

Proposed Rule Change by National Association of Securities Dealers  
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

<input type="checkbox"/> Initial	<input checked="" type="checkbox"/> Amendment	<input type="checkbox"/> Withdrawal	<input checked="" type="checkbox"/> Section 19(b)(2)	<input type="checkbox"/> Section 19(b)(3)(A)	<input type="checkbox"/> Section 19(b)(3)(B)
			Rule		
<input type="checkbox"/> Pilot	<input type="checkbox"/> Extension of Time Period for Commission Action	<input type="text" value=""/> Date Expires	<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	
			<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)	

<input type="checkbox"/> Exhibit 2 Sent As Paper Document	<input type="checkbox"/> Exhibit 3 Sent As Paper Document
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**Description**  
Provide a brief description of the proposed rule change (limit 250 characters).

**Contact Information**  
Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name	<input type="text" value="Andrea"/>	Last Name	<input type="text" value="Orr"/>
Title	<input type="text" value="Assistant General Counsel"/>		
E-mail	<input type="text" value="andrea.orr@nasd.com"/>		
Telephone	<input type="text" value="(202) 728-8156"/>	Fax	<input type="text" value="(202) 728-8264"/>

**Signature**  
Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date	<input type="text" value="02/23/2006"/>
By	<input type="text" value="Stephanie Dumont"/>
	(Name)
	<input type="text" value="Vice President and Associate General Counsel"/>
	(Title)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.



SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

**Form 19b-4 Information**

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change**

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

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Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

**1. Text of Proposed Rule Change**

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> the National Association of Securities Dealers, Inc. (“NASD”) is filing with the Securities and Exchange Commission (“SEC” or “Commission”) Amendment No. 3 to SR-NASD-2005-067 to amend Rule 6530 to clarify the availability of a process to review eligibility determinations on the OTC Bulletin Board (“OTCBB”) and to adopt fees for such review.

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

\* \* \* \* \*

**6530. OTCBB-Eligible Securities**

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

(a) through (d) No change.

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

(1) and (2) No change.

If an issuer’s security becomes ineligible for quotation on the OTCBB pursuant to paragraph (e)(1) above, the security will be removed from quotation on the OTCBB without the benefit of any grace period for the third delinquency, except that NASD will provide seven calendar days from the date notification is mailed to the issuer pursuant to

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

paragraph (f)(1) to permit an aggrieved party to request a review of the determination by a hearing panel pursuant to paragraph (f) below. Following the removal of an issuer's security[securities] pursuant to this paragraph (e), such security[securities] shall not be eligible for quotation until the issuer has timely filed in a complete form all required annual and quarterly reports due in a one-year period. For purposes of this paragraph, a report filed within any applicable extensions permitted by [SEC] Rule 12b-25 under the Exchange Act will be considered timely filed. Furthermore, filings for reporting periods ending before October 1, 2005 will not be considered for purposes of this paragraph (e).

(f) (1) Upon determining that an issuer's security would be ineligible for quotation under this rule, NASD will send a notification to the address on the cover of the issuer's last periodic report. This notification will state the date upon which the security will be removed, following any applicable grace period, unless the condition causing the ineligibility has been cured by that date. When a security becomes ineligible for quotation pursuant to paragraph (e) above, however, the issuer may not cure the condition that caused the ineligibility. In all cases, NASD will provide at least seven calendar days from the date the notification is mailed to the issuer to permit an aggrieved party to request review pursuant to paragraph (f)(2) below, before removal of the security.

(2) Pursuant to the Rule 9700 Series, as modified herein, an aggrieved party may request a review by a hearing panel of the determination that an issuer's security is ineligible for quotation under this rule. NASD must receive the request for review at least two business days prior to the scheduled removal of the security, together with a \$4,000 hearing fee payable to NASD to cover the

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

(3) The aggrieved party may request a review of a hearing panel's decision under Rule 9760. Such a request for review must be accompanied by a \$4,000 fee payable to NASD to cover the cost of review. This review will only consider whether the issuer's security, at the time of the initial review under paragraph (f)(2), was eligible for quotation in the Service and/or whether the issuer filed a complete report by the applicable due date taking into account any extensions pursuant to Rule 12b-25 under the Exchange Act. A request for review under this paragraph (f)(3) shall not stay the removal of the issuer's security from the Service and there will be no discretion to grant extensions of time for ineligible securities to become eligible. Notwithstanding any contrary provision in the Rule 9700 Series, a review under this paragraph (f)(3) will be based on the written record, unless additional hearings are ordered. If any further

hearings are ordered, the hearings will be conducted via telephone and NASD will provide the aggrieved party at least five business days notice of the hearing unless the aggrieved party waives such notice.

