

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

NASD Regulation 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, as amended.

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

Because the foregoing proposed rule change does not:

- (i) Significantly affect the protection of investors or the public interest;
 - (ii) Impose any significant burden on competition; and
 - (iii) Become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A) of the Act⁹ and Rule 19b-4(f)(6)¹⁰ thereunder.
- At any time within 60 days of the filing of the proposed rule change, 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.

NASD Regulation has asked that the Commission waive the 5-day pre-filing notice requirement and accelerate the operative date. The Commission finds good cause to do so, because such designation is consistent with the protection of investors and the public interest. Rule 9522, in its current form, does not provide a full description of the cases in which the Department of Member Regulation may approve an MC-400 application for relief from NASD eligibility requirements. Because the proposed rule change would amend Rule 9522 to provide a complete description of those cases in which the disqualifying event requires "short form" notification to the SEC under Rule 19h-1, the Commission finds waiver of the pre-filing notice requirement and operative delay is consistent with the protection of investors and the public interest. For these reasons, the Commission finds good cause to waive the 5-day pre-filing notice requirement and the 30-day operative waiting period to allow the

proposed rule change to be both effective and operative upon filing with the Commission.¹¹

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal 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 Association. All submission should refer to file number SR-NASD-2002-02 and should be submitted by February 14, 2002.

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

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45283; File No. SR-NASD-2001-84]

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 by the National Association of Securities Dealers, Inc. To Change the Description of the Market Capitalization Listing Standard to Market Value of Listed Securities

January 15, 2002.

I. Introduction

On November 14, 2001, the National Association of Securities Dealers, Inc. ("NASD" or "Association") through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change to modify the description of the market capitalization listing standard to market value of listed securities. Nasdaq is also proposing to provide a definition of the term "listed securities" in Nasdaq's Marketplace Rules.

The proposed rule change was published for comment in the **Federal Register** on December 5, 2001.³ The Commission received no comments on the proposal. On December 18, 2001, the Exchange submitted Amendment No. 1 to the proposed rule change.⁴

II. Description

The Exchange has proposed to amend the description of the market capitalization listing standard to market value of listed securities. One of the standards under which issuers can qualify for listing on The Nasdaq National Market ("National Market") is to have a market capitalization of at least \$75,000,000. Issuers may also qualify for continued inclusion on the National Market with at least \$50,000,000 in market capitalization. The minimum market capitalization standards for initial and continued inclusion on The Nasdaq SmallCap

¹¹ For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f). The Commission notes that, should cases arise where approval of an MC-400 application for relief from NASD eligibility requirements does not reasonably fall within the scope of Rule 9522 as amended by this proposed rule change, the NASD must file a proposed rule change to amend the Rule.

¹² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 45116 (November 28, 2001), 66 FR 63275 (December 5, 2001).

⁴ See Letter from John D. Nachmann, Senior Attorney, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated December 17, 2001 ("Amendment No. 1"). In Amendment No. 1, the Exchange requested that the proposed rule change become effective on June 1, 2002.

⁹ 15 U.S.C. 78s(b)(3)(A).

¹⁰ 17 CFR 240.19b-4(f)(6).

Market are \$50,000,000 and \$35,000,000, respectively.

For purposes of initial listing eligibility, Nasdaq has historically interpreted the term market capitalization to include only the value of listed securities. In connection with continued listing eligibility, however, Nasdaq has also considered market capitalization to include classes of non-redeemable convertible preferred stock, provided that the conversion price was "in the money." According to Nasdaq, this approach has created uncertainty among issuers and investors as to the definition and application of the market capitalization listing standard. In addition, Nasdaq's Marketplace Rules do not define market capitalization and Nasdaq believes that this term may be thought to include more than just the value of listed securities or non-redeemable convertible preferred stock that is in the money.

Accordingly, Nasdaq is amending the description of the market capitalization listing standard so that it is based on the market value of listed securities. In conjunction with this change, Nasdaq also is adding a definition of the term "listed securities" to Nasdaq's Marketplace Rules. Nasdaq believes that these modifications will clarify for issuers and investors that initial and continued listing eligibility will be based only upon the value of an issuer's securities that are quoted on Nasdaq or listed on a national securities exchange.

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.⁵ In particular, the Commission believes that the proposal is consistent with the requirements of sections 15A(b)(6) of the Act,⁶ which requires, among other things, that the Association's rules 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.

The Commission believes that the rule change should clarify the standards under which issuers can qualify for listing on the National Market. In particular, the rule change should clarify for issuers and investors that initial and continued listing eligibility will be based only upon the value of an

issuer's securities that are quoted on Nasdaq or listed on a national securities exchange.

IV. Amendment No. 1

The Commission finds good cause for approving Amendment No. 1 prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. In Amendment No. 1, Nasdaq notified the Commission that in order to minimize the impact of the proposed rule change on existing issuers, the rule will go into effect on June 1, 2002. The Commission believes that this is a suitable delay to allow issuers listed on the National Market to become informed of the rule change and prepare accordingly. Therefore, the Commission finds that granting accelerated approval to Amendment No. 1 is appropriate and consistent with section 19(b)(2) of the Act.⁷

V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 1, including whether it 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-2001-84 and should be submitted by February 14, 2002.

VI. Conclusion

For all of the aforementioned reasons, 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 exchange.

It Is Therefore Ordered, pursuant to section 19(b)(2) of the Act,⁸ that the proposed rule change (SR-NASD-2001-84) 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 34-45285; File No. SR-NASD-2001-93]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc.; Relating to Fees Associated With the Nasdaq Application of the Primex Auction SystemTM

January 15, 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 December 17, 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") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq has designated this proposal as one constituting a fee filing under section 19(b)(3)(A) of the Act, which renders the rule effective upon the Commission's receipt of this filing. Nasdaq will not assess fees pursuant to this fee schedule for approximately the first three months after the Nasdaq application of the Primex Auction System ("Primex" or "System") is operational.³ Nasdaq intends to begin assessing fees pursuant to this fee schedule beginning on April 1, 2002. However, Nasdaq will issue a Head Trader Alert to notify users of the exact date it will begin assessing fees. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ As described above, Nasdaq will not assess any fees pursuant to the fee schedule during the initial few months the System is operating, which also means Nasdaq will not share any transaction fees in accordance with the fee schedule during such period. However, Primex Trading N.A., L.L.C., an entity independent of Nasdaq and the licensor of the System, has indicated it will pay any revenue sharing amounts earned by participants during such period.

⁵ In approving this rule proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁶ 15 U.S.C. 78o-3(b)(2) and (6).

⁷ 15 U.S.C. 78s(b)(2).

⁸ 15 U.S.C. 78s(b)(2).