(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposal is to implement procedures in response to a situation currently confronting the Exchange whereby a well-known securities analyst presents over cable television, at the same time each day, an exclusive report of his analysis of a specific identified company or companies, often involving conjecture concerning a future transaction or development with respect to the company or companies. According to the Exchange, each day's broadcast often causes an immediate and significant impact on the market price of the stock(s) identified in the report. This permits certain viewers of the televised report, utilizing high speed computers, to transmit options orders to buy or sell options covering the stock(s) in question (depending on whether the report is ''bullish'' or ''bearish'') through RAES before either the price of the stock(s) in the primary market or the prices of options governing the stock(s) in RAES have had time to adjust. The Exchange states that the result is an abuse of the RAES system, in as much as, for a short period of time, persons entering computerized options orders in RAES are able to obtain automatic executions at prices that are no longer current, simply because there has not been sufficient time to adjust prices in RAES. According to the CBOE, the ability of certain persons to ''game'' the system in this way operates to the disadvantage of CBOE market makers who are obligated under Exchange rules to take the other side of the orders.

In response to this situation, the CBOE's Market Performance Committee, which consists of floor officials who are authorized under CBOE Rule 6.6 to take such action as is deemed necessary to maintain a fair and orderly market in response to unusual market conditions, has determined that the market in options of the class or classes covering the stock that is the subject of the televised report will be declared ''fast'' for a short period of time each day, commencing at the time the analyst's report is aired, at which time RAES will be deactivated temporarily by the Exchange's control room in the affected class or classes of options. RAES will be reactivated at the post with the consent of two floor officials as soon as stock prices in the primary market and options prices in RAES have adjusted, which is likely to occur within one or two minutes following the report. CBOE members will be notified of both the deactivation of RAES in particular classes of options and its reactivation by means of (1) a message to members that will print at each post on the trading floor, and (2) a message over the Exchange's TextNet system, which has terminals at various places around the Exchange floor.

The Exchange believes that this policy will help to encourage more active market maker participation in RAES without harming the intended beneficiaries of RAES, *i.e.*, public customers who submit small orders. In addition, the CBOE notes that even for the few minutes when RAES is deactivated, the trading crowd will continue to have the responsibility to fill customer orders according to CBOE rules, including the firm quote rule.

The CBOE believes that the proposed rule change is consistent with Section 6(b) of the Act, in general, and furthers the objectives of Section 6(b)(5), in particular, in that it is designed 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 to protect investors and the public interest.

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

The CBOE 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

No written comments were solicited or received with respect to the proposed rule change.

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

Within 35 after the 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 reason 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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., 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 Section, 450 Fifth Street, N.W., Washington, D.C. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by October 26, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[2]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–24797 Filed 10–4–95; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–36303; File No. SR–NASD–95–29]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change to the Corporate Financing Rule at Article III, Section 44 of the Rules of Fair Practice Regarding Rights of First Refusal

September 29, 1995.

I. Introduction

On June 1, 1995, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder.[2] The rule change amends the Rules of Fair Practice to: (a) Reduce the duration of the right of first refusal from five years to three years; (b) limit a member to one opportunity to waive or terminate a right of first refusal in consideration of any payment or fee; (c) limit the amount of such waiver/termination payments; and (d) specify

[2] 17 CFR 200.30–3(a)(12) (1994).

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b–4 (1994).

that compensation to members for waiving or terminating a right of first refusal must be in the form of cash.

Notice of the proposed rule change was provided by issuance of a Commission release and by publication in the Federal Register.[3] The Commission received one comment in response to the release. For the reasons discussed below, this order approves the proposed rule change.

II. Description of the Proposed Rule Change

The underwriting agreement between the issuer and its underwriter often includes a provision granting the underwriter a ''right of first refusal.'' Commonly, this provision is negotiated in connection with an issuer's initial public offering and grants, for a certain number of years, the underwriter a right to underwrite or participate in any future public offerings, private placements, or other financings by the issuer. Provided the amounts negotiated are reasonably related to the size of the subsequent offering in which the member is not participating, the NASD believes that members should be permitted to negotiate to waive or terminate a right of first refusal in the event that the issuer wishes to use a different underwriter in the subsequent offering.

Typically, rights of first refusal are associated with underwritings of small companies that lack significant operating history and, in the NASD's experience, these companies often do not comprehend fully the nature and extent of their relationship with the underwriter. The NASD, therefore, believes certain minimum limitations should be placed on the scope of rights of first refusal provisions in underwriting agreements. Specifically, the NASD proposes to:[4]

- Decrease from five years to three years the maximum duration for the effectiveness of a right of first refusal provision;
- Limit to one the number of times compensation can be received to waive or terminate a right of first refusal;
- Limit the amount of any payment to waive or terminate a right of first refusal to 1% of the original offering or 5% of the underwriting discount or commission paid in connection with the future offering; and
- Require that compensation for waiving or terminating a right of first refusal must be in the form of cash.

