which it was filed, or such shorter time as the Commission may designate. 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.

Nasdaq has requested that the Commission waive the 30-day operative delay. Under Rule 19–4(f)(6) of the Act, a proposed rule change does not become operative for 30 days after the date of filing, unless the Commission designates a shorter time. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Acceleration of the operative date will allow Nasdaq to respond quickly to the concerns of SuperMontage users and allow users to display actual round-lots as their quotes. For this reason, the Commission waives the 30-day operative delay and designates the proposal to be immediately effective and operative upon filing with the Commission.[13]

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. 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 the filing will also be available for inspection and copying at the principal office of the Association. All submissions should refer to File No. SR–NASD–2002–179 and should be submitted by January 14, 2003.

[13] For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C.78c(f).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[14]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–32312 Filed 12–23–02; 8:45 am]

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[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46999; File No. SR–NASD–98–26 Amendment No. 13]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Extension of Short Sale Rule and Continued Suspension of Primary Market Maker Standards Set Forth in NASD Rule 4612

December 13, 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 December 13, 2002, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association''), 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 and II below, which Items have been prepared by the Nasdaq.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq is proposing to extend the pilot program of the NASD short sale rule from December 15, 2002 until June 15, 2003. Nasdaq is also seeking to continue the suspension of the effectiveness of the Primary Market Maker (''PMM'') standards currently set forth in NASD Rule 4162 also from December 15, 2002 until June 15, 2003. Finally, Nasdaq is proposing to modify the method used to calculate the bid tick indicator used by members to determine whether a short sale is permitted. The text of the proposed rule change is as follows. Additions are in italics; deletions are bracketed.

NASD Rule 3350

(a)

(b)(1) *With respect to trades executed on or reported to the ADF,* [N]o member shall effect a short sale for the account of a customer or for its own account in a Nasdaq National Market security at or below the current national best (inside) bid when the current national best (inside) bid is below the preceding national best (inside) bid in the security.

(2) *With respect to trades executed on or reported to Nasdaq, no member shall effect a short sale for the account of a customer or for its own account in a Nasdaq National Market security at or below the current best (inside) bid displayed in the Nasdaq National Market Execution System when the current best (inside) bid is below the preceding best (inside) bid in the security.*

(b)–(k) No Change.

(l) This section shall be in effect until *June 15, 2003* [December 15, 2002].

IM–3350. Short Sale Rule

(a) No Change.

(b) *(1) With respect to trades executed on or reported to the ADF,* Rule 3350 requires that no member shall effect a short sale for the account of a customer or for its own account in a Nasdaq National Market security at or below the current national best (inside) bid when the current national best (inside) is below the proceeding national best (inside) bid in the security. NASD has determined that in order to effect a ''legal'' short sale when the current best bid is lower than the preceding best bid the short sale must be executed at a price of at least $0.01 above the current inside bid when the current inside spread is $0.01 or greater. The last sale report for such a trade would, therefore, be above the inside bid by at least $0.01.

(2) With respect to trades executed on or reported to Nasdaq, Rule 3350 requires that no member shall effect a short sale for the account of a customer or for its own account in a Nasdaq National Market security at or below the current best (inside) bid displayed in the Nasdaq National Market Execution System when the current best (inside) bid is below the proceeding best (inside) bid in the security. Nasdaq has determined that in order to effect a ''legal'' short sale when the current best bid is lower than the preceding best bid the short sale must be executed at a price of at least $0.01 above the current inside bid when the current inside spread is $0.01 or greater. The last sale report for such a trade would, therefore, be above the inside bid by at least $0.01.

(c) No Change.

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

[2] 17 CFR 240.19b–4.

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. The text of these statements may be examined at the places specified in Item III 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. Background and Description of the NASD's Short Sale Rule

Section 10(a) of the Act gives the Commission plenary authority to regulate short sales of securities registered on a national securities exchange, as needed to protect investors. Although the Commission has regulated short sales since 1938, that regulation has been limited to short sales of exchange-listed securities. In 1992, Nasdaq, believing that short-sale regulation is important to the orderly operation of securities markets, proposed a short sale rule for trading of its National Market securities that incorporates the protections provided by SEC Rule 10a–1. On June 29, 1994, the SEC approved the NASD's short sale rule (the "Rule") applicable to short sales [3] in Nasdaq National Market ("NNM") securities on an eighteen-month pilot basis through March 5, 1996.[4] The NASD and the Commission have extended Rule 3350 numerous times, most recently, until December 15, 2002.

