

exemption from all provisions of the Act. Applicant notes that in the release adopting rule 3a-5,² the SEC stated that it may be appropriate to grant exemptive relief to the finance subsidiary of a section 3(c) issuer, but only on a case-by-case basis so that it can have the opportunity to evaluate all of the relevant factors. According to the adopting release, the concern was that a company may be considered a non-investment company for the purposes of the Act under section 3(c) and still be engaged primarily in investment company activities.

2. Rule 3a-5(b)(3)(i) in relevant part defines a "company controlled by the parent company" to be a corporation, partnership, or joint venture that is not considered an investment company under section 3(a) or that is excepted or exempted by order from the definition of investment company by section 3(b) or by the rules and regulations under section 3(a). Certain of Toronto Dominion's subsidiaries do not fit within the technical definition of "companies controlled by the parent company" because they derive their non-investment company status from section 3(c) of the Act.

3. Toronto Dominion states that neither itself and its subsidiaries, nor TD and its subsidiaries, engage primarily in investment company activities. In addition, if TD were itself to issue the securities that are to be issued by Toronto Dominion and use the proceeds for its own purposes or advance them to its subsidiaries or affiliates, none of TD, Toronto Dominion nor any of their respective subsidiaries or affiliates would be subject to regulation under the Act. While TD has chosen to use Toronto Dominion as a financing vehicle, by virtue of the Guarantee, the holders of the securities issued by Toronto Dominion will have direct access to TD's credit.

4. Under rule 3a-5(a)(6), a finance subsidiary may only invest in government securities, securities of its parent company or a company controlled by its parent company or debt securities exempt under section 3(a)(3) of the 1933 Act. Toronto Dominion will hold equity securities of unaffiliated companies in an amount that does not exceed 4% of its assets. Toronto Dominion will hold such securities due to non-U.S. tax constraints applicable to TD. The primary purpose of Toronto Dominion,

however, will continue to be to finance the business operations of TD and companies controlled by TD. Moreover, purchasers of Toronto Dominion's debt securities will receive disclosure documents that make clear that such purchasers should ultimately look to TD for repayment pursuant to the Guarantee. Neither Toronto Dominion's structure nor its mode of operation will resemble that of an investment company.

5. Section 6(c) of the Act, in pertinent part, provides that the SEC, by order upon application, may conditionally or unconditionally exempt any person, security or transaction, or any class or classes of persons, securities or transactions, from any provision or provisions of the Act to the extent that such exemption is necessary or appropriate, in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Toronto Dominion submits that its exemptive request meet the standards set out in section 6(c) and should therefore be granted.

Applicant's Condition

Toronto Dominion agrees that the order granting the requested relief will be subject to the following condition:

1. Toronto Dominion will comply with all of the provisions of rule 3a-5 under the Act, except: (1) Toronto Dominion will be permitted to invest in or make loans to, corporations, partnerships, and joint ventures that do not meet the portion of the definition of "company controlled by the parent company" in rule 3a-5(b)(3)(i) solely because they are excluded from the definition of investment company by section 3(c)(1), (2), (3), (4), (6) or (7), provided that any such entity that Toronto Dominion invests in or makes loans to that is excluded from the definition of investment company pursuant to section 3(c)(1) or section 3(c)(7) will be engaged solely in lending, leasing or related activities (such as entering into credit derivatives to manage the credit risk exposures of its lending and leasing activities) and will not be structured as a means of avoiding regulation under the Act, and provided, further, that any such entity excluded from the definition of investment company pursuant to section 3(c)(6) of the Act will not be engaged primarily, directly or indirectly, in one or more of the businesses described in section 3(c)(5) of the Act; and (2) Toronto Dominion will be permitted to invest in, reinvest in, own, hold or trade in equity securities of unaffiliated companies

with a purchase price not in excess of 4% of Toronto Dominion's assets.

For the SEC, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-39412; File No. SR-Amex-97-42]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the American Stock Exchange, Inc. Providing for the Waiver of Shareholder Approval as a Prerequisite to Certain Issuances of Securities and the Removal of the Term "Backdoor Listing" From the Exchange's Company Guide

December 8, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ notice is hereby given that on November 3, 1997, the American Stock Exchange, Inc. ("Amex" or "Exchange") 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 Exchange. On December 5, 1997, the Exchange filed with the Commission Amendment No. 1 to the proposed rule change.² 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 Exchange seeks to amend Section 710 of its *Company Guide* to provide for the waiver of shareholder approval as a prerequisite to certain issuances of securities, when obtaining such approval would seriously jeopardize the financial viability of the issuer. The Exchange also seeks to revise Sections 142, 341, 713, and 1003 of its *Company Guide* to eliminate the term "backdoor listing."

