

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

#### 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](mailto:rule-comments@sec.gov). Please include File No. SR-ISE-2007-54 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-ISE-2007-54. 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 Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. 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-ISE-2007-54 and should be submitted on or before August 7, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>14</sup>

**J. Lynn Taylor,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-56044; File No. SR-NASDAQ-2007-024]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto To Provide Additional Transparency To How Nasdaq Applies Its Public Interest Authority

July 11, 2007.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on March 16, 2007, The NASDAQ Stock Market LLC ("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 substantially prepared by Nasdaq. On June 26, 2007, Nasdaq filed Amendment No. 1 to the proposed rule change. 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 the Substance of the Proposed Rule Change

Nasdaq proposes to modify Nasdaq IM-4300 to provide additional transparency to how Nasdaq applies its public interest authority. Nasdaq will implement the proposed rule upon approval. The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets.<sup>3</sup>

\* \* \* \* \*  
IM-4300. Use of Discretionary Authority

In order to further issuers' understanding of Rule 4300, Nasdaq is

<sup>14</sup> 17 CFR 200.30-3(a)(12).

<sup>15</sup> U.S.C. 78s(b)(1).

<sup>27</sup> 17 CFR 240.19b-4.

<sup>3</sup> Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at <http://www.complinet.com/nasdaq>.

adopting this Interpretive Material as a non-exclusive description of the circumstances in which the Rule is generally invoked.

Nasdaq may use its authority under Rule 4300 to deny initial or continued listing to an issuer when an individual with a history of regulatory misconduct is associated with the issuer. Such individuals are typically an officer, director, substantial security holder (as defined in Rule 4350(i)(5)), or consultant to the issuer. In making this determination, Nasdaq [shall] *will* consider a variety of factors, including: [the severity of the violation; whether it involved fraud or dishonesty; whether it was securities-related; whether the investing public was involved; when the violation occurred; how the individual has been employed since the violation; whether there are continuing sanctions against the individual; whether the individual made restitution; whether the issuer has taken effective remedial action; and the totality of the individual's relationship to the issuer.]

- *The nature and severity of the conduct, taken in conjunction with the length of time since the conduct occurred;*
- *whether the conduct involved fraud or dishonesty;*
- *whether the conduct was securities-related;*
- *whether the investing public was involved;*
- *how the individual has been employed since the violative conduct;*
- *whether there are continuing sanctions (either criminal or civil) against the individual;*
- *whether the individual made restitution;*
- *whether the issuer has taken effective remedial action; and*
- *the totality of the individual's relationship to the issuer, giving consideration to:*
  - the individual's current or proposed position;
  - the individual's current or proposed scope of authority;
  - the extent to which the individual has responsibility for financial accounting or reporting; and
  - the individual's equity interest.

Based on this review, Nasdaq may determine that the regulatory history rises to the level of a public interest concern, but may also consider whether remedial measures proposed by the issuer, if taken, would allay that concern. Examples of such remedial measures could include any or all of the following, as appropriate:

- The individual's resignation from officer and director positions, and/or other employment with the company;

- divestiture of stock holdings;
- terminations of contractual arrangements between the issuer and the individual; or

- the establishment of a voting trust surrounding the individual's shares.

Nasdaq staff is willing to discuss with issuers, on a case-by-case basis, what remedial measures may be appropriate to address public interest concerns, and for how long such remedial measures would be required. Alternatively, Nasdaq may conclude that a public interest concern is so serious that no remedial measure would be sufficient to alleviate it. In the event that Nasdaq staff [makes such a determination] denies initial or continued listing based on such public interest considerations, the issuer may seek review of that determination through the procedures set forth in the Rule 4800 Series. On consideration of such appeal, a listing qualifications panel comprised of persons independent of Nasdaq may accept, reject or modify the staff's recommendations by imposing conditions.

Nasdaq may also use its discretionary authority, for example, when an issuer files for protection under any provision of the federal bankruptcy laws or comparable foreign laws, when an issuer's independent accountants issue a disclaimer opinion on financial statements required to be audited, or when financial statements do not contain a required certification.

In addition, pursuant to its discretionary authority, Nasdaq [shall] will review the issuer's past corporate governance activities. This review may include activities taking place while the issuer is listed on Nasdaq or an exchange that imposes corporate governance requirements, as well as activities taking place after a formerly listed issuer is no longer listed on Nasdaq or such an exchange. Based on such review, and in accordance with the Rule 4800 Series, Nasdaq may take any appropriate action, including placing restrictions on or additional requirements for listing, or denying listing of a security, if Nasdaq determines that there have been violations or evasions of such corporate governance standards. Such determinations [shall] will be made on a case-by-case basis as necessary to protect investors and the public interest.

Although Nasdaq has broad discretion under Rule 4300 to impose additional or more stringent criteria, the Rule does not provide a basis for Nasdaq to grant exemptions or exceptions from the enumerated criteria for initial or continued listing, which may be granted

solely pursuant to rules explicitly providing such authority.