A. Three-Year Duration

Currently, the NASD prohibits, as unreasonable, any right of first refusal with a duration of more than five years from the effective date of the offering. The NASD proposes to decrease this period to three years. In its proposal, the NASD expressed concern about whether smaller issuers are able to evaluate fully the ramifications of agreeing to a right of first refusal with a term of five years. Further, the NASD is concerned that many of these provisions might not be negotiated freely by the issuer and the underwriter. The NASD has determined that a right of first refusal with a duration of five years is overreaching and that a three-year period is more appropriate.

B. Number of Payments for Waiver/Termination

The NASD believes that often the right of first refusal is included in the underwriting agreement without any original intent on the part of the underwriter to underwrite any subsequent offerings of securities by the issuer. Further, the NASD's experience indicates that certain underwriters routinely receive multiple ''stand-aside'' payments, often in cases where the underwriter is no longer providing any bona fide services to the issuer.[5] The NASD, therefore, proposes to limit members to one opportunity to waive or terminate a right of first refusal in consideration of any payment or fee.[6]

C. Limitation on Waiver/Termination Compensation

The NASD continues to believe that members should be permitted to negotiate to waive or terminate a right of first refusal. The NASD believes, however, that the amounts negotiated for the waiver or termination of the right should be limited to an amount that has some relation either to the original offering or to the subsequent offering in which the member is not participating. The NASD proposes, therefore, to limit the amount of such waiver/termination payments. Specifically, the NASD seeks to prohibit any payment to waive or terminate a right of first refusal that has a value in excess of the greater of 1% of the original offering (or a higher amount if additional compensation is available under the compensation guideline applicable to the original offering) or 5% of the underwriting discount or commission paid in connection with the future offering (including any overallotment option that may be exercised),[7] regardless of whether the payment or fee is negotiated at the time of or subsequent to the original public offering.[8]

D. Cash Payment Requirement

The NASD also proposes to require that compensation to members for waiving or terminating a right of first refusal must be in the form of cash. The NASD believes this provision will limit the waiver/termination payment to a percentage of the capital raised in the secondary offering and protect the company's shareholders from dilution resulting from the issuance of shares to a former underwriter.

E. Additional Clarifications

The rule change also clarifies current policy that any right of first refusal provided to the underwriter and related persons to underwrite or participate is applicable to all future ''public'' offerings and ''private placements or other financings''. Finally, the rule change clarifies current policy that all unreasonable terms and arrangements, cited under Subparagraph (v) to Section 44(6)(B), shall apply to any right of first refusal ''provided to the underwriter and related persons to underwrite and participate in'' future public offerings, private placements or other financings.

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[3] Securities Exchange Act Release No. 35961 (July 12, 1995), 60 FR 37117 (July 19, 1995).

[4] In addition, the NASD proposes certain other technical amendments to its Rules of Fair Practice concerning rights of first refusal provisions.

[5] The NASD also is concerned that multiple stand-aside payments by the issuer to a member result in difficulty for both the member and the NASD in tracking the payments received over the term of the right. Such tracking is important in order to insure compliance with the Corporate Financing Rule's compensation guidelines for the original offering. The NASD anticipates that the former underwriter will contact the NASD Corporate Financing Department when it is negotiating a waiver or termination of a right of first refusal to obtain information on whether additional compensation is available under the compensation guideline applicable to the original offering.

[6] An underwriter not wishing to terminate its right of first refusal for future offerings may, however, preserve its right by waiving its participation in a particular offering without accepting payment for such waiver.

[7] The proposed one percent limitation reflects the NASD's belief that it is appropriate that the former underwriter be permitted to negotiate a fee that is at least equal to the valuation of the right of first refusal in connection with the NASD's review of the original offering in the event that the issuer wishes to sever its relationship with the former underwriter. The five percent alternative limitation reflects the NASD's belief that the former underwriter that assumed the risk of distributing the issuer's IPO should be allowed to participate or equitably benefit from the issuer's subsequent offering of securities, including any overallotment option that may be exercised, regardless of whether the payment or fee is negotiated at the time of or subsequent to the original public offering.

[8] The NASD does not include the payment to waive or terminate a right of first refusal as compensation in connection with its review of the subsequent offering of securities. The proposed rule change does not modify this practice.

F. Effective Date of the Proposed Rule Change

The rule change will apply to filings that become effective with the Commission on or after January 1, 1996. Thus, offerings filed with the Corporate Financing Department of the NASD that have not become effective with the Commission prior to January 1, 1996 will be required to comply with the rule change, regardless of whether the Corporate Financing Department has previously issued an opinion that it has no objections to the terms and arrangements.

III. Comments

The Commission received one comment [9] in response to its publication of notice in the Federal Register. In addition, the NASD received four comments [10] in response to its solicitation of comment from its membership.[11] Generally, all the commenters opposed the proposal.

