

Text of the Nasdaq Rule 4000 Series

*This version of the 4000 series is effective until April 13, 2009.*

**4000. The Nasdaq Stock Market**

**4100. General**

**4110. Use of Nasdaq on a Test Basis**

Notwithstanding the listing standards set forth in the Rule 4300 and 4400 Series, Nasdaq may at any time authorize the use of its systems on a test basis for whatever studies it considers necessary and appropriate.

Adopted by SEC Release 34-53128 (Jan. 13, 2006).

**4120. Trading Halts**

**(a) Authority to Initiate Trading Halts**

In circumstances in which Nasdaq deems it necessary to protect investors and the public interest, Nasdaq, pursuant to the procedures set forth in paragraph (c):

**(1)** may halt trading on Nasdaq of a Nasdaq-listed security to permit the dissemination of material news; or

**(2)** may halt trading on Nasdaq of a security listed on another national securities exchange during a trading halt imposed by such exchange to permit the dissemination of material news; or

**(3)** may halt trading on Nasdaq: (A) in a security listed on another national securities exchange when such exchange imposes a trading halt in that security because of an order imbalance or influx ("operational trading halt"); or (B) Nasdaq market makers in a security listed on Nasdaq, when the security is a derivative or component of a security listed on another national securities exchange and such exchange imposes an operational trading halt in that security. In the event that Nasdaq halts trading, Nasdaq Participants may commence quotations and trading at any time following initiation of operational trading halts, without regard to procedures for resuming trading set forth in paragraph (c); or

**(4)** may halt trading in an American Depositary Receipt ("ADR") or other security listed on Nasdaq, when the Nasdaq-listed security or the security underlying the ADR is listed on or registered with another national or foreign securities exchange or market, and the national or foreign securities exchange or market, or regulatory authority overseeing such exchange or market, halts trading in such security for regulatory reasons; or

**(5)** may halt trading in a security listed on Nasdaq when Nasdaq requests from the issuer information relating to:

**(A)** material news;

**(B)** the issuer's ability to meet Nasdaq listing qualification requirements, as set forth in the Rule 4300, 4400, and 4800 Series; or

**(C)** any other information which is necessary to protect investors and the public interest.

**(6)** may halt trading in a security listed on Nasdaq when

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**(A)** extraordinary market activity in the security is occurring, such as the execution of a series of transactions for a significant dollar value at prices substantially unrelated to the current market for the security, as measured by the national best bid and offer, and

**(B)** Nasdaq determines that such extraordinary market activity is likely to have a material effect on the market for the security; and

**(C)**

**(i)** Nasdaq believes that such extraordinary market activity is caused by the misuse or malfunction of an electronic quotation, communication, reporting, or execution system operated by, or linked to, Nasdaq;

**(ii)** After consultation with another national securities exchange trading the security on an unlisted trading privileges basis, Nasdaq believes that such extraordinary market activity is caused by the misuse or malfunction of an electronic quotation, communication, reporting, or execution system operated by, or linked to, such other national securities exchange; or

**(iii)** After consultation with FINRA regarding a FINRA facility trading the security, Nasdaq believes that such extraordinary market activity is caused by the misuse or malfunction of such FINRA facility or an electronic quotation, communication, reporting, or execution system linked to such FINRA facility.

**(7)** may halt trading in a security that is the subject of an Initial Public Offering on Nasdaq.

**(8)** may halt trading in an index warrant on Nasdaq whenever Nasdaq Regulation shall conclude that such action is appropriate in the interests of a fair and orderly market and to protect investors. Among the factors that may be considered are the following:

**(A)** trading has been halted or suspended in underlying stocks whose weighted value represents 20% or more of the index value;

**(B)** the current calculation of the index derived from the current market prices of the stocks is not available;

**(C)** other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

**(9)** may halt trading in a series of Portfolio Depository Receipts, Index Fund Shares or Managed Fund Shares (as defined in Rule 4420) listed on Nasdaq if the Intraday Indicative Value (as defined in Rule 4420) or the index value applicable to that series is not being disseminated as required, during the day in which the interruption to the dissemination of the Intraday Indicative Value or the index value occurs. If the interruption to the dissemination of the Intraday Indicative Value or the index value persists past the trading day in which it occurred, Nasdaq will halt trading no later than the beginning of the trading day following the interruption. Nasdaq may also exercise discretion to halt trading in a series of Portfolio Depository Receipts, Index Fund Shares or Managed Fund Shares based on a consideration of the following factors: (A) trading in underlying securities comprising the index applicable to that series has been halted in the primary market(s), (B) the extent to which trading has ceased in securities underlying the index, or (C) the presence of other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market.

