

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 filings will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-BSE-2003-19 and should be submitted by November 13, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

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

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48646; File No. SR-NASD-2003-23]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. To Clarify the Applicability of the Nasdaq Corporate Governance Requirements During the Listing Review Process

October 16, 2003.

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 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") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. On October 10, 2003, NASD, through Nasdaq, submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> 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 clarify the applicability of its corporate governance requirements during the listing review process.

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

\* \* \* \* \*

#### 4800. Procedures for Review of Nasdaq Listing Determinations

##### 4810. Purpose and General Provisions

(a)-(d) No change.

(e) At each level of a proceeding under the Rule 4800 Series, the Listing Qualifications Panel, Listing Council, or NASD Board, as part of its respective review, may consider any failure to meet any quantitative standard or qualitative consideration set forth in the Rule 4000 Series, including failures previously not considered in the proceeding. *The Listing Council or the NASD Board, as part of its respective review, may also consider 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 issuer will be afforded notice of such consideration and an opportunity to respond. [In this regard,] *Furthermore,* the issuer may be subject to additional or more stringent criteria for the initial or continued inclusion of particular securities based on any event, condition, or circumstance that exists or occurs that makes initial or continued inclusion of the securities inadvisable or unwarranted in the opinion of the Association, even though the securities meet all enumerated criteria for initial or continued inclusion in The Nasdaq Stock Market.

\* \* \* \* \*

#### 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

The NASD Rule 4800 Series sets forth the procedures for the independent review of a staff determination prohibiting the listing of an issuer's securities. These rules provide that an issuer may appeal a staff determination to the Listing Qualifications Panel ("Panel"). Following a hearing, the Panel will issue a written decision that the issuer may appeal to the Listing and Hearing Review Council ("Listing Council"). Following its deliberations, the Listing Council will also issue a written decision. Although an issuer may not appeal a Listing Council decision to the NASD Board of Governors ("NASD Board"), the NASD Board may call a Listing Council decision for review.

Nasdaq rules further provide that while an appeal to the Panel will stay the delisting of an issuer's securities until a written decision is issued by the Panel, an appeal of a Panel decision to the Listing Council generally does not stay a delisting. Therefore, an issuer's securities generally will not be listed on Nasdaq during the time of the Listing Council's or the NASD Board's review of an appeal. Although NASD Rule 4810 currently provides that an issuer's failure to meet any quantitative standard or qualitative consideration may be considered at each level of the review process, Nasdaq proposes to clarify this rule by explicitly stating that the Listing Council and the NASD Board have the authority to consider any action undertaken by an issuer during the review process that would have constituted a violation of Nasdaq's corporate governance requirements if the issuer had been listed on Nasdaq at that time.<sup>4</sup> Nasdaq believes that this clarification is important so that issuers in the review process are aware of the necessity of their continued compliance with Nasdaq's corporate governance requirements.<sup>5</sup>

<sup>4</sup> Nasdaq represents that before the Listing Council or the NASD Board considers any action by an issuer that would have constituted a violation of Nasdaq's corporate governance rules had it been listed, the issuer will be provided notice of such consideration and an opportunity to respond.

<sup>5</sup> Nasdaq represents that, of course, an issuer in the review process would also need to be in compliance with Nasdaq's quantitative requirements before it could be relisted as public investors rely on Nasdaq's listing standards and are

Continued

<sup>13</sup> 17 CFR 200.30-3(a)(12).

<sup>14</sup> 15 U.S.C. 78s(b)(1).

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

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

In order to assist issuers that are in the listing review process comply with Nasdaq's corporate governance requirements, such issuers may contact Nasdaq staff to request any necessary corporate governance interpretations or financial viability waivers.

## 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 the proposed rule change is designed to prevent fraudulent and manipulative acts and practices and, in general, to protect investors and the public interest. In particular, Nasdaq believes the proposed rule change will provide greater clarity and transparency for investors, issuers, and their counsel.

### *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.

### *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, as amended, 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-2003-23 and should be submitted by November 13, 2003.

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. 34-48641; File No. SR-NASD-2003-148]

### **Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the NASD's Minor Rule Violation Plan and Late Fee Provision**

October 16, 2003.

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 October 3, 2003, the National Association of Securities Dealers, Inc. ("NASD" or "Association") 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 the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

<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.

### **I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The NASD is proposing to amend Interpretative Material 9216 (IM-9216) and Schedule A of the NASD By-Laws ("Schedule A") to clarify that a failure to timely file Schedule I, pursuant to Rule 17a-10 of the Act,<sup>3</sup> is eligible for disposition under the NASD's Minor Rule Violation Plan ("MRVP" or "the Plan") and for assessment of a late fee. Below is the text of the proposed rule change. Proposed new language is *italicized*; proposed deletions are in brackets.

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### **Schedule A to the NASD By-Laws**

\* \* \* \* \*

#### **Section 4—Fees**

(a)–(k) No Change.

(l) (1) Unless a specific temporary extension of time has been granted, there shall be imposed upon each member required to file reports, as designated by this paragraph, a fee of \$100 for each day that such report is not timely filed. The fee will be assessed for a period not to exceed 10 business days. Requests for such extension of time must be submitted to NASD at least three business days prior to the due date; and

(2) Any report filed pursuant to this Rule containing material inaccuracies or filed incompletely shall be deemed not to have been filed until a corrected copy of the report has been resubmitted.

(3) List of Designated Reports:

(A) SEC Rule 17a-5—Monthly and quarterly FOCUS reports and annual audit reports[.]; and

(B) *SEC Rule 17a-10—Schedule I.*

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#### **9200. Disciplinary Proceedings**

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IM-9216. Violations Appropriate for Disposition Under Plan Pursuant to SEC Rule 19d-1(c)(2)

—Rules 2210(b) and (c) and Rules 2220(b) and (c)—Failure to have advertisements and sales literature approved by a principal prior to use, failure to maintain separate files of advertisements and sales literature containing required information, and failure to file communications with NASD within the required time limits.

—Rule 3360—Failure to timely file reports of short positions on Form NS-1.

—Rule 3110—Failure to keep and preserve books, accounts, records,

<sup>3</sup> 17 CFR 240.17a-10.

entitled to assume that listed securities meet its minimum listing requirements. See KLH Engineering Group, Inc., 52 S.E.C. 460 (1995); ORS Automation, Inc., 48 S.E.C. 490 (1986).

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

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