

**SECURITIES AND EXCHANGE COMMISSION**  
**(Release No. 34-53546; File No. SR-NASD-2005-067)**

**March 24, 2006**

**Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment Nos. 1, 2, and 3 Thereto Relating to Amendments to NASD Rule 6530 to Clarify the Review Process for OTCBB Eligibility Determinations and to Implement Fees for Such Review**

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 May 24, 2005, 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” or “SEC”) a proposed rule change to amend NASD Rules 6530 and 7010 to clarify the availability of a process to review eligibility determinations under NASD Rule 6530 and to adopt service-based fees for Over-the-Counter Bulletin Board (“OTCBB”) issuers. On September 27, 2005, Nasdaq filed with the Commission Amendment No. 1 to the proposed rule change to remove the record-keeping fee proposed in NASD Rule 7010. On October 1, 2005, the Commission approved a separate proposed rule change in which NASD amended its Plan of Allocation and Delegation of Functions by NASD to Subsidiaries, as well as certain corresponding NASD rules, to permit NASD to assume direct authority for over-the-counter (“OTC”) equity operations, including the OTCBB, rather than continuing to delegate this authority to Nasdaq.<sup>3</sup> As such, NASD assumed direct authority for OTC equities operations, including operation of the OTCBB (quotation and trade reporting platform and other services), trade reporting for other non-OTCBB OTC equity

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

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

<sup>3</sup> See Securities Exchange Act Release No. 52508 (September 26, 2005), 70 FR 57346 (September 30, 2005) (SR-NASD-2005-089). Nasdaq, however, will continue to furnish the OTCBB quotation and trade reporting platform and certain other services that it provided with respect to over-the-counter equity operations.

securities and other services, and related rulemaking functions. On December 8, 2005, NASD filed with the Commission Amendment No. 2 to the proposed rule change to reflect NASD's authority for the OTCBB and to make certain clarifying changes. On February 23, 2006, NASD filed with the Commission Amendment No. 3 to the proposed rule change to clarify eligibility for the hearing process set forth in proposed NASD Rule 6530(f) for those securities of an OTCBB issuer subject to removal from the OTCBB under NASD Rule 6530(e)(1),<sup>4</sup> and to make clarifying changes relating to the application of the NASD Rule 9700 Series, as described in Items I, II, and III below, which Items have been prepared by NASD.<sup>5</sup> 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**

NASD is proposing to amend NASD Rule 6530 to clarify the availability of a process to review eligibility determinations with respect to OTCBB securities and to implement fees for such review. Below is the text of the proposed rule change, as amended. Proposed new language is underlined; proposed deletions are in [brackets].

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<sup>4</sup> Pursuant to NASD Rule 6530(e), the securities of those OTCBB issuers (1) that are delinquent in a required filing three times in a two-year period and (2) those that are removed from the OTCBB for failure to file two times in a two-year period, are ineligible for quotation on the OTCBB. Following removal under NASD Rule 6530(e), an issuer's security would not be eligible for re-inclusion unless the issuer has timely filed in complete form all required annual and quarterly reports for a one-year period. See Securities Exchange Act Release No. 52786 (November 16, 2005), 70 FR 70907 (November 23, 2005) (SR-NASD-2005-011). See also *infra* note 14.

<sup>5</sup> Amendment No. 3 replaced and superseded the prior filings for this proposed rule change in their entirety.

### **6530. OTCBB-Eligible Securities**

A Member shall be permitted to quote the following categories of securities in the Service:

(a) through (d) No change.

(e) Notwithstanding the foregoing paragraphs, a member shall not be permitted to quote a security if:

(1) and (2) No change.

