

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-53542; File No. SR-NASD-2006-029]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to Rule 6530 To Clarify the Removal Process for Securities of OTCBB Issuers That Fail To Remain Current With OTCBB Reporting Requirements

March 23, 2006.

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 February 27, 2006, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. NASD has designated the proposed rule change as "constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule" under Section 19(b)(3)(A)(i) of the Act<sup>3</sup> and Rule 19b-4(f)(1) thereunder,<sup>4</sup> which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

NASD is proposing to amend NASD Rule 6530 to clarify the removal process for the securities of issuers quoted on the Over-the-Counter Bulletin Board ("OTCBB") that fail to remain current with reporting their financial information to the Commission or other appropriate regulator. The text of the proposed rule change is available on NASD's Web site (<http://www.nasd.com>), at the principal office of NASD, and at the Commission's Public Reference Room.

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

In its filing with the Commission, NASD 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. NASD 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

In January 1999, the Commission approved amendments to NASD Rules 6530 and 6540 that limit quotations on the OTCBB to securities of issuers that are current in their periodic filings with the Commission or other applicable regulator.<sup>5</sup> In November 2005, the Commission approved amendments to NASD Rule 6530 that limit the eligibility for quotation on the OTCBB of the securities of issuers that are repeatedly late or otherwise delinquent in filing periodic reports.<sup>6</sup> Specifically, NASD Rule 6530(e) provides that OTCBB issuers that fail to file a complete periodic report with the Commission or other respective regulator, even if they file within the grace period allowed by NASD Rule 6530, three times in a two-year period and those issuers that have been removed from the OTCBB for failure to file two times in a two-year period, are ineligible for quotation on the OTCBB by an NASD member.<sup>7</sup> Following removal pursuant to NASD Rule 6530(e), the securities of an issuer would only become eligible for quotation on the OTCBB again if the issuer has timely filed complete required periodic reports for a one-year period.

NASD is filing the proposed rule change to clarify the removal process and grace periods for securities of OTCBB issuers that fail to remain current in their reporting requirements. Specifically, when an issuer does not comply with the reporting requirements in NASD Rule 6530, either because a filing was not made<sup>8</sup> or because a filing

was incomplete,<sup>9</sup> a fifth character "E" is appended to the trading symbol of that issuer's security.<sup>10</sup> Notice of the pending symbol change to append the "E" modifier is publicly reported on the OTCBB Daily List.<sup>11</sup> This identifier notifies investors and other market participants that the issuer is not current, or that the NASD staff does not have sufficient information to determine if the issuer is current, in its reporting obligations.<sup>12</sup>

NASD Rule 6530 generally permits the continued quoting of securities of delinquent issuers for a specified grace period.<sup>13</sup> Questions have been raised as to from what date the grace period, if applicable, commences. NASD is clarifying that the grace period, if

security. If the issuer did in fact timely file with its respective regulator, the issuer would not be considered delinquent for purposes of NASD Rule 6530(e).

<sup>9</sup> In order for a filing to be complete, it must, for example, contain all required certifications, attestations, and financial statements, including an auditor's review pursuant to SAS-100 (for quarterly reports) or an unqualified auditor's opinion (for annual reports). See Rule 13a-14 under the Act, 17 CFR 240.13a-14, and Rules 10-01(d) and 2-02(c) of Regulation S-X, 17 CFR 210.10-01(d) and 2-02(c). In addition, the auditor must be registered with the Public Company Accounting Oversight Board. See Section 102(a) of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7212(a).

<sup>10</sup> A filing would not be considered delinquent if made within any applicable extension permitted by Rule 12b-25 under the Act, provided that the issuer files the applicable materials specified in Rule 12b-25. See 17 CFR 240.12b-25 (under Rule 12b-25, an issuer would need to file, among other things, a Form 12b-25 notice with the Commission no later than one business day after the due date for the applicable report). If the issuer does not file the required report by the expiration of the applicable Rule 12b-25 grace period, notice of a pending change to the issuer's symbol will be publicly reported on the OTCBB Daily List and the "E" modifier will be appended to the trading symbol of that issuer's securities. The applicable grace period under NASD Rule 6530 will be calculated from the date of publication on the OTCBB Daily List.

<sup>11</sup> Notice of a pending symbol change is publicly reported on the OTCBB Daily List within seven business days of the due date of the report. The "E" modifier is then appended to the issuer's security symbol within two business days thereafter. The OTCBB Daily List is available at <http://www.otcbb.com>.

<sup>12</sup> A list of delinquent issuers is available on <http://www.otcbb.com>.

<sup>13</sup> The grace period set forth in NASD Rule 6530 varies depending on the type of issuer. OTCBB issuers that file with the Commission are subject to a 30 calendar day grace period, whereas, OTCBB issuers that do not file with the Commission, but are required to file with other regulators (*i.e.*, banks, savings associations, and insurance companies) are afforded a 60 calendar day grace period. Pursuant to NASD Rule 6530(e), however, the third time an OTCBB issuer is delinquent in the prior two-year period, that issuer's securities will be removed from quotation on the OTCBB without the benefit of any grace period for the third delinquency, although seven calendar days will be provided to request a review of the staff determination by a hearing panel. See Securities Exchange Act Release No. 52786 (November 16, 2005), 70 FR 70907 (November 23, 2005) (SR-NASD-2005-011).

