

DCGS00571 Senior Policy Advisor to the Deputy Assistant Secretary for Service Industries, Tourism. Effective November 21, 2003.

DCGS00420 Special Assistant to the Deputy Assistant Secretary for Export Promotion Services. Effective November 24, 2003.

DCGS00558 Confidential Assistant to the Chief of Staff. Effective November 24, 2003.

DCGS00609 Confidential Assistant to the Chief of Staff. Effective November 24, 2003.

DCGS00628 Confidential Assistant to the Deputy Assistant Secretary for Export Promotion Services. Effective November 24, 2003.

*Section 213.3315 Department of Labor*

DLGS60003 Special Assistant to the Secretary of Labor. Effective November 13, 2003.

DLGS60116 Special Assistant to the Chief Financial Officer. Effective November 13, 2003.

DLGS60149 Special Assistant to the Director of the Women's Bureau. Effective November 13, 2003.

DLGS60247 Intergovernmental Assistant to the Assistant Secretary for Congressional and Intergovernmental Affairs. Effective November 13, 2003.

DLGS60174 Staff Assistant to the Secretary of Labor. Effective November 21, 2003.

DLGS60182 Staff Assistant to the Deputy Secretary of Labor. Effective November 21, 2003.

DLGS60220 Special Assistant to the Assistant Secretary for Public Affairs. Effective November 25, 2003.

*Section 213.3317 Department of Education*

DBGS00300 Confidential Assistant to the Chief of Staff. Effective November 04, 2003.

DBGS00299 Special Assistant to the Assistant Secretary for Elementary and Secondary Education. Effective November 07, 2003.

*Section 213.3331 Department of Energy*

DEGS00382 Senior Policy Advisor to the Assistant Secretary of Energy (Environmental Management). Effective November 05, 2003.

DEGS00386 Director, Press Office to the Director, Public Affairs. Effective November 21, 2003.

*Section 213.3332 Small Business Administration*

SBGS60174 Regional Administrator to the Associate Administrator for Field Operations. Effective November 19, 2003.

*Section 213.3351 Federal Mine Safety and Health Review Commission*

FRGS90501 Attorney Advisor (General) to the Chairman. Effective November 04, 2003.

FRGS90504 Attorney Advisor (General) to a Member. Effective November 04, 2003.

*Section 213.3382 National Endowment for the Arts*

NAGS00051 National Initiatives Program Manager to the Senior Deputy Chairman. Effective November 05, 2003.

*Section 213.3394 Department of Transportation*

DTGS60365 Special Assistant to the Assistant Secretary for Transportation Policy. Effective November 10, 2003.

DTGS60237 Special Assistant to the Director of Public Affairs. Effective November 13, 2003.

DTGS60268 Speechwriter to the Associate Director for Speechwriting. Effective November 13, 2003.

**Authority:** 5 U.S.C. 3301 and 3302; E.O. 10577, 3 CFR 1954-1958 Comp., p. 218

Office of Personnel Management.

**Kay Coles James,**

*Director.*

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**SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-49060; File No. SR-NASD-2003-172]**

**Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment Nos. 1, 2, 3, and 4 Thereto by the National Association of Securities Dealers, Inc. Relating to Certain Technical and Clarifying Changes to NASD Rules 4200, 4200A, 4350, and 4350A**

January 12, 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 November 25, 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") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. On

December 18, 2003, December 23, 2003, December 29, 2003, and January 9, 2004, Nasdaq submitted Amendment Nos. 1, 2, 3, and 4, respectively, to the proposed rule change.<sup>3</sup> Nasdaq has filed the proposed rule change as a "non-controversial" rule change under Rule 19b-4(f)(6) under the Act,<sup>4</sup> which renders the proposal effective upon filing with the Commission. 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**

The NASD through Nasdaq is proposing changes to NASD Rules 4200, 4200A, 4350, and 4350A to make certain technical and clarifying amendments to these rules, including, for example, inserting the date of Commission approval, correcting errors in numbering of sections, and clarifying the deadline for disclosure of waivers of a company's code of conduct. Below is the text of the proposed rule change. Proposed new language is in *italics*; proposed deletions are in brackets.