¹ 15 U.S.C. § 78s(b)(1).

² Amendment No. 1 corrected a drafting error that inadvertently omitted Section 142 of the Exchange's *Company Guide* from the proposed rule change provision that would eliminate the term "backdoor listing." See Letter from Claudia Crowley, Special Counsel, Legal & Regulatory Policy, Exchange, to Michael L. Loftus, Attorney, Division of Market Regulation, Commission, dated December 3, 1997.

² Rule 3a-5 provides an exemption from the definition of investment company for certain companies organized primarily to finance the business operations of their parent companies or companies controlled by their parent companies.

The text of the proposed rule change is available at the Office of the Secretary, the Exchange, and at the Commission.

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 Exchange 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 Exchange 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange, along with the New York Stock Exchange ("NYSE") and The Nasdaq Stock Market, Inc. ("Nasdaq"), maintains guidelines requiring shareholder approval for certain issuances of securities. The Exchange's guidelines are set forth in Sections 711-713 of the Exchange's *Company Guide*. These requirements typically apply to the issuance of securities in connection with management stock option plans, large acquisitions, or discounted private placements involving the issuance of 20% or more of the issuer's shares. Because the process of obtaining shareholder approval may be time-consuming, the Exchange has long observed an unwritten policy allowing the waiver of the shareholder approval requirement in circumstances where the very process of obtaining shareholder approval would seriously jeopardize the issuer's ability to survive. The Exchange notes that the rules of the NYSE and Nasdaq specifically provide for such an exception.

To conform its rules to those of the other marketplaces, the Exchange proposes to amend Section 710 of the *Company Guide* to provide that waivers of the shareholder approval required for certain issuances of securities may be granted, upon written application to the Exchange when: (i) The delay in securing shareholder approval would seriously jeopardize the financial viability of the issuer; (ii) reliance by the issuer on this exception is expressly approved by the audit committee of the issuer's board of directors or a comparable body; and (iii) the issuer

mails a letter to all shareholders, at least ten days before the shares are to be issued, describing the transaction, alerting the shareholders to its omission to seek the shareholder approval that would otherwise be required, and indicating that the audit committee of the issuer's board of directors or a comparable body has expressly approved the exception.

In addition, the Exchange proposes to eliminate the term "backdoor listing" from Section 341 of the *Company Guide* and certain related provisions.³ The Exchange currently uses the term to describe a merger between a listed and unlisted company, the net effect of which is so substantial that the Exchange considers it appropriate to evaluate the listing eligibility of the surviving entity under the Exchange's original listing guidelines. The Exchange will retain the substance of the affected Sections, but eliminate the term "backdoor listing" because the Exchange believes the phrase creates an undesirable image. The Exchange contends that Section 341 actually enhances regulation by requiring a substantially changed company to meet original listing guidelines in order to remain listed.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,⁴ in general, and furthers the objectives of Section 6(b)(5),⁵ in particular, in that 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 a national market system, and to protect investors and the public interest.

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

The Exchange does not believe the proposed rule change will impose any inappropriate burden on competition.

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

The Exchange did not solicit or receive written comments with respect to the proposed rule change.

³ Conforming changes are also proposed to be made to Sections 142, 713 and 1003 of the *Company Guide*.

⁴ 15 U.S.C. § 78f(b).

⁵ 15 U.S.C. § 78f(b)(5).

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

Because the foregoing proposed rule change: (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 become operative for 30 days from December 5, 1997, the date on which it was filed,⁶ and the Exchange provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to the filing date, it has become effective pursuant to Section 19(b)(3)(A) of the Act⁷ and Rule 19b-4(e)(6)⁸ 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 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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. 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 persons, 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 Section, 450 Fifth Street, NW., Washington, DC 20549. 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-97-42 and should be submitted by January 6, 1998.

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

⁶ The proposed rule change filing is deemed filed as of the date Amendment No. 1 was received by the Commission.

⁷ 15 U.S.C. § 78s(b)(3)(A).

⁸ 17 CFR 240.19b-4(e)(6).

⁹ 17 CFR 200.30-3(a)(12).

