

parties have agreed to arbitrate the claim after it has arisen. This amendment excludes from Exchange arbitration statutory employment discrimination claims of non-registered employees (or other persons that may not be deemed to be an associated person) pursuant to pre-dispute arbitration agreements.

The EEOC and several members of Congress have endorsed arbitration as an effective means of resolving discrimination claims, provided the parties agree to arbitrate after the claim has arisen. The Exchange's proposed amendment provides a forum for those employees who choose post-dispute to resolve their statutory employment discrimination claims through arbitration.

Some employment disputes may contain both contract or tort claims as well as statutory employment discrimination claims. Under amended Rule 23 (and Rule 24 for non-registered employees who have executed pre-dispute arbitration agreements) these cases may be bifurcated. The employment discrimination claims will be heard in a forum other than the exchange, such as court, while any claims subject to arbitration may continue to be heard at the Exchange.¹² The parties may avoid bifurcation by agreeing to proceed with all claims in a single forum. Given a choice, after a dispute has arisen, employees in many instances believe that arbitration is preferable to protracted and expensive litigation and will willingly make that choice.¹³

The proposed rule change is consistent with Section 6(b)(5) of the Exchange Act in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons regulating securities transactions, 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.

¹² The bifurcation of securities industry claims is not unprecedented. Before the Supreme Court's decision in *Shearson v. McMahon*, 482 U.S. 220 (1987) (holding that claims under the Securities Exchange Act of 1934 could be compelled to arbitration), the Supreme Court decided *Dean Witter Reynolds, Inc. v. Byrd*, 105 S. Ct. 1238 (1985). In *Byrd*, the dispute involved allegations of federal securities laws violations and pendent state law claims. The Court compelled the state law claims to arbitration and held that the federal securities laws claims could be heard in court.

¹³ See *Duffield v. Robertson Stephens & Company*, 144 F.3d 1182 (9th Cir. 1998), cert. denied, (U.S. Nov. 9, 1998) (No. 98-237).

(B) Self-Regulatory Organization's Statement on Burden on Competition

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

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

The Exchange 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

After careful consideration, the Commission has concluded, for the reasons set forth below, that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder. Further, the Exchange is requesting accelerated approval of the proposed rule change pursuant to section 19(b)(2) so that it may become effective on or shortly after January 1, 1999, on which date the NYSE proposal discussed above becomes effective. The Commission notes that the proposal is virtually identical to an NYSE proposal the Commission has already approved, one that was subject to the full comment period.¹⁴ It is expected that in the near future other self-regulatory organizations ("SROs") will adopt similar rules or issue interpretive releases to provide uniformity throughout the securities industry. To prevent forum shopping among SROs and to prevent prospective plaintiffs from being disadvantaged by any inconsistency in the effective dates of SROs' rule changes or interpretative releases, the Commission finds good cause for approving the proposal prior to the 30th day after the date of publication of notice of the filing in the **Federal Register**.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal is consistent with the Exchange Act. 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 person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 522, will be available for inspection and copying at 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 CHX. All submissions should refer to File No. SR-CHX-98-29 and should be submitted by January 29, 1999.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,¹⁵ that the proposal, SR-CHX-98-29, and amendment No. 1 thereto be and hereby is approved.¹⁶

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁷

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 99-412 Filed 1-7-99; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-40878; File No. SR-NASD-98-51]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Granting Approval of Proposed Rule Change and Amendment No. 1 To Be Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Microcap Initiatives-Amendments to NASD Rules 6530 and 6540

January 4, 1999.

I. Introduction

On October 7, 1998, the National Association of Securities Dealers, Inc. ("NASD"), through its wholly-owned subsidiary, the Nasdaq Stock Market, Inc. ("Nasdaq") submitted to the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act")¹ and Rule 19b-4 thereunder,² proposed amendments to NASD Rules

¹⁵ 15 U.S.C. 78s(b)(2).

¹⁶ In approving the proposal, the Commission has considered the rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁷ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

¹⁴ See footnote 8 above.

6530 and 6540 to limit quotations on the OTC Bulletin Board® (“OTCBB”) to the securities of issuers that are current in their reports filed with the SEC or other regulatory authority, and to prohibit a member from quoting a security on the OTCBB unless the issuer has made current filings, respectively.

