

reassurance that the issuer remains a viable business vehicle despite its low bid price.

Nasdaq has provided the Commission with a discussion of its surveillance program for securities that fall below a \$1 bid price. The Commission believes that this program, designed to detect fraudulent and abusive trading activity, should further the protection of investors and the public interest.

For these reasons, the Commission is approving this pilot proposal for extending the bid price grace periods. As noted above, Nasdaq previously has committed to study the effect of the pilot changes to its maintenance listing standards.<sup>34</sup> This data will be essential in analyzing—if and when Nasdaq seeks permanent approval for the rules allowing bid price grace periods—whether derogations from the bid price standards undermine the principles of the Act as they are reflected in Nasdaq's listing rules. Previously, the Commission required that Nasdaq submit the study six months prior to the expiration of the pilot (*i.e.*, by June 30, 2004).<sup>35</sup> However, because only 12 months remain in the pilot period, the Commission now believes that it would be appropriate to allow Nasdaq to submit the study three months prior to the expiration of the pilot (*i.e.*, by September 30, 2004). In view of its concerns about the potential for manipulation in the market for low-priced, thinly capitalized securities, the Commission believes that it would be difficult to permit any extension of the pilot provisions without first analyzing the results of Nasdaq's study.<sup>36</sup>

#### *B. Accelerated Approval of Amendment No. 3*

Pursuant to Section 19(b)(2) of the Act,<sup>37</sup> the Commission finds good cause for approving the proposal, as revised by Amendment No. 3, prior to the thirtieth day after the date that the notice of the amended proposal was published in the **Federal Register**. No comments were received on the original proposal, and the Commission believes that Amendment No. 3 does not materially alter the proposal and is intended only to make certain technical clarifications. Accordingly, the

Commission is accelerating approval of the proposal, as amended.

#### **IV. Text of Amendment No. 3**

In Amendment No. 3, Nasdaq proposed further amendments to NASD Rule 4310(c), noted below. The base text is that proposed in Amendment No. 2 (*i.e.*, how the rule would appear if only Amendment No. 2 were approved by the Commission). Changes made by Amendment No. 3 are in *italic*; deletions are in brackets.

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#### **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)–(7) No change.

(8)(A)–(C) No change.

(D) A failure to meet the continued inclusion requirement for minimum bid price on The Nasdaq SmallCap Market shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 180 calendar days from such notification to achieve compliance. If the issuer has not been deemed in compliance prior to the expiration of the 180 day compliance period, it shall be afforded an additional 180 day compliance period, provided, that on the 180th day of the first compliance period, the issuer demonstrates that it meets the criteria for initial inclusion set forth in Rule 4310(c) (except for the bid price requirement set forth in Rule 4310(c)(4)) based on the issuer's most recent public filings and market information. If the issuer has publicly announced information (*e.g.*, in an earnings release) indicating that it no longer satisfies the applicable initial inclusion criteria, it shall not be eligible for the additional compliance period under this rule.

[If on the 180th day of the second compliance period, the issuer has not been deemed in compliance during such compliance period but it satisfies the criteria for initial inclusion set forth in Rule 4310(c) (except for the bid price requirement set forth in Rule 4310(c)(4)), the issuer shall be provided with an additional compliance period up to its 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.] *If on the 180th day of the second compliance period, the issuer has not been deemed in compliance during such compliance period but it satisfies the criteria for initial inclusion set forth in Rule 4310(c) (except for the bid price requirement set forth in Rule 4310(c)(4)), the issuer shall be provided with an additional compliance period up to its next shareholder meeting scheduled to occur no later than two years from the original notification of the bid price deficiency, provided the issuer commits to seek shareholder approval at that meeting for a reverse stock split to address 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.* Compliance can be achieved during any compliance period by meeting the applicable standard for a minimum of 10 consecutive business days.

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Amendment No. 3 clarifies that the shareholder meeting referred to in the proposed changes to NASD Rule 4310(c)(8)(D) need not be the annual shareholder meeting, but could also be a special shareholder meeting. A special meeting could be called for the express purpose of seeking shareholder approval for a reverse stock split to cure the issuer's bid price deficiency within the grace period allowed by proposed NASD Rule 4310(c)(8)(D). Nasdaq noted in Amendment No. 3 that, in some circumstances, the next annual meeting could fall outside the two-year deadline for such action and a special meeting would therefore be required.

Amendment No. 3 also clarifies the meaning of the term “extraordinary circumstances” used in regard to whether Nasdaq would exercise its discretion under NASD Rule 4810(b) to grant additional exceptions to its bid price maintenance standard.

Amendment No. 3 can be obtained from the Commission's Public Reference Room or from the principal offices of Nasdaq.

<sup>34</sup> See *supra* note 17.

<sup>35</sup> See letter from Florence Harmon, Division of Market Regulation, Commission, to Sara Nelson Bloom, Nasdaq, dated April 4, 2003.

<sup>36</sup> In addition, following issuance of this approval order, staff of the Commission's Division of Market Regulation will send a letter to Nasdaq setting forth in more detail the data that Nasdaq should provide in its study.

<sup>37</sup> 15 U.S.C. 78s(b)(2).