\* \* \* \* \*

## 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 modify Nasdaq IM-4300 to provide additional transparency to how Nasdaq applies its public interest authority. Specifically, Nasdaq proposes to clarify certain of the factors contained in this interpretive material to better guide companies. Nasdaq also proposes to change the formatting of portions of the text to enhance their readability and to add new language highlighting Nasdaq staff's willingness to discuss these concerns, and possible remedial measures, with companies. Nasdaq does not consider these changes to be substantive in nature.

#### 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 6 of the Act,<sup>4</sup> in general, and with section 6(b)(5) of the Act,<sup>5</sup> in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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. The proposed rule change clarifies how Nasdaq applies its public interest authority.

<sup>4</sup> 15 U.S.C. 78f.

<sup>5</sup> 15 U.S.C. 78f(b)(5).

### 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.

## 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2007-024 on the subject line.

#### Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2007-024. 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 Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of Nasdaq. 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-NASDAQ-2007-024 and should be submitted on or before August 7, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>6</sup>

**J. Lynn Taylor,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-56039; File No. SR-NASD-2007-021]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc., Notice of Filing of Proposed Rule Change To Amend the Definition of Public Arbitrator

July 10, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on March 12, 2007, the National Association of Securities Dealers, Inc. ("NASD"), through its wholly owned subsidiary, NASD Dispute Resolution, Inc. ("NASD Dispute Resolution") 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 NASD. 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

NASD Dispute Resolution proposes to amend the Code of Arbitration Procedure for Customer Disputes ("Customer Code"), and the Code of Arbitration Procedure for Industry Disputes ("Industry Code") to amend the definition of public arbitrator to add an annual revenue limitation. The text of the proposed rule change is available at NASD, <http://www.nasd.com>, and the Commission's Public Reference Room.

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

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD 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

NASD has taken numerous steps in recent years to ensure the integrity and neutrality of its arbitrator roster by addressing classification of arbitrators. For example, in August 2003, NASD proposed changes to Rules 10308 and 10312 of the Code of Arbitration Procedure ("Code") to modify the definitions of public and non-public arbitrators to further prevent individuals with significant ties to the securities industry from serving as public arbitrators.<sup>3</sup> The 2003 proposal:

<sup>3</sup> In July 2002, the SEC retained Professor Michael Perino to assess the adequacy of arbitrator disclosure requirements at NASD and at the New York Stock Exchange (NYSE). Professor Perino's report (Perino Report) concluded that undisclosed conflicts of interest were not a significant problem in arbitrations sponsored by self-regulatory organizations (SROs), such as NASD and the NYSE. However, the Perino Report recommended several amendments to SRO arbitrator classification and disclosure rules that might "provide additional assurance to investors that arbitrations are in fact neutral and fair." This proposal implemented the recommendations of the Perino Report and made several other related changes to the definitions of public and non-public arbitrators that were consistent with the Perino Report recommendations. The Perino Report is available at <http://www.sec.gov/pdf/arbconflict.pdf>.

- Increased from three years to five years the period for transitioning from a non-public to public arbitrator after leaving the securities industry.

- Clarified that the term "retired" from the industry includes anyone who spent a substantial part of his or her career in the industry.

- Prohibited anyone who has been associated with the industry for at least 20 years from ever becoming a public arbitrator, regardless of how long ago the association ended.

- Excluded from the public arbitrator roster attorneys, accountants, or other professionals whose firms have derived 10 percent or more of their annual revenue in the previous two years from clients involved in securities-related activities.

The proposal was approved by the SEC on April 16, 2004, and became effective on July 19, 2004.<sup>4</sup>

On July 22, 2005, NASD proposed a further amendment to Rule 10308 of the Code relating to arbitrator classification to prevent individuals with certain indirect ties to the securities industry from serving as public arbitrators. Specifically, NASD proposed to amend the definition of public arbitrator to exclude individuals who work for, or are officers or directors of, an entity that controls, is controlled by, or is under common control with, a broker/dealer, or who have a spouse or immediate family member who works for, or is an officer or director of, an entity that is in such a control relationship with a broker/dealer. NASD also proposed to amend Rule 10308 to clarify that individuals registered through broker-dealers may not be public arbitrators, even if they are employed by a non-broker-dealer (such as a bank). This rule filing was approved by the SEC on October 16, 2006, and became effective on January 15, 2007.<sup>5</sup>

Finally, during the time that the above changes were being made, NASD also had pending at the Commission a 2003 proposal to amend the Code to reorganize the rules into the Customer Code, the Industry Code, and a separate code for mediation. The final provisions of this proposal were approved by the Commission on January 24, 2007, and became effective on April 16, 2007.<sup>6</sup>

<sup>4</sup> See Securities Exchange Act Rel. No. 49573 (April 16, 2004), 69 FR 21871 (April 22, 2004) (SR-NASD-2003-95) (approval order). The changes were announced in Notice to Members 04-49 (June 2004).

<sup>5</sup> See Securities Exchange Act Rel. No. 54607 (Oct. 16, 2006), 71 FR 62026 (Oct. 20, 2006) (SR-NASD-2005-094) (approval order). The changes were announced in Notice to Members 06-64 (November 2006).

<sup>6</sup> See Securities Exchange Act Rel. No. 51856 (June 15, 2005), 70 FR 36442 (June 23, 2005) (SR-

<sup>6</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.