

On October 23, 2003, the NASD, through Nasdaq, submitted Amendment No. 3 to the Nasdaq Issuer Applicability Proposal.²⁴

On October 10, 2002, the NASD, through Nasdaq, filed with the Commission, pursuant to section 19(b)(1) of the Exchange Act, and Rule 194-4 thereunder, a proposed rule change (SR-NASD-2002-139) to amend NASD Rule 4350(n) to require listed companies to adopt a code of conduct for all directors, officers, and employees ("Nasdaq Code of Conduct Proposal"). On January 15, 2003, the NASD, through Nasdaq, submitted Amendment No. 1 to the Nasdaq Code of Conduct Proposal.²⁵ On July 10, 2003, the proposed rule change, as amended, was published for comment in the **Federal Register**.²⁶ The Commission received two comment letters on the Nasdaq Code of Conduct Proposal.²⁷ On October 6, 2003, the NASD, through Nasdaq, submitted Amendment No. 2 to the Nasdaq Code of Conduct Proposal.²⁸ This order

thereto. In Amendment No. 2 to the Issuer Applicability Proposal, Nasdaq proposed to clarify that (1) Investment companies (including business development companies) are subject to all the requirements of NASD Rule 4350, except that registered management investment companies are exempt from the requirements of NASD Rule 4350(c); (2) asset-backed issuers and certain other passive issuers are exempt from the requirements of NASD Rule 4350(c) and (d); and (3) certain cooperative entities are exempt from NASD Rule 4350(c), however, each of these entities must comply with all federal securities laws, including without limitation, section 10A(m) of the Exchange Act and Rule 10A-3 thereunder.

²⁴ See letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated October 23, 2003. Amendment No. 3 replaced in full the Nasdaq Issuer Applicability Proposal and Amendment Nos. 1 and 2 thereto. In Amendment No. 3 to the Nasdaq Issuer Applicability Proposal, Nasdaq proposed to set forth the dates by which companies would be required to come into compliance with the proposed rule changes that are the subject of this Order; add new Rules 4200A and 4350A to incorporate the sections of Rules 4200 and 4350 that would continue to apply until the proposed rule changes become effective; and exempt registered management investment companies, asset-backed issuers, and unit investment trusts from the requirement of proposed subsection (n) of NASD Rule 4350 regarding codes of conduct.

²⁵ See letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated January 15, 2003.

²⁶ See Securities Exchange Act Release No. 48125 (July 2, 2003), 68 FR 41194.

²⁷ See *supra* note.

²⁸ See letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated October 3, 2003. In Amendment No. 2 to the Nasdaq Code of Conduct Proposal, Nasdaq proposed to re-letter the section of NASD Rule 4350 addressing the code of conduct requirement as subsection (n), add cross-references to 17 CFR 228.406 and 17 CFR 229.406, and clarify that any waivers of the code for directors or

approves the NYSE Corporate Governance Proposal, as amended by NYSE Amendment Nos. 1, 2, and 3; the Nasdaq Independent Director Proposal, as amended by Amendment Nos. 1, 2, 3, 4, and 5 to the Nasdaq Independent Director Proposal; the Nasdaq Going Concern Proposal; the Nasdaq Related Party Transactions Proposal, as amended by Amendment Nos. 1, 2, and 3 to that proposal; the Nasdaq Issuer Applicability Proposal, as amended by Amendment Nos. 1, 2, and 3 to that proposal; and the Nasdaq Code of Conduct Proposal, as amended by Amendment Nos. 1 and 2 to that proposal. The Commission is granting accelerated approval to Amendment Nos. 2 and 3 to the NYSE Corporate Governance Proposal, Amendment Nos. 2, 3, 4, and 5 to the Nasdaq Independent Director Proposal, Amendment Nos. 2 and 3 to the Nasdaq Related Party Transactions Proposal, Amendment Nos. 1, 2, and 3 to the Nasdaq Issuer Applicability Proposal, and Amendment No. 2 to the Nasdaq Code of Conduct Proposal, as discussed below, and is soliciting comments from interested persons on these amendments.