\* \* \* \* \*

(b) Not applicable.

(c) Not applicable.

**2. Procedures of the Self-Regulatory Organization**

The Board of Directors of Nasdaq approved the proposed rule change at its meetings on October 29, 2003 and April 20, 2005, and the Board of Governors of the NASD had an opportunity to review the proposed rule change at its meetings on March 4 and April 21, 2005, which authorized the filing of the rule change with the Commission. The staff of Nasdaq has provided an opportunity for the staff of NASD Regulation, Inc. to consult with respect to the proposed rule change, pursuant to the Plan of Allocation and Delegation of Functions by NASD to Subsidiaries. No other action by NASD is necessary for the filing of the rule change.<sup>2</sup>

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

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

(a) Purpose

**Rule Filing History**

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<sup>2</sup> As further detailed in Section 3, effective October 1, 2005, the ownership and operations of the OTCBB were transferred from Nasdaq to NASD, including the related rulemaking functions in this area. Given the foregoing, NASD is filing this Amendment No. 3.

On May 24, 2005, NASD, through its subsidiary, The Nasdaq Stock Market, Inc. (“Nasdaq”), filed with the Commission proposed rule change SR-NASD-2005-067, proposing amendments to Rule 6530 and Rule 7010 to clarify the availability of a process to review eligibility determinations under Rule 6530 and to adopt service based fees for OTCBB issuers. On September 27, 2005, Nasdaq filed with the Commission Amendment No. 1 to SR-NASD-2005-067 (“Amendment No. 1”), which proposed to delete the record-keeping fee, among other technical changes. On October 1, 2005, the Commission approved SR-NASD-2005-089, which provided NASD direct authority for OTC equities operations, rather than the prior delegation to Nasdaq. As such, NASD assumed direct authority for OTC equities operations, including operation of the OTCBB (quotation and trade reporting platform and other services), trade reporting for other non-OTCBB OTC equity securities and other services, and related rulemaking functions. Given the SEC’s approval of SR-NASD-2005-089, NASD filed with the Commission Amendment No. 2 to SR-NASD-2005-067 (“Amendment No. 2”), which amended the proposed rule change to reflect NASD’s authority for the OTCBB, among other clarifying changes.

NASD is filing this Amendment No. 3 to SR-NASD-2005-067 (“Amendment No. 3”), which replaces and supersedes the prior filings in their entirety, to make certain clarifications to the proposed rule text relating to the eligibility and hearing process for those securities of an OTCBB issuer that is repeatedly late or otherwise delinquent in

filing its periodic reports under Rule 6530(e)(1),<sup>3</sup> and other clarifying changes relating to the application of the Rule 9700 Series, as described herein.

### **Proposal**

In January 1999, Nasdaq and NASD adopted amendments to Rules 6530 and 6540 that require all issuers of securities quoted on the OTCBB to be current in their filings with the Commission or other appropriate regulator (the “Eligibility Rule”).<sup>4</sup> When an issuer does not comply with the Eligibility Rule, either because a filing is not made or because a filing is incomplete,<sup>5</sup> a fifth character “E” is appended to the trading symbol of that issuer’s security.<sup>6</sup> This identifier notifies investors and other market

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<sup>3</sup> Pursuant to Rule 6530(e), the securities of those OTCBB issuers (1) that are delinquent in a required filing three times in a two-year period and (2) those that are removed from the OTCBB for failure to file two times in a two-year period, are ineligible for quotation on the OTCBB. Following removal under Rule 6530(e), an issuer’s security would not be eligible for re-inclusion unless the issuer has timely filed in complete form all required annual and quarterly reports for a one year period. See Securities Exchange Act Release No. 52786 (November 16, 2005), 70 FR 70907 (November 23, 2005) (SR-NASD-2005-011). See infra note 12.

