

(File No. SR-DTC-2002-08) pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").¹ Notice of the proposal was published in the **Federal Register** on December 6, 2002.² No comment letters were received. For the reasons discussed below, the Commission is approving the proposed rule change.

I. Description

DTC's rule change will clarify the procedures under which DTC's nominee, Cede & Co., will exercise certain rights as the recordholder of securities on deposit at DTC where Cede & Co. is required to act with respect to 100% of the securities on deposit or not act at all. Such an event is known as a "Unitary Action."

When involved in a situation that requires a Unitary Action under applicable law, DTC will attempt to follow its normal procedures for actions that are not Unitary Actions. Specifically, for solicitations when an issuer has announced an annual or special shareholders meeting or consent solicitation and where a record date has been established, DTC will assign applicable Cede & Co. voting rights or consenting rights to its participants that have securities credited to their accounts on the record date, will issue an omnibus proxy, and will forward it to the issuer or trustee. DTC also will assist its participants in exercising other rights available to Cede & Co. as the recordholder of securities on deposit at DTC. Examples of the rights that participants may exercise through DTC are the right to dissent and seek an appraisal of stock, the right to inspect a stock ledger, and the right to accelerate a bond. Participants may seek DTC's assistance in exercising such rights on their own behalf or on behalf of their customers. DTC will act in these matters only upon written instructions from participants with securities credited in their DTC free accounts.

However, if, for example, a foreign bankruptcy court stated that it would accept votes for approval of a plan of bankruptcy from bondholders holding through DTC but only in the form of a 100% yes or no vote or not at all, DTC will attempt to assign its voting rights to its participants or otherwise act in accordance with its participants' instructions.

DTC will not be liable for any losses arising from actions it takes or fails to take in connection with Unitary Actions other than those losses that are directly

caused by DTC's gross negligence or willful misconduct.

In Unitary Action situations, DTC may incur unusual expenses (e.g., hiring outside counsel) that are specifically attributable to the securities that are subject to the Unitary Action. Under DTC Rule 20, DTC may charge each participant holding a position in a Unitary Action security such participant's pro rata share (based on the number of shares or the principal amount of bonds or notes) of DTC's expenses related to DTC's taking or not taking an action in connection with a Unitary Action.

II. Discussion

Section 17A(b)(3)(F)³ of the Act requires that the rules of a clearing agency be designed, among other things, to remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions. The Commission finds that the proposed rule change is consistent with DTC's obligations under section 17A(b)(3)(F) because it preserves DTC's participants' ability to exercise their individual rights in corporate actions while continuing to hold their positions in a book-entry environment in situations involving Unitary Actions. This clarification should also add more certainty to the allocation of voting rights and the costs involved in Unitary Action situations.

III. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of section 17A of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that the proposed rule change (File No. SR-DTC-2002-08) be, and hereby is, approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.⁴

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48035; File No. SR-NASD-98-26]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Amendment Nos. 14 and 15 to a Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to an Extension of the Short Sale Rule and Continued Suspension of the Primary Market Maker Standards Set Forth in NASD Rule 4612

June 16, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on March 19, 1998, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), 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 and II below, which Items have been prepared by the Nasdaq. The NASD subsequently filed several amendments to the proposed rule change. On June 11, 2003, the NASD filed Amendment No. 14 to the proposed rule change.³ On June 16, 2003, the NASD filed Amendment No. 15 to the proposed rule change.⁴ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, and to grant accelerated approval of the proposed rule change, as amended.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Nasdaq is proposing to extend the pilot program of the NASD short sale rule from June 15, 2003, until December 15, 2003. Nasdaq is also seeking to continue the suspension of the effectiveness of the Primary Market Maker ("PMM") standards currently set forth in NASD Rule 4162 also from June 15, 2003, until December 15, 2003. The text of the proposed rule change is below. Proposed new language is italicized; deletions are [bracketed]. NASD Rule 3350

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Mary M. Dunbar, Vice-President and Deputy General Counsel, NASD, to Kathy England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated June 10, 2003 ("Amendment No. 14").

