

agreements in a timely fashion. The proposed rule change also would ensure consistent treatment across the securities markets regarding these requirements.

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

The MSRB does not believe that the proposed rule change will result in any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

#### *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 on the proposal.

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

Because the proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days (or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest) from the date on which it was filed, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>16</sup> and Rule 19b-4(f)(6) thereunder.<sup>17</sup>

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b-4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The MSRB has asked the Commission to waive the 30-day operative delay. The Commission hereby grants this request. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will enable the MSRB to make the effective date of the proposed rule change coincide with NASD's for the same requirements. The effective date for the amendments will be May 1, 2005. The MSRB has extended the compliance date for its prior amendments to Rule G-8(a)(xi)(M)(1) to June 1, 2005, to coincide with NASD's compliance date for the same provisions. The MSRB has also requested that the Commission waive the pre-filing notice requirement of at least five business days (or such

shorter time as designated by the Commission).<sup>18</sup> The Commission hereby grants the MSRB's request to waive the pre-filing requirement.<sup>19</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.<sup>20</sup>

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-MSRB-2005-07 on the subject line.

#### *Paper Comments*

• Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. All submissions should refer to File Number SR-MSRB-2005-07. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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 also will be

<sup>16</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>19</sup> For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>20</sup> See Section 19(b)(3)(C) of the Act, 15 U.S.C. 78s(b)(3)(C).

available for inspection and copying at the principal office of the MSRB. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MSRB-2005-07 and should be submitted on or before June 22, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>21</sup>

**Margaret H. McFarland,**  
*Deputy Secretary.*

[FR Doc. E5-2751 Filed 5-31-05; 8:45 am]

BILLING CODE 8010-01-P

## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-51735; File No. SR-NASD-2004-165]

### **Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto Relating to NASD Rule 2790**

May 24, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 29, 2004, the National Association of Securities Dealers, Inc. ("NASD") 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. On February 1, 2005, NASD submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> On April 18, 2005, NASD submitted Amendment No. 2 to the proposed rule change.<sup>4</sup> The Commission is publishing this notice to solicit 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**

NASD is filing with the Commission a proposed rule change to amend subparagraph (i)(9) of NASD Rule 2790

<sup>21</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> Amendment No. 1 included minor changes to the rule text of the proposed rule change.

<sup>4</sup> Amendment No. 2 included minor changes to the proposed rule change including clarifying that most REITs have invested assets at the time of their initial public offering.

<sup>16</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>17</sup> 17 CFR 240.19b-4(f)(6).

to exclude from the definition of "new issue" securities offerings of a business development company ("BDC"), a direct participation program ("DPP"), and a real estate investment trust ("REIT"). NASD also is proposing a technical change to the exemption for foreign investment companies in subparagraph (c)(6) of NASD Rule 2790 to clarify the scope of the exemption as reflected in a recent NASD staff memorandum dated August 6, 2004 ("Staff Memorandum").<sup>5</sup> In addition, NASD is proposing to amend NASD Rule 2790 to codify the filing requirement for distribution information. Below is the text of the proposed rule change. Proposed new language is italicized; proposed deletions are bracketed.

## 2700. Securities Distributions

\* \* \* \* \*

### 2790. Restrictions on the Purchase and Sale of Initial Equity Public Offerings

(a) through (b) No Change.

(c) General Exemptions

The general prohibitions in paragraph (a) of this rule shall not apply to sales to and purchases by the following accounts or persons, whether directly or through accounts in which such persons have a beneficial interest:

(1) through (5) No Change.

(6) An investment company organized under the laws of a foreign jurisdiction, provided that:

(A) The investment company is listed on a foreign exchange for sale to the public or authorized for sale to the public by a foreign regulatory authority; and

(B) No person owning more than 5% of the shares of the investment company is a restricted person;

(7) through (10) No Change.

(d) through (h) No Change.

(i) Definitions

(1) through (8) No Change.

(9) "New issue" means any initial public offering of an equity security as defined in Section 3(a)(11) of the Act, made pursuant to a registration statement or offering circular. New issue shall not include:

(A) Offerings made pursuant to an exemption under Section 4(1), 4(2) or 4(6) of the Securities Act of 1933, or SEC Rule 504 if the securities are "restricted securities" under SEC Rule 144(a)(3), or Rule 144A or Rule 505 or Rule 506 adopted thereunder;

(B) Offerings of exempted securities as defined in Section 3(a)(12) of the Act, and rules promulgated thereunder;

(C) Offerings of securities of a commodity pool operated by a

commodity pool operator as defined under Section 1a(5) of the Commodity Exchange Act;

(D) Rights offerings, exchange offers, or offerings made pursuant to a merger or acquisition;

(E) Offerings of investment grade asset-backed securities;

(F) Offerings of convertible securities;

(G) Offerings of preferred securities;

(H) Offerings of an investment company registered under the Investment Company Act of 1940; [and]

(I) Offerings of securities (in ordinary share form or ADRs registered on Form F-6) that have a pre-existing market outside of the United States[.]; and

(J) Offerings of a business development company as defined in Section 2(a)(48) of the Investment Company Act of 1940, a direct participation program as defined in NASD Rule 2810(a)(4), or a real estate investment trust as defined in Section 856 of the Internal Revenue Code.

