

significantly minimize the potential for manipulation of the Indexes. First, as noted above, the Indexes represent a broad cross-section of domestic highly capitalized U.S. companies. Second, the Commission notes that the Index is a capitalization-weighted index whose value is more difficult to affect than that of a price-weighted index. Third, CBOE has represented that it will notify the Commission when: (1) The number of securities in each index drops by one-third or more; (2) 10% or more of the weight of each index is represented by component securities having a market value of less than \$75 million; (3) less than 80% of the weight of each Index is represented by component securities that are eligible for options trading pursuant to CBOE Rule 5.3; (4) 10% or more of the weight of each Index is represented by component securities trading less than 20,000 shares per day; or (5) the largest component security accounts for more than 15% of the weight of each Index or the largest five components in the aggregate account for more than 50% of the weight of the Index. Fourth, the CBOE has proposed reasonable position and exercise limits for the Index options that will serve to minimize potential manipulation and other market impact concerns. Accordingly, the Commission believes that these factors minimize the potential for manipulation because it would affect significantly the Indexes values. Moreover, the surveillance procedures discussed below should detect as well as deter potential manipulation and other trading abuses.

#### C. Customer Protection

The Commission believes that a regulatory system designed to protect public customers must be in place before the trading of sophisticated financial instruments, such as the options on the Russell Indexes (including full-value and reduced value Index LEAPS), can commence on a national securities exchange. The Commission notes that the trading of standardized exchange-traded options occurs in an environment that is designed to ensure, among other things, that: (1) The special risks of options are disclosed to public customers; (2) only investors capable of evaluating and bearing the risk of options trading are engaged in such trading; and (3) special compliance procedures are applicable to options accounts. Accordingly, because the index options and index LEAPS will be subject to the same regulatory regime as the other standardized options traded on the CBOE, the Commission believes that adequate safeguards are in place to

ensure the protection of investors in the Russell Indexes options.<sup>12</sup>

#### D. Surveillance

The Commission generally believes that a surveillance sharing agreement between an exchange proposing to list a stock index derivative product and the exchange(s) trading the stocks underlying the derivative product is an important measure for surveillance of the derivative and underlying securities markets. Such agreements ensure the availability of information necessary to detect and deter potential manipulations and other trading abuses, thereby making the stock index product less readily susceptible to manipulation. In this regard, the NYSE, AMEX, and the NASD are all members of ISG. In addition, the CBOE will apply the same surveillance procedures as those used for existing broad-based index options trading on the CBOE. Further, CBOE has represented that it will have complete access to the information regarding the trading activity of the underlying securities.

#### E. Market Impact

The Commission believes that the listing and trading of options on the Russell Indexes on the Exchange will not adversely impact the underlying securities markets. First, as described above, the Indexes are broad-based and no one stock or industry group dominates any particular Index. Second, as noted above, the stocks contained in the Indexes generally are not inactively traded. Third, existing CBOE stock index options rules and surveillance procedures will apply to Russell Indexes options. Fourth, the Exchange has established reasonable position and exercise limits for the Russell Indexes options that will serve to minimize potential manipulation and market impact concerns. Fifth, the risk to investors of contra-party non-performance will be minimized because the Index options will be issued and guaranteed by the Options Clearing Corporation just like any other standardized option traded in the U.S. Lastly, the Commission believes that settling options on the Russell Indexes based on the opening prices of component securities is reasonable and consistent with the Act because it may contribute to the orderly unwinding of

<sup>12</sup> In addition, CBOE has represented that it and OPRA have the necessary systems capacity to support these new series of options that would result from the introduction of Index options and Index LEAPS. See Exhibit D to the proposed rule change (letter from Joe Corrigan, Executive Director, OPRA, to Bill Speth, Director of Research, CBOE, dated March 24, 2003).

Index options positions upon expiration.

The Commission finds good cause for approving the proposed rule change, and Amendment No. 1 thereto, prior to the thirtieth day after the date of publication of notice in the **Federal Register**. The Commission believes that the trading of options on the Russell Indexes does not raise novel regulatory issues that were not addressed in previous filings regarding the listing and trading of similar instruments on the CBOE. The Commission further believes that the options on the Russell Indexes will provide investors with an additional investment choice and that accelerated approval of the proposal will allow investors to begin trading these index options promptly.

#### V. Conclusion

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act,<sup>13</sup> that the proposed rule change (SR-CBOE-2003-17), as amended, is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>14</sup>

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

[FR Doc. 03-25674 Filed 10-9-03; 8:45 am]

BILLING CODE 8010-01-P

#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48592; File No. SR-NASD-2003-44]

#### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the National Association of Securities Dealers, Inc. To Modify the Existing Pilot Program Relating to the Compliance Periods for the Nasdaq Bid Price Criteria

October 3, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on March 18, 2003, 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 submitted

<sup>13</sup> 15 U.S.C. 78s(b)(2).

<sup>14</sup> 17 CFR 200.30-3(a)(12).