<sup>5</sup> See Securities Exchange Act Release No. 40878 (January 4, 1999), 64 FR 1255 (January 8, 1999) (SR-NASD-98-51).

<sup>6</sup> See Securities Exchange Act Release No. 52786 (November 16, 2005), 70 FR 70907 (November 23, 2005) (SR-NASD-2005-011).

<sup>7</sup> NASD Rule 6530(e) applies to filings for reporting periods ending on and after October 1, 2005.

<sup>8</sup> When NASD does not receive notice that an issuer which files with a regulator other than the Commission has timely filed, the "E" modifier is appended to the trading symbol of the issuer's

<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. 78s(b)(3)(A)(i).

<sup>4</sup> 17 CFR 240.19b-4(f)(1).

applicable, is calculated from the date notification of the pending symbol change to append the "E" modifier is published on the OTCBB Daily List. If the issuer does not comply within any applicable grace period provided by NASD Rule 6530 and no request for review by a hearing panel has been received,<sup>14</sup> then the securities of the issuer are removed from quotation on the OTCBB following a subsequent publication on the OTCBB Daily List of the removal. In this case, notice of removal will appear on the Daily List within one business day after the expiration of the grace period.<sup>15</sup> Alternatively, if the delinquent issuer becomes current in its filings with the Commission or its respective regulator during any applicable grace period provided for in NASD Rule 6530, the "E" modifier will be removed from the trading symbol of that issuer's security following subsequent publication thereof on the OTCBB Daily List.<sup>16</sup> In

<sup>14</sup> A party aggrieved by a determination relating to the OTCBB may request a review of such determination by a hearing panel pursuant to the NASD Rule 9700 Series. The hearing panel determines whether the securities of an issuer are eligible for continued quotation because the issuer has, in fact, filed a complete periodic report. The hearing panel does not have the discretion to allow the securities of delinquent companies to continue to trade on the OTCBB. A request for review by a hearing panel will stay the security's removal until the panel makes its determination. An issuer that is not removed because it files a late report after requesting a hearing but before a decision by the hearing panel has been issued in the matter would not be considered to have failed to file for purposes of NASD Rule 6530(e)(2), however, that issuer would be considered to have filed late for purposes of NASD Rule 6530(e)(1). In a separate filing with the Commission, NASD is proposing to clarify the availability of this review process and to adopt fees for such review. See SR-NASD-2005-067 (available at <http://www.nasd.com>). See also Securities Exchange Act Release No. 52786 (November 16, 2005), 70 FR 70907 (November 23, 2005) (SR-NASD-2005-011).

<sup>15</sup> After publication on the Daily List, the issuer's securities will be removed from quotation on the following business day. Telephone conversation among Andrea Orr, Assistant General Counsel, NASD, Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, Tim Fox, Special Counsel, Division of Market Regulation, Commission, and Richard Holley III, Special Counsel, Division of Market Regulation, Commission, on March 20, 2006.

<sup>16</sup> A delinquent issuer may not prevent its security from being removed from the OTCBB by filing the required complete periodic report after the grace period expires but before notice of removal is published on the OTCBB Daily List and the security is removed from the system (e.g., if the issuer files the report on the 31st day following publication, where the grace period expired on the 30th day), and OTCBB market makers are not permitted to initiate quotations in delinquent issuers in such instances after the grace period has expired. After the expiration of any applicable grace period where the issuer has not filed the complete periodic report, NASD will continue to process the removal, and an NASD member would only be

this case, notice of the symbol change will appear on the OTCBB Daily List within one business day after the filing of the complete periodic report.<sup>17</sup>

## 2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, which requires, among other things, that NASD rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the proposed rule change will clarify and provide greater transparency to the process for removing the securities of issuers from quotation on the OTCBB that fail to comply with the reporting requirements in NASD Rule 6530.

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

NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received by NASD.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has become effective pursuant to Section 19(b)(3)(A)(i) of the Act<sup>18</sup> and Rule 19b-4(f)(1) thereunder,<sup>19</sup> in that the proposed rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of NASD.

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

permitted to quote the issuer's security to the extent permitted by NASD Rule 6530 and other applicable rules. Telephone conversation among Andrea Orr, Assistant General Counsel, NASD, Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, Tim Fox, Special Counsel, Division of Market Regulation, Commission, and Richard Holley III, Special Counsel, Division of Market Regulation, Commission, on March 20, 2006.

<sup>17</sup> See e-mail from Andrea Orr, Assistant General Counsel, NASD to Tim Fox, Special Counsel, Division of Market Regulation, Commission, dated March 22, 2006.

<sup>18</sup> 15 U.S.C. 78s(b)(3)(A)(i).

<sup>19</sup> 17 CFR 240.19b-4(f)(1).

necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

## 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. Comments may be submitted by any of the following methods:

### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2006-029 on the subject line.

### Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASD-2006-029. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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 also will be available for inspection and copying at the principal office of NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to the File Number SR-NASD-2006-029 and should be submitted on or before April 19, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>20</sup>

Nancy M. Morris,  
Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-53541; File No. SR-NASD-2006-033]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendments No. 1 and 2 Thereto To Amend NASD Rule 11890

March 22, 2006.

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 March 1, 2006, 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") the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. On March 13, 2006 and March 22, 2006, Nasdaq submitted Amendments No. 1<sup>3</sup> and 2,<sup>4</sup> respectively, to the proposed rule change. Nasdaq has designated the proposed rule change as constituting a non-controversial rule change under Rule 19b-4(f)(6) under the Act,<sup>5</sup> which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

Nasdaq proposes to clarify the scope of NASD Rule 11890. Nasdaq proposes to implement the proposed rule change

on March 13, 2006.<sup>6</sup> The text of the proposed rule change is below.<sup>7</sup> Proposed new language is italicized; proposed deletions are in brackets.

#### 11890. Clearly Erroneous Transactions

(a) Authority To Review Transactions Pursuant to Complaint of Market Participant

(1) No change.

(2) Procedures for Reviewing

Transactions

(A)—(B) No change.

(C) Following the expiration of the period for submission of supporting material, a Nasdaq officer shall determine whether the complaint is eligible for review. A complaint shall not be eligible for review under paragraph (a) unless:

(i) The complainant has provided all of the supporting information required under paragraph (a)(2)(B), and

(ii) For trades in *Nasdaq securities* executed between 9:30 a.m. and 4 p.m. Eastern Time, or *trades in non-Nasdaq securities executed between the time when the primary market for the security first posts an executable two-sided quote for its regular market trading session and 4 p.m. Eastern Time*, the price of transaction to buy (sell) that is the subject of the complaint is greater than (less than) the best offer (best bid) by an amount that equals or exceeds the minimum threshold set forth below:

#### Inside Price Minimum Threshold

\$0—\$0.99—\$0.02 + (0.10 × Inside Price)

\$1.00—\$4.99—\$0.12 + (0.07 × (Inside Price—\$1.00))

\$5.00—\$14.99—\$0.40 + (0.06 × (Inside Price—\$5.00))

\$15 or more \$1.00

For a transaction to buy (sell) a Nasdaq [listed] security, the inside price shall be the best offer (best bid) in Nasdaq at the time that the first share of the order that resulted in the disputed transaction was executed, and for a transaction to buy (sell) a [non exchange-listed] *non-Nasdaq* security, the inside price shall be the national best offer (best bid) at the time that the first share of the order that resulted in the disputed transaction was executed. A "*Nasdaq security*" means a security for which transaction reports are disseminated under the Nasdaq UTP Plan, and a "*non-Nasdaq security*" means a security for which

transaction reports are disseminated under the Consolidated Tape Association Plan. The "*primary market*" for a non-Nasdaq security is the market designated as the primary market under the Consolidated Tape Association Plan.

(D)—(G) No change.

(b)—(d) 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

NASD Rule 11890(a) allows designated officers of Nasdaq to declare transactions that arise out of the use or operation of Nasdaq execution or communications systems to be clearly erroneous and to nullify or modify the terms of such transactions. In SR-NASD-2004-009,<sup>8</sup> Nasdaq established a minimum price deviation threshold to provide a "bright line" rule standard for determining when transactions are considered eligible for review. A transaction price that meets these thresholds does not automatically trigger a clearly erroneous determination, but if the transaction price does not meet these thresholds the transaction will not be considered for clearly erroneous review. Thus, there is now a conclusive presumption that a transaction to buy (sell) is not clearly erroneous unless its price is greater than (less than) the best offer (best bid) by an amount that equals or exceeds the minimum threshold set forth below:

Inside price	Minimum threshold
\$0—\$0.99 .....	\$0.02 + (0.10 × Inside Price).

<sup>8</sup> See Securities Exchange Act Release No. 52141 (July 27, 2005), 70 FR 44709 (August 3, 2005) (SR-NASD-2004-009).

<sup>20</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> See Form 19b-4 dated March 13, 2006 ("Amendment No. 1"). In Amendment No. 1, Nasdaq amended its filing to indicate that Nasdaq proposes to implement the proposed rule change on March 13, 2006, rather than immediately, in the event the Commission waives the 30-day operative waiting period.

<sup>4</sup> See Form 19b-4 dated March 21, 2006 ("Amendment No. 2"). In Amendment No. 2, Nasdaq amended its proposed definition of "Nasdaq security" and "non-Nasdaq security."

<sup>5</sup> 17 CFR 240.19b-4(f)(6).

<sup>6</sup> See Amendment No. 1, *supra* note 3.

<sup>7</sup> The proposed rule change is marked to show changes from the rule as it appears in the electronic NASD Manual available at <http://www.nasdaq.com>. Prior to the date when The NASDAQ Stock Market LLC ("NASDAQ LLC") commences operations, NASDAQ LLC will file a conforming change to the rules of NASDAQ LLC approved in Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006).