

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-52342; File No. SR-NASD-2004-125)

August 26, 2005

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change and Amendment No. 1 and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 2 Regarding Procedures for Denying Listing on Nasdaq

I. Introduction

On August 18, 2004, 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”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² a proposed rule change regarding its procedures for denying listing on Nasdaq. On February 9, 2005, Nasdaq filed Amendment No. 1 to the proposed rule change. The proposed rule change, as amended, was published for comment in the Federal Register on March 4, 2005.³ The Commission received 2 comments on the proposal as amended by Amendment No. 1.⁴ On July 1, 2005, Nasdaq filed Amendment No. 2 to the proposed rule change in response to the comment letters.⁵ This order approves the proposed rule change, as amended. Simultaneously, the Commission provides notice of, and grants accelerated approval to, Amendment No. 2.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 51268 (February 28, 2005), 70 FR 10716.

⁴ See letters to Jonathan G. Katz, Secretary, Commission, from David A. Donohoe, Jr., President, Donohoe Advisory Associates LLC, dated March 25, 2005 (“Donohoe Letter”) and Lyle Roberts and H. Hubert Yang, Wilson Sonsini Goodrich & Rosati, dated April 1, 2005 (“Wilson Letter”). The letters are described in Section III, infra.

⁵ Amendment No. 2 made modifications to the rule text and the purpose section in response to comment letters.

II. Description of Proposed Rule Change

Nasdaq proposes to enhance, clarify, and increase the transparency of its procedures for denying or limiting initial or continued listing on Nasdaq. Among others, Nasdaq proposes to clarify the various decision-makers responsible for denying or limiting listing on Nasdaq, proper documentation of decisions, conducts deemed appropriate for such decision-makers, and procedural deadlines involved. Also, more specifically, Nasdaq proposes to define more clearly the decision-makers authorized to exercise discretion to grant exceptions, how exceptions are documented, and when exceptions must expire. Further, Nasdaq proposes minor miscellaneous changes to the rules.

III. Summary of Comments and Nasdaq's Response

The Commission received two comment letters on the proposed rule change.⁶ Generally, the commenters supported the proposed rule change. However, the commenters also expressed concern regarding proposed NASD Rule 4802, which provides 90 and 60-day time limits on exceptions to the listing standards granted by Nasdaq Listing Qualifications Panel ("Panel") and the Nasdaq Listing and Hearing Review Council ("Listing Council"), respectively. Furthermore, one commenter sought clarifications regarding proposed NASD IM-4803,⁷ proposed NASD Rule 4806(d), and proposed NASD Rule 4802(f).⁸

The commenters expressed concern that the time limits in proposed NASD Rule 4802 would result in an inflexible application of exceptions. One commenter argued that that the proposed 90 and 60-day time limits on exceptions to the listing standards are inconsistent with the Commission's observation in In the Matter of Tassaway, Inc. that Nasdaq's rules with respect

⁶ See supra note 4.

⁷ See Donohoe Letter at 3-4.

⁸ See Dohonoe Letter at 4.

to delisting “do not lend themselves to mechanical and inflexible administration.”⁹ Likewise, to illustrate, another commenter provided that an issuer with a viable plan to regain compliance in 91 days from a Panel Decision, rather than 90 days required in the proposal, would be automatically delisted.¹⁰

Nasdaq responded in Amendment No. 2 that it believes that strict time limits are appropriate. Nasdaq explained that the Commission also held in In the Matter of Tassaway, Inc. that prospective investors in Nasdaq securities are “entitled to assume that the securities in [Nasdaq] meet [Nasdaq’s] standards. Thus, the presence in [Nasdaq] of non-complying securities could have a serious deceptive effect.”¹¹ Nasdaq also replied that where, for example, an issuer gains compliance shortly after the expiration of a 90-day Panel exception, such issuer would have been out of compliance for an extended period of time. In Amendment No. 2, Nasdaq continued to explain that in its experience an issuer that must rely on an extended exception period in order to regain compliance with the listing standards frequently falls again out of compliance within a short period and is eventually delisted. Moreover, Nasdaq argued that investors in Nasdaq listed companies are entitled to an expectation that such companies meet the listing standards and would be permitted to remain listed under an exception for only a limited period of time. Accordingly, Nasdaq affirmed its belief that continued inclusion of non-complying companies would be inappropriate and that the proposed 90 and 60-day time limits strike a balance between flexible application of the rules and the rights and expectations of

⁹ See Donohoe Letter at 1 and 4. See Securities Exchange Act Release No. 11291 (March 13, 1975), 45 SEC 706, 6 SEC Docket 427.

