Determination. Nasdaq believes this time frame will provide an issuer with a sufficient opportunity to prepare a public announcement while also ensuring that investors receive information in a timely manner. If an issuer fails to disclose the receipt of a Staff Determination, trading of its securities will be halted until the disclosure is made, even if the issuer appeals to the Listings Qualifications Panel, as provided for under Marketplace Rule 4820. If an issuer fails to make the public announcement by the time the Listing Qualification Panel issues its decision, that decision will also determine whether to delist an issuer's securities for failure to make the public announcement.

III. Discussion

The Commission finds the proposed rule change is consistent with the Act and the rules and regulations promulgated thereunder.[4] Specifically, the Commission finds that approval of the proposed rule change is consistent with Section 15A(b)(6)[5] of the Act. Section 15A(b)(6)[6] requires that the rules of a registered national securities association be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general, protect investors and the public interest.

Specifically, the Commission finds that the proposal to amend NASD Rule 4815 to require that an issuer make a public announcement through the news media to disclose the receipt of a Staff Determination to prohibit continued listing of the issuer's securities as a result of the issuer's failure to comply with the continued listing requirements is consistent with Section 15A(b)(6)[7] because it will provide notice to investors that Nasdaq has determined to delist an issuer's securities for non-compliance with Nasdaq's continued listing requirements, and the Rules upon which the Staff Determination was based. Such information should serve to protect present and future investors in an issuer's securities by providing them with this information as promptly as possible, and not more than seven calendar days following the receipt of a Staff Determination for failure to comply with continued listing requirements. Nasdaq believes, and the Commission agrees, that requiring public announcement of this information as promptly as possible, but not more than seven calendar days from receipt of the Staff Determination, allows a reasonable timeframe for the issuer to prepare an announcement, while ensuring that investors receive the information in a timely manner. The Commission believes that investors should have the benefit of knowing that an issuer has failed to meet Nasdaq's continued listing requirements and the Rules upon which the Staff Determination is based, and therefore finds the provision that trading of an issuer's securities, if an issuer fails to disclose receipt of a Staff Determination, will be halted until the disclosure is made, even if the issuer appeals to the Listing Qualifications Panel, to be reasonable and consistent with the Act. Finally, the Commission believes that the proposal should benefit investors because it will ensure that all Nasdaq issuers publicly disclose the receipt of a Staff Determination in both a timely and uniform manner, as opposed to the current situation whereby some issuers voluntarily make the disclosure while others do not.

IV. Conclusion

For the above reasons, the Commission finds that the proposed rule change is consistent with the provisions of the Act, in general, and with Section 15A(b)(6),[8] in particular.

It Is Therefore Ordered, pursuant to section 19(b)(2) of the Act,[9] that the proposed rule change (SR–NASD–00–48), be and hereby is approved.

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

Margaret H. McFarland,

Deputy Secretary.

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

[5] 15 U.S.C. 78o–3(b)(6).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] 15 U.S.C. 78s(b)(2).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–43549; File No. SR–NASD–00–50]

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

November 13, 2000.

On August 11, 2000, The National Association of Securities Dealers, Inc. (''NASD'' or ''Association''), through its wholly owned subsidiary, The Nasdaq Stock Marker, 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] a proposed rule change regarding the adoption of interpretive material defining ''Public Offering'' for purposes of Nasdaq's shareholder approval rules.[2] On October 4, 2000, the Nasdaq filed Amendment No. 1 to the proposed rule change.[3] The proposed rule change was noticed in the **Federal Register.**[4] On October 13, 2000, the NASD filed Amendment No. 2 to the proposed rule change.[5] No comments were submitted on the proposed rule change. This order approves the proposed rule change, as amended.

I. Background

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

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

[2] The American Stock Exchange, Inc. filed a similar proposed rule change SR–Amex–00–46. *See* Securities Exchange Act Release No. 43419 (Oct. 6, 2000), 65 FR 61206 (Oct. 16, 2000).