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**(10)** shall halt trading in Derivative Securities Products (as defined in Rule 4120(b)(4)(A)) for which a net asset value ("NAV") (and in the case of Managed Fund Shares under Rule 4420(o), a Disclosed Portfolio) is disseminated if Nasdaq becomes aware that the NAV (or in the case of Managed Fund Shares, the Disclosed Portfolio) is not being disseminated to all market participants at the same time.

Nasdaq will maintain the trading halt until such time as Nasdaq becomes aware that the NAV (or in the case of Managed Fund Shares, the Disclosed Portfolio, as applicable) is available to all market participants or, in the case of Derivative Securities Products traded on Nasdaq pursuant to unlisted trading privileges, until such time trading resumes in the listing market.

**(b) Trading Halts for Trading of Certain Derivative Securities Products on Nasdaq Pursuant to Unlisted Trading Privileges**

**(1)** During Pre-Market Session. If a Derivative Securities Product begins trading on Nasdaq in the Pre-Market Session and subsequently a temporary interruption occurs in the calculation or wide dissemination of an applicable Required Value, Nasdaq may continue to trade the Derivative Securities Product for the remainder of the Pre-Market Session.

**(2)** During Regular Market Session. During the Regular Market Session, if a temporary interruption occurs in the calculation or wide dissemination of an applicable Required Value, and the listing market halts trading in the Derivative Securities Product, Nasdaq, upon notification by the listing market of a halt due to such temporary interruption, also shall immediately halt trading in the Derivative Securities Product on Nasdaq.

**(3)** Post-Market Session and Next Trading Day.

**(A)** If an applicable Required Value continues not to be calculated or widely disseminated after the close of the Regular Market Session, Nasdaq may trade the Derivative Securities Product in the Post-Market Session only if the listing market traded the Derivative Securities Product until the close of its regular trading session without a halt.

**(B)** If an applicable Required Value continues not to be calculated or widely disseminated as of the beginning of the Pre-Market Session on the next trading day, Nasdaq shall not commence trading of the Derivative Securities Product in the Pre-Market Session that day. If an interruption in the calculation or wide dissemination of an applicable Required Value continues, Nasdaq may resume trading in the Derivative Securities Product only if calculation and wide dissemination of the applicable Required Value resumes or trading in the Derivative Securities Product resumes in the listing market.

**(4)** Definitions. For purposes of this Rule:

**(A)** "Derivative Securities Product" means a series of Portfolio Depository Receipts, Index Fund Shares, Managed Fund Shares or Trust Issued Receipts (as defined in Nasdaq Rule 4420), a series of Commodity-Related Securities (as defined in Nasdaq Rule 4630), securities representing interests in unit investment trusts or investment companies, or any other UTP Derivative Security (as defined in Rule 4421).

**(B)** "Pre-Market Session" means the trading session that begins at 7:00 a.m. and continues until 9:30 a.m.

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(C) "Post-Market Session" means the trading session that begins at 4:00 p.m. or 4:15 p.m., and that continues until 8:00 p.m.

(D) "Regular Market Session" means the trading session from 9:30 am. until 4:00 p.m. or 4:15 p.m.

(E) "Required Value" shall mean (i) the value of any index or any commodity-related value underlying a Derivative Securities Product, (ii) the indicative optimized portfolio value, intraday indicative value, or other comparable estimate of the value of a share of a Derivative Securities Product updated regularly during the trading day, (iii) a net asset value in the case of a Derivative Securities Product for which a net asset value is disseminated, and (iv) a "disclosed portfolio" in the case of a Derivative Securities Product that is a series of managed fund shares or actively managed exchange-traded funds for which a disclosed portfolio is disseminated.

**(c) Procedure for Initiating a Trading Halt**

(1) Nasdaq issuers are required to notify Nasdaq of the release of certain material news prior to the release of such information to the public as required by Rules 4310(c)(16) and 4320(e)(14).

(2) Except in emergency situations, notification shall be provided directly to Nasdaq's MarketWatch Department through Nasdaq's electronic disclosure system available at [www.nasdaq.net](http://www.nasdaq.net). In emergency situations, issuers shall instead provide notification by telephone or facsimile.

(3) Upon receipt of information, from the issuer or other source, Nasdaq will promptly evaluate the information, estimate its potential impact on the market and determine whether a trading halt in the security is appropriate.

