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NASD Regulation, Inc.
Corporate Financing Department
1801 K Street, NW
Washington, DC 20006
(202) 974-2700

January 8, 1999

Michael Walinkas, Senior Special Counsel
Division of Market Regulation
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549
Mail Stop 10-1/Room 10511

Re: **SR-NASD-99-02**
Proposed Rule Change Regarding SEC Rule 504 Offerings

Dear Mr. Walinkas:

Pursuant to Rule 19b-4, enclosed herewith is the above-numbered rule filing. Also enclosed is a 3-1/2" disk containing the rule filing in Microsoft Word to facilitate production of the Federal Register.

If you have any questions, please contact Suzanne E. Rothwell, Chief Counsel, Corporate Financing Department, NASD Regulation, Inc., at (202) 974-2700 and rothwels@nasd.com. The fax number of the Corporate Financing Department is (202) 974-2732.

Very truly yours,

Joan C. Conley
Secretary

cc: Richard K. Wulff
Office of Small Business
Division of Corporation Finance

Attachment

File No. SR-NASD-99-02
Consists of 18 Pages

SECURITIES AND EXCHANGE COMMISSION

Washington, D. C.

Form 19b-4

Proposed Rule Change

by

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

Pursuant to Rule 19b-4 under the
Securities Exchange Act of 1934

1. Text of Proposed Rule Change

Pursuant to the provisions of Section 19(b)(1) under the Securities Exchange Act of 1934 ("Act"), the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its wholly-owned subsidiary NASD Regulation, Inc. ("NASD Regulation"), is herewith filing a proposed rule change to amend NASD Conduct Rules IM-2110-1, 2710, 2720. Below is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

IM-2110-1. "Free-Riding and Withholding"

* * *

(I) Explanation of Terms

The following explanation of terms is provided for the assistance of members. Other words which are defined in the By-Laws and Rules shall, unless the context otherwise requires, have the meaning as defined therein.

(1) Public Offering

The term public offering shall mean any primary or secondary distribution of securities made pursuant to a registration statement or offering circular including exchange offers, rights offerings, offerings made pursuant to a merger or acquisition, straight debt offerings, offerings pursuant to SEC Rule 504, and all other securities distributions of any kind whatsoever, except any offering made pursuant to an exemption from registration under Sections 4(1), 4(2) or 4(6) of the Securities Act of 1933, as amended, or pursuant to Rules [504 (unless considered a public offering in

the states where offered), Rule] 505 or [Rule] 506 adopted under the Securities Act of 1933, as amended. The term public offering shall exclude exempted securities as defined in Section 3(a)(12) of the Act, and debt securities (other than debt securities convertible to common or preferred stock) and financing instrument-backed securities that are rated by a nationally recognized statistical rating organization in one of its four highest generic rating categories. The term public offering shall exclude secondary offerings by an issuer, or any security holder of the issuer, of actively-traded securities.

* * *

2710. Corporate Financing Rule - Underwriting Terms and Arrangements

(a) No change.

(b) Filing Requirements

(1) - (7) No change.

(8) Exempt Offerings

Notwithstanding the provisions of subparagraph (1) above, the following offerings are exempt from this Rule, Rule 2720, and Rule 2810. Documents and information relating to the following offerings need not be filed for review:

(A) securities exempt from registration with the Commission pursuant to the provisions of Sections 4(1), 4(2) or 4(6) of the Securities Act of 1933, as amended, or pursuant to Rules [504 (unless considered a public offering in the states where offered), Rule] 505 or [Rule] 506 adopted under the Securities Act of 1933, as amended;

* * *

(9) Offerings Required to be Filed

Documents and information relating to all other public offerings including, but not limited to, the following must be filed with the Association for review:

(A) - (C) No change.

