

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46939; File No. SR-NASD-2002-127]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. to Amend Rule 11890 Concerning Clearly Erroneous Transactions

December 3, 2002.

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 September 24, 2002, the National Association of Securities Dealers, Inc., through its subsidiary, the Nasdaq Stock Market, Inc. ("Nasdaq") 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 Nasdaq. On November 1, 2002, Nasdaq filed Amendment No. 1 to its proposal with the Commission.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 amend NASD Rule 11890 (Clearly Erroneous Transactions) to implement a number of clarifications and modifications to the text of the existing rule. Nasdaq will make the proposed rule change effective immediately upon Commission approval.

The text of the proposed rule change is below. Proposed new language is in

italics; proposed deletions are in brackets.

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11890. Clearly Erroneous Transactions

(a) Authority to Review Transactions Pursuant to Complaint of Market Participant

(1) *Scope of Authority.* [For the purposes of this Rule, the terms of a transaction are clearly erroneous when there is an obvious error in any term, such as price, number of shares or other unit of trading, or identification of the security.]

[(2)] Officers of [The] Nasdaq [Stock Market, Inc. ("Nasdaq")] designated by [the] its President [of Nasdaq] shall, pursuant to the procedures set forth in paragraph [(b)] (a)(2) below, have the authority to review any transaction arising out of the use or operation of any [automated quotation,] execution[,] or communication system owned or operated by Nasdaq and approved by the Commission, *including transactions entered into by a member of a national securities exchange with unlisted trading privileges in Nasdaq-listed securities (a "UTP Exchange") through such a system; provided, however, that the parties to the transaction must be readily identifiable by Nasdaq through its systems* [excluding transactions arising from use of the Nasdaq Application of OptiMark]. A Nasdaq officer shall review transactions with a view toward maintaining a fair and orderly market and the protection of investors and the public interest. Based upon this review, the officer shall decline to act upon a disputed transaction if the officer believes that the transaction under dispute is not clearly erroneous[, or,] [i]f the officer determines the transaction in dispute is clearly erroneous, *however*, he or she shall declare that the transaction is null and void or modify one or more terms of the transaction. When adjusting the terms of a transaction, the Nasdaq officer shall seek to adjust the price and/or size of the transaction to achieve an equitable rectification of the error that would place the parties to a transaction in the same position, or as close as possible to the same position, *as [that] they would have been in had the error not occurred.* [Nasdaq shall promptly provide oral notification of a determination to the parties involved in a disputed transaction and thereafter issue a written confirmation of the determination.] *For the purposes of this Rule, the terms of a transaction are clearly erroneous when there is an obvious error in any term, such as price, number of shares or other unit of trading, or identification of the security.*

[(b) Procedures for Reviewing Transactions]

[(1)] (2) *Procedures for Reviewing Transactions*

(A) Any member, *member of a UTP Exchange*, or person associated with [a] *any such member* that seeks to have a transaction reviewed pursuant to paragraph (a)(1) hereof[,] shall submit a written complaint[, via facsimile or otherwise,] to Nasdaq Market Operations in accordance with the following time parameters:

[(A)] (i) for transactions occurring at or after 9:30 a.m., Eastern Time, but prior to 10 a.m., Eastern Time, complaints must be [submitted] *received by Nasdaq* by 10:30 a.m., Eastern Time; and

[(B)] (ii) for transactions occurring prior to 9:30 a.m., Eastern Time and at or after 10:00 a.m., Eastern Time, complaints must be [submitted] *received by Nasdaq* within thirty minutes.

[(2)] (B) Once a complaint has been received in accord with subparagraph [(b)(1)] (a)(2)(A) above:

[(A)] (i) the complainant shall have up to thirty (30) minutes, or such longer period as specified by Nasdaq staff, to submit any supporting written information concerning the complaint necessary for a determination under paragraph [(a)(2)] (a)(1)[, via facsimile or otherwise];

[(B)] (ii) the counterparty to the trade shall be [verbally] notified of the complaint *via telephone* by Nasdaq staff and shall have up to thirty (30) minutes, or such longer period as specified by Nasdaq staff, to submit any supporting written information concerning the complaint necessary for a determination under paragraph [(a)(2)] (a)(1)[, via facsimile or otherwise]; and

[(C)] (iii) either party to a disputed trade may request the written information provided by the other party pursuant to this subparagraph.