(4) Should Nasdaq determine that a basis exists under Rule 4120(a) for initiating a trading halt, the commencement of the trading halt will be effective at the time specified by Nasdaq in a notice posted on a publicly available Nasdaq website. In addition, Nasdaq shall disseminate notice of the commencement of a trading halt through major wire services.

(5) Trading in a halted security shall resume at the time specified by Nasdaq in a notice posted on a publicly available Nasdaq website. In addition, Nasdaq shall disseminate notice of the resumption of trading through major wire services.

**(6)**

(A) In the case of a trading halt under Rule 4120(a)(6) based on the misuse or malfunction of an electronic quotation, communication, reporting, or execution system that is not operated by Nasdaq, Nasdaq will promptly contact the operator of the system in question (as well as any national securities exchange or FINRA facility to which such system is linked) to ascertain information that will assist Nasdaq in determining whether a misuse or malfunction has occurred, what effect the misuse or malfunction is having on trading in a security, and what steps are being taken to address the misuse or malfunction. If the operator of the system is unavailable when contacted by Nasdaq, Nasdaq will continue efforts to contact the operator of the system to ascertain information that will assist Nasdaq in determining whether the trading halt should be terminated.

(B) A trading halt initiated under Rule 4120(a)(6) shall be terminated as soon as Nasdaq determines either that the system misuse or malfunction that caused the extraordinary market activity will no

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longer have a material effect on the market for the security or that system misuse or malfunction is not the cause of the extraordinary market activity.

(7)

**(A)** A trading halt initiated under Rule 4120(a)(1), (4), (5), (6), (9) or (10) or Rule 4120(b) shall be terminated when Nasdaq releases the security for trading. Prior to terminating the halt, there will be a 5-minute Display Only Period during which market participants may enter quotations and orders in that security in Nasdaq systems. At the conclusion of the 5-minute Display Only Period, the security shall be released for trading unless Nasdaq extends the Display Only Period for an additional 1-minute period pursuant to subparagraph (C) below. At the conclusion of the Display Only Period, trading shall immediately resume pursuant to Rule 4753.

**(B)** A trading halt initiated under Rule 4120(a)(7) shall be terminated when Nasdaq releases the security for trading. Prior to terminating the halt, there will be a 15-minute Display Only Period during which market participants may enter quotes and orders in that security in Nasdaq systems. At the conclusion of the 15-minute Display Only Period, the security shall be released for trading unless Nasdaq extends the Display Only Period for up to six additional 5-minute Display Only Periods pursuant to subparagraph (C) below. At the conclusion of the Display Only Period, trading shall immediately resume pursuant to Rule 4753.

**(C)** If at the end of a Display Only Period, Nasdaq detects a liquidity imbalance in the security, Nasdaq will extend the Display Only Period as permitted under subparagraphs (A) and (B) above. Liquidity Imbalances shall be established when (i) the Current Reference Prices, as defined in Rule 4705(a)(2), disseminated 15 seconds and immediately prior to the end of the Display Only Period differ by more than the greater of 5 percent or 50 cents, or (ii) all buy or sell market orders will not be executed in the cross.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-019 eff. July 28, 2006; amended by SR-NASDAQ-2006-043 eff. Oct. 16, 2006; amended by SR-NASDAQ-2006-001 eff. Oct. 16, 2006; amended by SR-NASDAQ-2006-050 eff. Feb. 9, 2007; amended by SR-NASDAQ-2007-016 eff. Mar. 5, 2007; amended by SR-NASDAQ-2007-073 eff. Aug. 20, 2007; amended by SR-NASDAQ-2007-029 eff. Sept. 4, 2007; amended by SR-NASDAQ-2008-039 eff. June 13, 2008; amended by SR-NASDAQ-2008-054 eff. June 13, 2008; amended by SR-NASDAQ-2008-046 eff. July 7, 2008; amended by SR-NASDAQ-2009-004 eff. January 30, 2009.

**IM-4120-1. Disclosure of Material Information**

Rules 4310(c)(16) and 4320(e)(14) require that, except in unusual circumstances, Nasdaq issuers disclose promptly to the public through any Regulation FD compliant method (or combination of methods) of disclosure any material information which would reasonably be expected to affect the value of their securities or influence investors' decisions. Nasdaq issuers must notify Nasdaq in the manner described below of the release of such material information that involves any of the events set forth below prior to its release to the public. Nasdaq recommends that Nasdaq issuers provide such notification at least ten minutes before such release. Under unusual circumstances issuers may not be required to make public disclosure of material events; for example, where it is possible to maintain confidentiality of those events and immediate public disclosure would prejudice the ability of the company to pursue its legitimate corporate objectives. However, Nasdaq issuers remain obligated to disclose this information to Nasdaq upon request pursuant to Rules 4310(c)(15) or 4320(e)(13).

