

members and associated persons have a duty to comply with awards obtained in non-SRO forums.

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

The foregoing proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act⁹ and Rule 19b-4(f)(6) thereunder¹⁰ because the proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative until May 17, 1999, more than 30 days from April 14, 1999, the date on which it was filed, and NASD Regulation provided the Commission with written notice of its intent to file the proposed rule change at least five days prior to the filing date. At any time within 60 days of the filing of such 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.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, 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, N.W., Washington, D.C. 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 the file number in the caption above and should be submitted by May 26, 1999.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 99-11144 Filed 5-3-99; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-41337; File No. SR-NASD-99-14]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Adoption of Interpretive Materials Regarding Future Priced Securities

April 27, 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 April 15, 1999,³ the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its wholly owned 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 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

Nasdaq proposes to adopt interpretive material relating to certain convertible

securities. Below is the text of the proposed rule change. All text is being added.

* * * * *

IM-4300, Interpretive Material Regarding Future Priced Securities Summary

Future Priced Securities are private financing instruments which were created as an alternative means of quickly raising capital for issuers. The security is generally structured in the form of a convertible security and is often issued via a private placement. Issuers will typically receive all capital proceeds at the closing. The conversion price of the Future Priced Security is generally linked to a percentage discount to the market price of the underlying common stock at the time of conversion and accordingly the conversion rate for Future Priced Securities floats with the market price of the common stock. As such, the lower the price of the issuer's common stock at the time of conversion, the more shares into which the Future Priced Security is convertible. The delay is setting the conversion price is appealing to issuers who believe that their stock will achieve greater value after the financing is received. However, the issuance of Future Priced Securities may be followed by a decline in the common stock price, creating additional dilution to the existing holders of the common stock. Such a price decline allows holders to convert the Future Priced Security into large amounts of the issuer's common stock. As these shares are issued upon conversion of the Future Priced Security, the common stock price may tend to decline further.

For example, an issuer may issue \$10 million of convertible preferred stock (the Future Priced Security), which is convertible by the holder or holders into \$10 million of common stock based on a conversion price of 80% of the closing price of the common stock on the date of conversion. If the closing price is \$5 on the date of conversion, the Future Priced Security holders would receive 2,500,000 shares of common stock. If, on the other hand, the closing price is \$1 on the date of conversion, the Future Priced Security holders would receive 12,500,000 shares of common stock.

Unless the issuer carefully considers the terms of the securities in connection with several NASD Rules, the issuance of Future Priced Securities could result in a failure to comply with Nasdaq listing standards and the concomitant delisting of the issuer's securities from the Nasdaq Stock Market. Nasdaq's experience has been that issuers do not

⁹ 15 U.S.C. 78s(b)(3)(A).

¹⁰ 17 CFR 240.19b-4(f)(6). In reviewing this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Association originally filed the proposed rule change on March 8, 1999. After consultation with Commission staff, the Association filed Amendment No. 1 to clarify certain provisions of the proposed rule language. Letter to Richard Strasser, Assistant Director, Division of Market Regulation, Commission, from Robert E. Aber, Senior Vice President and General Counsel, NASD, dated April 14, 1999 ("Amendment No. 1").

always appreciate this potential consequence. NASD Rules that bear upon the continued listing qualification of an issuer and that must be considered when issuing Future Priced Securities include:

1. the shareholder approval rules
2. the voting rights rules.
3. the bid price requirement
4. the listing of additional shares rules
5. the change in control rules
6. Nasdaq's discretionary authority rules

It is important for issuers to clearly understand that failure to comply with any of these rules could result in the delisting of the issuer's securities.

This notice is intended to be of assistance to companies considering financings involving Future Priced Securities. By adhering to the above requirements, issuers can avoid unintended listing qualifications problems. Issuers having any questions about this notice should contact The Nasdaq Stock Market, Office of General Counsel at (202) 728-8294 or Listing Qualifications Department at (202) 496-2500. Nasdaq will provide an issuer with a written interpretation of the application of NASD Rules to a specific transaction, upon request of the issuer.

