

single security or small number of securities to dominate an index.

The Exchange has requested accelerated approval of the proposed rule change. The Commission notes that the proposed rule change is similar to rules previously approved for other derivative products.¹⁰ The Commission also notes that a similar proposal was previously approved by the Commission and was subject to the full comment period, with no comments received.¹¹

Accordingly, the Commission finds good cause, pursuant to Sections 6(b)(5) and 19(b)(2) of the Act,¹² for approving the proposed rule change prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**.

III. 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 No. SR-ISE-2005-11 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-ISE-2005-11. 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 Room. Copies of such filing also will be available for inspection and copying at the principal office of the ISE. 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-ISE-2005-11 and should be submitted on or before March 25, 2005.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹³ that the proposed rule change (SR-ISE-2005-11) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51268; File No. SR-NASD-2004-125]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change Regarding Procedures for Denying Listing on Nasdaq

February 28, 2005.

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 August 18, 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 February 9, 2005, Nasdaq filed Amendment No. 1 to the proposed rule change.³ The Commission is publishing this notice, as amended, to solicit

comments on the proposed rule change from interested persons.

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

Nasdaq proposes to amend various rules to enhance, clarify, and increase the transparency of the procedures associated with denying companies initial or continued listing on Nasdaq. Nasdaq will implement the proposed rule change immediately upon approval by the Commission.

The text of the proposed rule change is below. Proposed new language is italicized; proposed deletions are in [brackets].⁴ IM-4120-2. Disclosure of Written Notice of Staff Determination

[Rule 4815(b) requires] *Rules 4803(a) and 4804(b) require* that an issuer make a public announcement through the news media disclosing the receipt of (i) *a notice that the issuer does not meet a listing standard set forth in the Rule 4000 Series, and (ii) a* [Written Notice of] Staff Determination [("Staff Determination")] to *limit or prohibit* continued listing of the issuer's securities under Rule [4815(a)] *4804(a)* as a result of the issuer's failure to comply with the continued listing requirements[, and the Rule(s) upon which the Staff Determination was based]. Such public announcement shall be made as promptly as possible, but not more than [seven calendar] *four business* days following the receipt of the *notification or the* Staff Determination, *as applicable*. If the public announcement is not made by the issuer within the time allotted, trading of its securities shall be halted, even if the issuer appeals the Staff Determination as set forth in Rule [4820] *4805*. If the issuer fails to make the public announcement by the time that the Listing Qualifications Panel issues its decision, that decision will also determine whether to delist the issuer's securities for failure to make the public announcement.

[Rule 4815(b) does] *Rules 4803(a) and 4804(b) do not* relieve an issuer of its *disclosure* obligation [to make a materiality assessment of the pending delisting action as it may relate to the disclosure requirements of] *under* the federal securities laws, nor should it be construed as providing a safe harbor under the federal securities laws. It is suggested that the issuer consult with corporate/securities counsel in assessing

¹⁰ See Securities Exchange Act Release Nos. 44532 (July 10, 2001), 66 FR 37078 (July 16, 2001) (SR-Amex-2001-25); and 45920 (May 13, 2002), 67 FR 35605 (May 20, 2002) (SR-NASD-2002-45).

¹¹ See Securities Exchange Act Release No. 50945 (December 29, 2004), 70 FR 1498 (January 7, 2005) (SR-Phlx-2004-66).

¹² 15 U.S.C. 78(b)(5) and 78s(b)(2).

¹³ 15 U.S.C. 78s(b)(2).

¹⁴ 17 CFR 200.30-3(a)(12).

¹⁵ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 replaced the original filing in its entirety.

⁴ The proposed rule change is marked to show changes from the rules as they appear in the electronic NASD Manual available at <http://www.nasdaq.com>.

its disclosure obligations under the federal securities laws.

* * * * *

4300. Qualification Requirements for NASDAQ Stock Market Securities

The Nasdaq Stock Market[,] is entrusted with the authority to preserve and strengthen the quality of and public confidence in its market. The Nasdaq Stock Market stands for integrity and ethical business practices in order to enhance investor confidence, thereby contributing to the financial health of the economy and supporting the capital formation process. Nasdaq issuers, from new public companies to companies of international stature[, by being included in Nasdaq,] are publicly recognized as sharing these important objectives [of The Nasdaq Stock Market].

Nasdaq, therefore, in addition to applying the enumerated criteria set forth in the Rule 4300 and 4400 Series, [will exercise] *has* broad discretionary authority over the initial and continued inclusion of securities in Nasdaq in order to maintain the quality of and public confidence in its market, *to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest.* [Under such broad discretion and in addition to its authority under Rule 4330(a),] Nasdaq may use such discretion to deny initial inclusion, [or] apply additional or more stringent criteria for the initial or continued inclusion of particular securities, or suspend or terminate the inclusion of particular securities based on any event, condition, or circumstance [which] *that* exists or occurs that makes initial or continued inclusion of the securities in Nasdaq inadvisable or unwarranted in the opinion of Nasdaq, even though the securities meet all enumerated criteria for initial or continued inclusion in Nasdaq. *In all circumstances where one of the Listing Departments (as defined in Rule 4801) exercises its authority under Rule 4300, the Listing Department shall issue a Staff Determination under Rule 4804, and in all circumstances where an Adjudicatory Body (as defined in Rule 4801) exercises such authority, the use of the authority shall be described in the written decision of the Adjudicatory Body.*

IM-4300. Use of Discretionary Authority

In order to further issuers' understanding of Rule 4300, Nasdaq is adopting this Interpretive Material as a non-exclusive description of the circumstances in which the Rule is generally invoked.

Nasdaq may use its authority under Rule 4300 to deny initial or continued listing to an issuer when an individual with a history of regulatory misconduct is associated with the issuer. Such individuals are typically an officer, director, substantial security holder (as defined in Rule 4350(i)(5)), or consultant to the issuer. In making this determination, Nasdaq shall consider a variety of factors, including the severity of the violation; whether it involved fraud or dishonesty; whether it was securities-related; whether the investing public was involved; when the violation occurred; how the individual has been employed since the violation; whether there are continuing sanctions against the individual; whether the individual made restitution; whether the issuer has taken effective remedial action; and the totality of the individual's relationship to the issuer.

Based on this review, Nasdaq may determine that the regulatory history rises to the level of a public interest concern, but may also consider whether remedial measures proposed by the issuer, if taken, would allay that concern. Examples of such remedial measures could include the individual's resignation from officer and director positions; divestiture of stock holdings; terminations of contractual arrangements between the issuer and the individual; or the establishment of a voting trust surrounding the individual's shares. Alternatively, Nasdaq may conclude that a public interest concern is so serious that no remedial measure would be sufficient to alleviate it. In the event that Nasdaq staff makes such a determination, the issuer may seek review of that determination through the procedures set forth in the Rule 4800 Series.

Nasdaq may also use its discretionary authority, for example, when an issuer files for protection under any provision of the federal bankruptcy laws or comparable foreign laws, when an issuer's independent accountants issue a disclaimer opinion on financial statements required to be audited, or when financial statements do not contain a required certification.

In addition, pursuant to its discretionary authority, Nasdaq shall review issuer's past corporate governance activities. This review may include activities taking place while the issuer is listed on Nasdaq or an exchange that imposes corporate governance requirements, as well as activities taking place after a formerly listed issuer is no longer listed on Nasdaq or such an exchange. Based on such review, and in accordance with the Rule 4800 Series, Nasdaq may take any

appropriate action, including placing restrictions on or additional requirements for listing, or denying listing of a security if Nasdaq determines that there have been violations or evasions of such corporate governance standards. Such determinations shall be made on a case-by-case basis as necessary to protect investors and the public interest.

Although Nasdaq has broad discretion under Rule 4300 to impose additional or more stringent criteria, the Rule does not provide a basis for Nasdaq to grant exemptions or exceptions to the enumerated criteria for initial or continued inclusion, which may be granted solely pursuant to rules explicitly providing such authority.

* * * * *

4330. [Suspension or Termination of Inclusion of a Security and Exceptions to Inclusion Criteria] *Obligation To Provide Information*

[(a) Nasdaq may, in accordance with Rule 4800 Series, deny inclusion or apply additional or more stringent criteria for the initial or continued inclusion of particular securities or suspend or terminate the inclusion of an otherwise qualified security if:]

[(1) An issuer files for protection under any provision of the federal bankruptcy laws;]

[(2) An issuer's independent accountants issue a disclaimer opinion on financial statements required to be certified; or]

[(3) Nasdaq deems it necessary to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, or to protect investors and the public interest.]

[(b) If the Association determines to suspend or terminate a security's inclusion because of noncompliance with the provisions of this Rule 4000 Series, the Association will notify the issuer prior to suspension or termination or as soon as practicable thereafter. This notification constitutes a Staff Determination for purposes of Rule 4815 and the issuer may request review of the decision under the Rule 4800 Series.]

[(c)] Nasdaq may request any additional information or documentation, public or non-public, deemed necessary to make a determination regarding a security's initial or continued inclusion, including, but not limited to, any material provided to or received from the Commission or other appropriate regulatory authority. [Information requested pursuant to this subparagraph shall be submitted within a reasonable

period.] An issuer may be delisted if it fails to provide such information[.] *within a reasonable period of time or* [An issuer may also be delisted] if any communication to Nasdaq contains a material misrepresentation or omits material information necessary to make the communication to Nasdaq not misleading.

[(d) Nasdaq may make exceptions to the application of the criteria contained in Rule 4310 or Rule 4320 where it deems it appropriate.]

[(e) A security that has been suspended shall be required, prior to re-inclusion, to comply with requirements for continued inclusion. A security that has been terminated shall be required, prior to re-inclusion, to comply with the requirements for initial inclusion.]