Whenever unusual market activity takes place in a Nasdaq issuer's securities, the issuer normally should determine whether there is material information or news which should be disclosed. If rumors

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or unusual market activity indicate that information on impending developments has become known to the investing public, or if information from a source other than the issuer becomes known to the investing public, a clear public announcement may be required as to the state of negotiations or development of issuer plans. Such an announcement may be required, even though the issuer may not have previously been advised of such information or the matter has not yet been presented to the issuer's Board of Directors for consideration. It may also be appropriate, in certain circumstances, to publicly deny false or inaccurate rumors which are likely to have, or have had, an effect on the trading in its securities or would likely have an influence on investment decisions.

### *Notification to Nasdaq MarketWatch Department*

Nasdaq issuers must notify Nasdaq's MarketWatch Department prior to the distribution of certain material news. Except in emergency situations, this notification must be made through Nasdaq's electronic disclosure system available at [www.nasdaq.net](http://www.nasdaq.net). In emergency situations, issuers shall instead provide notification by telephone or facsimile. Examples of an emergency situation include: lack of computer or internet access; technical problems on either the issuer or Nasdaq system or an incompatibility between those systems; and a material development such that no draft disclosure document exists, but immediate notification to MarketWatch is important based on the material event.

If a Nasdaq issuer repeatedly fails to either notify Nasdaq prior to the distribution of material news, or use the electronic disclosure system when Nasdaq finds no emergency situation existed, Nasdaq may issue a Staff Determination (pursuant to the Rule 4800 Series) that is a public reprimand letter or, in extreme cases, a Staff Determination to delist the company's securities. In determining whether to issue a public reprimand letter, Nasdaq will consider whether the issuer has demonstrated a pattern of failures, whether the issuer has been contacted concerning previous violations, and whether the issuer has taken steps to assure that future violations will not occur.

### *Trading Halts*

A trading halt benefits current and potential shareholders by halting all trading in any Nasdaq securities until there has been an opportunity for the information to be disseminated to the public. This decreases the possibility of some investors acting on information known to them but which is not known to others. A trading halt provides the public with an opportunity to evaluate the information and consider it in making investment decisions. It also alerts the marketplace to the fact that news has been released.

Nasdaq's MarketWatch Department monitors real time trading in all Nasdaq securities during the trading day for price and volume activity. In the event of certain price and volume movements, the MarketWatch Department may contact an issuer and its market makers in order to ascertain the cause of the unusual market activity. The MarketWatch Department treats the information provided by the issuer and other sources in a highly confidential manner, and uses it to assess market activity and assist in maintaining fair and orderly markets. A Nasdaq listing includes an obligation to disclose to the MarketWatch Department information that the issuer is not otherwise disclosing to the investing public or the financial community. On, occasion, changes in market activity prior to the issuer's release of material information may indicate that the information has become known to the investing public. Changes in market activity also may occur when there is a release of material information by a source other than the issuer, such as when a Nasdaq issuer is subject to an unsolicited take-over bid by another company. Depending on the nature of the event and the issuer's views regarding the business advisability of disclosing the information, the MarketWatch Department may work with the issuer to accomplish a timely release of the information. Furthermore, depending on the materiality of the information and the anticipated affect of the information on the price of the issuer's securities, the

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MarketWatch Department may advise the issuer that a temporary trading halt is appropriate to allow for full dissemination of the information and to maintain an orderly market. The institution of a temporary trading halt pending the release of information is not a reflection on the value of the securities halted. Such trading halts are instituted, among other reasons, to insure that material information is fairly and adequately disseminated to the investing public and the marketplace, and to provide investors with the opportunity to evaluate the information in making investment decisions. A trading halt normally lasts one half hour but may last longer if a determination is made that news has not been adequately disseminated or that the original or an additional basis under Rule 4120 exists for continuing the trading halt.

The MarketWatch Department is required to keep non-public information, confidential and to use such information only for regulatory purposes.