How the Rules Apply

Shareholder Approval

NASD Rule 4310(c)(25)(H)(i) relating to Nasdaq SmallCap issuers and Rule 4460(i)(1) relating to Nasdaq National Market issuers provide, in part:

Each issuer shall require shareholder approval * * * prior to the issuance of designated securities * * * in connection with a transaction other than a public offering involving * * * the sale or issuance by the issuer of common stock (or securities convertible into or exercisable for common stock) equal to 20 percent or more of the common stock or 20 percent or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.⁴

When Nasdaq staff is unable to determine the number of shares to be issued in a transaction, it looks to the maximum potential issuance of shares to determine whether there will be an issuance of 20 percent or more of the common stock outstanding. In the case of Future priced Securities, the actual conversion price is dependent on the market price at the time of conversion

and so the number of shares that will be issued is uncertain until the conversion occurs. Accordingly, staff will look to the maximum potential issuance of common shares at the time the Future Priced Security is issued. Typically, with a Future Priced Security, the maximum potential issuance will exceed 20 percent of the common stock outstanding because the Future Priced Security could, potentially, be converted into common stock based on a share price of one cent per share, or less. Further, for the purposes of this calculation, the lowest possible conversion price is below the book or market value of the stock at the time of issuance of the Future Priced Security. Therefore, shareholder approval must be obtained *prior* to the issuance of the Future Priced Security. Issuers should also be cautioned that obtaining shareholder ratification of the transaction after the issuance of a Future Priced Security does not satisfy the shareholder approval requirements.

Some Future Priced Securities may contain features to obviate the need for shareholder approval by: (1) placing a cap on the number of shares that can be issued upon conversion, such that the holders of the Future Priced Security cannot, without prior shareholder approval, convert the security into 20 percent or more of the common stock or voting power outstanding before the issuance of the Future Priced Security;⁵ or (2) placing a floor on the conversion price, such that the conversion price will always be at least as high as the greater of book or market value of the common stock prior to the *issuance* of the Future Priced Securities. Even when a Future Priced Security contains these features, however, shareholder approval is still required under Rules 4310(c)(25)(H)(i)(b) and 4460(i)(1)(B) if the issuance will result in a change of control.

* * * * *

Voting Rights

NASD Rule 4310(c)(21) provides: Voting rights of existing shareholders of publicly traded common stock registered under Section 12 of the Act cannot be disparately reduced or restricted through any corporate action or issuance.

Rule 4460(j) and IM-4310 also provide rules relating to voting rights of Nasdaq issuers.

Under the voting rights rules, an issuer cannot create a new class of security that votes at a higher rate than an existing class of securities or take any other action that has the effect of restricting or reducing the voting rights of an existing class of securities. The voting rights rules are typically implicated when the holders of the Future Priced Security are entitled to vote on an as-converted basis or when the holders of the Future Priced Security are entitled to representation on the Board of Directors. Staff will consider whether a voting rights violation exists by comparing the Future Priced Security holders' voting rights to their relative contribution to the company based on the company's overall book or market value at the time of the *issuance* of the Future Priced Security. The percentage of the overall vote attributable to the Future Priced Security holders and the Future Priced Security holders' representation on the board of directors must not exceed their relative contribution to the company based on the company's overall book or market value at the time of the issuance of the Future Priced Security. If the voting power or the board percentage exceeds that percentage interest, a violation exists because a new class of securities has been created that votes at a higher rate than an already existing class. Future Priced Securities that vote on an as-converted basis also raise voting rights concerns because of the possibility that, due to a decline in the price of the underlying common stock, the Future Priced Security holder will have voting rights disproportionate to its investment in the Company.

It is important to note that compliance with the shareholder approval rules prior to the issuance of a Future Priced Security does not affect whether the transaction is in violation of the voting rights rule. Furthermore, shareholders cannot otherwise agree to permit a voting rights violation by the issuer. Because a violation of the voting rights requirement can result in delisting of the issuer's securities from Nasdaq, careful attention must be given to this issue to prevent a violation of the rule.

* * * * *

The Bid Price Requirement

NASD Rules 4310(c)(4) and 4450(a)(5) provide that for an issue to be eligible for continued inclusion on the Nasdaq Stock Market, the minimum bid price per share shall be \$1.

In addition, Rule 4450(b)(4), which applies only to issues qualifying for the Nasdaq National Market under maintenance standard 2, provides that for an issue to remain eligible for

⁴ Nasdaq may make exceptions to this requirement when the delay in securing stockholder approval would seriously jeopardize the financial viability of the enterprise and reliance by the company on this exception is expressly approved by the Audit Committee or a comparable body of the Board of Directors.

