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For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-38611; File No. SR-NASD-97-30]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to an Amendment to the NASD's Rule Governing the Eligibility of Members To Become Primary Market Makers in Issues Subject to a Secondary Offering

May 12, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), and the National Association of Securities Dealers, Inc.'s ("NASD" or "Association") Plan of Allocation and Delegation of Functions by NASD to Subsidiaries, notice is hereby given that on April 24, 1997,<sup>1</sup> the Nasdaq Stock Market, Inc. ("Nasdaq") filed with the Securities and Exchange Commission ("Commission" or "SEC") 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 proposes to amend NASD Rule 4612(g) to permit a member who is a manager or co-manager of a secondary offering to be eligible to become a Primary Nasdaq Market Maker ("PMM") in that issue prior to the effective date of the secondary offering regardless of whether the member was a registered market maker in the stock before the announcement of the secondary

offering. The proposed amendment to Rule 4612(g) would only apply to members that are a PMM in 80% or more of the securities in which they are registered. (Additions are italicized.)

\* \* \* \* \*

#### NASD Rule 4612

(a)-(g) (1) No change.

(g)(2) Notwithstanding paragraph (g)(1) above, after an offering in a stock has been publicly announced or a registration statement has been filed, no market maker may register in the stock as a Primary Nasdaq Market Maker unless it meets the requirements set forth below:

(A) For secondary offerings:

(i) The secondary offering has become effective and the market maker has satisfied the qualification criteria in the time period between registering in the security and the offering become effective; *provided, however, that if the member is a manager or co-manager of the underwriting syndicate for the secondary offering and it is a PMM in 80% or more of the Nasdaq National Market securities in which it is registered, the member is eligible to become a PMM in the issue prior to the effective date of the secondary offering regardless of whether the member was a registered market maker in the stock before the announcement of the secondary offering;* or

(ii) The market maker has satisfied the qualification criteria for 40 calendar days.

(g)(2)(B)-(h) 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

Presently, NASD Rule 4612(g)(2)(A) provides that unless a market maker is registered in a security prior to the time a secondary offering in that stock has been publicly announced or a registration statement has been filed, it cannot become a Primary Market Maker

("PMM") in the stock unless: (1) The secondary offering has become effective and the market maker has satisfied the PMM standards between the time the market maker registered in the security and the time the offering became effective or (2) the market maker has satisfied the PMM standards for 40 calendar days ("Secondary Offering PMM Delay Rule").<sup>2</sup> This aspect of the PMM standards, which is unaffected by the waiver, until October 1, 1997, of the four quantitative PMM standards contained in NASD Rule 4612 (a) and (b), was first adopted because the time period after secondary offerings have been announced is sensitive to short selling pressure. Specifically, in these situations, the stock of the issuer is currently being traded and the "overhang" on the market of the new stock coming into the market from the offering makes the security particularly susceptible to manipulative short selling. The result of such short selling can adversely impact the capitalization of the issuer, particularly smaller issuers, whose securities often have less liquid secondary markets. Thus, Nasdaq has been and continues to be concerned with dealers entering the market after secondary offerings have been announced in order to take advantage of the market maker exemption from the short sale rule.

There have been instances where managers and co-managers of secondary offerings that have not previously been registered in the issue have been precluded from becoming a PMM in the issue prior to the effective date of the secondary offering, however. Accordingly, because of the inherent commitment of managers and co-managers to the issues that they underwrite as well as the additional liquidity that these members can provide, Nasdaq believes it would be appropriate for managers and co-

<sup>2</sup> The PMM standards are used to determine the eligibility of market makers to an exemption from the NASD's short-sale rule. Previously, a market maker was required to satisfy at least two of the following four quantitative standards to be a PMM: (1) The market maker must be at the best bid or best offer as shown on Nasdaq no less than 35 percent of the time; (2) the market maker must maintain a spread no greater than 102 percent of the average dealer spread; (3) no more than 50 percent of the market maker's quotation updates may occur without being accompanied by a trade execution of at least one unit of trading; or (4) the market maker executes 1½ times its "proportionate" volume in the stock. See NASD Rule 4612 (a) and (b). Because of changes to market maker quotation and trading activity since implementation of the SEC's Order Handling Rules, the Commission approved an NASD proposal to waive the PMM standards until October 1, 1997, to afford Nasdaq an opportunity to develop new PMM standards. See Securities Exchange Act Release No. 38294 (February 14, 1997), 62 FR 8289.