(D) securities exempt from registration with the Commission pursuant to Section 3(a)(11) of the Securities Act of 1933, as amended[, which is considered a public offering in the state where offered];

(E) securities exempt from registration with the Commission pursuant to Rule 504 adopted under the Securities Act of 1933, as amended[, which is considered a public offering in the states where offered];

* * *

2720. Distribution of Securities of Members and Affiliates -- Conflicts of Interest

(a) General No change.

(b) Definitions

For purposes of this Rule, the following words shall have the stated meanings:

(1) - (13) No change.

(14) Public offering -- any primary or secondary distribution of securities made pursuant to a registration statement or offering circular including exchange offers, rights offerings, offerings made pursuant to a merger or acquisition, straight debt offerings, offerings pursuant to SEC Rule 504, and all other securities distributions of any kind whatsoever, except any offering made pursuant to an exemption from registration under Sections 4(1),

4(2) or 4(6) of the Securities Act of 1933, as amended, or pursuant to SEC Rules [504 (unless considered a public offering in the states where offered), SEC Rule] 505 or [SEC Rule] 506 adopted under the Securities Act of 1933, as amended. The term public offering shall exclude exempted securities as defined in Section 3(a)(12) of the Act.

* * *

2. Procedures of the Self-Regulatory Organization

(a) The proposed rule change was approved by the Board of Directors of the NASD Regulation at its meeting on January 21, 1998, which authorized the filing of the rule change with the SEC. The Nasdaq Stock Market has been provided an opportunity to consult with respect to the proposed rule change, pursuant to the Plan of Allocation and Delegation of Functions by NASD to Subsidiaries. The NASD Board of Governors had an opportunity to review the proposed rule change at its meeting on January 22, 1998. No other action by the NASD is necessary for the filing of the proposed rule change. Article VII, Section 1(a)(ii) of the By-Laws permits the NASD Board of Governors to adopt and amend rules of the Association in general, including Rules IM-2110-1, 2710, and 2720, without recourse to the membership for approval.

(b) Questions regarding this rule filing may be directed to Suzanne E. Rothwell, Chief Counsel, Corporate Financing Department, NASD Regulation, Inc., (202) 974-2747.

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

(a) **Purpose**

Background: The term “public offering” is expressly defined in two NASD Rules: the Free-Riding and Withholding Interpretation, Rule IM-2110-1, and the Conflicts-of-Interest Rule, Rule 2720. The definition in Rule 2720 applies not only to offerings subject to that rule, but also to filing for pre-offering review under the Corporate Financing Rule in Rule 2710 and the Direct Participation Programs Rule in Rule 2810.¹ In addition, the definition in Rule 2720 is generally relied upon to define the scope of other provisions of the NASD’s rules that reference the term “public offering” or “public offering price.”²

Proposed Rule Change: NASD Regulation proposes to amend the definition of “public offering” in IM-2110-1 and Rule 2720 to clarify that it includes all offerings of securities exempt from SEC registration under SEC Rule 504. It is further proposed that Rules 2710(b)(8) and (9), which list offerings exempt from Rule 2710 and offerings required to be filed under that rule, be amended to clarify that all Rule 504 offerings are required to be filed under Rule 2710 and are governed by the requirements in Rules 2710, 2720, and 2810.³

Currently, the definitions of “public offering” in IM-2110-1 and Rule 2720 include only offerings made in reliance on Rule 504 if the offering is “considered a public offering in

¹ The definition of the term “public offering” included in the Free-Riding and Withholding Interpretation is limited to the application of that Interpretation. See Endnote 1 in NASD Notice to Members 98-48 (July 1998).

² See, Rules 0120(h), (p), (q); IM-2110-1, 2710, 2720, 2750, 2810, 2830, 3350, 3370, and 6410(e).

³ The filing requirements of Rule 2720 are broader than and take precedence over those of Rule 2710.

the states where offered" and Paragraphs (b)(8) and (9) of Rule 2710 only require the filing of Rule 504 offerings under such circumstances. Thus, as a result of the proposed rule change deleting this language, all Rule 504 offerings would be required to be filed with the Association for review and subject to compliance with Rules 2710, 2720, and 2810 and the Free-Riding and Withholding Interpretation. In addition, other provisions of NASD rules that refer to "public offerings" would be interpreted to include Rule 504 offerings within the meaning of that rule.