The Rule employs a "bid" test rather than a tick test because Nasdaq trades are not necessarily reported to the tape in chronological order. The Rule prohibits short sales at or below the inside bid when the current inside bid is below the previous inside bid. Nasdaq calculates the inside bid from all market makers in the security (including bids for exchanges trading Nasdaq securities on an unlisted trading privileges basis), and disseminates symbols to denote whether the current inside bid is an "up-bid" or a "down-bid." To effect a "legal" short sale on a down-bid, the short sale must be executed at a price at least $.01 above the current inside bid. The Rule is in effect from 9:30 a.m. until 4 p.m. each trading day.

To reduce the compliance burdens on its members, the Rule also incorporates seven exemptions contained in SEC Rule 10a–1 that are relevant to trading on Nasdaq.[5] For example, in an effort to not constrain the legitimate hedging needs of options market makers, the Rule also contains a limited exception for standardized options market makers. The Rule also contains an exemption for warrant market makers similar to the one available for options market makers.

2. Background of the Primary Market Maker Standards

To ensure that market maker activities that provide liquidity and continuity to the market are not adversely constrained when the short sale rule is invoked, Rule 3350 provides an exemption for "qualified" market makers (*i.e.*, market makers that meet the PMM standards). Presently, NASD Rule 4612 provides that a member registered as a market maker pursuant to NASD Rule 4611 may be deemed a PMM if that member meets certain threshold standards.

Since the Rule has been in effect, Nasdaq has used three methods to determine whether a market maker is eligible for the market maker exemption. Specifically, from September 4, 1994 through February 1, 1996, Nasdaq market makers that maintained a quotation in a particular NNM security for 20 consecutive business days without interruption were exempt from the Rule for short sales in that security, provided the short sales were made in connection with bona fide market making activity ("the 20-day" test). From February 1, 1996 until the February 14, 1997, the "20-day" test was replaced with a four-part quantitative test known as the PMM standards.[6]

On February 14, 1997, the PMM standards were waived for all NNM securities due to the impacts of the SEC's Order Handling Rules and corresponding NASD rule change and system modifications on the operation of the four quantitative standards.[7] For example, among other impacts, the requirement that market makers display customer limit orders adversely affected the ability of market makers to satisfy the "102% Average Spread Standard." Since that time all Nasdaq Market Makers have been deemed to be PMMs.

In March 1998, Nasdaq proposed PMM standards that received substantially negative comments.[8] In light of those comments, Nasdaq staff convened an advisory subcommittee to develop new PMM standards ("Subcommittee") in August 1998. The Subcommittee met nine times and formulated new PMM standards. NASD/Nasdaq staff requested to meet with the Commission staff and the Subcommittee to receive informal feedback on the new PMM standards. This meeting occurred on December 9, 1998. At the conclusion of the meeting, Commission staff noted the progress made by the Subcommittee and requested time to digest and more carefully analyze the proposed new PMM standards.

On July 29, 1999, members of the Nasdaq staff conducted a conference call with members of the Commission staff to receive feedback on the PMM standards that Nasdaq presented at the December 9, 1998 meeting. During the meeting, the Commission staff requested that Nasdaq modify several of the proposed standards and analyze the impact of those modifications on the primary market maker determination. On September 27, 1999, Nasdaq reported that the NASD Economic Research staff had analyzed data based on the Commission's recommended revisions and concluded that the Commission's modified standards

[3] A short sale is a sale of a security that the seller does not own or any sale that is consummated by the delivery of a security borrowed by, or for the reason of, the seller. To determine whether a sale is a short sale members must adhere to the definition of a "sort sale" contained in SEC Rule 3b–3, which is incorporated into Nasdaq's short sale rule by NASD Rule 3350(k)(1).

[4] *See* Securities Exchange Act Release No. 34277 (June 29, 199) ("Short Sale Rule Approval Order").

