

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48124; File No. SR-NASD-2002-138]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Require Non-U.S. Issuers To Disclose Any Exemptions They May Receive From Nasdaq's Corporate Governance Listing Standards

July 2, 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 October 9, 2002, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. 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

Nasdaq proposes to implement changes to its listing standards relating to foreign issuers that are aimed at helping to restore investor confidence by enhancing transparency.³ Nasdaq proposes that the rule take effect for new listings and filings made on or after January 1, 2004.

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

Rule 4350. Qualitative Listing Requirements for Nasdaq National Market and Nasdaq Small Cap Market Issuers Except for Limited Partnerships Traded on the Nasdaq National Market
(a) Applicability.

No provisions of this Rule shall be construed to require any foreign issuer to do any act that is contrary to a law, rule or regulation of any public authority exercising jurisdiction over such issuer or that is contrary to generally accepted business practices in

the issuer's country of domicile. Nasdaq shall have the ability to provide exemptions from [the applicability of] this Rule as may be necessary or appropriate to carry out this intent, *except to the extent that such exemptions would be contrary to the federal securities laws. An issuer that receives an exemption under this subsection must disclose in its annual report filed with the Commission (e.g., Forms 20-F, 40-F, or 10-K) each requirement from which it is exempted and describe the alternative practice, if any, of the issuer in lieu of these requirements. In addition, foreign issuers making their initial public offering or first U.S. listing on Nasdaq must disclose any such exemptions in their registration statement (e.g., Forms F-1, 20-F, or 40-F).*

IM-4350: Currently, foreign issuers listed on Nasdaq may obtain exemptions from Nasdaq's corporate governance standards if such rules would require the issuer to do anything contrary to the laws, rules, regulations or generally accepted business practices of the home country. Nasdaq believes that the current exemption process should be made more transparent for the benefit of investors.

Accordingly, the proposed rule change requires a foreign issuer to disclose the receipt of a corporate governance exemption from Nasdaq in the issuer's annual report with the Commission, and at the time of the issuer's original listing in the United States, if that listing is on Nasdaq. The disclosure must include a statement of what alternative measures, if any, the issuer has taken in lieu of the particular corporate governance requirement from which it was exempted. Nasdaq believes that such disclosure will not only alert investors that the issuer has been granted an exemption from certain Nasdaq rules, but may also cause foreign issuers to consider carefully their need for an exemption, rather than applying for one as a matter of course.

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

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

1. Purpose

Disclosure of Exemptions to Corporate Governance Standards. Currently, non-U.S. issuers listed on Nasdaq may obtain exemptions from Nasdaq's corporate governance standards if such rules would require the issuer to do anything contrary to the laws, rules, regulations or generally accepted business practices of the issuer's home country. Nasdaq believes that the current exemption process should be made more transparent for the benefit of investors. Accordingly, the proposed rule change requires a foreign issuer to disclose the receipt of a corporate governance exemption from Nasdaq in its annual report for the year the exemption is granted and on an annual basis thereafter. Such disclosure must be made within the issuer's annual filing of its financial statements with the Commission and Nasdaq on Forms 20-F, 40-F, or, in certain cases, Form 10-K. The disclosure must include a statement of what alternative measures, if any, the issuer has taken, pursuant to home country law or practice, in lieu of the particular corporate governance requirement from which it was exempted. Nasdaq believes that such disclosure will not only alert investors that the issuer has been granted an exemption from certain Nasdaq rules, but may also cause non-U.S. issuers to consider carefully their need for an exemption, rather than applying for one as a matter of course. In addition, the proposed rule change clarifies that any exemption from Nasdaq requirements granted by Nasdaq in no way affects the issuer's obligation to comply with applicable law and regulation.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,⁴ in general, and with section 15A(b)(6) of the Act,⁵ 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.

⁴ 15 U.S.C. 78o-3.

⁵ 15 U.S.C. 78o-(b)(6).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See also Securities Exchange Act Release No. 47516 (March 17, 2003), 68 FR 14451 (March 25, 2003) (NASD 2002-141) for a description of additional proposed revisions to NASD's corporate governance listing standards.

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

Nasdaq 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. 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-2002-138 should be submitted by July 31, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁶

J. Lynn Taylor,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48125; File No. SR-NASD-2002-139]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. To Amend NASD Rule 4350 To Require Listed Companies To Adopt a Code of Conduct for All Directors, Officers, and Employees

July 2, 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 October 10, 2002, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. On January 15, 2003, Nasdaq submitted Amendment No. 1 to the proposed rule change.³ 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 the Substance of the Proposed Rule Change

Nasdaq proposes to amend Rule 4350 to require listed companies to adopt a code of conduct for all directors, officers and employees.⁴ Issuers must comply with the rule as of six months from the date of approval.

The text of the proposed rule change is below. Proposed new language is in italics.

4350. Qualitative Listing Requirements for Nasdaq National Market and Nasdaq

⁶ 17 CFR 200.30-3(a)(12).

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, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated January 15, 2003.

⁴ See also Securities Exchange Act Release No. 47516 (March 17, 2003), 68 FR 14451 (March 25, 2003) (NASD 2002-141) for a description of additional proposed revisions to NASD's corporate governance listing standards.

Small Cap Market Issuers Except for Limited Partnerships Traded on the Nasdaq National Market

(a)-(l) No change.

(m) *Each Issuer shall adopt a code of conduct applicable to all directors, officers and employees, which shall be publicly available. A code of conduct satisfying this rule must comply with the definition of a "code of ethics" set out in Section 406(c) of the Sarbanes-Oxley Act of 2002 ("the Sarbanes-Oxley Act") and any regulations promulgated thereunder by the Commission. In addition, the code must provide for an enforcement mechanism. Any waivers of the code for directors or executive officers must be approved by the Board and must be disclosed in the issuer's public filings, not later than the next periodic report.*

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Ethical behavior is required and expected of every corporate director, officer and employee whether or not a formal code of conduct exists. The requirement of a publicly available code of conduct applicable to all directors, officers and employees of an issuer is intended to demonstrate to investors that the board and management of Nasdaq issuers have carefully considered the requirement of ethical dealing and have put in place a system to ensure that they become aware of and take prompt action against any questionable behavior. For company personnel, a code of conduct with enforcement provisions provides assurance that reporting of questionable behavior is protected and encouraged, and fosters an atmosphere of self-awareness and prudent conduct.

Rule 4350(m) requires issuers to adopt a code of conduct complying with the definition of a "code of ethics" under Section 406(c) of the Sarbanes-Oxley Act of 2002 ("the Sarbanes-Oxley Act") and any regulations promulgated thereunder by the Commission. Thus, the code must include such standards as are reasonably necessary to promote the ethical handling of conflicts of interest, full and fair disclosure, and compliance with laws, rules and regulations, as specified by the Sarbanes-Oxley Act. However, the code of conduct required by Rule 4350(m) must apply to all directors, officers, and employees. Issuers can satisfy this obligation by adopting one or more codes of conduct, such that all directors, officers and employees are subject to a code that satisfies the definition of a "code of ethics."

As the Sarbanes-Oxley Act recognizes, investors are harmed when the real or perceived private interest of a director, officer or employee is in conflict with