[(3)] (C) Notwithstanding subparagraph [(b)(2)] (a)(2)(B) above, once a party to a disputed trade communicates that it does not intend to submit any further information concerning a complaint, the party may not thereafter provide additional information unless requested to do so by Nasdaq staff. If both parties to a disputed trade indicate that they have no further information to provide concerning the complaint before their respective thirty-minute information submission period has elapsed, then the matter may be immediately presented to a Nasdaq officer for a determination pursuant to paragraph [(a)(2)] (a)(1) above.

[(4)] (D) Each member, *member of a UTP Exchange*, or person associated

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated November 1, 2002 ("Amendment No. 1"), which replaced the original form 19b-4 in its entirety. In Amendment No. 1, Nasdaq, in part, reinstated the requirement that a Nasdaq officer must notify a market participant within 30 minutes of a disruption or malfunction in the Nasdaq market when Nasdaq acts on its own motion to modify or nullify a trade. Nasdaq also provided an example, in Amendment No. 1, of a situation where the number of transactions affected by a decision to break or modify trades on Nasdaq's own motion would be such that the decision would have to be accorded immediate finality in order to maintain a fair and orderly market, or to protect investors and the public interest. In addition, Amendment No. 1 clarified that market participants should submit materials to Nasdaq via facsimile for the purpose of seeking Nasdaq's review of a particular transaction, unless the market participant receives Nasdaq's permission to submit the materials via electronic mail.

with any such member [and/or person associated with a member] involved in the transaction shall provide Nasdaq with any information that it requests in order to resolve the matter on a timely basis notwithstanding the time parameters set forth in subparagraph [(b)(2)] (a)(2)(B) above.

[(5)] (E) Once a party has applied to Nasdaq for review, the transaction shall be reviewed and a determination rendered, unless both parties to the transaction agree to withdraw the application for review prior to the time a decision is rendered pursuant to paragraph [(a)(2)] (a)(1).

[(c)] (b) Procedures for Reviewing Transactions [Executed During System Disruptions or Malfunctions] on Nasdaq's Own Motion

In the event of (i) a disruption or malfunction in the use or operation of any [automated] quotation, execution, [or] communication, or trade reporting system owned or operated by Nasdaq and approved by the Commission, or (ii) extraordinary market conditions or other circumstances in which the nullification or modification of transactions may be necessary for the maintenance of a fair and orderly market or the protection of investors and the public interest, the President of Nasdaq or any Executive Vice President designated by the President, acting through an officer designated by the President of Nasdaq pursuant to paragraph (a)(2), may, on [its] his or her own motion, [pursuant to the standards set forth in paragraph (a), declare] review any transaction[s] arising out of or reported through [the use or operation of such systems during the period of such disruption or malfunction] any such quotation, execution, communication, or trade reporting system, including transactions entered into by a member of a UTP Exchange through the use or operation of such a system, but excluding transactions that are entered into through, or reported to, a UTP Exchange. A Nasdaq officer acting pursuant to this subsection may declare any such transaction null and void or modify the terms of [these] any such transaction[s] if the officer determines that (i) the transaction is clearly erroneous, or (ii) such actions are necessary for the maintenance of a fair and orderly market or the protection of investors and the public interest; provided, however, that, in the absence of extraordinary circumstances, [a] the [Nasdaq] officer must take action pursuant to this [paragraph] subsection within thirty (30) minutes of detection of the [erroneous] transaction[(s)], but in no event later than [6]3:00 p.m., Eastern

Time, on the next trading day following the date of the trade at issue. [When Nasdaq takes action pursuant to this subparagraph, the member firms involved in the transaction shall be notified as soon as is practicable and shall have a right to appeal such action in accordance with paragraph (d)(1) below.]

[(d)] (c) Review by the Market Operations Review Committee ("MORC")

