0–1(a)(7) under the Act by the compliance date for the rule.

For the Commission, by the Division of Investment Management, under delegated authority.

Nancy M. Morris,

Secretary.

[FR Doc. E6–5245 Filed 4–10–06; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

In the Matter of KSW Industries, Inc.; Order of Suspension of Trading

April 7, 2006.

It appears to the Securities and Exchange Commission (''Commission'') that there is a lack of current and accurate information concerning the securities of KSW Industries, Inc. (''KSW Industries'') because of questions regarding the accuracy of assertions by KSW Industries in statements made to investors concerning, among other things: (1) The identity of KSW Industries' current chief executive officer and president; and (2) its business activities, including a joint venture it purportedly entered into in or about November 2005, a letter of intent it issued in or about February 2006, and negotiations it entered into in or about March 2006 to license the company's purported EM–100 process.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above-listed company is suspended for the period from 9:30 a.m. EDT, April 7, 2006 through 11:59 p.m. EDT, on April 21, 2006.

By the Commission.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 06–3484 Filed 4–7–06; 11:34 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

In the Matter of Golden Apple Oil and Gas, Inc.; Order of Suspension of Trading

April 7, 2006.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Golden Apple Oil and Gas, Inc. (''Golden Apple''), a Nevada corporation headquartered in Phoenix, Arizona. Questions have arisen regarding the accuracy of assertions by Golden Apple, and by others, in press releases and internet postings to investors concerning, among other things: (1) The company's assets, (2) the company's business operations, (3) the company's current financial condition, and (4) financing arrangements involving the issuance of Golden Apple shares.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above-listed company is suspended for the period from 9:30 a.m. EDT, April 7, 2006, through 11:59 p.m. EDT, on April 21, 2006.

By the Commission.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 06–3485 Filed 4–7–06; 11:34 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–53596; File No. SR–NASD–2004–044]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change and Amendment Nos. 1 and 2 Thereto Relating to Short Sale Delivery Requirements

April 4, 2006.

I. Introduction

On March 10, 2004, the National Association of Securities Dealers, Inc. (''NASD'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC''), 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 apply a delivery framework to certain non-reporting equity securities similar to that imposed on reporting equity securities by Regulation SHO.[3] The NASD submitted Amendment No. 1 to its proposed rule change on October 6, 2005 and submitted Amendment No. 2 to its proposed rule change on October 28, 2005.[4] The proposed rule change, as amended, was published for notice and comment in the **Federal Register** on November 16, 2005.[5] The Commission received nine comment letters on the proposal.[6] The NASD filed a response to the comment letters on March 15, 2006.[7]

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

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (Aug. 6, 2004) (''Regulation SHO Adopting Release''). The Commission adopted Regulation SHO to, among other things, impose a requirement on a participant of a registered clearing agency to take action to close out fail to deliver positions in ''threshold securities.'' Regulation SHO defines a ''threshold security'' as any equity security that is registered under Section 12 of the Act, or where the issuer of such security is required to file reports under Section 15(d) of the Act, and which security has, for five consecutive settlement days, had aggregate fails to deliver at a registered clearing agency of at least 10,000 shares that are also equal to at least 0.5% of the issuer's total shares outstanding (''TSO''). *See* 17 CFR 242.203(c)(6). In the Regulation SHO Adopting Release, the Commission noted that because the calculation of the threshold that would trigger the delivery requirements under the rule depends on identifying the aggregate fails to deliver as a percentage of the TSO, the Commission believed it was necessary to limit the close out requirement to companies that are subject to the reporting requirements of the Act. *See* Regulation SHO Adopting Release, 69 FR at 48016, fn. 82.

[4] On account of the adoption of Regulation SHO, Amendment No. 1, among other things, narrowed the scope of the proposal to those equity securities not otherwise covered by the delivery requirements of Rule 203(b) of Regulation SHO. Amendment No. 2 replaced and superseded Amendment No. 1 in its entirety and made technical changes to the proposed rule change.

[5] *See* Securities Exchange Act Release No. 52752 (Nov. 8, 2005), 70 FR 69614 (Nov. 16, 2005) (''Proposing Release'').