(10) No Change.

(j) Information Required To Be Filed

(1) The book-running managing underwriter of a new issue shall be required to file the following information in the time and manner specified by NASD with respect to new issues:

(A) The initial list of distribution participants and their underwriting commitment and retention amounts on or before the offering date; and

(B) The final list of distribution participants and their underwriting commitment and retention amounts no later than three business days after the offering date.

## 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 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 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

I. Securities Offerings of BDCs, DPPs, and REITs. Currently, the definition of "new issue" under subparagraph (i)(9) of NASD Rule 2790 excludes, among

other things, securities offerings of closed-end investment companies registered under the Investment Company Act of 1940 (the "Investment Company Act"). NASD staff has observed that securities of closed-end investment companies "typically commence trading at the public offering price with little potential for trading at a premium because the fund's assets at the time of the offering are the capital it has previously raised."<sup>6</sup> Moreover, if there is a premium, it is generally small. In light of these facts, NASD exempted securities of closed-end investment companies registered under the Investment Company Act from the definition of "new issue," noting that including such offerings within the scope of NASD Rule 2790 would do little to further the purposes of the Rule and, moreover, may impair the ability of such companies to obtain capital.<sup>7</sup> For similar reasons, as discussed below, NASD is proposing to exclude from the definition of "new issue" securities offerings of BDCs as defined in Section 2(a)(48) of the Investment Company Act,<sup>8</sup> DPPs as defined in NASD Rule 2810(a)(4), and REITs as defined in Section 856 of the Internal Revenue Code (the "Code").<sup>9</sup>

A. BDCs. According to NASD, through the passage of the Small Business Investment Incentive Act of 1980 and the corresponding amendments to the Investment Company Act, Congress enacted a regulatory structure for BDCs in an effort to encourage capital investment in small developing businesses and financially troubled businesses.<sup>10</sup>

A BDC is defined as a domestic, closed-end investment company that: is operated for the purpose of making investments in small and developing businesses and financially troubled businesses; that must make available significant managerial assistance to certain of its portfolio companies; and that has notified the Commission of its election to be subject to the provisions of Sections 55 through 65 of the Investment Company Act.<sup>11</sup> According to NASD, while a BDC technically is not registered under the Investment

<sup>6</sup> Securities Exchange Act Release No. 48701 (October 24, 2003), 68 FR 62126 (October 31, 2003) (order approving File No. SR-NASD-99-60).

<sup>7</sup> *Id.*; Securities Exchange Act Release No. 43627 (November 28, 2000), 65 FR 76316 (December 6, 2000) (notice of filing of Amendment No. 2 to File No. SR-NASD-99-60).

<sup>8</sup> 15 U.S.C. 80a-2(a)(48).

<sup>9</sup> 26 U.S.C. 856.

<sup>10</sup> See Investment Company Act Release No. 11493 (December 16, 1980), 45 FR 83479 (December 19, 1980).

<sup>11</sup> See Section 2(a)(48) of the Investment Company Act; 15 U.S.C. 80a-2(a)(48).

<sup>5</sup> The Staff Memorandum is available on the NASD's Web site at <http://www.nasdr.com>.

Company Act, it is subject to many of the same requirements that are applicable to registered investment companies.<sup>12</sup>

Section 55 of the Investment Company Act,<sup>13</sup> in part, describes the securities in which a BDC can invest. These securities generally must comprise at least 70% of the value of the BDC's investment assets and include securities of certain companies, cash, cash items, U.S. government securities, and high quality debt instruments. The companies in which a BDC can invest are primarily "eligible portfolio companies" as defined in Section 2(a)(46) of the Investment Company Act,<sup>14</sup> which generally include small developing businesses and financially troubled businesses. Further, NASD staff understands that BDCs are similar to registered closed-end investment companies in that a BDC's primary asset at the time of its initial public offering is the capital it has raised through the offering process. Thus, NASD believes that like registered closed-end investment companies, BDCs generally commence trading at their public offering price and premiums, if any, tend to be very small.