¹⁰ See Wilson Letter at 2.

¹¹ See supra note 9.

prospective investors. Nasdaq also noted that delisted issuers that believe they would regain compliance in the near term are able to appeal the Panel Decision to the Listing Council.

The commenters also expressed concern that the proposed NASD Rule 4802 would not permit a Panel or Listing Council discretion to grant additional time to regain compliance where an issuer fails to meet the filing requirement contained in NASD Rule 4310(c)(14).¹² Nasdaq recognized that as a result of increased demands placed upon public companies by the Sarbanes-Oxley Act, certain issuers may face transitional difficulties complying with NASD Rule 4310(c)(14). Nevertheless, Nasdaq affirmed its belief that the imposition of the proposed time limits would not result in inequitable results. Nasdaq, however, stated that it intends to closely monitor, and propose adjustments to, the time limits applicable to exceptions to the filing requirement if such adjustments appear advisable in future.

One commenter noted that the 90-day and 60-day exception periods are based on the date of the applicable decision, which is not a fixed date.¹³ As such, the commenter expressed concern that the proposed NASD Rule 4802 “provides insufficient practical guidance to companies subject to delisting.”¹⁴ Nasdaq agreed that the exception periods are not sufficiently precise and that different non-complying issuers could remain listed for varying amounts of time, depending on the time required to schedule a hearing and to issue a decision. Consequently, in response to the commenter’s concern, Nasdaq proposed to amend the time limits for exceptions to provide that a Panel exception may not exceed the earlier of 90 days from the date of the Panel Decision or 180 days from the date of the Staff Determination with respect to the deficiency for which the exception is granted, and a Listing Council exception may not exceed the earlier of 60

¹² See Donohoe Letter at 2 and Wilson Letter at 2.

¹³ See Wilson Letter at 2.

¹⁴ Id.

days from the date of the Listing Council Decision or 180 days from the date of the Panel Decision.

Another commenter sought clarification regarding proposed NASD IM-4803.¹⁵ The commenter asked that Nasdaq clarify its position on the Panel's authority to grant exceptions to issuers seeking to demonstrate compliance with income requirement on The Nasdaq SmallCap Market or the total assets and total revenue requirement on the Nasdaq National Market.¹⁶ Nasdaq responded by affirming that Nasdaq staff would not accept a plan to regain compliance with these requirements. Nasdaq explained that each of these rules requires compliance based on a completed fiscal year and, as such, non-compliance would be determined based on an issuer's annual periodic filing. Because an issuer could regain compliance only with another annual periodic filing, such plan would always be unacceptable, because the curative filing would not be made for approximately 12 months.

One commenter requested clarification on whether an issuer that retained its Nasdaq listing, but is subject to Panel monitoring under proposed NASD Rule 4806(d) because it fell out of compliance with equity or filing continued listing requirements, would be entitled to an oral hearing in the event that the issuer fell out of compliance with the equity or filing requirement during the monitoring period.¹⁷ In response, Nasdaq proposed to amend the proposed rule change to clarify that in such situation the issuer would be provided with the opportunity for an oral hearing pursuant to the terms of NASD Rule 4805, since the issuer would have been in full compliance with applicable listing standards for a period of time. However, because the purpose of proposed NASD Rule 4806(d) is to expedite review of issuers that repeatedly fail to satisfy the

¹⁵ See Donohoe Letter at 3 and 4.

¹⁶ See Donohoe Letter at 3.

¹⁷ See Donohoe Letter at 4.

listing standards, Nasdaq also proposed to clarify that in the situation where the Panel grants an issuer an exception from continued listing standards pertaining to the shareholder equity and periodic report filing, but the Panel opts not to monitor the issuer pursuant to NASD Rule 4806(d)(2), and issuer regains compliance but falls out of compliance again within a one-year period, (i) the issuer would not be permitted to provide the Listing Department with a plan to regain compliance, if it would otherwise be permitted to do so under proposed NASD Rule 4803, (ii) the Listing Department would not be permitted to grant additional time for the issuer to regain compliance, and (iii) the Panel conducting the subsequent hearing would consider the issuer's prior non-compliance.