[6] *See* Letter from Paul Vuksich, II, dated December 22, 2005; letter from Amal Aly, Vice President and Associate General Counsel, Securities Industry Association, on behalf of the Securities Industry Association Regulation SHO Working Group, dated December 14, 2005 (''SIA Letter''); letter from Jim L. Hoch, dated December 14, 2005; letter from Paul Vuksich, II, dated December 12, 2005 (''Vuksich Letter''); letter from Donald J. Stoecklein, President, Stoecklein Law Group, dated December 13, 2005 (''Stoecklein Law Group Letter''); letter from Peter J. Chepucavage, General Counsel, Plexus Consulting, dated December 1, 2005; letter from Bob O'Brien, dated November 17, 2005; letter from David Patch, dated November 14, 2005; and letter from Richard M. Rosenthal, Esq, dated November 10, 2005.

[7] *See* letter from Andrea D. Orr, Assistant General Counsel, NASD, to Nancy M. Morris, Secretary, SEC, dated March 15, 2006 (''Response to Comments'').

This order approves the proposed rule change, as amended.

II. Description of the Proposal

The proposed rule change would require participants [8] of registered clearing agencies [9] to take action to immediately close out fail to deliver positions that exist for thirteen consecutive settlement days in non-reporting threshold securities by purchasing securities of like kind and quantity. A ''non-reporting threshold security'' is ''any equity security of an issuer that is not registered pursuant to Section 12 of the Act [10] and for which the issuer is not required to file reports pursuant to Section 15(d) of the Act: [11] (A) For which there is an aggregate fail to deliver position for five consecutive settlement dates at a registered clearing agency of 10,000 shares or more and for which on each settlement day during the five consecutive day period, the reported last sale during the normal market hours for the security on that settlement day would value the aggregate fail to deliver position at $50,000 or more, provided that, if there is no reported last sale on a particular settlement day, then the price used to value the position on such settlement day would be the previously reported last sale; and (B) is included on a list published by the NASD.''

In addition, if the fail to deliver position is not closed out in the requisite time period, a participant or any broker-dealer for which it clears transactions, including market-makers, would be prohibited from accepting any short sale order in the non-reporting threshold security from another person, or effecting a short sale in the non-reporting threshold security for its own account, without borrowing the security or entering into a bona-fide arrangement to borrow the security, until the participant has closed out the fail to deliver position by purchasing securities of like kind and quantity.

Under the proposed rule change, NASD would publish a list daily of the non-reporting threshold securities.[12] In order to be removed from the non-reporting threshold securities list, a security must not meet or exceed the threshold requirements in the proposed rule change for five consecutive settlement days.[13]

III. Summary of Comments

The Commission received nine comment letters on the proposal.[14] Several commenters supported the proposal.

A. Delivery Requirements for Non-Reporting Threshold Securities

Several commenters supported applying a delivery framework to non-reporting threshold securities. Some commenters, however, objected to certain provisions of the proposed rule change.

i. Uniform Short Sale Delivery Requirements

One commenter asserted that a uniform short sale delivery requirement for reporting and non-reporting equity securities would be preferable.[15] This commenter argued that the adoption of the proposed rule change would upset the regulatory uniformity that Regulation SHO [16] was intended to create because it would result in additional rules that apply only to NASD member firms.[17] In addition, this commenter expressed concern that separate rules for reporting and non-reporting equity securities could be subject to disparate revisions and/or interpretations, thereby subjecting member firms to different delivery requirements, depending on which securities are at issue.[18]

This commenter urged the Commission to amend the Regulation SHO delivery requirements to also address non-reporting equity securities.[19]

