

issuer, but rather, that the SMMP is aware of, or capable of making itself aware, and can independently understand the significance of, the material facts available from established industry sources. The interpretive notice recognizes that there "may be times when an SMMP is not satisfied that the information available from established industry sources is sufficient to allow it to make an informed investment decision. However, in those circumstances, the MSRB believes that an SMMP can recognize that risk and take appropriate action, be it declining to transact, undertaking additional investigation, or asking the dealer to acquire additional information."

The MSRB understands that the ICI and NFMA believe that SMMPs generally obtain information about exempt securities through dealers.<sup>77</sup> However, the MSRB is concerned that the commentators may be confusing the role of a dealer effecting primary market transactions for SMMPs, with a dealer that is acting as an order taker effecting non-recommended secondary market transactions for an SMMP. While a dealer acting on behalf of an issuer may have more information about a municipal security than an SMMP, there is no reason to assume that a dealer effecting a non-recommended secondary market transaction would have the same informational advantage.<sup>78</sup> Nonetheless, the SMMP interpretation states that "if material information is not accessible to the market but known to the dealer and not disclosed, the dealer may be found to have engaged in an unfair practice."<sup>79</sup> Continuing to impose rule G-17's affirmative disclosure obligations on dealers transacting with SMMPs will not necessarily create the desired additional information since

<sup>77</sup> The MSRB believes that disclosure information may also be available from established industry sources since many issuers of exempt securities (e.g., VRDOs) are also issuers of Rule 15c2-12 issues and thus have Rule 15c2-12 disclosure obligations for those issues that are not exempt.

<sup>78</sup> Moreover, investors' comments may incorrectly assume that remarketing agents usually are effecting secondary market transactions in exempt securities (i.e. VRDOs). A "primary offering" is defined in Rule 15c2-12 to mean an offering directly or indirectly by an issuer. Many remarketings of VRDOs meet the definition of a "primary offering" under Rule 15c2-12(c). See Pillsbury, Madison & Sutro, SEC No-Action Letter, [1990-1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79, 659 at 78, 027 (Mar. 11, 1991) (cautioning the inquirer not to read the language of Rule 15c2-12(e)(7) too restrictively and instructing that each remarketing of exempt securities should be examined as though it were a new offering to determine if an exemption applies).

<sup>79</sup> The ICI's comment letter applauded the MSRB's clarification of this point in the July SMMP Guidance and recommended that the MSRB remind dealers "of their duty not to mislead customers." ICI II, *supra* note 23.

disclosure information must come from the issuer, not the dealer. In fact, it should be recognized that a dealer operating an ATS is likely to have very little information concerning the security in question if, for example, an institutional customer offers the security for sale through the ATS.

#### Miscellaneous

*Comments Received.* MuniCenter and UBSPW both expressed the view that the MSRB should issue definitive guidance about online recommendations.<sup>80</sup> MuniCenter recognized that the MSRB is reserving its guidance on the definition of an online recommendation, but "would like to state our view that an electronic platform listing securities input by institutional sellers and buyers, or the results displayed by a user's defined search criteria are not a recommendation by the platform." UBSPW stated, that the "only way the MSRB can achieve its goal of permitting sophisticated institutional investors to participate in electronic trading platforms 'on par with dealers when engaging in non-recommended secondary market transactions' is to make absolutely clear that the posting of line items coupled with a user-directed search feature and/or dealer controlled filter does not constitute the recommendation of any securities posted."<sup>81</sup>

*MSRB Response.* The MSRB will take these comments into consideration when it considers appropriate guidance concerning online recommendations.

#### 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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submissions, 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 will also be available for inspection and copying at the MSRB's principal offices. All submissions should refer to File No. SR-MSRB-2002-02 and should be submitted by March 4, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>82</sup>

**Margaret H. McFarland,**  
*Deputy Secretary.*

[FR Doc. 02-3232 Filed 2-8-02; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45387; File No. SR-NASD-2002-13]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by the National Association of Securities Dealers, Inc., Relating to the Bid Price Criteria of Nasdaq Listing Standards

February 4, 2002.