[(f)]

4340. Reverse Mergers

An issuer must apply for initial inclusion following a transaction whereby the issuer combines with a non-Nasdaq entity, resulting in a change of control of the issuer and potentially allowing the non-Nasdaq entity to obtain a Nasdaq Listing (for purposes of this rule, such a transaction is referred to as a "Reverse Merger"). In determining whether a Reverse Merger has occurred, Nasdaq [will] *shall* consider all relevant factors including, but not limited to, changes in the management, board of directors, voting power, ownership, and financial structure of the issuer. Nasdaq [will] *shall* also consider the nature of the businesses and the relative size of the Nasdaq issuer and non-Nasdaq entity.

4350. Qualitative Listing Requirements for Nasdaq National Market and Nasdaq Small Cap Market Issuers Except for Limited Partnerships

[Nasdaq shall review the issuer's past corporate governance activities. This review may include activities taking place while the issuer is listed on Nasdaq or an exchange that imposes corporate governance requirements, as well as activities taking place after a formerly listed issuer is no longer listed on Nasdaq or an exchange that imposes corporate governance requirements. Based on such review, Nasdaq may take any appropriate action, including placing of restrictions on or additional requirements for listing, or the denial of listing of a security if Nasdaq determines that there have been violations or evasions of such corporate governance standards. Such determinations shall be made on a case-by-case basis as necessary to protect investors and the public interest.]

(a)-(h) No change.

(i) Shareholder Approval

(1) No change.

(2) *An [E]xception[s] applicable to a specified issuance of securities* may be made upon *prior written* application to Nasdaq's *Listing Qualifications Department* when: (A) The delay in securing stockholder approval would seriously jeopardize the financial viability of the enterprise; and (B) reliance by the company on this exception is expressly approved by the audit committee or a comparable body of the board of directors *comprised solely of independent, disinterested directors*. *The Listing Qualifications Department shall respond to each application for such an exception in writing.*

A company [relying on this] *that receives such an exception* must mail to all shareholders not later than ten days before issuance of the securities a letter alerting them to its omission to seek the shareholder approval that would otherwise be required [and indicating]. *Such notification shall disclose the terms of the transaction (including the number of shares of common stock that could be issued and the consideration received), the fact that the issuer is relying on a financial viability exception to the shareholder approval rules, and that the audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors has expressly approved reliance on the exception. The issuer shall also make a public announcement through the news media disclosing the same information as promptly as possible, but no later than ten days before the issuance of the securities.*

(3)-(6) No change.

(j)-(n) No change.

IM-4350-1. Interpretive Material Regarding Future Priced Securities

Summary. No change.

How the Rules Apply

Shareholder Approval. No change.

Voting Rights. No change.

The Bid Price Requirement. No change.

Listing of Additional Shares. No change.

Public Interest Concerns

NASD Rule 4300 provides:

The Nasdaq Stock Market is entrusted with the authority to preserve and strengthen the quality of and public confidence in its market. The Nasdaq Stock Market stands for integrity and ethical business practices in order to enhance investor confidence, thereby contributing to the financial health of

the economy and supporting the capital formation process. Nasdaq issuers, from new public companies to companies of international stature[, by being included in Nasdaq.] are publicly recognized as sharing these important objectives [of The Nasdaq Stock Market].

Nasdaq, therefore, in addition to applying the enumerated criteria set forth in the Rule 4300 and 4400 Series, has broad discretionary authority over the initial and continued inclusion of securities in Nasdaq in order to maintain the quality of and public confidence in its market, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest.

Nasdaq may use such discretion to deny initial inclusion, apply additional or more stringent criteria for the initial or continued inclusion of particular securities, or suspend or terminate the inclusion of particular securities based on any event, condition, or circumstance that exists or occurs that makes initial or continued inclusion of the securities in Nasdaq inadvisable or unwarranted in the opinion of Nasdaq, even though the securities meet all enumerated criteria for initial or continued inclusion in Nasdaq.

[NASD Rule 4330(a) provides:

Nasdaq may * * * deny inclusion or apply additional or more stringent criteria for the initial or continued inclusion of particular securities or suspend or terminate the inclusion of an otherwise qualified security if * * * Nasdaq deems it necessary to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, or to protect investors and the public interest.]

The returns on Future Priced Securities may become excessive compared with those of public investors in the issuer's common securities. In egregious situations, the use of a Future Priced Security may raise public interest concerns under Rule[s] 4300 [and 4330(a)]. In addition to the demonstrable business purpose of the transaction, other factors that Nasdaq staff will consider in determining whether a transaction raises public interest concerns include: (1) The amount raised in the transaction relative to the issuer's existing capital structure; (2) the dilutive effect of the transaction on the existing holders of common stock; (3) the risk undertaken by the Future Priced Security investor; (4) the relationship between the Future Priced Security investor and the issuer; (5) whether the transaction was preceded by other similar transactions; and (6) whether the transaction is consistent

with the just and equitable principles of trade.

Some Future Priced Securities may contain features that address the public interest concerns. These features tend to provide incentives to the investor to hold the security for a longer time period and limit the number of shares into which the Future Priced Security may be converted. Such features may limit the dilutive effect of the transaction and increase the risk undertaken by the Future Priced Security investor in relationship to the reward available.

Reverse Merger

NASD Rule [4330(f)] 4340 provides:

An issuer must apply for initial inclusion following a transaction whereby the issuer combines with a non-Nasdaq entity, resulting in a change of control of the issuer and potentially allowing the non-Nasdaq entity to obtain a Nasdaq Listing (for purposes of this rule, such a transaction is referred to as a "Reverse Merger"). In determining whether a Reverse Merger has occurred, Nasdaq [will] *shall* consider all relevant factors including, but not limited to, changes in the management, board of directors, voting power, ownership, and financial structure of the issuer. Nasdaq [will] *shall* also consider the nature of the businesses and the relative size of the Nasdaq issuer and non-Nasdaq entity.

This provision, which applies regardless of whether the issuer obtains shareholder approval for the transaction, requires issuers to qualify under the initial inclusion standards following a Reverse Merger.⁴ It is important for issuers to realize that in certain instances, the conversion of a Future Priced Security may implicate this provision. For example, if there is no limit on the number of common shares issuable upon conversion, or if the limit is set high enough, the exercise of conversion rights under a Future Priced Security could result in a Reverse Merger with the holders of the Future Priced Securities. In such event, an issuer may be required to re-apply for initial inclusion and satisfy all initial inclusion requirements.

* * * * *

4410. Applications for Designation

(a)–(b) No change.

[(c) Nasdaq shall review the issuer's past corporate governance activities when the issuer's securities were traded

on or after withdrawal from Nasdaq National Market or a securities exchange which imposes corporate governance requirements. Based on such review, Nasdaq may take any appropriate action, including placing of restrictions on or additional requirements for designation, or the denial of designation of a security, if Nasdaq determines that there have been violations or evasions of such corporate governance standards. Determinations under this paragraph (c) shall be made on a case-by-case basis as necessary to protect investors and the public interest.

(d) Nasdaq may make exceptions to the criteria contained in the Rule 4400 Series where it deems appropriate.]

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4800. PROCEDURES FOR REVIEW OF NASDAQ LISTING DETERMINATIONS

4801. Definitions

(a) *The term "Adjudicator" shall mean a member of an Adjudicatory Body.*

(b) *The term "Adjudicatory Body" shall mean a Listing Qualifications Panel, the Listing Council, or the NASD Board.*

(c) *The term "Advisor" shall mean an individual employed by Nasdaq or NASD who is advising an Adjudicatory Body with respect to a proceeding under the Rule 4800 Series.*

(d) *The term "Hearings Department" shall mean the Nasdaq Office of Listing Qualifications Hearings.*

(e) *The term "Listing Council" shall mean the Nasdaq Listing and Hearing Review Council, a committee appointed by the Nasdaq Board of Directors pursuant to Article V of the Nasdaq By-Laws whose responsibilities include the review of determinations to limit or prohibit the listing of an issuer's securities made by a Listing Qualifications Panel.*

(f) *The term "Listing Council Decision" shall mean a written decision of the Listing Council.*

(g) *The term "Listing Departments" shall mean the Listing Qualifications Department and the Listing Investigations Department, the departments of Nasdaq that are responsible for evaluating the compliance of issuers with the quantitative and qualitative listing standards set forth in the Rule 4000 Series and determining the eligibility for initial or continued listing of an issuer's securities.*

(h) *The term "Listing Qualifications Panel" or "Panel" shall mean an independent panel composed of at least two persons, not employees of the NASD*

or its subsidiaries, designated by the Nasdaq Board of Directors.

(i) *The term "NASD Board" shall mean the Board of Governors of the NASD.*

(j) *The term "Panel Decision" shall mean a written decision of a Listing Qualifications Panel.*

(k) *The term "Staff Determination" shall mean a written determination by either or both of the Listing Departments to limit or prohibit the initial or continued listing of an issuer's securities pursuant to Rule 4804.*

4802 [4810]. Purpose and General Provisions

(a) The purpose of this Rule 4800 Series is to provide procedures for the independent review of determinations of the Association that prohibit or limit the listing of an issuer's securities on the Nasdaq Stock Market based upon the Nasdaq Stock Market Rules, as set forth in the Rule 4000 Series. Securities of issuers that do not meet the quantitative or qualitative listing standards set forth in the Rule 4000 Series are subject to delisting from, or denial of initial inclusion on, The Nasdaq Stock Market.

