

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-50541; File No. SR-NASD-2004-147)

October 14, 2004

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change to Bid Price Compliance Periods and Market Value of Publicly Held Shares Requirements

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 October 1, 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”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. 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

Nasdaq proposes to modify the bid price compliance periods on the Nasdaq National Market and the Nasdaq SmallCap Market and to require non-Canadian foreign issuers to satisfy the minimum bid price and market value of publicly held shares requirements applicable to domestic issuers for continued listing on the Nasdaq SmallCap Market.

Nasdaq will implement the proposed rule change relating to compliance periods effective January 1, 2005, upon expiration of the existing pilot rules. Nasdaq will implement the proposed rule change relating to continued listing requirements for bid price and market value of listed securities for non-U.S. issuers effective 18 months after approval by the Commission.

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

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

The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets.<sup>3</sup>

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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 will satisfy all applicable requirements contained in paragraphs (a) or (b), and (c) hereof.

(a) No change.

(b) No change.

(c) In addition to the requirements contained in paragraph (a) or (b) above, and unless otherwise indicated, a security will 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

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<sup>3</sup> Pending filing SR-NASD-2004-125 would renumber and modify the text of NASD Rule 4820. Nasdaq has represented that it would make a technical correction to this filing if and when the Commission approves SR-NASD-2004-125. No other pending rule filings would affect the portions of the rules amended herein.

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 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.] Compliance can be achieved during any compliance period by meeting the applicable standard for a minimum of 10 consecutive business days.

(E) No change.

(9) – (29) No change.

(d) No change.

#### **4320. Qualification Requirements for Non-Canadian Foreign Securities and American Depositary Receipts**

To qualify for inclusion in Nasdaq, a security of a non-Canadian foreign issuer, an American Depositary Receipt (ADR) or similar security issued in respect of a security of a foreign issuer shall satisfy the requirements of paragraphs (a), (b) or (c), and (d) and (e) of this Rule.

(a) – (d) No change.

(e) In addition to the requirements contained in paragraphs (a), (b) or (c), and (d), the security shall satisfy the criteria set out in this subsection for inclusion in Nasdaq. In the case of ADRs, the underlying security will be considered when determining the ADR's qualification for initial or continued inclusion on Nasdaq.

(1) No change.

(2)(A) For initial inclusion, [the issue shall have a minimum bid price of \$4 and]the issuer shall have:

(i) – (iii) No change.

(B) – (D) No change.

(E) (i) For initial inclusion, common stock, preferred stock and secondary classes of common stock, or their equivalents, shall have a minimum bid price of \$4 per share. For continued inclusion, the minimum bid price per share shall be \$1.

(ii) 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 4320(e) (except for the bid price requirement set forth in Rule 4320(e)(2)(E)(i)) 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. Compliance can be achieved during any compliance period by meeting the applicable standard for a minimum of 10 consecutive business days.

(iii) Nasdaq may, in its discretion, require an issuer to maintain a bid price of at least \$1.00 per share for a period in excess of ten consecutive business days, but generally no more than 20 consecutive business days, before determining that the issuer has demonstrated an ability to maintain long-term compliance. In determining whether to monitor bid price beyond ten business days, Nasdaq will consider the following four factors: (i) margin of compliance (the amount by which the price is above the \$1.00 minimum standard); (ii) trading volume (a lack of trading volume may indicate a lack of bona fide market interest in the security at the posted bid price); (iii) the market maker montage (the number of market makers quoting at or above \$1.00 and the size of their quotes); and, (iv) the trend of the stock price (is it up or down).

(3) – (4) No change.

(5) There shall be at least 1,000,000 publicly held shares for initial inclusion and 500,000 publicly held shares for continued inclusion. For initial inclusion, such shares shall have a market value of at least \$5 million. For continued inclusion, such shares shall have a market value of at least \$1 million. In the case of preferred stock and secondary classes of common stock, there shall be at least 200,000 publicly held shares having a market value of at least \$2 million for initial inclusion and 100,000 publicly held shares having a market value of \$500,000 for continued inclusion. In addition, the issuer's common stock or common stock equivalent security must be traded on either Nasdaq or a national securities exchange. In the event the issuer's common stock or common stock equivalent security is not traded on either Nasdaq or a national securities exchange, the preferred stock and/or secondary class of common stock may be included in Nasdaq so long as the security satisfies the listing criteria for common stock. Shares held directly or indirectly by any officer or director of the issuer and by any person who is the beneficial owner of more than 10 percent of the total shares outstanding are not considered to be publicly held.