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

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

amendments to the proposed rule change on March 24, 2003,<sup>3</sup> and September 26, 2003.<sup>4</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

Nasdaq is proposing to modify an existing pilot program relating to compliance periods for the bid price criteria for Nasdaq National Market and Nasdaq SmallCap Market issuers. Nasdaq has represented that, during the pilot period, it would assess the effectiveness of these changes.

Below is the text of the proposed rule change, including the revisions to the proposed rule text made by Amendment Nos. 1 and 2. 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* [will] 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* [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*, [following notification of this deficiency,] the issuer *demonstrates that it meets the criteria for initial inclusion set forth in Rule 4310(c)[(2)(A)] (except for the bid price requirement set forth in Rule 4310(c)(4))* based on the issuer's most recent public[ly filed] filings and market [financial] 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 annual shareholder meeting, provided: the issuer commits to seek shareholder approval for a reverse stock split to address the bid price deficiency at or before its next annual meeting, and to promptly thereafter effect the reverse stock split; and the shareholder meeting to seek such approval is scheduled to occur no later than two years from the original notification of 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. [If the issuer has not been deemed in compliance prior to the expiration of the second 180 day compliance period, it shall be afforded an additional 90 day compliance period, provided that on the last day of the second 180 day compliance period, 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 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.

#### 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* [will] 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 [either] Rule[s] 4420[(a)(1) and (a)(5), Rule 4420(b)(1) or Rule 4420(c)(6).] (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[ly filed financial] 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 [180 day] 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,

<sup>3</sup> See letter from Sara Nelson Bloom, Associate General Counsel, Nasdaq, to Katherine A. England, Division of Market Regulation, Commission, dated March 21, 2003 ("Amendment No. 1"). In Amendment No. 1, Nasdaq made minor revisions to the original proposal.

<sup>4</sup> See letter from Edward S. Knight, Executive Vice President, Nasdaq, to Katherine A. England, Division of Market Regulation, Commission, dated September 25, 2003 ("Amendment No. 2"). In Amendment No. 2, Nasdaq revised the length of the compliance periods and added to the criteria that issuers would have to meet to avail themselves of such periods.

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* [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.

(f)–(i) No change.

#### 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* [will] 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* [will] take immediate effect. All hearings *shall* [will] be held before a Listing Qualifications Panel as described in Rule 4830. All hearings *shall* [will] 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* [will] 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* [will] be provided at least 10 calendar days notice of the hearing unless the issuer waives such notice.

(b)–(c) No change.

\* \* \* \* \*

## 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

Following the extraordinary market conditions surrounding the September 11th tragedy, Nasdaq implemented a moratorium on enforcement of its bid price rules.<sup>5</sup> In January 2002, immediately after the moratorium ended, Nasdaq implemented a pilot program to extend certain compliance periods applicable to the bid price rule.<sup>6</sup> The pilot program was modified and extended to December 31, 2004.<sup>7</sup> The current pilot program provides for a 180-day bid price compliance period for SmallCap Market issuers. Thereafter, SmallCap Market issuers are allowed an additional 180-day compliance period if they meet heightened requirements based upon certain core initial listing standards. SmallCap issuers are allowed an additional 90-day compliance period, provided that the issuer continues to meet the heightened requirements. National Market companies currently receive a single 180-day bid price compliance period.

After careful consideration, Nasdaq continues to believe that the bid price requirements are valuable measures of compliance. However, Nasdaq believes that the measurement periods for the requirements should be extended and modified to provide additional flexibility to both National Market and SmallCap Market companies that are engaged in turnaround strategies. Nasdaq proposes that these modifications also be subject to implementation under the pilot program currently in effect through December 31, 2004.

Specifically, this proposal would modify and extend the pilot as follows:

- Provide an additional 180-calendar-day compliance period for those National Market issuers able to demonstrate compliance with the National Market initial listing criteria

<sup>5</sup> See Securities Exchange Act Release No. 44857 (September 27, 2001), 66 FR 50485 (October 3, 2001) (SR–NASD–2001–61).

<sup>6</sup> See Securities Exchange Act Release No. 45387 (February 4, 2002), 67 FR 6306 (February 11, 2002) (SR–NASD–2002–13).

<sup>7</sup> See Securities Exchange Act Release No. 47482 (March 11, 2003), 68 FR 12729 (March 17, 2003) (SR–NASD–2003–34).

set forth in Rule 4420 (except for the bid price requirement set forth in Rule 4420(a)(4), (b)(4) or (c)(3);

- Maintain the initial 180-calendar-day bid price compliance period for all SmallCap Market issuers, and provide a second 180-day compliance period for SmallCap Market issuers that satisfy the initial listing criteria set forth in Rule 4310(c) (except for the bid price requirement set forth in Rule 4310(c)(4)). This is more stringent than the current compliance period which conditions eligibility for the second 180-day compliance period on meeting only the financial or “core” initial listing criteria. After the two initial 180-day compliance periods, instead of the additional 90-day compliance period provided by the recent modification to the pilot program,<sup>8</sup> issuers would be provided with an additional compliance period up to their next annual shareholder meeting provided: the issuer commits to seek shareholder approval for a reverse stock split to address the bid price deficiency at or before its next annual meeting, and to promptly thereafter effect the reverse stock split; and the shareholder meeting to seek such approval is scheduled to occur no later than two years from the original notification of 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.