(b) An issuer may file a written request for an [extension of time] exception to [comply with] any of the standards set forth in the Rule 4000 Series [or an exception to those standards] at any time during the pendency of a proceeding under the Rule 4800 Series. [The Association] A Listing Qualifications Panel may grant [extensions or] exceptions of up to 90 days from the date of the Panel Decision, and the Listing Council may grant exceptions of up to 60 days from the date of the Listing Council Decision where it deems appropriate.

(c) At each level of a proceeding under the Rule 4800 Series, the Listing Qualifications Panel [(as defined in Rule 4830)], the [Nasdaq] Listing [and Hearing Review] Council [(the "Listing Council")], or the NASD Board [of Governors (the "NASD Board")], as part of its respective review, (1) may request additional information from the issuer or the Listing Departments, and (2) may consider such additional information available from any source as the Adjudicatory Body may deem to be relevant. The issuer [will] and the Listing Departments shall be afforded written notice and an opportunity to address the significance of [the] any such information requested or considered.

[(d) 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

⁴ This provision is designed to address situations where a company attempts to obtain a "backdoor listing" on Nasdaq by merging with a Nasdaq issuer with minimal assets and/or operations.

review, may consider the issuer's bid price, market makers or any information that the issuer releases to the public, including any additional quantitative deficiencies reflected in the released information.]

[(e)] (d) At each level of a proceeding under the Rule 4800 Series, [the Listing Qualifications Panel, Listing Council, or NASD Board] an *Adjudicatory Body*, 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] shall be afforded written notice of such consideration and an opportunity to respond. Furthermore, an *Adjudicatory Body* [the issuer] may [be] subject the issuer 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] *Adjudicatory Body*, even though the securities meet all enumerated criteria for initial or continued inclusion in The Nasdaq Stock Market.

(e) The Listing Departments or the Advisor to an *Adjudicatory Body*, as applicable, shall document the date on which a decision with respect to an issuer is implemented.

(f) A security that has been suspended shall be required, prior to re-inclusion, to comply with requirements for continued inclusion. A security that has been delisted shall be required, prior to re-inclusion, to comply with the requirements for initial inclusion.

4803. Staff Review of Deficiency

(a) Whenever staff of a Listing Department determines that an issuer does not meet a listing standard set forth in the Rule 4000 Series, staff shall immediately notify the issuer. The issuer shall make a public announcement through the news media disclosing the receipt of this notice, including the Rule(s) upon which it was based. Prior to the release of the public announcement, the issuer shall provide such disclosure to Nasdaq's StockWatch and Listing Qualifications Departments. The public announcement shall be

made as promptly as possible, but not more than four business days following receipt of the notice from the Listing Department.

(1) In the case of

(A) All quantitative deficiencies from standards that do not provide a compliance period;

(B) Deficiencies from the standards of Rules 4350(c) or (d) or 4360(c) or (d) where the cure period of the Rule is not applicable; or

(C) Deficiencies from the standards of Rules 4350(f), (h), (i), (k), or (n), 4360(f) or (i), or 4351;

staff's notice shall provide the issuer with fifteen calendar days to submit a plan to regain compliance with the listing standard; provided, however, that the issuer shall not be provided with an opportunity to submit such a plan if review under the Rule 4800 Series of a prior Staff Determination with respect to the issuer is already pending. Subject to the restrictions of paragraph (b), staff may extend this deadline upon good cause shown. Upon receipt of the issuer's plan, staff in the Listing Department may request such additional information from the issuer as is necessary to make a determination regarding the likelihood that the plan will allow the issuer to meet the listing standard at issue.

(2) In the case of:

(A) Quantitative deficiencies from standards that do provide a compliance period; and

(B) Deficiencies from the standards of Rules 4350(c) or (d) or 4360(c) or (d) where the cure period of the Rule is applicable; staff's notice shall provide the issuer with the applicable compliance or cure period.

(3) In all other cases, staff's notice shall be in the form a Staff Determination issued pursuant to Rule 4804(a).

(b) Unless review under the Rule 4800 Series of a prior Staff Determination with respect to the issuer is already pending, the Listing Department may grant the issuer additional time to regain compliance with a listing standard described in paragraph (a)(1); provided, however, that the additional time provided by all such exceptions shall not exceed 105 calendar days from the date of staff's notification pursuant to paragraph (a). The Listing Department shall prepare a written record describing the basis for granting any exception, and shall provide the issuer with written notice as to the terms of the exception. If the issuer does not regain compliance within the time period provided by all applicable exceptions, the Listing Department shall

immediately issue a Staff Determination pursuant to Rule 4804(a). If the Listing Department determines not to grant the issuer additional time to regain compliance, the Listing Department shall immediately issue a Staff Determination pursuant to Rule 4804(a) that includes a description of the basis for denying the exception.

IM-4803. Staff Review of Deficiency

As provided in Rule 4803(a)(1)(A), the staff of a Listing Department may accept a plan to regain compliance with respect to quantitative deficiencies from standards that do not themselves provide a compliance period. Such standards include:

- Rules 4310(c)(2)(B)(i) and (iii)
- Rule 4310(c)(6)
- Rule 4310(c)(7) (but only as to the number of publicly held shares, and not as to such shares' market value)
- Rules 4320(e)(2)(B)(i) and (iii)
- Rules 4320(e)(4) and (5) (but only as to the number of publicly held shares, and not as to such shares' market value)
- Rules 4450(a)(1), (3), and (4)
- Rules 4450(b)(1)(B), (b)(2), and (b)(5), and
- Rules 4450(h)(1) and (4).

In a case where an issuer fails to comply with the requirement of Rules 4310(c)(2)(B)(iii), 4320(e)(2)(B)(iii), or 4450(b)(1)(B), the Listing Department shall not accept a plan to achieve compliance with those requirements in the future, since compliance requires stated levels of net income or assets and revenues during completed fiscal years and therefore can only be demonstrated through audited financial statements. Similarly, an issuer may not submit a plan relying on partial-year performance to demonstrate compliance with these standards. An issuer cited for non-compliance with these requirements may, however, submit a plan that demonstrates current or near-term compliance with Rules 4310(c)(2)(B)(i), 4320(e)(2)(B)(i), or 4450(a)(3) (i.e., the alternative listing requirement relating to stockholders' equity), or Rules 4310(c)(2)(B)(ii), 4320(e)(2)(B)(ii), or 4450(b)(1)(A) (i.e., the alternative listing requirement relating to market value of listed securities).

4804 [4815]. Written Notice of Staff Determination

(a) If either of the Listing [Qualifications] Departments [or the Listing Investigations Department] reaches a determination [(the "Staff Determination")] to limit or prohibit the initial or continued listing of an issuer's securities, it [will] shall prepare and provide to the issuer a Staff

Determination [notify the issuer,] *that shall* describe the specific grounds for the determination, identify the quantitative standard or qualitative consideration set forth in the Rule 4000 Series that the issuer has failed to satisfy, and provide notice that upon request the issuer [will] *shall* be provided an opportunity for a hearing under this Rule 4800 Series.

(b) An issuer that receives a Staff Determination to prohibit continued listing of the issuer's securities under Rule [4815] 4804(a) shall make a public announcement through the news media disclosing the receipt of the Staff Determination, including the Rule(s) upon which the Staff Determination was based. Prior to the release of the public announcement, an issuer shall provide such disclosure to Nasdaq's StockWatch and Listing Qualifications Departments. [*] The public announcement shall be made as promptly as possible, but not more than [seven calendar] *four business* days following receipt of the Staff Determination.

4805 [4820]. Request for Hearing

(c) *If review under the Rule 4800 Series of a Staff Determination is pending and either of the Listing Departments identifies the existence of one or more additional deficiencies with respect to the issuer, the Listing Department shall prepare and provide to the issuer a Staff Determination with respect to such additional deficiencies. If the new Staff Determination is issued prior to a Panel hearing with respect to the original Staff Determination, the new Staff Determination shall notify the issuer that it should present its views with respect to the additional deficiencies at the Panel hearing. If the new Staff Determination is issued after a Panel hearing with respect to the original Staff Determination, the new Staff Determination shall inform the issuer that it should present its views with respect to the additional deficiencies in writing within the period specified in the Staff Determination, to allow review of the additional deficiencies as provided under Rule 4802(d).*

(a) An issuer may, within seven calendar days of the date of the Staff Determination, request either a written or oral hearing to review the Staff Determination. Requests for hearings

should be filed with [The Nasdaq Office of Listing Qualifications Hearings ([the "[Hearings Department]"]. A request for a hearing shall stay the delisting action pending the issuance of a [written determination by a Listing Qualifications] Panel *Decision*. If no hearing is requested within the seven calendar day period, the right to request review is waived, and the Staff Determination shall take immediate effect. All hearings shall be held before a Listing Qualifications Panel as described in Rule 4806 [4830]. All hearings shall be scheduled, to the extent practicable, within 45 days of the date that the request for hearing is filed, at a location determined by the Hearings Department. The Hearings Department shall make an acknowledgment of the issuer's hearing request stating the date, time, and location of the hearing, and the deadline for written submissions to the Listing Qualifications Panel. The issuer shall be provided at least 10 calendar days notice of the hearing unless the issuer waives such notice.

(b) The issuer may file a written submission with the Hearings Department stating the specific grounds for the issuer's contention that the Staff Determination was in error or requesting *that the Listing Qualifications Panel* grant an [extension of time to comply with the listing requirements or an] exception [to those requirements], as permitted by Rule 4802 [4810]. The issuer may also submit any documents or other written material in support of its request for review, including any information not available at the time of the Staff Determination.

(c) No change.

