practice or interpretation with respect to the meaning, administration, or enforcement of an existing rule, it has become effective pursuant to section 19(b)(3)(A) of the Act [10] and Rule 19b–4(f)(1) thereunder.[11] 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.

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 Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov.* All comment letters should refer to File No. SR–CHX–2003–37. This file number should be included on the subject line if e-mail is used. To help the Commission process and review comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. 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 at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the CHX. All submissions should refer to the File No. SR–CHX–2003–37 and should be submitted by January 21, 2004.

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

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–32178 Filed 12–30–03; 8:45 am]

BILLING CODE 8010–01–P

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(1).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48991; File No. SR–NASD–2003–44]

Self-Regulatory Organizations; Order Granting Approval to Proposed Rule Change and Amendment Nos. 1 and 2 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 3 Thereto by the National Association of Securities Dealers, Inc. To Modify an Existing Pilot Program Relating to the Bid Price Test of the Nasdaq Maintenance Listing Standards

December 23, 2003.

I. Introduction

On March 18, 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'') a proposed rule change to modify an existing pilot program relating to the bid price test of Nasdaq's maintenance listing standards. Nasdaq submitted amendments to the proposed rule change on March 24, 2003,[1] and September 26, 2003.[2] On October 10, 2003, the Commission published notice of the proposal in the **Federal Register**.[3] No comments were received on the proposed rule change. On November 26, 2003, Nasdaq submitted Amendment No. 3 to the proposed rule change.[4] This notice and order solicits comment on Amendment No. 3 and approves the proposed rule change, as amended, on an accelerated basis.

II. Description of the Proposal

To obtain a listing on the Nasdaq Stock Market, an issuer must meet the initial listing standards; to keep a listing on Nasdaq, an issuer must meet the maintenance listing standards on an ongoing basis.[5] One of these standards relates to the bid price of the issuer's security. On either the Nasdaq National Market or the SmallCap Market, the security must maintain a bid price of at least $1.00 or face delisting.[6] Nasdaq's listing rules provide that a failure to meet the bid price standard exists if the bid price remains less than $1.00 for 30 consecutive business days.[7] After 30 consecutive business days of the security failing the bid price test, Nasdaq would notify the issuer of the deficiency.[8] Nasdaq's listing rules would then provide for certain ''grace periods'' during which the issuer is expected to regain compliance with the bid price standard or be delisted.

On the Nasdaq SmallCap Market, an issuer that fails the bid price test automatically receives a 180-calendar-day grace period.[9] An issuer need not meet any special requirements to qualify for this grace period. If the issuer still fails the bid price test at the end of the 180 days,[10] it could be granted an additional 180-day grace period if it meets one of the quantitative initial listing standards (rather than the lesser maintenance standards) of the SmallCap Market.[11] If the issuer were still deficient at the end of the second 180-day grace period, it could be granted an additional 90-calendar-day grace period if the issuer again meets one of the quantitative initial listing standards of the SmallCap Market. At the end of the 90 days (or of any other grace period where the issuer does not qualify for an additional grace period), Nasdaq would delist the security, subject to the procedural requirements of the NASD Rule 4800 Series. Thus, Nasdaq's maintenance listing standards currently allow a SmallCap issuer a theoretical maximum of approximately 1.25 years of non-compliance with the bid price standard before facing delisting.

On the Nasdaq National Market, like on the SmallCap Market, an issuer that fails the bid price test would automatically receive a 180-calendar-day grace period without having to meet

[1] *See* letter from Sara Nelson Bloom, Associate General Counsel, Nasdaq, to Katherine A. England, Division of Market Regulation, Commission, dated March 21, 2003 (''Amendment No. 1''). In Amendment No. 1, Nasdaq made minor revisions to the original proposal.

[2] *See* letter from Edward S. Knight, Executive Vice President, Nasdaq, to Katherine A. England, Division of Market Regulation, Commission, dated September 25, 2003 (''Amendment No. 2''). In Amendment No. 2, Nasdaq revised the length of the grace periods available to issuers not in compliance with the bid price test and added to the criteria that issuers would have to meet to avail themselves of such periods.