(1) A member, member of a UTP Exchange, or person associated with [a] any such member may appeal a determination made under [paragraphs] subsection (a)[(2) or (c)] to the MORC. A member, member of a UTP Exchange, or person associated with any such member may appeal a determination made under subsection (b) to the MORC unless the officer making the determination also determines that the number of the affected transactions is such that immediate finality is necessary to maintain a fair and orderly market and to protect investors and the public interest. [provided such] An appeal must be [is] made in writing[, via facsimile or otherwise], and must be received by Nasdaq within thirty (30) minutes after the [member or person associated with a member receives verbal] person making the appeal is given notification of [such] the determination being appealed, except that if Nasdaq notifies the parties of action taken pursuant to paragraph [(c)] (b) after 4:00 p.m., [either party has until] the appeal must be received by Nasdaq by 9:30 a.m. the next trading day [to appeal]. Once a written appeal has been received, the counterparty to the trade will be notified of the appeal and both parties shall be able to submit any additional supporting written information[, via facsimile or otherwise,] up until the time the appeal is considered by the Committee. Either party to a disputed trade may request the written information provided by the other party during the appeal process. An appeal to the Committee shall not operate as a stay of the determination [made pursuant to paragraph (a)(2) or (c) above] being appealed. Once a party has appealed a determination to the Committee, the determination shall be reviewed and a decision rendered, unless both parties to the transaction agree to withdraw the appeal prior to the time a decision is rendered by the Committee. Upon consideration of the record, and after such hearings as it may in its discretion order, the Committee, pursuant to the standards set forth in [paragraph (a)] this section, shall affirm, modify, reverse, or remand the

determination [made under paragraph (a)(2) or (c) above].

(2) The decision of the Committee pursuant to an appeal, or a determination by a Nasdaq officer that is not appealed, shall be final and binding upon all [any member or person associated with a member] parties and shall constitute final Association action on the matter in issue. Any [adverse] determination by a Nasdaq officer pursuant to paragraph (a)[(2)] or [(c)] (b) or any [adverse] decision by the Committee pursuant to paragraph [(d)] (c)(1) shall be rendered without prejudice as to the rights of the parties to the transaction to submit their dispute to arbitration.

(d) Communications

(1) All materials submitted to Nasdaq or the MORC pursuant to this Rule shall be submitted via facsimile machine and within the time parameters specified herein; provided, however, that if requested, Nasdaq staff may authorize submission of material via electronic mail on a case-by-case basis. Materials shall be deemed received at the time indicated by the equipment (i.e., facsimile machine or computer) receiving the materials. Nasdaq, in its sole and absolute discretion, reserves the right to reject or accept any material that is not received within the time parameters specified herein.

(2) Nasdaq shall provide affected parties with prompt notice of determinations under this Rule via facsimile machine, electronic mail, or telephone (including voicemail); provided, however, that if an officer nullifies or modifies a large number of transactions pursuant to subsection (b), Nasdaq may instead provide notice to parties via the Nasdaq Workstation II Service, a press release, or any other method reasonably expected to provide rapid notice to many market participants.

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

* * * * *

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

Nasdaq proposes to amend NASD Rule 11890, which provides Nasdaq with authority to nullify or modify transactions. The proposed rule change is designed to achieve three primary goals: first, to clarify the conditions under which Nasdaq will consider petitions by market participants to review transactions; second, to clarify Nasdaq's authority to nullify or modify transactions on its own motion; and third, to clarify procedural aspects of the process of reviewing transactions. Unless otherwise noted below, the proposed rule change is not designed to modify the current scope of the rule, but is rather intended to rewrite the rule using more precise language that more clearly describes the current application of the rule.

a. Review of Transactions Pursuant to Complaint of Market Participant

Since 1990, Nasdaq has had the authority to receive petitions from market participants requesting that designated officers of Nasdaq review the terms of a transaction and nullify or modify it if the transaction is found to be clearly erroneous. Under subsections (a) and (b) of current NASD Rule 11890, a market participant may seek review by submitting a written complaint to Nasdaq Market Operations within specified time parameters—by 10:30 a.m. for transactions occurring within the first half hour of the regular trading day, and within thirty minutes of the time of the transaction for all other transactions. Following timely receipt of a complaint, the complainant and the counterparty to the disputed trade are given an opportunity to submit supporting information in writing and the matter is then adjudicated by a Nasdaq officer.

Currently, subsection (a) of NASD Rule 11890 states that it applies to “any transaction arising out of the use or operation of any automated quotation, execution, or communication system owned or operated by Nasdaq and approved by the Commission.” Nasdaq believes that this language could be construed to cover not only transactions executed through Nasdaq systems, such

as SuperMontage, SuperSOES, and SelectNet, but also transactions whose only nexus with Nasdaq systems is the posting of quotations on Nasdaq's quotation montage. For example, a transaction executed entirely through an electronic communications network (an “ECN”) or an exchange trading Nasdaq securities pursuant to unlisted trading privileges (a “UTP exchange”), or a trade that is crossed internally by a market maker, may arise out of a quotation posted on the Nasdaq quotation montage.

