

submissions should refer to File No. SR-AMEX-2001-107 and should be submitted by March 28, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

Jill M. Peterson,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45492; File No. SR-NASD-2002-20]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. Relating to the Use of Share Caps To Comply With the Shareholder Approval Rules of The Nasdaq Stock Market

March 1, 2002.

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, 2002, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. On February 27, 2002, the NASD—through Nasdaq—submitted Amendment No. 1 to the proposal.³ Nasdaq has asserted that the proposed rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule and, therefore, is immediately effective pursuant to Rule 19b-4(f)(1) under the Act.⁴ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

¹² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Sara Nelson Bloom, Associate General Counsel, Nasdaq, to Katherine England, Assistant Director, Division of Market Regulation, Commission, dated February 26, 2002 ("Amendment No. 1"). In Amendment No. 1, Nasdaq clarified the consequences for Nasdaq issuers of engaging in transactions that employ defective share caps.

⁴ 17 CFR 240.19b-4(f)(1).

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

Nasdaq is adopting interpretive material on the use of share caps to comply with the 20% limitations under NASD Rule 4350(i) and to make conforming changes to NASD IM-4300, NASD IM-4310-2, and NASD Rule 4350(i). Text of the proposed rule change, as amended, appears below. New language is italicized; deletions are bracketed.

* * * * *

IM-4300, Interpretive Material Regarding Future Priced Securities, is renumbered as IM-4350-1 and footnote 2 is amended as follows:

2. [In order to obviate the need for shareholder approval through such an arrangement, those shares already issued in connection with the Future Priced Security must not be entitled to vote on the proposal to approve the issuance of additional shares upon conversion of the Future Priced Security.] See IM-4350-2, Interpretive Material Regarding the Use of Share Caps to Comply with Rule 4350(i).

New Rule, IM-4350-2, Interpretive Material Regarding the Use of Share Caps to Comply with Rule 4350(i), is added as follows:

IM-4350-2—Interpretive Material Regarding the Use of Share Caps to Comply with Rule 4350(i)

Rule 4350(i) limits the number of shares or voting power that can be issued or granted without shareholder approval prior to the issuance of certain securities.¹ Generally, this limitation applies to issuances of 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance.²

Issuers sometimes comply with the 20% limitation in this rule by placing a "cap" on the number of shares that can be issued in the transaction, such that there cannot, under any circumstances, be an issuance of 20% or more of the common stock or voting power previously outstanding without prior shareholder approval. If an issuer

¹ An exception to this rule is available to issuers when the delay in securing stockholder approval would seriously jeopardize the financial viability of the enterprise. Rule 4350(i)(2). However, a share cap is not permissible in conjunction with the financial viability exception provided in Rule 4350(i)(2), because the application to Nasdaq and the notice to shareholders required in the rule must occur prior to the issuance of any common stock or securities convertible into or exercisable for common stock.

² While Nasdaq's experience is that this issue is generally implicated with respect to these situations, it may also arise with respect to the 5% threshold set forth in Rule 4350(i)(1)(C)(i).

determines to defer a shareholder vote in this manner, shares that are issuable under the cap (in the first part of the transaction) must not be entitled to vote to approve the remainder of the transaction. In addition, a cap must apply for the life of the transaction, unless shareholder approval is obtained. For example, caps that no longer apply if a company is not listed on Nasdaq are not permissible under the Rule. Of course, if shareholder approval is not obtained, then the investor will not be able to acquire 20% or more of the common stock or voting power outstanding before the transaction and would continue to hold the balance of the original security in its unconverted form.

