

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

This proposed rule change will remove a burden on competition in that it provides a mechanism for ISE market makers to announce indications of interest where currently they only have such capability on other options exchanges. Restricting ISE market makers' ability to seek liquidity for large-size trading interest when they are able to do so on other options exchanges is a substantial burden on competition as it reduces the likelihood that such orders will be executed on the Exchange. It is not necessary or appropriate in furtherance of the purposes of the Act to competitively disadvantage the ISE on the basis that its members communicate electronically rather than in person.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

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 Exchange 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 is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the

Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing will also be available for inspection and copying at the principal offices of the ISE. All submissions should refer to File No. SR-ISE-01-03 and should be submitted by March 1, 2001.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁶

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-43914; File No. SR-NASD-00-78]

Self Regulatory Organizations; Notice of Filing of a Proposed Rule Change by the National Association of Securities Dealers, Inc. Amending the Nasdaq By-Laws

January 31, 2001.

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 January 22, 2001, the National Association of Securities Dealers, Inc. ("NASD") through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

Nasdaq is proposing to amend its By-Laws regarding the balancing requirements on the Nasdaq Board of Directors ("the Board") and the composition and operation of certain Nasdaq committees. Nasdaq also seeks to make certain changes to conform to the General Corporation Law of the State of Delaware ("Delaware law"). Proposed new language is in italics; proposed deletions are in brackets.

⁶ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

By-Laws of the NASDAQ Stock Market, Inc.

Article I

Definitions

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(j) "Industry Director" or "Industry member" means a Director (excluding [the President or the Chief Executive Officer] *any two officers of Nasdaq, selected at the sole discretion of the Board, amongst those officers who may be serving as Directors (the "Staff Directors")*) or Nasdaq Listing and Hearing Review Council or committee member who (1) is or has served in the prior three years as an officer, director, or employee of a broker or dealer, excluding an outside director or a director not engaged in the day-to-day management of a broker or dealer; (2) is an officer, director (excluding an outside director), or employee of an entity that owns more than ten percent of the equity of a broker or dealer, and the broker or dealer accounts for more than five percent of the gross revenues received by the consolidated entity; (3) owns more than five percent of the equity securities of any broker or dealer, whose investments in brokers or dealers exceed ten percent of his or her net worth, or whose ownership interest otherwise permits him or her to be engaged in the day-to-day management of a broker or dealer; (4) provides professional services to brokers or dealers, and such services constitute 20 percent or more of the professional revenues received by the Director or 20 percent or more of the gross revenues received by the Director's or member's firm or partnership; (5) provides professional services to a director, officer, or employee of a broker, dealer, or corporation that owns 50 percent or more of the voting stock of a broker or dealer, and such services relate to the director's officer's, or employee's professional capacity and constitute 20 percent or more of the professional revenues received by the Director or member or 20 percent or more of the gross revenues received by the Director's or member's firm or partnership; or (6) has a consulting or employment relationship with or provides professional services to the NASD, NASD Regulation, Nasdaq, or Amex (and any predecessor) or has had any such relationship or provided any such services at any time within the prior three years;

* * * * *

(p) "[National] Nominating Committee" means the [National] Nominating Committee appointed

pursuant to [Article VII, Section 9 of the NASD] *these* By-Laws;

(q) "Non-Industry Director" or "Non-Industry member" means a Director (excluding the [President or the Chief Executive Officer] *Staff Directors*) or Nasdaq Listing and Hearing Review Council or committee member who is (1) a Public Director or Public member; (2) an officer or employee of an issuer of securities listed on Nasdaq [or Amex], or traded in the over-the-counter market; or (3) any other individual who would not be an Industry Director or Industry member;

* * * *

[(u) "Floor Governor" or "Amex Floor Governor" means a Floor Governor of Amex elected pursuant to Article II, Section .01(a) of the Amex By-Laws;]

[(v) "Nasdaq-Amex" means Nasdaq-Amex Market Group, Inc.];

[(w) (v) "Amex" means American Stock Exchange LLC; and].

[(x) "Amex Board" means the Board of Governors of Amex.]

