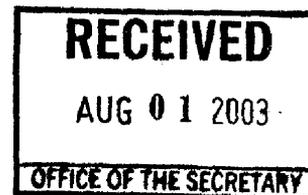




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July 31, 2003

Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549-0609



Re: 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
File No. SR-NASD-2002-139, 68 FR 41194 (July 10, 2003)

Dear Mr. Katz:

America's Community Bankers (ACB)¹ is pleased to comment on the rule change proposed by The Nasdaq Stock Market, Inc. (NASDAQ), to require that listed companies adopt a code of conduct for all directors, officers, and employees.²

The proposed listing requirement would require that a company with securities listed on the NASDAQ adopt a code of conduct that complies with the definition of a "code of ethics" set forth in Section 406(c) of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley)³ and the final regulations adopted by the Securities and Exchange Commission (SEC) implementing that section of the law.⁴ Under the SEC regulations, disclosure must be made of whether a public company has adopted a code of ethics that applies to the principal executive officer and certain officers performing financial and accounting functions. A code of ethics is defined as written standards that are reasonably designed to deter wrongdoing and promote:

- Honest and ethical conduct, including the ethical handling of actual **or** **apparent** conflicts of interest between personal and professional relationships;
- Full, fair, accurate, timely and understandable disclosure in reports and documents that a company files with, or submits to, the SEC and in other public communications made by the company;

¹ **ACB** represents the **nation's** community banks. ACB members, whose aggregate assets total more than \$1 trillion, pursue progressive, entrepreneurial **and** service-oriented strategies in providing financial services to benefit their customers **and** communities.

² **68 Fed. Reg.** 41194 (July 10, 2003).

³ Pub. L. 107-204 (2002).

⁴ **Final Rule:** Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, **68 Fed. Reg.** 5110 (January 31, 2003), codified at 17 C.F.R. §§ 228.406 and 229.406.

- Compliance with applicable governmental laws, rules and regulations;
- The prompt internal reporting of code violations to an appropriate person or persons identified in the code; and
- Accountability for adherence to the code.

The **NASDAQ** proposal would require a listed company to adopt a code applicable to all directors, officers and employees. The code would have to be publicly available and all waivers of the code for directors or executive officers would have to **be** approved by **the board of** directors and disclosed in the company's public filings.

ACB Support for the Proposal

ACB supports the NASDAQ proposal. At the time that the SEC proposed rules to implement section 406 of Sarbanes-Oxley, we supported the extension of the disclosure requirement to address whether the code of ethics covered all directors, executive officers, and **all** other employees. ACB believes that companies should have a code of ethics that sets forth the company's expectations about proper corporate behavior from all individuals that manage or serve the company. Banking regulations specifically require directors to avoid conflicts of interest and prohibit them from taking advantage of a corporate opportunity.⁵ Furthermore, the federal banking regulators either require or encourage depository institutions to have in place written codes or policies on conflicts of interest and ethics.⁶

ACB does have two suggestions that we believe would make the rule proposal better and more consistent with the requirements of the SEC. Under the SEC rule, waivers that must be disclosed are only waivers of a material departure from a provision of the code.⁷ We had requested this clarification in our comment letter on the initial SEC proposal to implement section 406 to avoid overwhelming investors with insignificant information. We believe that **a** burdensome disclosure requirement would discourage companies from adopting codes that are comprehensive in nature, impeding the goals and principles behind the NASD proposal. Because a comprehensive code of conduct may cover a variety of matters, some more significant than others, the disclosure requirement should be limited to waivers **of** material terms **of** the code.

It would be helpful if the NASD also clarified whether it is adopting the SEC position on "implicit waivers." Under the SEC rule, "implicit waivers" of the code of ethics also must be disclosed on **a** Form 8-K. "Implicit waivers" are defined as the company's failure to take action within a reasonable period of time regarding a material departure from a provision of the code of ethics that has been made known to certain specified executive officers.⁸ The current **NASDAQ**

⁵ 12 C.F.R. §§ 563.200 and 563.201.

⁶ See, for example, the Federal Deposit Insurance Corporation's *Pocket Guide for Directors*, at <http://www.fdic.gov/regulations/resources/directors/index.html>; *The Director's Book – The Role of a National Bank Director*, issued by the Office of the Comptroller of the Currency, available at <http://www.occ.treas.gov/director.pdf>; and the *Directors Responsibilities Guide*, issued by the Office of Thrift Supervision and available at <http://www.ots.treas.gov/docs/48090.pdf>.

⁷ Form 8-K, General Instructions, Item 10 of the Information to Be Included in the Report.

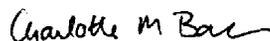
⁸ *Id.*

proposal and the related commentary do not address “implicit waivers” even though other **aspects** of the proposal appear to be drawn from the SEC rule.

We would suggest that **the** proposal be revised to allow waivers of the code to be approved either by the board of directors or a committee of the board. That would give listed companies **flexibility** to place the oversight of a company’s **code** of conduct within the jurisdiction of a particular committee if that structure would be more effective and appropriate. This alternative also would be more consistent with the NASDAQ proposal to require approval of related party transactions by an independent body of the board.’

ACB appreciates the opportunity to comment on this important matter. If you have any questions, please contact the undersigned at (202) 857-3121 or via e-mail at cbahin@acbankers.org, or Diane Koonjy at (202) 857-3144 or via e-mail at dkoonjy@acbankers.org.

Sincerely,



Charlotte M. Bahin
Senior Vice President, Regulatory Affairs

⁹ Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 thereto by the National Association of Securities Dealers, Inc. to Require an Issuer’s **Audit** Committee or Another Independent Body of the Board of **Directors to Approve** Related Party Transactions, **68 Fed. Reg.** 42 152 (July 16, 2003).