

but generally no more than 20 consecutive business days, before determining that the issuer has demonstrated an ability to maintain long-term compliance. In determining whether to monitor bid price beyond ten business days, Nasdaq *shall* [will] consider the following four factors: (i) margin of compliance (the amount by which the price is above the \$1.00 minimum standard); (ii) trading volume (a lack of trading volume may indicate a lack of bona fide market interest in the security at the posted bid price); (iii) the market maker montage (the number of market makers quoting at or above \$1.00 and the size of their quotes); and, (iv) the trend of the stock price (is it up or down).

(3)–(4) No change.

(f)–(i) No change.

#### 4820. Request for Hearing

(a) An issuer may, within seven calendar days of the earlier of the date of the Staff Determination or the Staff Warning Letter referenced in Rule 4450(e), request either a written or oral hearing to review the Staff Determination. Requests for hearings should be filed with The Nasdaq Office of Listing Qualifications Hearings (the "Hearings Department"). A request for a hearing *shall* [will] stay the delisting action pending the issuance of a written determination by a Listing Qualifications Panel. If no hearing is requested within the seven calendar day period, *the right to request review is waived, and* the Staff Determination *shall* [will] take immediate effect. All hearings *shall* [will] be held before a Listing Qualifications Panel as described in Rule 4830. All hearings *shall* [will] be scheduled, to the extent practicable, within 45 days of the date that the request for hearing is filed, at a location determined by the Hearings Department. The Hearings Department *shall* [will] make an acknowledgment of the issuer's hearing request stating the date, time and location of the hearing, and the deadline for written submissions to the Listing Qualifications Panel. The issuer *shall* [will] be provided at least 10 calendar days notice of the hearing unless the issuer waives such notice.

(b)–(c) No change.

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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.<sup>5</sup> In January 2002, immediately after the moratorium ended, Nasdaq implemented a pilot program to extend certain compliance periods applicable to the bid price rule.<sup>6</sup> The pilot program was modified and extended to December 31, 2004.<sup>7</sup> The current pilot program provides for a 180-day bid price compliance period for SmallCap Market issuers. Thereafter, SmallCap Market issuers are allowed an additional 180-day compliance period if they meet heightened requirements based upon certain core initial listing standards. SmallCap issuers are allowed an additional 90-day compliance period, provided that the issuer continues to meet the heightened requirements. National Market companies currently receive a single 180-day bid price compliance period.

After careful consideration, Nasdaq continues to believe that the bid price requirements are valuable measures 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 companies that are engaged in turnaround strategies. Nasdaq proposes that these modifications also be subject to implementation under the pilot program currently in effect through December 31, 2004.

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

- Provide an additional 180-calendar-day compliance period for those National Market issuers able to demonstrate compliance with the National Market initial listing criteria

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

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

<sup>7</sup> See Securities Exchange Act Release No. 47482 (March 11, 2003), 68 FR 12729 (March 17, 2003) (SR-NASD-2003-34).

set forth in Rule 4420 (except for the bid price requirement set forth in Rule 4420(a)(4), (b)(4) or (c)(3);

- Maintain the initial 180-calendar-day bid price compliance period for all SmallCap Market issuers, and provide a second 180-day compliance period for SmallCap Market issuers that satisfy the initial listing criteria set forth in Rule 4310(c) (except for the bid price requirement set forth in Rule 4310(c)(4)). This is more stringent than the current compliance period which conditions eligibility for the second 180-day compliance period on meeting only the financial or "core" initial listing criteria. After the two initial 180-day compliance periods, instead of the additional 90-day compliance period provided by the recent modification to the pilot program,<sup>8</sup> issuers would be provided with an additional compliance period up to their 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.

Nasdaq believes that the proposal appropriately distinguishes between the National Market and the SmallCap Market by providing a relatively shorter compliance period for National Market issuers compared to that available to SmallCap Market issuers, and by expediting the National Market issuer delisting process. The proposal further provides that SmallCap Market issuers eligible for the longest compliance periods must take concrete corrective action to address the bid price deficiency or face prompt delisting. Nasdaq further believes that the proposal would benefit investors by lessening the disruption that can be associated with an issuer's move from the Nasdaq Stock Market to less liquid and regulated markets.

*Implementation.* Nasdaq proposes that this rule be effective upon Commission approval, and that issuers that are at that time in the Rule 4800 Series review process be afforded the benefit of the new rule. As such, issuers would be extended any additional compliance periods provided by this

<sup>8</sup> See *id.*