If an issuer's security becomes ineligible for quotation on the OTCBB pursuant to paragraph (e)(1) above, the security will be removed from quotation on the OTCBB without the benefit of any grace period for the third delinquency, except that NASD will provide seven calendar days from the date notification is mailed to the issuer pursuant to paragraph (f)(1) to permit an aggrieved party to request a review of the determination by a hearing panel pursuant to paragraph (f) below. Following the removal of an issuer's security[securities] pursuant to this paragraph (e), such security[securities] shall not be eligible for quotation until the issuer has timely filed in a complete form all required annual and quarterly reports due in a one-year period. For purposes of this paragraph, a report filed within any applicable extensions permitted by [SEC] Rule 12b-25 under the Exchange Act will be considered timely filed. Furthermore, filings for reporting periods ending before October 1, 2005 will not be considered for purposes of this paragraph (e).

(f) (1) Upon determining that an issuer's security would be ineligible for quotation under this rule, NASD will send a notification to the address on the cover of the issuer's last periodic report. This notification will state the date upon which the security will be removed, following any applicable grace period, unless the condition causing the

ineligibility has been cured by that date. When a security becomes ineligible for quotation pursuant to paragraph (e) above, however, the issuer may not cure the condition that caused the ineligibility. In all cases, NASD will provide at least seven calendar days from the date the notification is mailed to the issuer to permit an aggrieved party to request review pursuant to paragraph (f)(2) below, before removal of the security.

(2) Pursuant to the Rule 9700 Series, as modified herein, an aggrieved party may request a review by a hearing panel of the determination that an issuer's security is ineligible for quotation under this rule. NASD must receive the request for review at least two business days prior to the scheduled removal of the security, together with a \$4,000 hearing fee payable to NASD to cover the cost of review. A request for review under this paragraph (f)(2) will stay the removal of the issuer's security from the Service until the hearing panel issues a decision under Rule 9750. The hearing panel will consider only the issues of whether the issuer's security is then eligible for quotation in the Service and/or whether the issuer filed a complete report by the applicable due date taking into account any extensions pursuant to Rule 12b-25 under the Exchange Act. The hearing panel shall not have discretion to grant any extensions of time for ineligible securities to become eligible. Notwithstanding any contrary provision in the Rule 9700 Series, hearings will be conducted via telephone and NASD will provide the aggrieved party at least five business days notice of the hearing unless the aggrieved party waives such notice.

(3) The aggrieved party may request a review of a hearing panel's decision under Rule 9760. Such a request for review must be accompanied by a \$4,000 fee payable to NASD to cover the cost of review. This review will only consider whether the issuer's

security, at the time of the initial review under paragraph (f)(2), was eligible for quotation in the Service and/or whether the issuer filed a complete report by the applicable due date taking into account any extensions pursuant to Rule 12b-25 under the Exchange Act. A request for review under this paragraph (f)(3) shall not stay the removal of the issuer's security from the Service and there will be no discretion to grant extensions of time for ineligible securities to become eligible. Notwithstanding any contrary provision in the Rule 9700 Series, a review under this paragraph (f)(3) will be based on the written record, unless additional hearings are ordered. If any further hearings are ordered, the hearings will be conducted via telephone and NASD will provide the aggrieved party at least five business days notice of the hearing unless the aggrieved party waives such notice.

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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, 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, Nasdaq and NASD adopted amendments to NASD Rules 6530 and 6540 that require all issuers of securities quoted on the OTCBB to be current in their filings with

the Commission or other appropriate regulator (the “Eligibility Rule”).<sup>6</sup> When an OTCBB issuer does not comply with the Eligibility Rule, either because a filing is not made or because a filing is incomplete,<sup>7</sup> a fifth character “E” is appended to the trading symbol of that issuer’s security.<sup>8</sup> This identifier notifies investors and other market participants that NASD does not have information that the issuer is current in its reporting obligations. If the issuer does not comply within the applicable grace period provided by the Eligibility Rule (typically 30 days), the issuer’s security is removed from the OTCBB.<sup>9</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 an issuer that is repeatedly late or otherwise delinquent in filing periodic reports.<sup>10</sup> Specifically, NASD Rule 6530(e) provides that OTCBB issuers that file late with the Commission or other respective regulator, even if within the grace period allowed by NASD Rule 6530, three times in a two-year period and those that have been removed from the OTCBB for failure to file two times in a two-year

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<sup>6</sup> See Securities Exchange Act Release No. 40878 (January 4, 1999), 64 FR 1255 (January 8, 1999) (SR-NASD-98-51).

