

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-47482; File No. SR-NASD-2003-34)

March 11, 2003

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Bid Price Test in Nasdaq Listing Standards

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> notice is hereby given that on March 7, 2003, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, the Nasdaq Stock Market, Inc. ("Nasdaq") 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 Nasdaq. Nasdaq has designated this proposed rule change as "non-controversial" pursuant to Rule 19b-4(f)(6) of the Act,<sup>3</sup> which renders it effective immediately upon filing. 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

Nasdaq has proposed to modify and extend until December 31, 2004, the existing pilot program relating to compliance periods for the bid price criteria for Nasdaq National Market and Nasdaq SmallCap Market issuers; to eliminate the provision which permitted, on a pilot basis, certain companies that transferred to the SmallCap Market to return to

---

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

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

<sup>3</sup> 17 CFR 240.19b-4(f)(6).

the Nasdaq National Market under the continued inclusion criteria;<sup>4</sup> and to permanently modify the continued bid price requirement for certain Nasdaq National Market issuers by requiring these issuers meet a \$1 bid price instead of the existing \$3 requirement. During the pilot period, Nasdaq will assess the effectiveness of these changes.

Below is the text of the proposed rule change. Proposed new language is italicized; proposed deletions are in brackets.

\* \* \* \* \*

#### **4310. Qualification Requirements for Domestic and Canadian Securities**

To qualify for inclusion in Nasdaq, a security of a domestic or Canadian issuer shall satisfy all applicable requirements contained in paragraphs (a) or (b), and (c) hereof.

(a) - (b) No change.

(c) In addition to the requirements contained in paragraph (a) or (b) above, and unless otherwise indicated, a security shall satisfy the following criteria for inclusion in Nasdaq:

(1) - (7) No change.

(8)(A) - (C) No change.

(D) A failure to meet the continued inclusion requirement for minimum bid price on The Nasdaq SmallCap Market shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 180 calendar days from such notification to achieve compliance. If the issuer

---

<sup>4</sup> An issuer that has transferred to the Nasdaq SmallCap Market in reliance on the existing pilot rule would be permitted to return to the Nasdaq National Market under the terms of the rule in effect at the time of transfer.

has not been deemed in compliance prior to the expiration of the 180 day compliance period, it will be afforded an additional 180 day compliance period, provided that on the 180<sup>th</sup> day following notification of this deficiency, the issuer meets any of the three criteria for initial inclusion set forth in Rule 4310(c)(2)(A) based on the issuer's most recent publicly filed financial information. If the issuer has not been deemed in compliance prior to the expiration of the second 180 day compliance period, it will be afforded an additional 90 day compliance period, provided that on the last day of the second 180 day compliance period, the issuer meets any of the three criteria for initial inclusion set forth in Rule 4310(c)(2)(A) based on the issuer's most recent publicly filed financial information. Compliance can be achieved during any [either 180 day] compliance period by meeting the applicable standard for a minimum of 10 consecutive business days.

(E) No change.

(9) - (29) No change.

(d) No change.

#### **4450. Quantitative Maintenance Criteria**

After designation as a Nasdaq National Market security, a security must substantially meet the criteria set forth in paragraphs (a) or (b), and (c), (d), (e), (f), (g), (h) or (i) below to continue to be designated as a national market system security. A security maintaining its designation under paragraph (b) need not also be in compliance with the quantitative maintenance criteria in the Rule 4300 series.

(a) No change.

(b) Maintenance Standard 2 - First Class of Common Stock, Shares or Certificates of Beneficial Interest of Trusts, Limited Partnership Interests in Foreign or Domestic Issues and American Depositary Receipts

(1) - (3) No change.

(4) Minimum bid price per share of [~~\$3~~] \$1;

(5) - (6) No change.

(c) - (d) No change.

(e) Compliance Periods

(1) No change.