Issuers are required to notify the MarketWatch Department of the release of material information included in the following list of events prior to the release of such information to the public. It should also be noted that every development that might be reported to Nasdaq in these areas would not necessarily be deemed to warrant a trading halt. In addition to the following list of events, Nasdaq encourages issuers to avail themselves of the opportunity for advance notification to the MarketWatch Department in situations where they believe, based upon their knowledge of the significance of the information, that a temporary trading halt may be necessary or appropriate.

- (a) Financial-related disclosures, including quarterly or yearly earnings, earnings restatements, pre-announcements or "guidance."
- (b) Corporate reorganizations and acquisitions, including mergers, tender offers, asset transactions and bankruptcies or receiverships.
- (c) New products or discoveries, or developments regarding customers or suppliers (e.g., significant developments in clinical or customer trials, and receipt or cancellation of a material contract or order).
- (d) Senior management changes of a material nature or a change in control.
- (e) Resignation or termination of independent auditors, or withdrawal of a previously issued audit report.
- (f) Events regarding the issuer's securities — e.g., defaults on senior securities, calls of securities for redemption, repurchase plans, stock splits or changes in dividends, changes to the rights of security holders, or public or private sales of additional securities.
- (g) Significant legal or regulatory developments.
- (h) Any event requiring the filing of a Form 8-K.

### *Use of Regulation FD Compliant Methods in the Disclosure of Material Information*

Regardless of the method of disclosure that an issuer chooses to utilize, issuers are required to notify the MarketWatch Department of the release of material information that involves any of the events set forth above prior to its release to the public. Nasdaq recommends that issuers provide such notification at least ten minutes before such release. When an issuer chooses to utilize a Regulation FD compliant method for disclosure other than a press release or Form 8-K, the issuer will be required

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to provide prior notice to the MarketWatch Department of: 1) the press release announcing the logistics of the future disclosure event; and 2) a descriptive summary of the material information to be announced during the disclosure event if the press release does not contain such a summary.

Depending on the materiality of the information and the anticipated effect of the information on the price of the issuer's securities, the MarketWatch Department may advise the issuer that a temporary trading halt is appropriate to allow for full dissemination of the information and to maintain an orderly market. The MarketWatch Department will assess with issuers utilizing methods of disclosure other than a press release or Form 8-K the timing within the disclosure event when the issuer will cover the material information so that the halt can be commenced accordingly. Issuers will be responsible for promptly alerting the MarketWatch Department of any significant changes to the previously outlined disclosure timeline. Issuers are reminded that the posting of information on its own website is not by itself considered a sufficient method of public disclosure under Regulation FD, and as a result, under Nasdaq rules.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-019 eff. July 28, 2006; amended by SR-NASDAQ-2007-029 eff. Sept. 4, 2007.

### **IM-4120-2. Disclosure of Written Notice of Staff Determination**

Rules 4803(a) and 4804(b) require that an issuer make a public announcement through the news media disclosing the receipt of (i) a notice that the issuer does not meet a listing standard set forth in the Rule 4000 Series, and (ii) a Staff Determination to limit or prohibit continued listing of the issuer's securities under Rule 4804(a) as a result of the issuer's failure to comply with the continued listing requirements. Such public announcement shall be made as promptly as possible, but not more than four business days following the receipt of the notification or the Staff Determination, as applicable. If the public announcement is not made by the issuer within the time allotted, trading of its securities shall be halted, even if the issuer appeals the Staff Determination as set forth in Rule 4805. If the issuer fails to make the public announcement by the time that the Listing Qualifications Panel issues its decision, that decision will also determine whether to delist the issuer's securities for failure to make the public announcement.

Rules 4803(a) and 4804(b) do not relieve an issuer of its disclosure obligation under the federal securities laws, nor should it be construed as providing a safe harbor under the federal securities laws. It is suggested that the issuer consult with corporate/securities counsel in assessing its disclosure obligations under the federal securities laws.

Adopted by SEC Release 34-53128 (Jan. 13, 2006).

### **4121. Market Closings**

Upon SEC request (including, but not limited to, in accordance with standing SEC requests regarding market closings), Nasdaq will halt all domestic trading in both securities listed on Nasdaq and securities traded on Nasdaq pursuant to unlisted trading privileges if other major securities markets initiate marketwide trading halts in response to extraordinary market conditions.

Adopted by SEC Release 34-53128 (Jan. 13, 2006).

### **4200. Definitions**

**(a)** For purposes of the Rule 4000 Series, unless the context requires otherwise:

**(1)** "Act" means the Securities Exchange Act of 1934.



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(2) "Best efforts offering" means an offering of securities by members of a selling group under an agreement which imposes no financial commitment on the members of such group to purchase any such securities except as they may elect to do so.