[5] *See* NASD Rule 3350(c)(2)–(8). The Rule also provides that a member not currently registered as a Nasdaq market maker in a security that has acquired the security while acting in the capacity of a block positioner shall be deemed to own such security for the purposes of the Rule notwithstanding that such member may not have a net long position in such security if and to the extent that such member's short position in such security is subject to one or more offsetting positions created in the course of bona fide arbitrage, risk arbitrage, or bone fide hedge activities. In addition, the NASD has recognized that SEC staff interpretations to SEC Rule 10a–1 dealing with the liquidation of index arbitrage positions and an "international equalizing exemption" are equally applicable to the NASD's short sale rule.

[6] Under the PMM standards, a market maker was required to satisfy at least two of the following four criteria each month to be eligible for an exemption from the short sale rule: (1) The market maker must be at the best bid or best offer as shown on Nasdaq no less than 35 percent of the time; (2) the market maker must maintain a spread not greater than 102 percent of the average dealer spread; (3) no more than 50 percent of the market maker's quotation updates may occur without being accompanied by a trade execution of at least one unit of trading; or (4) the market maker executes 1½ times its "proportionate" volumn in the stock. If a PMM did not satisfy the threshold standards after a particular review period, the market maker lost its designation as a PMM (*i.e.,* the "P" next to its market maker identification was removed). Market makers could re-qualify for designation as a PMM by satisfying the threshold standards in the next review period.

[7] *See* Securities Exchange Act Release No. 34–38294 (February 17, 1997), 62 FR 8289 (February 24, 1997).

[8] *See* Securities Exchange Act Release 39189 (March 30, 1998), 63 FR 16841 (April 6, 1998).

produced unfavorable results. Nasdaq requested that the Commission comment on the outcome of this test "as we intend to communicate your comments to the Subcommittee in an effort to resume the process of developing new standards."[9]

Nasdaq suspended development of PMM standards in late-1999 after the Commission signaled to the securities industry that it is considering fundamental changes to Rule 10a–1, changes that could impact the manner in which Nasdaq and the other markets regulate short sales. In October 1999, the Commission issued a Concept Release on Short Sales in which it sought comment on, among other things, revising the definition of a short sale, extending short sale regulation to non-exchange listed securities, and eliminating short sale regulation altogether. Nasdaq believed that it would be inappropriate for Nasdaq to dramatically alter its regulation of short sales while the Commission is considering fundamentally changing Rule 10a–1. At the request of the staff of the Division of Market Regulation, Nasdaq has resumed development of PMM standards and has been working with the Commission staff towards that goal.

3. Proposal To Extend the Short Sale Rule and Suspend the PMM Standards

Nasdaq believes that it is in the best interest of investors to extend the short sale regulation pilot program. When the Commission approved the NASD's short sale rule on a pilot basis, it made specific findings that the Rule was consistent with Sections 11A,[10] 15A(b)(6),[11] 15A(b)(9),[12] and 15A(b)(11)[13] of the Act. Specifically, the Commission stated that, "recognizing the potential for problems associated with short selling, the changing expectations of Nasdaq market participants and the competitive disparity between the exchange markets and the OTC market, the Commission believes that regulation of short selling of Nasdaq National Market securities is consistent with the Act."[14] In addition, the Commission stated that it "believes that the NASD's short sale bid-test, including the market maker exemptions, is a reasonable approach to short sale regulation of Nasdaq National Market securities and reflects the realities of its market structure."[15] The benefits that the Commission recognized when it first approved Rule 3350 apply with equal force today.

Similarly, the concerns that caused the Commission to waive the PMM standards in February 1997 continue to exist today. Nasdaq and the Commission agreed to waive the PMM standards for three reasons that were discovered only after the Order Handling Rules were implemented.[16] Through late-1999, Nasdaq worked diligently to address those concerns to the Commission's satisfaction, including convening a special subcommittee on PMM issues, proposing two different sets of PMM standards, and being continuously available and responsive to Commission staff to discuss this issue. Despite these efforts, the Commission and Nasdaq were unable to establish satisfactory PMM standards. At the request of Commission staff, Nasdaq has begun developing PMM standards suitable to today's rapidly changing marketplace. Re-instating the PMM standards set forth in NASD Rule 4612 would be extremely disruptive to the market and harmful to investors.

