

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 the NASD. All submissions should refer to file number SR-NASD-2003-166 and should be submitted by January 20, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48967; File No. SR-NASD-03-191]

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

December 22, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 19, 2003, 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 ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change.

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

The Nasdaq is proposing to extend the pilot program of the National Association of Securities Dealers' short sale rule retroactively to December 15 and prospectively until June 15, 2004. The 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 retroactive to December 15, 2003 and prospective through June 15, 2004. The text of the proposed rule change is as follows. Additions are *italicized*; deletions are bracketed.

\* \* \* \* \*

#### NASD Rule 3350

(a)-(k) No Change.

(l) This section shall be in effect until June 15, 2004 [December 15, 2003].

\* \* \* \* \*

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

In its filing with the Commission, the 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 III below. The 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

*Background and Description of the NASD's Short Sale Rule.* Section 10(a) of the Act<sup>3</sup> 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, the 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 Rule 10a-1 under the Act.<sup>4</sup> On June 29, 1994, the Commission approved the NASD's short

sale rule (the "Rule") applicable to short sales<sup>5</sup> in Nasdaq National Market ("NNM") securities on an eighteen-month pilot basis through March 5, 1996.<sup>6</sup> The NASD and the Commission have extended NASD Rule 3350 numerous times, most recently, until December 15, 2003.

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. The Nasdaq calculates the inside bid from all market makers in the security 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 4:00 p.m. each trading day.

In December of 2002, the Nasdaq modified 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"). The Nasdaq currently calculates and applies the Nasdaq-based bid tick indicator to all SuperMontage trades. With respect to trades executed outside Nasdaq execution systems and reported to the Nasdaq, Nasdaq participants have been permitted to transition from the NBBO-based bid tick to the Nasdaq-based bid tick, provided that each firm select and apply a single bid tick indicator for all such trades executed by that firm. That transition has not been completed and, as explained below, in light of the Commission's proposal of Regulation SHO, the Nasdaq has alerted members that it would not be prudent to transition from the NBBO bid tick to the Nasdaq bid tick at this time.

To reduce the compliance burdens on its members, the Rule also incorporates seven exemptions contained in Rule 10a-1 under the Act,<sup>7</sup> and other exemptions that are relevant to trading

<sup>5</sup> 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 account of, the seller. To determine whether a sale is a short sale members must adhere to the definition of a "short sale" contained in Rule 3b-3 of the Act, which is incorporated into Nasdaq's short sale rule by NASD Rule 3350(k)(1).

<sup>6</sup> See Securities Exchange Act Release No. 34277 (June 29, 1994), 59 FR 34885 (July 7, 1994) ("Short Sale Rule Approval Order").

<sup>7</sup> 17 CFR 240.10a-1.

<sup>10</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78a(10)(A).

<sup>4</sup> 17 CFR 240.10a-1.