

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 proposal accomplishes these objectives by allowing the mutual fund industry an opportunity to reconfigure its internal systems, thereby helping to ensure a seamless transition to a time when Nasdaq provides an Inside Quote from 4:00 p.m. until 6:30 p.m. Eastern Time.

For these reasons, the Commission finds that designation of the proposal to become operative today is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of this proposed rule change, the Commission may summarily abrogate this rule change if it appears to the Commission that such action is necessary or appropriate in the public interest or 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 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 number SR-NASD-99-71, and should be submitted by January 6, 2000.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁹

Jonathan G. Katz,
Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-42214; File No. SR-NASD-99-61]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc., Amending Its Rules for the Listing of Additional Shares

December 9, 1999.

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 October 19, 1999, 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 ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. 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 NASD is proposing to modify the notification requirements under the Nasdaq's Listing of Additional Shares ("LAS") Program and to make conforming changes to procedures for calculating the related LAS fee. Below is the text of the proposed rule change. Proposed new language appears in italic; proposed deletions are bracketed.

* * * * *

4310. Qualification Requirements for Domestic and Canadian Securities

To qualify for inclusion in Nasdaq, a security of a domestic or Canadian issuer shall satisfy all applicable requirements contained in paragraphs (a) or (b), and (c) hereof.

(a) No change.

(b) No change.

(c) In addition to the requirements contained in paragraph (a) or (b) above, and unless otherwise indicated, a security shall satisfy the following criteria for inclusion in Nasdaq:

(1)-(16) No change.

(17) The issuer shall be required to [file on a form designated by Nasdaq notification of the creation of a stock option, employee stock purchase or other stock remuneration plan or the issuance of additional shares of any class of securities included in Nasdaq, except for the issuance of additional

shares under a stock option, employee stock purchase or other stock remuneration plan, no later than 15 calendar days prior to the creation of the plan or the issuance of additional shares.] *notify Nasdaq on the appropriate form no later than 15 calendar days prior to:*

(A) *establishing a stock option plan, purchase plan or other arrangement pursuant to which stock may be acquired by officers or directors without shareholder approval; or*

(B) *issuing securities that may potentially result in a change of control of the issuer; or*

(C) *issuing any common stock or security convertible into common stock in connection with the acquisition of the stock or assets of another company, if any officer or director or substantial shareholder of the issuer has a 5% or greater interest (or if such persons collectively have a 10% or greater interest) in the company to be acquired or in the consideration to be paid; or*

(D) *entering into a transaction that may result in the potential issuance of common stock (or securities convertible into common stock) greater than 10% of either the total shares outstanding or the voting power outstanding on a pre-transaction basis.*

(18)-(28) No change.

(d) No change.

4320. Qualification Requirements for Non-Canadian Foreign Securities and American Depositary Receipts

To qualify for inclusion in Nasdaq, a security of a non-Canadian foreign issuer, an American Depositary Receipt (ADR) or similar security issued in respect of a security of a foreign issuer shall satisfy the requirements of paragraphs (a), (b) or (c), and (d) and (e) of this Rule.

(a)-(d) No change.

(e) In addition to the requirements contained in paragraph (a), (b) or (c), and (d), the security shall satisfy the following criteria for inclusion in Nasdaq:

(1)-(14) No change.

(15) The issuer shall be required to [file on a form designated by Nasdaq notification of creation of a stock option, employee stock purchase or other stock remuneration plan or the issuance of additional shares of any class of securities included in Nasdaq, except for the issuance of additional shares under a stock option, employee stock purchase or other stock remuneration plan, no later than 15 calendar days prior to the creation of the plan or the issuance of additional shares.] *notify Nasdaq on the appropriate form no later than 15 calendar days prior to:*

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

¹⁹ 17 CFR 200.30-3(a)(12).

(A) establishing a stock option plan, purchase plan or other arrangement pursuant to which stock may be acquired by officers or directors without shareholder approval; or

(B) issuing securities that may potentially result in a change of control of the issuer; or

(C) issuing any common stock or security convertible into common stock in connection with the acquisition of the stock or assets of another company, if any officer or director or substantial shareholder of the issuer has a 5% or greater interest (or if such persons collectively have a 10% or greater interest) in the company to be acquired or in the consideration to be paid; or

(D) entering into a transaction that may result in the potential issuance of common stock (or securities convertible into common stock) greater than 10% of either the total shares outstanding or the voting power outstanding on a pre-transaction basis.

