

manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system

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

Amex does not believe that the proposed rule change will impose any burden on competition.

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

No written comments were solicited or received with respect to the proposed rule change.

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

Amex represents that the proposed rule change would effect a change in an existing order-entry or trading system that: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not have the effect of limiting the access to or availability of the system. Amex concludes, therefore, that the proposal has become effective pursuant to section 19(b)(3)(A) of the Act⁸ and Rule 19b-4(f)(5)⁹ 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 the 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 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 Exchange. All submissions should refer to File No. SR-Amex-01-11 and should be submitted by April 9, 2001.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁰

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44062; File No. SR-CHX-00-31]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by the Chicago Stock Exchange, Incorporated Relating to Preopening Orders

March 12, 2001.

I. Introduction

On October 18, 2000, the Chicago Stock Exchange, Incorporated ("Exchange" or "CHX"), 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 to amend the CHX rule governing preopening orders in Nasdaq/NM securities³ to explicitly define "preopening orders" in Nasdaq/NM securities, and to explicitly provide for a single price opening at or better than the NBBO at the first unlocked, uncrossed market. On December 20, 2000, the CHX filed Amendment No. 1 to the proposed rule change.⁴ The proposed rule change was published in the **Federal Register** on January 22,

¹⁰ 17 CFR 200.30-3(a)(12).

¹¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See CHX Article XX, Rule 37(a)(4).

⁴ In Amendment No. 1, the CHX clarified the proposed rule text to reflect that the 8:25 a.m. cutoff time for preopening orders is "Central Time." See Letter from Kathleen M. Boege, Associate General Counsel, CHX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated December 20, 2000 ("Amendment No. 1").

2001.⁵ No comments were received on the proposal. This order approves the proposed rule change, as amended.

II. Description of the Proposed Rule Change

The Exchange proposes to amend the CHX rule governing preopening orders in Nasdaq/NM securities to provide for additional clarity regarding the types of orders eligible for treatment as preopening orders and the price at which such orders will be filled. The Exchange represents that because Article XX, Rule 37(a)(4) of the Exchange's rules does not explicitly define what constitutes a preopening order in the case of Nasdaq/NM securities, there has been some confusion as to which orders are eligible for treatment as preopening orders, and consequently, some unintended execution guarantees. The proposed rule change will expressly provide that, for an order to be considered a preopening order, an order must be received at or prior to 8:25 a.m. (Central Time) of the date of the opening.

The Exchange also proposes to provide additional clarity regarding the price at which each preopening order will be filled. Currently, the rule provides that preopening orders for Nasdaq/NM securities must be filled "at the Exchange opening trade price." The Exchange believes that it is in the best interest of its order-sending firms and their customers to provide for greater specificity as to the parameters governing the fill price for preopening orders. Accordingly, the proposed rule change provides that each preopening order must be filled "on a single price opening at or better than the NBBO at the first unlocked, uncrossed market."

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 exchange.⁶ In particular, the Commission believes that the proposal is consistent with section 6(b)(5) of the Act,⁷ which requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market,

⁵ See Securities Exchange Act Release No. 43835 (January 11, 2001), 66 FR 6718.

⁶ In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78(c)(f).

⁷ 15 U.S.C. 78f(b)(5).

⁸ 15 U.S.C. 78s(b)(3)(A).

⁹ 17 CFR 240.19b-4(f)(5).

and to protect investors and the public interest.

The Commission finds that the Exchange's amendments to its rule governing preopening orders provides greater clarity and alleviates some confusion for investors as to what constitutes "preopening orders" in Nasdaq/NM securities and how such orders are priced. The CHX proposal explicitly defines preopening orders in Nasdaq/NM securities as those orders received at or prior to 8:25 a.m. (Central Time) on the date of the opening. The CHX proposal also specifies that each preopening order must be filled on a single price opening at or better than the NBBO at the first unlocked, uncrossed market.

The Commission finds that the Exchange's proposed rule change is consistent with the Act because it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market, and to protect investors and the public interest, by providing more specificity and clarity for order-sending firms and their customers regarding its rule governing preopening orders in Nasdaq/NM securities.