In its Response to Comments, NASD agreed that uniformity with respect to rulemaking across self-regulatory organizations (''SROs'') is preferable to the extent possible and practicable.[20] In addition, NASD noted that if, in the future, the SEC determines to amend the Regulation SHO delivery requirements to apply to non-reporting equity securities, NASD would consider repealing its rule.[21] NASD also stated in its Response to Comments that, although NASD believes that the vast majority of trading in non-reporting securities occurs through NASD members, uniformity in this area can be achieved if other SROs propose similar requirements. NASD also noted that it did not believe it was appropriate to forestall an SRO proposal solely because other SROs have not put forth comparable requirements.[22]

ii. $50,000 Threshold Requirement

Some commenters opposed the $50,000 value threshold requirement contained in the definition of a ''non-reporting threshold security.'' For example, one commenter argued that the dollar threshold value is inappropriate, stating that it is not an accurate indicator of non-reporting securities with excessive fails to deliver.[23] Another commenter believed that the dollar threshold value was too high, noting that such a value would harm small companies,[24] while another commenter argued that the dollar threshold value was too low and would capture a vastly expanded universe of threshold securities.[25]

In its Response to Comments, NASD noted that it proposed the dollar threshold value to ensure that the non-reporting threshold security list would not be overly broad or impracticable.[26] NASD noted that it was concerned that having a security on the non-reporting threshold security list solely based on whether the failure to deliver position is equal to, or greater than, 10,000 shares may not represent a significant failure to deliver position relative to the price of the security, particularly given that many non-reporting securities trade at less than $1.00.[27] Thus, NASD believes that the $50,000 value threshold strikes an appropriate balance to ensure that the threshold list is not overly broad or narrow.[28]

iii. Impact on Liquidity in the Marketplace

One commenter believed that the proposed rule change may result in negative consequences for this class of securities, such as further reducing liquidity in already illiquid securities and having a greater impact on price

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[8] A ''participant'' means a participant as defined in Section 3(a)(24) of the Act, that is an NASD member. *See* Proposing Release, *supra* note 5, 70 FR at 69615.

[9] A ''registered clearing agency'' is a clearing agency, as defined in Section 3(a)(23)(A) of the Act, that is registered with the SEC pursuant to Section 17A of the Act.

[10] 15 U.S.C. 78*l*.

[11] 15 U.S.C. 78*o*(d).

[12] Proposing Release, *supra* note 5, 70 FR at 69616.

[13] *Id.*, 70 FR at 69615.

[14] *See supra* note 6.

[15] *See* Letter, *supra* note 6, at 3.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Response to Comments, *supra* note 7, at 4.

[21] *Id.*

[22] *Id.*

[23] *See* Stoecklein Law Group Letter, *supra* note 6, at 1.

[24] *See* Vuksich Letter, *supra* note 6, at 1.

[25] *See* SIA Letter, *supra* note 6, at 5.

[26] Response to Comments, *supra* note 7, at 3.

[27] *Id.*

[28] *Id.* In addition, in its Response to Comments, NASD noted that NASD staff analyzed data relating to non-reporting securities over a five-day settlement period in February 2006 to get an indication of the number of non-reporting securities that would meet the proposed threshold requirements. During this time period, the analysis indicated that 44 securities would be deemed non-reporting threshold securities under the proposed threshold requirements. *See* Response to Comments, *supra* note 7, at fn. 20.

than would be the case with reporting equity securities.[29]

In its Response to Comments, NASD noted that similar concerns were raised in the context of Regulation SHO, to which the SEC responded that the requirements would only apply to a limited number of securities and would not apply to any fail to deliver positions existing prior to the security meeting the threshold requirements.[30] NASD noted in its Response to Comments that it believes these same assertions apply in the context of the proposed rule change as well, given the Commission's Office of Economic Analysis' (''OEA'') estimates on non-reporting securities with fails to deliver of 10,000 shares or greater,[31] and that NASD's proposal would further reduce this estimate due to the proposed additional $50,000 value threshold requirement.[32]

iv. Exemptive Authority

One commenter raised concerns with the provision that permits NASD to grant exemptive relief under certain specified conditions, arguing that NASD may abuse such discretion or the provision may provide a blanket exemption to firms.[33]

In its Response to Comments, NASD commented that it believes this comment is without merit.[34] NASD believes that it is important to have the ability to address, through the exemptive process, situations that may warrant relief.[35] In addition, NASD noted that the proposed exemptive authority, by its terms, is specifically limited to those situations where granting such relief is consistent with the protection of investors and the public interest, and NASD will execute such authority consistent with this requirement.[36]

[29] *See* SIA Letter, *supra* note 6, at 4.