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Article III

Meeting of Stockholders

[Action by Consent of Stockholder]

Annual Meetings of Stockholders

Sec. 3.1 (a) Nominations of persons for election to the Board and the proposal of business to be considered by the stockholders may be at an annual meeting of stockholders only (i) pursuant to Nasdaq's notice of meeting (or any supplement thereto), (ii) by or at the direction of the Board or the [National] Nominating Committee or (iii) by an stockholder of Nasdaq who was a stockholder of record of Nasdaq at the time the notice provided for in this Section 3.1 is delivered to the Secretary of Nasdaq, who is entitled to vote at the meeting and who complies with the notice procedures set forth in this Section 3.1.

(b) For nominations or other business to be properly brought before an annual meeting by a stockholder pursuant to Section 3.1(a)(iii), the stockholder must have given timely notice thereof in writing to the Secretary of Nasdaq and any such proposed business other than the nominations of persons for election to the Board must constitute a proper matter for stockholder action. To be timely, a stockholder's notice shall be delivered to the Secretary at the principal executive offices of Nasdaq not later than the close of business on the ninetieth day nor earlier than the close of business on the one hundred twentieth day prior to the first anniversary of the preceding year's

annual meeting (provided, however, that in the event that the date of the annual meeting is more than thirty days before or more than seventy days after such anniversary date, notice by the stockholder must be so delivered not earlier than the close of business on the one hundred twentieth day prior to such annual meeting and not later than the close of business on the later of the ninetieth day prior to such annual meeting or the tenth day following the day on which public announcement of the date of such meeting is first made by Nasdaq). For purposes of the first annual meeting of stockholders of Nasdaq held after 2000, the first anniversary of the 2000 annual meeting of stockholders shall be deemed to be *May 15, 2001*. In no event shall the public announcement of an adjournment or postponement of an annual meeting commence a new time period (or extend any time period) for the giving of a stockholder's notice as described above. Such stockholder's notice shall set forth: (i) As to each person whom the stockholder proposes to nominate for election as a director all information relating to such person that is required to be disclosed in solicitations of proxies of election of directors in an election contest, or is otherwise required, in each case pursuant to Regulation 14A under the Act and Rule 14a-11 thereunder (and such person's written consent to being named in the proxy statement as a nominee and to serving as a director if elected); (ii) as to any other business that the stockholder proposes to bring before the meeting, a brief description of the business desired to be brought before the meeting, the text of the proposal or business (including the text of any resolutions proposed for consideration and in the event that such business includes a proposal to amend the By-Laws of Nasdaq, the language of the proposed amendment), the reasons for conducting such business at the meeting and any material interest in such business of such stockholder and the beneficial owner, if any, on whose behalf the proposal is made; and (iii) as to the stockholder giving the notice and the beneficial owners, if any, on whose behalf the nomination or proposal is made (A) the name and address of such stockholder, as they appear on Nasdaq's books, and of such beneficial owner, (B) the class and number of shares of capital stock of Nasdaq which are owned beneficially and of record by such stockholder and such beneficial owner, (C) a representation that the stockholder is a holder of record of stock of Nasdaq entitled to vote at such meeting and

intends to appear in person or by proxy at the meeting to propose such business or nomination, and (D) a representation whether the stockholder or the beneficial owner, if any, intends or is part of a group which intends (1) to deliver a proxy statement and/or form of proxy to holders of at least the percentage of Nasdaq's outstanding capital stock required to approve or adopt the proposal or elect the nominee and/or (2) otherwise to solicit proxies from stockholders in support of such proposal or nomination. Nasdaq may require any proposed nominee to furnish such other information as it may reasonably require to determine the eligibility of such proposed nominee to serve as a director of Nasdaq.

(c) No change.

Special Meetings of Stockholders

Sec. 3.2 Only such business shall be conducted at a special meeting of stockholders as shall have been brought before the meeting pursuant to Nasdaq's notice of meeting. Nominations of persons for election to the Board may be made at a special meeting of stockholders at which directors are to be elected pursuant to Nasdaq's notice of meeting (a) by or at the direction of the Board or the [National] Nominating Committee or (b) provided that the Board has determined that directors shall be elected at such meeting, by any stockholder of Nasdaq who is a stockholder of record at the time the notice provided for in this Section 3.2 is delivered to the Secretary of Nasdaq, who is entitled to vote at the meeting and upon such election and who complies with the notice procedures set forth in this Section 3.2. In the event Nasdaq calls a special meeting of stockholders for the purpose of electing one or more directors to the Board, any such stockholder entitled to vote in such election may nominate a person or persons (as the case may be) for election to such position(s) as specified in Nasdaq's notice of meeting, if the stockholder's notice required by Section 3.1(b) shall be delivered to the Secretary at the principal executive offices of Nasdaq not earlier than the close of business on the one hundred twentieth day prior to such special meeting and not later than the close of business on the later of the ninetieth day prior to such special meeting or the tenth day following the day on which the public announcement is first made of the date of the special meeting and of the nominees proposed by the Board to be elected at such meeting. In no event shall the public announcement of an adjournment or postponement of a special meeting commence a new time