⁴ See letter from Mary M. Dunbar, Vice-President and Deputy General Counsel, NASD, to Kathy England, Assistant Director, Division, Commission, dated June 10, 2003 ("Amendment No. 15").

¹ 15 U.S.C. 78s(b)(1).

² Securities Exchange Act Release No. 46930 (Nov. 27, 2002); 67 FR 72713.

³ 15 U.S.C. 78q-1(b)(3)(F).

⁴ 17 CFR 200.30-3(a)(12).

(a)–(k) No Change.

(l) This section shall be in effect until December 15, 2003 [June 15, 2003]].

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

In its filing with the Commission, the 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 III below. The 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

Background and Description of the NASD's Short Sale Rule

Section 10(a) of the Act⁵ gives the Commission plenary authority to regulate short sales of securities registered on a national securities exchange, as needed to protect investors. Although the Commission has regulated short sales since 1938, that regulation has been limited to short sales of exchange-listed securities. In 1992, Nasdaq, believing that short-sale regulation is important to the orderly operation of securities markets, proposed a short sale rule for trading of its National Market securities that incorporates the protections provided by Rule 10a–1 of the Act.⁶ On June 29, 1994, the Commission approved the NASD's short sale rule (the "Rule") applicable to short sales⁷ in Nasdaq National Market ("NNM") securities on an eighteen-month pilot basis through March 5, 1996.⁸ The NASD and the Commission have extended NASD Rule 3350 numerous times, most recently, until June 15, 2003.

The Rule employs a "bid" test rather than a tick test because Nasdaq trades are not necessarily reported to the tape

in chronological order. The Rule prohibits short sales at or below the inside bid when the current inside bid is below the previous inside bid. Nasdaq calculates the inside bid from all market makers in the security (including bids for exchanges trading Nasdaq securities on an unlisted trading privileges basis), and disseminates symbols to denote whether the current inside bid is an "up-bid" or a "down-bid." To effect a "legal" short sale on a down-bid, the short sale must be executed at a price at least \$.01 above the current inside bid. The Rule is in effect from 9:30 a.m. until 4 p.m. each trading day.

To reduce the compliance burdens on its members, the Rule also incorporates seven exemptions contained in Rule 10a–1 of the Act,⁹ and other exemptions that are relevant to trading on Nasdaq.¹⁰ For example, in an effort to not constrain the legitimate hedging needs of options market makers, the Rule also contains a limited exception for standardized options market makers. The Rule also contains an exemption for warrant market makers similar to the one available for options market makers.

Background of the Primary Market Maker Standards

To ensure that market maker activities that provide liquidity and continuity to the market are not adversely constrained when the short sale rule is invoked, NASD Rule 3350 provides an exemption for "qualified" market makers (*i.e.*, market makers that meet the PMM standards). NASD Rule 4612 provides that a member registered as a market maker pursuant to NASD Rule 4611 may be deemed a PMM if that member meets certain threshold standards.

Since the Rule has been in effect, Nasdaq has used three methods to determine whether a market maker is eligible for the market maker exemption. Specifically, from September 4, 1994 through February 1, 1996, Nasdaq market makers that maintained a quotation in a particular NNM security

for 20 consecutive business days without interruption were exempt from the Rule for short sales in that security, provided the short sales were made in connection with bona fide market making activity ("the 20-day" test). From February 1, 1996 until the February 14, 1997, the "20-day" test was replaced with a four-part quantitative test known as the PMM standards.¹¹

On February 14, 1997, the PMM standards were waived for all NNM securities due to the impacts of the Commission's Order Handling Rules and corresponding NASD rule change and system modifications on the operation of the four quantitative standards.¹² For example, among other impacts, the requirement that market makers display customer limit orders adversely affected the ability of market makers to satisfy the "102% Average Spread Standard." Since that time all Nasdaq Market Makers have been deemed to be PMMs.

In March 1998, Nasdaq proposed PMM standards that received substantially negative comments.¹³ In light of those comments, Nasdaq staff convened an advisory subcommittee to develop new PMM standards ("Subcommittee") in August 1998. The Subcommittee met nine times and formulated new PMM standards. NASD/Nasdaq staff requested to meet with the Commission staff and the Subcommittee to receive informal feedback on the new PMM standards. This meeting occurred on December 9, 1998. At the conclusion of the meeting, Commission staff noted the progress made by the Subcommittee and requested time to digest and more carefully analyze the proposed new PMM standards.