⁵ In order to obviate the need for shareholder approval through such an arrangement, those shares already issued in connection with the Future Priced Security must not be entitled to vote on the proposal to approve the issuance of additional shares upon conversion of the Future Priced Security.

continued inclusion in the Nasdaq National Market, the minimum bid price shall be \$5.

The bid price requirement establishes a minimum bid price for issues trading on Nasdaq. An issue is subject to delisting from Nasdaq if its bid price falls below \$1. In addition, certain issues are subject to delisting from the Nasdaq National Market if their bid price falls below \$5.

The bid price rules must be thoroughly considered because the characteristics of Future Priced Securities often exert downward pressure on the bid price of the issuer's common stock. Specifically, dilution from the discounted conversion of the Future Priced Security may result in a significant decline in the price of the common stock. Furthermore, there appear to be instances where short selling has contributed to a substantial price decline, which, in turn, could lead to a failure to comply with the bid price requirement.⁶

* * * * *

Listing of Additional Shares

NASD Rule 4310(c)(17) provides:

The issuer shall be required to file on a form designated by Nasdaq notification of * * * the issuance of additional shares of any class of securities included in Nasdaq * * * no later than 15 calendar days prior to * * * the issuance of additional shares.

Issuers should be cognizant that under this rule notification is required at least 15 days prior to issuing any security (including a Future Priced Security) convertible into shares of a class of securities already listed on Nasdaq. Failure to provide such notice can result in an issuer's removal from Nasdaq.

* * * * *

Public Interest Concerns

NASD Rule 4300 provides:

The Nasdaq Stock Market is entrusted with the authority to preserve and strengthen the quality of and public confidence in its market. The Nasdaq Stock Market stands for integrity and ethical business practices in order to enhance investor confidence, thereby contributing to the financial health of the economy and supporting the capital formation process. Nasdaq issuers, from new public companies to companies of international stature, by being included in Nasdaq, are publicly recognized as

sharing these important objectives of the Nasdaq Stock Market.

NASD Rule 4330(a) provides:

Nasdaq may * * * deny inclusion or apply additional or more stringent criteria for the initial or continued inclusion of particular securities or suspend or terminate the inclusion of an otherwise qualified security if * * * Nasdaq deems it necessary to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, or to protect investors and the public interest.

The returns on Future Priced Securities may become excessive compared with those of public investors in the issuer's common securities. In egregious situations, the use of a Future Priced Security may raise public interest concerns under Rules 4300 and 4330(a). In addition to the demonstrable business purpose of the transaction, other factors that Nasdaq staff will consider in determining whether a transaction raises public interest concerns include: (1) the amount raised in the transaction relative to the issuer's existing capital structure; (2) the dilutive effect of the transaction on the existing holders of common stock; (3) the risk undertaken by the Future Priced Security investor; (4) the relationship between the Future Priced Security investor and the issuer; (5) whether the transaction was preceded by other similar transactions; and (6) whether the transaction is consistent with the just and equitable principles of trade.

Some Future Priced Securities may contain features that address the public interest concerns. These features tend to provide incentives to the investor to hold the security for a longer time period and limit the number of shares into which the Future Priced Security may be converted. Such features may limit the dilutive effect of the transaction and increase the risk undertaken by the Future Priced Security investor in relationship to the reward available.

* * * * *

Change of Control and Change in Financial Structure

NASD Rule 4330(f) provides:

Nasdaq shall require a Nasdaq SmallCap Market issuer to comply with all applicable requirements for initial inclusion under this Rule 4300 Series and shall require a Nasdaq National Market issuer to comply with all applicable requirements for initial inclusion under the Rule 4300 Series and Rule 4400 Series in the event that such issuer enters into a merger, consolidation, or other type of acquisition with a non-Nasdaq entity

(including domestic and foreign corporations and limited partnerships), which results in a change of control and either a change in business or change in the financial structure of the Nasdaq SmallCap Market or Nasdaq National Market issuer.

