

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.<sup>14</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58335; File No. SR-NASDAQ-2008-053]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of Proposed Rule Change To Modify the Definition of "Independent Director"

August 8, 2008.

On June 6, 2008, The NASDAQ Stock Market LLC ("Nasdaq") filed with the Securities and Exchange Commission ("Commission") pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to modify Nasdaq's definition of "independent director." The proposed rule change was published for comment in the **Federal Register** on July 2, 2008.<sup>3</sup> The Commission received no comments on the proposal.

Currently, Nasdaq Rule 4200(a)(15)(B) provides that a director of a listed company who accepted, or has a family member who accepted, any compensation from the company in excess of \$100,000 during any period of twelve months within the preceding three years cannot be deemed an independent director (with certain exceptions). The proposed rule change would change this threshold amount to \$120,000.

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 exchange, and in particular with Section 6(b)(5) of the Act.<sup>4</sup> The Commission notes that Regulation S-K, Item 404, under the Act,<sup>5</sup> which requires public companies to disclose certain material information regarding the independence of directors (among other "related persons" associated with the company),

establishes \$120,000 as the amount above which financial transactions and relationships involving a company and its directors must be disclosed.<sup>6</sup> The Commission believes that it is appropriate for Nasdaq to use this same threshold amount with regard to its definition of "independent director" in Nasdaq Rule 4200(a)(15) as a "bright line" test to determine whether a director of a listed company would be precluded from being considered independent. The Commission further notes that even if a director (or a family member) received less than \$120,000 in compensation from the listed company, the company's board still would have to make an affirmative determination that the director has no relationship with the listed company that, in the board's opinion, would interfere with the exercise of his or her independent judgment in carrying out the responsibilities of a director.<sup>7</sup>

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,<sup>8</sup> that the proposed rule change (SR-NASDAQ-2008-053) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>9</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58344; File No. SR-NSCC-2007-15]

### Self-Regulatory Organizations; National Securities Clearing Corporation; Order Granting Approval of a Proposed Rule Change Relating to the Admission of Foreign Entities

August 12, 2008.

#### I. Introduction

On November 16, 2007, National Securities Clearing Corporation ("NSCC") filed with the Securities and Exchange Commission ("Commission") proposed rule change SR-NSCC-2006-15 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").<sup>1</sup> Notice of the proposal was published in the **Federal Register** on

March 10, 2008.<sup>2</sup> No comment letters were received. For the reasons discussed below, the Commission is granting approval of the proposed rule change.

#### II. Description

The proposed rule change establishes a policy statement regarding the admission of entities that are organized in a foreign country and are not subject to U.S. federal or state regulation ("foreign entities") as members of NSCC.<sup>3</sup> NSCC Rule 2 and Addendum B to NSCC's Rules address the admission of applicants as NSCC members. NSCC's Rules provide that admission as a member is subject to an applicant's demonstration that it meets NSCC's standards of financial responsibility, operational capability, and character. Additionally, each member must continue to be in a position to demonstrate to NSCC that it meets these standards. The purpose of the proposed rule change is to establish admission criteria that will permit well-qualified foreign entities to become NSCC members and thereby obtain direct access to NSCC's services while assuring that the unique risks associated with the admission of foreign entities are adequately addressed.

The admission of foreign entities as members raises a number of unique risks and issues, including that (1) the entity is not subject to U.S. federal or state regulation, (2) the operation of the laws of the entity's home country and time zone differences<sup>4</sup> may impede the successful exercise of NSCC's rights and remedies particularly in the event of the entity's failure to settle, and (3) financial information about the foreign entity made available to NSCC for monitoring purposes may be less adequate than information about U.S.-based entities.

<sup>2</sup> Securities Exchange Act Release No. 57391 (February 27, 2008), 71 FR 76414.

<sup>3</sup> The Depository Trust Company ("DTC") filed and the Commission has granted approval of a similar proposed rule change that would permit DTC to adopt a similar policy statement with respect to the admission of foreign entities as participants. Securities Exchange Act Release No. 58345 (August 12, 2008) (File No. SR-DTC-2007-16).

<sup>4</sup> Time zone differences could complicate communications between the foreign member and its U.S. Settling Bank with respect to the timely payment of the member's net debit to NSCC, including intraday demands for payment. These differences could also delay NSCC's receipt of information available in the member's home country to others (including its other creditors) about the member's financial condition on the basis of which NSCC would have taken steps to protect the interests of NSCC and its members.

<sup>14</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 58029 (June 26, 2008), 73 FR 38016.

<sup>4</sup> 15 U.S.C. 78f(b)(5). In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>5</sup> 17 CFR 229.404 and 17 CFR 228.404.

<sup>6</sup> See Securities Exchange Act Release No. 54302A (August 29, 2006), 71 FR 53158 (September 8, 2006).

<sup>7</sup> See Nasdaq Rule 4200(a)(15) and IM-4200.

<sup>8</sup> 15 U.S.C. 78s(b)(2).

<sup>9</sup> 17 CFR 200.30-3(a)(12).

<sup>15</sup> U.S.C. 78s(b)(1).