On July 29, 1999, members of the Nasdaq staff conducted a conference

¹¹ Under the PMM standards, a market maker was required to satisfy at least two of the following four criteria each month to be eligible for an exemption from the short sale rule: (1) The market maker must be at the best bid or best offer as shown on Nasdaq no less than 35 percent of the time; (2) the market maker must maintain a spread no greater than 102 percent of the average dealer spread; (3) no more than 50 percent of the market maker's quotation updates may occur without being accompanied by a trade execution of at least one unit or trading; or (4) the market maker executes 1½ times its "proportionate" volume in the stock. If a PMM did not satisfy the threshold standards after a particular review period, the market maker lost its designation as a PMM (*i.e.* the "P" next to its market maker identification was removed). Market makers could re-qualify for designation as a PMM by satisfying the threshold standards in the next review period.

¹² See Securities Exchange Act Release No. 38294 (February 17, 1997), 62 FR 8289 (February 24, 1997), (SR–NASD–97–07).

¹³ See Securities Exchange Act Release No. 39819 (March 30, 1998), 63 FR 16841 (April 6, 1998), (SR–NASD–97–73).

⁵ 15 U.S.C. 78j.

⁶ 17 CFR 240.10a–1.

⁷ A short sale is a sale of a security that the seller does not own or any sale that is consummated by the delivery of a security borrowed by, or for the account of, the seller. To determine whether a sale is a short sale members must adhere to the definition of a "short sale" contained in Rule 3b–3 of the Act, which is incorporated into Nasdaq's short sale rule by NASD Rule 3350(k)(1).

⁸ See Securities Exchange Act Release No. 34277 (June 29, 1994), 59 FR 34885 (July 7, 1994), (SR–NASD–92–12), ("Short Sale Rule Approval Order").

⁹ 17 CFR 240.10a–1.

¹⁰ See NASD Rule 3350(c)(2)–(8). The Rule also provides that a member not currently registered as a Nasdaq market maker in a security that has acquired the security while acting in the capacity of a block positioner shall be deemed to own such security for the purposes of the Rule notwithstanding that such member may not have a net long position in such security if and to the extent that such member's short position in such security is subject to one or more offsetting positions created in the course of bona fide arbitrage, risk arbitrage, or bona fide hedge activities. In addition, the NASD has recognized that Commission staff interpretations to Rule 10a–1 of the Act dealing with the liquidation of index arbitrage positions and an "international equalizing exemption" are equally applicable to the NASD's short sale rule.

call with members of the Commission staff to receive feedback on the PMM standards that Nasdaq presented at the December 9, 1998 meeting. During the meeting, the Commission staff requested that Nasdaq modify several of the proposed standards and analyze the impact of those modifications on the primary market maker determination. On September 27, 1999, Nasdaq reported that the NASD Economic Research staff had analyzed data based on the Commission's recommended revisions, and concluded that the Commission's modified standards produced unfavorable results. Nasdaq requested that the Commission comment on the outcome of this test "as we intend to communicate your comments to the Subcommittee in an effort to resume the process of developing new standards."¹⁴

Nasdaq suspended development of PMM standards in late-1999 after the Commission signaled to the securities industry that it is considering fundamental changes to Rule 10a-1 of the Act,¹⁵ changes that could impact the manner in which Nasdaq and the other markets regulate short sales. In October 1999, the Commission issued a Concept Release on Short Sales in which it sought comment on, among other things, revising the definition of a short sale, extending short sale regulation to non-exchange listed securities, and eliminating short sale regulation altogether. Nasdaq believed that it would be inappropriate for Nasdaq to dramatically alter its regulation of short sales while the Commission is considering fundamentally changing Rule 10a-1 of the Act.¹⁶ At the request of the Division, Nasdaq has resumed development of PMM standards and has been working with the Commission staff towards that goal.

Proposal to Extend the Short Sale Rule and Suspend the PMM Standards.

