

proposing to permit a member to execute up to 40% of a complex order (which is a limit order by definition because it must be entered with a total debit or credit price) as principal immediately because the Exchange's Facilitation Mechanism contained in Rule 716(d), which guarantees a facilitating firm an execution of at least forty percent (40%) of the original size of a facilitation order in the "regular" market, will not be available for complex orders. Under the proposal, a member that wants to facilitate a complex order will be permitted to enter a proprietary counter-order to trade against up to forty percent (40%) of the initial complex order size prior to the expiration of 30 seconds. Thus, the trading crowd will be given an opportunity to participate in the execution of at least 60% of each complex order. Any portion of an order that remains unexecuted after 30 seconds may be executed by the member by entering another proprietary order.

The Exchange believes that the proposed rule changes strike an appropriate balance because they will not permit trades at prices inferior to the displayed bids and offers available in the ISE market, while providing the added protection that a complex order will not trade ahead of Public Customer orders at the same price unless the net price is better than what is available in the market. In those circumstances where an order meets the criteria contained in proposed Rule 722, the Exchange believes it is fair to give complex orders entered at a net price the prescribed special priority and order handling treatment.

This proposal permits ISE members to execute orders in a manner that is similar to how such orders are executed on the floor-based exchanges today. The Exchange proposes to adopt these rules for one year only, while the Exchange develops technology that might improve upon the existing execution practices of the industry today. The Exchange will file a new proposal with the Commission prior to the expiration of the rule.

Finally, the Exchange is proposing to amend Rule 805 (Market Maker Orders) to permit the entry of complex orders by market makers. In lieu of individually listing the types of orders that a market maker is permitted to enter outside of its appointed classes, the Exchange also proposes to amend the language in paragraph (b) of Rule 805 to clarify that market makers can enter any type of order outside their assigned classes that other non-customers are permitted to

enter as all such order types were listed in the rule.

## 2. Statutory Basis

The basis under the act for this proposed rule change is the requirement under Section 6(b)(5)<sup>9</sup> that an exchange have rules that are 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.

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

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

## 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 self-regulatory organization 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.

### Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change 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, D.C. 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

<sup>9</sup> 15 U.S.C. 78f(b)(5).

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 ISE. All submissions should refer to File No. SR-ISE-2001-18 and should be submitted by September 4, 2001.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44651; File No. SR-NASD-2001-38]

### Self-Regulatory Organizations; Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendment Nos. 1 and 2 Thereto Filed by the National Association of Securities Dealers, Inc. Relating to the Listing of Additional Shares

August 3, 2001.

#### I. Introduction

On May 29, 2001, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), submitted to the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change relating to the listing of additional shares. The **Federal Register** published the proposed rule change for comment on July 2, 2001.<sup>3</sup> Nasdaq submitted

<sup>10</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Securities Exchange Act Release No. 44467 (June 22, 2001), 66 FR 34973.

Amendment Nos. 1<sup>4</sup> and 2<sup>5</sup> 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,<sup>6</sup> 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.<sup>7</sup> In particular, the Commission finds that the proposed rule change is consistent with the requirements of Sections 15A(B)(5)<sup>8</sup> and 15A(b)(6)<sup>9</sup> 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,<sup>10</sup> 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.<sup>11</sup>

**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")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> 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

<sup>4</sup> 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.

<sup>5</sup> 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.

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

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

<sup>8</sup> 15 U.S.C. 78o-3(b)(5).

<sup>9</sup> 15 U.S.C. 78o-3(b)(6).

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.