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 January 17, 2002, 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. Nasdaq has designated this proposed rule change as "non-controversial" pursuant to Rule 19b-4(f)(6) of the Act,<sup>3</sup> which renders it effective immediately upon

<sup>82</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> 17 CFR 240.19b-4(f)(6).

<sup>80</sup> See MuniCenter and UBSPW, *supra* note 23.

<sup>81</sup> *Id.*

filing. 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 grace period within which an issuer must demonstrate compliance with the bid price criteria on the Nasdaq SmallCap Market and to clarify the procedures pursuant to which Nasdaq National Market issuers transfer to the SmallCap Market for failing to comply with the bid price requirement. Nasdaq further proposes that this rule operate on a pilot basis ending on December 31, 2003. Nasdaq has represented that, during the pilot period, it will assess the effectiveness of these changes.

Below is the text of the proposed rule change. Proposed new language is italicized; proposed deletions are in brackets.

\* \* \* \* \*

#### 4310. Qualification Requirements for Domestic and Canadian Securities

To qualify for inclusion in Nasdaq, a security of a domestic or Canadian issuer shall satisfy all applicable requirements contained in paragraphs (a) or (b), and (c) hereof.

(a)—(b) No change.

(c) In addition to the requirements contained in paragraph (a) or (b) above, and unless otherwise indicated, a security shall satisfy the following criteria for inclusion in Nasdaq:

(1)—(7) No change.

(8)(A) A failure to meet the continued inclusion requirement[s] for a number of market makers shall be determined to exist only if the deficiency continues for a period of 10 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 30 calendar days from such notification to achieve compliance [with the applicable continued inclusion standard]. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 30-day compliance period.

(B) A failure to meet the continued inclusion requirement[s] for [minimum bid price and] market value of publicly held shares [float] shall be determined to exist only if the deficiency [for the applicable criterion] continues for a period of 30 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 90 calendar days from such notification to achieve compliance [with the applicable continued inclusion

standard]. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 90-day compliance period.

(C) A failure to meet the continued inclusion requirement[s] for market capitalization shall be determined to exist only if the deficiency continues for a period of 10 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 30 calendar days from such notification to achieve compliance [with the applicable continued inclusion standard]. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 30-day compliance period.

(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 will be afforded an additional 180 day compliance period, provided that on the 180th day following the notification of the deficiency, the issuer meets any of the three criteria for initial inclusion set forth in Rule 4310(c)(2)(A), based on the issuer's most recent publicly filed financial information. Compliance can be achieved during either 180-day compliance period by meeting the applicable standard for a minimum of 10 consecutive business days.

(9)—(29) No change.

(d) 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),] and (f) 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) Maintenance Standard 1—Common Stock, Preferred Stock, Shares or Certificates of Beneficial Interest of Trusts and Limited Partnership Interests in Foreign or Domestic Issues

(1) “ (5) No change

(6) At least two registered and active market makers.

(b)—(d) No change.

(e) *Compliance Periods* [Market Makers]

(1) A failure to meet the continued inclusion requirement for market value of publicly held shares 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 90 calendar days from such notification to achieve compliance. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 90-day compliance period.

(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 90 calendar days from such notification to achieve compliance. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 90-day compliance period. If the issuer has not been deemed in compliance prior to the expiration of the 90 day compliance period, 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. A Nasdaq National Market issuer transferring to The Nasdaq SmallCap Market must pay the entry fee set forth in Rule 4520(a). Upon such transfer, a domestic or Canadian Nasdaq National Market issuer transferring to The Nasdaq SmallCap Market will be afforded the remainder of the initial 180 day compliance period set forth in Rule 4310(c)(8)(D) and may thereafter be eligible for the subsequent 180 day compliance period pursuant to that rule. The issuer may also request a hearing to remain on The Nasdaq National Market pursuant to the Rule 4800 Series. The 90-day grace period afforded by this rule and any time spent in the hearing process will be deducted from the applicable grace periods on The Nasdaq SmallCap Market. Non-Canadian foreign issuers that transfer to The Nasdaq SmallCap Market are not subject to the \$1 minimum bid price requirement pursuant to Rule 4320. Any issuer (including a non-Canadian foreign issuer) that was formerly listed on The Nasdaq National Market, and which transferred to The Nasdaq SmallCap Market pursuant to this

