

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 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 Exchange. All submissions should refer to File No. SR-CSE-99-05 and should be submitted by February 17, 2000.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>5</sup>

**Margaret H. McFarland,**  
*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-42351; File No. SR-NASD-99-61]

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

January 20, 2000.

#### I. Introduction and Background

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") a proposed rule change 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> The proposed rule change modifies the procedures employed by the NASD in assessing fees against issuers listing additional shares on either the Nasdaq National Market ("NNM") or Nasdaq SmallCap Market ("NSCM").

Notice of the proposed rule change was published for comment in the **Federal Register** on December 16, 1999.<sup>3</sup> The Commission received no comments on the proposal.

#### II. Description of the Proposal

The Commission recently approved a rule change filed by the NASD to modify the fee rate structures and notification requirements applicable to issuers listing additional shares on the

NNM and NSCM.<sup>4</sup> The rule change harmonizes the fee structures applicable to issuers of additional shares of NNM and NSCM securities, and allows issuers to file notifications of several issuances on a single form.

To further simplify the administration of the Listing of Additional Shares ("LAS") Program, the NASD is modifying notification procedures applicable to issuers of additional shares, and Nasdaq's monitoring and assessment of fees on the listing of such additional shares.

Nasdaq staff employ the LAS Program 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 form 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.<sup>5</sup>

The NASD believes that the current LAS Program is difficult and unduly time-consuming to administer. Specifically, 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: 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. Furthermore, the timing of the notifications required by the current LAS Program varies depending on the nature of the 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.

To remedy these deficiencies, the NASD proposal makes the following changes to the current LAS Program:

1. In order to address the problem of monitoring the number of fee-assessable shares, the billing aspect of the LAS Program will be separated from required compliance reviews. 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.<sup>6</sup> This modification will 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 will thereby eliminate the current procedure of establishing a baseline number of shares upon an issuer's initial listing as well as the resultant confusion surrounding when transactions resulting in new shares being issued must be reported to Nasdaq. This modification will also permit Nasdaq staff to rely on the publicly reported TSO when performing reconciliations.

2. To address the uncertainty which has surrounded issuers' LAS notification requirements, the process of reporting to Nasdaq will be streamlined by confining issuers' notification requirements to those transactions implicated by the Nasdaq's corporate governance compliance requirements.<sup>7</sup> Consequently, notification will 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 will be required to be filed 15 calendar days prior to issuance (except for stock splits and dividends

<sup>6</sup> Billing for all issuers will be conducted on a calendar year basis and LAS fees will 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.

<sup>7</sup> See NASD Rules 4310(c)(25) and 4320(e)(21).

<sup>5</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. 42214 (Dec. 9, 1999), 64 FR 70309.

<sup>4</sup> Securities Exchange Act Release No. 42300 (Dec. 30, 1999), 65 FR 1210 (Jan. 7, 2000) (SR-NASD-99-40).

<sup>5</sup> See NASD Rules 4310(c)(17) and 4320(e)(15). The Commission granted 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).

which are required to be filed 10 calendar days prior to the record date pursuant to Rule 10b-17 under the Act<sup>8</sup>). This requirement eliminates the numerous timing requirements under the current LAS Program and enables Nasdaq staff to consider the most current information when evaluating such transactions.

The NASD believes that these changes 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 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 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 requirement that issuers file information about issuances that do not raise corporate governance concerns.

### 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 the NASD. Specifically, the Commission finds that the rule change is consistent with the provisions of Sections 15A(b)(5) and (6) of the Act.<sup>9</sup> Section 15A(b)(5) requires that the rules of the NASD provide for the equitable allocation of reasonable dues, fees, and other charges among members, issuers and other persons using any facility or system which the NASD operates or controls. Section 15A(b)(6) requires in pertinent part that the rules of the NASD be designed to promote just and equitable principles of trade and not to permit unfair discrimination between customers, issuers, brokers or dealers. The Commission believes that the amended rules, which affect the notification and billing processes associated with the LAS Program, are consistent with the Act because they are designed to simplify the procedures applicable to Nasdaq issuers listing additional shares on the NNM and NSCM, as well as those of Nasdaq staff monitoring such issuers. This in turn

will increase the issuers' levels of compliance and the staff's surveillance effectiveness.

### IV. Conclusion

The Commission finds that the rule change is consistent with the Act, in general, and in particular with Sections 15A(b)(5) and (6) of the Act.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>10</sup> that the proposed rule change (SR-NASD 99-61) be, and hereby is, approved.<sup>11</sup>

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SMALL BUSINESS ADMINISTRATION

### [Declaration of Disaster #3232]

#### State of Kentucky (Amendment #1)

In accordance with a notice received from the Federal Emergency Management Agency dated January 15, 2000, the above-numbered Declaration is hereby amended to include Hopkins County, Kentucky as a disaster area due to damages caused by tornadoes, severe storms, torrential rains, and flash flooding that occurred on January 3-4, 2000.

In addition, applications for economic injury loans from small businesses located in the contiguous Counties of Christian and Muhlenberg in the State of Kentucky may be filed until the specified date at the previously designated location. Any counties contiguous to the above-named primary county and not listed herein have been previously declared.

All other information remains the same, i.e., the deadline for filing applications for physical damage is March 10, 2000 and for economic injury the deadline is October 10, 2000.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: January 20, 2000.

**Herbert L. Mitchell,**

*Acting Associate Administrator for Disaster Assistance.*

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

<sup>11</sup> In approving the proposal, the Commission has considered the rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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

## SMALL BUSINESS ADMINISTRATION

### [Declaration of Disaster #3233]

#### State of New York (And Contiguous Counties in New Jersey & Connecticut)

Westchester County and the contiguous Counties of Bronx, Orange, Putnam, and Rockland in New York, Bergen County, New Jersey and Fairfield County, Connecticut constitute a disaster area as a result of damages caused by a fire that occurred on December 29, 1999 in the Village of Ossining. Applications for loans for physical damage as a result of this disaster may be filed until the close of business on March 20, 2000 and for economic injury until the close of business on Oct. 19, 2000 at the address listed below or other locally announced locations: U.S. Small Business Administration, Disaster Area 1 Office, 360 Rainbow Boulevard South, 3rd Floor, Niagara Falls, NY 14303.

The interest rates are:

	Percent
<i>For Physical Damage:</i>	
HOMEOWNERS WITH CREDIT AVAILABLE ELSEWHERE .....	7.500
HOMEOWNERS WITHOUT CREDIT AVAILABLE ELSEWHERE .....	3.750
BUSINESSES WITH CREDIT AVAILABLE ELSEWHERE .....	8.000
BUSINESSES AND NON-PROFIT ORGANIZATIONS WITHOUT CREDIT AVAILABLE ELSEWHERE .....	4.000
OTHERS (INCLUDING NON-PROFIT ORGANIZATIONS) WITH CREDIT AVAILABLE ELSEWHERE .....	6.750
<i>For Economic Injury:</i>	
BUSINESSES AND SMALL AGRICULTURAL COOPERATIVES WITHOUT CREDIT AVAILABLE ELSEWHERE .....	4.000

The numbers assigned for physical damages are 323305 for New York, 323405 for New Jersey, and 323505 for Connecticut. For economic injury the numbers are 9G5100 for New York, 9G5200 for New Jersey, and 9G5300 for Connecticut.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Dated: January 19, 2000.

**Aida Alvarez,**

*Administrator.*

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<sup>8</sup> 17 CFR 240.10b-17.

<sup>9</sup> 15 U.S.C. 780-3(b)(5) and (6).