IV. Conclusion

For the foregoing reasons, the Commission finds that the CHX's proposal to amend its rule governing preopening orders in Nasdaq/NM securities, as amended, is consistent with the requirements of the Act and rules and regulations thereunder.

It is Therefore Ordered, pursuant to Section 19(b)(2) of the Act,⁸ that the proposed rule change (SR-CHX-00-31), 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. 34-44067; File No. SR-NASD-01-01]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by the National Association of Securities Dealers, Inc. to Amend NASD Rule 4330(f) to Require a Nasdaq Issuer to Apply for Initial Inclusion Following a Reverse Merger With a Non-Nasdaq Entity

March 13, 2001.

I. Introduction

On October 9, 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"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² a proposal to amend paragraph (f) of NASD Rule 4330, "Suspension or Termination of Inclusion of a Security and Exceptions to Inclusion Criteria," to require a Nasdaq issuer to apply for initial inclusion following a Reverse Merger, as defined below, with a non-Nasdaq entity, and to make conforming changes to IM-4300, "Interpretive Material Regarding Future Priced Securities." The proposed rule change was published for comment in the **Federal Register** on February 7, 2001.³ No comments were received on the proposal. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

NASD Rule 4330(f) requires a Nasdaq issuer to comply with all applicable initial inclusion requirements under Nasdaq rules if the issuer enters into a merger, consolidation, or other types of acquisition with a non-Nasdaq entity which results in a change of control and either a change in business or a change in the financial structure of the Nasdaq issuer.

Nasdaq notes that it adopted NASD Rule 4330(f)⁴ in 1993 to address concerns associated with non-Nasdaq entities seeking a "backdoor listing" on Nasdaq through a business combination

involving a Nasdaq issuer.⁵ In these combinations, a non-Nasdaq entity purchased a Nasdaq issuer in a transaction that resulted in the non-Nasdaq entity obtaining a Nasdaq listing without qualifying for initial listing or being subject to the background checks and scrutiny normally applied to issuers seeking initial listing.

According to Nasdaq, some issuers and their counsel have expressed uncertainty regarding the circumstances under which NASD Rule 4330(f) is applicable. Therefore, Nasdaq proposes to amend NASD Rule 4330(f) to indicate that an issuer must apply for initial inclusion following a transaction whereby the issuer combines with a non-Nasdaq entity, resulting in a change of control of the Nasdaq issuer⁶ and the potential for the non-Nasdaq entity to acquire a Nasdaq listing (for purposes of NASD Rule 4330(f), such transaction is referred to as a "Reverse Merger"). To provide further clarification, NASD Rule 4330(f), as amended, sets forth a list of non-exclusive factors which Nasdaq will consider when determining whether a Reverse Merger has occurred. These factors include changes in the management, board of directors, voting power, ownership, and financial structure of the Nasdaq issuer. Nasdaq will also consider the nature of the businesses and the relative size of the Nasdaq issuer and non-Nasdaq entity. Nasdaq believes that these proposed amendments will clarify NASD Rule 4330(f) for issuers while continuing to prevent "backdoor listings" on Nasdaq.

Nasdaq also proposes to make conforming changes to IM-4300.

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.⁷ In particular, the Commission finds that the proposal is consistent with Section 15A(b)(6) of the Act,⁸ which requires, among other things, that the rules of an association be designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest.

According to Nasdaq, some issuers have expressed uncertainty regarding

⁵ See Securities Exchange Act Release No. 32264 (May, 4, 1993), 58 FR 27760 (May 11, 1993) (order approving File No. SR-NASD-93-07).

⁶ It is not necessary to obtain a majority interest in order for a change of control to occur.

⁷ 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).

⁸ 15 U.S.C. 78o-3(b)(6).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 43907 (January 30, 2001), 66 FR 9398.

⁴ When the Nasdaq adopted the rule, it appeared in Section 3(f) of Part II to Schedule D of the NASD By-Laws.

⁸ 15 U.S.C. 78s(b)(2).

⁹ 17 CFR 200.30-3(a)(12).