[3] *See* Securities Exchange Act Release No. 48592 (October 3, 2003), 68 FR 58732.

[4] *See* letter from Sara Nelson Bloom, Associate General Counsel, Nasdaq, to Katherine A. England, Division of Market Regulation, Commission, dated November 25, 2003. In Amendment No. 3, Nasdaq made minor revisions to the proposal.

[5] *See* NASD Rules 4300 *et seq.* and 4400 *et seq.*

[6] *See* NASD Rule 4310(c)(4) (for SmallCap); NASD Rules 4450(a)(5) and (b)(4) (for National Market).

[7] *See* NASD Rule 4310(c)(8)(D) (for SmallCap); NASD Rule 4450(e)(2) (for National Market).

[8] *See id.*

[9] *See* NASD Rule 4310(c)(8)(D).

[10] An issuer is deemed to be back in compliance with the bid price standard if it maintains a bid price of over $1 for ten consecutive business days, *see id.,* although Nasdaq in its discretion may extend the ten-day requirement to as long as 20 consecutive business days, *see id.*

[11] *See id.* (requiring issuer to meet any of the three criteria for initial listing set forth in NASD Rule 4310(c)(2)(A)).

any special requirements.[12] If the issuer still fails the bid price test at the end of the 180 days, it could be granted an additional 180-day grace period if it meets one of the quantitative initial listing standards (rather than the lesser maintenance standards) of the National Market.[13] If an issuer were still deficient at the end of the second 180-day grace period (or does not qualify for the second 180-day grace period), Nasdaq could delist the security, subject to the procedural requirements of the NASD Rule 4800 Series. Thus, Nasdaq's maintenance listing standards currently allow a National Market issuer a theoretical maximum of approximately 1.0 years of non-compliance with the bid price test before facing delisting. A National Market security that meets the maintenance listing standards for the SmallCap Market could ''phase down'' to the SmallCap Market to take advantage of the additional grace period offered there.[14]

The second 180-day grace period and the additional 90-day grace period on the SmallCap Market were established by pilot rules adopted by Nasdaq in February 2002 and modified in March 2003.[15] Also as part of the pilot program, Nasdaq extended the first grace period on the National Market from 90 days to 180 days and established the second 180-day grace period.[16] This pilot program expires on December 31, 2004.

Nasdaq has committed to study the effect of these changes to the maintenance listing standards during the pilot period.[17]

Nasdaq is now proposing to amend the pilot program by further extending the bid price grace periods. For the National Market, Nasdaq would provide an issuer with a third 180-calendar-day grace period if, at the end of the second 180-day period, the issuer meets all of the initial listing standards of the National Market (except for the bid price test).[18] Thus, a National Market issuer could fail the bid price test for a theoretical maximum of approximately 1.5 years before being delisted. For the SmallCap Market, Nasdaq would replace the current 90-day grace period (which comes after the two 180-day grace periods), with a grace period that would last up to the issuer's next shareholder meeting,[19] provided four conditions are met: (1) The issuer meets all of the initial listing standards for the SmallCap Market (other than the bid price test); (2) the shareholder meeting is scheduled to occur no later than two years from the original notification of the bid price deficiency; (3) the issuer obtains shareholder approval at the meeting to carry out the reverse stock split; and (4) the issuer executes the reverse stock split promptly after the shareholder meeting. If the issuer fails to timely propose, obtain approval for, or promptly execute the reverse stock split, Nasdaq would immediately institute delisting proceedings. Thus, Nasdaq's proposal would allow SmallCap issuers to fail the bid price test for a theoretical maximum of 2.0 years before being delisted.[20]

In addition, Nasdaq is proposing to amend the second of the two 180-day grace periods in the SmallCap Market by requiring that an issuer, at the end of the first 180-day period, meet all of the initial listing requirements to the SmallCap Market before entering the second grace period. Currently, the issuer need meet only one of the quantitative initial listing requirements of the SmallCap Market to receive the second grace period. The first 180-day grace period would continue to be available without any stipulations.

