

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.

(b) Statutory Basis

The NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6)⁵ 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. 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.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The NASD does not believe that the proposed rule change will 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

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 NASD 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.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. 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-00-50 and should be submitted by November 3, 2000.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁶

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-43417; File No. SR-NASD-00-16]

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 3 to Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Amendments to Minimum Listing Requirements for the Inclusion and Maintenance of Open and Closed-End Funds in Nasdaq's Mutual Fund Quotation Service

October 5, 2000.

I. Introduction

On April 4, 2000, the National Association of Securities Dealers, Inc. ("NASD") through its wholly owned 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 proposed rule change relating to amendments to the minimum listing requirements for the inclusion and maintenance of open and closed-end funds in Nasdaq's Mutual Fund Quotation Service ("MFQS" or "Service").³ On May 16, 2000, the Nasdaq submitted Amendment No. 2 to the proposed rule change.⁴ The proposed rule change was published in the **Federal Register** on June 5, 2000.⁵ On September 29, 2000, the Nasdaq submitted Amendment No. 3 to the proposed rule change.⁶ No comments were received on the proposal. This order approves the proposed rule change, as amended. Also, Amendment No. 3 is approved on an accelerated basis.

II. Description of the Proposal

Nasdaq proposes to amend NASD Rule 6800 regarding the minimum listing requirements for the inclusion and maintenance of open and closed-end funds in Nasdaq's Mutual Fund Quotation Service ("MFQS"). Proposed new language is in *italics*; proposed deletions are in *brackets*.

* * * * *

6800. MUTUAL FUND QUOTATION SERVICE

(a)-(b) No Change.

(c) News Media Lists.

(1)(A) An eligible open end fund shall be authorized for inclusion in the News Media List released by the Association if it has at least 1,000 shareholders or \$25 million in net assets.

(B) An eligible closed-end fund shall be authorized for inclusion in the News Media List released by the Association if it has at least \$60 [100] million in net assets.

(C) Compliance with subparagraphs (1)(A) and (B) shall be certified by the fund to the Association at the time of initial application for inclusion in the List.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The NASD filed its proposed rule change on March 31, 2000. On April 4, 2000, the NASD filed Amendment No. 1 that entirely replaced the original rule filing.

⁴ See Letter from Rober E. Aber, General Counsel and Senior Vice President, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission (May 16, 2000). Amendment No. 2 corrected a typographical error that appeared in the proposed rule language and clarified that the Mutual Fund Quotation Service includes only 73.8% of the total open-end and closed-end fund population.

⁵ Securities Exchange Act Release No. 42831 (May 25, 2000), 65 FR 35693.

⁶ See Letter from Edward S. Knight, General Counsel and Senior Vice President, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission (September 29, 2000). Amendment No. 3 amended the language of proposed NASD Rule 6800(d)(3) to replace the phrase "investment management firm managing the fund" with "investment adviser" and make other technical corrections.

⁵ 15 U.S.C. 78o-3(b)(6).

⁶ 17 CFR 200.30-3(a)(12).

(2)(A) An authorized open-end fund shall remain included in the News Media List if it has either 750 shareholders or \$15 million in net assets.

(B) An authorized closed-end fund shall remain included in the News Media List if it has \$30 [60] million in net assets.

(C) Compliance with subparagraphs (2)(A) and (B) shall be certified to the Association upon written request by the Association.

(d) Supplemental List.

An eligible open-end or closed-end fund shall be authorized for inclusion in the Supplemental List released to vendors of Nasdaq Level 1 Service if it meets one of the criteria set out in subparagraph (1), subparagraph (2), or subparagraph (3) below:

(1) The fund has net assets of \$10 million or more; or

(2) The fund has had two full years of operation; or

(3) The fund's investment adviser:

(A) Is the investment adviser of at least one other fund that is listed on the Mutual Fund Quotation Service and that has net assets of \$10 million or more; and

(B) Has at least \$15 million in total assets of open-end and closed-end funds under management.

(e) No Change.

* * * * *

The MFQS was created to collect daily price and related data for mutual funds and money market funds and to disseminate that information to the news media and market data vendors.⁷ Currently, the MFQS disseminates the valuation data for over 11,000 funds. This information dissemination process is facilitated by the use of web browser-based technology, which enables funds included in the Service, or the pricing agents designated by such funds, to transmit directly to Nasdaq a multitude of pricing information, including information about a fund's net asset value, offer price, and closing market price.