Further, Nasdaq proposed to give the Panel the option to monitor an issuer directly in all cases where the Panel concludes that there is a likelihood that the issuer would fail to maintain compliance with any continued listing standard in the one-year period following its decision.¹⁸ If a Panel monitors an issuer and any subsequent deficiency occurs during the monitoring period, as in the scenario above, the issuer would not be permitted to provide the Listing Department with a plan to regain compliance and the Listing Qualifications Department would be unable to grant additional time for the issuer to regain compliance. Additionally, the Panel would promptly consider this deficiency.¹⁹ Again, the issuer would be entitled to an oral hearing pursuant to the terms of NASD Rule 4805.

¹⁸ Nasdaq represented that whether or not the Panel opts to monitor an issuer, the Nasdaq Listing Qualifications Department would monitor the issuer's compliance with all Nasdaq listing standards, as it does for all Nasdaq-listed issuers.

¹⁹ A commenter also requested clarification regarding the ability of Panel and Listing Council to relist an issuer under the maintenance requirements, notwithstanding proposed NASD Rule 4802(f). See Donohoe Letter at 4. Nasdaq responded that it believes that such discretion should exist under its listing rules and intends to file a separate rule proposal in the near term that would codify the limits of discretion in this regard.

IV. Discussion

After careful review of the proposal, the comment letters, and Nasdaq's response to comments, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder.²⁰ In particular, the Commission finds that the proposed rule change, as amended, is consistent with Section 15A(b)(6) of the Act²¹ because it is designed to promote just and equitable principles of trade and, in general, to protect investors and the public interest. The Commission believes that the proposed rule change strikes a reasonable balance between Nasdaq's obligation to protect investors and their confidence in the market, with its obligation to perfect the mechanism of free and open market.

A. Review of Deficiency and Discretion to Grant Exceptions

Nasdaq's proposes certain rule changes to enhance, clarify, and increase the transparency of its procedures for denying or limiting initial or continued listing. First, Nasdaq's provides in proposed NASD Rule 4803 that in the event of an issuer's deficiency, the Listing Department would either initiate proceedings to deny or limit listing or notify the issuer of the deficiency and provide 15 days to submit a plan to regain compliance with the listing standards. Nasdaq staff would then be required to initiate proceedings to deny or limit listing or grant the issuer up to 105 days to regain compliance.²² The staff's authority to grant an exception, however, would not

²⁰ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²¹ 15 U.S.C. 78o-3(b)(6).

²² If an issuer is already the subject of a Staff Determination by the Listing Department pursuant to NASD Rule 4804, the Listing Department would not provide the issuer with the opportunity to submit a plan, nor could the staff grant an exception, with respect to a new deficiency. Rather, the new deficiency would be considered by the relevant Adjudicatory Body as provided by NASD Rule 4810(e) (redesignated as NASD Rule 4802(d)).

apply to quantitative listing standards that, by their terms, specify a period during which an issuer may seek to regain compliance before being subject to delisting²³ or to qualitative listing standards that are considered fundamental to an investor's participation in, or to Nasdaq's relationship with, the issuer.²⁴

The Commission believes that proposed NASD Rule 4803 is consistent with the Act. Specifically, the Commission believes that proposed NASD Rule 4803 clarifies and increases the transparency of the Listing Department's procedures for reviewing deficiencies. Also, the Commission believes that proposed NASD Rule 4803 provides fair procedures for issuers. The Commission notes that Nasdaq's proposal to grant issuers with up to 105 days to regain compliance is appropriate because it provides issuers additional time while not causing undue delay between the identification of deficiencies and the determination to limit or prohibit initial or continued listing. Further, by making clear which listing standards are subject to exceptions, the Commission believes that the proposal provides issuers with greater guidance regarding factors relevant to listing and delisting procedures.