period (or extend any time period) for the giving of a stockholder's notice as described above.

General

Sec. 3.3 (a) Only such persons who are nominated in accordance with the procedures set forth in this Article III shall be eligible to be elected at an annual or special meeting of stockholders of Nasdaq to serve as directors and only such business shall be conducted at a meeting of stockholders as shall have been brought before the meeting in accordance with the procedures set forth in this Article III. Except as otherwise provided by law, the chairman of the meeting shall have the power and duty [(a)] (i) to determine whether a nomination or any business proposed to be brought before the meeting was made or proposed, as the case may be, in accordance with the procedures set forth in this Article III (including whether the stockholder or beneficial owner, if any, on whose behalf the nomination or proposal is made solicited (or is part of a group which solicited) or did not so solicit, as the case may be, proxies in support of such stockholder's nominee or proposal in compliance with such stockholder's representation as required by Section 3.1(b)(iii)(D)) and (ii) if any proposed nomination or business was not made or proposed in compliance with this Article III, to declare that such nomination shall be disregarded or that such proposed business shall not be transacted. Notwithstanding the foregoing provisions of this Article III, if the stockholder (or a qualified representative of the stockholder) does not appear at the annual or special meeting of stockholders of Nasdaq to present a nomination or business, such nomination shall be disregarded and such proposed business shall not be transacted, notwithstanding that proxies in respect of such vote may have been received by Nasdaq.

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Article IV

Board of Directors

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Qualifications

Sec. 4.3 Directors need not be stockholders of Nasdaq. The number of Non-Industry Directors, including at least one Public Director and at least one issuer representative, shall equal or exceed the number of Industry Directors, [plus the President and the Chief Executive Officer (if they are elected Directors),] unless the Board consists of ten or more Directors. In

such case at least two Directors shall be issuer representatives. [At least two Industry Directors and two Non-Industry Directors shall be drawn from candidates proposed to the National Nominating Committee by a majority of the non-NASD stockholders of Nasdaq.]

Election

Sec. 4.4 No change.

Resignation

Sec. 4.5 Any Director may resign at any time either upon [written] notice of resignation to the Chair of the Board, the Chief Executive Officer, the President, or the Secretary. Any such resignation shall take effect at the time specified therein or, if the time is not specified, upon receipt thereof, and the acceptance of such resignation, unless required by the terms thereof, shall not be necessary to make such resignation effective.

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Filling of Vacancies

Sec. 4.8 If a Director position becomes vacant, whether because of death, disability, disqualification, removal, or resignation, the [National] Nominating Committee shall nominate, and the Board shall elect by majority vote, a person satisfying the classification (Industry, Non-Industry, or Public Director), *if applicable*, for the directorship as provided in Section 4.3 to fill such vacancy, except that if the remaining term of office for the vacant Director position is not more than six months, no replacement shall be required.

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Sec. 4.11 (a)–(c) No change.

(d) Directors or members of any committee appointed by the Board may participate in a meeting of the Board or of such committee through the use of a conference telephone or [similar] *other* communications equipment by means of which all persons participating in the meeting may hear one another, and such participation in a meeting shall constitute presence in person at such meeting for all purposes.

Notice of Meetings; Waiver of Notice

Sec. 4.12 (a) No change.

(b) Notice of any meeting of the Board need not be given to any Director if waived by that Director in writing or by *electronic transmission* (or by telegram, telefax, cable, radio, or wireless and subsequently confirmed in writing or by *electronic transmission*) whether before or after the holding of such meeting, or if such Director is present at such meeting, subject to Article X, Section 10.3(b).

(c) No change.