\* \* \* \* \*  
Rule 4200 Definitions

\* \* \* \* \*

IM—4200 Definition of Independence—  
Rule 4200(a)(15)

It is important for investors to have confidence that individuals serving as independent directors do not have a relationship with the listed company that would impair their independence. The board has a responsibility to make an affirmative determination that no such relationships exist through the application of Rule 4200. Rule 4200 also provides a list of certain relationships that preclude a board finding of

<sup>3</sup> See letters from Eleni Constantine, Associate General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated December 17, 2003 ("Amendment No. 1"), December 22, 2003 ("Amendment No. 2"), and December 22, 2003 ("Amendment No. 3"), and letter from John D. Nachmann, Senior Attorney, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated January 8, 2004 ("Amendment No. 4"). Amendment No. 1 made technical corrections to the original submission. Amendment No. 2 included references to section 19(b)(3)(A) of the Act that had been omitted in the original filing and made a minor clarification. Amendment No. 3 restored Nasdaq's request, made in the original filing, for acceleration of the operative date of the proposed rule change. Amendment No. 4 deleted references to the manner in which foreign issuers must disclose any waivers of the issuer's code of conduct. Nasdaq noted its intention to file a proposed rule change that addresses this issue in the near future. The changes made by Amendment Nos. 1, 2, 3, and 4 are incorporated in this notice.

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

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

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

independence. These objective measures provide transparency to investors and companies, facilitate uniform application of the rules, and ease administration. Because Nasdaq does not believe that ownership of company stock by itself would preclude a board finding of independence, it is not included in the aforementioned objective factors. It should be noted that there are additional, more stringent requirements that apply to directors serving on audit committees, as specified in Rule 4350.

The rule's reference to a "parent or subsidiary" is intended to cover entities the issuer controls and consolidates with the issuer's financial statements as filed with the U.S. Securities and Exchange Commission (but not if the issuer reflects such entity solely as an investment in its financial statements). The reference to executive officer means those officers covered in Rule 16a-1(f) under the Act. In the context of the definition of Family Member under Rule 4200(a)(14), the reference to marriage is intended to capture relationships specified in the rule (parents, children and siblings) that arise as a result of marriage, such as "in-law" relationships.

The three year look-back periods referenced in paragraphs (A), (C), (E) and (F) of the rule commence on the date the relationship ceases. For example, a director employed by the company is not independent until three years after such employment terminates. Paragraph (B) of the rule is generally intended to capture situations where a payment is made directly to (or for the benefit of) the director or a family member of the director. For example, consulting or personal service contracts with a director or family member of the director or political contributions to the campaign of a director or a family member of the director would be considered under paragraph (B) of the rule.

Paragraph (D) of the rule is generally intended to capture payments to an entity with which the director or Family Member of the director is affiliated by serving as a partner, controlling shareholder or executive officer of such entity. Under exceptional circumstances, such as where a director has direct, significant business holdings, it may be appropriate to apply the corporate measurements in paragraph (D), rather than the individual measurements of paragraph (B). Issuers should contact Nasdaq if they wish to apply the rule in this manner. The reference to a partner in paragraph (D) is not intended to include limited partners. It should be noted that the

independence requirements of paragraph (D) of the rule are broader than Rule 10A-3(e)(8) under the Act.

Under paragraph (D), a director who is, or who has a Family Member who is, an executive officer of a charitable organization may not be considered independent if the company makes payments to the charity in excess of the greater of [the greater of] 5% of the charity's revenues or \$200,000. However, Nasdaq encourages companies to consider other situations where a director or their Family Member and the company each have a relationship with the same charity when assessing director independence.