<sup>9</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> The NASD filed an amendment ("Amendment No. 1") clarifying footnote 3 to say that a firm is not precluded from being a manager or co-manager of a secondary offering if it is not a PMM in 80% or more of the stocks in which it makes a market. See Letter from Thomas R. Gira, Associate General Counsel, the Nasdaq Stock Market, Inc., to Katherine England, Assistant Director, Office of Market Supervision, Division of Market Regulation, Commission, dated May 7, 1997.

managers of secondary offerings to be eligible to register as PMMs in such issues before the secondary offering is effective. The proposed amendment to Rule 4612(g) would only apply to members that are a PMM in 80% or more of the securities in which they are registered, however

Nasdaq believes the proposed rule change is consistent with Section 15A(b)(6) of the Act. 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. Specifically, by permitting managers and co-managers of secondary offerings who did not previously make a market in such issues to become PMMs in such issues prior to the effective date of the secondary offering, Nasdaq believes the proposed rule change will enhance market liquidity, facilitate greater competition among market makers, and promote the capital formation process. At the same time, given the inherent commitment of managers and co-managers to the stocks they underwrite, along with the requirement that such firms be a PMM in 80% or more of stocks in which they are registered under the proposal,<sup>3</sup> Nasdaq does not believe the proposal will compromise the regulatory purposes underlying the "Secondary Offering PMM Delay Rule."

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

Nasdaq believes that the proposed rule change will not 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*

Comments were neither solicited nor received.

<sup>3</sup> Of course, a firm is not precluded from being a manager or co-manager of a secondary offering if it is not a PMM in 80% or more of the stocks in which it makes a market.

### **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, N.W., Washington, D.C. 20549. 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 number SR-NASD-97-30 and should be submitted by June 6, 1997.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority. (17 CFR 200.30-3(a)(1) (1989)).

**Margaret H. McFarland,**

*Deputy Secretary.*

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### **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-38610; File No. SR-NASD-97-31]

#### **Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc., Relating to an Amendment to the NASD's Rule Governing Market Maker Registration**

May 12, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), and the National Association of Securities Dealers, Inc.'s ("NASD" or "Association") Plan of Allocation and Delegation of Functions by NASD to Subsidiaries, notice is hereby given that on April 24, 1997, The Nasdaq Stock Market, Inc. ("Nasdaq") filed with the Securities and Exchange Commission ("Commission" or "SEC") 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 proposes to amend NASD Rule 4611(d) to permit managers and co-managers of an underwriting syndicate participating in a secondary offering of a security listed and traded on Nasdaq to register as a market maker in such issue on a same-day basis on the day of the secondary offering. (Additions are italicized; deletions are bracketed.)

\* \* \* \* \*

NASD Rule 4611

(a)-(c) No change.

(d) A Nasdaq market maker may become registered in an issue already included in Nasdaq by entering a registration request via a Nasdaq terminal. If registration is requested in an issue that has been included in Nasdaq for more than five (5) days, and the requirements of paragraph (b) above are satisfied, registration shall become effective on the day after the registration request is entered. *Provided*, [If] however, *that same day registration is permissible for:*

(1) a Nasdaq market maker, registered in a security that is the subject of a publicly announced merger or acquisition offer with another Nasdaq issue, *who* seeks registration in the other merger or acquisition issue; [, same-day registration is permissible.]; *and*