Nasdaq, however, has not generally adjudicated trades unless they have actually been executed through a Nasdaq system. Nasdaq asserts several reasons for delineating the scope of its authority in this fashion. First, broker-dealers and exchanges through which trades are executed are likely to have their own procedures for reviewing and breaking trades. Second, because Nasdaq may not be able to identify the counterparty to a transaction executed through a non-Nasdaq system without obtaining this information from the entity through which the transaction was executed, it may not be possible to provide a prompt adjudication. As a result of these considerations, Nasdaq has received few “clearly erroneous” petitions concerning transactions that are not executed through Nasdaq systems and has generally declined to adjudicate the petitions that it has received, on the grounds that the transaction can more appropriately be reviewed by the market center through which it was executed. Accordingly, Nasdaq believes that NASD Rule 11890(a) should be amended to explicitly limit its purview to transactions arising out of the use or operation of Nasdaq execution or communication systems⁴ and to explicitly require that the parties to a reviewable transaction be readily identifiable by Nasdaq through its systems.

Other proposed changes to NASD Rule 11890(a) governing review of complaints by market participants include the following:

⁴ At present, the systems covered by the rule would be SuperSOES, SOES, SelectNet, SuperMontage, Primex, Liquidity Tracker, and CAES. The Over-the-Counter Bulletin Board would not be covered, because it is only a quotation system, but the proposed Bulletin Board Exchange (“BBX”) would be covered, because it will allow executions. It should also be noted that Nasdaq is not proposing to delete the phrase “approved by the Commission” from Rule 11890, but that Nasdaq construes the rule language to include systems and aspects of systems that are exempted from formal approval under section 19(b)(2) of the Act by section 19(b)(3)(A) of the Act or SEC Rules 19b-4(f) or 19b-5.

- Consolidating subsections (a) and (b) of the rule into a new subsection (a).
- Clarifying that the rule covers transactions entered into by a member of a UTP exchange through a Nasdaq execution system. Thus, the rule would cover transactions executed between a Nasdaq member and a member of UTP exchange that had agreed to accept automatic executions through SuperSOES or SuperMontage, but would not cover transactions where the UTP exchange merely posted a quote and was accessible only via telephone.

- Clarifying that information submitted by parties to Nasdaq must be received by Nasdaq within the time frames specified by the rule.
- Eliminating redundant references to communications via facsimile and making other miscellaneous changes designed to improve the wording of the rule.

b. Review of Transactions on Nasdaq's Own Motion

Since 1998, Nasdaq has had the authority to nullify or modify transactions on its own motion. Nasdaq represents that it has used its authority in circumstances where Nasdaq believed that market integrity was threatened by aberrant market activity and a large number of trades had to be broken to protect investors. Nasdaq believes, however, that the language of NASD Rule 11890 should be amended to provide greater clarity as to its scope.

Specifically, Nasdaq proposes to amend subsection (b) of NASD Rule 11890 to state that Nasdaq's authority may be exercised in the event of extraordinary market conditions or other circumstances in which the nullification or modification of transactions may be necessary for the maintenance of a fair and orderly market or the protection of investors and the public interest. Because NASD Rule 11890 is designed to allow Nasdaq to respond to aberrational market conditions, Nasdaq believes that its scope must be broad and flexible in light of the difficulty of defining *ex ante* all situations in which application of the rule might be necessary. However, Nasdaq expects that the amended rule, like the current rule, would be used primarily in circumstances where the disruption or malfunction of a system resulted in the execution of trades with obvious errors, such as a price substantially unrelated to the inside market.⁵

⁵ Nasdaq notes that, in the event of an emergency or extraordinary market conditions, Article VII, section 3 of the NASD By-Laws grants the NASD Board of Governors or persons designated by the NASD Board the authority to take any action regarding, among other things, trading in the over-

