

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹¹ that the proposed rule change (SR-CBOE-97-36), as amended, is approved.

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

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-39482; File No. SR-NASD-97-86]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Small Order Execution System Tier Classification

December 22, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ notice is hereby given that on December 12, 1997, the National Association of Securities Dealers ("NASD" or Association) 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.² 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 Substance of the Proposed Rule Change

The NASD is submitting this filing to effectuate The Nasdaq Stock Market, Inc.'s ("Nasdaq") periodic reclassification of Nasdaq National Market ("NNM") securities into appropriate tier sizes for purposes of

determining the maximum size order for a particular security eligible for execution through Nasdaq's Small Order Execution System ("SOES").

Specifically, under the proposal, 544 NNM securities will be reclassified into a different SOES tier size effective January 1, 1998. Since the NASD's proposal is an interpretation of existing NASD rules, there are no language changes.

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 and a copy of the Notice-to-Members 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

The purpose of the rule change is to effectuate Nasdaq's periodic reclassification of NNM securities into appropriate tier sizes for purposes of determining the maximum size order for a particular security eligible for execution through SOES. Nasdaq periodically reviews the SOES tier size applicable to each NNM security to determine if the trading characteristics of the issue have changed so as to warrant a tier size adjustment. Such a review was conducted using data as of September 30, 1997, pursuant to the following established criteria.³

NNM securities with an average daily non-block volume of 3,000 shares or more a day, a bid price less than or equal to \$100, and three or more market makers are subject to a minimum quotation size requirement of 1,000 shares and a maximum SOES order size of 1,000 shares;

NNM securities with an average daily non-block volume of 1,000 shares or more a day, a bid price less than or equal to \$150, and two or more market makers are subject to a minimum quotation size requirement of 500 shares and a maximum SOES order size of 500 shares; and

NNM securities with an average daily non-block volume of less than 1,000 shares a day, a bid price less than or equal to \$250, and two or more market makers are subject to a

minimum quotation size requirement of 200 shares and a maximum SOES order size of 200 shares.

Pursuant to the application of this classification criteria, 544 NNM securities will be reclassified effective January 1, 1998. These 544 NNM securities are set out in the NASD's Notice to Members 97-90 (December, 1997).

In ranking NNM securities pursuant to the established classification criteria, Nasdaq followed the changes dictated by the criteria with three exceptions. First, an issue was not moved more than one tier size level. For example, if an issue was previously categorized in the 1,000-share tier size, it would not be permitted to move to the 200-share tier even if the reclassification criteria showed that such a move was warranted. In adopting this policy, Nasdaq was attempting to maintain adequate public investor access to the market for issues in which the tier size level decreased and help ensure the ongoing participation of market makers in SOES for issues in which the tier size level increased. Second, for securities priced below \$1 where the reranking called for a reduction in tier size, the tier size was not reduced. Third, for the top 50 Nasdaq securities based on market capitalization, the SOES tier sizes were not reduced regardless of whether the reranking called for a tier-size reduction.

2. Statutory Basis

The NASD believes the proposed rule change is consistent with Section 15A(b)(6) of the Act.⁴ Section 15A(b)(6) requires that the rules of a national securities association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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. Specifically, the NASD believes that the reassignment of NNM securities within SOES tier size levels will further these ends by providing an efficient mechanism for small, retail investors to execute their orders on Nasdaq and by providing investors with the assurance that they can effect trades up to a certain size at the best prices quoted on Nasdaq.

¹¹ 15 U.S.C. § 78s(b)(2).

¹² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² See letter from Robert E. Aber, Vice President and General Counsel, Nasdaq, to Katherine England, Assistant Director, SEC, dated Dec. 11, 1997 ("Amendment No. 1"). The Exchange initially submitted the proposal on December 4, 1997. However, at the Commission's request, the Exchange filed Amendment No. 1 to the proposed rule change on December 12, 1997. Amendment No. 1 corrects a typographical error in the SOES tier-size classification criteria used by the Nasdaq. Amendment No. 1 also clarifies that, despite the typographical error, the correct criteria set out in NASD Rules 4613(a)(2) and 4710(g) was used by Nasdaq in reclassifying the SOES tier sizes. The correction was also made in the Notice to Members 97-90.