Nasdaq believes that the proposal appropriately distinguishes between the National Market and the SmallCap Market by providing a relatively shorter compliance period for National Market issuers compared to that available to SmallCap Market issuers, and by expediting the National Market issuer delisting process. The proposal further provides that SmallCap Market issuers eligible for the longest compliance periods must take concrete corrective action to address the bid price deficiency or face prompt delisting. Nasdaq further believes that the proposal would benefit investors by lessening the disruption that can be associated with an issuer’s move from the Nasdaq Stock Market to less liquid and regulated markets.

*Implementation.* Nasdaq proposes that this rule be effective upon Commission approval, and that issuers that are at that time in the Rule 4800 Series review process be afforded the benefit of the new rule. As such, issuers would be extended any additional compliance periods provided by this

<sup>8</sup> See *id.*

rule to which they would have been entitled had the rule been in effect upon their original notification of the bid price deficiency.<sup>9</sup> Accordingly, issuers would be eligible for extended compliance periods in circumstances where they meet the terms of the new rule. Those issuers that do not meet the eligibility requirements under the new rule would be afforded an opportunity to present a definitive plan to demonstrate compliance with the bid price requirement or eligibility for the new compliance periods, and panels could determine to grant exceptions in order for such issuers to effectuate such plans. In addition, such issuers would be permitted to complete any pending compliance period that was extended pursuant to the rule in effect when the compliance period began.<sup>10</sup> However, in no event shall a SmallCap Market issuer be afforded a period that exceeds two years from the date of the original bid price deficiency notification, absent extraordinary circumstances.<sup>11</sup> All time periods under the new rule would run concurrent with the prior rule, from the date of the original bid price deficiency notification.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with Section 15A(b)(6) of the Act<sup>12</sup> in

<sup>9</sup>Nasdaq has represented that, during the pendency of this rule proposal, panels have afforded issuers exceptions consistent with the proposal as filed at the time pursuant to NASD Rule 4810(b). All pending exceptions will be modified in accord with this new rule and this implementation proposal.

<sup>10</sup>For example, a SmallCap Market issuer that is currently in the final 90-day compliance period would be eligible to complete this 90-day compliance period, notwithstanding the fact that such period would be eliminated under the proposed rule. At the conclusion of the 90-day compliance period, the issuer would be afforded the final compliance period under the proposed rule up to its next shareholder meeting, provided it satisfied all requirements of the new rule. That is, it must satisfy all initial listing criteria, commit to seek shareholder approval at its next shareholder meeting, but in no event later than two years from the original bid price notification (nine months from the expiration of the 90-day period), and to promptly thereafter effect the reverse stock split to come into compliance with the bid price requirement.

<sup>11</sup>NASD Rule 4810(b) provides that Nasdaq may grant exceptions to its listing rules. As noted above, Nasdaq would be unwilling to exercise this discretion for SmallCap issuers beyond two years from the date of the original bid price deficiency notification, absent "extraordinary circumstances." Nasdaq has stated that adverse financial developments affecting the issuer would not support a finding of "extraordinary circumstances." Rather, the term "extraordinary circumstances" is intended to refer to a *force majeure* event that makes it impossible for the issuer to avail itself of the due process afforded by the Nasdaq listing rules. See e-mail from Sara Bloom, Nasdaq, to Michael Gaw, Commission, dated October 2, 2003.

<sup>12</sup>15 U.S.C. 78o-3(b)(6).

that it is designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest. As previously mentioned, Nasdaq is proposing this rule change to allow issuers additional time to comply with the bid price requirements if they demonstrate compliance with heightened listing standards. Under the proposed rule change, issuers meeting heightened standards would have additional time to execute business and compliance plans, thereby, in Nasdaq's view, minimizing disruption to investors and providing greater transparency and consistency.

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

Nasdaq does not believe that the proposed rule change, as amended, 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.

## 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, as amended, 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-2003-44 and should be submitted by October 31, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 03-25795 Filed 10-9-03; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48583; File No. SR-OC-2003-07]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by OneChicago, LLC To Amend Its Policy Regarding Block Trades, Pre-Execution Discussions and Cross Trades

October 1, 2003.

Pursuant to Section 19(b)(7) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-7 under the Act,<sup>2</sup> notice is hereby given that on September 12, 2003 OneChicago, LLC ("OneChicago") filed with the Securities and Exchange Commission ("Commission") the proposed rule changes described in Items I, II, and III below, which Items have been prepared by OneChicago. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons. On September 11, 2003, OneChicago filed a written certification under Section 5c(c) of the Commodity Exchange Act ("CEA")<sup>3</sup> with the Commodity Futures Trading Commission ("CFTC").

#### I. Self-Regulatory Organization's Description of the Proposed Rule Change

OneChicago is proposing to amend its policy regarding block trades, pre-execution discussions and cross trades. The text of the proposed rule change

<sup>13</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(7).

<sup>2</sup> 17 CFR 240.19b-7.

<sup>3</sup> 7 U.S.C. 7a-2(c).