[3] Amendment No. 1 changed 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, Division of Market Regulation (''Division''), SEC (Oct. 2, 2000).

[4] Securities Exchange Act Release No. 43420 (Oct. 6, 2000), 65 FR 61011 (Oct. 13, 2000).

[5] Amendment No. 2 made a minor technical change to the interpretation. *See* Letter from Arnold P. Golub, Senior Attorney, Nasdaq, to Katherine A. England, Assistant Director, Division, SEC (Oct. 11, 2000). Because the amendment is technical, it does not need to be published for comment.

''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.[6] 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, Nasdaq 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.

To help 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. 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.

II. Discussion

The Commission finds that the proposed rule change is consistent with the provisions of Section 15A(b)(6)[7] 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.[8] The Commission believes 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.

It Is Therefore ordered, pursuant to Section 19(b)(2) of the Act,[9] that the proposal, SR–NASD–00–50, as amended, be and hereby is approved.

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

Margaret H. McFarland,

Deputy Secretary.

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[6] The Commission believes that this activity is not appropriate under Section 5 of the Securities Act of 1933. *See* 15 U.S.C. 77e.

[7] 15 U.S.C. 78*o*–3(b)(6).

[8] In approving the proposal, the Commission has considered the rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[9] 15 U.S.C. 78s(b)(2).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–43538; File No. SR–NYSE–00–39]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the New York Stock Exchange, Inc. To Amend Arbitration Rules Regarding Pilot Program for Mediation and Administration Conferences

November 9, 2000.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 29, 2000, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') 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.

I. Self-Regulatory Organizations's Statement of the Terms and Substance of the Proposed Rule Change

The purpose of extending and amending the pilot program for mediation is to continue to offer mediation as a way for parties to settle cases earlier with fewer costs. The administrative conference pilot, as extended and amended, will allow the arbitrators(s) to intervene early in the case to set deadlines and resolve preliminary issues. Below is the text of the proposed rule change. Additions are italicized; deletions are in brackets.

* * * * *

Rule 638 Mediation

(a) Mediation Pending Arbitration

(1) [(a)] A single mediation session of up to four hours will be conducted in all cases [not involving public customers] submitted for arbitration where the amount of the claim is [$500,000] *$250,000* or more.

(2) [(b)] The New York Stock Exchange will provide the parties with a mediator. The mediator's fee for the single mediation session shall be $500 and shall be paid by the New York Stock Exchange. If the parties select a mediator of their own choosing, from outside the list of proposed mediators, they shall be responsible for any difference in the mediator's fee. If the parties desire they can extend the mediation beyond the first session at their own expense.

(3) [(c)] Unless the parties agree on a mediator, the Director of Arbitration will send the parties a list of five proposed mediators together with the mediators's biographical information described in Rule 608. The parties shall have ten days to agree on a mediator from the list or chose their own mediator. If no agreement is reached, the Director of Arbitration will select a mediator from the list unless all the names on the list are objected to by the parties. In that instance, the Director of Arbitration will appoint a mediator from outside the list.

(4) [(d)] Unless otherwise agreed to by the parties, mediation shall not delay the arbitration.

(5) [(e)] The mediation shall be confidential and no record kept of the proceeding. The mediator will not be permitted to act as an arbitrator in the same case and the mediator shall not be called to testify in any proceeding regarding the mediation.

[(f) Mediation under this rule shall be available in all matters submitted to arbitration involving public customers where the amount of the claim is $500,000 or more, upon the consent of the parties. The mediator will be compensated under paragraph (b) of this rule.]

(6) [g] In all other matters submitted to arbitration, mediation shall be available upon the consent of the parties, at their own expense.

(b) Mediation Prior to Arbitration

(1) If the parties agree, any matter eligible for arbitration under the Constitution and Rules of the New York Stock Exchange may be mediated at the Exchange. To begin mediation under

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

[2] 17 CFR 240.19b–4.