The Commission believes that the proposed amendments to NASD Rule 4810 (redesignated as NASD Rule 4802) are consistent with the Act. The Commission notes that Nasdaq proposes to clarify the decision-makers authorized to exercise discretion to grant an exception to its listing standards, how the exception is documented, and when the exception must

²³ These standards include the requirements for number of market makers (NASD Rules 4310(c)(1), 4320(e)(1), and 4450(a)(6), (b)(6), and (h)(5)); market value of publicly held shares (NASD Rules 4310(c)(7) and 4450(a)(2), (b)(3), and (h)(2)); market value of listed securities (NASD Rules 4310(c)(2), 4320(e)(2), and 4450(b)(1)); and bid price (NASD Rules 4310(c)(4) and 4450(a)(5), (b)(4), and (h)(3)).

²⁴ These standards include the requirements to provide Nasdaq with responsive and accurate information (NASD Rule 4330); file periodic reports (NASD Rules 4350(b) and 4360(b)); hold annual meetings and solicit proxies (NASD Rules 4350(e) and (g) and 4360(e) and (g)); and execute a listing agreement (NASD Rules 4350(j) and 4360(h)).

expire. Pursuant to proposed NASD Rule 4810(b) (redesignated as NASD Rule 4802(b)), a Panel may grant an exception from any of the listing standards set forth in NASD Rule 4000 Series for a period not to exceed the earlier of 90 days from the date of the Panel Decision or 180 days from the date of the Staff Determination, and the Listing Council may grant an exception for a period not to exceed the earlier of 60 days from the date of the Listing Council Decision or 180 days from the date of the Panel Decision.

The Commission believes that by clarifying how exceptions are granted and for how long, the proposed rule change helps issuers better understand the factors relevant to listing and delisting procedures. The Commission agrees that the proposed rule strikes a balance between flexible application of the rules and the rights and expectations of prospective investors in Nasdaq securities. The Commission believes that Nasdaq proposed timeframes for exceptions help prevent non-complying issuers from remaining listed for an undue amount of time. Moreover, the Commission notes that Nasdaq intends to monitor the time limits applicable to exceptions as they relate to filing requirements in NASD Rule 4310(c)(14) and to propose adjustments, if advisable. Lastly, the Commission notes that Amendment No. 2 addresses the commenter's concern that the exception periods are imprecise and provide insufficient guidance to issuers (because the time periods may vary among issuers based on the scheduling of hearing dates and dates of decisions) by providing that a Panel exception would not exceed the earlier of 90 days from the date of the Panel Decision or 180 days from the date of the Staff Determination, and a Listing Council exception would not exceed the earlier of 60 days from the date of the Listing Council Decision or 180 days from the date of the Panel Decision.

The Commission believes that Nasdaq's amendment to NASD Rule 4830 is consistent with the Act. In the proposed rule change, Nasdaq proposes to amend NASD Rule 4830

(redesignated as NASD Rule 4806) to give the Panel the option to monitor an issuer for up to one year if the Panel concludes that there is a likelihood that the issuer would fail to maintain compliance with any listing standard during that period following the date it regains compliance.

The Commission expects Nasdaq to quickly institute delisting proceedings for issuers that fall below Nasdaq listing standards during the one-year period following the date such issuers regain compliance. Nasdaq, in turn, proposes that where the Panel opts to monitor an issuer, it would promptly schedule an oral hearing pursuant to the terms of NASD Rule 4805 if the issuer fails to maintain compliance with any of the listing standards. Where the Panel opts to monitor an issuer, and where an issuer is granted an exception from continued listing standards, regains compliance, and falls out of compliance again within a one-year period (i) the issuer would not be permitted to provide the Listing Department with a plan to regain compliance, if it would otherwise be permitted to do so under proposed NASD Rule 4803, (ii) the Listing Department would not be permitted to grant additional time for the issuer to regain compliance, and (iii) the Panel conducting the subsequent hearing would consider the issuer's prior non-compliance. Nasdaq represents that the Panel would opt to monitor an issuer directly in all cases where the Panel concludes that there is a likelihood that the issuer would fail to maintain compliance with any listing standard in the one-year period following its decision.

Likewise, Nasdaq proposes that if the Panel opts not to monitor an issuer and within one year the issuer again fails to maintain compliance, the Listing Department would promptly provide the issuer with a Staff Determination. Even if the Panel opts not to monitor an issuer, if the Panel grants an issuer an exception from continued listing standards pertaining to the shareholder equity or periodic report filing, and the issuer regains compliance but fails to maintain such compliance for a one-year period, the expedited delisting procedures described

above would apply. Again, such issuer would be entitled to an oral hearing pursuant to the terms of NASD Rule 4805. The Commission believes that to uphold the quality of its market, it is reasonable for Nasdaq to implement procedures that allow an expedited resolution to a repeatedly deficient issuer.

