

The use of certificates can result in significant delays and expenses in processing securities transactions and can raise safety concerns associated with lost, stolen, and forged certificates. The concerns associated with lost certificates was dramatically demonstrated during the September 11, 2001, tragedy when tens of thousands of certificates maintained in broker-dealers' vaults either were destroyed or were unavailable for transfer.

Accordingly, for the reasons stated above the Commission finds that the rule change, which clarifies that DTC's rules only permit it to honor its participants' requests to withdraw securities, is consistent with section 17A of the Act.

V. 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 with the requirements of section 17A(b)(3)(F) of the Act and the rules and regulations thereunder. *It is therefore ordered*, pursuant to section 19(b)(2) of the Act, that the proposed rule change (File No. SR-DTC-2003-02) be and hereby is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.⁶⁷

J. Lynn Taylor,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47982; File No. SR-NASD-2003-80]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc. to Codify the Policy of the Nasdaq Market Operations Review Committee With Respect to Review Panels

June 4, 2003.

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 May 6, 2003, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"),

timeframes as well as within any future shortened settlement cycle.

⁶⁷ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

submitted to 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. On June 2, 2003, Nasdaq filed Amendment No. 1 to the proposed rule change.³ 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

Nasdaq proposes to codify the policy of the Nasdaq Market Operations Review Committee with respect to the use of review panels. Below is the text of the proposed rule change. New text is in *italics*.

* * * * *

4612. Primary Nasdaq Market Maker Standards

(a)-(h) No change.

Cross Reference—IM-11890-2, Review by Panels of the MORC

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4619. Withdrawal of Quotations and Passive Market Making

(a)-(e) No change.

Cross Reference—IM-11890-2, Review by Panels of the MORC

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4620. Voluntary Termination of Registration

(a)-(d) No change.

Cross Reference—IM-11890-2, Review by Panels of the MORC

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4710. Participant Obligations in NNMS

(a)-(e) No change.

Cross Reference—IM-11890-2, Review by Panels of the MORC

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11890. Clearly Erroneous Transactions

(a)-(d) No change.

IM-11890-1. Refusal to Abide by Rulings of a Nasdaq Officer or the MORC

It shall be considered conduct inconsistent with just and equitable principles of trade for any member to

³ See letter from John M. Yetter, Assistant General Counsel, Nasdaq, to Katherine England, Assistant Director, Division of Market Regulation, Commission, dated May 30, 2003 ("Amendment No. 1"). In Amendment No. 1, Nasdaq added cross-references to proposed new IM-11890-2 to the text of related rules. For purposes of calculating the 60-day abrogation period, the Commission considers the proposed rule change to have been filed on June 2, 2003, when Amendment No. 1 was filed.

refuse to take any action that is necessary to effectuate a final decision of a Nasdaq officer or the MORC under Rule 11890.

IM-11890-2. Review by Panels of the MORC

For purposes of Rule 11890 and other NASD rules that permit review of Nasdaq decisions by the MORC, a decision of the MORC may be rendered by a panel of three or more members of the MORC, provided that no more than 50 percent of the members of any panel are directly engaged in market making activity or employed by a member firm whose revenues from market making activity exceed ten percent of its total revenues.

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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

The purpose of this rule filing is to codify the existing practice of the Market Operations Review Committee (the "MORC") with respect to convening panels of its members to undertake reviews of Nasdaq decisions that are subject to review by the MORC. The MORC is a standing committee selected by the Nasdaq Board of Directors. Under the Plan of Allocation and Delegation of Functions by NASD to Subsidiaries (the "Delegation Plan"), however, no more than 50 percent of the MORC's members may be directly engaged in market making activity or employed by a member firm whose revenues from market making activity exceed ten percent of its total revenues. At this time, five members of the MORC are market maker representatives under the standard established by the Delegation Plan, while the remaining nine members of the MORC are not. Currently, the MORC's primary function is to review Nasdaq's decisions to nullify or modify clearly erroneous

transactions under Rule 11890. In addition, the MORC reviews Nasdaq decisions (i) to deny a market maker's request for an excused withdrawal of quotations, or to impose conditions upon its reentry, under Rule 4619; and (ii) to deny a market maker's request for reinstatement following a voluntary termination of its registration as a market maker under Rule 4620 or a withdrawal of quotations under Rule 4710(b)(5).⁴