³ The classification criteria are set forth in NASD Rule 4613(a)(2) and the footnote to NASD Rule 4710(g).

⁴ 15 U.S.C. § 78o-3.

B. Self-Regulatory Organization's Statement on Competition

The proposed rule change does not impose 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 has neither solicited nor received written comments on the proposed rule change.

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

The foregoing rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule and, therefore, has become effective pursuant to Section 19(b)(3)(A)(i) of the Act⁵ and subparagraph (e) of Rule 19b-4 thereunder.⁶

At any time within sixty 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. 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. 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 at the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR-NASD-97-86 and should be submitted by January 21, 1998.

⁵ 15 U.S.C. 78s(b)(3)(A).

⁶ 17 CFR 240.19b-4(e).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁷

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-39478; File No. SR-NASD-97-85)

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc., Relating to NASD Rule 2460 Concerning Payments for Market Making

December 22, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act"),¹ notice is hereby given that on December 1, 1997, the National Association of Securities Dealers, Inc. ("NASD"), through its wholly owned subsidiary, 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 NASD Regulation.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

NASD Regulation, pursuant to Section 19(b)(3)(A)(i) of the Act³ and Rule 19b-4(e)(i) under the Act,⁴ is proposing this interpretation of NASD Rule 2460 concerning payments for market

⁷ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. § 78s(b)(1).

² The proposal was originally filed with the Commission on November 18, 1997, but was withdrawn on December 1, 1997. See Letter from Alden S. Adkins, Vice President and General Counsel, NASD Regulation, to Richard C. Strasser, Assistant Director, Division of Market Regulation, Commission. (File No. SR-NASD-97-84). On December 22, 1997, the NASD filed Amendment No. 1 with the Commission. See Letter from Alden S. Adkins, Vice President and General Counsel, NASD Regulation, to Richard C. Strasser, Assistant Director, Division of Market Regulation, Commission. In addition, several minor technical corrections authorized by NASD Regulation are included in this Notice. Telephone conversation between David A. Spotts, Office of the General Counsel, NASD Regulation, and Elaine M. Darroch, Office of Market Supervision, Division of Market Regulation, Commission (December 4, 1997).

³ 15 U.S.C. § 78s(b)(3)(A)(i).

⁴ 17 CFR 240.19b-4(e)(i).

making. The text of the letter setting forth the interpretation is attached as Exhibit 1.

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

In its filing with the Commission, NASD Regulation included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule filing. The text of these statements may be examined at the places specified in Item IV below. NASD Regulation 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

NASD Regulation is proposing to issue a staff interpretation of NASD Rule 2460 to clarify the position of NASD Regulation with respect to the application of the rule to certain member broker-dealers that participate in a Freddie Mac Interdealer Cash Market Trading Initiative, as described below.

NASD Rule 2460—Payments for Market Making

On July 3, 1997, the SEC approved NASD Rule 2460 ("Rule"),⁵ which explicitly prohibits an NASD member or person associated with a member from accepting any payment or other consideration from issuers or the issuers' affiliates or promoters, directly or indirectly, for: (1) publishing a quotation, (2) acting as a market maker, or (3) submitting an application in connection therewith. The rule was intended, among other things, to assure that members act in an independent capacity when publishing a quotation or making a market in an issuer's securities.

NASD Regulation originally proposed this new rule and requested comment from members and the public in Notice to Members 96-83 ("NTM 96-83") in December 1996. As stated in NTM 96-83, it has been a longstanding policy and position of the NASD that a broker-dealer is prohibited from receiving compensation or other payments from an issuer for listing, quoting, or making a market in an issuer's securities or for covering the member's out-of-pocket

⁵ Securities Exchange Act Release No. 38812 (July 3, 1997), 62 FR 37105 (July 10, 1997) (File No. SR-NASD-97-29).