The purpose of the proposed rule change is to make the treatment of Rule 504 offerings under IM-2110-1 and Rules 2710, 2720, and 2810 consistent with the treatment of other types of "exempt" offerings; such as Regulation A offerings. NASD Regulation believes that it is appropriate to treat Rule 504 offerings as "public offerings" because they are generally offered to the public without being subject to federal securities law restrictions on resale or requirements concerning investor qualification.

NASD Regulation also proposes other amendments to the definitions of "public offering" in Rules IM-2110-1 and 2720 to make them consistent and easier to read. Moreover, the proposed rule change would amend the definition of "public offering" in Rule 2720 to exempt securities defined as "exempted securities" under Section 3(a)(12) of the Act in order to conform Rule 2720 with the definition in the Free-Riding and Withholding Interpretation and prior practice.

Finally, the proposed rule change would amend the provision in Rule 2710(b)(9) to delete the language stating that an offering relying on Section 3(a)(11) of the Securities Act

of 1933 (the “intra-state exemption”) must be filed only when it is “considered a public offering in the state where offered.” The Association is proposing to eliminate this language so that Rule 2710(b)(9) is consistent with the definitions of “public offering” in IM-2110-1 and Rule 2720, which definitions encompass all intra-state offerings exempt from SEC registration.⁴ Consequently, all Section 3(a)(11) securities offerings would be filed with the Corporate Financing Department for review.

(b) Statutory Basis

NASD Regulation believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act⁵ in that clarification whether offerings relying on SEC Rule 504 are subject to Rule IM-2110-1, Rule 2710, Rule 2720, and Rule 2810 (and are interpreted to be within the concept of “public offering” in other rules of the Association) will promote just and equitable principles of trade and will protect investors and the public and, further, that the proposed rule change is consistent with the provisions of Section 15A(b)(2) in that the proposed rule change will promote compliance by members with the rules of the NASD that are applicable to or reference public offerings of securities. Moreover, other amendments that make the filing requirement consistent for offerings exempt from filing under Section 3(a)(11) of the Securities Act and make the definitions in Rule 2720 more consistent with that in IM-2110-1 will promote just and equitable principles

⁴ The definitions of “public offering” in IM-2110-1 and Rule 2720 include “all securities distributions of any kind whatsoever” and do not exclude any type of intra-state offering.

⁵ 15 U.S.C. § 78o-3.

of trade, protect investors and the public, and enforce compliance by members with the rules of the NASD as required by Sections 15A(b)(2) and 15A(b)(6).

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

NASD Regulation 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, as amended.

5. 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.

6. Extension of Time Period for Commission Action

NASD Regulation does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Exhibits

1. Completed notice of proposed rule change for publication in the Federal Register.

Pursuant to the requirements of the Securities Exchange Act of 1934, NASD Regulation has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

NASD REGULATION, INC.

BY: _____
Joan C. Conley, Secretary

Date: January 8, 1999

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- ; File No. SR-NASD-99-02)

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to the Application of Its Rules to Limited Offerings Under SEC Rule 504 and Intra-State-Only Offerings

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 , the National Association of Securities Dealers, Inc. ("NASD" or "Association"), 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. 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 NASD Conduct Rules IM-2110-1, 2710, and 2720 to clarify their application to offerings of securities made in reliance on the SEC's limited offering exemption provided by Rule 504 of Regulation D. Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

IM-2110-1. “Free-Riding and Withholding”

* * *

(I) Explanation of Terms

The following explanation of terms is provided for the assistance of members. Other words which are defined in the ByBLaws and Rules shall, unless the context otherwise requires, have the meaning as defined therein.