The proposed rule change, including Amendment No. 1, appeared in the **Federal Register** on November 4, 1998.³ The Commission received three comments concerning the proposed rule change.⁴ This order approves the proposed rule change, as amended.

II. Description of Proposal

The NASD has actively studied the OTC market in an effort to address abuses in the trading and sales of thinly traded, thinly capitalized (microcap) securities. These securities are not listed on Nasdaq or any exchange and trade on the OTCBB, in the “pink sheets” published by the National Quotation Bureau, Inc. (“Pink Sheets”), and in other quotation media where there are no listing requirements. With respect to its examination of the OTCBB in particular, the NASD noted the lack of reliable and current financial information about the issuers, and the perception by the public that the OTCBB is similar to a highly regulated market, such as the registered exchanges or Nasdaq.⁵

The OTCBB provides a real-time quotation medium that NASD member firms can use to enter, update, and retrieve quotation information (including unpriced indications of interest) for equity securities traded over-the-counter that are neither listed on Nasdaq nor on a primary national securities exchange. Eligible securities include national, regional, and foreign equity issues, warrants, units, Direct Participation Programs (“DPPs”)⁶ and

American Depositary Receipts (“ADRs”)⁷ not listed on any other U.S. national securities market or exchange. Unlike Nasdaq or registered exchanges where individual companies apply for listing on the market—and must meet and maintain strict listing standards—there are no listing standards for the OTCBB, and there currently is no requirement that issuers of securities on the OTCBB make current, publicly-available reports with the SEC or other regulator. In fact, over half of the companies that are currently quoted on the OTCBB are not subject to any public reporting requirements.

The proposed rule change was developed in an effort to balance the benefits that the transparency of the OTCBB provides with the public need for information about the issuers being quoted. The NASD is concerned that where there is no public information available regarding a security, the broad-based automated display of quotations in that security creates an unjustified perception of reliability. While the NASD realizes that the new rule may result in the lack of real-time quotations for those securities that become ineligible for the OTCBB, it believes that this loss is outweighed by the benefit to investors who would, under the proposed rule, have access to information about the companies in which they may invest. In addition, transactions in securities ineligible for the OTCBB would still be subject to real-time last sale trade reporting. These reports are publicly disseminated through market data vendors on a real-time basis.

Amendment to Rule 6530

This proposed amendment to Rule 6530 would limit quotations on the OTCBB to the securities of issuers that make current filings pursuant to Sections 13⁸ and 15(d) of the Act,⁹ securities of depository institutions that are not required to make filings under the Act, but file publicly-available reports with the appropriate regulatory agencies, registered closed-end investment companies, and insurance companies that are exempt from registration under Section 12(g)(2)(G) of the Act.¹⁰

To remain eligible for quotation on the OTCBB, an issuer must remain

Thus, gains and losses are taxed to the investor not the issuer of the security.

⁷ ADRs are receipts for shares of foreign corporations that are held by U.S. banks and bought and sold in the U.S. by investors, without utilizing overseas markets.

⁸ 15 U.S.C. 78m.

⁹ 15 U.S.C. 78o-(d).

¹⁰ 15 U.S.C. 78l(g)(2)(G).

current in its filings with the SEC or applicable regulatory authority. A member would be required to inform the NASD of the issuer's reporting schedule. Based upon that schedule, the NASD will affix a modifier on the security's symbol if the NASD has not received information that the report was timely filed.¹¹ The addition of the modifier to the symbol, as well as any changes to the symbol necessary to accommodate the modifier, will be publicly reported on the OTCBB Daily List, which is available to market makers and investors through the OTCBB web site at <http://www.otcbb.com>. Once an issuer is delinquent in filing a required report (e.g., Form 10-K, Form 10-Q, Form 20-F, Insurance Company Annual Statement, or call report), a security of the issuer may continue to be quoted on the OTCBB for a 30 or 60 calendar day grace period from the due date of the report, depending on the type of issuer. After the grace period, quotations in the security of the delinquent issuer would not be permitted on the OTCBB.

