on the collection of information summarized below. The Commission plans to submit this existing material to the Office of Management and Budget for extension and approval.

Part 257 [17 CFR part 257] under the Public Utility Holding Company Act of 1935, as amended (''Act''), 15 U.S.C. 79, *et seq.*, generally mandates the preservation, and provides for the destruction, of books and records of registered public utility holding companies subject to rule 26 under the Act and service companies subject to rule 93. Part 257 prescribes which records must be maintained for regulatory purposes and which media methods may be used to maintain them. Further, it sets a schedule for destroying particular documents or classes of documents.

The Commission estimates that there is an associated recordkeeping burden of 29 hours in connection with the record preservation programs administered by registered holding companies under part 257 (29 recordkeepers × 1 hour = 29 burden hours). In addition to the costs associated with the burden hours, the annual non-labor cost associated with complying with part 257 is estimated at $2,000 for each registered holding company system. The total estimated annual non-labor recordkeeping burden is $58,000 (29 recordkeepers × $2,000 = $58,000).

Written comments are invited on: (1) Whether the proposed record maintenance and destruction requirements under part 257 under the Act are necessary for the proper performance of the functions of the agency, including whether the requirement will have practical utility; (2) the accuracy of the agency's estimate of the burden of the collection of information; (3) ways to enhance the quality, utility, and clarity of the information required to be maintained under Part 257; and (4) ways to minimize the burden of the collection of information on respondents that is required to be maintained under part 257, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549.

Dated: August 25, 2004.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E4–2007 Filed 8–31–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50259; File No. SR–NASD–2004–124]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. To Provide an Exception From Shareholder Approval Requirements When Officers, Directors, Employees or Consultants Participate in a Discounted Private Placement

August 25, 2004.

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 August 13, 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 the Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

Nasdaq proposes to provide an exception from shareholder approval requirements when officers, directors, employees or consultants participate in a discounted private placement.

Below is the text of the proposed rule change. Proposed new language is *italicized*; proposed deletions are in brackets.[3]

* * * * *

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

(a)–(h) No Change.

(i) Shareholder Approval.

(1) Each issuer shall require shareholder approval prior to the issuance of designated securities under subparagraph (A), (B), (C), or (D) below:

(A) when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which options or stock may be acquired by officers, directors, employees, or consultants, except for:

(i) Warrants or rights issued generally to all security holders of the company or stock purchase plans available on equal terms to all security holders of the company (such as a typical dividend reinvestment plan); or

(ii) Tax qualified, non-discriminatory employee benefit plans (*e.g.*, plans that meet the requirements of Section 401(a) or 423 of the Internal Revenue Code) or parallel nonqualified plans, provided such plans are approved by the issuer's independent compensation committee or a majority of the issuer's independent directors; or plans that merely provide a convenient way to purchase shares on the open market or from the issuer at fair market value; or

(iii) Plans or arrangements relating to an acquisition or merger as permitted under IM–4350–5; or

(iv) Issuances to a person not previously an employee or director of the company, or following a bonafide period of non-employment, as an inducement material to the individual's entering into employment with the company, provided such issuances are approved by either the issuer's independent compensation committee or a majority of the issuer's independent directors. Promptly following an issuance of any employment inducement grant in reliance on this exception, a company must disclose in a press release the material terms of the grant, including the recipient(s) of the grant and the number of shares involved; *or*

(v) Sales by the issuer to officers, directors, employees or consultants as part of, or in connection with, sales to third parties that do not involve any public offering, where:

a. The sales are at prices less than the greater of book or market value of the company's stock (''discounted sales'');

b. The sales to officers, directors, employees or consultants are at the same price and on the same terms as the sales made to the third parties in the transaction;

c. The total number of shares sold or to be sold to all such officers, directors, employees or consultants, either individually or in the aggregate, is less than five percent of the total number of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The proposed rule change is marked to show changes to NASD Rule 4350(i) and to Interpretive Material (''IM'') 4350–1, 4350–3 and 4350–5 as currently reflected in the NASD Manual available at *www.nasd.com*. No other pending or recently approved rule filings would affect the text of this Rule or the IMs.

shares issued or to be issued in the transaction; and

d. The total number of shares issued or to be issued to all officers, directors, employees, or consultants in the transaction, aggregated with all other discounted sales to officers, directors, employees, or consultants during the preceding 12-month period, does not exceed one percent of the total number of shares outstanding at the beginning of the 12-month period.