(1) Public Offering

The term public offering shall mean any primary or secondary distribution of securities made pursuant to a registration statement or offering circular including exchange offers, rights offerings, offerings made pursuant to a merger or acquisition, straight debt offerings, offerings pursuant to SEC Rule 504, and all other securities distributions of any kind whatsoever, except any offering made pursuant to an exemption from registration under Sections 4(1), 4(2) or 4(6) of the Securities Act of 1933, as amended, or pursuant to Rules [504 (unless considered a public offering in the states where offered), Rule] 505 or [Rule] 506 adopted under the Securities Act of 1933, as amended. The term public offering shall exclude exempted securities as defined in Section 3(a)(12) of the Act, and debt securities (other than debt securities convertible to common or preferred stock) and financing instrument-backed securities that are rated by a nationally recognized statistical rating organization in one of its four highest generic rating categories. The term public offering shall exclude secondary offerings by an issuer, or any security holder of the issuer, of actively-traded securities.

* * *

2710. Corporate Financing Rule - Underwriting Terms and Arrangements

(a) No change.

(b) Filing Requirements

(1) - (7) No change.

(8) Exempt Offerings

Notwithstanding the provisions of subparagraph (1) above, the following offerings are exempt from this Rule, Rule 2720, and Rule 2810. Documents and information relating to the following offerings need not be filed for review:

(A) securities exempt from registration with the Commission pursuant to the provisions of Sections 4(1), 4(2) or 4(6) of the Securities Act of 1933, as amended, or pursuant to Rules [504 (unless considered a public offering in the states where offered), Rule] 505 or [Rule] 506 adopted under the Securities Act of 1933, as amended;

(9) Offerings Required to be Filed

Documents and information relating to all other public offerings including, but not limited to, the following must be filed with the Association for review:

(A) - (C) No change.

(D) securities exempt from registration with the Commission pursuant to Section 3(a)(11) of the Securities Act of 1933, as amended[, which is considered a public offering in the state where offered];

(E) securities exempt from registration with the Commission pursuant to Rule 504 adopted under the Securities Act of 1933, as amended, [which is considered a public offering in the states where offered];

* * *

2720. Distribution of Securities of Members and Affiliates B Conflicts of Interest

(a) General No change.

(b) Definitions

(1) - (13) No change.

(14) Public offering B any primary or secondary distribution of securities made pursuant to a registration statement or offering circular including exchange offers, rights offerings, offerings made pursuant to a merger or acquisition, straight debt offerings, offerings pursuant to SEC Rule 504, and all other securities distributions of any kind whatsoever, except any offering made pursuant to an exemption from registration under Sections 4(1), 4(2) or 4(6) of the Securities Act of 1933, as amended, or pursuant to SEC Rules [504 (unless considered a public offering in the states where offered), SEC Rule] 505 or [SEC Rule] 506 adopted under the Securities Act of 1933, as amended. The term public offering shall exclude exempted securities as defined in Section 3(a)(12) of the Act.

* * *

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 change. 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

1. Purpose

Background: The term “public offering” is expressly defined in two NASD Rules: the Free-Riding and Withholding Interpretation, Rule IM-2110-1, and the Conflicts-of-Interest Rule, Rule 2720. The definition in Rule 2720 applies not only to offerings subject to that rule, but also to filing for pre-offering review under the Corporate Financing Rule in Rule 2710 and the Direct Participation Programs Rule in Rule 2810.³ In addition, the definition in Rule 2720 is generally relied upon to define the scope of other provisions of the NASD’s rules that reference the term “public offering” or “public offering price.”⁴

Proposed Rule Change: NASD Regulation proposes to amend the definition of “public offering” in IM-2110-1 and Rule 2720 to clarify that it includes all offerings of securities exempt from SEC registration under SEC Rule 504. It is further proposed that

³ The definition of the term “public offering” included in the Free-Riding and Withholding Interpretation is limited to the application of that Interpretation. See Endnote 1 in NASD Notice to Members 98-48 (July 1998).