4806 [4830]. The Listing Qualifications Panel

(a) All hearings [will] *shall* be conducted before a[n independent panel (the "[Listing Qualifications Panel]") composed of at least two persons, not employees of the NASD or its subsidiaries, designated by the Nasdaq Board of Directors. No person shall serve as a Listing Qualifications Panel member for a matter if his or her interest or the interests of any person in whom he or she is directly or indirectly interested will be substantially affected by the outcome of the matter].

[(b)] Prior to the hearing, the Listing Qualifications Panel [will] *shall* review the written record, as defined in Rule 4811 [4870]. At the hearing, the issuer may make such presentation as it deems appropriate, including the appearance by its officers, directors, accountants, counsel, investment bankers, or other persons. Hearings are generally scheduled to last one hour, but may be

extended at the discretion of the Listing Qualifications Panel. The Listing Qualifications Panel may question any representative of the issuer appearing at the hearing. A transcript of oral hearings [will] *shall* be kept. The record of proceedings before a Listing Qualifications Panel [will] *shall* be kept by the Hearings Department.

[(c)] (b) After the hearing, the Listing Qualifications Panel [will] *shall* issue a [written decision (the "[Panel Decision]") describing the specific grounds for the determination and identifying the quantitative standard or qualitative consideration set forth in the Rule 4000 Series that the issuer has failed to satisfy] *that meets the requirements of Rule 4811, and, except as provided in paragraph (c), each member of the Listing Qualifications Panel shall affirmatively approve it*. The Panel Decision [will] *shall* be promptly provided to the issuer and is effective immediately unless it specifies to the contrary. The Panel Decision [will] *shall* provide notice that the issuer may request review of the Panel Decision by the [Nasdaq] Listing [and Hearing Review] Council within 15 calendar days of the date of the Panel Decision and that the Panel Decision may be called for review by the [Nasdaq] Listing [and Hearing Review] Council within 45 calendar days from the date of the Panel Decision pursuant to Rule 4807 [4840].

[(d)] (c) If, following the hearing, the Listing Qualifications Panel cannot reach a unanimous decision regarding the matter under review, a Panel Decision shall not be issued, and the issuer shall be notified of this circumstance. Thereafter, the issuer shall be provided an additional hearing before a Listing Qualifications Panel composed of three persons who did not participate in the previous hearing. The issuer may determine whether the hearing [will] *shall* be conducted based on the written record or an oral hearing, whether in person or by telephone. The issuer may submit any documents or other written material in support of its request for review, including any information not available at the time of the initial hearing before the Listing Qualifications Panel. There shall be no fee for the new hearing. *After a hearing of a Listing Qualifications Panel convened pursuant to this paragraph (c), the Listing Qualifications Panel shall issue a Panel Decision that meets the requirements of Rule 4811 and that has been affirmatively approved by at least a majority of the Listing Qualifications Panel.*

(d) *In the event that a Listing Qualifications Panel exercises its authority under Rule 4802(b) to grant an*

[* Notification may be provided to the StockWatch section of Nasdaq's MarketWatch Department at 1-800-537-3929 or (301) 978-8500 (telephone), (301) 978-8510 (facsimile) and to the Hearings Department of Nasdaq's Listing Qualifications Department at (301) 978-8079 (telephone), (301) 978-8080 (facsimile).]

exception from listing standards in the Rule 4000 Series requiring the issuer to maintain certain levels of stockholders' equity or to file periodic reports with the Commission in a timely manner, the Listing Qualifications Panel shall retain jurisdiction over the issuer; provided, however, that the Listing Qualification Panel's jurisdiction shall be concurrent with the Listing Council's jurisdiction to review the Panel Decision under Rule 4807, and a decision of the Listing Council may divest the Listing Qualification Panel of jurisdiction. If the issuer regains compliance with such listing standards during the time period covered by the exception granted by the Listing Qualifications Panel, the Panel shall monitor the issuer's continued compliance for a period of one year following the date that the issuer regained compliance. If the issuer again fails to satisfy such listing standards during such one-year period, the Listing Qualifications Panel (or a newly convened Panel if the initial Panel is unavailable) shall promptly conduct a hearing with respect to such failure pursuant to Rule 4806(a).

4807 [4840]. Review by the Nasdaq Listing and Hearing Review Council

(a) [The Nasdaq Listing and Hearing Review Council (the "Listing Council") is a committee appointed by the Nasdaq Board of Directors pursuant to Article V of the Nasdaq By-laws whose responsibilities include the consideration of determinations to limit or prohibit the listing of an issuer's securities.

(b) [The issuer may initiate the Listing Council's review of any Panel Decision by making a written request within 15 calendar days of the date of the decision. Requests for review should be addressed to the Listing Council in care of the Nasdaq Office of Appeals and Review. The request [will] *shall* not operate as a stay of the Panel Decision. Also within 15 calendar days of the date of the Panel Decision, the issuer must submit a fee of \$4,000 to The Nasdaq Stock Market, Inc. to cover the cost of the review. Upon receipt of the request for review and the applicable fee, the Nasdaq Office of Appeals and Review [will] *shall* make an acknowledgment of the issuer's request stating the deadline for the issuer to provide any written submissions.

[(c)] (b) The Listing Council may also consider any Panel Decision upon the request of one or more members of the Listing Council within 45 calendar days of the date of the Panel Decision. The issuer [will] *shall* be promptly informed of the reasons for the review and [will] *shall* be provided a deadline to provide

a written submission if the issuer wishes. The institution of discretionary review by the Listing Council [will] *shall* not operate as a stay of the Panel Decision, unless the call for review specifies to the contrary. At the sole discretion of the Listing Council, the call for review of a Panel Decision may be withdrawn at any time prior to the issuance of a decision.

[(d)] (c) The Listing Council [will] *shall* consider the written record and, at its discretion, hold additional hearings. Any hearing [will] *shall* be scheduled, to the extent practicable, within 45 days of the date that a request for review initiated by either the issuer or one or more members of the Listing Council, is made. The Listing Council may also recommend that the NASD Board [of Governors ("NASD Board")] consider the matter. The record of proceedings before the Listing Council [will] *shall* be kept by the Nasdaq Office of Appeals and Review.

(d) *In each proceeding before the Listing Council, a subcommittee consisting of at least two members of the Listing Council shall review the complete written record. Members of the Listing Council who are not on a subcommittee shall be provided with a written summary of the record prepared by an Advisor, and may, but shall not be required to, review the complete written record.*

(e) The Listing Council [will] *shall* issue a [written decision (the "[Listing Council Decision]") that affirms, modifies, or reverses the Panel Decision or that [refers] *remands* the matter to [Nasdaq staff] *the Listing Departments* or to the Listing Qualifications Panel for further consideration. The Listing Council Decision [will] describe the specific grounds for the decision, identify the quantitative standard or qualitative consideration set forth in the Rule 4000 Series that the issuer has failed to satisfy, and] *shall be affirmatively approved by at least a majority of the Listing Council and shall meet the requirements of Rule 4811. The Listing Council Decision shall* provide notice that the NASD Board may call the Listing Council Decision for review at any time before its next meeting which is at least 15 calendar days following the issuance of the Listing Council Decision. The Listing Council Decision [will] *shall* be promptly provided to the issuer and [will] *shall* take immediate effect unless it specifies to the contrary.

4808 [4845]. Reconsideration by the Listing Qualifications Panel and the Listing and Hearing Review Council

(a) An issuer may request that the Listing Qualifications Panel reconsider a

Panel Decision only upon the basis that a mistake of material fact existed at the time of the Panel Decision. The issuer's request shall be made within seven calendar days of the date of issuance of the Panel Decision. An issuer's request for reconsideration shall not stay a Listing Qualifications Panel delisting determination unless the Listing Qualifications Panel issues a written determination staying the delisting prior to the scheduled date for delisting. An issuer's request for reconsideration shall not toll the time period set forth in Rule [4840(b)] *4807(a)* for the issuer to initiate the Listing Council's review of the Panel Decision. If the Listing Qualifications Panel grants an issuer's reconsideration request, the Listing Qualifications Panel shall issue a modified decision *meeting the requirements of Rule 4806(b)* within 15 calendar days following the issuance of the original Panel Decision or lose jurisdiction over the matter. If the Listing Council calls a Panel Decision for review on the same issue that the issuer has requested reconsideration by the Listing Qualifications Panel, the Listing Council, in its discretion, may assert jurisdiction over the Panel Decision or may permit the Listing Qualifications Panel to proceed with the reconsideration.

(b) An issuer may request that the Listing Council reconsider a Listing Council Decision only upon the basis that a mistake of material fact existed at the time of the Listing Council Decision. The issuer's request shall be made within seven calendar days of the date of issuance of the Listing Council Decision. If the Listing Council grants an issuer's reconsideration request, the Listing Council shall issued a modified decision *meeting the requirements of Rule 4807(e)* within 15 calendar days following the issuance of the original Listing Council Decision or lose jurisdiction over the matter.

(c) No change.

4809 [4850]. Discretionary Review by NASD Board

(a) A Listing Council Decision may be called for review by the NASD Board solely upon the request of one or more Governors not later than the next NASD Board meeting that is 15 calendar days or more following the date of the Listing Council Decision. Such review [will] *shall* be undertaken solely at the discretion of the NASD Board.

(b) If the NASD Board conducts a discretionary review, the review generally [will] *shall* be based on the written record considered by the Listing Council. However, the NASD Board may, at its discretion, request and

consider additional information from the issuer and/or from [Nasdaq] *staff of the Listing Departments*. [Should] If the Board considers additional information, the record of proceedings before the NASD Board [will] *shall* be kept by the Nasdaq Office of Appeals and Review.

