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 the filing will also be available for inspection and copying at the principal offices of the Exchange. All submissions should refer to File No. SR–NASD–2002–129 and should be submitted by November 7, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[6]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–26368 Filed 10–16–02; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46649; File No. SR–NASD–2002–140]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by National Association of Securities Dealers, Inc. Relating to Shareholder Approval for Stock Option Plans or Other Arrangements

October 11, 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 October 9, 2002, the National Association of Securities Dealers, Inc. (''NASD''), 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. On October 10, 2002, Nasdaq filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

Nasdaq proposes to amend NASD Rule 4350(i) (''NASD Rule 4350(i)'' or ''Rule'') to strengthen listing standards relating to shareholder approval for stock option plans or other arrangements, adopt interpretative material pertaining to shareholder approval for stock option plans or other arrangements, and to make related conforming changes to NASD Rules 4310(c)(17)(A) and 4320(15)(A).

The text of the proposed rule change is below. Proposed new language is *italicized*; proposed deletions are in brackets.

* * * * *

Rule 4310. Qualification Requirements for Domestic and Canadian Securities

(a)–(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 notify Nasdaq on the appropriate form no later than 15 calendar days prior to:

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

(B)–(D) No change.

(18)–(29) No change.

(d) No change.

* * * * *

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

(a)–(d) No change.

(e) In addition to the requirements contained in paragraphs (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 notify Nasdaq on the appropriate form no later than 15 calendar days prior to:

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

(B)–(D) No change.

(16)–(25) No change.

(f) No change.

* * * * *

Rule 4350. Quantitative Listing Requirements for Nasdaq National Market and Nasdaq SmallCap Market Issuers Except for Limited Partnerships

(a)–(h) No change.

(i) Shareholder Approval.

(1) Each issuer shall require shareholder approval [of a plan or arrangement under subparagraph (A) below, or] prior to the issuance of designated securities under subparagraph *(A),* (B), (C), or (D) below:

(A) when a stock option or purchase plan is to be established *or materially amended* or other arrangement made pursuant to which options or stock may be acquired by officers*,* [or] directors*, employees, or consultants,* except for:

(i) warrants or rights issued generally to *all* security holders of the company; or

(ii) [broadly based plans or arrangements including other employees (*e.g.* ESOPs).] *tax qualified, non-discriminatory employee benefit plans (e.g., plans that meet the requirements of Section 401(a) or 423 of the Internal Revenue Code) or parallel nonqualified plans, provided such plans are approved by the issuer's compensation committee or a majority of the issuer's independent directors; or*

(iii) plans relating to an acquisition or merger as permitted under IM–4350–5; or

(iv) [In a case where the shares are] issuances[ed] to a person not previously *an* employee [d by] *or director* of the company, as an inducement [essential] *material* to the individual's entering into [an] employment [contract] with the company, *provided such issuances are approved by the issuer's compensation committee or a majority of the issuer's independent directors.* [shareholder approval will generally not be required. The establishment of a plan or arrangement under which the amount of securities that may be issued does not exceed the lesser of 1% of the number of shares of common stock, 1% of the voting power outstanding, or 25,000 shares will not generally require shareholder approval.]

(B)–(D) No change.

(2)–(6) No change.

(j)–(l) No change.

* * * * *

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[6] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from John D. Nachmann, Senior Attorney, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated October 10, 2002 (''Amendment No. 1''). In Amendment No. 1, Nasdaq did the following: (1) made technical corrections to its proposed rule language; (2) clarified the exceptions to shareholder approval for tax qualified, non-discriminatory employee benefit plans, parallel nonqualified plans, and plans relating to an acquisition or merger; and (3) clarified in the purpose section of its filing that it was proposing to make conforming changes to NASD Rules 4310(c)(17)(A) and 4320(15)(A).

IM–4350–5. Shareholder Approval for Stock Option Plans or Other Arrangements

Employee ownership of company stock can be an effective tool to align employee interests with those of other shareholders. Stock option plans can also assist in the recruitment and retention of employees, which is especially critical to young, growing companies, or companies with insufficient cash resources to attract and retain highly qualified employees. However, these plans can potentially dilute shareholder interests. As such, Rule 4350(i)(1)(A) ensures that shareholders have a voice in the use of stock option plans, given this potential for dilution.

