

Amendment Nos. 1⁴ and 2⁵ to the proposed rule change on July 13, 2001 and July 19, 2001, respectively. The Commission received no comments on the proposed rule change. This order approves the proposed rule change and grants accelerated approval to Amendment Nos. 1 and 2.

II. Description

Nasdaq proposes to amend Nasdaq Marketplace Rules 4320, 4510, and 4520, regarding the listing of additional shares ("LAS Program"). Nasdaq proposes to amend Nasdaq Marketplace Rules 4510(b)(2) and 4520(b)(2) to provide a carve-out from fees for the listing of additional shares for issuances of up to 49,999 shares per quarter. To offset the loss in revenues resulting from this carve-out, Nasdaq proposes to change the maximum quarterly fee for the listing of additional shares from \$17,500 to \$22,500 and the maximum annual fee from \$35,000 to \$45,000. Nasdaq states that these changes will alleviate issuers' concerns regarding small issuances while maintaining the revenues generated by the current LAS fee schedule. Nasdaq also proposes to amend Nasdaq Marketplace Rules 4510(b)(4) and 4520(b)(4) to give the Board of Directors, or its designee, the ability to defer or waive all or any part of the fees relating to the LAS Program.

Lastly, Nasdaq proposes to clarify the LAS notification requirement for foreign issuers. Originally, Nasdaq Marketplace Rule 4320(e)(15) excluded American Depositary Receipts (ADRs) from the LAS notification requirements for foreign issuers because it is very difficult to track the creation as well as unwinding of ADRs and their creation may not implicate any Nasdaq regulatory requirements. When the notification requirements were amended in January 2000,⁶ the exclusion of ADRs was inadvertently omitted from Rule 4320(e)(15). As such, Nasdaq proposes to amend this Rule to clarify that ADRs

are not subject to the LAS notification requirement.

III. Discussion

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 proposed rule change is consistent with the requirements of Sections 15A(B)(5)⁸ and 15A(b)(6)⁹ of the Act. Section 15A(b)(5) requires the rules of the Association to provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system that the Association operates or controls. Section 15A(b)(6) of the Act requires the Association's rules to be designed to promote just and equitable principles of trade, and to protect investors and the public interest. The Commission believes that the proposed rule change changes will alleviate issuers' concerns regarding fees for small issuances while maintaining the revenues generated by the current LAS fee schedule. In addition, the Commission believes that it is appropriate for the NASD to have the ability to defer or waive LAS fees in situations where such action would be justified to achieve an equitable result. Finally, the Commission believes that the proposed rule change will benefit investors and the public interest by clarifying that ADRs are not subject to the LAS notification requirement.

The Commission finds good cause for accelerating approval of Amendment Nos. 1 and 2 to the proposed rule change prior to the thirtieth day after publication in the *Federal Register*. These amendments merely correct typographical errors and request retroactive effectiveness of the proposed rule change by June 29, 2001, which will permit issuers to benefit from the proposed rule change without undue delay. Accordingly, the Commission finds that good cause exists to accelerate approval of Amendment Nos. 1 and 2 to the proposed rule change.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment Nos. 1 and 2, including whether the amendments are 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 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 the File No. SR-NASD-2001-38 and should be submitted by September 4, 2001.

V. Conclusion

It is Therefore Ordered, pursuant to Section 19(b)(2) of the Act,¹⁰ that the proposed rule change (SR-NASD-2001-38), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44658; File No. SR-NYSE-2001-12]

Self Regulatory Organizations; New York Stock Exchange; Order Granting Approval to Proposed Rule Change Amending Sections 102.01C, 103.01B, and 802.01C of the Listed Company Manual and NYSE Rule 499

August 6, 2001.

On May 17, 2001, the New York Stock Exchange, Inc. ("NYSE") filed with the Securities and Exchange Commission ("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 change to amend sections 102.01C and 103.01B of the *Listed Company Manual* to align the cash flow revenue original listing standard with that of the global market capitalization standard. The proposed rule change would also amend section

⁴ See letter from John D. Nachman, Senior Attorney, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated June 29, 2001 ("Amendment No. 1"). Amendment No. 1 corrects typographical errors in the text of the proposed rule change. Specifically, Amendment No. 1 amends proposed Nasdaq Marketplace Rules 4510(b)(2) and 4520(b)(2) to provide a maximum quarterly fee of \$22,500, instead of \$22,000.

⁵ See letter from John D. Nachman, Senior Attorney, Nasdaq, to Florence Harmon, Senior Special Counsel, Division, Commission, dated July 19, 2001 ("Amendment No. 2"). Amendment No. 2 requests the Commission to approve the proposed rule change on a retroactive basis effective June 29, 2001.

⁶ See Securities Exchange Act Release No. 42351 (January 20, 2000), 64 FR 4457 (January 27, 2000).

