that rights are subject to initial inclusion standards; (5) clarify that the publicly held shares, market value of publicly held shares, and bid price initial inclusion requirements do not apply to rights and warrants to be listed on the Nasdaq National Market.

*Compliance With the Continued Inclusion Requirements for Market Capitalization and Number of Market Makers*

Rules 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)<sup>7</sup>

sets forth additional requirements for those securities designated for the Nasdaq National Market.

<sup>5</sup> Securities Exchange Act Release No. 42876 (May 31, 2000), 65 FR 36198.

<sup>6</sup> See Letter to Jack Drogin, Senior Special Counsel, Division, Commission, from John Nachman, Nasdaq, dated October 4, 2000 ("Amendment No. 3"). Amendment No. 3 withdraws proposed Rule 4200(a)(20), which defines market capitalization, and rennumbers the remaining provisions of Rule 4200(a) accordingly.

<sup>7</sup> 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

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<sup>6</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 Letter to Jack Drogin, Senior Special Counsel, Division of Market Regulation ("Division"), 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 clarifies 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.

<sup>4</sup> See Letter to Jack Drogin, Senior Special Counsel, Division, 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

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.<sup>8</sup>

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.<sup>9</sup>

#### *Shareholder Approval for the Potential Issuance of Shares*

Rules 4310(c)(25)(i)(b) and (d), 4320(e)(21)(G)(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 stated that it 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 to clarify that shareholder approval is required based on the present or potential issuance of shares.

Nasdaq SmallCap Market and the Nasdaq National Market. See Amendments No. 1 and 2, *supra* notes 3 and 4.

<sup>8</sup> 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).

<sup>9</sup> 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. See Amendments No. 1 and 2, *supra* notes 3 and 4.

#### *Changes to Reflect the Underlying Security for ADRs*

Historically, Nasdaq states that it 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). According to Nasdaq, 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 whether these standards have been met. The proposed rule change would clarify that the underlying security should be considered when determining compliance in the case of ADRs. In addition, the proposed rule change would clarify the continued inclusion time frame requirements for ADRs for market capitalization purposes.

#### *Rights and Warrants*

Rule 4420(d)(1) does not currently reference the initial listing of rights on the Nasdaq National Market. 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 states that it 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.<sup>10</sup>

### **III. Discussion**

The Commission finds that the proposed rule change is consistent with section 15A of the Act<sup>11</sup> and the rules and regulations applicable to a national securities association. In particular, the Commission finds the proposed rule change is consistent with section 15A(b)(6) of the Act,<sup>12</sup> which requires

<sup>10</sup> 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.

<sup>11</sup> 15 U.S.C. 78o-3.

<sup>12</sup> 15 U.S.C. 78o-3(b)(6).

the rules of an association to be designed 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.<sup>13</sup>

Preliminarily, the Commission notes that the development and enforcement of adequate standards governing the listing of securities on an exchange is of critical importance to our financial markets and to the investing public. Listing standards serve as a means for a self-regulatory organization to screen issuers and to provide listed status only to bona fide companies with, among other things, substantial float, investor base and trading interest to ensure sufficient liquidity for fair and orderly markets. Additionally, the development and adherence to listing maintenance standards are equally as important. Once an issuer has been approved for listing, ongoing monitoring of the status and trading characteristics of that issuer ensures that standards for trading depth and liquidity are continually met, again to the benefit of the investing public. Finally, the Commission notes that initial listing and maintenance standards that are not sufficiently clear may not benefit issuers, the public interest, or our capital markets and indeed may impede a free and open market. Therefore, the Commission believes that the proposed rule change will promote the purposes of the Act by explicitly codifying and clarifying certain provisions of Nasdaq's listing and maintenance standards.

