

settlement process of DTC. The enhancement will enable settling banks to use the Federal Reserve Bank's ("Fed") National Net Settlement Service ("NSS") as an alternative vehicle to satisfy their net-net debit balances at DTC.² As described more fully below, NSS permits DTC to submit instructions to have the Fed accounts of participating settling banks charged for their DTC net-net debit balance. Utilization of NSS will serve to eliminate the need for a settling bank to initiate a wire to DTC's Fed Account in satisfaction of a net-net debit balance and therefore will reduce the risk a settling bank may incur a late payment fee due to a delay in wiring funds to DTC. Fees connected with DTC's end-of-day settlement process remain unchanged with respect to the NSS enhancements.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, DTC 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. DTC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.³

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to provide settling banks with additional flexibility in the end-of-day settlement process of DTC. Currently, settling banks settle their DTC end-of-day net-net balances over the Fedwire system. If, however, a settling bank chooses to utilize NSS, once the settling bank acknowledges its net-net debit balances, DTC will transmit a file to the Fed with instructions to charge the participating settling bank with a net-net debit.⁴ DTC will receive a message from the Fed when the file is successfully processed and balances updated. If a settling bank's Fed account does not have sufficient funds to complete the charge, DTC will be

notified by the Fed, and DTC will contact the settling bank directly to obtain required funding.

DTC believes that the proposed rule change is consistent with the requirements of Section 17A of the Act⁵ and the rules and regulations thereunder applicable to DTC because the proposed rule change will give participants more efficient usage of DTC's settlement processes. The proposed rule change will be implemented consistently with the safeguarding of securities and funds in DTC's custody or control or for which it is responsible because the new operation of DTC's settlement processes, as modified by the proposed rule change, will enhance the current operation of the function.

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

DTC perceives no adverse impact on competition by reason of the proposed rule change.

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

The proposed rule change has been developed through discussions with several participants. Written comments from participants or others have not been solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(iii)⁶ of the Act and Rule 19b-4(f)(4)⁷ promulgated thereunder because the proposal effects a change in an existing service of a registered clearing agency that does not adversely affect the safeguarding of securities or funds in the custody or control of the clearing agency or for which it is responsible and does not significantly affect the respective rights or obligations of the clearing agency or persons using the service. At any time within sixty days of the filing of such 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 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 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 Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of DTC.

All submissions should refer to File No. SR-DTC-01-02 and should be submitted by May 8, 2001.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.⁸

Jonathan G. Katz,
Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44174; File No. SR-NASD-00-78]

Self Regulatory Organizations; Order Approving Proposed Rule Change by the National Association of Securities Dealers, Inc. Amending the Nasdaq By-Laws

April 11, 2001.

I. Introduction

On January 22, 2001, the National Association of Securities Dealers, Inc. ("NASD") through its 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"),¹ and Rule 19b-4 thereunder,² a

² DTC implemented NSS on February 5, 2001. Thirteen settling banks currently use the service.

³ The Commission has modified the text of the summaries prepared by DTC.

⁴ Settling banks in a net-net credit situation will continue to be credited via the Fedwire system outside of NSS in accordance with DTC's current procedures.

⁵ 15 U.S.C. 78q-1.

⁶ 15 U.S.C. 78s(b)(3)(A)(iii).

⁷ 17 CFR 240.19b-4(f)(4).

⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

proposed rule change amending the Nasdaq By-Laws. The proposed rule change was published for comment in the **Federal Register** on February 8, 2001.³ On February 8, 2001, Nasdaq filed Amendment No. 1 with the Commission.⁴ The Commission received no comments on the proposal. This order approves the proposal, as amended.

II. Description of the Proposal

Nasdaq proposes to amend its By-Laws regarding the Nasdaq Board of Directors (the "Board") by designating up to two officers of Nasdaq who will be treated as "neutral" Board members for classification and composition purposes. Nasdaq also proposes to create new Nasdaq Management Compensation, Audit, and Nominating Committees, and to amend its By-law provisions regarding the composition and operation of certain other Nasdaq committees. Finally, Nasdaq seeks to make certain changes to conform its By-Laws to Delaware law and to reflect the new corporate relationship between the NASD and Nasdaq.