II. Description of the NYSE and Nasdaq Proposals

A. History

In 1998, the NYSE and NASD sponsored a committee to study the effectiveness of audit committees. This committee became known as the Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committees ("Blue Ribbon Committee"). In its 1999 report, the Blue Ribbon Committee recognized the importance of audit committees and issued ten recommendations to enhance their effectiveness.²⁹ In response to these recommendations, the NYSE and the NASD, as well as other exchanges, revised their listing standards relating to audit committees.³⁰ In February 2002, in light of several high-profile corporate failures, the Commission's Chairman at that time requested that the NYSE and NASD, as well as the other exchanges, review their listing standards, with an

executive officers would be required to be disclosed in a Form 8-K within five days.

²⁹ See Report and Recommendations of the Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committees (February 1999). The Blue Ribbon Committee Report is available at <http://www.nyse.com>.

³⁰ See Securities Exchange Act Release Nos. 42233 (December 14, 1999), 64 FR 71529 (December 21, 1999) (NYSE); 42231 (December 14, 1999), 64 FR 71523 (December 21, 1999) (NASDAQ); 42232 (December 14, 1999), 64 FR 71518 (December 21, 1999) (American Stock Exchange); 43941 (February 7, 2001), 66 FR 10545 (February 15, 2001) (Pacific Exchange).

emphasis this time on all corporate governance listing standards, and not just those provisions relating to audit committees.³¹ After reviewing their corporate governance listing standards, the NYSE and the NASD, through Nasdaq, filed corporate governance reform proposals with the Commission in 2002.³²

In January 2003, pursuant to the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley Act"),³³ the Commission proposed Rule 10A-3 under the Exchange Act,³⁴ which directs each national securities exchange and national securities association to prohibit the listing of any security of an issuer that is not in compliance with the audit committee requirements specified in Rule 10A-3. Because the provisions concerning audit committees in the NYSE and Nasdaq corporate governance reform proposals, as filed with the Commission, did not conform in all respects with the audit committee requirements set forth in Rule 10A-3 as proposed by the Commission, both the NYSE and Nasdaq revised their proposals.³⁵ In April 2003, the Commission adopted Rule 10A-3.³⁶ In order to conform their proposals to the requirements of final Rule 10A-3, and to incorporate comments from the public and revisions suggested by the Commission's staff, the NYSE and Nasdaq each filed further amendments to their proposals.³⁷ Significant aspects of the proposed rule changes, as amended, are described below.

B. NYSE Proposals

According to the NYSE, the NYSE Corporate Governance Proposal is designed to further the ability of honest and well-intentioned directors, officers, and employees of listed issuers to perform their functions effectively. The NYSE believes that the proposal also will allow shareholders to more easily and efficiently monitor the performance of companies and directors in order to reduce instances of lax and unethical behavior.³⁸

³¹ See Commission Press Release No. 2002-23 (February 13, 2002).

³² See File Nos. SR-NYSE-2002-33, SR-NASD-2002-77, SR-NASD-2002-80, SR-NASD-2002-138, SR-NASD-2002-139, SR-NASD-2002-141.

³³ Pub. L. 107-204, 116 Stat. 745 (2002).

³⁴ See Securities Exchange Act Release No. 47137 (January 8, 2003), 68 FR 2637, (January 17, 2003).

³⁵ See NYSE Amendment No. 1, *supra* note 3, and Amendment No. 1 to the Nasdaq Independent Director Proposal, *supra* note 8.

³⁶ 17 CFR 240.10A-3.

³⁷ See NYSE Amendment Nos. 2 and 3, *supra* notes 6 and 7; and NASD Amendment Nos. 2, 3, and 4, *supra* notes 11, 12, and 13 respectively.

³⁸ See NYSE Corporate Governance Proposal.