(c) If the NASD Board conducts a discretionary review, the issuer [will] *shall* be provided with a written decision [describing the specific grounds for its decision, and identifying the quantitative standard or qualitative consideration set forth in the Rule 4000 Series that the issuer has failed to satisfy] *that meets the requirements of Rule 4811*. The NASD Board may affirm, modify or reverse the Listing Council Decision and may remand the matter to the Listing Council, Listing Qualifications Panel, or [Nasdaq] *staff of the Listing Departments* with appropriate instructions. *Unless the matter is remanded, the NASD Board's* [This] decision represents the final action of the Association and [will] *shall* take immediate effect unless it specifies to the contrary.

(d) If the NASD Board declines to conduct a discretionary review or withdraws its call for review, the issuer [will] *shall* be promptly provided with written notice that the Listing Council Decision represents the final action of the Association.

4810 [4860]. Application to the Commission for Review

Any issuer aggrieved by a final action of the Association may make application for review to the Commission in accordance with Section 19 of the Act.

4811 [4870]. Record on Review; Contents of Decisions

(a) Documents in the written record may consist of the following items, as applicable: correspondence between Nasdaq and the issuer, the issuer's public filings, information released to the public by the issuer, and any written submissions or exhibits submitted by either the issuer or the Listing [Qualifications] Departments [or the Listing Investigations Department], including any written request for an [extension or] exception as permitted in Rule 4802(b) [4810(b)] and any response thereto. Any additional information requested from the issuer *or staff of the Listing Departments* by the Listing Qualifications Panel, Listing Council, or NASD Board as part of the review process [will] *shall* be included in the written record. The written record [will] *shall* be supplemented by the transcript of any hearings held during the review process and each decision issued. At

each level of review under this Rule 4800 Series, the issuer [will] *shall* be provided with a list of documents in the written record, and a copy of any documents included in the record that are not in the issuer's possession or control, at least three calendar days in advance of the deadline for issuer submissions, unless the issuer waives such production.

(b) In addition to the documents described in paragraph (a) [above], if *any additional information* [the issuer's bid price, market makers, or any information that the issuer releases to the public.] is considered as permitted in Rule [4810] 4802(c), that information, and any written submission addressing the significance of that information, [will] *shall* be made part of the record.

(c) If additional issues arising under the Rule 4000 Series are considered, as permitted in Rule 4802 [4810], the notice of such consideration and any response to such notice [will] *shall* be made a part of the record.

(d) *Each Panel Decision, Listing Council Decision, and decision of the NASD Board shall include:*

(1) *A statement describing the procedural history of the proceeding, including investigations or reviews undertaken by the Listing Departments;*

(2) *The quantitative standard or qualitative consideration set forth in the Rule 4000 Series that the issuer is alleged to have failed to satisfy;*

(3) *A statement setting forth the findings of fact with respect to the issuer;*

(4) *The conclusions of the Adjudicatory Body as to whether the issuer has failed to satisfy the quantitative standards or qualitative considerations set forth in the Rule 4000 Series,* (5) *A statement of the Adjudicatory Body in support of the disposition of the principal issues raised by the issuer in the proceeding, and, if applicable, any exception to the Rule 4000 Series as permitted by Rule 4802 (b) and the rationale therefor.*

4812 [4875]. Document Retention Procedures

Any document submitted to *Nasdaq or the NASD* [the Association] in connection with a Rule 4800 proceeding [that is not made part of the record will] *shall* be retained [by the Association until the date upon which the Rule 4800 Series proceeding decision becomes final including, if applicable, upon conclusion of any review by the Commission or a federal court] *in accordance with applicable record retention policies.*

4813 [4880]. Delivery of Documents

Delivery of any document under this Rule 4800 Series by an issuer, *Nasdaq, or the NASD* [or by the Association] may be made by hand delivery to the designated address, by facsimile to the designated facsimile number and overnight courier to the designated address, or *to an issuer* by e-mail if the issuer consents to such method of delivery. Delivery [will] *shall* be considered timely if hand delivered prior to the relevant deadline or upon being e-mailed or faxed and/or sent by overnight courier service prior to the relevant deadline. If an issuer has not specified a facsimile number or street address, delivery [will] *shall* be made to the last known facsimile number and street address. If an issuer is represented by counsel or a representative, delivery [will] *shall* be made to the counsel or representative.

4814 [4885]. Computation of Time

(a) In computing any period of time under the Rule 4800 Series, the day of the act, event, or default from which the period of time begins to run is not to be included. The last day of the period so computed is included, unless it is a Saturday, Sunday, federal holiday, or NASD holiday in which event the period runs until the end of the next day that is not a Saturday, Sunday, federal holiday or NASD holiday.

(b) *In the event that the Office of General Counsel determines that notice required to be provided under the Rule 4800 Series was not properly given or that other extenuating circumstances exist, the Office of General Counsel shall adjust the periods of time provided by such rules for the filing of written submissions, the scheduling of hearings, or the performance of other procedural actions by the issuer or an Adjudicator, as applicable, to allow the issuer or the Adjudicator the time contemplated by these rules.*

(c) *An issuer may waive any notice period specified by the Rule 4800 Series.*

4815 [4890]. [Prohibited Communications] *Ex Parte Communications; Separation of Adjudicators*

(a) *Ex Parte Communications*
(1) Unless on notice and opportunity for [the appropriate Nasdaq] *staff of the Listing Departments* and the issuer to participate, a [representative] *member of the staff of the* [Association] *Listing Departments* involved in reaching a Staff Determination, *counsel to the Listing Departments*, [or] an issuer, or counsel to or representative of an issuer, shall not make or knowingly cause to be

made *an ex parte* communication relevant to the merits of a proceeding under this Rule 4800 Series [(a) "Prohibited Communication"] to an *Adjudicator* [any member of the Listing Qualifications Panel or the Listing Council, to any Governor of the NASD Board] who is participating in [or advising in the] a decision [in] with respect to that proceeding, or to any [Association] *Advisor* [employee who is participating or advising in the decision of these individuals] with respect to that proceeding.

[(b)] (2) *No Adjudicator* [Listings Qualifications Panel members, Listing Council members, Governors of the NASD Board and Association employees] who is [are] participating in [or advising in the] a decision [in] with respect to a proceeding under this Rule 4800 Series, and no *Advisor* with respect to such a proceeding, shall [not] make or knowingly cause to be made an *ex parte* communication relevant to the merits of that proceeding [Prohibited Communication] to an issuer, counsel to or representative of an issuer, [or] a [representative of the Association] member of the staff of the Listing Departments involved in reaching a Staff Determination, or counsel to the Listing Departments.

[(c)] (3) [(f) a] *An Adjudicator or Advisor who is participating in or advising with respect to a proceeding who receives, makes, or knowingly causes to be made an ex parte communication relevant to the merits of a proceeding* [Prohibited Communication is made, received, or caused to be made, the Association will] shall place a copy of it, or its substance if it is an oral communication, in the record of the proceeding. [The Association will permit Nasdaq staff] *Staff of the Listing Departments or the issuer, as applicable, shall be permitted to respond to the ex parte communication* [Prohibited Communication], and any such response [will place any response] shall be placed in the record of the proceeding. [(d) If the issuer submits a proposal to resolve matters at issue in a Rule 4800 Series proceeding, that submission will constitute a waiver of any claim that Association communications relating to the proposal were Prohibited Communications.]

(b) Separation of Adjudicators

(1) *Members of a Listing Qualifications Panel and their Advisors who are participating in a proceeding under this Rule 4800 Series are prohibited from making communications relevant to the merits of such proceeding to members of the*

Listing Council or the NASD Board or their respective Advisors.

(2) *Members of the Listing Council and their Advisors are prohibited from making communications relevant to the merits of a proceeding under this Rule 4800 Series to members of a Listing Qualifications Panel who are participating in such proceeding or their Advisors, or members of the NASD Board or their Advisors.*

(3) *Members of the NASD Board and their Advisors are prohibited from making communications relevant to the merits of a proceeding under this Rule 4800 Series to members of a Listing Qualifications Panel who are participating in such proceeding or their Advisors, or members of the Listing Council or their Advisors.*

(4) *An Adjudicator or Advisor who is participating in or advising with respect to a proceeding who receives, makes, or knowingly causes to be made a communication prohibited by paragraphs (b)(1)–(3) of this Rule shall place a copy of it, or its substance if it is an oral communication, in the record of the proceeding. Staff of the Listing Departments and the issuer shall be permitted to respond to the communication, and any such response shall be placed in the record of the proceeding.*

4816. Recusal or Disqualification

(a) *No person shall serve as a member of a Listing Qualifications Panel, or participate as a member of the Listing Council, the NASD Board, or the staff of the Listing Departments, in a matter as to which he or she has a conflict of interest or bias, or circumstances otherwise exist where his or her fairness might reasonably be questioned. In any such case, the person shall recuse himself or herself, or shall be disqualified as follows:*

(1) NASD Board

The Chair of the NASD Board shall have authority to order the disqualification of a Governor, and a majority of the NASD Board excluding the Chair of the NASD Board shall have authority to order the disqualification of the Chair.

(2) Listing Council

A Chair of the Listing Council shall have authority to order the disqualification of a member of the Listing Council, and a majority of the Listing Council excluding any Chairs of the Listing Council shall have authority to order the disqualification of a Chair of the Listing Council.

(3) Staff of Listing Departments; Panelist of Listing Qualifications Panel

The General Counsel of Nasdaq shall have authority to order the

disqualification of (A) a member of the staff of the Listing Departments reviewing the qualifications of an issuer, or (B) a member of a Listing Qualifications Panel.