(B) When the issuance or potential issuance will result in a change of control of the issuer;

(C) In connection with the acquisition of the stock or assets of another company if:

(i) Any director, officer or substantial shareholder of the issuer has a 5% or greater interest (or such persons collectively have a 10% or greater interest), directly or indirectly, in the company or assets to be acquired or in the consideration to be paid in the transaction or series of related transactions and the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, could result in an increase in outstanding common shares or voting power of 5% or more; or

(ii) Where, due to the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, other than a public offering for cash:

a. The common stock has or will have upon issuance voting power equal to or in excess of 20% of the voting power outstanding before the issuance of stock or securities convertible into or exercisable for common stock; or

b. The number of shares of common stock to be issued is or will be equal to or in excess of 20% of the number of shares or common stock outstanding before the issuance of the stock or securities; or

(D) In connection with a transaction other than a public offering involving[:]

[(i)] The sale, issuance or potential issuance by the issuer of common stock (or securities convertible into or exercisable for common stock) at a price less than the greater of book or market value which *alone, or* together with sales by officers, directors, *employees, consultants*, or substantial shareholders of the company, equals 20% or more of *the* common stock or 20% or more of the voting power outstanding before the issuance. *For sales of discounted stock made to officers, directors, employees, or consultants of the company, see Rule 4350(i)(1)(A)(v).* [; or

(ii) The sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable common stock) equal to 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.]

(2)–(6) No change.

Cross Reference—IM–4350–1, Future Priced Securities

Cross Reference—IM–4350–2, Interpretative Material Regarding the use of Share Caps to Comply with Rule 4350(i)

Cross Reference—IM–4350–3, Definition of Public Offering

Cross Reference—IM–4350–5, Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements

Cross Reference—IM–4350–7, Code of Conduct

Cross Reference—Rule 4350(h), Conflicts of Interest

(j)–(n) No change.

* * * * *

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

Summary No change.

How the Rules Apply

Shareholder Approval

NASD Rule 4350(i)(1)(D) provides, in part:

Each issuer shall require shareholder approval [* * *] prior to the issuance of designated securities * * * in connection with a transaction other than a public offering involving [* * *] the sale, issuance or potential issuance by the issuer of common stock (or securities convertible into or exercisable for common stock) at a price less than the greater of book or market value which *alone, or* together with sales by officers, directors, *employees, consultants*, or substantial shareholders of the company, equals 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance.[1] *For sales of discounted stock made to officers, directors, employees, or consultants of the company, see Rule 4350(i)(1)(A)(v).*

* * * * *

Voting Rights No change.

The Bid Price Requirement No change.

Listing of Additional Shares No change.

Public Interest Concerns No change.

Reverse Merger No change.

Footnotes to IM–4350–1. No change.

* * * * *

IM–4350–3. Definition of a Public Offering

[Rule 4350(i)(1)(D) provides that shareholder approval is required for the issuance of common stock (or securities convertible into or exercisable for common stock) equal to 20 percent or more of the common stock or 20 percent or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock. Under this rule, however, shareholder approval is not required for a ''public offering.'']

Rule 4350(i) contains several references to a ''public offering.'' Issuers are encouraged to consult with Nasdaq staff in order to determine if a particular offering is a ''public offering'' for purposes of the shareholder approval rules. Generally, a firm commitment underwritten securities offering registered with the Securities and Exchange Commission will be considered a public offering for these purposes. Likewise, any other securities offering which is registered with the Securities and Exchange Commission and which is publicly disclosed and distributed in the same general manner and extent as a firm commitment underwritten securities offering will be considered a public offering for purposes of the shareholder approval rules. However, Nasdaq staff will not treat an offering as a ''public offering'' for purposes of the shareholder approval rules merely because they are registered with the Commission prior to the closing of the transaction.

When determining whether an offering is a ''public offering'' for purposes of these rules, Nasdaq staff will consider all relevant factors, including but not limited to:

(i) The type of offering (including whether the offering is conducted by an underwriter on a firm commitment basis, or an underwriter or placement agent on a best-efforts basis, or whether the offering is self-directed by the issuer);

(ii) The manner in which the offering is marketed (including the number of investors offered securities, how those investors were chosen, and the breadth of the marketing effort);

(iii) The extent of the offering's distribution (including the number and identity of the investors who participate in the offering and whether any prior relationship existed between the issuer and those investors);

(iv) The offering price (including the extent of any discount to the market price of the securities offered); and

(v) The extent to which the issuer controls the offering and its distribution.