<sup>7</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, e.g., 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>8</sup> To the extent an issuer has multiple classes of securities quoted on the OTCBB, when an issuer becomes delinquent with respect to its reporting requirements under NASD Rule 6530, all of that issuer’s securities become ineligible for quotation on the OTCBB.

<sup>9</sup> The Eligibility Rule provides a 60-day grace period to banks, savings associations and insurance companies that do not file with the Commission, but are required to file with other regulators. NASD has filed a separate proposed rule change with the Commission, which became effective upon filing, to amend NASD Rule 6530 to clarify the removal process and grace periods contained in that rule. See File No. SR-NASD-2006-029.

<sup>10</sup> See Securities Exchange Act Release No. 52786 (November 16, 2005), 70 FR 70907 (November 23, 2005) (SR-NASD-2005-011).

period, are ineligible for quotation on the OTCBB by an NASD member until such time as the issuer has timely filed complete required periodic reports for a one-year period.<sup>11</sup>

Since late 2000, a party aggrieved by a determination relating to the OTCBB (“aggrieved party”) has been able to request a review of a determination under the Eligibility Rule by a hearing panel pursuant to the NASD Rule 9700 Series.<sup>12</sup> The proposed rule change would provide transparency to the availability and scope of such review and impose a fee for such review.<sup>13</sup> Specifically, under the proposed rule change, upon determining that an issuer’s security would be ineligible for quotation under NASD Rule 6530, NASD would send a notice to the address appearing on the issuer’s most recent periodic report at least seven calendar days prior to the removal, even if there is no applicable grace period.<sup>14</sup> The notice would indicate the removal date for the issuer’s security after any applicable grace period, unless the condition causing the ineligibility has been cured by the expiration of any applicable grace period.<sup>15</sup>

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<sup>11</sup> This provision of NASD Rule 6530 applies to filings for reporting periods ending on and after October 1, 2005.

<sup>12</sup> See, e.g., High Speed Net Solutions, Inc., Securities Exchange Act Release No. 43434 (October 12, 2000); Palmworks, Inc., Securities Exchange Act Release No. 43423 (October 6, 2000); JD American Workwear, Inc., Securities Exchange Act Release No. 43295 (September 15, 2000).

<sup>13</sup> Under proposed NASD Rule 6530(f)(2), the hearings would be conducted via telephone.

<sup>14</sup> Under NASD Rule 6530(e), the securities of an issuer are removed from the OTCBB the third time that the issuer fails to file by the due date (including, if applicable, any extension permitted by Rule 12b-25 of the Exchange Act) in a two-year period, without the benefit of the grace period for the third delinquency. Prior to removal from the OTCBB, however, NASD provides seven calendar days to allow an aggrieved party to request a review of such determination by a hearing panel. As such, where an issuer’s security will be removed for failure to file by the due date for the third time in a two-year period, NASD provides seven calendar days (not the 30 or 60 day grace period provided in NASD Rule 6530(a)) to allow an aggrieved party time to request a hearing. See Securities Exchange Act Release No. 52786 (November 16, 2005), 70 FR 70907 (November 23, 2005) (SR-NASD-2005-011). NASD is proposing to amend NASD Rule 6530(e) and (f) to codify this procedural framework.