(b) *At least five days prior to any proceeding under the Rule 4800 Series, the issuer shall provide the Hearings Department or the Advisor to the Listing Council or the NASD Board, as applicable, with names and biographical information of each person that will appear on behalf of the issuer at the proceeding, and the Hearings Department or such Advisor, as applicable, shall provide the issuer with names and biographical information of the Adjudicators for the proceeding; provided, however, that with respect to proceedings before the Listing Council or the NASD Board, the Advisor to the respective Adjudicatory Body may post names and biographical information of each Adjudicator on a publicly available website in lieu of providing them directly to the issuer.*

(c) *An issuer or the staff of the Listings Departments may file a request to disqualify an Adjudicator. Such a request shall be based upon a reasonable, good faith belief that a conflict of interest or bias exists or circumstances otherwise exist where the Adjudicator's fairness might reasonably be questioned, and shall be accompanied by an statement setting forth in detail the facts alleged to constitute grounds for disqualification, and the dates on which the party learned of those facts. Such a request shall be filed (1) not later than two days after the party was provided with the name and biographical information of the Adjudicator, or (2) if the name and biographical information of the Adjudicator has been posted on a website, not later than two days after the issuer requested Listing Council review or received notice of discretionary review by the Listing Council or the NASD Board. A request for disqualification of an Adjudicator shall be decided by the party with authority to order disqualification of such Adjudicator, who shall promptly investigate whether disqualification is required and issue a written response to the request.*

* * * * *

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, as amended, and discussed any comments it received on

the proposed rule change, as amended. 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 is proposing a range of rule changes to enhance, clarify, and increase the transparency of its procedures for denying or limiting initial or continued listing on The Nasdaq Stock Market. Nasdaq believes that these changes will increase the objectivity and consistency of listing decisions, clarify the roles of staff, counsel, and adjudicators throughout the process, and promote public confidence in Nasdaq.

Under Nasdaq's procedures to deny or limit listing, Nasdaq's Listing Qualifications Department and Listing Investigations Department ("Listing Departments") initiate a proceeding by issuing a written determination to the issuer when it fails to meet Nasdaq's listing standards ("Staff Determination Letter"). The issuer may then request a hearing before a Listing Qualifications Panel ("Panel"). The hearing is conducted by two panelists, drawn from a pool of individuals who are independent of Nasdaq and who have been approved to perform this function by the Nasdaq Board. An attorney from the Nasdaq Office of Qualification Hearings provides advice to the panelists and prepares a decision at their direction ("Panel Decision").

The issuer may appeal the Panel Decision to the Nasdaq Listing and Hearing Review Council ("Listing Council"). The Listing Council is composed of individuals independent of Nasdaq and previously approved by the Nasdaq Board. In addition, the Listing Council has the right to call for review of a Panel Decision, whether or not the issuer appeals it. An attorney from the Nasdaq Office of Appeals and Review advises the Listing Council and prepares a decision at its direction. The final decision is subject to review by the NASD Board and the Commission.

Discretion to Grant Exceptions

NASD Rule 4810(b) currently provides that the Association (*i.e.*, NASD, including, for this purpose, Nasdaq) may grant "extensions or exceptions" to listing standards upon

written request of the issuer.⁵ Nasdaq believes that such discretion is necessary to ensure that investors are not harmed by premature delisting of companies that have presented viable plans to regain compliance with listing standards. Nevertheless, Nasdaq has concluded that the rigor of the listing review process could be enhanced by defining more clearly the decision-makers authorized to exercise discretion to grant an exception, how the exception is documented, and when the exception must expire. Nasdaq believes these changes would enhance the transparency and objectivity of Nasdaq's decisions and help promote public confidence in the quality of Nasdaq's listed companies.

First, Nasdaq is proposing to eliminate the phrase "extension or exception" and replace it with the term "exception," which is the term commonly used by Nasdaq staff and Adjudicators when referring to relief granted to allow an issuer the opportunity to regain compliance with a listing standard. As described below, the time periods during which an exception may be in effect will be subject to time limits.

Second, new NASD Rule 4803 would provide that upon determining that a listing requirement may not be satisfied, the staff of a Listing Department would provide written notice of the deficiency. Depending on the nature of the deficiency, the notice would either take the form of a Staff Determination Letter, which would initiate proceedings to deny or limit listing, or would notify the issuer of the deficiency and provide the issuer with 15 days to submit a plan to regain compliance with the listing standard. The staff would then be required either to initiate proceedings or to grant the issuer up to 105 days to regain compliance with the listing standard.⁶ The 105-day period would be measured from the date of the initial notice of non-compliance. If the issuer does not regain compliance within the time period provided, the Listing Department staff would immediately initiate proceedings to deny listing.

⁵ Securities Exchange Act Release No. 41367 (May 4, 1999), 64 FR 25942 (May 13, 1999) (SR-NASD-98-88).

⁶ If an issuer is already the subject of a written determination by a Listing Department to limit or prohibit the initial or continued listing of an issuer's securities pursuant to Rule 4804 ("Staff Determination"), the Listing Department staff would not provide the issuer with the opportunity to submit a plan, nor could the staff grant an exception, with respect to the new deficiency. Rather, the new deficiency would be considered by the relevant Adjudicatory Body as provided by NASD Rule 4810(e) (redesignated as NASD Rule 4802(d)).

The staff's authority to grant an exception under the NASD rule would not apply, however, to quantitative listing standards that, by their terms, specify a period during which an issuer may seek to regain compliance before being subject to delisting.⁷ Upon the expiration of such specified grace periods, proceedings would be commenced immediately. Similarly, the staff's authority would not extend to qualitative listing standards that are considered fundamental to an investor's participation in the company or to Nasdaq's relationship with the company.⁸ The staff's authority would apply, however, to quantitative standards that do not contain an explicit grace period⁹ and to all other qualitative standards.¹⁰

If a review a Staff Determination is pending and either of the Listing Departments identifies the existence of one or more additional deficiencies with

⁷ These standards include the requirements for number of market makers (NASD Rules 4310(c)(1), 4320(e)(1), and 4450(a)(6), (b)(6), and (h)(5)); market value of publicly held shares (NASD Rules 4310(c)(7) and 4450(a)(2), (b)(3), and (h)(2)); market value of listed securities (NASD Rules 4310(c)(2), 4320(e)(2), and 4450(b)(1)); and bid price (NASD Rules 4310(c)(4) and 4450(a)(5), (b)(4), and (h)(3)).

⁸ These standards include the requirements to provide Nasdaq with responsive and accurate information (NASD Rule 4330); file periodic reports (NASD Rules 4350(b) and 4360(b)); hold annual meetings and solicit proxies (NASD Rules 4350(e) and (g) and 4360(e) and (g)); and execute a listing agreement (NASD Rules 4350(j) and 4360(h)).

⁹ These standards include the requirements for levels of stockholders' equity (NASD Rules 4310(c)(2), 4320(e)(2), and 4450(a)(3)); number of publicly held shares (NASD Rules 4310(c)(7), 4320(e)(5), and 4450(a)(1), (b)(2), and (h)(1)); number of round lot stockholders (NASD Rules 4310(c)(6), 4320(e)(4), and 4450(a)(4), (b)(5), and (h)(4)); net income (NASD Rules 4310(c)(2) and 4320(e)(2)); and total assets and total revenue (NASD Rule 4450(b)(1)(B)). In connection with the net income and total assets and total revenue standards, Nasdaq is proposing to adopt NASD IM-4803 to make it clear that a plan of compliance submitted under NASD Rule 4803 with respect to a net income or total assets and total revenue deficiency must present a viable plan for achieving full compliance with the rules, which require stated levels during completed fiscal years as demonstrated through audited financial statements. Thus, a plan may not rely upon projections that an issuer would achieve full compliance at a time after an exception period has elapsed, nor may it rely upon partial year performance to demonstrate the possibility of future compliance. An issuer may, however, submit a plan to gain compliance in the near term with alternative listing standards relating to stockholders' equity or market value of listed securities, which are measured at a point in time rather than with reference to completed fiscal years.

¹⁰ These standards include the requirements for independent directors and audit committees in circumstances where the cure periods contained in the rules are not applicable (NASD Rules 4350(c) and (d) and 4360(c) and (d)); quorums (NASD Rules 4350(f) and 4360(f)); conflict of interest review (NASD Rules 4350(h) and 4360(i)); shareholder approval (NASD Rule 4350(i)); peer review (NASD Rule 4350(k)); code of conduct (NASD Rule 4350(n)); and voting rights (NASD Rule 4351).

respect to the issuer, the Listing Department shall prepare and provide to the issuer a Staff Determination with respect to the additional deficiencies. If the new Staff Determination is issued prior to a Panel hearing with respect to the original Staff Determination, the issuer would be given the opportunity to present its views with respect to the additional deficiencies at the Panel hearing. If the new Staff Determination is issued after a Panel hearing with respect to the original Staff

Determination, the issuer may present its views with respect to the additional deficiencies in writing. The additional deficiencies would then be reviewed as provided under NASD Rule 4810(e) (redesignated as NASD Rule 4802(d)). Specifically, if the Panel hearing had been held but the Panel Decision had not yet been issued, the additional deficiencies would be adjudicated on the written record and reflected in the Panel Decision. If the Panel Decision had been issued, the additional deficiencies would be adjudicated by the Listing Council.

When granting an exception pursuant to NASD Rule 4803, the staff of the Listing Department shall prepare a written record describing the basis for the exception and shall provide notice of the terms of the exception to the issuer. Similarly, if the staff of the Listing Department determines not to grant an exception, the Staff Determination shall include a description of the basis for denying the request for an exception.

