percentage of assets held in that Portfolio.

3. Applicants request relief to permit Portfolios that are not advised by Davenport (''Unaffiliated Portfolios'') to engage in principal securities transactions with Davenport, and any entity controlling, controlled by, or under common control with Davenport. Applicants also request relief for any future series of the Trust that is an Unaffiliated Portfolio (''Future Portfolio''). Any Future Portfolios that rely on the relief will comply with the terms and conditions of the application.

Applicants' Legal Analysis

1. Section 17(a) of the Act generally prohibits sales or purchases of securities between a registered investment company and an affiliated person, or an affiliated person of an affiliated person, of the company. Sections 2(a)(3)(C) and (E) define an ''affiliated person'' of another person to be any person directly or indirectly controlling, controlled by, or under common control with the person, and any investment adviser of an investment company, respectively. Because the Trust's officers and trustees oversee the management and policies of each Portfolio, the Portfolios might be deemed to be under common control and each Portfolio might be deemed to be an affiliated person of each other Portfolio. Each investment adviser of a Portfolio may be deemed to be an affiliated person of an affiliated person (''second-tier affiliate'') of any of the Portfolios that it does not advise and therefore prohibited by section 17(a) from engaging in principal transactions with any of the Portfolios.

2. Applicants request an exemption from section 17(a) to permit principal securities transactions entered into in the ordinary course of business between the Unaffiliated Portfolios and Davenport and entities controlling, controlled by, or under common control with Davenport. The requested exemption would apply only where Davenport is deemed to be a second-tier affiliate of an Unaffiliated Portfolio solely because Davenport is the adviser to another Portfolio of the Trust.

3. Section 17(b) of the Act provides that the Commission shall exempt a transaction from section 17(a) if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, that the transaction is consistent with the policy of each registered investment company concerned, and that the transaction is consistent with the general purposes of the Act. Section 6(c) of the Act provides that the Commission may exempt any person or transaction from any provision of the Act, if the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants believe that the proposed transactions meet the standards of sections 17(b) and 6(c) for the reasons stated below.

4. Applicants assert that section 17(a) is intended to prevent persons who have the power to influence an investment company from using that influence to their own pecuniary advantage. Applicants state that there would be no conflict of interest inherent in an Unaffiliated Adviser's decision to execute a portfolio transaction with Davenport, and there is no danger of overreaching on the part of any person concerned. Because each Unaffiliated Adviser is responsible for making its investment decisions independently, and each Unaffiliated Adviser would be dealing with Davenport as a competitor, the pecuniary interests of the Unaffiliated Adviser are aligned with those of the Unaffiliated Portfolio.

5. Applicants also state that the proposed transactions will be consistent with the policies of each Unaffiliated Portfolio, because each Unaffiliated Adviser is required to manage the Unaffiliated Portfolio in accordance with the investment objectives and related investment policies of the Unaffiliated Portfolio as described in its registration statement. Applicants also assert that permitting the transactions will be consistent with the general purposes of the Act and in the public interest because the ability to engage in the transactions will increase the likelihood of an Unaffiliated Portfolio achieving best price and execution on its principal transactions while giving rise to none of the abuses that section 17(a) was designed to prevent.

Applicants' Conditions

Applicants agree that any order of the Commission granting the requested relief will be subject to the following conditions:

1. Davenport (except by virtue of serving as Adviser) will not be an affiliated person or a second-tier affiliate of any Unaffiliated Adviser or any officer, trustee or employee of the Portfolio engaging in the transaction.

2. Davenport will not directly or indirectly consult with any Unaffiliated Adviser concerning allocation of principal or brokerage transactions.

3. Davenport will not participate in any arrangement whereby the amount of its advisory fees will be affected by the investment performance of an Unaffiliated Portfolio.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jonthan G. Katz,

Secretary.

[FR Doc. 98–26279 Filed 9–30–98; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40485; File No. SR–NASD–98–26]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval to Amendment No. 5 to a Proposed Rule Change by the National Association of Securities Dealers, Inc. to Institute, on a Pilot Basis, New Primary Nasdaq Market Maker Standards for Nasdaq National Market Securities

September 25, 1998.

I. Introduction

On March 19, 1998, the National Association of Securities Dealers, Inc. (''NASD'' 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 (''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to: (a) implement, on a pilot basis, new Primary Nasdaq Market Maker (''PMM'') standards for all Nasdaq National Market (''NNM'') securities; (b) extend the NASD's Short Sale Rule pilot until November 1, 1998; and (c) extend the suspension of existing PMM standards until May 1, 1998. On March 30, 1998, the Commission issued notice of the filing and approved, on an accelerated basis, the portions of the filing extending the NASD's Short Sale Rule pilot and the suspension of existing PMM standards.[3] The suspension of existing PMM standards was subsequently extended until October, 1998.[4]

On September 25, 1998, Nasdaq proposed to (1) continue to suspend the current PMM standards until March 31, 1999, and (2) extend the NASD's Short

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Exchange Act Release No. 39819 (March 30, 1998) 63 FR 16841 (April 6, 1998).