(6) – (25) No change.

(f) No change.

#### **4450. Quantitative Maintenance Criteria**

After designation as a Nasdaq National Market security, a security must substantially meet the criteria set forth in paragraphs (a) or (b), and (c), (d), (e), (f), (g), (h) or (i) below to continue to be designated as a national market system security. A security maintaining its designation under paragraph (b) need not also be in compliance with the quantitative maintenance criteria in the Rule 4300 series.

(a) – (d) No change.

(e) Compliance Periods

(1) No change.

(2) A failure to meet the continued inclusion requirement for minimum bid price 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 following the notification of the deficiency, the issuer demonstrates that it meets the criteria for initial inclusion set forth in Rule 4420 (except for the bid price requirement set forth in Rule 4420(a)(4), (b)(4) or (c)(3)) 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 the issuer has not been deemed in compliance 45 calendar days before the expiration of the second 180 day compliance period, the Listing Qualifications Department shall issue a letter (the "Staff Warning Letter"), notifying the issuer of its non-compliance, the pending expiration of the compliance period, and its right to request a hearing. The issuer must request a hearing within seven calendar days of the date of the Staff Warning Letter in order to preserve its right to review pursuant to Rule 4820. If the issuer requests a hearing, the hearing shall be scheduled for a date promptly following the expiration of the compliance period. If the issuer fails to request a hearing and does not regain compliance prior to the expiration of the compliance period, it shall

be delisted immediately following the compliance period with no further opportunity for a hearing.] Compliance can be achieved during any compliance period by meeting the applicable standard for a minimum of 10 consecutive business days [during the applicable compliance period].

Nasdaq may, in its discretion, require an issuer to maintain a bid price of at least \$1.00 per share for a period in excess of ten consecutive business days, but generally no more than 20 consecutive business days, before determining that the issuer has demonstrated an ability to maintain long-term compliance. In determining whether to monitor bid price beyond ten business days, Nasdaq shall consider the following four factors: (i) margin of compliance (the amount by which the price is above the \$1.00 minimum standard); (ii) trading volume (a lack of trading volume may indicate a lack of bona fide market interest in the security at the posted bid price); (iii) the market maker montage (the number of market makers quoting at or above \$1.00 and the size of their quotes); and, (iv) the trend of the stock price (is it up or down).

(3) – (4) No change.

(f) – (h) No change.

(i) Transfers between The Nasdaq National and SmallCap Markets For Bid Price Deficient Issuers

(1) If a National Market issuer has not been deemed in compliance prior to the expiration of [a] the compliance period for bid price provided in Rule 4450(e)(2), it may transfer to The Nasdaq SmallCap Market, provided that it meets all applicable requirements for continued inclusion on the SmallCap Market set forth in Rule 4310(c) [(other than the minimum bid price requirement of Rule 4310(c)(4))] or Rule 4320(e), as applicable, other than the minimum bid price requirement. A Nasdaq National Market issuer transferring to The Nasdaq SmallCap



Market must pay the entry fee set forth in Rule 4520(a). The issuer may also request a hearing to remain on The Nasdaq National Market pursuant to the Rule 4800 Series.

(2) Following a transfer to The Nasdaq SmallCap Market pursuant to paragraph (1), a [domestic or Canadian] Nasdaq National Market issuer will be afforded the remainder of any compliance period set forth in Rule 4310(c)(8)(D) or Rule 4320(e)(2)(E)(ii) as if the issuer had been listed on The Nasdaq SmallCap Market. The compliance periods afforded by this rule and any time spent in the hearing process will be deducted in determining the length of the remaining applicable compliance periods on The Nasdaq SmallCap Market.

#### **4820. Request for Hearing**

(a) An issuer may, within seven calendar days of [the earlier of] the date of the Staff Determination [or the Staff Warning Letter referenced in Rule 4450(e)], request either a written or oral hearing to review the Staff Determination. Requests for hearings should be filed with The Nasdaq Office of Listing Qualifications Hearings (the "Hearings Department"). A request for a hearing shall stay the delisting action pending the issuance of a written determination by a Listing Qualifications Panel. If no hearing is requested within the seven calendar day period, the right to request review is waived, and the Staff Determination shall take immediate effect. All hearings shall be held before a Listing Qualifications Panel as described in Rule 4830. All hearings shall be scheduled, to the extent practicable, within 45 days of the date that the request for hearing is filed, at a location determined by the Hearings Department. The Hearings Department shall make an acknowledgment of the issuer's hearing request stating the date, time and location of the hearing, and the deadline for written submissions to the Listing Qualifications Panel. The issuer shall be provided at least 10 calendar days notice of the hearing unless the issuer waives such notice.