**B. DPPs and REITs.** A DPP, as defined in NASD Rule 2810(a)(4), is a program that provides for flow-through tax consequences regardless of the structure of the legal entity or vehicle for distribution, including, but not limited to, oil and gas programs, cattle programs, condominium securities, Subchapter S corporate offerings and all other programs of a similar nature, regardless of the industry represented by the program, or any combination thereof. NASD Rule 2810 excludes REITs from the definition of a DPP.

A REIT is a recognized investment vehicle for income-generating real estate, and it is allowed to benefit from the tax advantages of a trust as long as certain asset, income, and distribution criteria have been satisfied as set forth

in the Code.<sup>15</sup> For instance, pursuant to the Code, at least 75 percent of a REIT's gross income must be derived from real estate, and at least 75 percent of the value of its total assets must be represented by real estate assets, cash and cash items, and Government securities.<sup>16</sup>

According to NASD, nearly all DPPs and a few REITs, at the time of their initial public offering, have no invested assets. The initial public offering raises capital, which is subsequently invested. As such, NASD believes that the initial public offerings of these DPPs and REITs, like registered closed-end investment companies, are not expected to open at a premium. Like registered closed-end funds, the primary asset of these DPPs and REITs immediately following the public offering is the capital raised in the offering.

According to NASD, most REITs making an initial public offering have invested assets upon consummation of the offering. Although the common stock of these REITs has a greater potential for immediate premiums in the secondary market, NASD staff's review of such offerings has shown that even in these cases, premiums, if any, tend to be small. According to NASD, because the assets of REITs (e.g., rental properties or mortgage portfolio) generally have a reasonably determinable market value, it is rare that REITs will commence trading at a significant premium. Moreover, NASD believes that investors typically invest in REITs for income rather than capital appreciation, which may further limit premiums in the immediate aftermarket.

For these reasons, NASD is proposing to exclude securities offerings of all BDCs, DPPs, and REITs from the definition of "new issue" under subparagraph (i)(9) of NASD Rule 2790. As noted above, NASD staff has found that historically most of these offerings have not traded at a substantial premium. If warranted by future developments in the trading pattern of such securities in the immediate secondary market, however, the staff would reconsider the appropriateness of a blanket exclusion for these types of offerings.

**II. Foreign Investment Company Exemption.** NASD also is proposing a technical change to the exemption for foreign investment companies in subparagraph (c)(6) of NASD Rule 2790 to clarify the scope of the exemption as reflected in the Staff Memorandum. The Staff Memorandum was prepared in

response to inquiries about whether the foreign investment company exemption would apply to various hedge funds and other funds exempt from registration under the Investment Company Act that were listed on a foreign exchange (such as the Irish Stock Exchange). In the Staff Memorandum, NASD staff explained that the foreign investment company exemption is intended to extend to foreign investment companies that are similar to U.S. registered investment companies.<sup>17</sup> NASD staff further explained the exemption for foreign investment companies extends only to an investment company organized under the laws of a foreign jurisdiction that is either "listed on a foreign exchange for sale to the public" or "authorized for sale to the public," and that does not have any restricted person that beneficially owns more than 5% of the company's shares.

The Staff Memorandum also reiterated the position in *NtM* 03-79 that a foreign investment company that is limited to select investors would not be considered as "for sale to the public." As NASD staff explained, foreign investment companies that are limited to high net worth individuals are not eligible for the foreign investment company exception. According to NASD, inasmuch as U.S. registered investment companies are not limited to sale to high net worth individuals, it would be inconsistent to permit foreign investment companies to impose such requirements and still avail themselves of the exemption provided for foreign investment companies under

<sup>17</sup> In *Notice to Members* ("NtM") 97-30, which proposed the foreign investment company exception in the Free-Riding and Withholding Interpretation, IM-2110-1 (the predecessor to Rule 2790), NASD stated that:

Purchases of shares of investment companies registered under the Investment Company Act of 1940 (1940 Act) are exempt from the restrictions of the Interpretation. The rationale for this existing provision is that the interest of any one restricted person in an investment company ordinarily is *de minimis* and that, because the ownership of investment company shares generally is subject to frequent turnover, determining compliance with the Interpretation would be extremely difficult in this context. *NASD Regulation is proposing to extend this rationale to the purchase of shares of foreign entities that are similar to U.S. investment companies.* (emphasis added).

Likewise, in *NtM* 03-79, which announced the SEC's approval of NASD Rule 2790, NASD explained that "the foreign investment company exception is intended to extend benefits to foreign investment entities that are similar to U.S. mutual funds."