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

<sup>5</sup> In order for a filing to be complete, it must, for example, contain all required certifications, attestations, and financial statements, including an auditor’s review pursuant to SAS–100 (for quarterly reports) or an unqualified auditor’s opinion (for annual reports). See, e.g., Rule 13a–14 under the Act, 17 CFR 240.13a–14, and Rules 10–01(d) and 2–02(c) of Regulation S–X, 17 CFR 210.10–01(d) and 2–02(c). In addition, the auditor must be registered with the Public Company Accounting Oversight Board. See Section 102(a) of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7212(a).

<sup>6</sup> To the extent an issuer has multiple classes of securities quoted on the OTCBB, when an issuer becomes delinquent with respect to its reporting requirements under Rule 6530, all of that issuer’s securities become ineligible for quotation on the OTCBB.

participants that NASD does not have information that the issuer is current in its reporting obligations. If the issuer does not comply within the applicable grace period provided by the Eligibility Rule (typically 30 days), the issuer's security is removed from the OTCBB.<sup>7</sup>

In November 2005, the SEC approved amendments to Rule 6530 that limit the eligibility for quotation on the OTCBB of the securities of an issuer that is repeatedly late or otherwise delinquent in filing periodic reports.<sup>8</sup> Specifically, Rule 6530(e) provides that OTCBB issuers that file late with the SEC or other respective regulator, even if within the grace period allowed by Rule 6530, three times in a 24-month period and those that have been removed from the OTCBB for failure to file two times in a 24-month period, are ineligible for quotation on the OTCBB by an NASD member until such time as the issuer has timely filed complete required periodic reports for a one-year period.<sup>9</sup>

Since late 2000, a party aggrieved by a determination relating to the OTCBB ("aggrieved party") has been able to request a review of a determination under the Eligibility Rule by a hearing panel pursuant to the NASD Rule 9700 Series.<sup>10</sup> The

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<sup>7</sup> The Eligibility Rule provides a 60-day grace period to banks, savings associations and insurance companies that do not file with the Commission, but are required to file with other regulators.

<sup>8</sup> See Securities Exchange Act Release No. 52786 (November 16, 2005), 70 FR 70907 (November 23, 2005) (SR-NASD-2005-011).

<sup>9</sup> The amendments apply to filings for reporting periods ending on and after October 1, 2005.

<sup>10</sup> See High Speed Net Solutions, Inc., Securities Exchange Act Release No. 43434 (October 12, 2000); Palmworks, Inc., Securities Exchange Act Release No. 43423 (October 6, 2000); JD American Workwear, Inc., Securities Exchange Act Release No. 43295 (September 15, 2000).

proposed rule change would provide transparency to the availability and scope of such review and impose a fee for such review.<sup>11</sup> Specifically, under the proposed rule change, upon determining that an issuer's security would be ineligible for quotation under Rule 6530, NASD would send a notice to the address appearing on the issuer's most recent periodic report at least seven calendar days prior to the removal, even if there is no applicable grace period.<sup>12</sup> The notice will 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 removal date.<sup>13</sup>

In addition, the proposed rule change advises aggrieved parties of their right to request a review of the determination by a hearing panel and the fees associated therewith. The proposed rule specifies that the hearing panels can determine whether the issuer's security is eligible for continued quotation and/or whether the issuer filed a complete report by the applicable due date taking into account any extensions pursuant to

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<sup>11</sup> NASD also is proposing to amend Rule 6530(f)(2) to clarify that the hearings will be conducted via telephone.

<sup>12</sup> Under Rule 6530(e), the securities of an issuer are removed from the OTCBB the third time that the issuer fails to file by the due date (including, if applicable, any extension permitted by Rule 12b-25 of the Exchange Act) in a two-year period, without the benefit of the grace period for the third delinquency. Prior to removal from the OTCBB, however, NASD provides seven calendar days to allow an aggrieved party to request a review of such determination by a hearing panel. As such, where an issuer's security will be removed for failure to file by the due date for the third time in a two-year period, NASD provides seven calendar days (not the 30 or 60 day grace period provided in Rule 6530(a)) to allow an aggrieved party time to request a hearing. See SR-NASD-2005-011. NASD is proposing to amend Rule 6530(e) and (f) to codify this procedural framework.

<sup>13</sup> If an issuer's security becomes ineligible for failure to file by the due date for the third time in a two-year period, such issuer will not be able to cure the condition causing the ineligibility. See Securities Exchange Act Release No. 52786 (November 16, 2005), 70 FR 70907 (November 23, 2005) (SR-NASD-2005-011).