Committees

Sec. 4.13 (a) The Board may, by resolution or resolutions adopted by [a majority of] the [whole] Board, appoint one or more committees. Except as herein provided, vacancies in membership of any committee shall be filled by the [vote of a majority of the whole] Board. The Board may designate one or more Directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. In the absence or disqualification of any member of a committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not such member or members constitute a quorum, may unanimously appoint another Director to act at the meeting in the place of any such absent or disqualified member. Members of a committee shall hold office for such period as may be fixed by a resolution adopted by [a majority of] the [whole] Board. Any member of a committee may be removed from such committee only [after a majority vote] by [of] the [whole] Board, after appropriate notice.

(b) The Board may, by resolution or resolutions adopted by a majority of the whole Board, delegate to one or more committees the power and authority to act on behalf of the Board in carrying out the functions and authority delegated to Nasdaq by the NASD under the Delegation Plan. Such delegations shall be in conformance with applicable law, the Restated Certificate of Incorporation, these By-Laws, and the Delegation Plan. Action taken by a committee pursuant to such delegated authority shall be subject to review, ratification, or rejection by the Board. In all other matters, the Board may, by resolution or resolutions adopted by [a majority of] the [whole] Board, delegate to one or more committees that consist solely of one or more Directors the power and authority to act on behalf of the Board in the management of the business and affairs of Nasdaq to the extent permitted by law and not inconsistent with the Delegation Plan. A committee, to the extent permitted by law and provided in the resolution or resolutions creating such committee may authorize the seal of Nasdaq to be affixed to all papers that may require it.

(c) No change.

(d) The Board may appoint an Executive Committee, which shall, to the fullest extent permitted by Delaware law and other applicable law, have and be permitted to exercise all the powers and authority of the Board in the management of the business and affairs

of Nasdaq between meetings of the Board, and which may authorize the seal of Nasdaq to be affixed to all papers that may require it. [The Executive Committee shall consist of three or four Directors, including at least one Public Director. The Chief Executive Officer of Nasdaq shall be a member of the Executive Committee.] The number of Non-Industry [committee members] Directors on the Executive Committee shall equal or exceed the number of Industry [committee members] Directors on the Executive Committee [plus the Chief Executive Officer]. The percentage of Public Directors on the Executive Committee shall be at least as great as the percentage of Public Directors on the whole Board. An Executive Committee member shall hold office for a term of one year. [At all meetings of the Executive Committee, a quorum for the transaction of business shall consist of a majority of the Executive Committee. In the absence of a quorum, a majority of the committee members present may adjourn the meeting until a quorum is present].

(e) The Board may appoint a Finance Committee. The Finance Committee shall advise the Board with respect to the oversight of the financial operations and conditions of Nasdaq, including recommendations for Nasdaq's annual operating and capital budgets and proposed changes to the rates and fees charged by Nasdaq. [The Finance Committee shall consist of three or four Directors. The Chief Executive Officer of Nasdaq shall serve as a member of the Committee]. A Finance Committee member shall hold office for a term of one year.

(f) The Board shall appoint a Management Compensation Committee. The Management Compensation Committee shall consider and recommend compensation policies, programs, and practices for employees of Nasdaq. A majority of Management Compensation Committee members shall be Non-Industry Directors. The Chief Executive Officer shall be an ex-officio, non-voting member of the Management Compensation Committee. A Management Compensation Committee member shall hold office for a term of one year.

(g) The Board shall appoint an Audit Committee.

(i) The Audit Committee shall consist of four or five Directors, none of whom shall be officers or employees of Nasdaq. A majority of the Audit Committee members shall be Non-Industry Directors. The Audit Committee shall include two Public Directors. A Public Director shall serve as Chair of the Committee. An Audit

Committee member shall hold office for a term of one year.

(ii) No member of the Audit Committee shall participate in the consideration or decision of any matter relating to a particular Nasdaq member, company, or individual if such Audit Committee member has a material interest in, or a professional, business, or personal relationship with, that member, company, or individual, or if such participation shall create an appearance of impropriety. An Audit Committee member shall consult with the General Counsel of Nasdaq to determine if recusal is necessary. If a member of the Audit Committee is recused from consideration of a matter, any decision on the matter shall be by a vote of a majority of the remaining members of the Audit Committee.

(h) The Board may appoint a Nominating Committee. The Nominating Committee shall nominate Directors for each vacant or new Director position on the Board and members for each vacant or new position on the Nasdaq Listing and Hearing Review Council for appointment by the Board.