(3) "Cash flow" means cash funds provided from limited partnership operations, including lease payments on net leases from builders and sellers, without deduction for depreciation, but after deducting cash funds used to pay all other expenses, debt payments, capital improvements and replacements.

(4) "Consolidated Quotations Service" (CQS) means the consolidated quotation collection system for securities listed on an exchange other than Nasdaq implementing SEC Rule 602.

(5) "Country of Domicile" means the country under whose laws an issuer is organized or incorporated.

(6) "Covered security" means a security described in Section 18(b) of the Securities Act of 1933.

(7) Reserved

(8) Reserved

(9) Reserved

(10) "Direct Registration Program" means any program by an issuer, directly or through its transfer agent, whereby a shareholder may have securities registered in the shareholder's name on the books of the issuer or its transfer agent without the need for a physical certificate to evidence ownership.

(11) "Dissenting Limited Partner" means a person who, on the date on which soliciting material is mailed to investors, is a holder of a beneficial interest in a limited partnership that is the subject of a limited partnership rollup transaction, and who casts a vote against the transaction and complies with procedures established by Nasdaq, except that for purposes of an exchange or tender offer, such person shall file an objection in writing under the rules of Nasdaq during the period in which the offer is outstanding. Such objection in writing shall be filed with the party responsible for tabulating the votes or tenders.

(12) "ESOP" means employee stock option plan.

(13) "Firm commitment offering" means an offering of securities by participants in a selling syndicate under an agreement that imposes a financial commitment on participants in such syndicate to purchase such securities.

(14) "Family Member" means a person's spouse, parents, children and siblings, whether by blood, marriage or adoption, or anyone residing in such person's home.

(15) "Independent director" means a person other than an executive officer or employee of the company or any other individual having a relationship which, in the opinion of the issuer's board of directors, would interfere with the exercise of independent judgement in carrying out the responsibilities of a director. The following persons shall not be considered independent:

(A) a director who is, or at any time during the past three years was, employed by the company;

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**(B)** a director who accepted or who has a Family Member who accepted any compensation from the company in excess of \$120,000 during any period of twelve consecutive months within the three years preceding the determination of independence, other than the following:

**(i)** compensation for board or board committee service;

**(ii)** compensation paid to a Family Member who is an employee (other than an executive officer) of the company; or

**(iii)** benefits under a tax-qualified retirement plan, or non-discretionary compensation,

Provided, however, that in addition to the requirements contained in this paragraph (B), audit committee members are also subject to additional, more stringent requirements under Rule 4350(d).

**(C)** a director who is a Family Member of an individual who is, or at any time during the past three years was, employed by the company as an executive officer;

**(D)** a director who is, or has a Family Member who is, a partner in, or a controlling shareholder or an executive officer of, any organization to which the company made, or from which the company received, payments for property or services in the current or any of the past three fiscal years that exceed 5% of the recipient's consolidated gross revenues for that year, or \$200,000, whichever is more, other than the following:

**(i)** payments arising solely from investments in the company's securities; or

**(ii)** payments under non-discretionary charitable contribution matching programs.

**(E)** a director of the issuer who is, or has a Family Member who is, employed as an executive officer of another entity where at any time during the past three years any of the executive officers of the issuer serve on the compensation committee of such other entity; or

**(F)** a director who is, or has a Family Member who is, a current partner of the company's outside auditor, or was a partner or employee of the company's outside auditor who worked on the company's audit at any time during any of the past three years.

**(G)** in the case of an investment company, in lieu of paragraphs (A)-(F), a director who is an "interested person" of the company as defined in Section 2(a)(19) of the Investment Company Act of 1940, other than in his or her capacity as a member of the board of directors or any board committee.

**(16)** "Index warrants" means instruments that are direct obligations of the issuing company, either exercisable throughout their life (i.e., American style) or exercisable only on their expiration (i.e., European style), entitling the holder to a cash settlement in U.S. dollars to the extent that the index has declined below (for a put warrant) or increased above (for a call warrant) the pre-stated cash settlement value of the index. Index warrants may be based on either foreign or domestic indexes.

**(17)** "Limited partner" or "investor in a limited partnership" means the purchaser of an interest in a direct participation program, as defined in Nasdaq Rule 2810, that is a limited partnership who is not involved in the day-to-day management of the limited partnership and bears limited liability.