Rule 4350(i)(1)(A) provides an exception to the requirement for shareholder approval for warrants or rights offered generally to all shareholders. In addition, an exception is provided for tax qualified, non-discriminatory employee benefit plans as these plans are regulated under the Internal Revenue Code and Treasury Department regulations. Along with tax qualified, non-discriminatory employee benefit plans, the Rule also provides an exception for parallel nonqualified plans.[1]

Further, there is an exception for inducement grants to new employees because in these cases a company has an arm's length relationship with the new employees, and its interests are directly aligned with the shareholders. Inducement grants for these purposes include grants of options or stock to new employees in connection with a merger or acquisition.

In addition, plans involving a merger or acquisition do not require shareholder approval in two situations. First, shareholder approval will not be required to convert, replace or adjust outstanding options or other equity compensation awards to reflect the transaction. Second, shares available under certain plans acquired in acquisitions and mergers may be used for certain post-transaction grants without further shareholder approval. This exception applies to situations where the party which is not a listed company following the transaction has shares available for grant under pre-existing plans that were previously approved by shareholders. These shares may be used for post-transaction grants of options and other equity awards by the listed company (after appropriate adjustment of the number of shares to reflect the transaction), either under the pre-existing plan or another plan, without further shareholder approval, so long as (1) the time during which those shares are available for grants is not extended beyond the period when they would have been available under the pre-existing plan, absent the transaction, and (2) such options and other awards are not granted to individuals who were employed by the granting company at the time the merger or acquisition was consummated. Nasdaq would view a plan adopted in contemplation of the merger or acquisition transaction as not pre-existing for purposes of this exception. This exception is appropriate because it will not result in any increase in the aggregate potential dilution of the combined enterprise.[2]

Inducement grants, tax qualified non-discriminatory benefit plans, and parallel nonqualified plans are subject to approval by either the issuer's compensation committee, or a majority of the issuer's independent directors. It should also be noted that a company would not be permitted to use repurchased shares to fund option plans or grants without prior shareholder approval.

Footnotes to IM–4350–5

[1] *The term ''parallel nonqualified plan'' means a plan that is a ''pension plan'' within the meaning of the Employee Retirement Income Security Act (''ERISA''), 29 U.S.C. § 1002 (1999), that is designed to work in parallel with a plan intended to be qualified under Internal Revenue Code Section 401(a), to provide benefits that exceed the limits set forth in Internal Revenue Code Section 402(g) (the section that limits an employee's annual pre-tax contributions to a 401(k) plan), Internal Revenue Code Section 401(a)(17) (the section that limits the amount of an employee's compensation that can be taken into account for plan purposes) and/or Internal Revenue Code Section 415 (the section that limits the contributions and benefits under qualified plans) and/or any successor or similar limitations that may thereafter be enacted. However, a plan will not be considered a parallel nonqualified plan unless (1) it covers all or substantially all employees of an employer who are participants in the related qualified plan whose annual compensation is in excess of the limit of Code Section 401(a)(17) (or any successor or similar limitation that may hereafter be enacted) and (2) its terms are substantially the same as the qualified plan that it parallels except for the elimination of the limitations described in the preceding sentence.*

[2] *Note that any such shares reserved for listing in connection with the transaction would be counted by Nasdaq in determining whether the transaction involved the issuance of 20% or more of the company's outstanding common stock and thus required shareholder approval under Rule 4350(i)(1)(D).*

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq 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. Nasdaq 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

NASD Rule 4350(i)(1)(A) generally requires shareholder approval for all stock option plans or other arrangements in which officers or directors participate. However, the Rule contains an exception for broadly based plans, that is, plans in which at least a majority of the eligible participants are not officers or directors and at least a majority of the grants go to employees other than officers and directors. Consistent with recent remarks by President Bush and SEC Chairman Pitt, and in order to enhance investor confidence, Nasdaq now proposes to delete the exception for broadly based plans and expand the Rule to generally require that all plans will be subject to shareholder approval.

Nasdaq also proposes to eliminate the *de minimis* exception to the Rule, which allows for the grant of the lesser of 1% of the number of shares of common stock or 25,000 shares, without shareholder approval. Nasdaq believes that this exception is not in accord with the concept of restricting the use of unapproved options.