4. Proposal To Modify Bid Tick Indicator

Nasdaq would like to modify the method it uses to calculate the last bid by having it refer to the "Nasdaq Inside" which is comprised of quotations from all participants in Nasdaq execution systems (*e.g.*, SuperMontage), rather than referring to the National Best Bid and Offer ("NBBO"). As explained in more detail below, this change is necessary to maintain a fair and orderly market within Nasdaq.

Historically, the NBBO only included Nasdaq market makers. In 1996, when the Chicago Stock Exchange began trading Nasdaq-listed issues, the NBBO and thus the Nasdaq bid-tick indicator became inclusive of other exchanges even though those exchanges are not subject to NASD Rule 3350. Due to Chicago's participation in Nasdaq systems and their willingness to be linked into Nasdaq execution systems, the NBBO and the best bid and offer in Nasdaq were identical and there was no need to calculate a separate best bid for Nasdaq.

Recently, several markets have begun trading Nasdaq securities pursuant to unlisted trading privileges. As a result, the NBBO is regularly different from the best bid that is accessible to Nasdaq market participants using Nasdaq execution systems. It is possible for a market without a short sale rule to affect the direction of the short sale arrow and accordingly have an impact on NASD members' short sale rule obligation in Nasdaq. This is inequitable since those markets currently impose no short selling obligations on their own members. Nasdaq has a compelling interest in resolving this issue in order to maintain a fair and orderly market within Nasdaq.

The separation of Nasdaq's market systems from the systems it operates as the exclusive securities information processor for Nasdaq securities has enabled Nasdaq to calculate an independent Nasdaq Inside Price ("Nasdaq Inside") and a last bid change based upon that Nasdaq Inside. The Nasdaq Inside is comprised of the best bid and offer quote from among all participants in the Nasdaq National Market Execution System (commonly known as "SuperMontage")—including all Nasdaq market participants as well as UTP exchanges that choose to participate in SuperMontage.

Given this new capability and the presence of markets with no short sale rules, Nasdaq proposes to modify the short sale rule to refer to the Nasdaq Inside rather than the NBBO. It is damaging to the Nasdaq market and its participants to restrict the short sales of Nasdaq firms based upon the quotations of markets with no short sale rule. Additionally, this approach is similar to the approach that the SEC has adopted under the short sale rule that applies to the listed markets where a primary exchange (*e.g.*, NYSE) is permitted to look only to transactions occurring on the primary exchange in determining its members' short sale rule obligations.

Nasdaq currently has the ability to calculate and apply the Nasdaq-based bid tick indicator to SuperMontage, and it will implement the proposed rule change immediately with respect to SuperMontage. With respect to trades executed outside Nasdaq execution systems and reported to Nasdaq, Nasdaq anticipates that it will have the ability to display the Nasdaq-based bid tick indicator to market participants on

[9] *See* Letter, dated September 27, 1999 from John F. Malitzis, Assistant General Counsel, Nasdaq, to Richard Strasser, Assistant Director, Division of Market Regulations, SEC.

[10] 15 U.S.C. 78k–1.

[11] 15 U.S.C. 78*o*–3(b)(6).

[12] 15 U.S.C. 78*o*–3(b)(9).

[13] 15 U.S.C. 78*o*–3(b)(11).

[14] *See* Short Sale Rule Approval Order, *supra* note 4.

[15] *Id.*

[16] Implementation of the Order Handling Rules created the following three issues: (1) Many market makers voluntarily chose to display customer limit orders in their quotes although the Limit Order Display Rule does not yet require it; (2) SOES decrementation for all Nasdaq stocks significantly affected market makers' ability to meet several of the primary market maker standards; and (3) with the inability to meet the existing criteria for a larger number of securities, a market maker may be prevented from registering as a primary market maker in an initial public offering because it fails to meet the 80% primary market maker test contained in Rule 4612(g)(2)(B).

January 13, 2003.[17] Nasdaq participants will then have up to 90 calendar days to transition from the NBBO-based bid tick to the Nasdaq-based bid tick for trades executed outside Nasdaq execution systems and reported to Nasdaq. In the event that Nasdaq is unable to display the Nasdaq-based bid tick indicator at that time, Nasdaq will inform the Commission and delay implementation of this transition period. In addition, Nasdaq is working with the NASD to ensure a continued high level of short sale compliance during that transition period.