The proposed rule change further implements the Restructuring Plan approved by NASD members on April 14, 2000 (the "Restructuring").⁵ The Restructuring broadens the ownership in Nasdaq through a two-phase private placement of common stock and warrants to NASD members, Nasdaq issuers, and certain others. Prior to the private placement, the NASD owned 100 percent of Nasdaq. Now after the closing of the private placement, Nasdaq has numerous shareholders, but the NASD retains voting control over Nasdaq. Concurrent with the ongoing Restructuring, Nasdaq submitted an application to the Commission to register as a national securities exchange ("Form 1") under section 6 of the Act.⁶ Prior to its registration as a national securities exchange, however, Nasdaq

will continue to operate under the Plan of Allocation and Delegation of Functions by the NASD to its Subsidiaries (the "Delegation Plan"), as approved by the Commission.⁷ Nasdaq is also subject to the provisions and requirements of the NASD's August 8, 1996 settlement order with the Commission ("1996 Order").⁸

Summary of Amendments

Article I

Article IV, Section 4.3 of the Nasdaq By-Laws requires that the number of Non-Industry Directors equal or exceed the number of Industry Directors. Currently, Nasdaq officers who serve on the Board are treated as Industry Directors for purposes of calculating the compositional balance of the Nasdaq Board. Nasdaq proposes that up to two officers of Nasdaq who may be elected to the Board be treated as "neutral" for purposes of calculating the balance between Industry and Non-Industry Directors. To effectuate this change, Nasdaq proposes to exclude from the definitions of Industry Director and Non-Industry Director up to two Nasdaq officers who are elected to the Board (the "Staff Directors"). Thus, if the stockholders elect one or two Nasdaq officers to the Board, they would be deemed "neutral" Staff Directors and would not be included in calculating the balance between Industry and Non-Industry Directors on the Nasdaq Board. If the stockholders elect three or more officers to the Board, then the Board, in its discretion, would designate two of the officers as "neutral" Staff Directors and the others would be considered Industry Directors for compositional purposes.

Article IV

Nasdaq proposes to modify its By-Law provision establishing the balancing requirements between Industry and Non-Industry Directors, by removing references to Nasdaq officers who may be elected to the Board. The effect of this amendment, in conjunction with the amendments to the definitions of Industry and Non-Industry Directors described above, would be to ensure that the two "neutral" Staff Directors are not counted when calculating the Industry/Non-Industry balance of the Board.

In addition, certain Nasdaq By-Laws relating to committees currently require resolutions to be adopted by a majority vote of the whole Board (*e.g.*, to appoint, fill vacancies, fix the term of office of a committee member, or remove a committee member). Nasdaq proposes to remove this high vote requirement because it is no longer required for Nasdaq under applicable Delaware law. Under the amended By-Laws, only a vote of the Board would be necessary to adopt such resolutions.

Nasdaq also proposes several amendments to section 4.13 relating to committees. Nasdaq proposes to create a new Nominating Committee, Management Compensation Committee, and Audit Committee. Currently the NASD Nominating Committee nominates candidates for the Nasdaq Board and the Nasdaq Listing and Review Council.⁹ In light of the broadening of the ownership of Nasdaq, Nasdaq proposes that a committee of its Board, rather than a committee of the board of the NASD, would be the appropriate nomination body for Nasdaq.¹⁰ Nasdaq has also proposed to make conforming amendments throughout its By-Laws to replace references to the NASD's National Nominating Committee with references to Nasdaq's Nominating Committee.¹¹ The new Audit and Management Compensation Committees each require that the majority of Committee members be Non-Industry Directors, and the Nominating Committee requires that the number of Non-Industry members on the Committee equal or exceed the number of Industry members on the Committee. With respect to the existing Nasdaq Executive and Finance Committees, Nasdaq proposes to remove limitations on the size of these committees. As currently provided in the By-Laws, the Executive Committee would continue to have balancing requirements for industry, Non-Industry, and Public Directors, but no such requirements would apply to the Finance Committee.

Under Delaware law, the Board of a stockholder-owned corporation must appoint the Directors who serve on Board committees. Moreover, Board committees must be comprised solely of Directors to be validly constituted as

³ Securities Exchange Act Release No. 43914 (January 31, 2001), 66 FR 9615 (February 8, 2001).

⁴ Letter from Mary M. Dunbar, Vice President, Nasdaq, to Katherine England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated February 8, 2001 ("Amendment No. 1"). Amendment No. 1 redesignated the term "Amex" as "Article I(u)" rather than "Article I(v)." This is a technical amendment and is not subject to notice and comment.