Jonathan G. Katz,

Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-39417; File No. SR-NASD-97-80]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc., Relating to Options Position Limits

December 9, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act"),¹ notice is hereby given that on October 30, 1997, NASD Regulation, Inc. ("NASD Regulation") 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 self-regulatory organization. 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

NASD Regulation is proposing to amend Rule 2860 of the Conduct Rules of the National Association of Securities Dealers, Inc. ("NASD" or "Association"), to exempt conventional equity option transactions that are intermediated by a member pursuant to Exchange Act Rule 15a-6(a)(3) from options position limits provided that the member reports such transactions to the Association in accordance with the options position reporting requirements. Below is the text of the proposed rule change. Proposed new language is italicized.

2860. Options

(b)(3) Position Limits;

(A) Stock Options—Except in highly unusual circumstances, and with the prior written approval of the Association pursuant to the Rule 9600 Series for good cause shown in each instance, no member shall effect for any account in which such member has an interest, or for the account of any partner, officer, director or employee thereof, or for the account of any customer, an opening transaction through Nasdaq, the over-the-counter

market or on any exchange in a stock option contract of any class of stock options if the member has reason to believe that as a result of such transaction the member or partner, officer, director or employee thereof, or customer would, acting alone or in concert with others, directly or indirectly, hold or control or be obligated in respect of an aggregate position in excess of:

* * * * *

(E) Conventional equity option transactions effected by a member pursuant to Exchange Act Rule 15a-6(a)(3) shall not be subject to position limits set forth in this subparagraph, provided that such conventional equity option transactions are reported to the Association in accordance with the requirements of subparagraph (5).

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 self-regulatory organization 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 self-regulatory organization 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 proposed rule change would exempt conventional equity option transactions in which members act as agent or intermediary pursuant to Exchange Act Rule 15a-6(a)(3) from options position limits provided that such conventional equity option transactions are reported to the Association pursuant to Rule 2860(b)(5). NASD Rule 2860(b)(3) establishes limits on the number of options contracts that a member, a customer, or a group of investors acting in concert can write or hold. Specifically, Rule 2860(b)(3) provides that "no member shall effect * * * for the account of any customer, an opening transaction through Nasdaq, the over-the-counter market or on any exchange in a stock option contract of any class of stock options if the * * * customer would * * * hold or control or be obligated in respect to an aggregate position in excess of [certain prescribed

limits]."² Members have expressed uncertainty as to whether U.S. broker/dealers that intermediate conventional equity option transactions between their affiliated foreign broker/dealers and U.S. institutional investors and major U.S. institutional investors pursuant to Rule 15a-6(a)(3), and that do not carry such options positions, are subject to the limits of the Rule. The NASD's options position limits apply to both conventional and standardized equity options. The proposed rule change, however, would affect only transactions in conventional equity options intermediated by a member pursuant to Rule 15a-6(a)(3). Position limits for all other conventional equity options transactions, as well as for standardized options, would remain unchanged.

NASD Regulation believes that Rule 2860 is ambiguous as to whether the limits specified in the Rule apply to option position transactions intermediated by a member firm under Rule 15a-6(a)(3),³ and understands that industry practice in this respect is inconsistent. NASD Regulation is filing this proposed rule change in order to provide clarity and consistency of treatment for all member firms participating in transactions with foreign broker/dealers under Rule 15a-6(a)(3), and also to ensure that such transactions are reported under paragraph (b)(5) of the Rule.

NASD Regulation proposes amending Rule 2860(b)(3) to expressly exempt conventional equity option transactions intermediated by U.S. broker/dealers pursuant to Rule 15a-6(a)(3), provided that the member report to the Association such transactions which establish an aggregate position of 200 or more option contracts pursuant to Rule 2860(b)(5). Exchange Act Rule 15a-6(a)(3) provides that a foreign broker or dealer may, without registering under the Securities Exchange Act of 1934, induce or attempt to induce the

² On September 5, 1997, the NASD filed a proposed rule change to Rule 2860(b) to disaggregate conventional equity options from exchange-traded equity options for position limit purposes and to amend the OTC Collar Exemption to provide that the exemption may be utilized with respect to an entire conventional equity option position, not just that portion that was established pursuant to the NASD's position limit hedge exemption rule. SR-NASD-97-67. This proposed rule change is currently pending with the Commission.

³ In NASD Notice to Members 94-46, the NASD answered common questions concerning position limits, and included the following:

Question #5: Do the NASD options rules apply to conventional option transactions effected abroad by an NASD member or a foreign branch of an NASD member?

Answer: Yes. If the option is booked and carried with an NASD member, it is subject to the NASD position-limit rule.

¹ 15 U.S.C. § 78s(b)(1).