

the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filings will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-BSE-2003-19 and should be submitted by November 13, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹³

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

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

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

October 16, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on February 26, 2003, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. On October 10, 2003, NASD, through Nasdaq, submitted Amendment No. 1 to the proposed rule change.³ The Commission is publishing this notice to

solicit comments on the proposed rule change, as amended, from interested persons.

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

Nasdaq proposes to clarify the applicability of its corporate governance requirements during the listing review process.

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

* * * * *

4800. Procedures for Review of Nasdaq Listing Determinations

4810. Purpose and General Provisions

(a)-(d) No change.
(e) At each level of a proceeding under the Rule 4800 Series, the Listing Qualifications Panel, Listing Council, or NASD Board, as part of its respective review, may consider any failure to meet any quantitative standard or qualitative consideration set forth in the Rule 4000 Series, including failures previously not considered in the proceeding. *The Listing Council or the NASD Board, as part of its respective review, may also consider any action by an issuer during the review process that would have constituted a violation of Nasdaq's corporate governance requirements had the issuer's securities been listed on Nasdaq at the time.* The issuer will be afforded notice of such consideration and an opportunity to respond. [In this regard,] *Furthermore,* the issuer may be subject to additional or more stringent criteria for the initial or continued inclusion of particular securities based on any event, condition, or circumstance that exists or occurs that makes initial or continued inclusion of the securities inadvisable or unwarranted in the opinion of the Association, even though the securities meet all enumerated criteria for initial or continued inclusion in The Nasdaq Stock Market.

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

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

and C below, of the most significant aspects of such statements.

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

1. Purpose

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

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

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

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

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¹³ 17 CFR 200.30-3(a)(12).

¹⁴ 15 U.S.C. 78s(b)(1).

¹⁵ 17 CFR 240.19b-4.

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