Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR –NASD–2004–183 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–2004–183. 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 that are filed with the Commission, and all written communications relating to the proposed rule 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 Commisison's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of NASD.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASD–2004–183 and should be submitted on or before July 19, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[85]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 06–5730 Filed 6–27–06; 8:45 am]

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[85] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–54028; File No. SR–NASD–2005–067]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Granting Approval to 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

June 21, 2006.

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''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend NASD Rules 6530 and 7010 to clarify the availability of a process to review a determination of an issuer's eligibility under NASD Rule 6530 for continued quotation of its securities on the Over-the-Counter Bulletin Board (''OTCBB'') and seek review of such determination. On September 27, 2005, Nasdaq filed with the Commission Amendment No. 1 to the proposed rule change.[3] On December 8, 2005, NASD filed with the Commission Amendment No. 2 to the proposed rule change,[4] and on February 23, 2006, NASD filed with the Commission Amendment No. 3 to the proposed rule change.[5] The proposed rule change, as amended, was published for comment in the **Federal Register** on March 31, 2006.[6] No comments were received on this proposal. This order approves the proposed rule change, as amended.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In Amendment No. 1, NASD removed the record-keeping fee it had originally proposed to establish in NASD Rule 7010.

[4] In Amendment No. 2, NASD amended the filing to reflect the Commission's approval of 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 OTC equity operations, including the OTCBB, rather than continuing to delegate this authority to Nasdaq. *See* Securities Exchange Act Release No. 52508 (September 26, 2005); 70 FR 57346 (September 30, 2005) (SR–NASD–2005–089).

[5] In Amendment No. 3, which replaced and superseded the prior filings in their entirety, NASD clarified the availability of the hearing process set forth in proposed NASD Rule 6530(f) in the event that an OTCBB security is subject to removal from the OTCBB under NASD Rule 6530(e)(1) and made clarifying changes relating to the application of the NASD Rule 9700 Series to hearings conducted to determine the security's eligibility for quotation on the OTCBB.

I. Description of the Proposal

Recently, the Commission approved NASD Rule 6530(e), which limits the eligibility for quotation on the OTCBB of the security of an issuer that is repeatedly late or otherwise delinquent in filing periodic reports to the issuer's respective regulator.[7] Specifically, NASD Rule 6530(e) provides that an NASD member will not be permitted to quote a security on the OTCBB: (1) If the issuer has failed to file a complete required report with the Commission or other respective regulator by the due date for such report (even if it later files within the grace period allowed by NASD Rule 6530(a)) three times in the prior two-year period; or (2) if the security has been removed from the OTCBB due to the issuer's failure to file a complete required report two times in the prior two-year period. Following the removal of an issuer's security pursuant to NASD Rule 6530(e), such security shall not be eligible for quotation on the OTCBB by an NASD member until such time as the issuer has timely filed in a complete form all required periodic due in a one-year period.

NASD's proposed revisions to NASD Rule 6530 would set forth procedures for an aggrieved party to request a review by a hearing panel, pursuant to the NASD Rule 9700 Series, of a determination by NASD that an issuer is ineligible for continued quotation on the OTCBB. The proposed rule change also would set forth the process for an aggrieved party to request review of the hearing panel's decision. In addition, the proposal would require an aggrieved party to pay a fee of $4,000 when requesting either a review by the hearing panel or a review of the hearing panel's decision. Finally, the proposal would codify the notification requirements to which NASD would adhere in the event that an issuer's security approaches the point of removal from quotation on the OTCBB for failure to comply with the provisions of NASD Rule 6530.

II. Discussion and Commission Findings

The Commission finds that the proposed rule change, as amended, is consistent with the provisions of section

[6] *See* Securities Exchange Act Release No. 53546 (March 24, 2006), 71 FR 16350 (''Notice'').

[7] *See* Securities Exchange Act Release No. 52786 (November 16, 2005), 70 FR 70907 (November 23, 2005) (SR–NASD–2005–011).

15A(b)(6) of the Act,[8] which requires, among other things, that NASD rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interests.[9]

Under the proposal, upon determining that an issuer's security would become 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 security's removal from the OTCBB, even if there is no applicable grace period.[10] 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.[11] The Commission believes that the proposed notice is reasonably designed to inform issuers of the imminent removal of their securities from OTCBB quotation.