B. Exception to Shareholder Approval Requirement

The Commission believes that Nasdaq's proposal to amend NASD Rule 4350(i)(2) is consistent with the Act. The Commission believes that Nasdaq's proposal to require an independent committee approve an issuer's reliance on an exception to shareholder approval requirements, the issuance of a press release when such exception is used, and the stipulation that communications between the issuer and the Listing Qualifications Department regarding the exception must be in writing should help provide transparency to investors and reduce the potential for abuse of this exception.

C. Public Interest Authority

The Commission also finds that Nasdaq's proposal to amend NASD Rule 4300 is consistent with the Act. Nasdaq proposes in NASD Rule 4300 to clarify that the Listing Department must issue a Staff Determination under NASD Rule 4815 (redesignated as NASD Rule 4804) when Nasdaq staff exercises its authority under NASD Rule 4300 to limit or prohibit the initial or continued listing of an issuer's securities. Nasdaq also proposes to supplement the rule with interpretive material that explains, among others things, the factors used in evaluating whether the regulatory misconduct of an individual associated with an issuer should be used as a basis to deny listing. The Commission believes that these proposals may enhance the transparency of Nasdaq's procedures for denying or limiting initial or continued listing on Nasdaq.

D. Supplementing the Record

Nasdaq proposes to amend NASD Rule 4810(c) and (d) (redesignated as NASD Rule 4802(c)) to provide an Adjudicatory Body at each level of review with broad authority to supplement the record on its own motion. Nasdaq also proposes to amend NASD Rule 4875 (redesignated as NASD Rule 4812) to provide that all documents submitted to Nasdaq or NASD in connection with a NASD Rule 4800 Series proceeding shall be retained in accordance with applicable record retention policies. The ability to supplement the record with necessary information would help ensure that the Adjudicatory Body's decision is informed and appropriate. Therefore, the Commission believes that it is important that each Adjudicatory Body has the authority to supplement its record on its own motion. The Commission also believes the new NASD Rule 4812 is consistent with the Act because Nasdaq proposes to comply with the rules thereunder.²⁵

E. Procedural Deadlines

Nasdaq proposes to amend NASD Rule 4885 (redesignated NASD Rule 4814) to provide that, if notice has not been properly given or if other extenuating circumstances exist, the Nasdaq Office of General Counsel may equitably adjust the time period provided by the rules for the filing of written submissions, the scheduling of hearings, or the performance of other procedural actions by the issuer or the Adjudicatory Body. Nasdaq also proposes to amend NASD Rule 4885 to provide that an issuer may waive any notice period specified by NASD Rule 4800 Series. The Commission believes that Nasdaq's proposed amendments to NASD Rule 4885 would facilitate fairness in the listing and delisting procedures.

²⁵ See 17 CFR 240.17a-6.

F. Listing Council Subcommittees

The Commission believes that Nasdaq's proposal to amend NASD Rule 4840 (redesignated NASD Rule 4807) is consistent with the Act. Nasdaq proposes to make transparent the current practice of using subcommittees for the review of the complete written record of an appeal. The Commission believes that Nasdaq's proposal may enhance the transparency of Nasdaq's procedures for appeals. Also, in the Commission's view, the practice of a subcommittee reviewing complete written record of an appeal and recommending a disposition of the matter to the Listing Council should provide an efficient and fair framework for handling the review process.

G. Content and Approval of Decisions

Nasdaq proposes to amend NASD Rule 4870 (redesignated NASD Rule 4811) to establish explicit standards for the content of decisions by the Adjudicatory Bodies. Nasdaq also proposes to amend the rules relating to the issuance of decisions to require explicitly the documentation of affirmative approval of decisions by each Adjudicator. The Commission believes that these proposed amendments may enhance the transparency of Nasdaq's procedures for denying or limiting initial or continued listing on Nasdaq.