⁵ On June 26, 2000, the Commission approved a number of changes to the Nasdaq By-Laws to implement the Restructuring. See Securities Exchange Act Release No. 42983 (June 26, 2000), 65 FR 41116 (July 3, 2000).

⁶ Nasdaq originally filed its Form 1 with the Commission on November 9, 2000. However, Nasdaq's initial Form 1 submission was incomplete, and therefore on March 15, 2001, Nasdaq submitted additional documents to address the deficiencies. Thus Nasdaq's Form 1 was not officially filed with the Commission until March 15, 2001.

⁷ After exchange registration, Nasdaq will no longer be governed pursuant to the Delegation Plan.

⁸ See Order Instituting Public Proceedings Pursuant to section 19(h)(1) of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions, Securities Exchange Act Release No. 37538 (August 8, 1996) ("1996 Order").

⁹ NASD By-Laws Article VII, section 9.

¹⁰ The NASD has proposed changes to its By-Laws to reflect this new procedure for electing Nasdaq Board members. See Securities Exchange Act Release No. 44004 (February 26, 2001), 66 FR 13601 (March 6, 2001) (SR-NASD-01-06) and Special NASD Notice to Members 00-90.

¹¹ Nasdaq By-Laws Article I(p); Article III, sections 3.1, 3.2; Article IV, section 4.8; and Article V, sections 5.3, 5.8.

such under Delaware law. Therefore, Nasdaq proposes to remove the By-Law provision that requires the Nasdaq Chief Executive Officer to serve on the Executive and Finance Committees because it is inconsistent with the Board's exclusive authority in this respect and inconsistent with the requirement that such committees be comprised solely of Directors. In the future, any Nasdaq officer elected to the Board may be appointed to these Committees.

Article VII

Section 7.1 currently provides that none of the principal officers of Nasdaq, except the Chair and Chief Executive Officer, need to be Directors. Nasdaq proposes to remove the reference to the Chief Executive Officer to provide the flexibility to have a Chief Executive Officer who is not a Director.

Other Changes To Conform the By-Laws to Nasdaq's New Corporate Relationship With the NASD; To Delete Unused Terms; and To Conform Nasdaq's By-Laws With Delaware Law

Other changes to the By-Laws are made to reflect Nasdaq's new ownership structure and to institute procedures necessary for Nasdaq to operate as a corporation. For example, Nasdaq proposes to delete Section 4.3 of Article IV, which requires that certain Directors be drawn from candidates proposed to the National Nominating Committee by a majority of the Non-NASD stockholders of Nasdaq. This provision is no longer operative because Nasdaq has already solicited the recommendations of the non-NASD stockholders and has mailed a ballot to non-NASD stockholders asking them to vote on such candidates. Also, definitions for "Amex Floor Governors," "Nasdaq-Amex," and "Amex Board" are deleted because the terms are no longer used in the Nasdaq By-Laws. Finally, Nasdaq proposes certain amendments to the By-Laws to conform to applicable Delaware law. For example, under Article IV, Section 4.16, Nasdaq Directors would now be permitted to take action without a meeting.

III. Discussion

The Commission has reviewed the NASD's proposed rule change and finds, for the reasons set forth below, that the proposal is consistent with the requirements of section 15A of the Act¹² and the rules and regulations thereunder applicable to a national

securities association.¹³ Specifically, the Commission believes the proposal is consistent with Sections 15A(b)(2), (b)(4) and (b)(6) of the Act.¹⁴ Section 15A(b)(2)¹⁵ requires that the association be so organized and have the capacity to be able to carry out the purpose of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the provisions of the Act.¹⁶ Section 15A(b)(4)¹⁷ requires that the rules of an association assure a fair representative of its members in the selection of its Directors and administration of its affairs and provide that one or more Directors shall be representative of issuers and investors and not be associated with a member of the association, broker, or dealer.¹⁸ Section 15A(b)(6)¹⁹ 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, 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.²⁰ The proposed rule change is also consistent with the Delegation Plan, and ensures that Nasdaq continues to meet its obligations under the 1996 Order.