All the significant arguments raised by the commenters were summarized and responded to by the NASD in its proposal and were included in the Commission's notice of publication and solicitation of comment. Generally, commenters expressed concern that the NASD is unnecessarily interfering with the contractual relationship between the issuer and the underwriter, who are free to negotiate a termination of the right if they so desire. For example, one commenter argued that the NASD should limit its role to general review of the level of underwriting compensation and not regulation of the ''method, manner, nature, timing and other matters relat[ed] to [underwriting] compensation.'' [12]

IV. Discussion

The Commission believes that the rule change is consistent with the requirements of Section 15A of the Act and the rules and regulations thereunder applicable to the NASD and, therefore, has determined to approve the proposal. Section 15A requires that the rules of the NASD, among other things, be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to remove impediments to and perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest.[13]

The Commission believes this proposal strikes an appropriate balance by allowing underwriters and issuers to continue to negotiate compensation agreements tailored to the needs of the parties while protecting issuers and investors from excessive and unfair payment arrangement under these agreements. The Commission agrees that issuers and underwriters should be allowed to enter into compensation arrangements which include compensation for terminating a right of first refusal. The Commission believes, however, that the NASD's proposal to place certain limits on the terms of these provisions will further the protection of issuers and investors and, thus, the public interest.

V. Conclusion

For the reasons discussed, the Commission finds that the rule change is consistent with the Act and the rules and regulations thereunder applicable to the NASD, in a particular, Section 15A(b)(6).

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change SR–NASD–95–29 be, and hereby is, approved.

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

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–24796 Filed 10–4–95; 8:45 am]

BILLING CODE 8010–01–M

[9] Letter from Perry L. Taylor, Jr., Chairman, Capital Markets Committee, Securities Industry Association, to Jonathan G. Katz, Secretary, SEC (Aug. 29, 1995).

[10] Letters from Stuart N. Kingoff, Associate Corporate Counsel, Lew Lieberbaum and Co., Inc. (Nov. 18, 1994); Lawrence B. Fisher, Kelley Drye and Warren (Nov. 30, 1994); and Bachner, Tally, Polevoy and Misher (Nov. 30, 1994), to Joan C. Conley, Secretary, NASD, and letter from Richard P. Woltman, President, Spelman & Co., Inc., to Jonathan G. Katz, Secretary, SEC (Nov. 16, 1994).

[11] NASD Notice to Members 94–82 (Oct. 1994).

[12] Letter from Perry L. Taylor, Jr., Chairman, Capital Markets Committee, Securities Industry Association, to Jonathan G. Katz, Secretary, SEC (Aug. 29, 1995).

[13] 15 U.S.C. 78*o*–3(b)(6) (1988).

[14] 17 CFR 200.30–3(a)(12) (1994).

[Release No. 34–36296; File No. SR–NASD–95–37]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendments No. 1, 2 and 3 to the Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Listing and Trading of Broad-Based Index Warrants on The Nasdaq Stock Market

September 28, 1995.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''), 15 U.S.C. 78s(b)(1), notice is hereby given that on August 28, 1995, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. The NASD filed Amendment No. 1 (''Amendment No. 1'') to the proposed rule change on September 22, 1995.[1] on September 27, 1995, the NASD filed Amendment No. 2 (''Amendment No. 2'') to the proposal.[2] On September 28, 1995, the NASD filed Amendment No. 3 (''Amendment No. 3'') to the proposal.[3] This Order approves the proposed rule change, as amended, on an accelerated basis and also solicits 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 proposing several changes to its rules to accommodate the trading of the index warrants based on broad-based indexes on The Nasdaq Stock Market (''Nasdaq''). The proposed changes augment and enhance the Association's regulatory requirements applicable to index warrants which were previously approved by the Commission in June 1992.[4] In addition, unlike the current regulatory structure for index warrants whereby the Commission separately approves each type of index warrant for trading (*i.e.*, Hong Kong Index warrants or Nikkei Index warrants), the proposed changes streamline the approval process for index warrants by providing that an index is eligible to underlie an index warrant traded through the facilities of the Nasdaq system once the Commission has approved such index to underlie an index warrant or option.

Specifically, the NASD proposes the following rule amendments. First, Section 2(c)(2) of Part III of Schedule D

[1] Letter from Joan C. Conley, Corporate Secretary, NASD, to Michael Walinskas, SEC, dated September 22, 1995. Amendment No. 1, which is superseded, in part, by Amendment No. 2, raises position limits on the Russell 2000 Index and S&P MidCap 400 Index (''MidCap Index''). It also establishes that Section 13, Liquidation of Positions, will apply to short sales in warrants.

[2] Letter from T. Grant Callery, Vice President and General Counsel, NASD, to Michael Walinskas, SEC, dated September 27, 1995. Amendment No. 2 reduces the position limits on the MidCap Index to 7.5 million warrants.

[3] Letter from Joan C. Conley, Corporate Secretary, NASD, to Michael Walinskas, SEC, dated September 28, 1995. Amendment No. 3 clarifies the settlement methodology to be utilized for index warrants.

[4] *See* Securities Exchange Act Release No. 30773 (June 3, 1992), 57 FR 24835 (June 11, 1992) (''Index Warrant Approval Order'').