⁷ In approving the proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁸ 15 U.S.C. 78o-3(b)(5).

⁹ 15 U.S.C. 78o-3(b)(6).

¹⁰ 15 U.S.C. 78s(b)(2).

¹¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

802.01C of the *Listed Company Manual* and NYSE Rule 499 to require a press release announcement when a company is notified it is below the \$1.00 price standard.

The proposed rule change was published for comment in the **Federal Register** on July 6, 2001.³ The Commission received no comments on the proposal.

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 exchange⁴ and, in particular, the requirements of Section 6 of the Act⁵ and the rules and regulations thereunder. The Commission finds specifically that the proposed rule change is consistent with Section 6(b)(5) of the Act⁶ 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, in general, to protect investors and the public interest. The proposal, which will align the cash flow revenue original listing standard with the global market capitalization standard, should continue to allow the Exchange to list companies that the Exchange believes will prove to be financially successful in the future, although recently they may not have been as profitable. The Commission also believes that the press release requirement for companies that are below criteria by reason of their share price is consistent with the Act, because it improves investor access to information. The Exchange already requires companies falling below the Exchange's other financial continued listing criteria related to market capitalization and shareholder's equity to put out a press release after notification by the Exchange.⁷

It is Therefore Ordered, pursuant to Section 19(b)(2) of the Act⁸, that the proposed rule change (SR-NYSE-2001-12) be, and it hereby 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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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44652; File No. SR-OCC-00-04]

Self-Regulatory Organizations; The Options Clearing Corporation; Order Approving a Proposed Rule Change Relating to the Definition of Marking Price and Closing Price

August 3, 2001.

On May 2, 2000, the Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") a proposed rule change (File No. SR-OCC-00-04) pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").¹ Notice of the proposal was published in the **Federal Register** on January 9, 2001.² No comment letters were received. For the reasons discussed below, the Commission is approving the proposed rule change.

I. Description

Under the rule change, OCC will conform the definition of "marking price" in OCC Rule 601 to the definition of "closing price" in OCC Rule 805. Rule 601 specifies the procedure for margining short positions in equity options. Under this procedure, open short positions are margined based on prices or quotes for the option itself. Assigned short positions, however, are margined based on the difference between the strike price of the option and the "marking price" of the underlying stock. Unlike the definition of "closing price" in Rule 805(j), the definition of "marking price" in Rule 601(b)(6) still refers to the closing price of an underlying stock on its "primary market."

OCC believes that the definition of "marking price" in Rule 601(b)(6) and the definition of "closing price" in Rule 805(j) should not be materially different. According to OCC, the two prices are normally determined in the same manner and therefore should be defined in the same way. Therefore, OCC proposes that the Rule 601 definition of

"marking price" conform to Rule 805 because the same concerns that led OCC to replace the term "primary market" in Rule 805 apply equally in the context of Rule 601.

The rule change also revises both definitions to clarify that OCC will normally determine underlying stock prices based on the last reported sale price during regular business hours. Specifically, Rule 805(j) and 601(b)(6) will be amended to refer to the last reported sale price "during regular trading hours (as determined by the Corporation [OCC]). * * *"³

II. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder and particularly with the requirements of Section 17A(b)(3)(F)⁴ of the Act. Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions. The Commission finds that OCC's rule change meets these conditions because it is designed to provide OCC's members greater administrative and operational convenience and clarity. By conforming the definitions of "marking price" and "closing price," OCC will be able to apply its procedural rules for clearing and settling expiring options in a more consistent manner. The same concerns that led OCC to replace the term "primary market" in Rule 805 in 1999 are equally valid in the context of Rule 601. Similarly, OCC is clarifying its rule by specifying in both Rules 601 and 805 that the last sale price is based on trading during regular trading hours. Thus, the rule change should reduce potential confusion among OCC's clearing members and therefore should promote the prompt and accurate clearance and settlement of securities transactions.

III. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular with the requirements of

³ See Securities Exchange Act Release No. 44484 (June 28, 2001), 66 FR 35686.

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

⁵ 15 U.S.C. 78f.

⁶ 15 U.S.C. 78f(b)(5).

⁷ See *Listed Company Manual* sections 802.02 and 802.03.

⁸ 15 U.S.C. 78s(b)(2).

⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² Securities Exchange Act Release No. 43782 (Dec. 29, 2000), 66 FR 1712.

³ Before February 1999, Rule 805(j) defined "closing price" to mean the closing price of an underlying stock "on its primary market." In recognition of the increasing fragmentation of the equity markets, the rule was amended in February 1999 to refer instead to the last reported sale price "on such national securities exchange or other domestic securities market as [OCC] shall determine." Securities Exchange Act Release No. 41089 (Feb. 23, 1999), 64 FR 10051 (Mar. 1, 1999).

⁴ 15 U.S.C. 78q-1(b)(3)(F).