

compliance periods described in Rule 4310(c)(8)(D) and if it has continually maintained compliance with all other requirements for continued listing on The Nasdaq National Market since being transferred. An issuer qualifying for such a transfer pursuant to the maintenance requirements is not required to pay the entry fee set forth in Rule 4510(a) upon transferring back to The Nasdaq National Market.]

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

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

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

Following the extraordinary market conditions surrounding the September 11th tragedy, Nasdaq implemented a moratorium on enforcement of its bid

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

After careful consideration, Nasdaq continues to believe that the bid price requirements are a valuable measure of compliance. However, Nasdaq believes that the measurement periods for the requirements should be extended and modified to provide additional flexibility to both National Market and SmallCap Market issuers that are engaged in turnaround strategies in what Nasdaq considers to be a continuing difficult and historically unique climate. Nasdaq proposes that these modifications also be subject to implementation on a pilot basis, in order to allow Nasdaq to assess the efficacy of the changes and whether it is appropriate to recommend further, more permanent action.

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

- Extend the bid price grace period for all National Market issuers from 90 calendar days to 180 calendar days. Pursuant to a separate rule filing,⁷ Nasdaq also will propose to provide an additional 180-calendar-day compliance period for those National Market issuers able to demonstrate compliance with the core National Market initial listing criteria (*i.e.*, \$30,000,000 in equity; \$75,000,000 in market value of listed securities; \$75,000,000 in total assets and total revenues; or \$15,000,000 in equity and \$1,000,000 in income from continuing operations before income

taxes in the most recently completed fiscal year, or two of the last three fiscal years);

- Maintain the initial 180-calendar-day bid price compliance period for all SmallCap Market issuers as well as the additional 180-day compliance period for SmallCap Market issuers demonstrating compliance with the core SmallCap Market initial listing criteria (*i.e.*, \$5,000,000 in equity; \$50,000,000 in market value of listed securities; or \$750,000 in net income from continuing operations in the most recently completed fiscal year, or two of the last three fiscal years) and provide an additional 90-day compliance period, if the issuer maintains compliance with the heightened, initial inclusion criteria noted above, as measured at the end of each compliance period. Pursuant to the separate rule filing, Nasdaq also will propose further extensions to the bid price compliance periods;

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

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

In addition, Nasdaq proposes to change the National Market continued

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

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

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

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

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