Filings for most OTCBB issuers are available through the SEC's Electronic Data Gathering, Analysis, and Retrieval (“EDGAR”) system.¹² Foreign issuers are generally permitted to file in paper format and copies of these filings are available from the Commission. Exchange Act filings of banks and thrifts are available upon filing from the financial institution's primary bank regulatory agency. The grace period for these issuers is 30 days. In the case of banks and thrifts that are not required to make Exchange Act filings, members can obtain call report information from the National Information Center of Banking Information website (<http://www.ffiec.gov/nic>) or the Federal Deposit Insurance Corporation's website (<http://www.fdic.gov>). Call reports are filed 30 days after the end of each calendar quarter and are available to the public within 15 days of filing. Insurance companies file annual statements with the National Association of Insurance Commissioners (“NAIC”) by March 1 of each year. This information is released to the public by NAIC by April 1. Because of the delay in the availability of call reports and insurance company annual statements, the proposed rule permits a 60 calendar day grace period for the quotation of securities of these companies after the

¹¹ It is contemplated that the modifier will be affixed one to two days after the report is due.

¹² EDGAR is the SEC's system for the receipt, acceptance, and review of documents submitted in electronic format.

³ Securities Exchange Act Rel. No. 40606 (October 27, 1998), 63 FR 59610.

⁴ Electronic comment letters from Edward Zorek, Tai Jim, and R. Jeffrey Bacon were received by the Commission at rule-comments@sec.gov on November 11, 1998, November 28, 1998, and November 29, 1998, respectively. The substance of the comments received is discussed in Section III. *Summary of Comments*.

⁵ In addition, the NASD has filed a proposed rule change through its subsidiary, NASD Regulation, to require a member to review current financial statements and other business information about the issuer of a security that is not listed on Nasdaq or a national securities exchange before that member could recommend a transaction to a customer in the security and to provide certain disclosure information on the trade confirmation for all customer transactions (solicited and unsolicited) in such securities. See SR-NASD-98-50.

⁶ DPP's are securities offerings that permit investors to directly participate in the cash flow and tax consequences of the underlying investments. DPPs provide for the “flow through” of tax results.

deadline for the issuer to submit a report to the appropriate regulator.

Amendment to Rule 6540

This proposed amendment to Rule 6540 would prohibit member firms from quoting an issuer's security if the issuer has not made current reports with the SEC or the appropriate regulatory authority. Members must also provide such reports to the NASD, although the reports may be provided by any market maker in the security. The NASD is exploring ways to reduce the burden of this requirement for members, particularly with respect to issuers who are EDGAR filers. As discussed above, the NASD will affix a modifier to the security's symbol if the NASD has not received information that the report was timely filed. This indication will provide members with notice that the NASD has not received information that the issuer's report was timely filed. Once the NASD provides this notice, the member will have the opportunity to acquire the necessary report and provide it to the NASD before the end of the grace period.

Phase-In

The new requirements will be immediately effective upon approval of the rule for securities not previously quoted on the OTCBB. Securities quoted on the OTCBB on the date the rule becomes effective will be afforded at least six months to comply with the new requirements. Specifically, and in order to accommodate the resource demands that may be placed upon the SEC when certain issuers elect to file current public reports, the new requirements will be applied in a month-by-month staggered manner for a period from six to eighteen months from the date the rule is approved. The NASD will apply the new rule to approximately the same number of issuers for each month during that period in order to evenly distribute the SEC's anticipated work load. The delayed effectiveness of the rule should also enable market makers, investors, and issuers to take appropriate action. It should be noted that for issuers who file a Form 10 or Form 10SB with the SEC to register under Section 12(g) of the Act,¹³ all SEC comments, if any, must be cleared with the SEC before securities can be quoted on the OTCBB.

III. Summary of Comments

The Commission received three comments on the proposed amendments.¹⁴ All three commenters

supported the proposal; noting that the proposed amendments should help to reduce fraud in OTCBB traded securities.