(b) – (c) No change.

## **IM-4350-1. Interpretive Material Regarding Future Priced Securities**

### **Summary**

No change.

### **How the Rules Apply**

#### *Shareholder Approval*

No change.

#### *Voting Rights*

No change.

#### *The Bid Price Requirement*

The bid price requirement establishes a minimum bid price for issues trading on Nasdaq. NASD Rules 4310(c)(4), [and] 4320(e)(2)(E), 4450(a)(5) and 4450(b)(4) provide that, for an issue to be eligible for continued inclusion on The Nasdaq Stock Market, the minimum bid price per share shall be \$1. An issue is subject to delisting from Nasdaq if its bid price falls below \$1.

[In addition, Rule 4450(b)(4), which applies only to issues qualifying for the Nasdaq National Market under maintenance standard 2, provides that for an issue to remain eligible for continued inclusion in the Nasdaq National Market, the minimum bid price shall be \$5.]

[The bid price requirement establishes a minimum bid price for issues trading on Nasdaq. An issue is subject to delisting from Nasdaq if its bid price falls below \$1. In addition, certain issues are subject to delisting from the Nasdaq National Market if their bid price falls below \$5.]

The bid price rules must be thoroughly considered because the characteristics of Future Priced Securities often exert downward pressure on the bid price of the issuer's common stock. Specifically, dilution from the discounted conversion of the Future Priced Security may result in

a significant decline in the price of the common stock. Furthermore, there appear to be instances where short selling has contributed to a substantial price decline, which, in turn, could lead to a failure to comply with the bid price requirement.\*\*\*

*Listing of Additional Shares*

No change.

*Public Interest Concerns*

No change.

*Reverse Merger*

No change.

Footnote to IM-4350-1:

\*\*\* If used to manipulate the price of the stock, short selling by the holders of the Future Priced Security is prohibited by the antifraud provisions of the securities laws and by NASD Rules and may be prohibited by the terms of the placement.

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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

Nasdaq rules relating to the minimum bid price requirement were approved on a pilot basis by the Commission in February 2002 and modified in March and December 2003.<sup>4</sup> These rules, which expire on December 31, 2004, provide 180 calendar days for a National Market issuer to regain compliance. Upon the expiration of the first 180 calendar days, an issuer able to satisfy all initial listing criteria is eligible for an additional grace period, also on the National Market, of another 180 calendar days. Thereafter, a National Market issuer is also eligible to phase-down to the SmallCap Market to take advantage of the extended bid price grace period on that market if it meets all SmallCap initial listing criteria except for bid price. If a National Market issuer is not in compliance 45 days prior to the expiration of its second grace period, Nasdaq sends a warning letter to the issuer and the issuer must request a hearing at that time, if one is desired.

Similarly, the current pilot provides 180 calendar days for a SmallCap Market issuer to regain compliance. Upon the expiration of the first 180-day grace period, an issuer satisfying all initial listing criteria is eligible for an additional grace period of 180 days. Thereafter, an issuer can receive a third grace period, up to the time of its next shareholders meeting (but not more than two years from the original notice of deficiency), if the issuer agrees to seek shareholder

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<sup>4</sup> See Securities Exchange Act Release No. 45387 (February 4, 2002), 67 FR 6306 (February 11, 2002) (SR-NASD-2002-13); Securities Exchange Act Release No. 47482 (March 11, 2003), 68 FR 12729 (March 17, 2003) (SR-NASD-2003-34); and Securities Exchange Act Release No. 48991 (December 23, 2003), 68 FR 75677 (December 31, 2003) (SR-NASD-2003-44), amended by Securities Exchange Act Release No. 48991A (February 5, 2004), 69 FR 6707 (February 11, 2004) (SR-NASD-2003-44).

approval for a reverse stock split at that meeting and to implement the reverse stock split promptly afterward.

Having reviewed its experiences under the pilot program, Nasdaq now proposes to modify the pilot rules and seek permanent approval of the revised rules. Nasdaq believes the time frames contained in the proposed rule, while shorter than those of the pilot rule, would allow sufficient time for issuers to execute a plan to regain compliance with the bid price rules. Nasdaq further believes that the proposed rule will simplify the administration of bid price deficiencies.

