

Institution and settlement of administrative proceedings of an enforcement nature

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 942-7070.

Dated: October 10, 2000.

**Jonathan G. Katz,**  
Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-43420; File No. SR-NASD-00-50]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to the Definition of "Public Offering" for Purposes of Nasdaq's Shareholder Approval Rules

October 6, 2000.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on August 11, 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 ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD.<sup>2</sup> On October 4, 2000, the Nasdaq filed Amendment No. 1 to the proposed rule change.<sup>3</sup> 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 is filing with the Commission a proposed rule change regarding the

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

<sup>2</sup> The American Stock Exchange, Inc. has filed a similar proposed rule change SR-Amex-00-46. See Securities Exchange Act Release No. 43419 (Oct. 6, 2000).

<sup>3</sup> Amendment No. 1 changes the section under which the proposed rule change was filed from Section 19(b)(3) to Section 19(b)(2) of the Act and made other technical changes. See Letter from Edward Knight, Executive Vice President and Chief Legal Officer, Nasdaq, to Katherine A. England, Assistant Director, SEC (Oct. 2, 2000).

adoption of interpretive material defining "Public Offering" for purposes of Nasdaq's shareholder approval rules. Below is the text of the proposed rule change. All text is being added.

\* \* \* \* \*

#### IM-4310-2. Definition of a Public Offering

Marketplace Rules 4310(c)(25)(G)(i)(d), 4320(e)(21)(G)(i)(d), and 4460(i)(1)(D) provide that shareholder approval is required for the issuance of common stock (or securities convertible into or exercisable for common stock) equal to 20 percent or more of the common stock or 20 percent or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock. Under these rules, however, shareholder approval is not required for a "public offering."

Issuers are encouraged to consult with Nasdaq staff in order to determine if a particular offering is a "public offering" for purposes of the shareholder approval rules. Generally, a firm commitment underwritten securities offering registered with the Commission will be considered a public offering for these purposes. Likewise, any other securities offering which is registered with the Commission and which is publicly disclosed and distributed in the same general manner and extent as a firm commitment underwritten securities offering will be considered a public offering for purposes of the shareholder approval rules. However, Nasdaq staff will not treat an offering as a "public offering" for purposes of the shareholder approval rules merely because they are registered with the Commission prior to the closing of the transaction.

When determining whether an offering is a "public offering" for purposes of these rules, Nasdaq staff will consider all relevant factors, including but not limited to:

(i) the type of offering (including whether the offering is conducted by an underwriter on a firm commitment basis, or an underwriter or placement agent on a best-efforts basis, or whether the offering is self-directed by the issuer);

(ii) the manner in which the offering is marketed (including the number of investors offered securities, how those investors were chosen, and the breadth of the marketing effort);

(iii) the extent of the offering's distribution (including the number and identity of the investors who participate in the offering and whether any prior relationship existed between the issuer and those investors);

(iv) the offering price (including the extent of any discount to the market price of the securities offered); and

(v) the extent to which the issuer controls the offering and its distribution.

\* \* \* \* \*

#### 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 NASD 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 NASD 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

##### (a) Purpose

Nasdaq rules require shareholder approval for stock issuances of 20 percent or more of an issuer's total shares outstanding, offered at less than the greater of book or market value. The applicable rules further provide, however, that shareholder approval is not required for a "public offering," although that term is not defined in the rules. Recently, a number of issuers have inquired as to whether certain large, below-market offerings were "public offerings" because the transactions, which were initiated pursuant to exceptions to the registration requirements, were registered with the Commission prior to closing the transactions.<sup>4</sup> Historically, for purposes of assessing the applicability of the shareholder approval rules, Nasdaq staff has interpreted "public offering" as a broadly distributed, registered offering based on a firm commitment underwriting. Conversely, staff does not consider a transaction to be a "public offering" for these purposes when the transaction is of limited distribution and/or is not based on a firm commitment underwriting, even if the offering was registered. Because the offerings described had limited distributions and, in some cases, the offerees were pre-determined by the issuer, Nasdaq believed that these transactions were not "public offerings" for purposes of the shareholder approval rules.

In order to ensure that all issuers understand how Nasdaq will determine whether a transaction is a "public offering" for purposes of the shareholder approval rules, Nasdaq has prepared the proposed Interpretative Material. Determinations as to whether a transaction is a "public offering" for purposes of these rules will be made based on the facts and circumstances surrounding each particular transaction.