Nasdaq has observed situations where issuers have attempted to cap the issuance of shares at below 20% but have also provided an alternative outcome based upon whether shareholder approval is obtained, such as a "penalty" or a "sweetener." For example, a company issues a convertible preferred stock or debt instrument that provides for conversions of up to 20% of the total shares outstanding with any further conversions subject to shareholder approval. However, the terms of the instrument provide that if shareholders reject the transaction, the coupon or conversion ratio will increase or the issuer will be penalized by a specified monetary payment. Likewise, a transaction may provide for improved terms if shareholder approval is obtained. Nasdaq believes that in such situations the cap is defective because the related penalty or sweetener has a coercive effect on the shareholder vote, and thus may deprive shareholders of their ability to freely exercise their vote. Accordingly, Nasdaq will not accept a cap that defers the need for shareholder approval in such situations. Instead, if the terms of a transaction can change based upon the outcome of the shareholder vote, no shares may be issued prior to the approval of the shareholders. Issuers that engage in transactions with defective caps will be in violation of Nasdaq rules and will be subject to delisting.

Issuers having questions regarding this policy are encouraged to contact The Nasdaq Stock Market, Listing Qualifications Department at (877) 536-2737, which will provide a written interpretation of the application of Nasdaq Rules to a specific transaction, upon prior written request of the issuer.

IM-4310-2, Definition of a Public Offering, is renumbered as IM-4350-3 and the first paragraph is amended as follows:

[Marketplace] Rule[s] 4310(c)(25)(G)(i)(d), 4320(e)(21)(G)(i)(d), and 4460(i)(1)(D) provide] 4350(i)(1)(D) provides that shareholder approval is required for the issuance of common stock (or securities convertible into or exercisable for common stock) equal to 20 percent or more of the common stock or 20 percent or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock. Under [these] this rule[s], however, shareholder approval is not required for a "public offering."

The existing cross-reference section following Rule 4350(i), Shareholder Approval, is amended to reflect the renumbering of existing IM-4300 and additional cross-references are added as follows:

IM-[4300]4350-1, Future Priced Securities

IM-4350-2, Interpretative Material Regarding the use of Share Caps to Comply with Rule 4350(i)

IM-4350-3, Definition of Public Offering

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

In its filing with the Commission, the NASD 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 NASD 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

NASD Rule 4350(i) limits the number of shares or voting power that can be issued or granted without shareholder approval prior to the issuance of certain securities. Generally, this limitation applies to issuances of 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance. Nasdaq has observed situations where issuers have attempted to cap the issuance of shares at below 20% but have also provided an alternative outcome based upon whether shareholder approval is obtained, such as a "penalty" or a "sweetener." Nasdaq believes that in such situations the cap is defective

because it has a coercive effect on the shareholder vote and, thus, may deprive shareholders of their ability to freely exercise their vote. Accordingly, Nasdaq will not accept a cap that defers the need for shareholder approval in such situations. Instead, if the terms of a transaction can change based upon the outcome of the shareholder vote, no shares may be issued prior to the approval of the shareholders. Issuers that engage in transactions with defective caps will be in violation of Nasdaq rules and will be subject to delisting. Accordingly, Nasdaq is proposing the adoption of interpretive material to clarify for issuers, their counsel, and investors Nasdaq's requirements pertaining to the use of share caps to comply with its shareholder approval rules.

Nasdaq is also proposing changes to conform existing rules and correct certain cross-references.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act⁵ in that it is designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest. As previously noted, Nasdaq is proposing to adopt this interpretive material to provide greater clarity and transparency for issuers, their counsel, and investors.

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

Nasdaq does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Nasdaq has asserted that the proposed rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule and, therefore, is immediately effective pursuant to Rule 19b-4(f)(1) under the Act.⁶ At any time within 60 days of the filing of this proposed rule change, as amended, the Commission may

summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal, as amended, is 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 File No. SR-NASD-2002-20 and should be submitted by March 28, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁷

Jill M. Peterson,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45487; File No. SR-NYSE-2002-10]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the New York Stock Exchange, Inc. To Adopt NYSE Rule 445, Anti-Money Laundering Compliance Program

February 28, 2002.

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 27, 2002, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange

⁷ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

⁵ 15 U.S.C. 78o-3(b)(6).

⁶ 17 CFR 240.19b-4(f)(1).