(i) The Nominating Committee shall consist of no fewer than six and no more than nine members. The number of Non-Industry members on the Nominating Committee shall equal or exceed the number of Industry members on the Nominating Committee. If the Nominating Committee consists of six members, at least two shall be Public committee members. If the Nominating Committee consists of seven or more members, at least three shall be Public committee members. No officer or employee of Nasdaq shall serve as a member of the Nominating Committee in any voting or non-voting capacity. No more than three of the Nominating Committee members and no more than two of the Industry committee members shall be current members of the Nasdaq Board.

(ii) A Nominating Committee member may not simultaneously serve on the Nominating Committee and the Board, unless such member is in his or her final year of service on the Board, and following that year, that member may not stand for election to the Board until such time as he or she is no longer a member of the Nominating Committee.

(iii) Members of the Nominating Committee shall be appointed annually by the Board and may be removed by majority vote of the Board.

(iv) The Secretary shall collect from each nominee for Director such information as is reasonably necessary to serve as the basis for a determination of the nominee's classification as an

Industry, Non-Industry, or Public Director, if applicable, and the Secretary shall certify to the Nominating Committee each nominee's classification, if applicable. Directors shall update the information submitted under this subsection at least annually and upon request of the Secretary, and shall report immediately to the Secretary and change in such information.

[(f)] (i) Each committee may adopt its own rules of procedure and may meet at stated times or on such notice as such committee may determine. Each committee shall keep regular minutes of its proceedings and report the same to the Board when required.

[(g)] (j) Unless otherwise provided by these By-Laws, a majority of a committee shall constitute a quorum for the transaction of business, and the vote of a majority of the members of such committee present at a meeting at which a quorum is present shall be an act of such committee.

[(h)] (k) Upon request of the Secretary of Nasdaq, each prospective committee member who is not a Director shall provide to the Secretary such information as is reasonably necessary to serve as the basis for a determination of the prospective committee member's classification as an Industry, Non-Industry, or Public committee member. The Secretary of Nasdaq shall certify to the Board each prospective committee member's classification. Such committee members shall update the information submitted under this [Section] subsection at least annually and upon request of the Secretary of Nasdaq, and shall report immediately to the Secretary any change in such information.

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Sec. 4.16 Any action required or permitted to be taken at a meeting of the Board or of a committee may be taken without a meeting if all Directors or all members of such committee, as the case may be, consent thereto in [writing, and the writing or writings are filed with the minutes of proceedings of the Board or the committee] accordance with applicable law.

Article V

NASDAQ Listing and Hearing Review Council

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Nomination Process

Sec. 5.3 The Secretary of Nasdaq shall collect from each nominee for the office of member of the Nasdaq Listing and Hearing Review Council such information as is reasonably necessary

to serve as the basis for a determination of the nominee's qualifications and classification as an Industry or Non-Industry member, and the Secretary shall certify to the [National] Nominating Committee each nominee's qualifications and classification. After appointment to the Nasdaq Listing and Hearing Review Council, each member shall update such information at least annually and upon request of the Secretary, and shall report immediately to the Secretary any change in such information.

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Filling of Vacancies

Sec. 5.8 If a position on the Nasdaq Listing and Hearing Review Council becomes vacant, whether because of death, disability, disqualification, removal, or resignation, the [National] Nominating Committee shall nominate, and the Board shall appoint a person satisfying the qualifications for the position as provided in Section 5.2(a) to fill such vacancy, except that if the remaining term of office for the vacant position is not more than six months, no replacement shall be required.

Quorum and Voting

Sec. 5.9 No change.

Meetings

Sec. 5.10 The members of the Nasdaq Listing and Hearing Review Council may participate in a meeting through the use of a conference telephone or [similar] *other* communications equipment by means of which all persons participating in the meeting may hear one another, and such participation in a meeting shall constitute presence in person at such meeting for all purposes.

* * * * *

Article VII

Officers, Agents, and Employees

Principal Officers

Sec. 7.1 The principal officers of Nasdaq shall be elected by the Board and shall include a Chair, a Chief Executive Officer, a President, a Secretary, a Treasurer, and such other officers as may be designated by the Board. One person may hold the offices and perform the duties of any two or more of said principal offices, except the offices and duties of President and Vice President or of President and Secretary. None of the principal officers, except the Chair of the Board [and the Chief Executive Officer], need be Directors of Nasdaq.