(2) [For issuers subject to the \$1.00 bid price requirement under Maintenance Standard 1 or the \$3.00 bid price requirement under Maintenance Standard 2, a] A failure to meet the continued inclusion requirement for minimum bid price shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 180 [90] calendar days from such notification to achieve compliance. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 180 [90] day compliance period. Nasdaq may, in its discretion, require an issuer [under Maintenance Standard 1] to maintain a bid price of at least \$1.00 per share for a period in excess of ten consecutive business days, but generally no more than 20 consecutive business days, before determining that the issuer has demonstrated an ability to maintain long-term compliance. In

determining whether to monitor bid price beyond ten business days, Nasdaq will consider the following four factors: (i) margin of compliance (the amount by which the price is above the \$1.00 minimum standard); (ii) trading volume (a lack of trading volume may indicate a lack of bona fide market interest in the security at the posted bid price); (iii) the market maker montage (the number of market makers quoting at or above \$1.00 and the size of their quotes); and, (iv) the trend of the stock price (is it up or down).

(3) - (4) No change.

(f) - (h) No change.

(i) Transfers between The Nasdaq National and SmallCap Markets

For Bid Price Deficient Issuers

(1) If a National Market issuer has not been deemed in compliance prior to the expiration of [the 90 day] a compliance period for bid price or otherwise so chooses, it may transfer to The Nasdaq SmallCap Market, provided that it meets all applicable requirements for continued inclusion on the SmallCap Market set forth in Rule 4310(c) (other than the minimum bid price requirement of Rule 4310(c)(4)) or Rule 4320(e), as applicable. A Nasdaq National Market issuer transferring to The Nasdaq SmallCap Market must pay the entry fee set forth in Rule 4520(a). The issuer may also request a hearing to remain on The Nasdaq National Market pursuant to the Rule 4800 Series.

(2) Following a transfer to The Nasdaq SmallCap Market pursuant to paragraph (1), a domestic or Canadian Nasdaq National Market issuer [under Maintenance Standard 1] will be afforded the remainder of [the initial] any [180 day] compliance period set forth in Rule 4310(c)(8)(D) as if the issuer had been listed on The Nasdaq SmallCap Market [and may thereafter be eligible for the subsequent 180 day compliance period pursuant to that rule]. The [90 day grace] compliance periods afforded by this rule and any time spent in the hearing process will be deducted in determining the length of the remaining [from the] applicable [grace] compliance periods on The Nasdaq SmallCap Market. [Any issuer that was formerly listed on The Nasdaq National Market, and which transferred to The Nasdaq SmallCap Market pursuant to this paragraph, may transfer back to The Nasdaq National Market without satisfying the initial inclusion criteria if it maintains compliance with the \$1 bid price requirement for a minimum of 30 consecutive business days prior to the expiration of the compliance periods described in Rule 4310(c)(8)(D) and if it has continually maintained compliance with all other requirements for continued listing on The Nasdaq National Market since being transferred. An issuer qualifying for such a transfer pursuant to the maintenance requirements is not required to pay the entry fee set forth in Rule 4510(a) upon transferring back to The Nasdaq National Market.]

[(3) Following a transfer to The Nasdaq SmallCap Market pursuant to paragraph (1), an issuer formerly qualifying for listing on The Nasdaq National Market under Maintenance Standard 2 or a non-Canadian foreign issuer, which is not subject to the \$1 bid price requirement, may transfer back to The Nasdaq National Market without satisfying the initial inclusion criteria if it maintains compliance with the applicable bid price requirement for continued listing on The Nasdaq National Market for a minimum of 30 consecutive business days within 360 days following the notification of the initial bid price deficiency, and if it has continually maintained compliance with all other requirements for continued listing on The Nasdaq National Market since being transferred. An issuer qualifying for such a transfer pursuant to the maintenance requirements is not required to pay the entry fee set forth in Rule 4510(a) upon transferring back to The Nasdaq National Market.]