paragraph, may transfer back to The Nasdaq National Market without satisfying the initial inclusion criteria if it maintains compliance with the \$1 bid price requirement for a minimum of 30 consecutive business days prior to the expiration of the compliance periods described in Rule 4310(c)(8)(D) and if it has continually maintained compliance with all other requirements for continued listing on The Nasdaq National Market since being transferred. Such an issuer is not required to pay the entry fee set forth in Rule 4510(a) upon transferring back to The Nasdaq National Market.

(3) [At least two registered and active market makers, except that an issue must have at least four registered and active market makers to satisfy Maintenance Standard 2 under paragraph (b) of this rule.] A failure to meet the continued inclusion requirement[s] for a number of market makers shall be determined to exist only if the deficiency continues for a period of 10 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 30 calendar days from such notification to achieve compliance. [with the applicable standard.] Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 30-day compliance period.

\* \* \* \* \*

## 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

On September 27, 2001, the NASD implemented a temporary moratorium on Nasdaq's enforcement of its continued listing requirements relating to the bid price and the market value of the public float.<sup>4</sup> Nasdaq has stated that

this moratorium was established to provide greater stability to the marketplace in response to the extraordinary market conditions following the tragedy of September 11th. Authority for the moratorium expired on January 2, 2002. After careful consideration, Nasdaq concluded that the requirements relating to a minimum bid price and market value of the public float continue to be useful. In particular, Nasdaq believes that the 90-day grace period for National Market issuers to regain compliance with these requirements is commensurate with the stature and integrity of the market.

Nasdaq, however, proposes to modify the grace period applicable to the bid price requirement on the SmallCap Market. Generally, the listing standards on the SmallCap Market are lower than those on the Nasdaq National Market. As a result, issuers that become non-compliant with National Market listing standards are often afforded an opportunity to "phase down" to the SmallCap Market to take advantage of the lower standards applicable to that market. In the case of the minimum bid price, however, the standards are currently identical. Thus, a National Market issuer that fails to meet the National Market bid price requirement will also fail to meet the SmallCap bid price requirement and be forced to go to an unlisted, less transparent market. To ameliorate this inconsistency and to provide Nasdaq National Market companies with more time to develop and implement a turn-around plan, Nasdaq is proposing to allow companies up to one year to regain compliance with the minimum bid price requirement. In addition, Nasdaq is proposing to codify procedures pursuant to which a National Market issuer could transfer to the SmallCap Market if it did not meet the National Market bid price requirement.

Specifically, Nasdaq proposes the following changes to the SmallCap Market bid price grace periods:

- Extend the grace period on the SmallCap Market from 90 calendar days to 180 calendar days. Following this grace period, an issuer that demonstrates compliance with the SmallCap Market initial inclusion requirement of \$5,000,000 in shareholders' equity; \$50,000,000 in market capitalization; or \$750,000 in net income in the most recently completed fiscal year or in two of the last three most recently completed fiscal years, will be afforded an additional grace period of 180 calendar days within which to regain compliance.
- If a Nasdaq National Market issuer is unable to regain compliance within

the existing grace period of 90 days, the issuer could phase down to the SmallCap Market and be afforded the remainder of the 180 calendar days automatically afforded to all SmallCap issuers. An additional 180 calendar days would then be available, provided the former National Market issuer were able to demonstrate compliance with the SmallCap Market initial inclusion requirement noted above.

- In the event the former National Market issuer were able to demonstrate compliance with the \$1 bid price requirement for 30 consecutive trading days prior to the expiration of all the SmallCap Market grace periods, and the issuer could demonstrate that it had maintained compliance with all Nasdaq National Market maintenance requirements (with the exception of minimum bid price) at all times since it was phased-down to the SmallCap Market, it would then be eligible to phase-up to the Nasdaq National Market pursuant to the maintenance criteria.