Special provisions would apply during the transition period between the old and new rules. An issuer currently in the delisting process for bid price deficiency could avail itself of any grace period to which it would have been entitled had the new pilot rules been in effect when the issuer received the original notification of the deficiency.[21] Furthermore, upon Commission approval of the new pilot rules, an issuer that is currently using a grace period offered by the old rules could remain listed for the duration of the period even though such period would be eliminated under the new rules. For example, a SmallCap issuer currently in the final 90-day grace period under the old rules would be permitted to maintain its listing on the SmallCap Market at least until the end of this period. At the end of the 90 days, the issuer could avail itself of the new rules and remain listed up to its next shareholder meeting, provided that it meets all of the initial listing criteria of the SmallCap Market (except the bid price test) and commits to seek shareholder approval for a reverse stock split, receives such approval, and promptly thereafter carries out the reverse stock split. However, in no event would a SmallCap issuer be afforded a cumulative grace period longer than two years from the date of the notification of the original bid price deficiency, absent ''extraordinary circumstances.''[22]

This proposal would not change the termination date of the pilot program. The pilot program will expire on December 31, 2004.

Finally, Nasdaq is proposing to amend NASD Rule 4820(a) to reference

[12] *See* NASD Rule 4450(e)(2).

[13] *See id.* (requiring issuer to meet the criteria for initial listing set forth in NASD Rules 4420(a)(1) and (5), Rule 4420(b)(1), or 4420(c)(6)).

[14] *See* NASD Rule 4450(i).

[15] *See* Securities Exchange Act Release No. 45387 (February 4, 2002), 67 FR 6306 (February 11, 2002) (SR–NASD–2002–13); Securities Exchange Act Release No. 47482 (March 11, 2003), 68 FR 12729 (March 17, 2003) (SR–NASD–2003–34).

[16] *See id.*

[17] *See* letter from Sara Nelson Bloom, Nasdaq, to Katherine A. England, Division of Market Regulation, Commission, dated January 31, 2002; letter from Florence Harmon, Division of Market Regulation, Commission, to Sara Nelson Bloom, Nasdaq, dated April 4, 2003.

[18] Under the proposal, the conditions relating to the first two 180-day grace periods would remain unchanged. The first 180-day grace period would be automatic; the second 180-day grace period would be available only if the issuer meets one (as opposed to all) of the quantitative initial listing requirements for the National Market.

[19] As originally proposed, the second year of the grace period would have lasted until the next *annual* shareholder meeting of the issuer. In Amendment No. 3, Nasdaq deleted the word ''annual'' and clarified that the shareholder meeting at which the reverse stock split is approved could be a special meeting rather than a regular annual meeting.

[20] In most cases, a SmallCap issuer would have a grace period of less than the two full years that is theoretically available. This can be demonstrated with the following example. Assume a SmallCap issuer receives an initial notice of bid price deficiency from Nasdaq on October 16, 2004. The issuer uses the first and the second 180-day grace periods, so the date is now October 11, 2005 (*i.e.*, 360 days after October 16, 2004). Assume further that the issuer's annual shareholder meeting is scheduled to occur on November 16, 2005. Although there is a theoretical maximum grace period of two years, the grace period in this case would extend only to November 16, 2005—a total of one year and one month. Now assume instead that the issuer holds its next annual shareholder meeting on October 10, 2006. The third grace period, therefore, could last until this annual meeting, if there is no intervening shareholder meeting. However, if there is a special shareholder meeting before October 10, 2006, authorization for the reverse stock split *must* be obtained at that meeting, because the pilot rule provides that the third grace period for the SmallCap Market extends only until the *next* shareholder meeting in the two-year window, not a shareholder meeting of the issuer's choosing. See e-mail from Sara Bloom, Nasdaq, to Michael Gaw, Division of Market Regulation, Commission, dated December 9, 2003.

[21] Nasdaq has stated that, during the pendency of this rule proposal, panels convened pursuant to the NASD Rule 4800 Series to consider delistings have been granting exemptions from the bid price rules consistent with the new pilot grace periods.