Proposed subsection (b) of NASD Rule 11890 also clarifies that this portion of the rule may be applied to any transaction arising out of or reported through a Nasdaq quotation, execution, communication, or trade reporting system, including transactions entered into by a member of a UTP exchange through a Nasdaq execution system (but excluding transactions entered into through, or reported to, a UTP exchange). In contrast to proposed subsection (a) of the rule, which focuses on errors made by the parties to a specific trade, the focus of proposed subsection (b) is on errors that may affect numerous trades. Nasdaq believes that the scope of the rule must be broad to ensure that, to the greatest extent possible, similarly situated trades may be given similar treatment. Thus, in a situation where the malfunction of a Nasdaq system or a member's system results in numerous market participants entering into trades on the basis of erroneous price information, the proposed rule change would expressly authorize Nasdaq to break or modify not only trades executed through its systems, but also trades executed through the systems of members that are reported to Nasdaq. In recognition of the authority of other self-regulatory organizations, Nasdaq does not assert authority to break or modify trades entered into through, or reported to, a UTP exchange. As it does under the current rule, however, Nasdaq would endeavor to coordinate its actions with other market centers in an attempt to achieve consistent treatment of trades outside of Nasdaq's jurisdiction.

Other proposed changes to NASD Rule 11890(b) governing Nasdaq's authority to review transactions on its own motion include the following:

- Providing that the authority conferred by the rule may be exercised only by Nasdaq's President or an Executive Vice President designated by the President. Currently, Nasdaq's authority to review trades on its own motion may be exercised by any officer designated by Nasdaq's President. Because this authority may affect a

the-counter securities market, the operation of Nasdaq systems and the trading of securities therein, and the operation of member firms' offices and systems. Thus, even in the absence of NASD Rule 11890, Nasdaq believes that there would be authority to break trades when the existence of extraordinary market conditions makes such actions necessary or appropriate for the protection of investors or the public interest or for the orderly operation of the marketplace. Nasdaq believes, however, that NASD Rule 11890's specific focus on the nullification or modification of trades, as well as the defined procedural mechanisms contained in the rule, provide a more tailored approach for addressing most situations in which aberrant transactions might occur.

broad range of market participants, Nasdaq believes that it should be exercised only by senior management.

- Providing that Nasdaq may act to nullify or modify a trade if it is clearly erroneous or if action is necessary for the maintenance of a fair and orderly market or the protection of investors and the public interest. This change will serve to clarify the scope of Nasdaq's authority in situations where quotations for a security have been affected by a system malfunction or erroneous market information. In such circumstances, the prices of trades might not be deemed "clearly erroneous" when measured against the national best bid and offer, but it might nevertheless be necessary, for the protection of investors, to nullify or modify transactions executed during the time frame when questionable quotations were posted.

- Amending the time frame for action under the current rule to require that the Nasdaq officer, on Nasdaq's own motion, act, except in extraordinary circumstances, no later than 3:00 p.m. on the next trading day.

Finally, Nasdaq is adding interpretative material after the rule to provide that it shall be considered conduct inconsistent with just and equitable principles of trade for a member to refuse to take action that is necessary to effectuate a final decision of a Nasdaq officer or the Market Operations Review Committee ("MORC"). When Nasdaq acts to nullify or modify a trade that has been executed through Nasdaq's systems, Nasdaq can effectuate the decision through those systems. However, in circumstances where Nasdaq takes action with respect to a trade executed through a non-Nasdaq system, the members that are parties to the transaction and/or that operate the execution system must effectuate Nasdaq's decision.

Accordingly, Nasdaq believes that it is important that members be required to abide by decisions made under the rule.

c. Review by the Market Operations Review Committee

Current NASD Rule 11890(d) (which Nasdaq is redesignating as NASD Rule 11890(c)) governs review by the MORC, a standing committee composed of representatives of member firms as well as "non-industry" representatives. Persons seeking to appeal a determination by Nasdaq must submit their appeal within the time parameters specified by the rule. Both parties are then given the opportunity to submit supporting arguments in writing, and the matter is submitted to the MORC for a determination. Nasdaq believes that most of the changes to proposed subsection (c) are non-substantive

clarifications of rule language. However, Nasdaq is also proposing that an officer empowered to review transactions on Nasdaq's own motion (*i.e.*, the President or an Executive Vice President) may determine that the number of transactions affected by a decision to break or modify trades on Nasdaq's own motion is such that the decision must be accorded immediate finality in order to maintain a fair and orderly market and to protect investors and the public interest. Although Nasdaq expects that it would use this authority only on rare occasions, Nasdaq believes that there will be circumstances in which review by the MORC of a large number of trades would be impractical and could expose market participants to unacceptable levels of risk.⁶ In such cases, Nasdaq believes that the market will be best served by finality. Other changes to the provision include clarifying that determinations of Nasdaq officers that are not appealed are final and binding and constitute final action by the NASD on the matter.