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Resignation and Removal of Officers

Sec. 7.5 (a) Any officer may resign at any time upon [written] notice of resignation to the Board, the Chief Executive Officer, the President, or the Secretary. Any such resignation shall take effect upon receipt of such notice or at any later time specified therein. The acceptance of a resignation shall not be necessary to make the resignation effective.

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Article X

Miscellaneous Provisions

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Waiver of Notice

Sec. 10.3 (a) Whenever notice is required to be given by law, the Restated Certificate of Incorporation, or these By-Laws, a [written] waiver thereof [signed] by the person or persons entitled to such notice, whether before or after the time stated therein, shall be deemed equivalent to notice. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the stockholders, Directors, or members of a committee of Directors need be specified in any [written] waiver of notice.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq proposes to amend its By-Laws regarding the balancing requirements on the Nasdaq Board of Directors and the composition and operation of certain Nasdaq committees and to make certain changes to conform Nasdaq's By-Laws to Delaware law. NASD members approved a restructuring plan on April 14, 2000, with 3,423 members voting in favor and 652 against. The plan involves broadening the ownership in Nasdaq through a two-phase private placement of common stock and warrants to NASD

members, Nasdaq issuers, and certain others. Before Phase 1 of the private placement closed on June 28, 2000, the NASD owned 100 percent of Nasdaq. Now, after the closing of Phase 2 of the private placement, Nasdaq has numerous shareholders, but the NASD will retain voting control of Nasdaq until Nasdaq obtains approval of its exchange registration application. On November 9, 2000, Nasdaq filed a Form 1 with the Commission, which, if granted, would change Nasdaq's status to an exchange and a separate self-regulatory organization from the NASD. Until the SEC approves the Form 1, Nasdaq's activities, including the activities of committees described below that involve functions or responsibilities of a registered securities association will be subject to the NASD's oversight under the Plan of Allocation and Delegation of Functions by NASD to Subsidiaries ("Delegation Plan"), as approved by the Commission.

Nasdaq proposes to amend its By-Laws to make certain changes to its corporate governance while it is operating under the Delegation Plan. Nasdaq believes that these changes will allow it to operate consistent with the requirements of its Restated Certificate of Incorporation and Delaware law and operate with more flexibility insofar as the balancing requirements are concerned.

Article I

Nasdaq proposes that up to two officers of Nasdaq who may be elected to the Board be treated as neutral for purposes of calculating the balance between Industry and Non-Industry Directors. Article IV, Section 4.3 of the Nasdaq By-Laws requires that the number of Non-Industry Directors equal or exceed the number of Industry Directors. Currently, Nasdaq officers who serve on the Board are treated as Industry Directors for purposes of calculating the compositional balance of the Nasdaq Board.

To effectuate this change, Nasdaq proposes to exclude from the definitions of Industry Director and Non-Industry Director up to two Nasdaq officers who are elected to the Board (hereinafter referred to as "Staff Directors"). Thus, if the stockholders elected one or two officers to the Board, they would be deemed neutral Staff Directors and would not be included in calculating the balance between Industry and Non-Industry Directors on the Nasdaq Board pursuant to Article IV, Section 4.3. If the stockholders elected three or more officers to the Board, then the Board, in its discretion, would designate two as

neutral Staff Directors and the others would be considered Industry Directors.

Definitions for "Amex Floor Governors," "Nasdaq-Amex," and "Amex Board" are deleted because the terms are no longer used in the Nasdaq By-Laws.

Article IV

Nasdaq proposes to modify its By-Law provision establishing the balancing requirements between Industry and Non-Industry Directors, by removing references to Nasdaq officers who may be elected to the Board. Nasdaq represents that the effect of this amendment, in conjunction with the amendments to the definitions of Industry and Non-Industry Directors described above, will ensure that the two neutral Staff Directors are not counted when calculating the Industry/Non-Industry balance of the Board.

Nasdaq proposes to delete the provision of Section 4.3 that requires that certain Directors be drawn from candidates proposed to the National Nominating Committee by a majority of the non-NASD stockholders of Nasdaq. This provision is no longer operative as Nasdaq has solicited the recommendations of the non-NASD stockholders and has mailed a ballot to non-NASD stockholders asking them to vote on such candidates. Nasdaq anticipates that the four new directors will be selected and begin serving on the Board by the end of January 2001.