[22] Existing NASD Rule 4810(b) provides that Nasdaq may grant exceptions to its listing rules. In Amendment No. 3, Nasdaq clarified that it would be unwilling to exercise this discretion to allow a SmallCap issuer to maintain its listing beyond two years from the date of the notification of the original bid price deficiency, absent ''extraordinary circumstances.'' Nasdaq stated that adverse financial developments affecting the issuer would not support a finding of ''extraordinary circumstances.'' Rather, the term ''extraordinary circumstances'' is intended to refer to a *force majeure* event that, in the opinion of Nasdaq, makes it impossible for the issuer to effect the actions necessary to achieve compliance within the specified compliance period.

the ''Staff Warning Letter'' described in the proposed amendments to paragraph (e)(2) of NASD Rule 4450 and to make other minor, technical revisions.

III. Discussion

A. Approval of Revised Pilot Program

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the regulations thereunder applicable to the NASD.[23] In particular, the Commission believes that the proposal is consistent with Section 15A(b)(6) of the Act.[24] Section 15A(b)(6) requires, among other things, that the rules of a national securities association be designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest.

During the 1980s, there was widespread concern about the occurrence of so-called penny stock fraud which prompted Congress to enact the Securities Enforcement Remedies and Penny Stock Reform Act of 1990.[25] This legislation provided the Commission with expanded authority to regulate the market in securities with a low bid price. In light of these developments and that fact that the provisions of the Penny Stock Reform Act do not apply to any security listed on Nasdaq, the Commission in January 1990 wrote the NASD urging it to carefully scrutinize Nasdaq listing applications to ensure that low-priced securities fully complied with all applicable standards.[26] Nasdaq responded with a proposal to raise its listing standards by, among other things, adopting for the first time a requirement that an issuer maintain a minimum bid price. In its September 1991 approval order for that proposal, the Commission noted that there were two competing interests present. First, small, thinly capitalized companies had an interest in listing on Nasdaq to further their efforts to raise capital and grow their businesses. Second, Nasdaq had an interest in preventing suspect issuers from evading the Penny Stock Reform Act by allowing them to list on Nasdaq.[27] More broadly, Nasdaq has an interest in establishing and maintaining investor confidence in the quality of securities that it allows to trade on its market. Nasdaq's listing regime is an ongoing effort to balance these two considerations, particularly with respect to the SmallCap Market, which is designed to allow smaller companies access to the capital markets.

Nasdaq's original bid price rules allowed a perpetual exemption from the $1 bid price minimum if the issuer met heightened requirements for the market value of its public float and for the amount of capital and surplus.[28] In 1997, Nasdaq proposed to eliminate this alternative method of compliance, providing several reasons for doing so. First, Nasdaq believed that removing the exemption and enforcing a maintenance standard of a $1 bid price for all Nasdaq issuers would ''provide a safeguard against certain market activity associated with low-priced securities.''[29] Second, Nasdaq pointed out that, when the exemption was adopted, it was intended to address ''temporary adverse market conditions,'' not to create a permanent means of meeting the listing standards.[30] Third, Nasdaq believed that ''a $1 minimum bid price would serve to increase investor confidence and the credibility of its market commensurate with its increased prominence.''[31]

Nasdaq's present proposal is in some ways a return to the alternate standard that was in effect from 1991 to 1997 since, under both regimes, an issuer can remain listed on Nasdaq if it meets heightened quantitative standards. Although the Commission found the alternate standard to be consistent with the Act in its 1991 approval order, the Commission now shares the concerns that prompted Nasdaq to rescind the alternative standard in 1997. An investor who purchases a security on the Nasdaq Stock Market should have reason to assume that the security has met all of the minimum standards to obtain a listing there, including the bid price standard. Moreover, as Nasdaq observed in 1997, enforcing a minimum bid price helps deter abusive market activity sometimes associated with low-priced, thinly capitalized securities. The Commission agrees with the NASD's 1997 statement that the $1 minimum bid price generally ''serve[s] to increase investor confidence and the credibility of its market.''[32]

