

- 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); but that each of these entities must comply with all federal securities laws, including Rule 10A-3;

- Set forth the dates by which issuers 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 operative; 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.

In addition, Nasdaq amended its Code of Conduct Proposal to clarify that any waivers of a company's code of conduct for directors or executive officers would be required to be disclosed in a Form 8-K within five days.³⁷⁰

V. Discussion

After careful review, the Commission finds that the NYSE Corporate Governance Proposal, as amended, is consistent with the Exchange Act and the rules and regulations promulgated thereunder applicable to a national securities exchange and, in particular, with the requirements of section 6(b) of the Exchange Act.³⁷¹ Specifically, the Commission finds that the NYSE Corporate Governance Proposal, as amended, is consistent with section 6(b)(5) of the Exchange Act³⁷² in that it is designed, among other things, to facilitate transactions in securities; to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; 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, and does not permit unfair discrimination among issuers.

After careful review, the Commission finds that the Nasdaq Independent Director Proposal, as amended; the Nasdaq Going Concern Proposal; the Nasdaq Related Party Transactions Proposal, as amended; the Nasdaq Issuer Applicability Proposal, as amended; and the Nasdaq Code of Conduct Proposal, as amended, are consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities association.³⁷³ The Commission finds that these Nasdaq proposed rule changes, as amended, are consistent with provisions of section 15A of the Exchange Act,³⁷⁴ in general, and with section 15A(b)(6) of the Exchange Act,³⁷⁵ in particular, in that they are designed, among other things, to facilitate transactions in securities; to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; 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, and do not permit unfair discrimination among issuers.

Recent corporate scandals have shaken investor confidence in the securities markets because of breaches of trust, failures of responsibility, breakdowns in governance, and lack of candid disclosure. These developments led to the enactment of the Sarbanes-Oxley Act, which, among other things, directed the Commission to undertake rulemaking in a number of areas, including mandatory listing standards to be adopted by self-regulatory organizations ("SROs") concerning the composition and function of listed issuers' audit committees. One of the main goals of the Sarbanes-Oxley Act is to improve investor confidence in the financial integrity of listed issuers, which in turn will promote confidence in the markets for listed issuers' securities.

Through their corporate governance listing standards, the SROs play an important role in assuring that their listed issuers establish good governance practices and maintain effective oversight of the reliability of corporate

financial information. A few years ago, several exchanges and Nasdaq implemented rules to strengthen the effectiveness of their listed companies' audit committees; these rules were adopted in response to the recommendations of the Blue Ribbon Committee.³⁷⁶ More recently, at the urging of the Commission's Chairman at the time, the exchanges and Nasdaq undertook a review of their corporate governance listing standards with the objective of strengthening their rules. In April of this year, in response to a directive of the Sarbanes-Oxley Act, the Commission adopted Rule 10A-3 under the Exchange Act. Rule 10A-3 requires the rules of the national securities exchanges or national securities associations to prohibit the initial or continued listing of any security of an issuer that is not in compliance with the rule's requirements regarding issuer audit committees. As a result of Commission and Congressional initiatives, the NYSE and Nasdaq proposed rule changes that are intended to assure that a listed issuer's board of directors and key committees are comprised in a manner that is designed to provide an objective oversight role and that directors and management adhere to high standards of conduct. In addition, the proposals are intended to strengthen the independence of audit committees, including by establishing rules designed to assure listed issuers' compliance with the requirements of Rule 10A-3.

In the Commission's view, the NYSE and Nasdaq proposals that are the subject of this Order will foster greater transparency, accountability and objectivity in the oversight by, and decision-making processes of, the boards and key committees of listed issuers. The NYSE and Nasdaq proposals also will promote compliance with high standards of conduct by the issuers' directors and management. In addition, in the Commission's view, the NYSE Corporate Governance Proposal and the Nasdaq Independent Director Proposal satisfy the mandate of Rule 10A-3, which requires that the rules of a national securities exchange or national securities association prohibit the initial or continued listing of any security of an issuer that is not in compliance with the requirements of any portion of paragraph (b) or (c) of Rule 10A-3. In this regard, the NYSE Corporate Governance Proposal and the Nasdaq Independent Director Proposal will promote independent and objective review and oversight of an issuer's financial reporting practices.

³⁷⁰ See also *supra* notes 14, 18-19, 22-24, 28.

³⁷¹ 15 U.S.C. 78f(b). In approving the NYSE Corporate Governance Proposal, the Commission has considered the proposed rules' impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

³⁷² 15 U.S.C. 78f(b)(5).

³⁷³ In approving the Nasdaq Independent Director Proposal, the Nasdaq Going Concern Proposal, the Nasdaq Related Party Transactions Proposal, the Nasdaq Issuer Applicability Proposal, and the Nasdaq Code of Conduct Proposal the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

³⁷⁴ 15 U.S.C. 78o-3.

³⁷⁵ 15 U.S.C. 78o-3(b)(6).

³⁷⁶ See *supra* note.