IV. Discussion

The Commission believes that the proposal is consistent with Section 15A of the Act¹⁵ as it will protect investors and the public interest by requiring issuers listed on the OTCBB to file reports containing current financial information with the Commission or appropriate regulatory agency. Specifically, the Commission believes the proposal is consistent with the requirements of Section 15A(b)(6) and (11) of the Act.¹⁶ Section 15A(b)(6) requires, among other things, that the association's rules be 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.¹⁷ Section 15A(b)(11) requires that the rules of the association be designed to produce fair and informative quotations, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting, distributing, and publishing quotations.¹⁸

Under proposed Rule 6530, market makers will not be permitted to quote OTCBB traded securities unless the issuer has made current filings with the appropriate regulatory agency. The filing requirement ensures that companies trading on the OTCBB market will have current, public information that investors can access, from the appropriate regulatory agency, when considering whether to invest in an OTCBB traded security. Proposed Rule 6530 should provide investors in OTCBB securities with more information on which to base investment decisions. The Commission also believes that limiting quotations on the OTCBB to the securities of issuers that report to the SEC or applicable regulatory authority may help to reduce fraud and manipulation. As a result of the reporting requirement, financial data on issuers will be available and issuers that provide false or misleading information in their required filings may be subject to liability for making those statements.¹⁹ The Commission finds

that proposed Rule 6530 is consistent with the Act because it will protect investors and the public interest.²⁰

Proposed Rule 6530 provides that domestic securities that were previously trading on the OTCBB will not be subject to the proposal until six months after the approval date. Neither foreign issuers nor issuers of securities not currently trading on the OTCBB will be able to take advantage of the phase-in provision; these issuers will be obligated to immediately comply with Rule 6530, as amended. The Commission believes that the phase-in period is reasonable and consistent with the Act. The Commission believes that the phase-in period for issuers of domestic securities that were previously trading on the OTCBB will provide these issuers with ample notice of the rule change and adequate time to comply with the new rules' requirements. Regarding issuers of domestic securities not currently quoted on the OTCBB and foreign securities, the Commission believes it is consistent with the Act and in the public interest that they be required to comply with the amendments to Rule 6530 effective immediately. The Commission finds that the phase-in period for issuers previously quoted on the OTCBB and immediate effectiveness of the amendments to Rule 6530 with respect to other issuers is reasonable, and consistent with Section 15A(b)(6) of the Act.²¹

Proposed amendments to Rule 6540 will permit NASD members to quote only the securities of issuers that satisfy the requirements of proposed Rule 6530. As proposed, Rule 6540 will also necessitate that NASD members provide the NASD copies of reports filed with the Commission or other applicable regulatory authority. These reports can be provided by any market maker in the security to the NASD. Once a market maker has properly filed all necessary reports with the NASD, all market makers in the security may quote the security, as long as the reports remain current. The Commission believes that the rule should ensure that market makers have current financial information available to them regarding issuers quoted on the OTCBB and enable NASD market makers to reflect this information in their quote. The Commission finds that proposed Rule 6540 is consistent with Section

¹⁵ 15 U.S.C. 78o-3.

¹⁶ 15 U.S.C. 78o-3(b)(6) and (11).

¹⁷ 15 U.S.C. 78o-3(b)(6).

¹⁸ 15 U.S.C. 78o-3(b)(11).

¹⁹ See, e.g., *SEC v. Savoy Industries, Inc.*, 587 F.2d 1149 (D.C. Cir. 1978), *cert denied*, 440 U.S. 913

(1979); Exchange Act Rule 10b-5, 17 CFR 240.10b-5.

²⁰ 15 U.S.C. 78o-3(b)(6).

²¹ 15 U.S.C. 78o-3(b)(6).

¹³ 15 U.S.C. 78l(g).

¹⁴ See *supra* note 4.

15A(b)(11) of the Act²² in that it is designed to produce fair and informative quotations, to prevent fictitious or misleading quotations and to promote orderly procedures for collecting, distributing, and publishing quotations.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,²³ that the proposed rule change (SR-NASD-98-51) is approved, as amended.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁴

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99-414 Filed 1-7-99; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-40874; File No. SR-NASD-98-88]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Listing and Continued Listing Determinations

December 31, 1998.

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 27, 1998, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its wholly-owned subsidiary, The Nasdaq Stock Market Inc. ("Nasdaq"), filed a proposed rule change with the Securities and Exchange Commission ("Commission") relating to issuer listing and continued listing determinations. The NASD amended this proposal on December 15, 1998.³ The proposed rule change, as amended, is 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

The Association is filing with the Commission a proposed rule change that would replace the existing Rule 4800 Series (Rules 4810 through 4890) with a new code of procedure for review of Nasdaq listing determinations. The proposal also would temporarily relocate the existing Rule 4800 Series, to the extent it relates to other grievances concerning the Association's automated systems, to the Rule 9700 Series.⁴ Below is the text of the proposed rule change. New language is *italicized* and deletions are [bracketed].