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

Nasdaq believes that the proposed rule change will not 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

Comments were neither solicited nor received.

III. 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. 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 the file number in the caption above and should be submitted by January 14, 2003.

[17] At that time, Nasdaq anticipates that the quotations of exchanges that lack a hard-wired linkage to Nasdaq will be removed from the Nasdaq Quotation Data Service (''NQDS'') data feed. Nasdaq is currently analyzing alternative methods for calculating the Nasdaq-based bid tick indicator in the event the removal from NQDS of quotations of exchanges that lack hard-wired linkages is delayed.

IV. Commission's Findings and Order Granting Accelerated Approval of the Amendment

After careful consideration, the Commission finds, for the reasons set forth below, that the extension of the Short Sale Rule Pilot until June 15, 2003, the suspension of the existing PMM standards until June 15, 2003 and the modification of the method used to calculate the bid tick indicator used by members to determine the permissibility of a short sale are consistent with the requirements of the Act and the rules and regulations thereunder. In particular, the proposal is consistent with Section 15A(b)(6)[18] of the Act, which requires that the NASD's rules be designed, among other things, to remove impediments to and perfect the mechanism of a free and open market and a national market system and to promote just and equitable principles of trade.

The Commission finds that the continuation of the Short Sale Rule Pilot, the continued suspension of the PMM standards, and the modification of the method used to calculate the bid tick indicator will maintain the status quo while the Commission is considering amending Rule 10a–1 under the Act. This extension of the pilot, continued suspension of the PMM standards, and modification of the bid tick test is subject to modification or revocation should the Commission amend Rule 10a–1 under the Act in a manner as to deem the extension, suspension, or modification unnecessary or in conflict with any adopted amendments.[19]

The Commission finds good cause for approving the extension of the Short Sale Rule Pilot, the suspension of existing PMM standards, and the modification of the method used to calculate the bid tick indicator prior to the 30th day after the date of publication of notice of the filing in the **Federal Register**. It could disrupt the Nasdaq market and confuse market participants to reintroduce the previous PMM standards while new PMM standards are being developed and while the Commission considers amending Rule 10a–1 under the Act.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[20] that Amendment No. 13 to the proposed rule change, SR–NASD–98–26, which extends the NASD Short Sale Rule Pilot through June 15, 2003, suspends the PMM standards through June 15, 2003, and modifies the method used to calculate the bid tick indicator is approved on an accelerated basis.[21]

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[22]

Margaret H. McFarland,

Deputy Secretary.

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[18] 15 U.S.C. 78*o*–3(b)(6).

[19] Absent an exemption, Rule 10a–1 under the Act would apply to Nasdaq on Commission approval of its exchange registration.

[20] 15 U.S.C. 78s(b)(2).

[21] In approving Amendment No. 13, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47003; File No. SR–NASD–2002–59]

Self-Regulatory Organizations; Order Approving a Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to a New Trade Report Modifier To Be Attached to Trades Whose Prices Exceed Certain Parameters

December 16, 2002.

I. Introduction

On April 29, 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 (''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 create a new trade report modifier to be attached to trades whose prices exceed certain parameters. The proposed rule change was published for comment in the **Federal Register** on June 14, 2002.[3] The Commission received two comment letters regarding the proposal.[4] Nasdaq responded to the commenters on November 30, 2002.[5]

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 46056 (June 10, 2002), 67 FR 40975.

[4] *See* letter from Michael T. Dorsey, Senior Vice President, Director of Legislative and Regulatory Affairs, Knight Trading Group, to Commission, dated July 19, 2002 (''Knight Letter'') and letter from Cindy D. Foster, Vice President, Compliance, SunGard Trading Systems, to Jonathan G. Katz, Secretary, Commission, dated July 5, 2002 (''SunGard Letter'').

[5] *See* letter from Edward S. Knight, Executive Vice President, General Counsel, Nasdaq, to Jonathan G. Katz, Secretary, Commission, dated November 20, 2002 (responding to the comment letters received regarding the proposed rule change) (''Nasdaq Response Letter'').