Nasdaq believes that it is in the best interest of investors to extend the short sale regulation pilot program. When the Commission approved the NASD's short sale rule on a pilot basis, it made specific findings that the Rule was consistent with sections 11A,¹⁷ 15A(b)(6),¹⁸ 15A(b)(9),¹⁹ and 15A(b)(11)²⁰ of the Act. Specifically, the Commission stated that,

"recognizing the potential for problems associated with short selling, the changing expectations of Nasdaq market participants and the competitive disparity between the exchange markets and the OTC market, the Commission believes that regulation of short selling of Nasdaq National Market securities is consistent with the Act."²¹ In addition, the Commission stated that it "believes that the NASD's short sale bid-test, including the market maker exemptions, is a reasonable approach to short sale regulation of Nasdaq National Market securities and reflects the realities of its market structure."²² The benefits that the Commission recognized when it first approved NASD Rule 3350 apply with equal force today.

Similarly, the concerns that caused the Commission to waive the PMM standards in February 1997 continue to exist today. Nasdaq and the Commission agreed to waive the PMM standards for three reasons that were discovered only after the Order Handling Rules were implemented.²³ Through late-1999, Nasdaq worked diligently to address those concerns to the Commission's satisfaction, including convening a special subcommittee on PMM issues, proposing two different sets of PMM standards, and being continuously available and responsive to Commission staff to discuss this issue. Despite these efforts, the Commission and Nasdaq were unable to establish satisfactory PMM standards. At the request of Commission staff, Nasdaq has begun developing PMM standards suitable to today's rapidly changing marketplace. Re-instating the PMM standards set forth in NASD Rule 4612 would be extremely disruptive to the market and harmful to investors.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,²⁴ in general and with section 15A(b)(6) of the Act,²⁵ in particular, in that it is

designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, remove impediments to a free and open market and a national market system, and, in general, to protect investors and the public interest.

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

The Nasdaq does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Nasdaq neither solicited nor received written comments with respect to the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to file number SR-NASD-98-26 and should be submitted by July 14, 2003.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change as a Pilot Program

After careful consideration, the Commission finds, for the reasons set forth below, that the extension of the Short Sale Rule Pilot until December 15, 2003, and the suspension of the existing PMM standards until December 15, 2003, are consistent with the requirements of the Act and the rules and regulations thereunder. In particular, the extension is consistent

¹⁴ See Letter, dated September 27, 1999 from John F. Malitzis, Assistant General Counsel, Nasdaq, to Richard Strasser, Assistant Director, Division of Market Regulation, Commission.

¹⁵ 17 CFR 240.10a-1.

¹⁶ 17 CFR 240.10a-1.

¹⁷ 15 U.S.C. 78k-1.

¹⁸ 15 U.S.C. 78o-3.

¹⁹ *Id.*

²⁰ *Id.*

²¹ See Short Sale Rule Approval Order, *supra* note 8.

²² *Id.*

²³ Implementation of the Order Handling Rules created the following three issues: (1) Many market makers voluntarily chose to display customer limit orders in their quotes although the Limit Order Display Rule did not yet require it; (2) SOES decrementation for all Nasdaq stocks significantly affected market makers' ability to meet several of the primary market maker standards; and (3) with the inability to meet the existing criteria for a larger number of securities, a market maker may be prevented from registering as a primary market maker in an initial public offering because it fails to meet the 80% primary market maker test contained in NASD Rule 4612(g)(2)(B).

²⁴ 15 U.S.C. 78o-3.

²⁵ 15 U.S.C. 78o-3(6).

with section 15A(b)(6)²⁶ of the Act, which requires that the NASD's rules be designed, among other things, to remove impediments to and perfect the mechanism of a free and open market and a national market system and to promote just and equitable principles of trade.

