

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-2001-19 and should be submitted by December 26, 2001.

VI. Conclusion

It is Therefore Ordered, pursuant to Section 19(b)(2) of the Act,⁴⁷ that the proposed rule change (SR-NASD-2001-19), as amended, is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.⁴⁸

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45116; File No. SR-NASD-2001-84]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. To Change the Description of the Market Capitalization Listing Standard to Market Value of Listed Securities

November 28, 2001.

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 November 14, 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") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. 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 has filed with the Commission a proposed rule change to change the description of the market

capitalization listing standard to market value of listed securities. Nasdaq is also proposing to provide a definition of the term "listed securities" in Nasdaq's Marketplace Rules. Proposed new language is in italics; proposed deletions are in brackets.

* * * * *

Rule 4200. Definitions

(a) For purposes of the Rule 4000 Series, unless the context requires otherwise:

(1)-(18) No change

(19) "*Listed securities*" means securities quoted on Nasdaq or listed on a national securities exchange.

Former (19)-(36) renumbered as (20)-(37)

(b) No change

Rule 4310. Qualification Requirements for Domestic and Canadian Securities

To qualify for inclusion in Nasdaq, a security of a domestic or Canadian issuer shall satisfy all applicable requirements contained in paragraphs (a) or (b), and (c) hereof.

(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) No change

(2)(A) For initial inclusion, the issuer shall have:

(i) No change

(ii) *market value of listed securities* [market capitalization] of \$50 million (currently traded issuers must meet this requirement and the bid price requirement under Rule 4310(c)(4) for 90 consecutive trading days prior to applying for listing); or

(iii) No change

(B) For continued inclusion, the issuer shall maintain:

(i) No change

(ii) *market value of listed securities* [market capitalization] of \$35 million; or

(iii) No change

(3) For initial inclusion, the issuer shall have an operating history of at least one year or a *market value of listed securities* [market capitalization] of \$50 million.

(4)-(7) No change

(8)(A) No change

(B) No change

(C) A failure to meet the continued inclusion requirements for *market value of listed securities* [market capitalization] shall be determined to exist only if the deficiency continues for a period of 10 consecutive business days. Upon such failure, the issuers shall be notified promptly and shall have a period of 30 calendar days from

such notification to achieve compliance with the applicable continued inclusion standard. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 30 day compliance period.

(9)-(29) No change

(d) No change

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

To qualify for inclusion in Nasdaq, a security of a non-Canadian foreign issuer, an American Depositary Receipt (ADR) or similar security issued in respect of a security of a foreign issuer shall satisfy the requirements of paragraphs (a), (b) or (c), and (d) and (e) of this Rule.

(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) No change

(2)(A) For initial inclusion, the issuer shall have:

(i) No change

(ii) *market value of listed securities* [market capitalization] of U.S. \$50 million (currently traded issuers must meet this requirement for 90 consecutive trading days prior to applying for listing); or

(iii) No change

(B) For continued inclusion, the issuer shall maintain:

(i) No change

(ii) *market value of listed securities* [market capitalization] of U.S. \$35 million; or

(iii) No change

(C) No change

(D) A failure to meet the continued inclusion requirements for *market value of listed securities* [market capitalization] shall be determined to exist only if the deficiency continues for a period of 10 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 30 calendar days from such notification to achieve compliance with the applicable continued inclusion standard. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 30 day compliance period.

(E) No change

(3)-(25) No change

(f) No change

Rule 4420. Quantitative Designation Criteria

In order to be designated for the Nasdaq National Market, an issuer shall

⁴⁷ 15 U.S.C. 78s(b)(2).

⁴⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

be required to substantially meet the criteria set forth in paragraphs (a), (b), (c), (d), (e), (f), or (g) below. Initial Public Offerings substantially meeting such criteria are eligible for immediate inclusion in the Nasdaq National Market upon prior application and with the written consent of the managing underwriter that immediate inclusion is desired. All other qualifying issues, excepting special situations, are included on the next inclusion date established by Nasdaq.