* * * * *

IM–4350–5. Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements

Employee ownership of company stock can be an effective tool to align employee interests with those of other shareholders. Stock option plans or other equity compensation arrangements can also assist in the recruitment and retention of employees, which is especially critical to young, growing companies, or companies with insufficient cash resources to attract and retain highly qualified employees. However, these plans can potentially dilute shareholder interests. As such, Rule 4350(i)(1)(A) ensures that shareholders have a voice in these situations, given this potential for dilution.

Rule 4350(i)(1)(A) requires shareholder approval when a plan or other equity compensation arrangement is established or materially amended. For these purposes, a material amendment would include, but not be limited to, the following:

(1) Any material increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spinoff or similar transaction);

(2) Any material increase in benefits to participants, including any material change to: (i) Permit a repricing (or decrease in exercise price) of outstanding options, (ii) reduce the price at which shares or options to purchase shares may be offered, or (iii) extend the duration of a plan;

(3) Any material expansion of the class of participants eligible to participate in the plan; and

(4) Any expansion in the types of options or awards provided under the plan.

While general authority to amend a plan would not obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required. However, if a plan contains a formula for automatic increases in the shares available (sometimes called an ''evergreen formula''), or for automatic grants pursuant to a dollar-based formula (such as annual grants based on a certain dollar value, or matching contributions based upon the amount of compensation the participant elects to defer), such plans cannot have a term in excess of ten years unless shareholder approval is obtained every ten years. However, plans that do not contain a formula and do not impose a limit on the number of shares available for grant would require shareholder approval of each grant under the plan. A requirement that grants be made out of treasury shares or repurchased shares will not alleviate these additional shareholder approval requirements.

As a general matter, when preparing plans and presenting them for shareholder approval, issuers should strive to make plan terms easy to understand. In that regard, it is recommended that plans meant to permit repricing use explicit terminology to make this clear.

Rule 4350(i)(1)(A) provides an exception to the requirement for shareholder approval for warrants or rights offered generally to all shareholders. In addition, an exception is provided for tax qualified, non-discriminatory employee benefit plans as well as parallel nonqualified plans as these plans are regulated under the Internal Revenue Code and Treasury Department regulations. An equity compensation plan that provides non-U.S. employees with substantially the same benefits as a comparable tax qualified, non-discriminatory employee benefit plan or parallel nonqualified plan that the issuer provides to its U.S. employees, but for features necessary to comply with applicable foreign tax law, are also exempt from shareholder approval under this section.

Further, there is an exception for inducement grants to new employees because in these cases a company has an arm's length relationship with the new employees. Inducement grants for these purposes include grants of options or stock to new employees in connection with a merger or acquisition. The rule requires that such issuances must be approved by the issuer's independent compensation committee or a majority of the issuer's independent directors. The rule further requires that promptly following an issuance of any employment inducement grant in reliance on this exception, a company must disclose in a press release the material terms of the grant, including the recipient(s) of the grant and the number of shares involved.

In addition, plans or arrangements involving a merger or acquisition do not require shareholder approval in two situations. First, shareholder approval will not be required to convert, replace or adjust outstanding options or other equity compensation awards to reflect the transaction. Second, shares available under certain plans acquired in acquisitions and mergers may be used for certain post-transaction grants without further shareholder approval. This exception applies to situations where the party which is not a listed company following the transaction has shares available for grant under pre-existing plans that meet the requirements of this Rule 4350(i)(1)(A). These shares may be used for post-transaction grants of options and other equity awards by the listed company (after appropriate adjustment of the number of shares to reflect the transaction), either under the pre-existing plan or arrangement or another plan or arrangement, without further shareholder approval, provided: (1) The time during which those shares are available for grants is not extended beyond the period when they would have been available under the pre-existing plan, absent the transaction, and (2) such options and other awards are not granted to individuals who were employed by the granting company or its subsidiaries at the time the merger or acquisition was consummated. Nasdaq would view a plan or arrangement adopted in contemplation of the merger or acquisition transaction as not pre-existing for purposes of this exception. This exception is appropriate because it will not result in any increase in the aggregate potential dilution of the combined enterprise. In this regard, any additional shares available for issuance under a plan or arrangement acquired in a connection with a merger or acquisition would be counted by Nasdaq in determining whether the transaction involved the issuance of 20% or more of the company's outstanding common stock, thus triggering the shareholder approval requirements under Rule 4350(i)(1)(C).

