

general and with section 15A(b)(6) of the Act,<sup>5</sup> 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*

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**

The foregoing rule change has been filed by Nasdaq as a "non-controversial" rule change pursuant to section 19(b)(3)(A) of the Act<sup>6</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>7</sup> Consequently, because the foregoing rule change: (a) Does not significantly affect the protection of investors or the public interest; (b) does not impose any significant burden on competition; and (c) does not become operative for thirty days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to section 19(b)(3)(A) of the Act and Rule 19b-4 thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)<sup>8</sup> normally does not become operative prior to thirty days after the date of filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>9</sup> the Commission may designate a shorter operative date if such action is consistent with the protection of investors and the public interest. In addition, Rule 19b-4(f)(6)(iii) requires Nasdaq to provide the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the

proposed rule change, or such shorter time as designated by the Commission. Nasdaq seeks to have the proposed rule change become immediately operative and to waive the pre-filing notice requirement.

The Commission, consistent with the protection of investors and the public interest, has determined to waive the 30 day operative date.<sup>10</sup> As the entry of quotes that lock or cross another market already takes place in several venues that trade Nasdaq securities, the proposal does not significantly affect current levels of investor protection or harm the public interest. The proposal may also increase competition among market centers by allowing ECNs to choose among competing venues, including Nasdaq, to display bids or offers. The Commission also waives the requirement that Nasdaq provide the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change.

At any time within 60 days of the filing of a rule change the Commission may summarily abrogate the rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

### **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. Comments may also be submitted electronically at the following e-mail address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-NASD-04-006. 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, comments should be sent in hardcopy or by e-mail but not by both methods. 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 Nasdaq. All submissions should refer to file number SR-NASD-2004-06 and should be submitted by February 17, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>8</sup>

**Margaret H. McFarland,**  
*Deputy Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-49109; File No. SR-NASD-2003-23]

### **Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Granting Approval to Proposed Rule Change To Clarify the Applicability of the Nasdaq Corporate Governance Requirements During the Listing Review Process**

January 21, 2004.

On February 26, 2003, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, the Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to clarify the applicability of its corporate governance requirements during the listing review process. On October 10, 2003, NASD, through Nasdaq, submitted Amendment No. 1 to the proposed rule change.<sup>3</sup>

The proposed rule change, as amended, was published for comment in the **Federal Register** on October 23, 2003.<sup>4</sup> The Commission received no comments on the proposal.

The proposed rule change would amend NASD Rule 4810, concerning procedures for review of Nasdaq listing

<sup>8</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> See letter from Mary M. Dumbar, Vice President and Deputy General Counsel, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated October 9, 2003. Amendment No. 1 replaced the original filing in its entirety.

<sup>4</sup> See Securities Exchange Act Release No. 48646 (October 16, 2003), 68 FR 60747.

<sup>5</sup> 15 U.S.C. 78o-3(b)(6).

<sup>6</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>7</sup> 17 CFR 240.19b-4(f)(6).

<sup>8</sup> 17 CFR 240.19b-4(f)(6).

<sup>9</sup> 17 CFR 240.19b-4(f)(6).

<sup>10</sup> For purposes of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

determinations, to explicitly state that the Listing Hearing and Review Council ("Listing Council") or the NASD Board, as part of its respective review, may consider, among other things, any action by an issuer during the review process that would have constituted a violation of Nasdaq's corporate governance requirements had the issuer's securities been listed on Nasdaq at the time.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the NASD<sup>5</sup> and, in particular, the requirements of 15A(b)(6) of the Act<sup>6</sup> and the rules and regulations thereunder because it clarifies procedures for review of listing determinations. The proposed rule change is designed to place an issuer more clearly on notice that any action on its part during the review process that would constitute a violation of Nasdaq's corporate governance requirements, had the issuer's securities been listed on Nasdaq at the time, may be considered by the Listing Council or NASD Board as part of its respective review.

It is therefore ordered, pursuant to section 19(b)(2) of the Act<sup>7</sup>, that the proposed rule change (File No. SR-NASD-2003-23) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>8</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49110; File No. SR-NASD-2003-184]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Require Members To Review and Update Executive Representative Contact Information on a Quarterly Basis

January 21, 2004.

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 December 8, 2003, the National Association of Securities Dealers, Inc. ("NASD"), 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 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 require members to review and, if necessary, update their executive representative ("Representative") contact information on a quarterly basis. The text of the proposed rule change is below. Proposed new language is in italics.<sup>3</sup>

#### 1000. MEMBERSHIP, REGISTRATION AND QUALIFICATION REQUIREMENTS

\* \* \* \* \*

#### 1150. Executive Representative

*Each member must review and, if necessary, update its executive representative designation and contact information as required by Article IV, Section 3 of the NASD By-Laws within 17 business days after the end of each calendar quarter.*

\* \* \* \* \*

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

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

<sup>3</sup> The Commission notes that NASD filed the proposed rule change with a typographical error in the proposed rule text. In this instance, because the error was technical in nature, the Commission did not require NASD to file an amendment to the proposed rule change. In the future, the Commission expects that NASD will carefully review proposed rule changes before filing them with the Commission to ensure their accuracy.

#### 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

Under Article IV, section 3 of the NASD By-Laws, members must appoint and certify to NASD one Representative to represent, vote, and act for the member in all affairs of NASD. The Representative must be a member of senior management and a registered principal of the member. In addition, the Representative is required to maintain an Internet electronic e-mail account for communication with NASD and must update firm contact information.

Given the important role of the Representative in representing, voting, and acting for the member, NASD believes that members should review and update the Representative designation and contact information periodically to ensure its accuracy. Accordingly, the proposed rule change would require that each member conduct a review and, if necessary, update its Representative information on a quarterly basis, specifically within 17 business days after the end of each calendar quarter. NASD is examining different methods of reminding members of their need to review and update their Representative information on a quarterly basis, including the possibility of a Web page linked to the act of filing the FOCUS report that would prompt members to update such designation and contact information and/or through e-mail reminders to the firm.

###### 2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act<sup>4</sup>, which requires, among other things, that NASD's rules be designed to prevent fraudulent and manipulative acts and

<sup>4</sup> 15 U.S.C. 78o-3(b)(6).

<sup>5</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>6</sup> 15 U.S.C. 78o-3(b)(6). Section 15A(b)(6) requires that the rules of a registered national securities association be 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.

<sup>7</sup> 15 U.S.C. 78s(b)(2).

<sup>8</sup> 17 CFR 200.30-3(a)(12).