According to Nasdaq, the MORC has generally rendered decisions by convening panels of its members, usually consisting of three members.⁵ All panels must satisfy the same compositional requirements as the MORC itself (*i.e.*, no more than 50 percent of the members of a panel may be directly engaged in market making activity or employed by a member firm whose revenues from market making activity exceed ten percent of its total revenues). As the Commission has noted, an expeditious resolution of disputes relating to transactions that are alleged to be clearly erroneous benefits market participants and helps to ensure the accuracy of transactional information disseminated to investors.⁶ Consistent with this view, Nasdaq and the MORC concluded that the use of panels was necessary for the MORC to provide an expeditious resolution of matters presented to it. It is not practical to require all members of the MORC to adjudicate each matter presented for its review. MORC members are generally market or legal professionals who must take time out of their schedules to participate in MORC adjudications, which may occur whenever a member requests a review of a staff determination by the MORC. In 2002, there were 51 appeal hearings conducted by the MORC; hearings are scheduled as soon as possible, and almost always on the same day as the decision being appealed. It would simply not be possible to convene a meeting of all MORC members each

time that an appeal to the MORC is made, nor would it be fair to MORC members to require them to participate in each adjudication. Accordingly, if the practice of using panels were not used, it is likely that appeals could only be heard at regularly scheduled intervals, rather than at the time of the decision being appealed. Under such an arrangement, timely resolution of disputed transactions would be impossible, and Nasdaq believes that it would have more difficulty in finding qualified persons to serve as members of the MORC.

Nasdaq has concluded, however, that in the interest of clarity, the use of MORC panels should be explicitly reflected in NASD rules. Accordingly, Nasdaq is submitting this filing to codify the existing policy with respect to the administration of Rule 11890 and all other rules that allow review of Nasdaq decisions by the MORC. For purposes of such rules, a decision of the MORC may be rendered by a panel of three or more members of the MORC, provided that no more than 50 percent of the members of any panel are directly engaged in market making activity or employed by a member firm whose revenues from market making activity exceed ten percent of its total revenues.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,⁷ in general, and with section 15A(b)(6) of the Act,⁸ in particular, in that it promotes just and equitable principles of trade and protects investors and the public interest. The proposed rule change will promote the fair and efficient resolution of disputes involving clearly erroneous transactions and other matters that are subject to review by the MORC.

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

Nasdaq does not believe that the proposed rule change will impose 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

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

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act,⁹ and subparagraph (f)(1) of Rule 19b-4 thereunder because it is designated as a stated policy, practice or interpretation with respect to the meaning, administration, or enforcement of an existing rule.¹⁰ 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.¹¹

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the 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 Nasdaq. All submissions should refer to File No. NASD-2003-80 and should be submitted by July 2, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

J. Lynn Taylor,

Assistant Secretary.

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⁴ Under Rule 4612, the operation of which is currently suspended (*see* Securities Exchange Act Release No. 46999 (December 13, 2002), 67 FR 78534 (December 24, 2002)), the MORC would also have authority to review denial of a request for reconsideration of a decision to withhold designation as a primary market maker.

⁵ The practice of using panels to render decisions was noted in Securities Exchange Act Release No. 32349 (May 21, 1993), 58 FR 30836, n.4 (May 27, 1993) (SR-NASD-93-31).

⁶ Securities Exchange Act Release No. 39550 (January 14, 1998), 63 FR 4333, 4336 (January 28, 1998) (SR-NASD-96-51). Likewise, Nasdaq believes that speedy resolution of market maker's disputes under Rules 4619, 4620, and 4710 concerning their rights and obligations with respect to posting quotes is important to ensure equitable treatment of market makers.

⁷ 15 U.S.C. 78o-3.

⁸ 15 U.S.C. 78o-3(6).

⁹ 15 U.S.C. 78s(b)(3)(A).

¹⁰ 17 CFR 240.19b-4(f)(1).

¹¹ *See supra* note 3. For purposes of calculating the 60-day abrogation period, the Commission considers the proposed rule change to have been filed on June 2, 2003, when Amendment No. 1 was filed.

¹² 17 CFR 200.30-3(a)(12).