[30] Response to Comments, *supra* note 7, at 5.

[31] In its Response to Comments, NASD noted that general estimates relating to the number of non-reporting securities with fails to deliver in excess of 10,000 shares were made publicly available as part of the Regulation SHO Adopting Release. NASD noted that the Regulation SHO Adopting Release provided that the Commission's OEA analyzed NSCC data on fails to deliver in excess of 10,000 shares for non-reporting issuers and estimated that only an additional 1% of all securities would be added to its estimate of the number of securities that would be subject to the close out requirements of Regulation SHO. *See* Response to Comments *supra* note 7, at 4 (referencing the Regulation SHO Adopting Release at fn. 86).

[32] *See id.* at 5.

[33] *See* Stoecklein Law Group Letter, *supra* note 6, at 1.

[34] Response to Comments, *supra* note 7, at 4.

[35] *Id.*

[36] *Id.*

B. Defined Terms

NASD proposed that the term ''non-reporting threshold security'' means ''any equity security of an issuer that is not registered pursuant to Section 12 of the Act [37] and for which the issuer is not required to file reports pursuant to Section 15(d) of the Act:[38] (A) for which there is an aggregate fail to deliver position for five consecutive settlement dates at a registered clearing agency of 10,000 shares or more and for which on each settlement day during the five consecutive day period, the reported last sale during the normal market hours for the security on that settlement day that would value the aggregate fail to deliver position at $50,000 or more, provided that, if there is no reported last sale on a particular settlement day, then the price used to value the position on such settlement day would be the previously reported last sale; and (B) is included on a list published by the NASD.'' [39]

The Commission agrees with NASD that imposing a lower dollar value threshold requirement, or eliminating it altogether, as some commenters suggested, might be impracticable or an overly-broad method of addressing any potential abuses in this sector of the marketplace. Similarly, the Commission agrees with NASD that increasing the dollar value threshold requirement could be too limiting. As noted above, a five-day settlement period analysis by NASD staff found that under the proposed threshold requirements, only approximately 44 securities would qualify as non-reporting threshold securities.[40]

C. Implementation

NASD suggests that the effective date of the proposed rule change will be 30 days following publication of NASD's *Notice to Members* announcing Commission approval [41] and the Commission believes that this is reasonable.

IV. Discussion and Commission Findings

After careful review, the Commission finds, as discussed more fully below, that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association. The Commission finds specifically that the proposed rule change, as amended, is consistent with Sections 15A(b)(6) and 15A(b)(9) of the Act.[42]

Section 15A(b)(6) of the Act requires that NASD's rules are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.[43] Section 15A(b)(9) of the Act requires that NASD's rules do not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.[44]

Section 3(f) of the Act directs the Commission to consider, in addition to the protection of investors, whether approval of a rule change will promote efficiency, competition, and capital formation.[45] In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. In particular, the Commission determined that requiring a delivery framework for non-reporting threshold securities similar to that required under Regulation SHO would increase investor confidence in this sector of the marketplace by helping to reduce fails to deliver which, in turn, would promote capital formation.

When the Commission adopted Regulation SHO, it did not apply the Regulation SHO delivery requirements to non-reporting threshold securities because the calculation of the threshold that would trigger the delivery requirements under Regulation SHO depends on identifying the aggregate fails to deliver as a percentage of the TSO that is generally obtained from periodic reports filed with the Commission. Thus, the Commission believed it was necessary to limit the delivery requirement to companies that are subject to the reporting requirements of the Act.

The Commission believes that applying a delivery framework similar to that contained in Regulation SHO to non-reporting threshold securities will protect investors and the public interest by helping to reduce fails to deliver in

[37] 15 U.S.C. 78*l*.

[38] 15 U.S.C. 78*o*(d).

[39] Proposing Release, *supra* note 5, 70 FR at 69615.

[40] *See supra* note 28.

[41] NASD will announce the effective date of the proposed rule change in a *Notice to Members* to be published no later than 60 days following Commission approval.

[42] 15 U.S.C. 78*o*–3(b)(6) and (b)(9).