This provision, which applies regardless of whether the issuer obtains shareholder approval for the transaction, requires issuers to qualify under the initial inclusion standards following a merger or consolidation that results in a change of control if there is also a change in either the business or the financial structure of the issuer.⁷ It is important for issuers to realize that in certain instances, the conversion of a Future Priced Security may implicate this provision. For example, if there is no limit on the number of common shares issuable upon conversion, or if the limit is set high enough, the exercise of conversion rights under a Future Priced Security could result in a change of control in a deemed merger or consolidation with the holders of the Future Priced Securities. In addition, the issuance of the Future Priced Security and the large increase in the number of common shares outstanding after conversion of the Future Priced Security may be viewed as a change in financial structure. In such event, an issuer would be required to re-apply for initial inclusion and satisfy all initial inclusion requirements.

* * * * *

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

Nasdaq has seen an increase in the use of securities that convert into

⁶ If used to manipulate the price of the stock, short selling by the holders of the Future Priced Security is prohibited by the antifraud provisions of the securities laws and by NASD Rules and may be prohibited by the terms of the placement.

⁷ This provision is designed to address situations where a company attempts to obtain a "backdoor listing" on Nasdaq by merging with a Nasdaq issuer with minimal assets and/or operations.

common stock of the issuer based upon a below-market floating conversion rate ("Future Priced Securities"). In some cases, it appears that there may be a lack of understanding as to how these transactions may implicate Nasdaq rules. Accordingly, Nasdaq has prepared interpretive material that issuers can use when considering whether to issue these securities.

Nasdaq has studied the use of Future Priced Securities by Nasdaq issuers. While Future Priced Securities can provide a legitimate mechanism for issuers to raise capital, each issuance may raise concerns under several Nasdaq Rules, including those rules relating to shareholder approval, voting rights, bid price, listing of additional shares, and changes in control. In addition, the use of Future Priced Securities may be inconsistent with the protection of investors and the public interest. The interpretive material is designed to alert issuers to the potential effect Future Priced Securities may have on the issuer's qualification for continued inclusion on Nasdaq.

2. Statutory Basis

The NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁸ 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 interpretive material is designed to educate issuers as to how Nasdaq applies its various rules to Future Priced Securities in order 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.

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

The Association did not solicit or receive written comments on the proposed rule change.

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

The proposed rule change will become effective upon filing pursuant to Section 19(b)(3)(A)(i) of the Act,⁹ and Rule 19b-4(f)(1)¹⁰ thereunder, in that it is designated by the Association as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule. At any time within 60 days of the filing of such 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.¹¹

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, N.W., Washington, D.C. 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 in Washington, D.C. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to the File No. SR-NASD-99-14 and should be submitted by May 26, 1999.

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

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99-11146 Filed 5-3-99; 8:45 am]

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⁹ 15 U.S.C. 78s(b)(3)(A).

¹⁰ 17 CFR 240.19b-4(f)(1).

¹¹ In reviewing this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹² 17 CFR 200.30-3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3173]

State of Georgia

As a result of the President's major disaster declaration on April 20, 1999, and an amendment thereto on April 26, I find that Candler and Dooly Counties in the State of Georgia constitute a disaster area due to damages caused by Severe Storms and Tornadoes that occurred on April 15, 1999.

Applications for loans for physical damage as a result of this disaster may be filed until the close of business on June 18, 1999 and for economic injury until the close of business on January 20, 2000 at the address listed below or other locally announced locations:

U.S. Small Business Administration,
Disaster Area 2 Office, One Baltimore
Place, Suite 300, Atlanta, GA 30308

In addition, applications for economic injury loans from small businesses located in the following contiguous counties in the State of Georgia may be filed until the specified date at the above location: Bulloch, Crisp, Emanuel, Evans, Houston, Macon, Pulaski, Sumter, Tattnall, Toombs, and Wilcox.

The interest rates are:

	Percent
For Physical Damage:	
HOMEOWNERS WITH CREDIT AVAILABLE ELSEWHERE	6.875
HOMEOWNERS WITHOUT CREDIT AVAILABLE ELSEWHERE	3.437
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	7.000
For Economic Injury:	
BUSINESSES AND SMALL AGRICULTURAL COOPERATIVES WITHOUT CREDIT AVAILABLE ELSEWHERE ...	4.000

The numbers assigned to this disaster are 317311 for physical damage and 9C6300 for economic injury.

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

Dated: April 27, 1999.

Bernard Kulik,

Associate Administrator for Disaster Assistance.

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⁸ 15 U.S.C. 78o-3(b)(6).