(a)–(b) No change

(c) Entry Standard 3

An issuer designated under this paragraph does not also need to be in compliance with the quantitative criteria for initial inclusion in the Rule 4300 series.

(1)–(5) No change

(6) The issuer has:

(A) a *market value of listed securities* [market capitalization] of \$75 million (currently traded issuers must meet this requirement and the bid price requirement under Rule 4420(c)(3) for 90 consecutive trading days prior to applying for listing); or

(B) No change

(d)–(f) No change

(g) Nasdaq will consider designating as Nasdaq National Market securities Selected Equity-linked Debt Securities (SEEDS) that generally meet the criteria of this paragraph (g). SEEDS are limited-term, non-convertible debt securities of an issuer where the value of the debt is based, at least in part, on the value of another issuer's common stock or non-convertible preferred stock (or sponsored American Depositary Receipts (ADPs) overlying such equity securities).

(1)–(2) No change

(3) Minimum Standards Applicable to the Linked Security

An equity security on which the value of the SEEDS is based must:

(A)(i) have a *market value of listed securities* [market capitalization] of at least \$3 billion and a trading volume in the United States of at least 2.5 million shares in the one-year period preceding the listing of the SEEDS;

(ii) have a *market value of listed securities* [market capitalization] of at least \$1.5 billion and trading volume in the United States of at least 10 million shares in the one-year period preceding the listing of the SEEDS; or

(iii) have a *market value of listed securities* [market capitalization] of at least \$500 million and a trading volume in the United States of at least 15 million shares in the one-year period preceding the listing of the SEEDS.

(B)–(C) No change

(4)–(5) No change

(h) No change

Rule 4450. Quantitative Maintenance Criteria

After designation as a Nasdaq National Market security, a security must substantially meet the criteria set forth in paragraphs (a) or (b), and (c), (d), (e), and (f) below to continue to be designated as a national market system security. A security maintaining its designation under paragraph (b) need not also be in compliance with the quantitative maintenance criteria in the Rule 4300 series.

(a) No change

(b) Maintenance Standard 2—Common stock, Preferred Stock, Shares or Certificates of Beneficial Interest of Trusts and Limited Partnership Interests in Foreign or Domestic Issues

(1) The issuer has:

(A) a *market value of listed securities* [market capitalization] of \$50 million; or

(B) No change

(2)–(6) No change

(c)–(g) No change

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

The purpose of the proposed rule change is to amend the description of the market capitalization listing standard to market value of listed securities. One of the standards under which issuers can qualify for listing on The Nasdaq National Market ("National Market") is to have a market capitalization of at least \$75,000,000. Issuers may also qualify for continued inclusion on the National market with at least \$50,000,000 in market capitalization. The minimum market capitalization standards for initial and continued inclusion on The Nasdaq SmallCap Market are \$50,000,000 and \$35,000,000, respectively.

For purposes of initial listing eligibility, Nasdaq has historically

interpreted the term market capitalization to include only the value of listed securities. In connection with continued listing eligibility, however, Nasdaq has also considered market capitalization to include classes of non-redeemable convertible preferred stock, provided that the conversion price was "in the money." This approach has created uncertainty among issuers and investors as to the definition and application of the market capitalization listing standard. Furthermore, Nasdaq's Marketplace Rules do not define market capitalization and this term may be thought to include more than just the value of listed securities or non-redeemable convertible preferred stock that is in the money. For example, issuers and investors may believe that all unlisted convertible preferred stock or non-convertible preferred stock may be included in the definition of market capitalization.

As such, Nasdaq proposes to change the description of the market capitalization listing standard to market value of listed securities. In conjunction with this change, Nasdaq also proposes to add to Nasdaq's Marketplace Rules a definition of the term "listed securities." Nasdaq believes that these modifications will clarify for issuers and investors that initial and continued listing eligibility will be based only upon the value of an issuer's securities that are quoted on Nasdaq or listed on a national securities exchange.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act³ in that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices, and to protect investors and the public interest.

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.

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.