Section 15A(b)(4)²¹ of the Act requires fair representation of an association's members in the selection of its Directors and administration of its affairs, and provides that one or more Directors shall be representative issuers and investors and not be associated with a member of the association, broker, or dealer. The NASD, through the Delegation Plan, has the responsibility for ensuring that the Nasdaq Board fulfills the fair representation and public participation requirements. The fair representation requirement helps to ensure that no particular constituency is subject to the unfair, unfettered actions of another constituency, and helps to ensure that the NASD, including its Nasdaq subsidiary, is administered in a

way that is equitable to all NASD members.

The Commission finds that the proposed composition of the Board meets the fair presentation and public participation criteria as set forth in Section 15A(b)(4) of the Act.²² The proposed rule change does not change the requirement that the number of Non-Industry Directors equal or exceed the number of Industry Directors. Thus, the instant proposal continues to ensure that all interests, Industry, Non-Industry and Public will be adequately represented on the Board; that the decisions by the Board are not unfairly discriminatory between customers, issuers, brokers, or dealers; and that the protection of investors and the public interest is considered consistent with the requirements of the Act. Moreover, as staff representatives of Nasdaq, the two "neutral" Staff Directors should represent the interest of all members, including Industry, Non-Industry, and Public market participants.

The Commission also finds that Nasdaq's proposal to designate up to two officers of Nasdaq who may be elected to the Board as "neutral" for purposes of calculating the composition of Industry and Non-Industry Directors on the Board is consistent with Section 15A(b)(4) of the Act and with the 1996 Order. In particular, the Commission notes that the remainder of the Board will continue to maintain a majority of Non-Industry/Public representation. Moreover, the Staff Directors should represent the interest of the entire Nasdaq organization, which includes Industry, Non-Industry, and Public market participants. The Commission further notes that this portion of Nasdaq's proposal permits the Nasdaq board to be reduced in size and thus operate more efficiently.

The Commission also finds that Nasdaq's amendments to Section 4.13 of the Nasdaq By-Laws relating to committees are consistent with the requirements of Section 15A(b)(2) and Section 15A(b)(4) of the Act. The Commission notes that the establishment of these committees should result in the more efficient operation and administration of Nasdaq, particularly as Nasdaq moves forward in its efforts to complete its exchange registration and become a self-regulatory organization separate from the NASD.²³

²² *Id.*

²³ For example, Nasdaq's proposal to remove limitations on the size of the Executive and Finance Committees will permit the Board to determine the appropriate number of members on these committees as appropriate to the needs of Nasdaq and NASD members. As currently provided in the By-Laws, the Executive Committee would continue

¹³ In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital information. 15 U.S.C. 78c(f).

¹⁴ 15 U.S.C. 78o-3(b)(2), (b)(4), and (b)(6).

¹⁵ 15 U.S.C. 78o-3(b)(2).

¹⁶ Through the operation of the Delegation Plan, NASD must be responsible for, and Nasdaq must implement, rules, policies, and procedures that are consistent with the Act.

¹⁷ 15 U.S.C. 78o-3(b)(4).

¹⁸ See *supra* note 16.

¹⁹ 15 U.S.C. 78o-3(b)(6).

²⁰ See *supra* note 16.

²¹ 15 U.S.C. 78o-3(b)(4).

¹² 15 U.S.C. 78o-3.

The composition provisions of the Executive Committee and the new Nasdaq Committees ensure public participation in the Committees' decision-making process and provide for the fair representation of NASD members. Like the proposed changes to the structure and composition of the Board, the requirement that the number of Non-Industry Directors equal or exceed the number of Industry Directors, and the requirement that Public Directors be present helps to ensure that the decisions by the Executive Committee and the new Nasdaq committees take into account the public interest.

The Commission notes that the composition of the new Management Compensation, Audit, and Nominating Committees, are consistent with the specific compositional requirements for the mirror NASD committees, as set forth either in the Delegation Plan or the 1996 Order, and as implemented by the NASD By-Laws. For example, the composition of the proposed Management Compensation Committee fulfills the compositional requirements set forth in the 1996 Order that a majority of the committee members shall be Non-Industry Directors. The Management Compensation Committee also reflects other compositional requirements as set forth in the Delegation Plan, which designates that Nasdaq's CEO will be an ex-officio, non-voting member of the committee and that each committee member will hold office for one year.

