

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-55128; File No. SR-NASD-2006-074)

January 18, 2007

Self-Regulatory Organizations: National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change Relating to the Application of NASD Rule 2790 to Issuer-Directed Securities

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 June 12, 2006, 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. 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 is proposing to amend NASD Rule 2790 to expand the exemption for securities that are directed by the issuer to include offerings sold entirely on a non-underwritten basis, where no broker-dealer solicits or sells any new issue securities in the offering, and where no broker-dealer has any involvement or influence, directly or indirectly, in the issuer’s allocation decisions with respect to any of the new issue securities in the offering. NASD also is proposing to amend Rule 2790 to prohibit the allocation of issuer-directed securities to broker-dealers. Below is the text of the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

proposed rule change. Proposed new language is underlined; proposed deletions are in [brackets].

* * * * *

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

(a) through (c) No Change.

(d) Issuer-Directed Securities

The prohibitions on the purchase and sale of new issues in this rule shall not apply to securities that:

(1) are specifically directed by the issuer to persons that are restricted under the rule; provided, however, that securities directed by an issuer may not be sold to or purchased by:

(A) a broker-dealer; or

(B) an account in which any restricted person specified in subparagraphs (i)(10)(B) or (i)(10)(C) of this rule has a beneficial interest, unless such person, or a member of his or her immediate family, is an employee or director of the issuer, the issuer's parent, or a subsidiary of the issuer or the issuer's parent. Also, for purposes of this paragraph (d)(1) only, a parent/subsidiary relationship is established if the parent has the right to vote 50% or more of a class of voting security of the subsidiary, or has the power to sell or direct 50% or more of a class of voting security of the subsidiary;

(2) are specifically directed by the issuer and are part of an offering in which no broker-dealer:

(A) underwrites any portion of the offering;
(B) solicits or sells any new issue securities in the offering; and
(C) has any involvement or influence, directly or indirectly, in the issuer's allocation decisions with respect to any of the new issue securities in the offering;

(3) [(2)] are part of a program sponsored by the issuer or an affiliate of the issuer that meets the following criteria:

(A) the opportunity to purchase a new issue under the program is offered to at least 10,000 participants;

(B) every participant is offered an opportunity to purchase an equivalent number of shares, or will receive a specified number of shares under a predetermined formula applied uniformly across all participants;

(C) if not all participants receive shares under the program, the selection of the participants eligible to purchase shares is based upon a random or other non-discretionary allocation method; and

(D) the class of participants does not contain a disproportionate number of restricted persons as compared to the investing public generally;

or

(4) [(3)] are directed to eligible purchasers who are otherwise restricted under the rule as part of a conversion offering in accordance with the standards of the governmental agency or instrumentality having authority to regulate such conversion offering.

(e) through (j) No Change.

* * * * *

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

Background

NASD Rule 2790 protects the integrity of the public offering process by ensuring that: (1) members make *bona fide* public offerings of securities at the offering price; (2) members do not withhold securities in a public offering for their own benefit or use such securities to reward persons who are in a position to direct future business to members; and (3) industry insiders, including members and their associated persons, do not take advantage of their insider position to purchase new issues for their own benefit at the expense of public customers.

NASD Rule 2790 provides that, except as otherwise permitted under the Rule, a member (or an associated person) may not sell a new issue to an account in which a restricted person has a beneficial interest, a member (or an associated person) may not purchase a new issue in any account in which such member or associated person has a

beneficial interest, and a member may not continue to hold new issues acquired as an underwriter, selling group member, or otherwise.

Exemption for Issuer-Directed Non-Underwritten Offerings

NASD has long recognized that an issuer's ability to direct shares to investors is a valuable tool in employee development and retention (often an integral part of the employer-employee relationship), and often furthers the legitimate business interests of the issuer. As such, NASD historically has provided a tailored exemption for securities that are specifically directed by the issuer.