Funds must meet minimum eligibility criteria in order to be included in the MFQS.⁸ The MFQS has two "lists" in which a fund may be included—the News Media List and the supplemental List—and each list has its own initial inclusion requirements.⁹ The News Media List also has maintenance/continued inclusion requirements. If a fund qualifies for the News Media List, pricing information about the fund is eligible for inclusion in the fund tables of newspapers and is also eligible for dissemination over Nasdaq's Level 1 Service, which is distributed by market data vendors.¹⁰ If a fund qualifies for the Supplemental List, the pricing information about that fund generally is

not included in newspaper fund tables, but is disseminated over Nasdaq's Level 1 Service. The Supplemental List thus provides significant visibility for funds that do not otherwise qualify for inclusion in the News Media List. Each fund incurs an annual fee for inclusion in the Service.¹¹

Nasdaq proposes to amend the MFQS inclusion criteria for both the Supplemental and News Media List by expanding the universe of funds that are eligible for inclusion in the Service. The proposal lowers both the initial and maintenance requirements for closed-end funds to participate in the News Media List. Currently, in order to qualify initially for inclusion in the News Media List, a closed-end fund must have at least \$100 million in net assets. To remain in the News Media List, a closed-end fund must maintain at least \$60 million in net assets. The proposal would lower the net asset requirement for a closed-end fund to qualify initially for inclusion in the News Media List to at least \$60 million in net assets. The net asset requirement for a closed-end fund to remain included in the News Media List would be lowered to at least \$30 million.

Nasdaq also proposes to amend the inclusion criteria for the Supplemental List by providing an alternative means for a fund to be included in the Service. Under this alternative, a fund would qualify for the MFQS if the investment adviser is the investment adviser of at least one other fund listed on MFQS that has \$10 million in net assets. In addition, the firm must have at least \$15 million from open-end and closed-end funds under management. Nasdaq notes that manages assets from other sources—such as pension funds—would not be included for purposes of determining whether the investment firm meets the requirement that it manage at least \$15 million in fund-related assets.

III. Decision

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,¹² and in particular, the requirements of Section 15A(b)(6)¹³ of the Act, because it is designed to foster cooperation and coordination with persons engaged in processing information with respect to securities, to

remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission believes that the proposal will protect investors and the public interest by promoting better processing of fund pricing information. Specifically, the Commission notes that in Section 11A(a)(1)(C),¹⁴ Congress found that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations and transactions in securities. The Commission also believes that the proposed new listing criteria will provide greater transparency to the markets by providing pricing information for a broader base of funds for which there is significant investor interest. Further, by providing listed status to investment companies with a sufficient investor base and trading interest, the proposed new listing standards will continue to serve as a means for the marketplace to screen issuers and maintain fair and orderly markets.

The Commission also finds good cause for approving proposed Amendment No. 3 prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. Proposed Amendment No. 3 provides clarity to the rule.¹⁵ It replaces the term "investment management firm and managing the fund" in NASD Rule 6800(d)(3) with "investment adviser," a term which is defined in the Investment Advisers Act of 1940.¹⁶

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 3. 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 other person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be

¹¹ See NASD Rule 7090.

¹² 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).

¹³ 15 U.S.C. 78o-3(b)(6).

¹⁴ 15 U.S.C. 78k-1(a)(1)(C).

¹⁵ See *supra* n. 6.

¹⁶ 15 U.S.C. 80b-2(a)(11).

⁷ See Securities Exchange Act Release No. 22264 (July 23, 1985), 50 FR 30899 (July 29, 1985).

⁸ See NASD Rule 6800.

⁹ See *id.*

¹⁰ See NASD Rule 7010.

available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Association. All submissions should refer to the File No. SR-NASD-00-16 and should be submitted by November 3, 2000.

V. Conclusion

For the reasons discussed above, the Commission finds that the proposal is consistent with the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁷ that the proposed rule change, SR-NASD-00-16, as amended, be and hereby is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁸

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-43415; File No. SR-PHLX-00-52]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to Review of Decisions of the Exchange's Business Conduct Committee

October 4, 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 August 18, 2000, 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 Exchange. 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 PHLX proposes to amend the text of PHLX Rule 960.9 to incorporate procedures for the hearing of appeals in disciplinary matters. Specifically, the

procedures would be divided into four categories: (a) Petition by Respondent; (b) Conduct of Review, (c) Review on Motion by Board of Governors; and (d) Petition by Enforcement Staff.

