

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45135; File No. SR-NASD-2001-34]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Amendments to the Restated Certificate of Incorporation of The Nasdaq Stock Market, Inc.

December 5, 2001.

I. Introduction

On May 8, 2000, 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"), 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 to amend its Restated Certificate of Incorporation ("Certificate") to afford the holders of 4.0% Convertible Subordinated Notes due 2006 (the "Notes") the right to vote with Nasdaq stockholders.

On June 4, 2001 the NASD filed Amendment No. 1 to the proposal.³ The proposed rule change, as amended, was published for comment in the **Federal Register** on June 22, 2001.⁴ No comments were received on the proposal. This order approves the proposal.

II. Description of the Proposal

The proposed rule change amends the Certificate to afford the holders of 4.0% Convertible Subordinated Notes due 2006 (the "Notes") the right to vote with Nasdaq stockholders. Nasdaq has sold \$240 million of the Notes to Hellman & Friedman Capital Partners IV, L.P. H&F International Partners IV-A, L.P., H&F International Partners IV-B, L.P., and H&F Executive Fund IV, L.P. (collectively, the "HFCP IV LPs"). Below is a description of the amendments proposed to the Certificate to ensure that holders of the Notes have the right to vote with Nasdaq shareholder.

Article Fourth

Paragraph C.1. Nasdaq proposes to amend this paragraph of the Certificate to provide that holders of the Notes have the right to vote with Nasdaq stockholders, with each holder of Notes entitled to a number of votes equal to the number of shares of common stock such holder would obtain upon conversion of the principal amount of Notes held by such person. The amendment also provides that holders of Notes shall be deemed to be stockholders and the Notes shall be deemed to be shares of stock solely for the purposes of provisions of the Delaware General Corporation Law and the Certificate that require the vote of stockholders as a prerequisite to corporate action.

Paragraph C.2. Nasdaq proposes to amend the provision of the Certificate that imposes restrictions on stockholders voting shares in excess of 5% of outstanding stock to make the same restriction applicable to holders of the Notes. Therefore, any person who beneficially owns shares of common stock and/or Notes convertible into common stock in excess of 5% of the then-outstanding shares of common stock would not be permitted to vote such excess shares and/or Notes.⁵ As is true under the current Certificate, the calculation of the number of shares of common stock outstanding at any particular time is to be made in accordance with the last sentence of SEC Rule 13d-3(d)(1)(i).⁶ As a result, shares of common stock that may be acquired by a holder of Notes through conversion would be deemed to be outstanding for purposes of calculating the voting power owned by such holder.

Paragraph C.3(f), C.4., and C.5. Currently, these paragraphs: (1) Authorize the Nasdaq Board of Directors to make determinations necessary to implement Paragraph C of Article Fourth of the Certificate, including determinations about stockholder's beneficial ownership of shares; (2) empower the Nasdaq Board of Directors to demand that any person who is reasonably believed to be the beneficial owner of shares in excess of the 5%

voting limitation provide information about such person's ownership interest; and (3) provide that determinations made by the Nasdaq Board of Directors to implement Paragraph C of Article Fourth of the Certificate are conclusive and binding upon Nasdaq and its stockholders. Nasdaq proposes to amend these paragraphs to include conforming references to the Notes.

Paragraph C.6. Currently, this paragraph provides that the 5% voting limitation does not apply to: (1) The NASD or its affiliates until such time as the NASD beneficially owns 5% or less of Nasdaq's outstanding common stock; or (2) any other person that the Nasdaq Board of Director may exempt prior to the time that such person beneficially owns more than 5% of the outstanding shares of common stock. The paragraph also provides that the Board may not approve an exemption from the 5% limit for a registered broker or dealer or an affiliate thereof⁷ or a person that is subject to a statutory disqualification under Section 3(a)(29) of the Act.⁸ In addition, before granting an exemption, the Nasdaq Board must make certain findings with respect to the effect of an exemption on enumerated aspects of Nasdaq's regulatory obligations.

The proposed rule amendment would add conforming references to the Notes and would also provide that the HFCP IV LPs will be exempted from the 5% voting limitation if the Nasdaq Board of Directors approves an exemption from the 5% voting limitation for any other person (other than an exemption granted in connection with the establishment of a strategic alliance with another exchange or similar market). This exemption would not apply to any other person to whom the HFCP IV LPs might transfer Notes and/or common stock.

Paragraph C.7. Nasdaq represents that this paragraph is a savings clause that

⁷ A small number of the limited partners of the HFCP IV LPs are registered broker/dealers or affiliates of registered broker/dealers (the "Broker/Dealer Investors"). The Certificate provides that Nasdaq may not exempt a registered broker/dealer or an affiliate thereof from the 5% voting limitation. The Certificate defines "affiliate" with reference to SEC Rule 12b-2, 17 CFR 240.12b-2, which in turn defines an "affiliate" of a specified person as "a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified." The interests of the Broker/Dealer Investors in the HFCP IV LPs are minimal. Moreover, the limited partnership agreements that govern the HFCP IV LPs provide that the limited partners shall take no part in the control or management of the business or affairs of the limited partnership, nor shall they have any authority to act for or on behalf of the limited partnership. Accordingly, the HFCP IV LPs are not affiliates of the Broker/Dealer Investors.

⁸ 15 U.S.C. 78c(a)(39).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Mary M. Dunbar, Vice President, Nasdaq, to Katherine England, Assistant Director, Division of Market Regulation, Commission, dated June 12, 2001 ("Amendment No. 1").

⁴ Securities Exchange Act Release No. 44423 (June 13, 2001), 66 FR 33593.

