

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50267; File No. SR-NASD-2004-105)

August 26, 2004

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change, and Amendment No. 1 Thereto, by National Association of Securities Dealers, Inc. to Amend Rule 4350(n) and IM-4350-7 to Provide Time Frames for Foreign Issuers and Foreign Private Issuers to Disclose Certain Code of Conduct Waivers.

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 July 8, 2004, 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 August 23, 2004, Nasdaq filed an Amendment No. 1 to the proposed rule change.³ 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 change NASD Rule 4350 and related interpretative material to make a clarifying amendment to that rule relating to foreign issuers. Nasdaq will implement the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Mary M. Dunbar, Vice President and General Counsel, Nasdaq, to Katherine England, Assistant Director, Division of Market Regulation, Commission, dated August 20, 2004 (“Amendment No. 1”). In Amendment No. 1, Nasdaq replaced the original filing in its entirety.

proposed rule change immediately upon approval by the Commission. The text of the proposed rule change is below. Proposed new language is in *italics*; proposed deletions are in brackets.⁴

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Rule 4350. Qualitative Listing Requirements for Nasdaq National Market and Nasdaq SmallCap Market Issuers Except for Limited Partnerships

(a) – (m) No Change

(n) Code of Conduct

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. See 17 C.F.R. 228.406 and 17 C.F.R. 229.406. 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. [Domestic issuers] Issuers, other than foreign private issuers, shall disclose such waivers in a Form 8-K within five business days. Foreign private issuers shall disclose such waivers either in a Form 6-K or in the next Form 20-F or 40-F.

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IM-4350-1 through IM-4350-6

No Change

IM-4350-7: Code of Conduct

⁴ Changes are marked to the rule text that appears in the electronic NASD manual found at www.nasd.com. No pending or approved rule filings would affect the text of these rules.

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(n) 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. See 17 C.F.R. 228.406 and 17 C.F.R. 229.406. 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(n) 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 the interests of the company, as when the individual receives improper personal benefits as a result of his or her position with the company, or when the individual has other duties, responsibilities or obligations that run counter to his or her duty to the company. Also, the disclosures an issuer makes to the

Commission are the essential source of information about the company for regulators and investors – there can be no question about the duty to make them fairly, accurately and timely. Finally, illegal action must be dealt with swiftly and the violators reported to the appropriate authorities. Each code of conduct must require that any waiver of the code for executive officers or directors may be made only by the board and must be [promptly] disclosed to shareholders, along with the reasons for the waiver. [This disclosure requirement provides investors the comfort that waivers are not granted except where they are truly necessary and warranted, and that they are limited and qualified so as to protect the company to the greatest extent possible.] [Consistent with applicable law, domestic] All issuers, other than foreign private issuers, must disclose such waivers in a Form 8-K within five business days. Foreign private issuers must disclose such waivers either in a Form 6-K or in the next Form 20-F or 40-F. This disclosure requirement provides investors the comfort that waivers are not granted except where they are truly necessary and warranted, and that they are limited and qualified so as to protect the company and its shareholders to the greatest extent possible.

Each code of conduct must also contain an enforcement mechanism that ensures prompt and consistent enforcement of the code, protection for persons reporting questionable behavior, clear and objective standards for compliance, and a fair process by which to determine violations.

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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

Nasdaq rules currently require all issuers to adopt a code of conduct applicable to all directors, officers, and employees of the issuer and that such code require that any waivers of the code for directors or executive officers must be approved by the Board and promptly disclosed to shareholders, along with the reasons for the waiver. These rules require that domestic issuers make such disclosure in a Form 8-K within five business days. Nasdaq now proposes to clarify the time frame in which non-U.S. issuers must make such disclosure. Specifically, foreign issuers, other than foreign private issuers, will be required to make disclosure in the same manner as domestic issuers. Foreign private issuers will be required to make the disclosure either on the issuer's next Form 20-F or 40-F, or on a Form 6-K. This disclosure method and timing is consistent with that required by the Commission for waivers to a code of ethics for senior financial officers and the principal executive officer.⁵ As the Commission noted in approving those rules, this differing treatment reflects the fact that foreign private issuers do not have any specific interim or current disclosure requirements mandated by the Commission.

⁵ See Securities Act Release No. 8177, 68 FR 5110 (Jan. 31, 2003) (adopting new Item 16B to Form 20-F and paragraph (9) to General Instruction B of Form 40-F).

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,⁶ in general and with Section 15A(b)(6) of the Act,⁷ 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. Clarifying the timing of disclosure regarding code of conduct waivers by foreign issuers and foreign private issuers will serve 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

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

⁶ 15 U.S.C. 78o-3.

⁷ 15 U.S.C. 78o-3(b)(6).

- (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. Please include File Number SR-NASD-2004-105 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-NASD-2004-105. 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 Section, 450 Fifth

Street, NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the 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 File Number SR-NASD-2004-105 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.⁸

J. Lynn Taylor
Assistant Secretary

⁸ 17 CFR 200.30-3(a)(12).