First, with respect to petitions by a Respondent, the proposed rule provides that a Respondent's petition for appeal must be in writing and filed with the Secretary of the Exchange within 10 days after service of notice and a copy of the decision of the Business Conduct Committee, and that it specify the findings and conclusions that are the subject of the petition along with the reasons for the review thereof. Exchange Enforcement Staff will then have 15 days to file a written response, with the Respondent receiving 15 days after service of the Enforcement Staff's response to file a response thereto.

Second, paragraph (b) of the proposed rule, "Conduct of Review," provides that the review is to be conducted by the Exchange's Board of Governors ("Board"), or an Advisory Committee made up of three Governors, with at least one being a non-industry Governor appointed by the Chairman of the Board. No Governor who was a member of the hearing panel below may participate in the hearing on review. The review shall be based solely on the record below, unless the Board of Governors or Advisory Committee hearing the review allows oral argument after receiving a written request for one. If an Advisory committee hears the review, it is to submit a written report to the Board.

The proposed rule sets forth guidelines that the Board or an Advisory committee must follow in making the decision on review. The decision of the business Conduct Committee can be affirmed, reversed or modified, in whole or in part. A modification may include an increase or decrease of the sanction. The findings, conclusions, and decision of the Business Conduct Committee may not be reversed, or modified, in whole or in part, if the factual conclusions in the decision are supported by substantial evidence, and such decision is not arbitrary, capricious or an abuse of discretion. The Board must serve its written decision on the petitioner.

Paragraph (c) of the proposed rule includes procedures for a review by the Board of Governors on its own initiative. The review would follow the previously described procedure.

Finally, paragraph (d) of the proposed rule sets forth procedures by which the Exchange's Enforcement Staff, within 10 days after service of notice and a copy of the decision of the Business Conduct Committee, may petition the Board for permission to appeal, by presenting to

the Board a petition specifying the findings and conclusions that are subject of the petition, along with the reasons the staff is petitioning for review. Should the Board grant permission, Exchange Enforcement Staff shall serve a copy of the petition on the Respondent within 5 days. Respondent then has 15 days to file a written response with the Board, and Exchange Enforcement Staff then has 15 days to file a reply.

The proposed rule language follows. Additions are italicized; deletions are bracketed.

Rule 960.9. Review

(a) *Petition by Respondent.* A Respondent shall have 10 days after service of notice and a copy of a decision made pursuant to Rules 960.6(c) and 960.8 to appeal such decision to the Board of Governors in accordance with By-Law Article XI, Section [11-1] 11-3. *Such petition shall be in writing and shall specify the findings and conclusions of the Business Conduct Committee which is the subject of the petition, together with the reasons that Respondent petitions for review of these findings and conclusions. Any objections to a decision not specified in the petition for review shall be thereafter waived. Within 15 days after a Respondent's petition for review has been filed with the Secretary of the Exchange pursuant By-Law Article XI, Section 11-1(a), Enforcement staff may submit to the Secretary a written response to the petition. A copy of the response must be served upon the Respondent. A Respondent has 15 days from the service of the response to file a reply with the Secretary and the Enforcement staff.*

(b) *Conduct of Review.*

(i) *The review shall be conducted by the Board of Governors or an Advisory Committee thereof pursuant to By-Law Article XI, Section 11-3. If an Advisory Committee is appointed to conduct the review, it shall be composed pursuant to By-Law Article XI, Section 11-2. Any Board member who participated in a matter before the Business Conduct Committee may not participate in any review of that matter by the Board of Governors or an Advisory Committee. Unless the Board of Governors or the Advisory Committee shall decide to hear oral argument, such review shall be based solely upon the record and the written exceptions filed by the parties. The review shall be heard as soon as practicable.*

(ii) *Should the Board of Governors conduct the review, then based upon such review, the Board of Governors by a majority vote of its members, shall decide to affirm, reverse or modify, in whole or in part the decision of the Business Conduct Committee. Such modification may include any increase or decrease of the sanction. The Board of Governors may not reverse, or modify, in whole or in part, the findings, conclusions and decision of the Business Conduct Committee if the factual conclusions in the decision are supported by substantial evidence and such decision is not arbitrary, capricious or an abuse of discretion. The decision of the Board shall be in writing,*

¹⁷ 15 U.S.C. 78s(b)(2).

¹⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.