(16)–(24) No change.

(f) No change.

4510. The Nasdaq National Market³

(a) Entry fee

No change.

(b) Additional Shares

(1) The issuer of each class of security that is a domestic issue which is listed in the Nasdaq National Market shall pay to The Nasdaq Stock Market, Inc. the fee set forth in subparagraph (2) below in connection with the issuance of additional shares of each class of listed security.

(2) The fee in connection with additional shares shall be \$2,000 or \$.01 per additional share, whichever is higher, up to a maximum of \$17,500 per [notification] *quarter* and an annual maximum of \$35,000 per issuer.

(3) [Calculation of the fee will be] *The fee will be calculated and assessed quarterly based on the [issuer notification to Nasdaq of the issuance of additional shares of securities as required under provisions of Rule 4310(c)(17)] issuer's total shares outstanding as reported on its periodic reports filed with the SEC.*

(c)–(d) No change.

³ The NASD has filed a proposed rule change with the Commission to revise the fees it charges issuers listing additional shares on the Nasdaq National Market or Nasdaq SmallCap Market. Under the proposed rule change, the NASD seeks to modify its Rules 4510 and 4520 as they relate to the calculation of LAS fees. The language of Rules 4510 and 4520 as it appears here has been marked to show changes to the language published for comment in SR-NASD-99-40. See Commission File No. SR-NASD-99-40 and Securities Exchange Act Release No. 42108 (Nov. 4, 1999), 64 FR 61678 (Nov. 12, 1999).

4520. The Nasdaq SmallCap Market

(a) Entry Fee

No change.

(b) Additional Shares

(1) The issuer of each class of security that is a domestic issue which is listed in The Nasdaq SmallCap Market shall pay to The Nasdaq Stock Market, Inc. the fee set forth in subparagraph (2) below in connection with the issuance of additional shares of each class of listed security.

(2) The fee in connection with additional shares shall be \$2,000 or \$.01 per additional share, whichever is higher, up to a maximum of \$17,500 per [notification] *quarter* and an annual maximum of \$35,000 per issuer.

(3) [Calculation of the fee will be] *The fee will be calculated and assessed quarterly based on [issuer notification to the Association of the issuance of additional shares of securities as required under provisions of Rule 4310(c)(17).] the issuer's total shares outstanding as reported on its periodic reports filed with the SEC.*

(c)–(d) No change.

* * * * *

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

The LAS Program has been employed by Nasdaq staff to monitor compliance by issuers with Nasdaq listing rules governing shareholder approval, public interest concerns, reverse mergers, and voting rights. Since 1992, all Nasdaq issuers have been required to file a notification upon the creation of a stock option, employee stock purchase, or other stock remuneration plan, or upon the issuance of additional shares of any class of securities included in Nasdaq.⁴

⁴ See NASD Rules 4310(c)(17) and 4320(e)(15). The Commission issued an order granting

The NASD has reviewed the current LAS Program and is filing this proposed rule change to improve efficiency and to eliminate certain administrative burdens for Nasdaq staff and issuers arising from the requirements of the current LAS program.

The NASD believes that the current LAS Program is difficult and unduly time-consuming to administer. Specifically, the timing of the notification required by the current LAS Program varies depending on the nature of the specific action undertaken by an issuer and, as a result, has proved confusing to issuers and their counsel. This in turn has led to delays in filing or failures to comply with LAS Program notification and fee requirements. Furthermore, the NASD believes that, under the current LAS Program, it is difficult for an issuer to calculate the number of shares to be reported for LAS purposes because in order to do so an issuer must track the number of shares approved by Nasdaq according to current LAS criteria (a number not otherwise monitored by issuers and which has often proved difficult for Nasdaq staff and issuers to reconcile) instead of the total number of shares outstanding reported in periodic reports required to be filed with the Commission.