The proposed rule change adds a new Policy Statement<sup>5</sup> to NSCC's Rules that in addition to requiring execution of the standard NSCC Membership Agreement requires a foreign entity to enter into a series of undertakings and agreements that are designed to address jurisdictional concerns and to assure that NSCC is provided with audited financial information that is acceptable to NSCC.<sup>6</sup> These include that a premium on the financial requirements for a member that submits audited financial statements prepared in other than U.S. generally accepted account principles ("GAAP"). The premiums are as follows:

(i) For financial statements prepared in accordance with International Financial Reporting Standards ("IFRS"), the Companies Act of 1985 ("UK GAAP"), or Canadian GAAP—a premium of 1½ times the existing requirement;

(ii) For financial statements prepared in accordance with a European Union ("EU") country GAAP other than UK GAAP—a premium of 5 times the existing requirement; and

(iii) For financial statements prepared in accordance with any other type of GAAP a premium of 7 times the existing requirement.

The requirements in the Policy Statement also include that each non-U.S. entity agree to certain conditions with respect to actions brought by NSCC to enforce the entity's obligations under NSCC's Members Agreement, such as irrevocably waiving all immunity from NSCC's attachment of the entity's assets in the U.S. Each non-U.S. entity will also be required to obtain an opinion of reputable foreign counsel satisfactory to NSCC providing, among other things, that the agreements described in the Policy Statement may be enforced against the foreign entity in the courts of its home country or other jurisdictions where the entity or its property may be found.<sup>7</sup> Each non-U.S. entity would have to be subject to regulation in its home country and its home country regulator must have entered into a Bilateral Information

Sharing Arrangement or Memoranda of Understanding with the U.S. Securities and Exchange Commission regarding the sharing or exchange of information and each non-US entity must be in compliance with the financial reporting and responsibility standards of its home country regulator. Finally, the Policy Statement requires that each non-U.S. entity must provide sufficient information to NSCC in order to evaluate AML risk, including whether the non-U.S. entity is subject to comparable AML requirements to those imposed in the U.S. in its home country jurisdiction.

### III. Discussion

Section 17A(b)(3)(F) of the Act provides that the rules of a clearing agency should be designed to promote the prompt and accurate clearance and settlement of securities transactions and to safeguard securities and funds which are in the custody or control of the clearing agency or for which it is responsible.<sup>8</sup> By expanding the types of entities that are eligible for membership in NSCC, the proposed rule change will increase the direct access to and use of NSCC's clearance and settlement services and therefore should promote the prompt and accurate clearance and settlement of securities transactions. However, because these entities are organized outside of the U.S. and are not subject to U.S. regulation, the Policy Statement includes a number of requirements that are designed to address legal, financial, and information sharing risk that may result from the entity's non-U.S. status. These requirements include (1) the entity make certain waivers and agreements, including a foreign legal opinion, to ensure that NSCC may enforce the member's obligations under its Members Agreement; (2) the entity provide audited financial statements prepared in accordance with generally accepted accounting principles ("GAAP"), with an increase to the member's minimum financial requirements where non-U.S. GAAP is used; and (3) the entity is subject to regulation in its home country, there is an information sharing agreement with the home country regulator and the Commission, and the entity is in compliance with the financial reporting and responsibility standards of its home country regulator. The Commission believes that the additional requirements in the Policy Statement are designed to address the legal, financial, and information sharing risks presented by non-U.S. members and that, therefore, the proposed rule

change is designed to assure the safeguarding of securities and funds which are in NSCC's control or for which it is responsible.

### IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act and the rules and regulations thereunder.<sup>9</sup>

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR-NSCC-2006-15) be and hereby is approved.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.<sup>10</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58342; File No. SR-NSX-2008-14]

### Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the NSX BLADE<sup>SM</sup> Fee Schedule To Reduce Routing Fees

August 11, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on August 8, 2008, the National Stock Exchange, Inc. (the "Exchange" or the "NSX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which items have been prepared by the Exchange. The NSX filed the proposal pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

<sup>10</sup>17 CFR 200.30-3(a)(12).

<sup>1</sup>15 U.S.C. 78s(b)(1).

<sup>2</sup>17 CFR 240.19b-4.

<sup>3</sup>15 U.S.C. 78s(b)(3)(A).

<sup>4</sup>17 CFR 240.19b-4(f)(2).

<sup>5</sup>NSCC's proposed "Policy Statement on the Admission of Non-U.S. Entities as Direct Clearing Corporation Members" is attached as Exhibit 5 to its filing, which can be found at [http://www.dtcc.com/downloads/legal/rule\\_filings/2007/nscc/2007-15.pdf](http://www.dtcc.com/downloads/legal/rule_filings/2007/nscc/2007-15.pdf).

<sup>6</sup>In the Policy Statement, NSCC has reserved the right to waive certain of the criteria where such criteria are inappropriate to a particular applicant or class of applicants (e.g., a foreign government or international securities clearing corporation).

<sup>7</sup>NSCC reserves the right to require the entity to deposit additional amounts to the clearing fund and to post a letter of credit in an instance where NSCC, in its sole discretion, believes the entity presents legal risk.

<sup>8</sup>15 U.S.C. 78q-1(b)(3)(F).