[43] *See* 15 U.S.C. 78*o*–3(b)(6).

[44] *See* 15 U.S.C. 78*o*–3(b)(9).

[45] 15 U.S.C. 78c(f).

this sector of the marketplace. Thus, the Commission finds that the proposed rule change is consistent with Sections 15A(b)(6) and 15A(b)(9) of the Act.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[46] that the proposed rule change (SR–NASD–2004–044), as amended, be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[47]

Nancy M. Morris,

Secretary.

[FR Doc. E6–5236 Filed 4–10–06; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–53598; File No. SR–NASD–2005–080]

Self-Regulatory Organizations: National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment Nos. 1, 2 and 3 thereto to Establish New NASD Rule 2290 Regarding Fairness Opinions

April 4, 2006.

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 24, 2005, the National Association of Securities Dealers, Inc. (''NASD'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. On November 30, 2005, NASD filed Amendment No. 1 to the proposed rule change.[3] On January 25, 2006, NASD filed Amendment No. 2 to the proposed rule change.[4] On March 1, 2006, NASD filed Amendment No. 3 to the proposed rule change.[5] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

NASD is proposing to establish new NASD Rule 2290 to address disclosures and procedures concerning the issuance of fairness opinions. Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

* * * * *

2200. COMMUNICATIONS WITH CUSTOMERS AND THE PUBLIC

* * * * *

2290. Fairness Opinions

(a) Disclosures

Any member issuing a fairness opinion that may be provided, or described, or otherwise referenced to public shareholders must disclose, to the extent not otherwise required, in such fairness opinion:

(1) whether such member has acted as a financial advisor to any transaction that is the subject of the fairness opinion, and, if applicable, that it will receive compensation for:

(A) rendering the fairness opinion that is contingent upon the successful completion of the transaction;

(B) serving as an advisor that is contingent upon the successful completion of the transaction;

(2) whether such member will receive any other payment or compensation contingent upon the successful completion of the transaction;

(3) whether there is any material relationship that existed during the past two years or is mutually understood to be contemplated in which any compensation was received or is intended to be received as a result of the relationship between the member and the companies that are involved in the transaction that is the subject of the fairness opinion;

(4) the categories of information that formed a substantial basis for the fairness opinion that was supplied to the member by the company requesting the opinion concerning the companies involved in the transaction and whether any such information in each such category has been independently verified by the member; and

(5) whether the fairness opinion was approved or issued by a fairness committee.

(b) Procedures

Any member issuing a fairness opinion must have procedures that address the process by which a fairness opinion is approved by a firm, including:

(1) the types of transactions and the circumstances in which the member will use a fairness committee to approve or issue a fairness opinion, and in such transactions where it uses a fairness committee:

(A) the process for selecting personnel to be on the fairness committee;

(B) the necessary qualifications of persons serving on the fairness committee; and

(C) the process to promote a balanced review by the fairness committee, including review and approval by persons who do not serve on or advise the ''deal team'' to the transaction;

(2) the process to determine whether the valuation analyses used in the fairness opinion are appropriate, and the procedures should state the extent to which the appropriateness of the use of such valuation analyses is determined by the type of company or transaction that is the subject of the fairness opinion; and

(3) the process to evaluate whether the amount and nature of the compensation from the transaction underlying the fairness opinion benefiting any individual officers, directors or employees, or class of such persons, relative to the benefits to shareholders of the company, is a factor in reaching a fairness determination.

* * * * *

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

NASD notes that a fairness opinion addresses, from a financial point of view, the fairness of the consideration in a transaction. Fairness opinions are routinely used by directors of a company in corporate control transactions to satisfy their fiduciary duties to act with due care and in an

[46] 15 U.S.C. 78s(b)(2).

[47] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] In Amendment No. 1, which supplemented the original filing, NASD modified the scope of the proposed rule change and made certain clarifications to the rule text following discussions with Commission staff.

[4] In Amendment No. 2, NASD added clarifying language to the rule text following discussions with Commission staff.

[5] Amendment No. 3 was a technical amendment and replaced and superseded the original filing, as amended, in its entirety.