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**(18)** "Limited partnership" means an unincorporated association that is a direct participation program, as defined in Nasdaq Rule 2810, organized as a limited partnership whose partners are one or more general partners and one or more limited partners, which conforms to the provisions of the Revised Uniform Limited Partnership Act or the applicable statute that regulates the organization of such partnership.

**(19)** "Limited Partnership Rollup Transaction" means a transaction involving the combination or reorganization of one or more limited partnerships, directly or indirectly, in which:

**(A)** some or all of the investors in any of such limited partnerships will receive new securities, or securities in another entity, that will be reported under a transaction reporting plan declared effective before January 1, 1991, by the Commission under Section 11A of the Act <sup>1</sup>;

**(B)** any of the investors' limited partnership securities are not, as of the date of the filing, reported under a transaction reporting plan declared effective before January 1, 1991, by the Commission under Section 11A of the Act;

**(C)** investors in any of the limited partnerships involved are subject to a significant adverse change with respect to voting rights, the term of existence of the entity, management compensation, or investment objectives; and

**(D)** any of such investors are not provided an option to receive or retain a security under substantially the same terms and conditions as the original issue. Notwithstanding the foregoing definition, a "limited partnership rollup transaction" does not include:

**(i)** a transaction that involves only a limited partnership or partnerships having an operating policy or practice of retaining cash available for distribution and reinvesting proceeds from the sale, financing, or refinancing of assets in accordance with such criteria as the Commission determines appropriate;

**(ii)** a transaction involving only limited partnerships wherein the interests of the limited partners are repurchased, recalled or exchanged pursuant to the terms of the pre-existing limited partnership agreements for securities in an operating company specifically identified at the time of the formation of the original limited partnership;

**(iii)** a transaction in which the securities to be issued or exchanged are not required to be and are not registered under the Securities Act of 1933;

**(iv)** a transaction that involves only issuers that are not required to register or report under Section 12 of the Act, both before and after the transaction;

**(v)** a transaction, except as the Commission may otherwise provide for by rule for the protection of investors, involving the combination or reorganization of one or more limited partnerships in which a non-affiliated party succeeds to the interests of the general partner or sponsor, if:

a. such action is approved by not less than 66-2/3 percent of the outstanding units of each of the participating limited partnerships; and

b. as a result of the transaction, the existing general partners will receive only compensation to which they are entitled as expressly provided for in the pre-existing partnership agreements; or

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**(vi)** a transaction, except as the Commission may otherwise provide for by rule for the protection of investors, in which the securities offered to investors are securities of another entity that are reported under a transaction reporting plan declared effective before January 1, 1991, by the Commission under Section 11A of the Act<sup>2</sup>; if:

a. such other entity was formed, and such class of securities was reported and regularly traded, not less than 12 months before the date on which soliciting material is mailed to investors; and

b. the securities of that entity issued to investors in the transaction do not exceed 20 percent of the total outstanding securities of the entity, exclusive of any securities of such class held by or for the account of the entity or subsidiary of the entity.

**(vii)** a transaction involving only entities registered under the Investment Company Act of 1940 or any Business Development Company as defined in Section 2(a)(48) of that Act.

**(20)** "Listed securities" means securities listed on Nasdaq or another national securities exchange.

**(21)** "Management fee" means a fee paid to the sponsor, general partner(s), their affiliates, or other persons for management and administration of a limited partnership.

**(22)** "Market Value" means the closing bid price multiplied by the measure to be valued (e.g., an issuer's market value of public float is equal to the closing bid price multiplied by an issuer's public float).

**(23)** "Member" means a broker or dealer admitted to membership in Nasdaq.

**(24)** "Nasdaq market maker" means a dealer that, with respect to a security, holds itself out (by entering quotations in the Nasdaq Market Center) as being willing to buy and sell such security for its own account on a regular and continuous basis and that is registered as such.

**(25)** "Nasdaq Global Market" or "NGM" is a distinct tier of Nasdaq comprised of two segments: the Nasdaq Global Market and the Nasdaq Global Select Market. The Nasdaq Global Market is the successor to the Nasdaq National Market.

**(26)** "Nasdaq Global Market security" or "NGM security" means any security listed on Nasdaq which (1) satisfies all applicable requirements of the Rule 4300 Series and substantially meets the criteria set forth in the Rule 4400 Series; (2) is a right to purchase such security; (3) is a warrant to subscribe to such security; or (4) is an index warrant which substantially meets the criteria set forth in Rule 4420.