Furthermore, the Commission echoes Nasdaq's concern in rescinding the alternate standard that derogations from the bid price standard are meant to address ''temporary adverse market conditions.'' The Commission agrees with Nasdaq that ''at times companies experience temporary adverse market conditions that cause the share price of their security to fall below $1 without having a serious impact on the health or viability of the company.''[33] On that basis, the Commission was able to approve the alternate standard of compliance that allowed for the original, indefinite exemption from the bid price test. Nevertheless, an issuer should not be permitted to rely for an extended period of time on an exemption premised on ''*temporary* adverse market conditions.'' The Commission is concerned that the length of the grace periods for bid price deficiency in this case raises concerns about investor protection. Transparency is one of the fundamental aspects of any set of listing standards. If a listing standard is suspended for too long, the standard is not transparent and the investor protection principles underlying the listing standards could be compromised.

Despite these concerns, the Commission does not presently have reason to believe that Nasdaq's proposal is inconsistent with the Act. The present proposal differs from the earlier alternative to the bid price test in that the grace periods now are only temporary (up to 2.0 years for the SmallCap Market and 1.5 years for the National Market), whereas under the old rules an issuer that met the heightened quantitative standards could keep its listing indefinitely despite a bid price below $1. The present proposal also requires issuers that fail the bid price test to meet all of the initial listing criteria (except for the bid price test), whereas the old rules required issuers to meet just two heightened quantitative criteria (market value of the public float and amount of capital and surplus). These additional requirements that an issuer must meet to qualify for the grace periods should offer additional

[23] In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[24] 15 U.S.C. 78o-3(b)(6).

[25] Pub. L. 101–429, 104 Stat. 931 (October 15, 1990).

[26] *See* Securities Exchange Act Release No. 29638 (August 30, 1991), 56 FR 44108, 44109 (September 6, 1991) (approval of SR–NASD–90–18) (''1991 Approval'').

[27] *See* 1991 Approval, 56 FR at 44111.

[28] *See* Securities Exchange Act Release No. 38469 (April 2, 1997), 62 FR 17262, 17262, 17268 (April 9, 1997) (proposing SR–NASD–97–16) (''1997 Proposal'') (showing 1991 rules providing exemption from bid price maintenance standard). For the SmallCap Market, an issuer could use the exemption if the market value of its public float was at least $1 million and it had capital and surplus of at least $2 million. For the National Market, an issuer could use the exemption if the market value of its public float was at least $3 million and it had capital and surplus of at least $4 million.

[29] 1997 Proposal, 62 FR at 17269.

[30] *Id.*

[31] *Id.*

[32] 1997 Proposal, 62 FR at 17269.

[33] 1991 Approval, 56 FR at 44111.

reassurance that the issuer remains a viable business vehicle despite its low bid price.

Nasdaq has provided the Commission with a discussion of its surveillance program for securities that fall below a $1 bid price. The Commission believes that this program, designed to detect fraudulent and abusive trading activity, should further the protection of investors and the public interest.

For these reasons, the Commission is approving this pilot proposal for extending the bid price grace periods. As noted above, Nasdaq previously has committed to study the effect of the pilot changes to its maintenance listing standards.[34] This data will be essential in analyzing—if and when Nasdaq seeks permanent approval for the rules allowing bid price grace periods—whether derogations from the bid price standards undermine the principles of the Act as they are reflected in Nasdaq's listing rules. Previously, the Commission required that Nasdaq submit the study six months prior to the expiration of the pilot (*i.e.*, by June 30, 2004).[35] However, because only 12 months remain in the pilot period, the Commission now believes that it would be appropriate to allow Nasdaq to submit the study three months prior to the expiration of the pilot (*i.e.*, by September 30, 2004). In view of its concerns about the potential for manipulation in the market for low-priced, thinly capitalized securities, the Commission believes that it would be difficult to permit any extension of the pilot provisions without first analyzing the results of Nasdaq's study.[36]

B. Accelerated Approval of Amendment No. 3

Pursuant to Section 19(b)(2) of the Act,[37] the Commission finds good cause for approving the proposal, as revised by Amendment No. 3, prior to the thirtieth day after the date that the notice of the amended proposal was published in the **Federal Register**. No comments were received on the original proposal, and the Commission believes that Amendment No. 3 does not materially alter the proposal and is intended only to make certain technical clarifications. Accordingly, the Commission is accelerating approval of the proposal, as amended.