For purposes of determining whether a lawyer is eligible to serve on an audit committee, Rule 10A-3 under the Act generally provides that any partner in a law firm that receives payments from the issuer is ineligible to serve on that issuer's audit committee. In determining whether a director may be considered independent for purposes other than the audit committee, payments to a law firm would generally be considered under Rule 4200(a)(15)(D), which looks to whether the payment exceeds the greater of 5% of the recipient's gross revenues or \$200,000; however, if the firm is a sole proprietorship, Rule 4200(a)(15)(B), which looks to whether the payment exceeds \$60,000, applies.

Paragraph (G) of the rule provides a different measurement for independence for investment companies in order to harmonize with the Investment Company Act of 1940. In particular, in lieu of paragraphs (A)-(F), a director who is an "interested person" of the company as defined in section 2(a)(19) of the Investment Company Act of 1940, other than in his or her capacity as a member of the board of directors or any board committee, would not be considered to be independent.

#### Rule 4200A. Definitions

\* \* \* \* \*

(a) For purposes of the Rule 4000 Series, unless the context requires otherwise:

(14) No change.

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

(a) Applicability

(1) through (4) No change.

(5) Effective Dates/Transition. In order to allow companies to make necessary adjustments in the course of their regular annual meeting schedule, and consistent with Exchange Act Rule 10A-3, Rules 4200 [4300] and 4350 are

effective as set out in this subsection. During the transition period between [[insert date of approval by the Commission]] *November 4, 2003* and the effective date of Rules 4200 and 4350, companies that have not brought themselves into compliance with these rules must continue to comply with Rules 4200A and 4350A, which consist of sunset sections of previously existing Rules 4200 and 4350.

The provisions of Rule 4200(a) and Rule 4350(c), (d) and (m) regarding director independence, independent committees, and notification of noncompliance shall be implemented by the following dates:

- July 31, 2005 for foreign private issuers and small business issuers (as defined in Rule 12b-2); and
- For all other listed issuers, by the earlier of: (1) the listed issuer's first annual shareholders meeting after January 15, 2004; or (2) October 31, 2004.

In the case of an issuer with a staggered board, with the exception of the audit committee requirements, the issuer shall have until their second annual meeting after January 15, 2004, but not later than December 31, 2005, to implement all new requirements relating to board composition, if the issuer would be required to change a director who would not normally stand for election at an earlier annual meeting. Such issuers shall comply with the audit committee requirements pursuant to the implementation schedule bulleted above.

Issuers that have listed or shall be listed in conjunction with their initial public offering shall be afforded exemptions from all board composition requirements consistent with the exemptions afforded in Rule 10A-3(b)(1)(iv)(A) under the Act. That is, for each committee that the company adopts, the company shall have one independent member at the time of listing, a majority of independent members within 90 days of listing and all independent members within one year. It should be noted, however, that investment companies are not afforded these exemptions under Rule 10A-3. Issuers may choose not to adopt a compensation or nomination committee and may instead rely upon a majority of the independent directors to discharge responsibilities under the rules. These issuers shall be required to meet the majority independent board requirement within one year of listing.

Companies transferring from other markets with a substantially similar requirement shall be afforded the balance of any grace period afforded by the other market. Companies

transferring from other listed markets that do not have a substantially similar requirement shall be afforded one year from the date of listing on Nasdaq. This transition period is not intended to supplant any applicable requirements of Rule 10A-3 under the Act.

The limitations on corporate governance exemptions to foreign private issuers shall be effective July 31, 2005. However, the requirement that a foreign issuer disclose the receipt of a corporate governance exemption from Nasdaq shall be effective for new listings and filings made after January 1, 2004.

Rule 4350(n), requiring issuers to adopt a code of conduct, shall be effective [[insert date six months after approval by the Commission ]] *May 4, 2003*.

Rule 4350(h), requiring audit committee approval of related party transactions, shall be effective January 15, 2004.

The remainder of Rule 4350(a) and Rule 4350(b) are effective [[insert date of approval by the Commission ]] *November 4, 2003*.

(b) through (l) No change.

*(m) Notification of Material Noncompliance*

An issuer must provide Nasdaq with prompt notification after an executive officer of the corporation becomes aware of any material noncompliance by the issuer with the requirements of this Rule 4350.