Moreover, Rule 4350(i)(1)(A)(v) provides a de minimis exception to the requirement for shareholder approval for sales by the company to officers, directors, employees, or consultants at a price less than the greater of book or market value of the stock, also known as discounted private placements. Discounted private placements made to officers, directors, employees, or consultants of the company are to be considered ''compensation'' for purposes of Rule 4350(i)(1)(A) and would require shareholder approval. A de minimis exception to this requirement is provided solely in the limited circumstance where officers, directors, employees, or consultants are sold discounted stock as part of, or in connection with, sales to third parties, at the same price and on the same terms, and that do not involve any public offering. In addition, this exception requires that the total number of shares sold to all such officers, directors, employees or consultants, either individually or in the aggregate, be less than five percent of the total

shares to be issued in the transaction, and that the shares issued or to be issued in the transaction aggregated with all other discounted sales to officers, directors, employees, or consultants during the preceding 12-month period not exceed one percent of the total shares outstanding at the beginning of the 12-month period. Nasdaq intends that this exception be used solely in the situation where third parties that are considering investing in a company require a minimum level of participation in the company by officers, directors, employees, or consultants as a condition to their investment.

Inducement grants, tax qualified non-discriminatory benefit plans, and parallel nonqualified plans are subject to approval by either the issuer's independent compensation committee or a majority of the issuer's independent directors. It should also be noted that a company would not be permitted to use repurchased shares to fund option plans or grants without prior shareholder approval.

For purposes of Rule 4350(i)(1)(A) and IM–4350–5, the term ''parallel nonqualified plan'' means a plan that is a ''pension plan'' within the meaning of the Employee Retirement Income Security Act (''ERISA''), 29 U.S.C. § 1002 (1999), that is designed to work in parallel with a plan intended to be qualified under Internal Revenue Code Section 401(a), to provide benefits that exceed the limits set forth in Internal Revenue Code Section 402(g) (the section that limits an employee's annual pre-tax contributions to a 401(k) plan), Internal Revenue Code Section 401(a)(17) (the section that limits the amount of an employee's compensation that can be taken into account for plan purposes) and/or Internal Revenue Code Section 415 (the section that limits the contributions and benefits under qualified plans) and/or any successor or similar limitations that may thereafter be enacted. However, a plan will not be considered a parallel nonqualified plan unless: (i) It covers all or substantially all employees of an employer who are participants in the related qualified plan whose annual compensation is in excess of the limit of Code Section 401(a)(17) (or any successor or similar limitation that may hereafter be enacted); (ii) its terms are substantially the same as the qualified plan that it parallels except for the elimination of the limitations described in the preceding sentence; and, (iii) no participant receives employer equity contributions under the plan in excess of 25% of the participant's cash compensation.

* * * * *

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 is proposing amendments to NASD Rule 4350(i)(1)(A) and IM 4350–5 relating to shareholder approval requirements for certain stock issuances to officers, directors, employees or consultants, when such issuances are not made as part of a public offering and are for less than the greater of book value or market value of the stock.[4] The proposed rule change provides a *de minimis* exception to the requirement for shareholder approval for sales by the company to officers, directors, employees, or consultants at a price less than the greater of book or market value of the stock, also known as discounted private placements. Discounted private placements made to officers, directors, employees, or consultants of the company are to be considered ''compensation'' for purposes of NASD Rule 4350(i)(1)(A) and would require shareholder approval. A *de minimis* exception to this requirement is provided solely in the limited circumstance where officers, directors, employees, or consultants are sold discounted stock as part of, or in connection with, sales to third parties, at the same price and on the same terms, and that do not involve any public offering. In addition, this exception requires that the total number of shares sold to all such officers, directors, employees or consultants, either individually or in the aggregate, be less than five percent of the total shares to be issued in the transaction, and that the shares issued or to be issued in the transaction aggregated with all other discounted sales to officers, directors, employees, or consultants during the preceding 12-month period not exceed one percent of the total shares outstanding at the beginning of the 12-month period. Nasdaq intends that this exception be used solely in the situation where third parties that are considering investing in a company require a minimum level of participation in the company by officers, directors, employees, or consultants as a condition to their investment.[5]

Nasdaq also notes that, while NASD Rule 4350(i)(1)(A) does not generally require shareholder approval of any issuances that are made as part of a public offering and of any issuances at a price at or above book and market value, shareholder approval may still be required for such issuances under other provisions of NASD Rule 4350(i) (for example, in the event of a change of control of the company) or under other rules.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,[6] in general and with Section 15A(b)(6) of the Act,[7] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, and, in general, to protect investors and the public interest.