⁴ See, Rules 0120(h), (p), (q); IM-2110-1, 2710, 2720, 2750, 2810, 2830, 3350, 3370, and 6410(e).

Rules 2710(b)(8) and (9), which list offerings exempt from Rule 2710 and offerings required to be filed under that rule, be amended to clarify that all Rule 504 offerings are required to be filed under Rule 2710 and are governed by the requirements in Rules 2710, 2720, and 2810.⁵

Currently, the definitions of “public offering” in IM-2110-1 and Rule 2720 include only offerings made in reliance on Rule 504 if the offering is "considered a public offering in the states where offered" and Paragraphs (b)(8) and (9) of Rule 2710 only require the filing of Rule 504 offerings under such circumstances. Thus, as a result of the proposed rule change deleting this language, all Rule 504 offerings would be required to be filed with the Association for review and subject to compliance with Rules 2710, 2720, and 2810 and the Free-Riding and Withholding Interpretation. In addition, other provisions of NASD rules that refer to “public offerings” would be interpreted to include Rule 504 offerings within the meaning of that rule.

The purpose of the proposed rule change is to make the treatment of Rule 504 offerings under IM-2110-1 and Rules 2710, 2720, and 2810 consistent with the treatment of other types of “exempt” offerings; such as Regulation A offerings. NASD Regulation believes that it is appropriate to treat Rule 504 offerings as “public offerings” because they are generally offered to the public without being subject to federal securities law restrictions on resale or requirements concerning investor qualification.

NASD Regulation also proposes other amendments to the definitions of “public offering” in Rules IM-2110-1 and 2720 to make them consistent and easier to read. Moreover, the proposed rule change would amend the definition of “public offering” in Rule

⁵ The filing requirements of Rule 2720 are broader than and take precedence over those of Rule 2710.

2720 to exempt securities defined as “exempted securities” under Section 3(a)(12) of the Act in order to conform Rule 2720 with the definition in the Free-Riding and Withholding Interpretation and prior practice.

Finally, the proposed rule change would amend the provision in Rule 2710(b)(9) to delete the language stating that an offering relying on Section 3(a)(11) of the Securities Act of 1933 (the “intra-state exemption”) must be filed only when it is “considered a public offering in the state where offered.” The Association is proposing to eliminate this language so that Rule 2710(b)(9) is consistent with the definitions of “public offering” in IM-2110-1 and Rule 2720, which definitions encompass all intra-state offerings exempt from SEC registration.⁶ Consequently, all Section 3(a)(11) securities offerings would be filed with the Corporate Financing Department for review.

2. Statutory Basis

NASD Regulation believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act⁷ in that clarification whether offerings relying on SEC Rule 504 are subject to Rule IM-2110-1, Rule 2710, Rule 2720, and Rule 2810 (and are interpreted to be within the concept of “public offering” in other rules of the Association) will promote just and equitable principles of trade and will protect investors and the public and, further, that the proposed rule change is consistent with the provisions of Section 15A(b)(2) in that the proposed rule change will promote compliance by members with the

⁶ The definitions of “public offering” in IM-2110-1 and Rule 2720 include “all securities distributions of any kind whatsoever” and do not exclude any type of intra-state offering.

⁷ 15 U.S.C. § 78o-3.

rules of the NASD that are applicable to or reference public offerings of securities. Moreover, other amendments that make the filing requirement consistent for offerings exempt from filing under Section 3(a)(11) of the Securities Act and make the definitions in Rule 2720 more consistent with that in IM-2110-1 will promote just and equitable principles of trade, protect investors and the public, and enforce compliance by members with the rules of the NASD as required by Sections 15A(b)(2) and 15A(b)(6).

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

NASD Regulation 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, as amended.

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.

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:

by order approve such proposed rule change, or
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. 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 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 the file No. 99-02 and should be submitted by [insert date 21 days from the date of publication].

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

Jonathan G. Katz
Secretary

⁷ 17 CFR 200.30-3(a)(12).