and to protect investors and the public interest.

The Commission finds that the Exchange's amendments to its rule governing preopening orders provides greater clarity and alleviates some confusion for investors as to what constitutes ''preopening orders'' in Nasdaq/NM securities and how such orders are priced. The CHX proposal explicitly defines preopening orders in Nasdaq/NM securities as those orders received at or prior to 8:25 a.m. (Central Time) on the date of the opening. The CHX proposal also specifies that each preopening order must be filled on a single price opening at or better than the NBBO at the first unlocked, uncrossed market.

The Commission finds that the Exchange's proposed rule change is consistent with the Act because it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market, and to protect investors and the public interest, by providing more specificity and clarity for order-sending firms and their customers regarding its rule governing preopening orders in Nasdaq/NM securities.

IV. Conclusion

For the foregoing reasons, the Commission finds that the CHX's proposal to amend its rule governing preopening orders in Nasdaq/NM securities, as amended, is consistent with the requirements of the Act and rules and regulations thereunder.

It is Therefore Ordered, pursuant to Section 19(b)(2) of the Act,[8] that the proposed rule change (SR–CHX–00–31), is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

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

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–44067; File No. SR–NASD–01–01]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by the National Association of Securities Dealers, Inc. to Amend NASD Rule 4330(f) to Require a Nasdaq Issuer to Apply for Initial Inclusion Following a Reverse Merger With a Non-Nasdaq Entity

March 13, 2001.

I. Introduction

On October 9, 2001, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association''), 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 proposal to amend paragraph (f) of NASD Rule 4330, ''Suspension or Termination of Inclusion of a Security and Exceptions to Inclusion Criteria,'' to require a Nasdaq issuer to apply for initial inclusion following a Reverse Merger, as defined below, with a non-Nasdaq entity, and to make conforming changes to IM–4300, ''Interpretive Material Regarding Future Priced Securities.'' The proposed rule change was published for comment in the **Federal Register** on February 7, 2001.[3] No comments were received on the proposal. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

NASD Rule 4330(f) requires a Nasdaq issuer to comply with all applicable initial inclusion requirements under Nasdaq rules if the issuer enters into a merger, consolidation, or other types of acquisition with a non-Nasdaq entity which results in a change of control and either a change in business or a change in the financial structure of the Nasdaq issuer.

Nasdaq notes that it adopted NASD Rule 4330(f)[4] in 1993 to address concerns associated with non-Nasdaq entities seeking a ''backdoor listing'' on Nasdaq through a business combination involving a Nasdaq issuer.[5] In these combinations, a non-Nasdaq entity purchased a Nasdaq issuer in a transaction that resulted in the non-Nasdaq entity obtaining a Nasdaq listing without qualifying for initial listing or being subject to the background checks and scrutiny normally applied to issuers seeking initial listing.

According to Nasdaq, some issuers and their counsel have expressed uncertainty regarding the circumstances under which NASD Rule 4330(f) is applicable. Therefore, Nasdaq proposes to amend NASD Rule 4330(f) to indicate that an issuer must apply for initial inclusion following a transaction whereby the issuer combines with a non-Nasdaq entity, resulting in a change of control of the Nasdaq issuer[6] and the potential for the non-Nasdaq entity to acquire a Nasdaq listing (for purposes of NASD Rule 4330(f), such transaction is referred to as a ''Reverse Merger''). To provide further clarification, NASD Rule 4330(f), as amended, sets forth a list of non-exclusive factors which Nasdaq will consider when determining whether a Reverse Merger has occurred. These factors include changes in the management, board of directors, voting power, ownership, and financial structure of the Nasdaq issuer. Nasdaq will also consider the nature of the businesses and the relative size of the Nasdaq issuer and non-Nasdaq entity. Nasdaq believes that these proposed amendments will clarify NASD Rule 4330(f) for issuers while continuing to prevent ''backdoor listings'' on Nasdaq.

Nasdaq also proposes to make conforming changes to IM–4300.

III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.[7] In particular, the Commission finds that the proposal is consistent with Section 15A(b)(6) of the Act,[8] which requires, among other things, that the rules of an association be designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest.

According to Nasdaq, some issuers have expressed uncertainty regarding

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 43907 (January 30, 2001), 66 FR 9398.

[4] When the Nasdaq adopted the rule, it appeared in Section 3(f) of Part II to Schedule D of the NASD By-Laws.

[5] *See* Securities Exchange Act Release No. 32264 (May, 4, 1993), 58 FR 27760 (May 11, 1993) (order approving File No. SR–NASD–93–07).