Rule 12b-25 under the Exchange Act. The hearing panels do not have the discretion to allow the securities of delinquent companies to continue to be quoted on the OTCBB.<sup>14</sup> NASD believes that this lack of discretion is appropriate given the 30 or 60-day grace period that is already built into the rule. The proposed rule change notes that the request for review will stay the securities' removal until the panel makes its determination.

The proposed rule change also advises aggrieved parties of their right to request a review of the hearing panel decision and the fees associated therewith. The proposed rule change indicates that the review of the hearing panel decision is limited to whether the issuer's security, at the time of the initial review by the hearing panel, was eligible for quotation on the OTCBB and/or whether the issuer filed a complete report by the applicable due date taking into account any extensions pursuant to Rule 12b-25 under the Exchange Act. There is no discretion to allow the securities of delinquent companies to continue to be quoted on the OTCBB. The proposed rule change notes that the request for review of the hearing panel decision will not stay the securities' removal.<sup>15</sup>

Unlike the Rule 4800 Series that governs hearings for Nasdaq-listed securities, the Rule 9700 Series currently does not provide for a fee to offset the costs to conduct

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<sup>14</sup> If a valid filing is made before the hearing panel's decision is issued, the issuer would not be rendered ineligible for further quotation on the OTCBB. However, if a security becomes ineligible for quotation pursuant to 6530(e)(1), the issuer may not cure the condition that caused the ineligibility. See supra note 13.

<sup>15</sup> The proposed rule change further notes that review of the hearing panel decision will be based on the written record, unless further hearings are ordered. If further hearings are ordered, they will be conducted via telephone.

these hearings.<sup>16</sup> Given the increasing number of these hearings,<sup>17</sup> NASD believes it is appropriate to adopt a fee to offset the associated costs. Specifically, NASD proposes to adopt a \$4,000 fee for aggrieved parties requesting review by a hearing panel. In addition, aggrieved parties that seek review of the hearing panel's decision would also be subject to an additional \$4,000 fee.

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

(b) Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Act, which requires, among other things, that NASD rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that NASD operates or controls. NASD also believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, which requires, among other things, that NASD rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the proposed rule change will clarify the OTCBB

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<sup>16</sup> See NASD Rule 4805(c), which requires Nasdaq-listed issuers to submit a \$4,000 fee for a written hearing and a \$5,000 fee for an oral hearing, to cover the cost of holding the hearing, and NASD Rule 4807(a), which requires Nasdaq-listed issuers to submit a fee of \$4,000 to cover the cost of review by the Nasdaq Listing and Hearing Review Council. See also Sections 1203 and 1205 of the Amex Company Guide, which impose similar fees, and Section 804.00 of the NYSE Listed Company Manual, which requires an issuer to submit a \$20,000 fee to request review of a delisting decision by the NYSE staff.

<sup>17</sup> In 2003, 14 hearing requests were received from OTCBB issuers. By contrast, in 2004, 53 hearing requests were received from OTCBB issuers and, in 2005, 124 such requests were received.

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

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

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

**5. 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.

**6. Extension of Time Period for Commission Action**

NASD does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.

**7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)**

Not applicable.

**8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission**

Not applicable.

**9. Exhibits**

Exhibit 1. Completed notice of the proposed rule change for publication in the Federal Register.

Exhibit 4. Exhibit 4 shows the full text of the rule change marking changes from the Amendment No. 2, with Amendment No. 2 shown as if adopted, and the new language in this Amendment No. 3 marked to show additions and deletions.

**EXHIBIT 1**

**SECURITIES AND EXCHANGE COMMISSION**

(Release No. 34- ; File No. SR-NASD-2005-067)

Self-Regulatory Organizations: National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change Relating to Amendments to Rule 6530 to Clarify Review Process for OTCBB Eligibility Determinations and to Adopt Fees for Such Review

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on , the National Association of Securities Dealers, Inc. (“NASD”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) Amendment No. 3 to the proposed rule change<sup>3</sup> as described in Items I, II, and III below, which Items have been prepared by NASD. 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**

NASD is proposing to amend Rule 6530 to clarify the availability of a process to

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

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

<sup>3</sup> On May 24, 2005, NASD filed SR-NASD-2005-067 with the Commission. On September 27, 2005, NASD filed with the Commission Amendment No. 1 to SR-NASD-2005-067 that replaced and superseded in its entirety the text of the original rule filing. On December 8, 2005, NASD filed with the Commission Amendment No. 2 to SR-NASD-2005-067 that replaced and superseded in its entirety the text of Amendment No. 1 to SR-NASD-2005-067. Amendment No. 3 replaces and supercedes in its entirety the text of Amendment No. 2 to SR-NASD-2005-067.

review eligibility determinations on the OTC Bulletin Board (“OTCBB”) and to adopt fees for such review.