\* \* \* \* \*

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

In its filing with the Commission, Nasdaq 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. Nasdaq 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

Following the extraordinary market conditions surrounding the September 11th tragedy, Nasdaq implemented a moratorium on enforcement of its bid price rules.<sup>5</sup> In January 2002, immediately after the moratorium ended, Nasdaq implemented a pilot program, which expires at the end of this year, to extend certain compliance periods applicable to the bid price rule on the SmallCap Market.<sup>6</sup> Specifically, the current pilot program extends the bid price compliance period for SmallCap Market issuers from 90 days to 180 days. Thereafter, SmallCap Market issuers are allowed an additional 180-day compliance period if they meet heightened requirements based upon certain core financial initial listing standards. In addition, National Market issuers that are bid-price deficient are allowed to transition to the SmallCap Market and benefit from the longer compliance periods it affords, as long as they meet SmallCap Market continued listing standards (with the exception of the bid price requirement).

After careful consideration, Nasdaq continues to believe that the bid price requirements are a valuable measure of compliance. However, Nasdaq believes that the measurement periods for the requirements should be extended and modified to provide additional flexibility to both National Market and SmallCap Market issuers that are engaged in turnaround strategies in what Nasdaq considers to be a continuing difficult and historically unique climate. Nasdaq proposes that these modifications also be subject

---

<sup>5</sup> See Securities Exchange Act Release No. 44857 (September 27, 2001), 66 FR 50485 (October 3, 2001) (SR-NASD-2001-61).

<sup>6</sup> See Securities Exchange Act Release No. 45387 (February 4, 2002), 67 FR 6306 (February 11, 2002) (SR-NASD-2002-13).

to implementation on a pilot basis, in order to allow Nasdaq to assess the efficacy of the changes and whether it is appropriate to recommend further, more permanent action.

Specifically, this proposal would modify and extend the pilot as follows:

- Extend the bid price grace period for all National Market issuers from 90 calendar days to 180 calendar days. Pursuant to a separate rule filing,<sup>7</sup> Nasdaq also will propose to provide an additional 180-calendar-day compliance period for those National Market issuers able to demonstrate compliance with the core National Market initial listing criteria (i.e., \$30,000,000 in equity; \$75,000,000 in market value of listed securities; \$75,000,000 in total assets and total revenues; or \$15,000,000 in equity and \$1,000,000 in income from continuing operations before income taxes in the most recently completed fiscal year, or two of the last three fiscal years);
- Maintain the initial 180-calendar-day bid price compliance period for all SmallCap Market issuers as well as the additional 180-day compliance period for SmallCap Market issuers demonstrating compliance with the core SmallCap Market initial listing criteria (i.e., \$5,000,000 in equity; \$50,000,000 in market value of listed securities; or \$750,000 in net income from continuing operations in the most recently completed fiscal year, or two of the last three fiscal years) and provide an additional 90-day compliance period, if the issuer maintains compliance with the heightened, initial inclusion criteria noted above, as measured at the end of each compliance period. Pursuant to the separate rule

---

<sup>7</sup> This rule proposal will be filed pursuant to Section 19(b)(2) of the Act, 15 U.S.C. 78s(b)(2), and subject to public notice and comment prior to any Commission action on such proposal.

filing, Nasdaq also will propose further extensions to the bid price compliance periods;

- Extend the expiration date of the pilot program from December 31, 2003, to December 31, 2004.

Nasdaq believes that this proposal is consistent with the public interest because it conditions entitlement to the extended grace periods upon compliance with heightened requirements – core financial initial listing standards,<sup>8</sup> rather than continued listing standards. Nasdaq states, moreover, that these extended compliance periods will provide issuers with the time necessary to execute business and compliance plans that can address their bid price deficiencies, which Nasdaq believes in many cases may be attributable, at least to some degree, to the challenging economic conditions and continuing market downturn. Nasdaq also believes that this proposal benefits investors by lessening the disruption that can be associated with a company's move from the Nasdaq Stock Market to less liquid and regulated markets. However, given the extended compliance periods proposed, Nasdaq also proposes to eliminate the provision that permitted, on a pilot basis, certain companies that transferred to the SmallCap Market to return to the National Market under the continued inclusion criteria.<sup>9</sup>

In addition, Nasdaq proposes to change the National Market continued listing bid price requirement from \$3 to \$1 for those issuers qualifying for continued listing based

---

<sup>8</sup> Of course, companies will not be obligated to meet the requirements in NASD Rules 4420(c)(6)(A) or 4310(c)(2)(A)(ii) that currently traded issuers meet the bid price and market value of listed securities standards prior to applying for listing as these requirements apply to companies not currently listed on Nasdaq.