The NASD proposes to make the following changes to the current LAS Program:

1. The billing aspect of the LAS Program would be separated from required compliance reviews. Under the proposal, issuers will be billed each quarter for any increase in their total shares outstanding ("TSO") as reported in publicly available periodic reports required to be filed with the Commission.⁵ This modification would ensure that the LAS Program is administered based on a publicly disclosed TSO number rather than on the number of approved shares currently calculated by Nasdaq according to existing LAS criteria. This modification would thereby eliminate the current procedure of establishing a baseline number of shares upon an issuer's initial listing as well as the

permanent approval to the LAS Program in 1993. See Securities Exchange Act Release No. 31859 (February 16, 1993), 58 FR 9584 (Feb. 22, 1993), (SR-NASD-92-27).

⁵ Billing for all issuers would be conducted on a calendar year basis and LAS fees would then be assessed on any increase in the TSO number set forth in an issuer's most recent periodic report filed with the Commission pursuant to Section 13 or 15(d) of the Act. Telephone conversation between Arnold Golub, Senior Attorney, Office of the General Counsel, Nasdaq, and Matthew Boesch, Paralegal, Division of Market Regulation Commission, on December 6, 1999.

resultant confusion surrounding when transactions resulting in new shares being issued must be reported to Nasdaq. This modification would also permit Nasdaq staff to rely on the publicly reported TSO when performing reconciliations.

2. The process of reporting to Nasdaq would be streamlined by confining issuers' notification requirements to those transactions implicated by the Nasdaq's corporate governance compliance requirements.⁶ Consequently, notification would not be required, unless:

(a) a stock option plan, purchase plan or other arrangement is established without shareholder approval; or

(b) the issuer enters into a transaction that may result in a change of control; or

(c) the issuer issues common stock or a security convertible into common stock in connection with the acquisition of the stock or assets of another company, if any officer or director or substantial shareholder of the issuer has an interest of 5% or more (or if a group of such persons collectively holds an interest of 10% or more) in the company to be acquired or in the consideration to be paid; or

(d) the issuer enters into a transaction that may result in the potential issuance of common stock (or securities convertible into common stock) representing more than 10% of either the total shares outstanding or voting power outstanding on a pre-transaction basis.

Under the proposed rule change, all LAS notifications would be required to be filed 15 calendar days prior to issuance (except for stock splits and dividends which are required to be filed 10 calendar days prior to the record date pursuant to SEC Rule 10b-17⁷). This requirement would eliminate the numerous timing requirements under the current LAS Program and enable Nasdaq staff to consider the most current information when evaluating such transactions.

The NASD believes that these proposed changes to the LAS Program, if approved, will improve Nasdaq's administration of the LAS Program by focusing on the TSO reported publicly in periodic reports required to be filed with the Commission instead of relying on a calculated number of approved shares. In addition, the NASD believes that the proposed changes will streamline the filing requirements imposed on issuers by reducing the filing burden to the extent that no filings

will be required for issuances that do not raise corporate governance concerns, while simultaneously streamlining the notification filing time frame. Finally, the NASD believes that the proposed changes will allow Nasdaq staff to focus on larger and more complex transactions in its review of issuers' compliance with corporate governance rules and other continued listing standards by eliminating the current requirement that issuers file information about even those issuances that do not generally raise these concerns in these respects.

2. Statutory Basis

The NASD believes that the proposed rule change is consistent with the provisions of Sections 15A(b)(5) and (6)⁸ of the Act. The proposed rule change is consistent with Section 15A(b)(5) as it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers using the Nasdaq system. The proposed rule change will alter the frequency with which Nasdaq collects LAS fees from issuers by billing these quarterly rather than per transaction; the change will also simplify the computation of fees owed by issuers by basing such fees on changes in the TSO rather than the number of shares approved for issuance according to existing Nasdaq procedures. The proposed rule change is consistent with Section 15A(b)(6) as it is designed to promote just and equitable principles of trade and does not permit unfair discrimination between customers, issuers, brokers or dealers. As noted above, the proposed rule change is designed to reduce the number of LAS filings required of issuers and to thereby allow Nasdaq staff more time to review those share issuances that may be in contravention of Nasdaq corporate governance rules or listing standards.

(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, 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

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.

IV. 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, 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 number SR-NASD-99-61 and should be submitted by January 6, 2000.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁹

Jonathan G. Katz,
Secretary.

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⁶ See NASD Rules 4310(c)(25) and 4320(e)(21).

⁷ 17 CFR 240.10b-17.

⁸ 15 U.S.C. 78o-3(b)(5) and (6).

⁹ 17 CFR 200.30-3(a)(12).