Delaware law does not require director and officer resignations to be in writing.³ Conforming changes are made in Article IV, Section 4.5 and Article VII, Section 7.5 of the By-Laws.

Certain Nasdaq By-Laws relating to committees currently requires resolutions to be adopted by a majority vote of the whole Board (e.g., to appoint a committee, delegate authority to a committee, remove a committee member). Nasdaq proposes to remove this high vote requirement since it is no longer required for Nasdaq under applicable Delaware law.⁴

Nasdaq proposes several amendments to Section 4.13 relating to committees. With respect to the Executive and Finance Committees, Nasdaq proposes to remove limitations on the size of the Committees. As currently provided in the By-Laws, the Executive Committee would continue to have balancing requirements for Industry, Non-Industry, and Public Directors, but no such requirements would apply to the Finance Committee.

Under Delaware law, the Board of a stockholder-owned corporation must appoint the Directors who serve on Board committees. Moreover, Board committees must be comprised solely of directors to be validly constituted as such under Delaware law.⁵ Therefore, Nasdaq proposes to remove the By-Law provision that requires the Nasdaq Chief Executive Officer to serve on the Executive and Finance Committees because it is inconsistent with the Board's exclusive authority in this respect and inconsistent with the requirement that such committees be comprised solely of directors if the Chief Executive Officer is not a director. In the future, any Nasdaq officer elected to the Board may be appointed to these Committees.

New provisions for an Audit Committee and a Management Compensation Committee are added to Section 4.13. These provisions are modeled on the provisions for the counterpart NASD committees and comply with the balancing requirements of the NASD's August 8, 1996 settlement order with the Commission ("1996 Order").

Nasdaq proposes new provision for a Nominating Committee. Currently the NASD Nominating Committee nominates candidates for the Nasdaq Board and Listing and Review Council.⁶ In light of the broadening of the ownership of Nasdaq, Nasdaq proposes that a committee of its Board, rather than a committee of the board of one of its stockholders, would be the appropriate nomination body for the organization. The NASD has proposed conforming changes.⁷ The Nasdaq Nominating Committee compositional requirements would mirror the compositional requirements for the NASD Nominating Committee and comply with the requirements of the 1996 Order. Throughout the By-Laws, references to the NASD's National Nominating Committee would be replaced with references to Nasdaq's Nominating Committee.⁸ Nasdaq believes that, in general, establishment of these committee will help Nasdaq conduct its Board meetings in a more streamlined and efficient manner.

Nasdaq proposes to amend Section 4.16 to conform it with amendments to Delaware law affording greater use of technology. Specifically, under Delaware law, directors are now

permitted to take action without a meeting if all directors consent in writing or by electronic transmission.⁹

Article VII

Section 7.1 currently provides that none of the principal officers of Nasdaq, except the Chair and Chief Executive Officer, need be Directors. Nasdaq proposes to remove the reference to the Chief Executive Officer to provide the flexibility to have a Chief Executive Officer who is not a Director.

Article X

Delaware law no longer requires a waiver of certain notices to be in writing.¹⁰ Nasdaq proposes a conforming change in Section 10.3.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,¹¹ which requires, among other things, that the rules of the association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. Nasdaq believes that the changes proposed to its corporate governance will improve the efficiency of the Board and make its practices and procedures consistent with the Delaware law requirements for shareholder corporations.

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

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

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Nasdaq did not solicit or receive written comments on the proposed rule change.

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

⁵ *Id.*

⁶ Nasdaq By-Laws Article IV, Section 4.13(h).

⁷ Special NASD Notice to Members 00-90.

⁸ Nasdaq By-Laws Article I(p); Article III, Sections 3.1, 3.2; Article IV, Sections 4.8; and Article V, Sections 5.3, 5.8.

⁹ 8 Del. C. Section 141(f).

¹⁰ 8 Del. C. Section 229.

¹¹ 15 U.S.C. 78o-3(b)(6).

³ 8 Del. C. Section 141(b).

⁴ 8 Del. C. Section 141(c)(2).