4480. Termination Procedure.

(a) Failure to maintain compliance with the provisions of Rules 4450, 4460, or 4470 will result in the termination of an issuer's designation unless an exception is granted as provided in [this] *the* Rule [4480] 4800 Series. Termination shall become effective in accordance with the terms of the notice by Nasdaq.

(b) [An issuer that is subject to termination of its designation may request a review by a Panel authorized to hear appeals. If a review is requested, the issuer is entitled to submit materials and arguments in connection with such review.

(c) The Panel may grant or deny continued designation on the basis of the written submission by the issuer and whatever other data it deems relevant.

(d) Determinations by the Panel may be appealed to the Nasdaq Listing and Hearing Review Committee by any aggrieved person. An appeal to the Nasdaq Listing and Hearing Review Committee shall not operate as a stay of the decision of the Panel unless the Nasdaq Listing and Hearing Review Committee in its discretion determines to grant such a stay.

(e) The Rule 4800 series sets forth procedures applicable to the review of the termination of an issuer's designation.

(f) [An issuer may voluntarily terminate its designation upon written notice to Nasdaq.

* * * * *

4530. Issuer Hearing Fee

Removed

* * * * *

[4800] 9700. PROCEDURES ON GRIEVANCES CONCERNING THE AUTOMATED SYSTEMS

[4810] 9710. Purpose

The purpose of this Rule 9700 [4800] Series is to provide, where justified, redress for persons aggrieved by the operations of any automated quotation, execution, or communication system owned or operated by the Association, or any subsidiary thereof, and approved by the Commission, not

otherwise provided for by the Code of Procedure as set forth in the Rule 9000 Series [or], the Uniform Practice Code as set forth in the Rule 11000 Series, [and to provide procedures for the handling of qualification matters pursuant to The Nasdaq Stock Market Rules, as set forth in the Rule 4000 Series] *or the Procedures for Review of Nasdaq Listing Determinations as set forth in the Rule 4800 Series.*

[4820] 9720. Form of Application

No change

[4830] 9730. Request for Hearing

No change

[4840] 9740. Consideration of Applications

No change

[4850] 9750. Decision

No change

[4860] 9760. Review by the Nasdaq Listing and Hearing Review Council

No change

[4870] 9770. Findings of the Nasdaq Listing and Hearing Review Council on Review

No change

[4880] 9780. Discretionary Review by the Board

No change

[4890] 9790. Application to Commission for Review

Any decision not appealed under Rule 9760 [4860] or called for review under Rule 9760 [4860] or Rule 9780 [4880] shall become the final action of the Association upon expiration of the time allowed for appeal or call for review. In any case where a person feels aggrieved by any final action of the Association issued pursuant to Rule 9770 [4870] or Rule 9780 [4880], the person may make application for review to the Commission in accordance with the Act.

4800. PROCEDURES FOR REVIEW OF NASDAQ LISTING DETERMINATIONS

4810. Purpose and General Provisions

(a) *The purpose of this Rule 4800 Series is to provide procedures for the independent review of determinations of the Association that prohibit or limit the listing of an issuer's securities on the Nasdaq Stock Market based upon the Nasdaq Stock Market Rules, as set forth in the Rule 4000 Series. Securities of issuers that do not meet the quantitative or qualitative listing standards set forth in the Rule 4000 Series are subject to delisting from, or denial of initial inclusion on, The Nasdaq Stock Market.*

(b) *An issuer may file a written request for an extension of time to comply with any of the standards set forth in the Rule 4000 Series or an exception to those standards at any time during the pendency of a proceeding under the Rule 4800 Series. The Association may grant extensions or exceptions where it deems appropriate.*

(c) *At each level of a proceeding under the Rule 4800 Series, the Listing Qualifications Panel (as defined in Rule 4830). Nasdaq Listing and Hearing Review Council (the "Listing Council"), or the NASD Board of*

²² 15 U.S.C. 78o-3(b)(11).

²³ 15 U.S.C. 78s(b)(2).

²⁴ 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 Robert E. Aber, Senior Vice President and General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated December 15, 1998.

⁴ The Association intends this latter change as a temporary measure pending submission and approval of amendments to the Rule 9510 Series addressing these issues.