#### *Compliance With the Continued Inclusion Requirements for Market Capitalization and Number of Market Makers*

The Commission finds that setting forth the specific time frames for determining noncompliance and regaining compliance with Nasdaq's continued inclusion standards relating to the number of market makers and market capitalization removes impediments to and perfect the mechanism of a free and open market. As currently stated, the continued inclusion standards related to the number of market makers only discusses the time frame for determining when a failure to meet the standards exists; reference to time frames for determining subsequent compliance by the issuer is missing. Similarly, the continued inclusion standards related to market

<sup>13</sup> In approving this rule change, the Commission has considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

capitalization set forth neither the time frames for determining non-compliance nor compliance. Thus, the proposed rule change provides additional information that is critical to the determination of an issuer's continuing compliance with the standards relating to the number of market makers and market capitalization should an issuer fail to comply with either category.

#### *Shareholder Approval for the Potential Issuance of Shares*

Making clear that shareholder approval is required in the case of actual or potential issuance of shares promotes just and equitable principles of trade, and removes an impediment to and perfects the mechanism of a free and open market and a national market system. The Commission notes that Nasdaq has consistently interpreted the shareholder approval rules to include the potential issuance of shares and therefore the proposed rule change explicitly codifies accepted practice. Additionally, the Commission finds that requiring shareholder approval for the potential issuance of shares protects a shareholder's ability to vote on a significant corporate transaction that might affect the rights of the voting shareholder.

#### *Changes to Reflect the Underlying Security for ADRs*

The proposed rule change relating to the requirement that the underlying security be considered in determining compliance with initial or continued listing standards is appropriate because Nasdaq has consistently looked to the security underlying an ADR in other contexts involving ADRs (e.g., determining round lot shareholders, number of shares in the public float, market value of public float, and market capitalization). Thus, the proposed rule change removes an impediment to and perfects the mechanism of a free and open market by conforming the analysis of whether an ADR meets the initial or continued listing standards to other situations involving ADRs, and explicitly making clear that Nasdaq should consider the security underlying the ADR. The proposed rule change also protects the mechanism of a free and open market by explicitly stating the continued listing requirement time frames for ADRs.

#### *Rights and Warrants*

Finally, the Commission believes that the proposed rule change clarifying that rights as well as warrants are subject to the initial listing standards of Nasdaq Rule 4420(d)(1) will protect investors and the public interest. The

Commission notes that the continued listing standards address both rights and warrants,<sup>14</sup> and thus the proposed rule change rightly conforms the initial listing standards to the continued listing standards. Furthermore, the Commission finds that clarifying that rights and warrants need not meet the publicly held shares, market value of publicly held shares, or bid price initial listing standards is in the public interest because Nasdaq has represented that industry practices for pricing rights and warrants are such that Nasdaq has not historically required issuers to satisfy these requirements. Thus, the proposed rule change clarifies that these standards are not applicable to rights and warrants. Furthermore, the Commission notes that rights and warrants will be to satisfy all other initial inclusion requirements before they can be listed on Nasdaq, which should help to ensure that only bona fide companies with substantial float, investor base, and trading interest list rights and warrants on Nasdaq.

#### *Accelerated Approval of Amendment No. 3*

The Commission believes that it is consistent with the protection of investors and the public interest and therefore finds good cause for approving Amendment No. 3 to proposed rule change prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. Amendment No. 3 merely withdraws the portion of the proposed rule change that defines market capitalization to enable Nasdaq to more carefully consider how it wants to define the term without delaying approval of the remaining provisions of the proposed rule change.

#### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 3, including whether the amendment 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 submissions, 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 at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to the File No. SR-NASD-99-69 and should be submitted by November 9, 2000.

#### **V. Conclusion**

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder.

*It Is Therefore Ordered*, pursuant to section 19(b)(2) of the Act,<sup>15</sup> that the amended proposed rule change (SR-NASD-99-69) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>16</sup>

**Jonathan G. Katz,**  
Secretary.

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#### **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-43429; File No. SR-NYSE-00-42]

#### **Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange, Inc. Extending the Pilot Fee Structure Governing the Reimbursement of Member Organizations for Costs Incurred in the Transmission of Proxy and Other Shareholder Communications Materials**

October 10, 2000.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> (the "Act") and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 10, 2000, the New York Stock Exchange, Inc. ("Exchange" or "NYSE") 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 the NYSE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

<sup>16</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>14</sup> See Nasdaq Rule 4450(d).