(ii) as to which the NASD 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 is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR-NASD-78 and should be submitted by March 1, 2001.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 01-3238 Filed 2-7-01; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Advisory Circular 120-73, Damage Tolerance Assessment of Repairs to Pressurized Fuselages

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of issuance of advisory circular.

SUMMARY: This notice announces the issuance of Advisory Circular (AC) 120-73, "Damage Tolerance Assessment of Repairs to Pressurized Fuselages." The AC provides guidance on acceptable means of incorporating FAA-approved repair assessment guidelines in air

carrier maintenance or inspection programs.

DATES: Advisory Circular 120-73 was issued on December 14, 2000, by the Director of the Aircraft Certification Service, Federal Aviation Administration.

How to Obtain Copies: You can get a paper copy of AC 120-73 by writing to U.S. Department of Transportation, Subsequent Distribution Center, SVC-121.23, Ardmore East Business Center, 3341 Q 75th Avenue, Landover, Maryland 20785. The AC also will be available on the Internet at <http://www.faa.gov/avr/air/airhome.htm>, at the link titled "Advisory Circulars" under the "Available Information" drop-down menu.

FOR FURTHER INFORMATION CONTACT: For technical issues contact Brent Bandle, FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, Airframe Branch, ANM-120L, 3960 Paramount Boulevard, Lakewood, California 90712-4137; telephone (562) 627-5237; fax (562) 627-5210.

For other information contact: Jill DeMarco, FAA, Transport Airplane Directorate, Program Management Branch, ANM-114, 1601 Lind Avenue SW., Renton, Washington 98055-4056; telephone (425) 227-1313; fax (425) 227-1320.

SUPPLEMENTARY INFORMATION:

Discussion of Comments

On December 22, 1997, the FAA issued a notice of the availability of proposed Advisory Circular (AC) 120-XX, "Repair Assessment of Pressurized Fuselages." That notice was published in the **Federal Register** on January 2, 1998 (63 FR 137), and we requested comments from the public on the proposed AC document. Three commenters sent comments asking for changes to various sections of the proposed AC. We have addressed those comments in the final AC as described below.

Changes in General Terminology

One commenter requests that the FAA clarify the terminology used in the proposed AC to indicate that the area of inspection termed the "fuselage pressure boundary." The commenter states that this area includes not only the fuselage skin and bulkhead web, but the door skin as well.

The FAA concurs. The intent of the repair assessment is to include the entire fuselage pressure boundary, which does include, among other things, the fuselage, bulkhead webs, and the door skin. We have changed the terminology accordingly throughout the

final AC. [We made this same change in terminology in the final rule associated with this AC: Repair Assessment for Pressurized Fuselages, amendments 91-264, 121-275, 125-33, and 129-8 (65 FR 24108, April 25, 2000).]

Stage 1: Data Collection

One commenter suggests changes to the guidance that concerns the list of structure for which repair assessments are required. The proposed guidance states that some manufacturers have reduced this list by determining the inspection requirements for critical details. If the requirements are equal to normal maintenance checks, such as the Baseline Zonal Inspection (BZI), those details were excluded from this list. The commenter points out that some manufacturers also have excluded items from the list if, through any other inspection program, the repaired structure was previously found to be damage-tolerant. The commenter requests that this be noted in the proposed AC.

The FAA concurs. We have revised paragraph 5.a.(1) of the final AC accordingly.

Stage 2: Repair Classification

One commenter notes the guidance states that, during "Stage 2: Repair Classification," applicants would use information collected from "a survey form" to classify repairs (into one of three categories). The commenter states that, while filling in a survey form may be helpful when it is time to classify repairs, such a form is not necessary. Based on the knowledge of those doing the assessment, the classification could be done without filling in a survey form. Therefore, the commenter requests that the FAA revise the language in the proposed AC to state more generally that the applicant may use *the information gathered during Stage 1* to classify repairs.

The FAA concurs. We have revised the wording in paragraph 5.a.(2) of the final AC accordingly.

Category C Repairs

One commenter requests that the term "temporary" be further defined to mean "time-limited" when defining Category C repairs. The commenter points to an FAA letter (ANM-120S:SCF, dated February 12, 1990) that it previously received that provided three definitions of repairs. The definition contained in the letter that was most closely correlated to the definition of Category C repairs contained in the proposed AC, used the term "time-limited" to describe the repair, not "temporary."

¹² 17 CFR 200.30-3(a)(12).