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

\* \* \* \* \*

**6530. OTCBB-Eligible Securities**

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

(a) through (d) No change.

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

(1) and (2) No change.

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

Exchange Act will be considered timely filed. Furthermore, filings for reporting periods ending before October 1, 2005 will not be considered for purposes of this paragraph (e).

(f) (1) Upon determining that an issuer's security would be ineligible for quotation under this rule, NASD will send a notification to the address on the cover of the issuer's last periodic report. This notification will state the date upon which the security will be removed, following any applicable grace period, unless the condition causing the ineligibility has been cured by that date. When a security becomes ineligible for quotation pursuant to paragraph (e) above, however, the issuer may not cure the condition that caused the ineligibility. In all cases, NASD will provide at least seven calendar days from the date the notification is mailed to the issuer to permit an aggrieved party to request review pursuant to paragraph (f)(2) below, before removal of the security.

(2) Pursuant to the Rule 9700 Series, as modified herein, an aggrieved party may request a review by a hearing panel of the determination that an issuer's security is ineligible for quotation under this rule. NASD must receive the request for review at least two business days prior to the scheduled removal of the security, together with a \$4,000 hearing fee payable to NASD to cover the cost of review. A request for review under this paragraph (f)(2) will stay the removal of the issuer's security from the Service until the hearing panel issues a decision under Rule 9750. The hearing panel will consider only the issues of whether the issuer's security is then eligible for quotation in the Service and/or whether the issuer filed a complete report by the applicable due date taking into account any extensions pursuant to Rule 12b-25 under the Exchange Act. The

hearing panel shall not have discretion to grant any extensions of time for ineligible securities to become eligible. Notwithstanding any contrary provision in the Rule 9700 Series, hearings will be conducted via telephone and NASD will provide the aggrieved party at least five business days notice of the hearing unless the aggrieved party waives such notice.

(3) The aggrieved party may request a review of a hearing panel's decision under Rule 9760. Such a request for review must be accompanied by a \$4,000 fee payable to NASD to cover the cost of review. This review will only consider whether the issuer's security, at the time of the initial review under paragraph (f)(2), was eligible for quotation in the Service and/or whether the issuer filed a complete report by the applicable due date taking into account any extensions pursuant to Rule 12b-25 under the Exchange Act. A request for review under this paragraph (f)(3) shall not stay the removal of the issuer's security from the Service and there will be no discretion to grant extensions of time for ineligible securities to become eligible. Notwithstanding any contrary provision in the Rule 9700 Series, a review under this paragraph (f)(3) will be based on the written record, unless additional hearings are ordered. If any further hearings are ordered, the hearings will be conducted via telephone and NASD will provide the aggrieved party at least five business days notice of the hearing unless the aggrieved party waives such notice.

\* \* \* \* \*

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

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

**Rule Filing History**

On May 24, 2005, NASD, through its subsidiary, The Nasdaq Stock Market, Inc. (“Nasdaq”), filed with the Commission proposed rule change SR-NASD-2005-067, proposing amendments to Rule 6530 and Rule 7010 to clarify the availability of a process to review eligibility determinations under Rule 6530 and to adopt service based fees for OTCBB issuers. On September 27, 2005, Nasdaq filed with the Commission Amendment No. 1 to SR-NASD-2005-067 (“Amendment No. 1”), which proposed to delete the record-keeping fee, among other technical changes. On October 1, 2005, the Commission approved SR-NASD-2005-089, which provided NASD direct authority for OTC equities operations, rather than the prior delegation to Nasdaq. As such, NASD assumed direct authority for OTC equities operations, including operation of the OTCBB (quotation and trade reporting platform and other services), trade reporting for other non-OTCBB OTC equity securities and other services, and related rulemaking functions. Given the SEC’s approval of SR-NASD-2005-089, NASD filed with the Commission Amendment No. 2 to SR-NASD-2005-067 (“Amendment No. 2”), which amended the

proposed rule change to reflect NASD's authority for the OTCBB, among other clarifying changes.