³ 15 U.S.C. 78o(b)(6).

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 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 NASD. All submissions should refer to File No. SR-NASD-2001-84 and should be submitted by December 26, 2001.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁴

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45114; File No. SR-Phlx-2001-38]

Self-Regulatory Organizations; Order Granting Approval to Proposed Rule Change, and Amendment No. 1 Thereto, by the Philadelphia Stock Exchange, Inc. Relating to the Definition of a Controlled Account

November 28, 2001.

I. Introduction

On March 12, 2001, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("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 related to the definition of a controlled account. On August 16, 2001, the Exchange filed Amendment No. 1 to the proposed rule change.³ The proposed rule change was published for comment in the **Federal Register** on September 18, 2001.⁴ This order approves the proposed rule change, as amended.

II. Description of the Proposed Rule Change

The Phlx proposes to amend the definition of controlled accounts under Phlx Rule 1014(g)(i) and Option Floor Procedure Advice ("Advice") B-6. The proposed rule change would also make corresponding amendments to Phlx Rule 1014(g)(i) and Advice B-6 pertaining to the requirements to circle the "yield" field on order tickets. This proposed rule change has been filed in response to the Ordering Instituting Public Administrative Proceeding Pursuant to section 19(h)(1) of the Securities Exchange Act Release No. 43268 (September 11, 2000) and Administrative Proceeding File 3-10282 (the "Order"). Under Section IV.B.j of the Order, the Exchange is required to codify market maker practices pertaining to the allocation of orders.

Currently, Phlx Rule 1014(g) defines the term controlled account to include "any account controlled by or under common control with a member broker-dealer." Phlx Option Specialists, Registered Options Traders ("ROT's")

and other "firm proprietary" accounts (if for the account of a member broker-dealer) are included in this definition. Under the rule, if an account is not a controlled account, it is considered a customer account. Thus all other accounts, including non-member broker-dealer accounts, are considered customer accounts. Except for specialists and ROT's closing in-person, controlled accounts must yield priority to customer accounts. Presently, member broker-dealers are required to yield priority to non-member broker-dealer accounts because such accounts are considered customer accounts under the rule language. However, Phlx Rule 1014(g) has been interpreted to yield the priority of non-member broker-dealer orders to "true" customer orders, and treat non-member broker-dealer orders on par with member broker-dealer orders on the floor of the Exchange. This proposed rule change would codify the floor's interpretation of the term "controlled account."

Specifically, the proposed rule change would amend the controlled account definition to include a non-member broker-dealer account. Thus, non-member broker-dealers would be required to yield priority to public customer orders, and be treated on par with orders for accounts of member broker-dealers. For instance, currently, where both a customer and a non-member broker-dealer order bid for 100 contracts at the same time and at the same price, the customer and the non-member broker-dealer would each be entitled to 50 contracts of an incoming order to sell 100 contracts under the rule. However, under the proposed rule change, the customer's bid would have priority over the non-member broker-dealer and would receive the entire execution of an incoming sell order for 100 contracts at that price. In addition, under the proposed rule change, where a non-member broker-dealer and a ROT both bid for 100 contracts at the same time and at the same price, the ROT and the non-member broker-dealer would each be entitled to 50 contracts as opposed to the result under the current rule in which the non-member broker-dealer would have priority and be entitled to the entire execution of the incoming sell order for 100 contracts.

In addition, the proposed rule change would amend Advice B-6 to clarify that there is no requirement to circle the "yield" field on market maker order tickets because unlike customer order tickets, the tickets used for orders by ROT's and other exchanges' market makers (due to the processing needs of clearing firms), do not have such a category. This amendment would make

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Letter from Richard S. Rudolph, Counsel, Phlx, to Nancy J. Sanow, Senior Special Counsel, Division of Market Regulation, Commission, dated August 15, 2001 ("Amendment No. 1").

⁴ See Securities Exchange Act Release No. 44809 (September 18, 2001), 66 FR 49056 (September 25, 2001).

⁵ 17 CFR 200.30-3(a)(12).