<sup>4</sup> Nasdaq understands that the Commission believes that this activity is not appropriate under Section 5 of the Securities Act of 1933. See 15 U.S.C. 77e.

The proposed Interpretative Material identifies a number of factors that will be considered when determining whether an offering is a "public offering," including: the type of offering; the marketing of the offering; the extent of the offering's distribution; the offering price; and the extent to which the issuer controls the offering and its distribution.

#### (b) Statutory Basis

The NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6)<sup>5</sup> of the Act, which requires, among other things, that the Association's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Interpretative Material is designed to educate issuers and other interested parties as to how Nasdaq defines a "public offering" in order to ensure that issuers are aware as to which transactions require shareholder approval under the NASD's rules, thus promoting just and equitable principles of trade and protecting investors and the public interest.

#### (B) Self-Regulatory Organization's Statement on Burden on Competition

The NASD 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

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 NASD 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. 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-00-50 and should be submitted by November 3, 2000.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 00-26381 Filed 10-12-00; 8:45 am]

**BILLING CODE 8010-01-M**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-43417; File No. SR-NASD-00-16]

### Self-Regulatory Organizations; Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 3 to Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Amendments to Minimum Listing Requirements for the Inclusion and Maintenance of Open and Closed-End Funds in Nasdaq's Mutual Fund Quotation Service

October 5, 2000.

#### I. Introduction

On April 4, 2000, the National Association of Securities Dealers, Inc. ("NASD") through its wholly owned subsidiary The Nasdaq Stock Market, Inc. ("Nasdaq") filed with 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 relating to amendments to the minimum listing requirements for the inclusion and maintenance of open and closed-end funds in Nasdaq's Mutual Fund Quotation Service ("MFQS" or "Service").<sup>3</sup> On May 16, 2000, the Nasdaq submitted Amendment No. 2 to the proposed rule change.<sup>4</sup> The proposed rule change was published in the **Federal Register** on June 5, 2000.<sup>5</sup> On September 29, 2000, the Nasdaq submitted Amendment No. 3 to the proposed rule change.<sup>6</sup> No comments were received on the proposal. This order approves the proposed rule change, as amended. Also, Amendment No. 3 is approved on an accelerated basis.

#### II. Description of the Proposal

Nasdaq proposes to amend NASD Rule 6800 regarding the minimum listing requirements for the inclusion and maintenance of open and closed-end funds in Nasdaq's Mutual Fund Quotation Service ("MFQS"). Proposed new language is in italics; proposed deletions are in brackets.

\* \* \* \* \*

#### 6800. MUTUAL FUND QUOTATION SERVICE

(a)-(b) No Change.

(c) News Media Lists.

(1)(A) An eligible open end fund shall be authorized for inclusion in the News Media List released by the Association if it has at least 1,000 shareholders or \$25 million in net assets.

(B) An eligible closed-end fund shall be authorized for inclusion in the News Media List released by the Association if it has at least \$60 [100] million in net assets.

(C) Compliance with subparagraphs (1)(A) and (B) shall be certified by the fund to the Association at the time of initial application for inclusion in the List.

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

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> The NASD filed its proposed rule change on March 31, 2000. On April 4, 2000, the NASD filed Amendment No. 1 that entirely replaced the original rule filing.

<sup>4</sup> See Letter from Rober E. Aber, General Counsel and Senior Vice President, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission (May 16, 2000). Amendment No. 2 corrected a typographical error that appeared in the proposed rule language and clarified that the Mutual Fund Quotation Service includes only 73.8% of the total open-end and closed-end fund population.

<sup>5</sup> Securities Exchange Act Release No. 42831 (May 25, 2000), 65 FR 35693.

<sup>6</sup> See Letter from Edward S. Knight, General Counsel and Senior Vice President, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission (September 29, 2000). Amendment No. 3 amended the language of proposed NASD Rule 6800(d)(3) to replace the phrase "investment management firm managing the fund" with "investment adviser" and make other technical corrections.

<sup>5</sup> 15 U.S.C. 78o-3(b)(6).

<sup>6</sup> 17 CFR 200.30-3(a)(12).