NASD is filing this Amendment No. 3 to SR-NASD-2005-067 ("Amendment No. 3"), which replaces and supersedes the prior filings in their entirety, to make certain clarifications to the proposed rule text relating to the eligibility and hearing process for those securities of an OTCBB issuer that is repeatedly late or otherwise delinquent in filing its periodic reports under Rule 6530(e)(1),<sup>4</sup> and other clarifying changes relating to the application of the Rule 9700 Series, as described herein.

### **Proposal**

In January 1999, Nasdaq and NASD adopted amendments to Rules 6530 and 6540 that require all issuers of securities quoted on the OTCBB to be current in their filings with the Commission or other appropriate regulator (the "Eligibility Rule").<sup>5</sup> When an issuer does not comply with the Eligibility Rule, either because a filing is not made or because a filing is incomplete,<sup>6</sup> a fifth character "E" is appended to the trading

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<sup>4</sup> Pursuant to Rule 6530(e), the securities of those OTCBB issuers (1) that are delinquent in a required filing three times in a two-year period and (2) those that are removed from the OTCBB for failure to file two times in a two-year period, are ineligible for quotation on the OTCBB. Following removal under Rule 6530(e), an issuer's security would not be eligible for re-inclusion unless the issuer has timely filed in complete form all required annual and quarterly reports for a one year period. See Securities Exchange Act Release No. 52786 (November 16, 2005), 70 FR 70907 (November 23, 2005) (SR-NASD-2005-011). See infra note 13.

<sup>5</sup> See Securities Exchange Act Release No. 40878 (January 4, 1999), 64 FR 1255 (January 8, 1999) (SR-NASD-98-51).

<sup>6</sup> In order for a filing to be complete, it must, for example, contain all required certifications, attestations, and financial statements, including an auditor's review pursuant to SAS-100 (for quarterly reports) or an unqualified auditor's opinion

symbol of that issuer's security.<sup>7</sup> This identifier notifies investors and other market participants that NASD does not have information that the issuer is current in its reporting obligations. If the issuer does not comply within the applicable grace period provided by the Eligibility Rule (typically 30 days), the issuer's security is removed from the OTCBB.<sup>8</sup>

In November 2005, the SEC approved amendments to Rule 6530 that limit the eligibility for quotation on the OTCBB of the securities of an issuer that is repeatedly late or otherwise delinquent in filing periodic reports.<sup>9</sup> Specifically, Rule 6530(e) provides that OTCBB issuers that file late with the SEC or other respective regulator, even if within the grace period allowed by Rule 6530, three times in a 24-month period and those that have been removed from the OTCBB for failure to file two times in a 24-month

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(for annual reports). See, e.g., Rule 13a-14 under the Act, 17 CFR 240.13a-14, and Rules 10-01(d) and 2-02(c) of Regulation S-X, 17 CFR 210.10-01(d) and 2-02(c). In addition, the auditor must be registered with the Public Company Accounting Oversight Board. See Section 102(a) of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7212(a).

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

<sup>8</sup> The Eligibility Rule provides a 60-day grace period to banks, savings associations and insurance companies that do not file with the Commission, but are required to file with other regulators.

<sup>9</sup> See Securities Exchange Act Release No. 52786 (November 16, 2005), 70 FR 70907 (November 23, 2005) (SR-NASD-2005-011).

period, are ineligible for quotation on the OTCBB by an NASD member until such time as the issuer has timely filed complete required periodic reports for a one-year period.<sup>10</sup>

Since late 2000, a party aggrieved by a determination relating to the OTCBB (“aggrieved party”) has been able to request a review of a determination under the Eligibility Rule by a hearing panel pursuant to the NASD Rule 9700 Series.<sup>11</sup> The proposed rule change would provide transparency to the availability and scope of such review and impose a fee for such review.<sup>12</sup> Specifically, under the proposed rule change, upon determining that an issuer’s security would be ineligible for quotation under Rule 6530, NASD would send a notice to the address appearing on the issuer’s most recent periodic report at least seven calendar days prior to the removal, even if there is no applicable grace period.<sup>13</sup> The notice will indicate the removal date for the issuer’s

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<sup>10</sup> The amendments apply to filings for reporting periods ending on and after October 1, 2005.