H. Ex Parte Communications and Recusals and Disqualifications

The Commission finds that Nasdaq's proposals regarding ex parte communications are consistent with the Act. Nasdaq proposes certain changes to NASD Rule 4890 (redesignated as NASD Rule 4815), such as requiring recusal, disqualification, or removal for Adjudicators who engaged in ex parte communications or recusal, disqualification, or personnel action for Nasdaq staff engaged in the same. Nasdaq also proposes to make its procedures for recusals more transparent by adopting proposed NASD Rule 4816. Further, Nasdaq proposes to delete NASD

Rule 4890(d), which provides that an issuer's proposal to resolve matters at issue in a Rule 4800 listing determination proceeding constitutes a waiver of any claims regarding ex parte communications. The Commission believes the proposed safeguards enhance fairness and openness in Nasdaq's delisting proceedings. The Commission also believes that deleting NASD Rule 4890(d) is reasonable because an ex parte communication does not provide a basis for denying listing to an otherwise qualified issuer. Therefore, there is no need to construe an issuer's submission of a proposal to resolve matters at issue in the Rule 4800 proceeding as a waiver of any claims that Adjudicators engaged in ex parte communications.

I. Other Changes

The Commission also believes that Nasdaq's proposal to amend NASD Rule 4803 and NASD Rule 4804 regarding disclosures to news media about the receipt of a Staff Determination appropriate because it conforms to the new Form 8-K requirements. Likewise, the Commission believes that Nasdaq's proposal to amend NASD Rule 4830(d) (redesignated NASD Rule 4806(c)) consistent with the Act. The Commission believes that Nasdaq's clarification that a second Panel convened after the first fails to reach a unanimous decision may act through a majority of the Panel increases the transparency of procedures for denying or limiting initial or continued listing on Nasdaq.

V. Accelerated Approval of Amendment No. 2

The Commission finds good cause for approving the proposed Amendment No. 2 before the thirtieth day of publication of notice of filing thereof in the Federal Register. Nasdaq filed Amendment No. 2 in response to comments received after the publication of notice of filing of the proposed rule change, as amended, to address the commenters' concerns and to make several technical corrections to the proposed rule language. Specifically, Amendment No. 2 proposed to

amend the time limits for exceptions to provide that a Panel exception may not exceed the earlier of 90 days from the date of the Panel Decision or 180 days from the date of the Staff Determination, and a Listing Council exception may not exceed the earlier of 60 days from the date of the Listing Council Decision or 180 days from the date of the Panel Decision. Further, Amendment No. 2 proposed to give the Panel the option to monitor an issuer directly in all cases where the Panel concludes there is a likelihood that the issuer would fail to maintain compliance with any listing standard in the one-year period following its decision. In the case of such monitoring, Amendment No. 2 provides that where an issuer is granted an exception from continued listing standards, regains compliance, and falls out of compliance again within a one-year period (i) the issuer would not be permitted to provide the Listing Department with a plan to regain compliance, if it would otherwise be permitted to do so under proposed NASD Rule 4803, (ii) the Listing Department would not be permitted to grant additional time for the issuer to regain compliance, and (iii) the Panel conducting the subsequent hearing would consider the issuer's prior non-compliance. Similar expedited procedures would apply to an issuer that repeatedly falls below compliance with stockholder equity and periodic filing requirements, even if the Panel opts not to monitor the issuer. As mentioned above, Amendment No. 2 also proposed to make certain technical corrections to the proposed rule language.

The Commission believes that Nasdaq's proposed changes in Amendment No. 2 strengthen and clarify the proposed rule change in direct response to issues raised by commenters and raise no new regulatory issues. Based on the above, the Commission finds good cause for accelerating approval of Amendment No. 2.²⁶

²⁶ The Commission further notes that both the rule filing and the amendments thereto have been available since their respective filing dates on NASD's Web site (<http://www.nasd.com>).

VI. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 2, including whether the amendment 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. Please include File Number SR-NASD-2004-125 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File No. SR-NASD-2004-125. 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 amendment that are filed with the Commission, and all written communications relating to the amendment 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 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-2004-125 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

VII. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁷ that the proposed rule change, as amended, (SR-NASD-2004-125) is approved, and that Amendment No. 2 to the proposed rule change be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁸

Margaret H. McFarland
Deputy Secretary

²⁷ 15 U.S.C. 78s(b)(2).

²⁸ 17 CFR 200.30-3(a)(12).