The remaining exception for warrants or rights offered generally to all shareholders would be retained. In addition, shareholder approval would not be required for tax qualified, non-discriminatory benefit plans as these plans are regulated under the Internal Revenue Code and Treasury Department regulations. Along with tax qualified, non-discriminatory employee benefit plans, the Rule also proposes an exception for parallel nonqualified plans. The Nasdaq represents that the proposed amendments to the Rule would have no effect on any shareholder approval or other requirements under the Internal Revenue Code or other applicable laws or requirements for such plans.

Further, the exception for inducement grants to new employees would be retained because in these cases a company has an arm's length relationship with the new employees, and its interests are directly aligned with the shareholders. Inducement grants for these purposes would include grants of options or stock to new employees in connection with a merger or acquisition.

In addition, the proposed amendments to the Rule would make clear that plans involving a merger or acquisition would not require shareholder approval in two situations. First, shareholder approval will not be required to convert, replace or adjust outstanding options or other equity compensation awards to reflect the transaction. Second, shares available under certain plans acquired in acquisitions and mergers may be used for certain post-transaction grants without further shareholder approval. This exception applies to situations where the party which is not a listed company following the transaction has shares available for grant under pre-existing plans that were previously approved by shareholders. These shares may be used for post-transaction grants of options and other equity awards by the listed company (after appropriate adjustment of the number of shares to reflect the transaction), either under the pre-existing plan or another plan, without further shareholder approval, so long as (1) the time during which those shares are available for grants is not extended beyond the period when they would have been available under the pre-existing plan, absent the transaction, and (2) such options and other awards are not granted to individuals who were employed by the granting company at the time the merger or acquisition was consummated. Nasdaq would view a plan adopted in contemplation of the merger or acquisition transaction as not pre-existing for purposes of this exception. Nasdaq believes that this exception is appropriate because it believes that it will not result in any increase in the aggregate potential dilution of the combined enterprise.

Under the proposed amendments to the Rule, inducement grants, tax qualified, non-discriminatory benefit plans, and parallel nonqualified plans are subject to approval by either the issuer's compensation committee, or a majority of the issuer's independent directors. It should also be noted that a company would not be permitted to use repurchased shares to fund options without prior shareholder approval.

The proposed amendments to the Rule also clarify that material amendments to plans will require shareholder approval. Nasdaq will continue to provide guidance as to what constitutes a material amendment to a plan. Nasdaq currently determines the existence of a material amendment to a plan consistent with the Commission's position under former Rule 16b–3 of the Act. In particular, Nasdaq looks to whether there is a material change to: (1) The benefits available to potential recipients under the plan; (2) the number of shares available under the plan; or (3) the class of eligible participants under the plan. Nasdaq is considering whether these factors can be refined, and may provide further guidance following this consideration.

With respect to implementation of the proposed amendments to the Rule, Nasdaq proposes that the amended Rule become effective upon SEC approval, and that existing plans be grandfathered. Nasdaq represents that any material modification to plans in place or adopted after the effective date of the Rule would require shareholder approval.

Lastly, Nasdaq proposes to make conforming changes to NASD Rules 4310(c)(17)(A) and 4320(e)(15)(A). These proposed changes will require issuers to notify Nasdaq on the appropriate form no later than 15 calendar days prior to establishing or materially amending a stock option plan, purchase plan or other arrangement pursuant to which stock may be acquired by officers, directors, employees, or consultants without shareholder approval.

2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with the provisions of Section 15A of the Act,[4] in general and with Section 15A(b)(6) of the Act,[5] in particular, in that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to 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. As previously noted, Nasdaq believes that the proposed rule change will strengthen shareholder approval requirements with respect to stock option plans.

[4] 15 U.S.C. 78o–3.

[5] 15 U.S.C. 78o–3(6).

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

Nasdaq 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, as amended, in 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–2002–140 and should be submitted by November 7, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[6]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–26457 Filed 10–16–02; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46613; File No. SR–NFA–2002–05]

Self-Regulatory Organizations; Notice of Filing and Effectiveness of Proposed Rule Change by the National Futures Association Concerning Risk Disclosure for Security Futures Contracts

October 7, 2002.