Nasdaq proposes that these changes be implemented on a pilot basis, through December 31, 2003. This will allow Nasdaq and the Commission to evaluate the effectiveness of these changes on market participants.<sup>5</sup>

#### 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act<sup>6</sup> in that it is designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest. Nasdaq has stated that it is proposing this rule change to minimize the impact on issuers in the marketplace and their shareholders, while providing greater transparency and consistency.

### 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.

<sup>5</sup> Nasdaq has indicated that it "intends to analyze the impact of the proposed rule during the pilot period, to determine whether it makes sense to seek permanent approval of the rule." Letter from Sara Nelson Bloom, Associate General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated January 31, 2002. Nasdaq also stated that it "would examine those Nasdaq National Market companies that phase down to the SmallCap market, and then are able to return to the National Market pursuant to the provisions of the pilot rule \* \* \* and would share the results of this examination with the Commission staff on a confidential basis prior to seeking authority for a permanent rule." *Id.*

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

<sup>4</sup> See Securities Exchange Act Release No. 44857 (September 27, 2001), 66 FR 50485 (October 3, 2001) (SR-NASD-2001-61).

*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.

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

Nasdaq asserts that the proposed rule change is effective upon filing pursuant to section 19(b)(3)(A) of the Act<sup>7</sup> and paragraph (f)(6) of Rule 19b-4 thereunder,<sup>8</sup> because the proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.<sup>9</sup>

Nasdaq has requested that the Commission waive the 30-day period, which would make the rule operative immediately. The Commission finds that it is consistent with the protection of investors and the public interest to waive the 30-day pre-operative period in this case.<sup>10</sup> The Commission believes that no purpose would be served by having 30 days pass before the rule becomes operative because, during the intervening period, issuers and investors could become confused as to which grace periods applied. Allowing the rule to become operative immediately will allow Nasdaq to explain its bid price requirements more clearly to issuers that might have need of the grace period.

At any time within 60 days of this filing, the Commission may summarily abrogate this proposal if it appears to the Commission that such action is 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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. 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 such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR-NASD-2002-13 and should be submitted by March 4, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 02-3235 Filed 2-8-02; 8:45 am]

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-45382; File No. SR-PCX-2002-02]

**Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the Pacific Exchange, Inc. Relating to the Manner in Which Computer Generated Orders Are Designated**

February 1, 2002

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 January 7, 2002, the Pacific Exchange, Inc. ("PCX" or "Exchange") 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 the Exchange. On January 25, 2002, the PCX submitted Amendment No. 1 to the proposed rule change.<sup>3</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**

The PCX proposes to change the manner in which member firms are required to designate an order as "computer generated." The text of the proposed rule change, as amended, is available at the PCX and the Commission.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change, as amended, 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. The Exchange 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**

The purpose of the proposed rule change, as amended, is to change the manner in which member firms are required to designate an order as "computer generated" to accurately reflect current technological advances.

On September 22, 2000, the Commission approved a PCX proposed

<sup>3</sup> See letter from Cindy L. Sink, Senior Attorney, PCX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated January 24, 2002 ("Amendment No. 1"). In Amendment No. 1, the PCX changed the basis for immediate effectiveness for the proposed rule change. Specifically, the PCX re-designed the proposed rule change as a filing made under Rule 19b-4(f)(5) under the Act relating to a change in an existing order-entry or trading system of a self-regulatory organization, as opposed to a filing under Rule 19b-4(f)(1) relating to a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule. For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change, as amended, under section 19(b)(3)(C) of the Act, the Commission considers that period to commence on January 25, 2002, the date the PCX filed Amendment No. 1. See 15 U.S.C. 78s(b)(3)(C).

<sup>7</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>8</sup> 17 CFR 240.19b-4(f)(6)

<sup>9</sup> In addition, Rule 19b-4(f)(6) requires the self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of such proposed rule change, or such shorter time as designated by the Commission. Nasdaq filed with the Commission an earlier iteration of the proposed rule change (SR-NASD-2001-94) which was later withdrawn. The Commission deems the submission of SR-NASD-2001-94 to fulfill the five-day pre-filing notice requirement for the present filing, SR-NASD-2002-13.

<sup>10</sup> For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>11</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.