[4] *See* Exchange Act Release No. 40140 (June 26, 1998) 63 FR 36464 (July 6, 1998).

Sale Rule pilot (including extending the amendment to the definition of ''legal'' short sale) until March 31, 1999.[5]

Background

Presently, NASD Rule 4612 provides that a member registered as a Nasdaq market maker pursuant to NASD Rule 4611 may be deemed a PMM if that member meets certain threshold standards. The implementation of the SEC Order Handling Rules and what some perceive as a concurrent move toward a more order-driven, rather than a quote-driven, market raised questions about the continued relevance of those PMM standards. As a result, such standards were suspended beginning in early 1997.[6] Currently, all market makers are designated as PMMs.

Since February 1997, Nasdaq has worked to develop PMM standards that are more meaningful in what may be an increasingly order-driven environment and that better identify firms engaged in responsible market making activities deserving of the benefits associated with being a PMM, such as being exempt from NASD Rule 3350, the NASD's Short Sale Rule. The NASD now proposes to extend the current suspension of the existing PMM standards.

In light of a substantial number of comments on the proposed new PMM standards, Nasdaq staff in August 1998 convened a subcommittee to develop new standards. Nasdaq expects that the subcommittee will complete its task and that new PMM standards will be submitted to the appropriate Nasdaq and NASD committees and boards for approval shortly. Nasdaq also expects that it will file an amendment to SR–NASD–98–26 to incorporate the new PMM standards that currently are being developed by the subcommittee, or in the alternative, that it will withdraw SR–NASD–98–26 and will submit the new PMM standards as a new filing.

For the reasons discussed below, the Commission has determined to grant accelerated approval of Nasdaq's request, in Amendment No. 5, to continue to suspend the current PMM standards and to extend the NASD's Short Sale Rule Pilot until March 31, 1999.

II. Proposed Rule Change

In the current amendment, Nasdaq is proposing to extend the Short Sale Rule pilot (including extending the amendment to the definition of ''legal'' short sale) and the suspension of existing PMM standards to allow more time to refine the PMM standards.

* * * * * * *

The proposed rule language, as amended, follows. Additions are italicized; deletions are bracketed.

NASD Rule 3350

(a)–(k) No Changes

(l) This Rule shall be in effect until [November 1, 1998] *March 31, 1999.*

* * * * * * *

III. Discussion

After careful consideration, the Commission has concluded, for the reasons set forth below, that the extension of the Short Sale Rule pilot and the suspension of the existing PMM standards until March 31, 1999, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder. In particular, the extension is consistent with Section 15A(b)(6)[7] of the Exchange Act. Section 15A(b)(6) requires that the NASD's rules be designed, among other things, to remove impediments to and perfect the mechanism of a free and open market and a national market system and to promote just and equitable principles of trade. The Commission believes that continuation of the Short Sale Rule pilot and the continued suspension of the current PMM standards will maintain the status quo while the Commission and the NASD review the operation of revised PMM standards. Because the Commission's ultimate stance on the Short Sale Rule may be affected, in part, by the operation of revised PMM standards, it is reasonable to keep the Short Sale Rule pilot in place while work continues on the PMM standards. Furthermore, it is judicious, in the short term, to avoid reintroducing the previous PMM standards prior to the implementation of a new PPM pilot.

In finding that the suspension of the existing PMM standards is consistent with the Exchange Act, the Commission reserves judgment on the merits of the NASD's Short Sale Rule, any market maker exemptions to that rule, and the proposed new PMM standards. The Commission recognizes that the Short Sale Rule already has generated significant public comment. Such commentary, along with any further comment on the interaction of the Short Sale Rule with the proposed new PMM standards, will help guide the Commission's evaluation of the Short Sale Rule and new PMM standards. During the PMM pilot period, the Commission anticipates that the NASD will continue to address the Commission's questions and concerns and provide the Commission staff with any relevant information about the practical effects and the operation of the revised PMM standards and possible interaction between those standards and the NASD's Short Sale Rule.

The Commission finds good cause for approving the extension of the Short Sale Rule pilot (including extending the amendment to the definition of ''legal'' short sale) and the suspension of existing PMM standards prior to the 30th day after the date of publication of notice of the filing in the **Federal Register**. It could be disruptive to the Nasdaq market and confusing to market participants to reintroduce the previous PMM standards for a brief period prior to implementing a new PMM pilot.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 5, including whether the proposed 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, N.W., Washington, DC 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 No. SR–NASD–98–26 and should be submitted by October 22, 1998.

[5] *See* letter from Robert E. Aber, Senior Vice President and General Counsel, Nasdaq, to Richard Strasser, Assistant Director, Division, SEC, dated September 25, 1998.