⁵ The Commission notes that because paragraph C.1(b) of the Certificate deems the holders of Notes to be shareholders, this provision restricts voting of Notes to the extent that they are convertible into shares that exceed 5% of Nasdaq's then-outstanding Common Stock, or that exceed 5% when aggregated with the noteholder's direct holdings of Common Stock. Shares underlying the Notes held by a noteholder shall be deemed to be outstanding for the purpose of computing the percentage owned by that noteholder. The voting restriction applies only to holdings of shares and/or Notes in excess of the 5% threshold, however.

⁶ 17 CFR 240.13d-3(d)(1)(i).

provides that if any portion of Paragraph C. of Article Fourth of the Certificate is found to be invalid, the validity of remaining provisions shall not be affected. Nasdaq proposes to amend the paragraph to include conforming references to the Notes.

Article Ninth

Nasdaq proposes to amend this article to provide that a two-third vote of the holders of outstanding Notes is required: (1) To amend Paragraph C. of Article Fourth of the Certificate in a manner that would adversely affect the rights of the holders of the Notes without similarly affecting the rights of stockholders; or (2) to amend such two-thirds voting requirements.

Article Eleventh

This article authorizes the Nasdaq Board of Directors to consider the effect of proposed corporate action on enumerated aspects of Nasdaq's regulatory obligations. Nasdaq proposes to amend the provision to include conforming references to the Notes.

III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.⁹ In particular, the commission believes the proposal is consistent with the requirements of Sections 15A(b)(2) and (6) of the Act,¹⁰ which require, among other things, that the Association be so organized and have the capacity to be able to carry out the purposes of the Act and to comply with, and enforce compliance with, the provisions of the Act, and that the Association's rules are 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 purpose of this filing is ensure that the holders of the Notes are granted the same voting rights, and are subject to the same limitations, as the holders of common stock. Therefore, in reviewing this filing, it is instructive to consider the commission's original findings in approving the Certificate.¹¹ In its order approving the Certificate, the Commission found that the 5%

voting limitation and other limitations affecting the control of Nasdaq fulfill the obligations arising under sections 15A(b)(2) and (6). Specifically, the Commission noted that the limitation on voting shares owned in excess of 5% satisfies the requirements of Section 15A(b)(6) because it helps to avoid a situation where the integrity of Nasdaq might be compromised if the NASD had to choose between taking action against a broker or dealer that owned, and could vote, Nasdaq shares in excess of 5%, and fulfilling its self-regulatory responsibilities.

The Commission believes that the changes proposed to Nasdaq's Certificate in this filing are consistent with maintaining the 5% voting limitation that is currently contained in the Certificate, which serves the public interest by ensuring that certain individuals and entities cannot gain undue influence over the operations of Nasdaq, and are therefore consistent with sections 15A(b)(2) and (6).

The Commission also finds that the provision that would exempt HFCEP IV LPs from the 5% voting limitation if the Nasdaq Board of Directors approves an exemption from the 5% voting limitation for any other person (other than an exemption granted in connection with the establishment of a strategic alliance with another exchange or similar market) is consistent with section 15A(b)(6) of the Act. The commission notes that as originally approved, the Certificate provided that the Board could grant exemptions from the voting limitation if certain conditions were met.¹² The proposed amendments do not alleviate or in any way change those conditions. They simply provide that if the Board finds it appropriate to approve an exemption for one person or entity, it must also grant the exemption to HFCEP IV LPs assuming they meet the same conditions (unless the exemption discussed above for

establishment of a strategic alliance applies).

IV. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act¹³ that the proposed rule change (SR-NASD-2001-34) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45136; File No. SR-NYSE-2001-43]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc. Amending Paragraph (1) of the Guidelines to Exchange Rule 105 To Permit Approved Persons of Specialists to Act as a Specialist With Respect to an Option on a Specialty Stock

December 6, 2001.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 and ("Act"),¹ Rule 19b-4 thereunder,² notice is hereby given that on October 18, 2001, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") 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 Exchange. The Exchange filed Amendment No. 1 to the proposed rule change on December 4, 2001.³ The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

¹ 15 U.S.C. 78s(b)(2).

² 17 CFR 200.30-3(a)(12).

³ 15 U.S.C. 78s(b)(1).

⁴ 17 CFR 240.19b-4.

⁵ See letter from James E. Buck, Senior Vice President and Secretary, NYSE, to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, dated December 3, 2001 ("Amendment No. 1"). In Amendment No. 1, the NYSE decided to keep the portion of paragraph (l)(ii) of the Guidelines to NYSE Rule 105, which prohibits an approved person affiliated with an NYSE specialist that acts as an options market maker and any other approved person of the specialist from acting as a market maker in any equity security in which the associated specialist is registered as such and which underlies an option to which the approved person acts as an options market maker.

⁹ In approving this rule proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁰ 15 U.S.C. 78o-3(b)(2) and (6).

¹¹ See Securities Exchange Act Release No. 42983 (June 26, 2000), 65 FR 41116 (July 3, 2000) (File No. SR-NASD-00-27).

¹² Specifically, the Certificate provides that in no event shall an exemption from the scaled voting provision be granted to (1) a registered broker or dealer, or an affiliate thereof, or (2) an individual or entity subject to statutory disqualification under section 3(a)(39) of the Act. The Board may approve an exemption from the scaled voting provision if the Board determines that granting the exemption would (1) Not reasonably be expected to diminish the quality of, or public confidence in, the Nasdaq Stock Market or other operations of Nasdaq, on the ability to prevent fraudulent and manipulative acts and practices and on investors and the public, and (2) promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities or assist in the removal of impediments to or perfection of the mechanisms for a free and open market and a national market system.