Third, Nasdaq proposes to amend NASD Rule 4810(b) (redesignated as NASD Rule 4802(b)) to provide that a Panel may grant an exception from any of the listing standards set forth in the NASD Rule 4000 Series for up to 90 days from the date of its decision, and the Listing Council may grant an exception for up to 60 days from the date of its decision. No other exceptions would be permitted. As provided by proposed NASD Rule 4811(d)(5), any exception granted by a Panel or the Listing Council must be incorporated into a formal written decision, thereby ensuring that the exception is subject to appeal or call for review.

Finally, Nasdaq proposes to amend NASD Rule 4830 (redesignated as NASD Rule 4806) to provide that if a Panel grants an exception for an equity or filing deficiency (NASD Rules 4310(c)(2) and (c)(14), 4320(e)(2) and (e)(12), and 4350(b)), the Panel will continue to monitor the issuer for a one-year period following the date it achieves compliance, to assure the issuer's ability to sustain long-term compliance with the requirements. If

the issuer again falls out of compliance during the one-year period, the Panel would promptly conduct a hearing with respect to the new failure, thereby ensuring a speedier disposition of the issuer's status.¹¹ The Panel's monitoring authority would not permit the Panel to authorize an exception beyond the time limits described above; rather, the monitoring period would commence only if the issuer achieves compliance within the 90-day exception period authorized by NASD Rule 4810. Moreover, notwithstanding the Panel's retention of jurisdiction, the Panel Decision would still be subject to review by the Listing Council, which could divest the Panel of jurisdiction by reversing the decision to grant the exception and delisting the issuer.

Exception to Shareholder Approval Requirement

Apart from the authority to grant exceptions in the manner described above, NASD Rule 4350(i), which requires shareholder approval of certain enumerated issuances of securities, allows the staff of the Listing Qualifications Department to grant an exception from the application of the requirement to a specific issuance in circumstances where delay would seriously jeopardize an issuer's financial viability, the issuer's audit committee (or comparable body of its board of directors) approves reliance, and the issuer provides notice to shareholders of the decision not to seek their approval. An exception granted under this NASD Rule is permanent as applied to a specified issuance. Nasdaq proposes to amend NASD Rule 4350(i)(2) to require that a board committee approving reliance must be composed of independent, disinterested directors, to specify the content of the issuer's notice to shareholders, to require the issuance of a press release by the issuer, and to stipulate that communications between the issuer and the Listing Qualifications Department regarding the exception must be in writing.

Public Interest Authority

NASD Rule 4300 provides Nasdaq with broad discretionary authority to deny initial listing to issuer's securities, impose additional or more stringent criteria on initial or continued listing of an issuer's securities, or delist an

issuer's securities based on a determination that initial or continued listing is inadvisable or unwarranted. This authority is used primarily to address concerns about issuers who meet enumerated criteria for listing but whose management has been involved in unlawful activity or ethical lapses that could undermine investor confidence in Nasdaq securities. Nasdaq proposes to amend the rule to make it clear that, in all instances in which the Nasdaq staff exercises its authority under NASD Rule 4300, the Listing Departments must issue a Staff Determination under NASD Rule 4815 (redesignated as NASD Rule 4804). This is so that issuers may seek Panel review of the decision, and the use of the authority by an Adjudicatory Body shall be reflected in its written decision.

Nasdaq also proposes to supplement the rule with interpretive material that explains the circumstances under which the authority is generally used. The interpretive material explains the factors used by Nasdaq in evaluating whether the regulatory misconduct of an individual associated with an issuer should be used as a basis to deny initial or continued listing, as well as factors that may serve to mitigate public interest concerns under the NASD Rule 4300. The interpretive material also clarifies that NASD Rule 4300 does not provide a basis for granting exceptions from listing criteria.

Finally, Nasdaq is deleting provisions of NASD Rules 4330, 4350, and 4410 relating to additional or more stringent listing criteria¹² and including the text of the deleted provisions in the NASD Rule 4300 and the new interpretive material in order to consolidate related provisions under a single rule and to make it clear that Nasdaq's authority under NASD Rule 4300 covers the factors currently described in the deleted provisions. These factors include an issuer's bankruptcy filing, the issuance of a disclaimer opinion with respect to an issuer's financial statements, an issuer's past corporate governance activities, the absence of required financial statement certification, and any other factors that would support a determination that denial of listing is necessary to prevent fraudulent or manipulative acts or practices, to promote just and equitable

¹¹ The purpose of accelerated review would generally be to allow an issuer that is repeatedly deficient in these areas to be delisted more quickly. The rule focuses on the equity requirement, because, in Nasdaq's experience, it has been an area in which deficient issuers that regain compliance nevertheless can quickly fall out of compliance and the filing requirement because it is so fundamental to investors' understanding of an issuer.

¹² Nasdaq is also deleting NASD Rules 4330(d) and 4410(d), which contain language regarding exceptions, in order to consolidate all provisions regarding exceptions in the NASD Rule 4800 Series. Similarly, NASD Rules 4330(c) and (f) are being redesignated as NASD Rules 4330 and 4340, respectively. The substance of NASD Rule 4330(b) is being replaced by NASD Rule 4803, and NASD Rule 4330(e) is being relocated to NASD Rule 4802(f).

principles of trade, or to protect investors and the public interest.

Supplementing the Record

NASD Rule 4810(c) and (d) (redesignated as NASD Rule 4802(c)) allow an Adjudicatory Body at each level of review to request additional information from the issuer or consider public information. However, the NASD rules at each level of review are not parallel with respect to other aspects of an Adjudicatory Body's authority to supplement the record on its own motion. For example, the NASD Board may request additional information from Nasdaq staff under NASD Rule 4850 (redesignated as NASD Rule 4809), but the Listing Council may not. Nasdaq proposes to amend NASD Rule 4802(c) to provide an Adjudicatory Body at each level of review with broad authority to supplement the record on its own motion, subject to written notice to the issuer and the Listing Departments and an appropriate opportunity to respond.

Nasdaq also proposes to amend NASD Rule 4875 (redesignated as NASD Rule 4812) to provide that all documents submitted to Nasdaq or NASD in connection with a NASD Rule 4800 Series proceeding shall be retained in accordance with applicable record retention policies (*i.e.*, at least five years unless a shorter period is reflected in a Commission-approved document destruction plan under Rule 17a-6 of the Act).¹³ The current rule language provides that documents submitted in connection with a proceeding that are not part of the record would only be retained until the conclusion of the proceeding.

Procedural Deadlines

The NASD Rule 4800 Series establish various time frames during which an issuer or an Adjudicatory Body is required to take certain actions. For example, NASD Rule 4830(c) (redesignated as NASD Rule 4806(b)) provides that an issuer may request a Listing Council review of a Panel Decision within 15 days of the date of the decision, and the Listing Council may call the decision for review within 45 days of the date of the decision.

Nasdaq proposes to amend NASD Rule 4885 (redesignated NASD Rule 4814) to provide that, if notice has not been properly given or if other extenuating circumstances exist, the Nasdaq Office of General Counsel may equitably adjust the time period provided by the rules for the filing of written submissions, the scheduling of hearings, or the performance of other

procedural actions by the issuer or the Adjudicatory Body to help ensure fairness in the process. Thus, for example, if an issuer does not receive notice of the Panel Decision until a date well after its issuance, the Nasdaq Office of General Counsel could determine that the issuer would be provided additional time to request a Listing Council review.

NASD Rule 4885 would also be amended to provide that an issuer may waive any notice period specified by the NASD Rule 4800 Series. For example, proposed NASD Rule 4816(b) provides that an issuer shall be provided at least five days' notice of the names and biographies of persons that will serve on a Listing Panel. An issuer would be permitted to waive such notice.

Listing Council Subcommittees

The current practice of the Listing Council is for a subcommittee consisting of two members of the Listing Council to review the complete written record of an appeal and recommend a disposition of the matter. The remainder of the Listing Council reviews a summary of the record prepared by a staff advisor to the Listing Council. The full Listing Council then considers the subcommittee's recommendation and may accept, reject, or modify it. The practice is followed because the record is invariably voluminous, and requiring a full review of the entire record by each Listing Council member would impose an unreasonable burden on Listing Council members. The use of subcommittees allows for a comprehensive review by a portion of the Listing Council, as well as a review of the substance of the record by the entire Listing Council. Nasdaq is amending NASD Rule 4840 (redesignated NASD Rule 4807) to reflect explicitly the use of subcommittees.

Content and Approval of Decisions

Nasdaq proposes to amend NASD Rule 4870 (redesignated NASD Rule 4811) to establish explicit standards for the content of decisions by the Adjudicatory Bodies. Each decision shall include: (1) A statement describing the procedural history of the proceeding; (2) the listing standard that the issuer is alleged to have failed to satisfy; (3) a statement setting forth the findings of fact with respect to the issuer; (4) the conclusions of the Adjudicatory Body as to whether the issuer has failed to satisfy listing standards; and (5) a statement of the Adjudicatory Body in support of the disposition of the principal issues raised by the issuer in the proceeding, and, if applicable, any exception granted and

the rationale therefor. Nasdaq believes that these requirements will ensure that decisions are clear and complete on their face, properly cite applicable rules, contain a thorough analysis supporting the Adjudicatory Body's conclusions, and clearly describe the scope of, and basis for, any exception granted.

Nasdaq also proposes to amend the rules relating to issuance of decisions to require explicitly the documentation of affirmative approval of decisions by each Adjudicator required to provide approval (*i.e.*, each Panel member under NASD Rule 4806(b), a majority of Panel members under NASD Rule 4806(c), and a majority of the Listing Council or the NASD Board). However, the rule will not specify the particular means of documenting approval. Nasdaq contemplates that approval via physical signature, e-mail, or fax would all be acceptable. Having a variety of options for documenting such approval will help expedite issuance of the final decision.