<sup>15</sup> See Telephone conversation between Richard Holley III, Special Counsel, Division of Market Regulation, Commission, and Andrea Orr, Assistant General Counsel, NASD, on March 23, 2006. If an issuer’s security becomes ineligible for failure to file by the due date for the third time in a two-year period, such issuer will not be able to cure the condition causing the

In addition, the proposed rule change advises aggrieved parties of their right to request a review of the determination by a hearing panel, pursuant to the procedures in the NASD Rule 9700 Series as modified by the proposed rule change, and implements a \$4000 fee for such review. The proposed rule specifies that the hearing panels can determine whether the issuer's security is eligible for continued quotation and/or whether the issuer filed a complete report by the applicable due date taking into account any extensions pursuant to Rule 12b-25 under the Exchange Act. The hearing panels do not have the discretion to grant any extensions of time for ineligible securities to become eligible for quotation on the OTCBB.<sup>16</sup> NASD believes that this lack of discretion is appropriate given the 30 or 60-day grace period that is already built into the rule. The proposed rule change notes that the request for review will stay the securities' removal until the panel makes its determination.

The proposed rule change also advises aggrieved parties of their right to request a review of the hearing panel decision, pursuant to NASD Rule 9760, and implements a \$4000 fee for such review. The proposed rule change indicates that the review of the hearing panel decision is limited to whether the issuer's security, at the time of the initial review by the hearing panel, was eligible for quotation on the OTCBB and/or whether the issuer filed a complete report by the applicable due date taking into account any extensions pursuant to Rule 12b-25 under the Exchange Act. There is no discretion to grant any extensions of time for ineligible securities to

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ineligibility. See Securities Exchange Act Release No. 52786 (November 16, 2005), 70 FR 70907 (November 23, 2005) (SR-NASD-2005-011).

<sup>16</sup> If a valid filing is made before the hearing panel's decision is issued, the issuer would not be rendered ineligible for further quotation on the OTCBB. However, if a security becomes ineligible for quotation pursuant to NASD 6530(e)(1), the issuer may not cure the condition that caused the ineligibility. See supra note 15.

become eligible for quotation on the OTCBB. The proposed rule change notes that the request for review of the hearing panel decision will not stay the security's removal.<sup>17</sup>

Unlike the NASD Rule 4800 Series that governs hearings for Nasdaq-listed securities, the NASD Rule 9700 Series currently does not provide for a fee to offset the costs to conduct these hearings.<sup>18</sup> Given the increasing number of these hearings,<sup>19</sup> NASD believes it is appropriate to adopt a fee to offset the associated costs. Specifically, NASD proposes to adopt a \$4,000 fee for aggrieved parties requesting review by a hearing panel. In addition, aggrieved parties that seek review of the hearing panel's decision would also be subject to an additional \$4,000 fee.

The proposed rule change will be effective immediately upon Commission approval.

## **2. Statutory Basis**

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Act, which requires, among other things, that NASD rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that NASD operates or controls. NASD also 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

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<sup>17</sup> The proposed rule change further notes that review of the hearing panel decision will be based on the written record, unless further hearings are ordered. If further hearings are ordered, they will be conducted via telephone.

<sup>18</sup> See, e.g., NASD Rule 4805(c), which requires Nasdaq-listed issuers to submit a \$4,000 fee for a written hearing and a \$5,000 fee for an oral hearing, to cover the cost of holding the hearing, and NASD Rule 4807(a), which requires Nasdaq-listed issuers to submit a fee of \$4,000 to cover the cost of review by the Nasdaq Listing and Hearing Review Council. See also Sections 1203 and 1205 of the American Stock Exchange's Company Guide, which impose similar fees, and Section 804.00 of the New York Stock Exchange's Listed Company Manual, which requires an issuer to submit a \$20,000 fee to request review of a delisting decision by the NYSE staff.

<sup>19</sup> In 2003, 14 hearing requests were received from OTCBB issuers. By contrast, in 2004, 53 hearing requests were received from OTCBB issuers and, in 2005, 124 such requests were received.

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 the OTCBB eligibility review process and will impose certain fees associated therewith to compensate NASD for the costs of conducting eligibility review hearings.

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

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

**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**

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve such proposed rule change, as amended, or

(B) institute proceedings to determine whether the proposed rule change, as amended, should be disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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-2005-067 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-2005-067. 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 File Number SR-NASD-2005-067 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

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

Nancy M. Morris  
Secretary

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<sup>20</sup> 17 CFR 200.30-3(a)(12).