<sup>9</sup> An issuer that has transferred to the SmallCap Market in reliance on the existing pilot rule would be permitted to return to the National Market under the terms of the rule in effect at the time of transfer.

on the market value of listed securities or total assets and total revenue, as set forth in NASD Rule 4450(b).<sup>10</sup> Nasdaq does not believe that any material additional protection is afforded to investors as a result of the \$3 bid price requirement. Further, investors and issuers are often confused by the dual price requirements. Nasdaq notes that no other marketplace has such a dual price requirement, and there are only about 40 issuers currently subject to the \$3 bid price requirement.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act<sup>11</sup> in that it is designed to prevent fraudulent and manipulative acts and practices, and to protect investors and the public interest. As previously mentioned, Nasdaq is proposing this rule change to allow issuers additional time to comply with the bid price requirements if they demonstrate compliance with heightened financial standards. Under the proposed pilot, issuers meeting heightened standards will have additional time to execute business and compliance plans, which Nasdaq states will minimize disruption to investors and provide greater transparency and consistency.

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

Nasdaq does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

---

<sup>10</sup> This proposal is not part of the pilot program discussed above.

<sup>11</sup> 15 U.S.C. 78o-3(b)(6).

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

Nasdaq asserts that the proposed rule change is effective upon filing pursuant to Section 19(b)(3)(A) of the Act<sup>12</sup> and paragraph (f)(6) of Rule 19b-4 thereunder,<sup>13</sup> because the proposed rule change: (1) does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.<sup>14</sup> Nasdaq asserts that the proposed rule change does not alter the \$1 minimum bid price requirement, but merely extends the existing compliance periods applicable to this requirement. Nasdaq believes that the proposed compliance periods are generally comparable to, or more stringent than, those available on other marketplaces and already approved by the Commission.<sup>15</sup> Nasdaq further states that the proposal to

---

<sup>12</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>13</sup> 17 CFR 240.19b-4(f)(6)

<sup>14</sup> In addition, Nasdaq complied with the requirement in Rule 19b-4(f)(6) that the self-regulatory organization give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of such proposed rule change, or such shorter time as designated by the Commission.

<sup>15</sup> Nasdaq states that the proposed compliance period for the Nasdaq National Market is similar to the existing compliance period available on the New York Stock Exchange ("NYSE"). See NYSE Rule 802.01C. Nasdaq also states that the proposed compliance period for the Nasdaq SmallCap Market is more stringent than the American Stock Exchange ("Amex") listing standards, which do not have a specific minimum price requirement or compliance period. See Amex Rule 1003(f)(v).

change the National Market continued listing bid price requirement from \$3 to \$1 for those issuers qualifying for continued listed under NASD Rule 4450(b) is comparable to, or more stringent than, bid price requirements currently existing on other markets and already approved by the Commission.<sup>16</sup>

Nasdaq has requested that the Commission waive the 30-day period, which would make the rule operative immediately. The Commission finds that it is consistent with the protection of investors and the public interest to waive the 30-day pre-operative period in this case.<sup>17</sup> The Commission believes that no purpose would be served by having 30 days pass before the rule becomes operative because, issuers and investors could become confused as to which grace periods applied during the intervening period. Allowing the rule to become operative immediately will allow Nasdaq to explain its bid price standards more clearly to issuers that might have need of the grace period.

At any time within 60 days of this filing, the Commission may summarily abrogate this proposal 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.

#### 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. Persons making written submissions should file six copies thereof with the

---

<sup>16</sup> The proposed \$1 bid price is the same as the NYSE continued listing requirement. See NYSE Rule 802.01C. As noted above, Amex does not have this requirement.

<sup>17</sup> For purposes only of accelerating the operative date of 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).

Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. 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 File No. SR-NASD-2003-34 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.<sup>18</sup>

Margaret H. McFarland  
Deputy Secretary

---

<sup>18</sup> 17 CFR 200.30-3(a)(12).