Currently, Rule 2790(d)(1) states that the prohibitions on the purchase and sale of new issues in the Rule do not apply to new issue securities that are specifically directed by the issuer to restricted persons as defined in the Rule, provided that issuer-directed securities are not sold to or purchased by an account in which broker-dealer personnel, finders and fiduciaries, or certain members of their immediate family have a beneficial interest,³ unless such persons, or members of their immediate family, are employees or directors of the issuer, the issuer's parent, or a subsidiary of the issuer or the issuer's parent. The inclusion of these heightened requirements in Rule 2790(d)(1) is designed to ensure that such persons, who typically have the greatest potential to influence the IPO allocation process, have a demonstrated basis for being selected to purchase shares in the IPO. The issuer-directed exemption is applicable only when shares are in fact directed

³ The term broker-dealer personnel includes, among others, any officer, director, general partner, associated person, and employee of a broker-dealer, as well as certain immediate family members of such persons. The term finders and fiduciaries, with respect to the security being offered, includes a finder or any person acting in a fiduciary capacity to the managing underwriter, including, but not limited to, attorneys, accountants, and financial consultants, as well as certain

by an issuer (that is, a member cannot seek to have an issuer direct securities to restricted persons on the member's behalf under the exemption).

NASD recently received two requests for exemptive relief related to the issuer-directed exemption.⁴ Both requests came from banks that were eligible to offer their own securities pursuant to an exemption from registration under Section 3(a)(2) of the Securities Act of 1933. Both of these offerings were entirely on a non-underwritten basis,⁵ and all decisions regarding the allocation of shares in the offerings were determined at the sole discretion of the respective issuers. These issuers argued, and NASD staff agreed, that the heightened requirements of Rule 2790(d)(1) would impair their ability to attract capital and served no regulatory purpose in light of the fact that no broker-dealer was underwriting or otherwise involved in allocating any of the shares that were being offered. Further, Rule 2790 generally is predicated on a member's involvement in the allocation process. As such, NASD staff granted an exemption from Rule 2790 in connection with both offerings.

NASD is proposing to codify this position by amending Rule 2790(d) to provide that the prohibitions on the purchase and sale of new issues in Rule 2790 do not apply to

immediate family members of such persons. See NASD Rules 2790(i)(10)(B) and (i)(10)(C).

⁴ See Letter to Noel M. Gruber, Kennedy & Barris, LLP, from Afshin Atabaki, NASD, dated October 18, 2005 ("Gruber Letter") (available at: http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&ssDocName=NASDW_015421&PrinterFriendly=1), and Letter to Bruce E. Lee from Afshin Atabaki, NASD, dated February 3, 2006 ("Lee Letter") (available at: http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&ssDocName=NASDW_016098&PrinterFriendly=1).

⁵ Although a member was involved in one of these offerings, the member's involvement in the offering was mandated under state law and limited solely to ministerial functions.

securities that are specifically directed by the issuer to restricted persons, provided that a broker-dealer: (1) does not underwrite any portion of the offering; (2) does not solicit or sell any new issue securities in the offering; and (3) has no involvement or influence, directly or indirectly, in the issuer's allocation decisions with respect to any of the new issue securities in the offering.

Prohibition of Issuer-Directed Allocations to Broker-Dealers

NASD also is proposing to amend the issuer-directed provision in Rule 2790(d)(1) to prohibit expressly issuer-directed allocations of new issues to a broker-dealer. NASD believes that issuer-directed allocations to a broker-dealer run contrary to the purposes of the Rule. As discussed above, Rule 2790(d)(1) permits allocations of new issue securities by the issuer to an account in which broker-dealer personnel, finders or fiduciaries, or certain members of their immediate family have a beneficial interest, if such persons, or members of their immediate family, are employees or directors of the issuer, the issuer's parent, or a subsidiary of the issuer or the issuer's parent. However, NASD does not see any corresponding basis to justify new issue allocations from the issuer to a broker-dealer. The conditions in Rule 2790(d)(1) generally are inapplicable to a broker-dealer. Moreover, we have noted under the current Rule that to the extent that broker-dealer personnel have a beneficial interest in a broker-dealer, the broker-dealer would be subject to the limitations in Rule 2790(d)(1). The proposed rule change would establish a more direct prohibition against purchases of new issues by broker-dealers.

NASD will announce the effective date of the proposed rule change in a Notice to Members ("NTM") to be published no later than 60 days following Commission

approval. The effective date will be 30 days following publication of the NTM announcing Commission approval.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁶ which requires, among other things, that NASD's 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 strikes the correct balance between providing issuers with flexibility to direct shares and improving the capital raising process while at the same time preserving the objectives of the Rule.

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

NASD 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.

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. Please include File Number SR-NASD-2006-074 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASD-2006-074. 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

⁶ 15 U.S.C. 78o-3(b)(6).

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 available for inspection and copying at the principal office of 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-2006-074 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

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

Florence E. Harmon
Deputy Secretary

⁷ 17 CFR 200.30-3(a)(12).