IV. Text of Amendment No. 3

In Amendment No. 3, Nasdaq proposed further amendments to NASD Rule 4310(c), noted below. The base text is that proposed in Amendment No. 2 (*i.e.*, how the rule would appear if only Amendment No. 2 were approved by the Commission). Changes made by Amendment No. 3 are in italic; 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 has not been deemed in compliance prior to the expiration of the 180 day compliance period, it shall be afforded an additional 180 day compliance period, provided, that on the 180th day of the first compliance period, the issuer demonstrates that it meets the criteria for initial inclusion set forth in Rule 4310(c) (except for the bid price requirement set forth in Rule 4310(c)(4)) based on the issuer's most recent public filings and market information. If the issuer has publicly announced information (*e.g.*, in an earnings release) indicating that it no longer satisfies the applicable initial inclusion criteria, it shall not be eligible for the additional compliance period under this rule.

[If on the 180th day of the second compliance period, the issuer has not been deemed in compliance during such compliance period but it satisfies the criteria for initial inclusion set forth in Rule 4310(c) (except for the bid price requirement set forth in Rule 4310(c)(4)), the issuer shall be provided with an additional compliance period up to its next annual shareholder meeting, provided: the issuer commits to seek shareholder approval for a reverse stock split to address the bid price deficiency at or before its next annual meeting, and to promptly thereafter effect the reverse stock split; and the shareholder meeting to seek such approval is scheduled to occur no later than two years from the original notification of the bid price deficiency. If the issuer fails to timely propose, or obtain approval for, or promptly execute the reverse stock split, Nasdaq shall immediately institute delisting proceedings upon such failure.] *If on the 180th day of the second compliance period, the issuer has not been deemed in compliance during such compliance period but it satisfies the criteria for initial inclusion set forth in Rule 4310(c) (except for the bid price requirement set forth in Rule 4310(c)(4)), the issuer shall be provided with an additional compliance period up to its next shareholder meeting scheduled to occur no later than two years from the original notification of the bid price deficiency, provided the issuer commits to seek shareholder approval at that meeting for a reverse stock split to address the bid price deficiency. If the issuer fails to timely propose, or obtain approval for, or promptly execute the reverse stock split, Nasdaq shall immediately institute delisting proceedings upon such failure.* Compliance can be achieved during any compliance period by meeting the applicable standard for a minimum of 10 consecutive business days.

* * * * *

Amendment No. 3 clarifies that the shareholder meeting referred to in the proposed changes to NASD Rule 4310(c)(8)(D) need not be the annual shareholder meeting, but could also be a special shareholder meeting. A special meeting could be called for the express purpose of seeking shareholder approval for a reverse stock split to cure the issuer's bid price deficiency within the grace period allowed by proposed NASD Rule 4310(c)(8)(D). Nasdaq noted in Amendment No. 3 that, in some circumstances, the next annual meeting could fall outside the two-year deadline for such action and a special meeting would therefore be required.

Amendment No. 3 also clarifies the meaning of the term "extraordinary circumstances" used in regard to whether Nasdaq would exercise its discretion under NASD Rule 4810(b) to grant additional exceptions to its bid price maintenance standard.

Amendment No. 3 can be obtained from the Commission's Public Reference Room or from the principal offices of Nasdaq.

---

[34] *See supra* note 17.

[35] *See* letter from Florence Harmon, Division of Market Regulation, Commission, to Sara Nelson Bloom, Nasdaq, dated April 4, 2003.

[36] In addition, following issuance of this approval order, staff of the Commission's Division of Market Regulation will send a letter to Nasdaq setting forth in more detail the data that Nasdaq should provide in its study.

[37] 15 U.S.C. 78s(b)(2).

V. Solicitation of Comments on Amendment No. 3

Interested persons are invited to submit written data, views, and arguments on Amendment No. 3, including whether the amendment 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. Comments also may be submitted electronically at the following e-mail address: *rule-comments@sec.gov.* All comments should refer to File No. SR–NASD–2003–44. This file number should be included on the subject line if e-mail is used. To help the Commission process and review comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. 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. SR–NASD–2003–44 and should be submitted by January 21, 2004.