<sup>11</sup> See High Speed Net Solutions, Inc., Securities Exchange Act Release No. 43434 (October 12, 2000); Palmworks, Inc., Securities Exchange Act Release No. 43423 (October 6, 2000); JD American Workwear, Inc., Securities Exchange Act Release No. 43295 (September 15, 2000).

<sup>12</sup> NASD also is proposing to amend Rule 6530(f)(2) to clarify that the hearings will be conducted via telephone.

<sup>13</sup> Under Rule 6530(e), the securities of an issuer are removed from the OTCBB the third time that the issuer fails to file by the due date (including, if applicable, any extension permitted by Rule 12b-25 of the Exchange Act) in a two-year period, without the benefit of the grace period for the third delinquency. Prior to removal from the OTCBB, however, NASD provides seven calendar days to allow an aggrieved party to request a review of such determination by a hearing panel. As such, where an issuer’s security will be removed for failure to file by the due date for the third time in a two-year period, NASD provides seven calendar days (not the 30 or 60 day grace period provided in Rule 6530(a)) to allow an aggrieved party time to request a hearing. See SR-NASD-2005-011. NASD is proposing to amend Rule 6530(e) and (f) to codify this procedural framework.

security after any applicable grace period, unless the condition causing the ineligibility has been cured by the removal date.<sup>14</sup>

In addition, the proposed rule change advises aggrieved parties of their right to request a review of the determination by a hearing panel and the fees associated therewith. The proposed rule specifies that the hearing panels can determine whether the issuer's security is eligible for continued quotation and/or whether the issuer filed a complete report by the applicable due date taking into account any extensions pursuant to Rule 12b-25 under the Exchange Act. The hearing panels do not have the discretion to allow the securities of delinquent companies to continue to be quoted on the OTCBB.<sup>15</sup> NASD believes that this lack of discretion is appropriate given the 30 or 60-day grace period that is already built into the rule. The proposed rule change notes that the request for review will stay the securities' removal until the panel makes its determination.

The proposed rule change also advises aggrieved parties of their right to request a review of the hearing panel decision and the fees associated therewith. The proposed rule change indicates that the review of the hearing panel decision is limited to whether the issuer's security, at the time of the initial review by the hearing panel, was eligible for quotation on the OTCBB and/or whether the issuer filed a complete report by the

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<sup>14</sup> If an issuer's security becomes ineligible for failure to file by the due date for the third time in a two-year period, such issuer will not be able to cure the condition causing the ineligibility. See Securities Exchange Act Release No. 52786 (November 16, 2005), 70 FR 70907 (November 23, 2005) (SR-NASD-2005-011).

<sup>15</sup> If a valid filing is made before the hearing panel's decision is issued, the issuer would not be rendered ineligible for further quotation on the OTCBB. However, if a security becomes ineligible for quotation pursuant to 6530(e)(1), the issuer may not cure the condition that caused the ineligibility. See supra note 14.

applicable due date taking into account any extensions pursuant to Rule 12b-25 under the Exchange Act. There is no discretion to allow the securities of delinquent companies to continue to be quoted on the OTCBB. The proposed rule change notes that the request for review of the hearing panel decision will not stay the securities' removal.<sup>16</sup>

Unlike the Rule 4800 Series that governs hearings for Nasdaq-listed securities, the Rule 9700 Series currently does not provide for a fee to offset the costs to conduct these hearings.<sup>17</sup> Given the increasing number of these hearings,<sup>18</sup> NASD believes it is appropriate to adopt a fee to offset the associated costs. Specifically, NASD proposes to adopt a \$4,000 fee for aggrieved parties requesting review by a hearing panel. In addition, aggrieved parties that seek review of the hearing panel's decision would also be subject to an additional \$4,000 fee.

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

## 2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of

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<sup>16</sup> The proposed rule change further notes that review of the hearing panel decision will be based on the written record, unless further hearings are ordered. If further hearings are ordered, they will be conducted via telephone.

<sup>17</sup> See NASD Rule 4805(c), which requires Nasdaq-listed issuers to submit a \$4,000 fee for a written hearing and a \$5,000 fee for an oral hearing, to cover the cost of holding the hearing, and NASD Rule 4807(a), which requires Nasdaq-listed issuers to submit a fee of \$4,000 to cover the cost of review by the Nasdaq Listing and Hearing Review Council. See also Sections 1203 and 1205 of the Amex Company Guide, which impose similar fees, and Section 804.00 of the NYSE Listed Company Manual, which requires an issuer to submit a \$20,000 fee to request review of a delisting decision by the NYSE staff.