d. Communications between Nasdaq and Market Participants

Nasdaq is proposing to add a new subsection (d) to NASD Rule 11890 to describe in greater detail the parameters for communications between Nasdaq and market participants. Specifically, proposed subsection (d) provides that:

- Materials submitted to Nasdaq or the MORC must be submitted via facsimile machine and must be received within the time parameters specified by the rule. However, if requested, Nasdaq staff may authorize submission of materials via electronic mail on a case-by-case basis.⁷ Materials shall be deemed received at the time indicated by a facsimile machine or computer that receives the materials. Nasdaq reserves the right to reject or accept material that is not received within the time parameters specified by the rule.

Nasdaq will provide notice of determinations under the rule via facsimile machine, electronic mail, or

⁶ For example, Nasdaq believes that if an erroneously priced order or quote causes a large number of transactions to occur at prices far in excess of a security's true value and if a decision is made to break all of the affected trades, some sellers may appeal the decision to break the trades. If a market participant is a party to trades on both sides of the market, and some remain broken while others are appealed and reinstated, it will suffer losses that arise solely from the inconsistent treatment of its trades.

⁷ For example, if a party wishes to submit, pursuant to subparagraph (a)(2)(A) of the amended rule, a large document containing supporting information, it may be preferable to submit the document via electronic mail. Electronic mail may be used only when specifically authorized by Nasdaq staff, however, because it is impossible to control the delivery time of electronic mail.

telephone (including voicemail). However, in cases where an officer nullifies or modifies a large number of transactions pursuant to Nasdaq's authority to act on its own motion, individual notice may not be practicable. In that case, Nasdaq may provide notice to market participants via the Nasdaq Workstation II Service, a press release, or any other method reasonably expected to provide rapid notice to many market participants.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,⁸ in general and with section 15A(b)(6) of the Act,⁹ in particular, in that it promotes just and equitable principles of trade and protects investors and the public interest. Nasdaq believes that the proposed rule change will promote the fair and efficient resolution of disputes involving clearly erroneous transactions and will clarify Nasdaq's authority to review transactions on its own motion. Accordingly, Nasdaq believes that the proposed rule change will lessen the impact of erroneous transactions on the public by allowing Nasdaq to correct erroneous transactions quickly and by defining more clearly the scope of Nasdaq's authority.

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

Nasdaq 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

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

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 Nasdaq 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, 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 filings will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR-NASD-2002-127 and should be submitted by December 30, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁰

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02-31019 Filed 12-6-02; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46940; File No. SR-NASD-2002-89]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Amend Nasdaq's Listing Standards Pertaining to American Depositary Receipts, Preferred and Secondary Classes of Stock, Bid Price Compliance and Monitoring Periods, Categories of Securities Eligible for Initial Inclusion on Nasdaq, and the Market Capitalization Compliance Period

December 3, 2002.

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 January 7, 2002, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, the Nasdaq Stock Market, Inc. ("Nasdaq") 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 Nasdaq. On November 1, 2002, NASD filed Amendment No. 1 to the proposed rule change.³ On December 2, 2002, NASD filed Amendment No. 2 to the proposed rule change.⁴ 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 is proposing to modify Nasdaq's listing standards pertaining to American Depositary Receipts, preferred and secondary classes of stock, bid price compliance and monitoring periods, categories of securities eligible for initial inclusion on Nasdaq, and the market capitalization compliance period. Below is the text of the proposed rule change. Proposed new language is in *italic*; 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)-(3) No change.

(4) For initial inclusion, [common or preferred stock] *common stock, preferred stock and secondary classes of common stock* shall have a minimum bid price of \$4 per share. For continued inclusion, the minimum bid price shall be \$1 per share.

(5) No change

(6)(A) In the case of common stock, there shall be at least 300 round lot holders of the security. [An account of a member that is beneficially owned by

³ See letter from John Nachmann, Senior Attorney, Nasdaq, to Katherine England, Assistant Director, Division of Market Regulation, Commission, dated November 1, 2002.

⁴ See letter from John Nachmann, Senior Attorney, Nasdaq, to Katherine England, Assistant Director, Division of Market Regulation, Commission, dated December 2, 2002.

⁸ 15 U.S.C. 78o-3.

⁹ 15 U.S.C. 78o-3(b)(6).

¹⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.