[6] It is not necessary to obtain a majority interest in order for a change of control to occur.

[7] 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).

[8] 15 U.S.C. 78*o*–3(b)(6).

the applicability of NASD Rule 4330(f) when a Nasdaq issuer combines with a non-Nasdaq entity. To clarify NASD Rule 4330(f), the proposal amends NASD Rule 4330(f) to indicate that issuers must apply for initial inclusion following a Reverse Merger. NASD Rule 4330(f), as amended, provides a non-exclusive list of factors Nasdaq will consider to determine whether a Reverse Merger has occurred.

The Commission believes that the proposal should clarify NASD Rule 4330(f) and provide guidance to issuers concerning the circumstances under which an issuer that combines with a non-Nasdaq entity must apply for initial inclusion. At the same time, the Commission believes that NASD Rule 4330(f), as amended, will continue to protect investors and the public interest by helping to prevent ''backdoor listings'' on Nasdaq.

The Commission finds that the conforming changes to IM–4300 will make IM–4300 consistent with NASD rule 4330(f), as amended, and provide guidance concerning the circumstances under which the conversion of a Future Priced Security could result in a Reverse Merger.

IV. Conclusion

For the foregoing reasons, the Commission finds that the proposal is consistent with the requirements of the Act and rules and regulations thereunder.

It Is Therefore Ordered, pursuant to Section 19(b)(2) of the Act,[9] that the proposed rule change (SR–NASD–01–01) 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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[9] 15 U.S.C. 78s(b)(2).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–44061; File No. SR–Phlx–01–16]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to Providing Compensation to Hearing Panelist

March 9, 2001.

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 February 6, 2001, the Philadelphia Stock Exchange, Inc. (''Phlx'' 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 self-regulatory organization. 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

The Exchange is proposing to amend its Disciplinary Rules, specifically Rule 960.5, to include a provision that allows hearing panelists to be compensated in connection with certain extraordinary matters. The text of proposed rule change is available at the Exchange and at the Commission.

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

In its filing with the Commission, the Exchange 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 Exchange 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

1. Purpose

The purpose of the proposed rule change is to amend the Exchange's current Disciplinary Rules to include a provision that would allow hearing panelists to be compensated in certain instances. Pursuant to Exchange rules, a hearing on a Statement of Charges is held before a Hearing Panel composed of three persons that are appointed by the Chairman of the Business Conduct Committee (''BCC'').[3] At times, hearings and related proceedings[4] are lengthy and complex, and thereby require a protracted time commitment on behalf of the hearing panelists. The Exchange believes that in those extraordinary cases, hearing panelists should be compensated for their time devoted to hearing-related matters. By providing compensation pursuant to specific guidelines, the Exchange should continue to attract qualified and experienced hearing panelists.

The proposed amendment specifically provides that hearing panelists appointed by the Chairman of the Exchange's BCC may be compensated in extraordinary cases, as determined by the Chairman of the BCC, in consultation with the Chairman of the Board of Governors (''Board''). Factors to be considered when determining whether a case is extraordinary include, but are not limited to, the anticipated length of time of the hearing; the complexity and serious nature of the matter; and magnitude of the potential penalty.

In general, compensation will be paid only for attending (in person or by telephone) formal hearings, formal pre-hearing conferences or hearing panel deliberations, and not for conversations with staff, or telephone calls for the purpose of scheduling or other administrative matters. No compensation will be paid unless the Chairman of the BBC makes an affirmative determination that certain tasks warrant compensation. The Chairman of the BCC may also establish any caps or limits on compensation to hearing panelists for a given matter.[5] Compensation for attending a formal hearing or other meeting, or participating in a telephone conference regarding the same, will be paid at the same rate and on the same terms as Board members' compensation for service on a Standing Committee with the understanding that any multiple meetings and/or hearings on the same day would be considered a single meeting for the purposes of compensation.[6]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with

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

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Rule 960.5(a)(1).

[4] Related proceedings may include pre-hearing conferences, motions requesting the production of documentary evidence and witnesses, and conferences relating to the proceedings.

[5] The Chairman of the BBC must notify the Chairman of the Finance Committee of a determination to pay compensation and an estimate therefore. The Chairman of the Finance Committee shall report to the Finance Committee (without identifying the matter in question) and ensure that a provision is made for such compensation in the Exchange's budget, unless the expenditure is already provided for in existing budget categories in the relevant annual budget.

[6] For example, if a Board member, who is also a hearing panelist, attends a Board meeting and a pre-hearing conference on the same day, that member would be compensated at the rate that is equivalent to attending one meeting.