The proposed rule change codifies the right of an aggrieved party to request a review of a determination by NASD that an issuer's security is ineligible for continued quotation on the OTCBB, pursuant to the procedures set fourth in the NASD Rule 9700 Series as modified by the proposed rule change. The proposal also implements at $4,000 fee for such review.[12] The proposed rule change specifies that the hearing panel is limited to determining 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 permitted under Rule 12b–25 under the Act.[13]

The Commission believes that scope of the review is reasonably limited and tailored to reflect the requirements of NASD Rule 6530. In particular, the only matters subject to review are whether the OTCBB issuer filed a complete report by the applicable due date, taking into account any extensions pursuant to Rule 12b–25 under the Act, and whether the issuer's security is eligible for continued quotation.[14] The Commission further believes that providing for an aggrieved party's right to request review in NASD Rule 6530 will promote clarity and transparency of that process.

A request for a hearing under the proposed rule would temporarily stay a security's removal until the hearing panel makes its determination. An aggrieved party's request for review by the hearing panel would not prevent the issuer's delinquency from being counted as an occurrence for the purposes of NASD Rule 6530(e)(1), although the issuer's security would remain eligible for continued and uninterrupted quotation until such time as the hearing panel issues its opinion. In addition, the proposal would clarify that an aggrieved party may appeal the hearing panel's decision pursuant to NASD Rule 9760. Unlike the initial request for hearing panel review, the request for an appeal of the hearing panel's decision would not stay the security's removal.[15] The issues on appeal would be 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 Act. The Commission believes that the proposed rule change is reasonably designed to provide appropriate procedures for an aggrieved party to seek a review by the hearing panel and to appeal the hearing panel's decision.

The Commission notes that NASD currently does not provide for a fee to offset the costs to conduct hearings regarding a security's eligibility for quotation on the OTCBB pursuant to the NASD Rule 9700 Series. The proposed rule change would implement a $4,000 fee for aggrieved parties who request review by a hearing panel, as well as a $4,000 fee for aggrieved parties who seek review of the hearing panel's decision.[16] Given the increasing number of hearings relating to OTCBB eligibility,[17] the Commission believes that it is reasonable for NASD to adopt a fee to offset the costs associated with the conduct of the hearings and appeals process under the NASD Rule 9700 Series for parties aggrieved by a determination made under NASD Rule 6530.

III. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[18] that the proposed rule change (SR–NASD–2005–067), as amended, be, and it hereby is, approved.

For the commission, by the Division of Market Regulation, pursuant to delegated authority.[19]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 06–5756 Filed 6–27–06; 8:45 am]

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[8] 15 U.S.C. 78*o*–3(b)(6).

[9] In approving this proposed rule change, as amended, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[10] Under NASD Rule 6530(e), the securities of an issuer are removed from the OTCBB the third time that the issuer fails to file a required report by the due date (including, if applicable, any extension permitted by Rule 12b–25 of the Exchange Act (17 CFR 240.12b–25)) in a two-year period, without the benefit of the grace period for the third delinquency. Prior to removal of the security from the OTCBB, however, NASD would provide 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 would be removed for the issuer's failure to file a required report by the due date for the third time in a two-year period, NASD would provide 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's proposal to amend NASD Rule 6530(e) and (f) would codify this procedural framework.

[11] If an issuer's security becomes ineligible for failure to file by the due date for the third time in a two-year period, the issuer would not be able to cure the condition causing the ineligibility. *See* Securities Exchange Act Release No. 52786 (November 16, 2005), 70 FR 70907 (November 23, 2005) (SR–NASD–2005–011).

[12] Although NASD currently permits aggrieved parties to request a review of a determination of ineligibility pursuant to the NASD Rule 9700 Series, the proposed rule change would provide for that right in the rule governing OTCBB-eligible securities, NASD Rule 6530.

[13] The proposed rule specified that hearings will be conducted via telephone, and that NASD will provide the aggrieved party with at least five business days notice of the hearing unless the aggrieved party waives such notice.

[14] In the case of OTCBB issuers who file regulatory reports with a regulator other than the Commission (*e.g.,* Federal banking regulators), the Commission notes that NASD generally receives notice of a regulatory filing from the applicable market maker or the issuer itself. Accordingly, these issuers can help to alleviate any confusion regarding whether a filing has been timely made by providing NASD with a copy of the applicable filing made with the appropriate regulator on or before its due date.

[15] 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.

[16] In comparison, NASD Rule 4805(c) requires Nasdaq-listed issuers to submit a $4,000 fee for a hearing on the written record and a $5,000 fee for an oral hearing to cover the cost of holding the hearing, and NASD Rule 4807(a) 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.

[17] *See* Notice, *supra* note 6, at 16352 n.19 (noting that the number of hearing requests received by NASD from OTCBB issuers increased from 14 requests in 2003 to 124 requests in 2005).

[18] 15 U.S.C. 78s(b)(2).

[19] 17 CFR 200.30–3(a)(12).