Ex Parte Communications

Under NASD Rule 4890 (redesignated as NASD Rule 4815), the staff of the Listing Departments and the issuer are prohibited from communicating about the merits of a proceeding with the Panel, the Listing Council, the NASD Board, and any staff advising them. Nasdaq is proposing to make several non-substantive amendments to the rule to conform more closely to NASD Rule 9143, the analogous NASD Code of Procedure rule pertaining to ex parte communications, and to eliminate the use of ambiguous terms such as "appropriate Nasdaq staff." However, Nasdaq is omitting the portion of NASD Rule 9143 that allows a party's claim to be "dismissed, denied, disregarded, or otherwise adversely affected by reason of" an ex parte communication. Nasdaq believes that the policies underlying its listing standards will best be served by a full and open review of all issues pertaining to an issuer's qualifications to list. Accordingly, although the prohibition on ex parte communications will be strictly enforced, and Adjudicators or Nasdaq staff engaging in such communications may be subject to recusal, disqualification, or removal in the case of Adjudicators or recusal, disqualification, or personnel action in the case of Nasdaq staff, Nasdaq does not believe that the fact of an ex parte communication should serve as the basis for denying listing to a qualified issuer or allowing an unqualified issuer to remain listed. Rather, as provided in NASD Rule 4890(c) (redesignated NASD Rule 4815(a)(3)) and NASD Rule 4816, in a listing proceeding the appropriate

¹³ 17 CFR 240.17a-6.

remedy is disclosure of the substance of the communication, a full opportunity for affected parties to respond, and the possible recusal or disqualification of an Adjudicator receiving an ex parte communication.

In keeping with this view, Nasdaq is also proposing to delete NASD Rule 4890(d), which provides that an issuer's submission of a proposal to resolve matters at issue in a proceeding constitutes a waiver of any claims regarding ex parte communications relating to the proposal. Since the fact of an ex parte communication does not provide a basis for denying listing to an otherwise qualified issuer, there is no need to construe a submission of a proposal as a waiver.

The current NASD Rule 4800 Series does not prohibit communication among the Panel, Council, NASD Board, and their staff advisors regarding the merits of a proceeding, although in practice such communications are avoided. In contrast, in NASD disciplinary proceedings, which have a similarly structured multi-level review by outside bodies, the rules prohibit the various adjudicators from engaging in such communications with one another. Nasdaq is proposing to adopt rules that follow the NASD model to increase the separation and objectivity of Adjudicators at each level of a proceeding. It should be noted, however, that Nasdaq will not construe the prohibition to apply to discussions concerning policies of general applicability.

Recusals and Disqualifications

Nasdaq proposes to make its internal procedures for handling recusals more transparent by incorporating them into a rule that follows the model of NASD Rule 9160. Proposed NASD Rule 4816 will provide that Adjudicators and Listing Department staff must recuse themselves from matters as to which they have a conflict of interest or bias or if circumstances otherwise exist where their fairness might reasonably be questioned. In addition, the rule identifies persons with authority to order disqualifications of Adjudicators and staff.¹⁴ Finally, the new rule establishes procedures for disclosing the names and biographical information of

Adjudicators and issuer representatives in advance of proceedings and allows an issuer or a staff of the Listing Departments to file a formal request for disqualification.

Other Changes

In addition to the foregoing changes, Nasdaq is also proposing the following minor miscellaneous changes to the rules:

- Adding NASD Rule 4802(e) to require the Listing Departments or the advisor to an Adjudicatory Body, as appropriate, to document the date on which decisions are implemented.
- Adding a new definitions section (NASD Rule 4801) to make the NASD rules easier to understand and administer.
- Confirming Nasdaq's existing disclosure time frames to those of the Commission's new Form 8-K requirements (NASD IM-4120-2 and NASD Rule 4804) and adding a new disclosure requirement upon receipt of a notice from a Listing Department under NASD Rule 4803(a) that the issuer does not meet a listing standard set forth in the NASD Rule 4000 Series.
- Using the term "shall" in rules that impose a mandatory duty on Nasdaq or any other person and making other minor or conforming edits to improve the clarity of the rules.
- Deleting references in NASD Rule 4815 (redesignated NASD Rule 4804) to phone numbers of specific Nasdaq departments. Nasdaq believes that such phone numbers should be provided through Web sites rather than through a rule that cannot be amended without a filing to the Commission.
- Amending NASD Rule 4830(d) (redesignated NASD Rule 4806(c)) to clarify that a second Listing Qualifications Panel convened after a first Panel fails to reach a unanimous decision may act through a majority of the Panel.

2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with the provisions of Section 15A of the Act¹⁵ in general and with Section 15A(b)(6) of the Act¹⁶ in particular in that the proposal is 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. Nasdaq believes that these changes will increase the objectivity and transparency of decisions to deny or limit listing, clarify the roles of staff, counsel, and adjudicators throughout the process, and promote public confidence in The Nasdaq Stock Market.

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

Nasdaq does not believe that the proposed rule change, as amended, 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

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. 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-2004-125 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission,

¹⁴ Specifically, the Chair of the NASD Board has the authority to order disqualification with respect to an NASD Governor, a majority of the NASD Board excluding the Chair with respect to the Chair, a Chair of the Listing Council with respect to a member of the Listing Council, a majority of the Listing Council excluding Chairs with respect to a Chair, and the General Counsel of Nasdaq with respect to a member of the staff of the Listing Departments or a member of Listing Qualifications Panel.

¹⁵ 15 U.S.C. 78o-3.

¹⁶ 15 U.S.C. 78o-3(b)(6).

450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number SR-NASD-2004-125. 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. Copies of such filing also will be available for inspection and copying at the principal office of 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-2004-125 and should be submitted on or before March 25, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁷

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. E5-873 Filed 3-3-05; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51273; File No. SR-NYSE-2004-031]

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendments No. 1 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2 by the New York Stock Exchange, Inc. Relating to Appointments to the NYSE's Board of Arbitration and Other Changes to the NYSE's Arbitration Program

February 28, 2004.

I. Introduction

On June 21, 2004, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change relating to amendments to NYSE Rules 633, 634, and 635 relating to the administration of the Exchange's arbitration program. On October 29, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.³ The proposed rule change, as amended, was published for comment in the **Federal Register** on January 4, 2005.⁴

On January 18, 2005, the Exchange filed Amendment No. 2 to the proposed rule change, which proposed certain technical changes to the rule text.⁵ The Commission received one comment letter in response to the proposed rule change.⁶ For the reasons discussed below, the Commission is approving the proposed rule change as amended.

II. Description of the Proposed Rule Change

A. Description of the Proposal

The proposed rule change consists of amendments to NYSE Rules 633, 634, and 635 concerning appointments of members of the Board of Arbitration, appointments to panels of securities and

non-securities arbitrators, and the appointment of the Director of Arbitration of the Exchange. NYSE Rule 633 governs the appointment of a Board of Arbitration, whose membership consists of current or former members of the Exchange, allied members, or officers of member corporations. Members of the Board of Arbitration decide controversies between parties who are members of the Exchange, allied members, member firms or member corporations. Currently, the Chairman of the NYSE Board appoints the members of the Board of Arbitration annually. As proposed, the Chairman will no longer appoint the members of the Board of Arbitration. Rather, the Director of Arbitration will do so, and she or he will do so on an ongoing basis rather than annually. Moreover, under the proposal, members of the Board of Arbitration may not be members of the Board of Executives.⁷ Currently, under NYSE Rule 633, they may not be members of the Board of Directors.⁸

NYSE Rule 634 provides for the appointment of securities and non-securities arbitrators to standing panels of arbitrators available to decide customer disputes. Arbitration panels for individual disputes are typically composed of two non-securities arbitrators and one securities arbitrator.⁹ Under the proposal, these arbitrators would be appointed by the Director of Arbitration rather than the Chairman of the NYSE Board, as is currently the case.¹⁰ The proposal also would remove a provision stating that the NYSE will keep separate arbitration panels to serve within or outside of the New York metropolitan area because the provision

⁷ The NYSE Board of Executives, which includes the Chairman of the NYSE Board and investors and representatives from member organizations, advises the Chief Executive Officer of the Exchange in his or her management of the operations of the Exchange. See NYSE Constitution, Article V, Section 1.

⁸ Amendment No. 2, submitted on January 18, 2005, proposes a technical correction to the text of NYSE Rule 633, as follows. A proposed deletion appears in [brackets].

The Director of Arbitration shall appoint a Board of Arbitration to be composed of [such number of] present or former members, allied members and officers of member corporations of the Exchange who are not members of the Board of Executives.

⁹ A securities arbitrator is someone "engaged in or retired from the securities business" and a non-securities arbitrator is someone "not engaged in the securities business." See NYSE Rule 634.

¹⁰ As permitted by the NYSE Constitution, this authority has been delegated to the Vice President, Arbitration and Hearing Board. NYSE stated in its proposal that, in practice, arbitration department management routinely appoints new individuals to the rosters of arbitrators subject to the oversight of the Vice President.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Letter from Karen Kupersmith, Director of Arbitration, NYSE, to Catherine McGuire, Chief Counsel, Division of Market Regulation, SEC, dated October 29, 2004.

⁴ Exchange Act Release No. 50939 (Dec. 28, 2004), 70 FR 00420 (Jan. 4, 2005).

⁵ Amendment 2, submitted electronically to the Commission on January 18, 2005 and signed by Mary Yeager, Assistant Corporate Secretary.

⁶ Letter to Jonathan G. Katz, Secretary, Commission, from Robert S. Clemente, Esq., dated January 24, 2005, available online at <http://www.sec.gov/rules/sro/nyse/nyse200431/rscllemente4506.htm>.

¹⁷ 17 CFR 200.30-3(a)(12).