<sup>12</sup> For example, in December 2003, the Commission adopted a new rule under the Investment Company Act that requires each registered investment company as well as each BDC to adopt and implement written policies and procedures reasonably designed to prevent violation of the federal securities laws, review those policies and procedures annually for their adequacy and the effectiveness of their implementation, and designate a chief compliance officer to be responsible for administering the policies and procedures. See Investment Company Act Release No. 26299 (December 17, 2003), 68 FR 74714 (December 24, 2003) (Final Rule Relating to Compliance Programs of Investment Companies and Investment Advisers).

<sup>13</sup> 15 U.S.C. 80a-54.

<sup>14</sup> 15 U.S.C. 80a-2(a)(46).

<sup>15</sup> See Section 856 of the Code; 26 U.S.C. 856.

<sup>16</sup> *Id.*

NASD Rule 2790. NASD believes that none of the reasons underlying the exemption for U.S. registered investment companies, such as broad public ownership, the difficulty in identifying beneficial owners, the ability of any public investor to purchase an interest in the investment company, and the generally negligible interest of any single restricted person, are likely to be present with a foreign investment company offered only to high net worth individuals. Moreover, NASD staff believes that the purposes of NASD Rule 2790 could easily be frustrated by purchases of large quantities of a new issue by a foreign investment company listed on a foreign exchange that is owned entirely or principally by broker-dealer personnel (or other restricted persons). According to NASD, a foreign investment company that is limited to select investors would, however, be eligible to purchase new issues in accordance with the *de minimis* exemption set forth in subparagraph (c)(4) of NASD Rule 2790.

While NASD staff believes the text of NASD Rule 2790, *NtM* 03-79, and the rulemaking history of the foreign investment company provision support the interpretation provided in the Staff Memorandum, NASD staff also believes that it is appropriate to amend the rule text. Specifically, NASD is proposing to revise the foreign investment company exemption to state as follows:

(6) An investment company organized under the laws of a foreign jurisdiction, provided that:

(A) The investment company is listed on a foreign exchange for sale to the public or authorized for sale to the public by a foreign regulatory authority; and

(B) No person owning more than 5% of the shares of the investment company is a restricted person.

**III. Information Required to be Filed.** In 1996, NASD initiated a regulatory service, "NASDesk," for members to transmit underwriting commitment and retention information to NASD's Free-Riding Regulatory Database. NASD communicated with members regarding the "hot issue" status of initial public offerings ("IPOs") using a companion system, "Compliance Desk."<sup>18</sup> To coincide with the implementation of NASD Rule 2790, NASD replaced NASDesk/Compliance Desk with a new system for members to submit new issue distribution information named "IPO Distribution Manager."<sup>19</sup> IPO Distribution Manager is a Web-based application that permits the book-

running managing underwriter to transmit distribution information to NASD through Web COBRA, the Web-based filing system that members are required to use when filing information about IPOs under the Corporate Financing Rule (NASD Rule 2710).

NASD is proposing to amend NASD Rule 2790 to codify the requirement for the book-running managing underwriter to file distribution information as announced in *NtM* 04-20.

#### (2) Statutory Basis

NASD believes that the proposed rule change, as amended, is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>20</sup> which requires, among other things, that NASD rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the proposed rule change to NASD Rule 2790, as described herein, protects investors and the public interest by ensuring that member firms make a bona fide public offering of securities at the public offering price.

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

NASD does not believe that the proposed rule change, as amended, 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:

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, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2004-165.

##### Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549. All submissions should refer to File Number SR-NASD-2004-165. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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 Section, 450 Fifth Street, NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASD-2004-165 and should be submitted on or before June 22, 2005.

<sup>18</sup> See *NtM* 96-18.

<sup>19</sup> See *NtM* 04-20 (March 2004).

<sup>20</sup> 15 U.S.C. 78o-3(b)(6).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>21</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E5-2752 Filed 5-31-05; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51741; File No. SR-NASD-2005-054]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Granting Accelerated Approval of Proposed Rule Change and Amendment No. 1 Thereto Relating to Certain Amendments to the Restated Certificate of Incorporation and the By-Laws of The Nasdaq Stock Market, Inc

May 25, 2005.