[6] *See* Exchange Act Release No. 38294 (February 14, 1997) 62 FR 8289 (February 24, 1997) (approving temporary suspension of PMM standards); Exchange Act Release No. 39198 (October 3, 1997) 62 FR 53365 (October 14, 1997) (extending suspension through April 1, 1998); Exchange Act Release No. 39819 (March 30, 1998) 63 FR 16841 (April 6, 1998) (extending suspension through May 1, 1998); Exchange Act Release No. 39936 (April 30, 1998) 63 FR 25253 (May 7, 1998) (extending suspension through July 1, 1998); Exchange Act Release No. 40140 (June 26, 1998) 63 FR 36464 (July 6, 1998) (extending suspension through October 1, 1998).

[7] 15 U.S.C. 78o–3(b)(6).

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[8] that Amendment No. 5 to the proposed rule change, SR–NASD–98–26, which extends the NASD Short Sale Rule pilot and the suspension of the current PMM standards to March 31, 1999, be and hereby is approved on an accelerated basis.[9]

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Jonathan G. Katz,

Secretary.

[FR Doc. 98–26276 Filed 9–30–98; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40479; File No. SR–NYSE–98–28]

Self Regulatory Organizations; Notice of Filing of Proposed Rule Changes by the New York Stock Exchange, Inc. Relating to Arbitration Rules

September 24, 1998.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 15, 1998 the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule changes as described in Item 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 changes from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Changes

The proposed amendments to NYSE Rules 347 and 600 will exclude claims of employment discrimination, including sexual harassment, in violation of a statute from arbitration unless the parties have agreed to arbitrate the claim after it has arisen. The text of the proposed rule changes are as follows (additions are italicized, deletions are bracketed.)

* * * * *

NYSE Rule 347. Controversies As to Employment or Termination of Employment

(*a*) *Except as provided in paragraph (b),* [A]any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

(b) A claim alleging employment discrimination, including any sexual harassment claim, in violation of a statute shall be eligible for arbitration only where the parties have agreed to arbitrate the claim after it has arisen.

NYSE Rule 600. Arbitration

(f) Any claim alleging employment discrimination, including any sexual harassment claim, in violation of a statute shall be eligible for submission to arbitration under these Rules only where the parties have agreed to arbitrate the claim after it has arisen.

* * * * *

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule changes. The text of these statements may be examined at the places specified in Item IV below and is set forth in Sections A, B, and C below.

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

1. Purpose

The purpose of the proposed rule changes is to:

- Exclude any claim alleging employment discrimination, including any sexual harassment claim, in violation of a statute from the requirement that all employment disputes between a registered representative and a member or member organization be arbitrated, except where the parties agree to arbitrate the claim after it has arisen. (NYSE Rule 347)
- Provide that any claim alleging employing discrimination, including any sexual harassment claim, in violation of a statute shall be eligible for submission to arbitration only where the parties have agreed to arbitrate the claim after it has arisen. (NYSE Rule 600)

Background

NYSE Rule 347 has been in effect since the late 1950's, and requires that any employment-related disputes between a registered representative and a member or member organization be settled by arbitration.[3] In order to become ''registered'' an individual is required to sign and file with the Exchange a Form U–4 (Uniform Application for Securities Registration or Transfer). Form U–4 requires registered persons to submit to arbitration any claim that is required to be arbitrated under the rules of the self-regulatory organizations with which they register.

Until the 1990's, the rule was generally invoked to arbitrate business and contract disputes, such as wrongful discharge, breach of contract or claims regarding compensation. Beginning with the Supreme Court's decision in *Gilmer* v. *Interstate/Johnson Lane*,[4] claims alleging employment discrimination, including sexual harassment claims, were compelled to arbitration.

In 1994, the General Accounting Officer (''GAO'') conducted a study on the arbitration of employment discrimination disputes in the securities industry.[5] While the GAO Report did not address the adequacy of arbitration as a means of resolving employment discrimination disputes, it made several recommendations for improving the arbitration process. The recommendation included specialized training of arbitrators in discrimination law and the appointment of more women and minorities as arbitrators.

Despite steps to improve the process, registered representatives and others continue to oppose mandatory arbitration of discrimination claims pursuant to the Form U–4 and other pre-dispute agreements. In July 1997, the U.S. Equal Employment Opportunity Commission (''EEOC'') issued a policy statement that mandatory pre-dispute agreements to arbitrate statutory

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[8] 15 U.S.C. 78s(b)(2).

[9] In approving Amendment No. 5, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] NYSE Rule 347 provides: ''Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.''

[4] 500 U.S. 20 (1991). In *Gilmer*, the Court held that a registered representative could be compelled to arbitrate his claim under the Age Discrimination in Employment Act (''ADEA'') pursuant to Form U–4 and NYSE Rule 347.

[5] Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes (GAO/HEHS–94–17, March 30, 1994).