The proposed rules would provide a SmallCap Market issuer with an initial 180-calendar-day period to regain compliance. Thereafter, the issuer could receive an additional 180-day grace period if it complied with all initial inclusion requirements except bid price. A National Market issuer would be provided 180 days to regain compliance on the National Market, after which it could transfer to the SmallCap Market if it complied with all SmallCap initial inclusion requirements except for bid price.

An issuer in a compliance period under the pilot rules at the time the proposed rules are effective would get to finish that period, but must thereafter satisfy the proposed rules. Thus, for example, on January 1, 2005, when the proposed rules would be effective, a Nasdaq National Market issuer that is on day 120 of its second 180-day compliance period under the pilot program would be entitled to remain on the National Market for an additional 60 days to complete that compliance period; however, at the end of that period, the issuer would not be entitled to any additional time to regain compliance, nor would it be eligible to transfer to the Nasdaq SmallCap Market because the issuer would have been below the bid price requirement for a longer period than permitted under the proposed rules. The following chart provides further

examples of what would happen to issuers in compliance periods under the pilot rules on January 1, 2005:

<b>Market as of January 1, 2005</b>	<b>Status as of January 1, 2005</b>	<b>Action at end of compliance period, if still below \$1.00</b>
National Market	In 1 <sup>st</sup> 180-day compliance period	Transfer to SmallCap Market pursuant to proposed rules, if eligible, or subject to delisting if not eligible for transfer
National Market	In 2 <sup>nd</sup> 180-day compliance period	Subject to delisting at end of period <sup>5</sup>
SmallCap Market	In 1 <sup>st</sup> 180-day compliance period	Eligible for 2 <sup>nd</sup> 180-day compliance period pursuant to proposed rules
SmallCap Market	In 2 <sup>nd</sup> 180-day compliance period	Subject to delisting at end of period <sup>6</sup>
SmallCap Market	In 3 <sup>rd</sup> compliance period (until next shareholder meeting or two years from deficiency notification)	Subject to delisting at end of period

Finally, Nasdaq proposes to amend NASD Rule 4320 to require non-Canadian foreign issuers to satisfy the minimum bid price and market value of publicly held shares requirements applicable to domestic issuers for continued listing on the Nasdaq SmallCap Market.<sup>7</sup> Currently

<sup>5</sup> A Nasdaq National Market issuer that would be subject to delisting at the end of its current compliance period would be permitted to request a hearing to review that delisting decision even if it did not request such a hearing 45-days prior to the end of its compliance period as required by current NASD Rule 4450(e)(2). Nasdaq believes that this is appropriate as such an issuer may have failed to request a hearing because it believed it would be entitled to transfer to the SmallCap Market to obtain additional time under the pilot rules.

<sup>6</sup> Pursuant to the proposed NASD Rule 4820, upon the Staff Determination of the delisting, any issuer may request either a written or oral hearing to review the Staff Determination. Telephone discussion between Arnold Golub, Office of General Counsel, Nasdaq, and Geoffrey Pemble, Special Counsel, Division of Market Regulation (“Division”), Commission, and Natasha Cowen, Attorney, Division, Commission (October 7, 2004).

<sup>7</sup> A rule change to impose these requirements for initial listing by non-U.S. issuers was approved in September 2004. See Securities Exchange Act Release No. 50458

no such requirements apply to SmallCap Market issuers. In order to allow these issuers sufficient time to take appropriate action to achieve compliance, if necessary, Nasdaq proposes that this requirement be effective 18 months after approval by the Commission.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act<sup>8</sup> in general and with Section 15A(b)(6) of the Act<sup>9</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market, and to protect investors and the public interest. Specifically, the proposed change to the bid price compliance periods would simplify the application of Nasdaq's rules and enhance transparency as to the application of those rules. Further, Nasdaq believes that the proposal to adopt continued listing requirements for bid price and market value of publicly held shares for non-Canadian foreign issuers listed on the SmallCap Market will protect investors and the public interest.

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

Nasdaq does not believe that the proposed rule change would 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.

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(September 28, 2004), 69 FR 59286 (October 4, 2004). Under this change, all non-U.S. issuers are required to meet the same initial inclusion bid price and market value of publicly held shares requirements as domestic and Canadian issuers. Nasdaq believes that these requirements provide important protections to investors, regardless of where the issuer is located.

<sup>8</sup> 15 U.S.C. 78o-3.

<sup>9</sup> 15 U.S.C. 78o-3(b)(6).

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; or
- (B) institute proceedings to determine whether the proposed rule change 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 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-2004-147 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-NASD-2004-147. 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 Section, 450 Fifth Street, NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the 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-2004-147 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>10</sup>

Margaret H. McFarland  
Deputy Secretary

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