<sup>18</sup> In 2003, 14 hearing requests were received from OTCBB issuers. By contrast, in 2004, 53 hearing requests were received from OTCBB issuers and, in 2005, 124 such requests were received.

Section 15A(b)(5) of the Act, which requires, among other things, that NASD rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that NASD operates or controls. NASD also believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, which requires, among other things, that NASD rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the proposed rule change will clarify the OTCBB eligibility review process and will impose certain fees associated therewith to compensate NASD for the costs of conducting eligibility review hearings.

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

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

**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 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2005-067 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASD-2005-067. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule

change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549. 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 the File Number SR-NASD-2005-067 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>19</sup>

Nancy M. Morris

Secretary

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<sup>19</sup> 17 CFR 200.30-3(a)(12).

**EXHIBIT 4**

**Exhibit 4 shows the full text of rule change marking changes from Amendment No. 2 to SR-NASD-2005-067 to this Amendment No. 3, with the language in Amendment No. 2 shown as if adopted, and the new language in this Amendment No. 3 marked to show additions and deletions.**

Proposed new language in this Amendment No. 3 is underlined  
Proposed deletions in this Amendment No. 3 are in brackets

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**6530. OTCBB-Eligible Securities**

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

(a) through (d)~~[(e)]~~ No Change.

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

(1) and (2) No change.

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

Exchange Act will be considered timely filed. Furthermore, filings for reporting periods ending before October 1, 2005 will not be considered for purposes of this paragraph (e).

(f) (1) Upon determining that an issuer's security[securities] would be ineligible for quotation under the rule, NASD will send a notification to the address on the cover of the issuer's last periodic report. This notification will state the date upon which[last day of the applicable grace period and will indicate that unless the condition causing the ineligibility has been cured by that date,] the security[securities] will be removed, following any applicable grace period, unless the condition causing the ineligibility has been cured by that date. When a security becomes ineligible for quotation pursuant to paragraph (e) above, however, the issuer may not cure the condition that caused the ineligibility. [immediately thereafter; provided, however,] [i]In all cases, NASD will provide at least seven calendar days from the date the notification is mailed to the issuer to permit an aggrieved party to request review pursuant to paragraph (f)(2) below, before removal of the security[securities].

(2) Pursuant to the Rule 9700 Series, as modified herein, an aggrieved party may request a review by a hearing panel of the determination that an issuer's security is ineligible for quotation under this rule. [The issuer may request a review of the determination by a hearing panel under the Rule 9700 Series, as modified herein. ]NASD must receive the issuer's request for review at least two business days prior to the scheduled removal of the security[securities], together with a \$4,000 hearing fee payable to NASD to cover the cost of review. A request for review under this paragraph (f)(2) will stay the removal of the

issuer's security[securities] from the Service until the hearing panel issues a decision under Rule 9750. The hearing panel will consider only the issues of whether the issuer's security is[securities are] then eligible for quotation in the Service and/or whether the issuer filed a complete report by the applicable due date taking into account any extensions pursuant to Rule 12b-25 under the Exchange Act. The hearing panel shall not have discretion to grant any extensions of time for ineligible securities to become eligible. Notwithstanding any contrary provision in the Rule 9700 Series, hearings will be conducted via telephone and NASD will provide the aggrieved party[issuer will be provided] at least five business days notice of the hearing unless the aggrieved party[issuer] waives such notice.

(3) The aggrieved party[An issuer] may request a review of a hearing panel's decision under Rule 9760. Such a request for review must be accompanied by a \$4,000 fee payable to NASD to cover the cost of review. This review will only consider whether the [securities are]issuer's security, at the time of the initial review under paragraph (f)(2), was [then] eligible for quotation in the Service and/or whether the issuer filed a complete report by the applicable due date taking into account any extensions pursuant to Rule 12b-25 under the Exchange Act. A request for review under this paragraph (f)(3) shall not stay the removal of the issuer's security from the Service and there will be no [shall not have] discretion to grant extensions of time for ineligible securities to become eligible. Notwithstanding any contrary provision in the Rule 9700 Series, a review under this paragraph (f)(3) will be based on the written record, unless

additional hearings are ordered. If any further hearings are ordered, the hearings will be conducted via telephone and NASD will provide the aggrieved party at least five business days notice of the hearing unless the aggrieved party waives such notice.