*(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 CFR 228.406 and 17 CFR 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 shall disclose* [and must be disclosed] *such waivers* in a Form 8-K within five *business* days.

IM-4350-1 to IM-4350-5

No change.

IM-4350-6: *Applicability*

No change.

IM-4350-7: *Code of Conduct*

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)](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 CFR 228.406 and 17 CFR 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[(m)](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 issuers must disclose such waivers* [disclosure must be made] in a Form 8-K within five *business* days.

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.

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

Rule 4350A(a), (c), (d) or (h) shall continue to apply to any company until Rule 4350(a), (c), (d) or (h), respectively, becomes effective for such company. The effective dates of Rule 4350(a), (c), (d) or (h) are set out in Rule 4350(a)(5).

(a) No change.

(c) [(b)] Independent Directors

Each issuer shall maintain a sufficient number of independent directors on its board of directors to satisfy the audit committee requirement set forth in Rule 4350(d)(2).

(d) [(c)] Audit Committee

(1) Audit Committee Charter

No Change.

(2) Audit Committee Composition

No Change.

(h) No change.

\* \* \* \* \*

**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

On November 4, 2003, the Commission approved a number of rule changes to the corporate governance rules of Nasdaq and of the New York Stock Exchange.<sup>5</sup> These rule changes constituted a major reform in the corporate governance rules of these two markets. In the aftermath of those rule changes, Nasdaq proposes technical amendments to the rules by, for example, inserting the date of Commission approval, correcting some errors in numbering sections, inserting missing headings for certain sections, and similar technical changes. In addition, Nasdaq seeks to clarify that the five-day window allowed by Rule 4350(n) to file disclosure of a code of conduct waiver in a Form 8-K means five business days.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,<sup>6</sup> in general and with section 15A(b)(6) of the Act,<sup>7</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. Nasdaq believes that clarifying the new rules helps investors and issuers.

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

Nasdaq does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*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 proposed rule change has been filed by Nasdaq as a "non-controversial" rule change pursuant to section

19(b)(3)(A) of the Act<sup>8</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>9</sup>

Consequently, because the foregoing proposed rule change, as amended: (1) Does not significantly affect the protection of investors or the public interest, (2) does not impose any significant burden on competition, and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, provided that the self-regulatory organization has given 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 the Commission may designate, it has become effective pursuant to section 19(b)(3)(A) of the Act<sup>10</sup> and Rule 19b-4(f)(6) thereunder.<sup>11</sup>

Pursuant to Rule 19b-4(f)(6)(iii),<sup>12</sup> a proposed "non-controversial" rule change does not become operative for 30 days after the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. Nasdaq has requested that the Commission waive the five-day pre-notice requirement and the 30-day operative delay, to permit the NASD to implement the proposal immediately.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The revisions contained in the proposed rule change constitute either technical changes or minor revisions that, in the Commission's view, bring clarity to Nasdaq's new corporate governance listing standards. For these reasons, the Commission designates the proposed rule change, as amended, to be effective and operative upon filing with the Commission.<sup>13</sup> The Commission also waives the five-business day pre-filing requirement.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such 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.<sup>14</sup>

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change, as amended, 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-2003-172. 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 at 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 the File No. SR-NASD-2003-172 and should be submitted by February 11, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>15</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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<sup>8</sup> 15 U.S.C. 78s(b)(3)(A).

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

<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>11</sup> 17 CFR 240.19b-4(f)(6).

<sup>12</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>13</sup> For the purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rules impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>14</sup> For purposes of calculating the 60-day abrogation period, the Commission considers the period to commence on January 9, 2004, the date that the NASD filed Amendment No. 4.

<sup>15</sup> 17 CFR 200.30-3(a)(12).

<sup>5</sup> See Securities Exchange Act Release No. 48745 (November 4, 2003), 68 FR 64154 (November 12, 2003).

<sup>6</sup> 15 U.S.C. 78o-3.

<sup>7</sup> 15 U.S.C. 78o-3(b)(6).