Pursuant to section 19(b)(7) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–7 under the Act,[2] notice is hereby given that on September 27, 2002, the National Futures Association (''NFA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule changes described in Items I, II, and III below, which Items have been prepared by the NFA. The Commission is publishing this notice to solicit comments on the proposed rule changes from interested persons. NFA also has filed the proposed rule change with the Commodity Futures Trading Commission (''CFTC''). On September 25, 2002, NFA submitted the proposed rule changes to the CFTC for approval and invoked the ''ten-day'' provision of Section 17(j) of the Commodity Exchange Act (''CEA'').[3]

I. Self-Regulatory Organization's Description of the Proposed Rule Change

Section 15A(k) of the Act[4] makes NFA a national securities association for the limited purpose of regulating the activities of members who are registered as brokers or dealers in security futures products under Section 15(b)(11) of the Act.[5] The interpretive notice regarding the risk disclosure statement for security futures contracts will apply to these Members.

The proposed interpretive notice identifies the risk disclosure statement that Members and Associates who are not members of NASD are required to provide to a customer at or before the time the member approves the account to trade security futures products. The text of that notice and the risk disclosure statement follow.

NFA Compliance Rule 2–30(b): Risk Disclosure Statement for Security Futures Contracts; Interpretive Notice

NFA Compliance Rule 2–30(b) requires Members and Associates who are not members of NASD to provide a disclosure statement for security futures products to a customer at or before the time the Member approves the account to trade security futures products. NFA Compliance Rule 2–30(j)(1) requires these Members and Associates to make a record of when the disclosure statement was provided, and Compliance Rule 2–29(j)(12) prohibits Members who are registered as brokers and dealers in security futures products under Section 15(b)(11) of the Securities Exchange Act from including anything other than basic information in promotional material unless the promotional material is preceded or accompanied by the disclosure statement.[6] The disclosure statement for security futures products referred to in these Rules is a uniform statement that has been jointly developed by NFA, NASD, and a number of securities and futures exchanges.

The uniform disclosure statement, which is titled ''Risk Disclosure Statement for Security Futures Contracts,'' can be downloaded from NFA's website at www.nfa.futures.org. Copies are also available by calling NFA's Information Center at 800–621–3570.[7]

Members must be able to demonstrate to NFA, during an audit, that they provided the disclosure statement as required. Members are not, however, required to obtain a written acknowledgment from the customer regarding the disclosure statement.

* * * * *

Risk Disclosure Statement for Security Futures Contracts

This disclosure statement discusses the characteristics and risks of standardized security futures contracts traded on regulated U.S. exchanges. At present, regulated exchanges are authorized to list futures contracts on individual equity securities registered under the Securities Exchange Act of 1934 (including common stock and certain exchange-traded funds and American Depositary Receipts), as well as narrow-based security indices. Futures on other types of securities and options on security futures contracts may be authorized in the future. The glossary of terms appears at the end of the document.

Customers should be aware that the examples in this document are exclusive of fees and commissions that may decrease their net gains or increase their net losses. The examples also do not include tax consequences, which may differ for each customer.

Section 1—Risks of Security Futures

1.1. Risks of Security Futures Transactions

Trading security futures contracts may not be suitable for all investors. You may lose a substantial amount of money in a very short period of time. The amount you may lose is potentially unlimited and can exceed the amount you originally deposit with your broker. This is because futures trading is highly leveraged, with a relatively small amount of money used to establish a position in assets having a much greater value. If you are uncomfortable with this level of risk, you should not trade security futures contracts.

1.2. General Risks

• *Trading security futures contracts involves risk and may result in potentially unlimited losses that are greater than the amount you deposited with your broker.* As with any high risk financial product, you should not risk any funds that you cannot afford to lose, such as your retirement savings, medical and other emergency funds, funds set aside for purposes such as education or home ownership, proceeds from student loans or mortgages, or funds required to meet your living expenses.

• *Be cautious of claims that you can make large profits from trading security futures contracts.* Although the high degree of leverage in security futures contracts can result in large and immediate gains, it can also result in large and immediate losses. As with any financial product, there is no such thing as a ''sure winner.''

• *Because of the leverage involved and the nature of security futures contract transactions, you may feel the effects of your losses immediately.* Gains and losses in security futures contracts are credited or debited to your account, at a minimum, on a daily basis. If movements in the markets for security futures contracts or the underlying security decrease the value of your positions in security futures contracts, you may be required to have or make

[6] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(7).

[2] 17 CFR 240.19b–7.

[3] 7 U.S.C. 21j.

[4] 15 U.S.C. 78o–3(k).

[5] 15 U.S.C. 78o(b)(11).

[6] NASD members are subject to equivalent NASD requirements.

[7] There is a small charge for bulk orders.