The Commission finds that the continuation of the Short Sale Rule Pilot and the continued suspension of the PMM standards will maintain the status quo while the Commission is considering amending Rule 10a-1 of the Act.²⁷ This extension of the pilot and continued suspension of the PMM standards is subject to modification or revocation should the Commission amend Rule 10a-1 of the Act²⁸ in a manner as to deem the extension or suspension unnecessary or in conflict with any adopted amendments.²⁹

Accordingly, the Commission finds good cause for approving the extension of the Short Sale Rule Pilot and the suspension of existing PMM standards prior to the 30th day after the date of publication of notice of the filing in the **Federal Register**. It could disrupt the Nasdaq market and confuse market participants to reintroduce the previous PMM standards while new PMM standards are being developed, and while the Commission considers amending Rule 10a-1 of the Act.³⁰

It is therefore ordered, pursuant to section 19(b)(2) of the Act,³¹ that Amendment Nos. 14 and 15 to the proposed rule change, SR-NASD-98-26, which extends the NASD Short Sale Rule Pilot through December 15, 2003, and suspends the PMM standards through December 15, 2003, is approved on an accelerated basis.³²

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.³³

Margaret H. McFarland,

Deputy Secretary

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48042; File No. SR-NASD-2003-91]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to a New Qualification Examination: General Securities Principal Sales Supervisor Module (Series 23)

June 17, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on June 5, 2003, the National Association of Securities Dealers, Inc. ("NASD"), filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. NASD filed the proposal pursuant to section 19(b)(3)(A) of the Act,³ and Rule 19b-4(f)(6) thereunder,⁴ which renders the proposal effective upon filing with the Commission.⁵ 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 proposes to establish the General Securities Principal Sales Supervisor Module ("Series 23") examination program, and is filing with the Commission the selection specifications and study outline for the Series 23 examination.⁶ NASD is proposing the Series 23 examination program in connection with a change to the New York Stock Exchange, Inc. ("NYSE") qualification requirements whereby the NYSE recognized the NASD's General Securities Principal

("Series 24") examination program as an acceptable qualification alternative to the General Securities Sales Supervisor ("Series 9/10") examination program for supervisory persons whose duties do not include the supervision of options or municipal securities sales activity.⁷ Accordingly, NASD is proposing to accept the Series 9/10 examination as an acceptable qualification alternative to the Series 24 examination for associated persons who are required to register and qualify as Series 24 principals with NASD, provided that such persons also pass the proposed Series 23 examination, which covers material from the Series 24 examination not otherwise covered under the Series 9/10 examination. NASD is not proposing any textual changes to the By-Laws, Schedules to the By-Laws, or Rules of NASD.

A description of the Series 23 examination is included in the study outline that was attached to the proposed rule change. Additional information on the examination is included in the Series 23 selection specifications, which NASD omitted from this filing, but has submitted with a request for confidential treatment under separate cover to the Commission's Secretary pursuant to Rule 24b-2 under the Act.⁸

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

On October 9, 2002, the SEC approved a proposed rule change to NYSE Rule 342 ("Offices—Approval, Supervision and Control") that recognized NASD's Series 24 examination as an acceptable qualification alternative to the Series

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

⁵ NASD provided the Commission with written notice of its intent to file the proposed rule change on May 28, 2003. See Rule 19b-4(f)(6)(iii), 17 CFR 240.19b-4(f)(6)(iii).

⁶ Based upon instruction from Commission staff, NASD is submitting SR-NASD-2003-91 for immediate effectiveness pursuant to section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6) thereunder, and is not filing the question bank for Commission review. See letter to Alden S. Adkins, Senior Vice President and General Counsel, NASD Regulation, from Belinda Blaine, Associate Director, Division of Market Regulation, SEC, dated July 24, 2000. The question bank, which is a subset of the existing Series 24 question bank, is available for Commission review.

⁷ See Securities Exchange Act Release No. 46631 (October 9, 2002), 67 FR 64187 (October 17, 2002) (SR-NYSE-2002-24)(approval order).

⁸ 17 CFR 240.24b-2 (allowing the nondisclosure of information filed with the Commission and with any exchange).

²⁶ 15 U.S.C. 78o-3(b)(6).

²⁷ 17 CFR 240.10a-1.

²⁸ *Id.*

²⁹ Absent an exemption, Rule 10a-1 under the Act would apply to Nasdaq on Commission approval of its exchange registration.

³⁰ 17 CFR 240.10a-1.

³¹ 15 U.S.C. 78s(b)(2).

³² In approving Amendment Nos. 14 and 15, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

³³ 17 CFR 200.30-3(a)(12).