VI. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[38] that the proposed rule change (SR–NASD–2003–44) and Amendment Nos. 1 and 2 are approved, and that Amendment No. 3 is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[39]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 03–32171 Filed 12–30–03; 8:45 am]

BILLING CODE 8010–01–P

[38] *Id.*

[39] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48969; File No. SR–NASD–2003–07]

Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Amend Rules 1011, 1014 and 1017

December 22, 2003.

On January 17, 2003, the National Association of Securities Dealers, Inc. (''NASD''), filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend NASD Rules 1011, 1014 and 1017. On September 17, 2003, NASD filed Amendment No. 1 to the proposed rule change.[3] On October 16, 2003, NASD filed Amendment No. 2 to the proposed rule change.[4] Notice of the proposed rule change, as amended, was published for comment in the **Federal Register** on October 23, 2003.[5] No comments were received on the proposed rule change. This order approves the proposed rule change.

In brief, NASD would amend certain of its rules that govern applications for NASD membership and applications for approval of changes in business structure by NASD members. Currently, NASD Rule 1014 delineates certain factors, such as pending or past regulatory actions, that NASD may consider in assessing an applicant's ability to comply with applicable law and regulations, NASD rules, and just and equitable principles of trade. Furthermore, Rule 1017 requires existing NASD members to apply to NASD for approval of continued membership in the event of certain changes to their ownership, control or business operations. In reviewing such applications, NASD staff also considers the factors listed in Rule 1014. NASD asserts that it has proposed these changes in order to strengthen its ability to protect investors with pending claims, awards or judgments against NASD members, and to otherwise detect and prevent misconduct.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Kosha K. Dalal, Assistant General Counsel, NASD, to Katherine England, Assistant Director, Division of Market Regulation, Commission, dated September 16, 2003.

[4] *See* letter from Kosha K. Dalal, Assistant General Counsel, NASD, to Katherine England, Assistant Director, Division of Market Regulation, Commission, dated October 15, 2003.

[5] *See* Securities Exchange Act Release No. 48651 (October 17, 2003), 68 FR 60750 (''Notice'').

Accordingly, NASD would modify Rule 1017(a)(3) regarding when a member must request approval of a disposition of assets. The rule currently requires an NASD member to file an application for an ''acquisition of substantially all of the member's assets, unless the acquiring member is a member of the New York Stock Exchange, Inc. [NYSE].'' NASD would amend Rule 1017(a)(3) in three ways. First, it would add that transfers of a firm's assets, and not only acquisitions, would require approval. Second, NASD would require approval of a transfer unless *both* parties to the transaction, and not just the acquiring party, are members of the NYSE. Third, NASD would change the amount of a transfer that requires a request for approval from ''substantially all'' of the member's assets to ''25% or more in the aggregate of the member's assets or any asset, business or line of operation that generates revenues comprising 25% or more in the aggregate of the member's earnings measured on a rolling 36-month basis.''

NASD would also modify the factors listed in Rule 1014 that it considers in reviewing applications for membership and continued membership by adding pending arbitrations or civil actions against the applicant, as well as unpaid arbitration awards, or other adjudicated customer awards against the applicant and other persons who may have significant control or influence over the applicant. Such other persons would include the applicant's controlling persons, principals, registered representatives, other Associated Persons, any lender of 5% or more of the applicant's net capital, and any other member with respect to which these persons were a controlling person or a 5% lender of the applicant's net capital.

In addition, NASD's proposal would provide for a rebuttable presumption that an application for membership or continued membership should be denied when an analysis of the applicant's history reveals any one of the negative events enumerated in Rule 1014(a)(3)(A), (C), (D) and (E).[6] An applicant could overcome this presumption by demonstrating that it could nevertheless meet NASD's membership standards.

Finally, for purposes of its rules governing the above-described application processes, NASD would amend its definition of ''Associated Person.'' The term, as defined in Rule 1011(b), would be amended to bring

[6] *See* Notice, 68 FR at 60751.