#### I. Introduction

On April 19, 2005, the National Association of Securities Dealers ("NASD"), through its subsidiary, The Nasdaq Stock Market Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission" or "SEC") a proposed rule change, 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> to make certain amendments to the Nasdaq Restated Certificate of Incorporation (the "Certificate") and the Nasdaq By-Laws (the "By-Laws") to phase out the current classified board structure and provide for the annual election of all members of the Nasdaq Board of Directors (the "Nasdaq Board"). The proposed rule change was published for comment in the **Federal Register** on May 4, 2005.<sup>3</sup> The Commission received no comments on the proposal. On May 25, 2005, Nasdaq submitted Amendment No. 1 to the proposed rule change.<sup>4</sup> This order grants accelerated approval to the proposed rule change, as amended.

<sup>21</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. 51626 (April 28, 2005), 70 FR 23286 (May 4, 2005).

<sup>4</sup> In Amendment No. 1, Nasdaq modified the text of their proposed rule change to reflect NASD and stockholder approval of the proposed amendments to Nasdaq's Certificate of Incorporation. Specifically, the Amendment stated that the Board of Governors of the NASD (the "NASD Board") approved the proposed rule change on April 21, 2005, and that Nasdaq's stockholders approved the proposed rule change at the 2005 annual meeting of stockholders which was held on May 25, 2005. Amendment No. 1 is a technical amendment and, therefore, not subject to notice and comment.

#### II. Discussion and Commission Findings

The Commission has reviewed the proposed rule change, as amended, and finds that it is consistent with the requirements of Section 15A of the Act,<sup>5</sup> and the rules and regulations thereunder applicable to a national securities association.<sup>6</sup> In particular, the Commission finds that the proposed rule change is consistent with Sections 15A(b)(2) and (6) of the Act,<sup>7</sup> which require, among other things, that Nasdaq be so organized and have the capacity to be able to carry out the purposes of the Act and to comply with and enforce compliance with the provisions of the Act, and that Nasdaq's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Commission believes that the proposed rule change will serve the public interest by enhancing the accountability of board members through more frequent elections and thereby may help Nasdaq fulfill its obligations under the Act.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. In order for the amendments to the Certificate and the By-Laws to take effect as approved, Nasdaq requested that the Commission accelerate approval of the proposed rule change on May 25, 2005, immediately after the filing of the amendment indicating approval by Nasdaq's stockholders and the NASD Board. Accelerating approval will allow for the timely filing, of the proposed changes being made to the Certificate, with the Secretary of State of the State of Delaware. Furthermore, approval of the proposed rule change on May 25, 2005 will avert the need for a second stockholder vote at a later meeting that would entail additional expense and delay while not conferring benefits from a regulatory or corporate governance standpoint. Accordingly, the Commission finds good cause, consistent with Sections 15A(b)(6) and 19(b) of the Exchange Act, to approve the proposed rule change, as amended, on an accelerated basis.

<sup>5</sup> 15 U.S.C. 78o-3.

<sup>6</sup> In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>7</sup> 15 U.S.C. 78o-3(b)(2) and (6).

#### III. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>8</sup> that proposed rule change (SR-NASD-2005-054), as amended, is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

[FR Doc. E5-2767 Filed 5-31-05; 8:45 am]

BILLING CODE 8010-01-P

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

[STB Docket No. MC-F-21012]<sup>1</sup>

#### CUSA CSS, LLC d/b/a Crew Shuttle Services—Acquisition of Assets and Business Operations—Crew Shuttle Service, Inc.

**AGENCY:** Surface Transportation Board, DOT.

**ACTION:** Notice tentatively approving finance transaction.

**SUMMARY:** CUSA CSS, LLC d/b/a Crew Shuttle Services (CUSA CSS or Applicant), a federally regulated motor carrier (MC-522544), has filed an application under 49 U.S.C. 14303 to purchase the assets and business operations of Crew Shuttle Service, Inc. (Crew or Seller). Persons wishing to oppose this application must follow the rules at 49 CFR 1182.5 and 1182.8. The Board has tentatively approved the transaction, and, if no opposing comments are timely filed, this notice will be the final Board action.

**DATES:** Comments must be filed by July 18, 2005. Applicant may file a reply by August 1, 2005. If no comments are filed by July 18, 2005, this notice is effective on that date.

**ADDRESSES:** Send an original and 10 copies of any comments referring to STB Docket No. MC-F-21012 to: Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423-0001. In addition, send one copy of comments to Applicant's representative: Stephen Flott, Flott & Co. PC, PO Box 17655, Arlington, VA 22216-7655.

**FOR FURTHER INFORMATION CONTACT:** Joseph H. Dettmar, (202) 565-1600.

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

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

<sup>1</sup> A request for interim approval under 49 U.S.C. 14303(j) was included in this filing (STB Docket No. MC-F-21012 TA). Temporary approval was granted by decision served on May 16, 2005, which approval became effective on that date.