The composition of the proposed Audit Committee fulfills the compositional requirements set forth in the 1996 Order that a majority of the committee members shall be Non-Industry Directors. In addition, the provisions of the Audit Committee mirror those of the NASD By-Laws, which also requires that a majority of the Audit Committee members shall be Non-Industry Directors; that the Audit Committee shall include two Public Directors; and that a Public Director shall serve as chair of the Committee.²⁴

Finally, the Nasdaq Nominating Committee's compositional requirements would mirror the compositional requirements for the NASD Nominating Committee and comply with the requirements of the 1996 Order. The composition of the proposed Nominating Committee would continue to fulfill the compositional requirements

set forth in the 1996 Order that a majority of the committee members shall be Non-Industry Directors. In addition the Nasdaq Nominating Committee reflects the mirror NASD Committee, where the number of Non-Industry members on the Nominating Committee equals or exceeds the number of Industry members on the Nominating Committee.²⁵

The Commission therefore finds that the composition and operation of these Nasdaq committees are consistent with section 15A(b)(2) and 15A(b)(4) of the Act, which require that the Association, and through the Delegation Plan, Nasdaq, be so organized and have the capacity to carry out the purposes of the Act, and that Nasdaq's key committees provide for the fair representation of all members. The Commission notes further that the Nasdaq Committees mirror the equivalent NASD committee requirements as set forth in the Delegation Plan and 1996 Order and as reflected in the applicable NASD By-Laws, and are consistent with Section 15A(b)(2) and 15A(b)(4) of the Act. The Commission emphasizes that all actions undertaken by these Nasdaq committees remain subject to the review, ratification, or rejection by the NASD Board in accordance with procedures set forth and implemented pursuant to the Delegation Plan.²⁶

The Commission also finds that the proposed amendments, reflecting the new corporate relationship between the NASD and Nasdaq, deleting unused terms, and conforming the Nasdaq By-Laws to recent amendments to Delaware law, are consistent with Section 15A(b)(2) and (4) of the Act.²⁷ The changes to the By-Laws reflect Nasdaq's new ownership structure and institute procedures necessary for Nasdaq to operate as a corporation. For example, Nasdaq proposes to delete section 4.3 of Article IV, which requires that certain Directors be drawn from candidates proposed to the National Nominating Committee by a majority of the non-NASD stockholders of Nasdaq. This provision is no longer operative because Nasdaq has already solicited the recommendations of the non-NASD stockholders and has mailed a ballot to non-NASD stockholders asking them to vote on such candidates. In addition, definitions for "Amex Floor Governors," "Nasdaq-Amex," and "Amex Board" are deleted because the terms are no longer used in the Nasdaq By-Laws. Other

amendments, such as permitting Directors to take action without a meeting (Article IV, Section 4.16 of the Nasdaq By-Laws); permitting resignations in a form other than writing (Article IV, section 4.5 and Article VII, section 7.5 of the Nasdaq By-Laws);" no longer requiring a waiver of certain notices to be in writing (Article X, section 10.3 of the Nasdaq By-Laws); and no longer requiring that resolutions be adopted by a majority vote of the whole Board (e.g., to appoint a committee, fill vacancies on the committee, fix the term of office of a committee member, or remove a committee member), conform the Nasdaq By-Laws to applicable Delaware law.²⁸ The Commission finds that these proposed changes are generally consistent with the purposes of the Act.

IV. Conclusion

It is Therefore Ordered, pursuant to section 19(b)(2) of the Act,²⁹ that the proposed rule change (SR-NASD-00-78) is approved, as amended.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.³⁰

Jonathan G. Katz,
Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44175; File No. SR-NYSE-00-62]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Specialists' Specialty Stock Option Transactions

April 11, 2001.

I. Introduction

On December 22, 2000, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² a proposed rule to amend paragraph (1) of the Guidelines to NYSE Rule 105 and paragraph (a) of NYSE Rule 98. The proposed rule change was

²⁸ The Commission notes that the Nasdaq Board's power to delegate authority to a committee will still require a vote of the majority of the whole Board. Article IV, section 4.13(b) of the Nasdaq By-Laws.

²⁹ 15 U.S.C. 78s(b)(2).

³⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

to have balancing requirements for Industry, Non-Industry, and Public Directors, but no such requirements would apply to the Finance Committee.

²⁴ See NASD By-Laws, Article IX, Section 5.

²⁵ See NASD By-Laws, Article VII, Section 9.

²⁶ The NASD must retain the authority to oversee and control Nasdaq until Nasdaq registers as a national securities exchange.

²⁷ 15 U.S.C. 78o-3(b)(2) and (4).