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

Nasdaq does not believe that the proposed rule change will result in 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

Written comments were neither solicited nor received.

[4] Nasdaq is also proposing amendments to its IM–4350–1 and IM–4350–3 that are not substantive and are intended to conform the language of these two IMs to the proposed substantive amendments described herein.

[5] Nasdaq also believes that the scope of this *de minimis* exception is sufficiently narrow as to encourage the third-party investors to be actively involved in the negotiation of the investment terms, thus allaying concerns of self-dealing by any officer or director participants in the investment. However, to further alert companies to self-dealing concerns and to remind them of their obligations in related party transactions, Nasdaq proposes to include cross references to NASD Rule 4350(h), which sets forth review and approval requirements for certain related party transactions, and to IM–4350–7, which discusses a code of conduct applicable to officers, directors and employees, and specifically highlights the harm that results when such individuals receive improper personal benefits.

[6] 15 U.S.C. 78*o*–3.

[7] 15 U.S.C. 78*o*–3(b)(6).

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 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–2004–124 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–NASD–2004–124. 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, 450 Fifth Street, NW., Washington, DC 20549. 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–2004–124 and should be submitted on or before September 22, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E4–1984 Filed 8–31–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50267; File No. SR–NASD–2004–105]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change, and Amendment No. 1 Thereto, by National Association of Securities Dealers, Inc. To Amend Rule 4350(n) and IM–4350–7 To Provide Time Frames for Foreign Issuers and Foreign Private Issuers To Disclose Certain Code of Conduct Waivers

August 26, 2004.

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 July 8, 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 August 23, 2004, Nasdaq filed an Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

Nasdaq proposes to change NASD Rule 4350 and related interpretative material to make a clarifying amendment to that rule relating to foreign issuers. 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 in *italics*; proposed deletions are in brackets.[4]

* * * * *

Rule 4350. Qualitative Listing Requirements for Nasdaq National Market and Nasdaq SmallCap Market Issuers Except for Limited Partnerships

(a)–(m) No Change.

(n) Code of Conduct.

Each issuer shall adopt a code of conduct applicable to all directors, officers and employees, which shall be publicly available. A code of conduct satisfying this rule must comply with the definition of a ''code of ethics'' set out in Section 406(c) of the Sarbanes—Oxley Act of 2002 (''the Sarbanes-Oxley Act'') and any regulations promulgated thereunder by the Commission. See 17 C.F.R. 228.406 and 17 C.F.R. 229.406. In addition, the code must provide for an enforcement mechanism. Any waivers of the code for directors or executive officers must be approved by the Board. [Domestic issuers] *Issuers, other than foreign private issuers*, shall disclose such waivers in a Form 8–K within five business days. *Foreign private issuers shall disclose such waivers either in a Form 6–K or in the next Form 20–F or 40–F.*

* * * * *

IM–4350–1 through IM–4350–6

No Change.

IM–4350–7: Code of Conduct

Ethical behavior is required and expected of every corporate director, officer and employee whether or not a formal code of conduct exists. The requirement of a publicly available code of conduct applicable to all directors, officers and employees of an issuer is intended to demonstrate to investors that the board and management of Nasdaq issuers have carefully considered the requirement of ethical dealing and have put in place a system to ensure that they become aware of and take prompt action against any

[8] 17 CFR 200.30-3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Mary M. Dunbar, Vice President and General Counsel, Nasdaq, to Katherine England, Assistant Director, Division of Market Regulation, Commission, dated August 20, 2004 (''Amendment No. 1''). In Amendment No. 1, Nasdaq replaced the original filing in its entirety.

[4] Changes are marked to the rule text that appears in the electronic NASD manual found at *http://www.nasd.com*. No pending or approved rule filings would affect the text of these rules.