**(27)** "The Nasdaq Capital Market" is a distinct tier of Nasdaq comprised of securities that meet the requirements of and are listed as Nasdaq Capital Market securities.

**(28)** "Nasdaq Capital Market security" means any security listed on The Nasdaq Capital Market which (1) satisfies all applicable requirements of the Rule 4300 Series but that is not a Nasdaq Global Market security; (2) is a right to purchase such security; or (3) is a warrant to subscribe to such security.

**(29)** "Nasdaq Global Select Market" or "NGSM" is a segment of the Nasdaq Global Market comprised of NGM securities that met the requirements for initial inclusion contained in Rules 4425, 4426 and 4427.

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**(30)** "Nasdaq Global Select Market security" or "NGSM security" means any security listed on Nasdaq and included in the Nasdaq Global Select segment of the Nasdaq Global Market.

**(31)** "Normal unit of trading" means 100 shares of a security unless, with respect to a particular security, Nasdaq determines that a normal unit of trading shall constitute other than 100 shares. If a normal unit of trading is other than 100 shares, a special identifier shall be appended to the issuer's Nasdaq symbol.

**(32)** "Public holders" of a security include both beneficial holders and holders of record, but does not include any holder who is, either directly or indirectly, an executive officer, director, or the beneficial holder of more than 10% of the total shares outstanding.

**(33)** "Round lot holder" means a holder of a normal unit of trading. The number of beneficial holders will be considered in addition to holders of record.

**(34)** "SEC Rule 100," "SEC Rule 101," "SEC Rule 103," and "SEC Rule 104" means the rules adopted by the Commission under Regulation M, and any amendments thereto.

**(35)** "Solicitation expenses" means direct marketing expenses incurred by a member in connection with a limited partnership rollup transaction, such as telephone calls, broker/dealer fact sheets, members' legal and other fees related to the solicitation, as well as direct solicitation compensation to members.

**(36)** "Stabilizing bid" means the terms "stabilizing" or to "stabilize" as defined in SEC Rule 100.

**(37)** "Substitution Listing Event" means a reverse stock split, re-incorporation or a change in the issuer's place of organization, the formation of a holding company that replaces a listed company, reclassification or exchange of an issuer's listed shares for another security, the listing of a new class of securities in substitution for a previously-listed class of securities, or any technical change whereby the shareholders of the original company receive a share-for-share interest in the new company without any change in their equity position or rights.

**(38)** "Total holders" of a security include both beneficial holders and holders of record.

**(39)** "Transaction costs" means costs incurred in connection with a limited partnership rollup transaction, including printing and mailing the proxy, prospectus or other documents; legal fees not related to the solicitation of votes or tenders; financial advisory fees; investment banking fees; appraisal fees; accounting fees; independent committee expenses; travel expenses; and all other fees related to the preparatory work of the transaction, but not including costs that would have otherwise been incurred by the subject limited partnerships in the ordinary course of business or solicitation expenses.

**(40)** "Underwriting Activity Report" is a report provided by the Corporate Financing Department of FINRA in connection with a distribution of securities subject to SEC Rule 101 pursuant to NASD Rule 2710(b)(11) and includes forms that are submitted by members to comply with their notification obligations under Rules 4614, 4619, and 4623.

**(b)** For purposes of Rules 4614, 4619, and 4623, the following terms shall have the meanings as defined in SEC Rule 100: "affiliated purchaser," "distribution," "distribution participant," "independent

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bid," "net purchases," "passive market maker," "penalty bid," "reference security," "restricted period," "subject security," and "syndicate covering transaction."

(c) All forms and applications relating to listing of securities on Nasdaq referenced in the Rule 4000 Series are available on [www.nasdaq.com](http://www.nasdaq.com).

Adopted by SEC Release 34-53128 (Jan. 13, 2006); Amended by SR-NASDAQ-2006-007 eff. May 8, 2006; amended by SR-NASDAQ-2006-021 eff. Oct. 6, 2006; amended by SR-NASDAQ-2006-041 eff. Mar. 13, 2007; amended by SR-NASDAQ-2006-032 eff. Apr 18, 2007; amended by SR-NASDAQ-2008-037 eff. June 17, 2008; amended by SR-NASDAQ-2008-054 eff. June 13, 2008; amended by SR-NASDAQ-2008-053 eff. August 8, 2008.

<sup>1</sup> Transaction reporting plans under Section 11A were declared effective prior to January 1, 1991 for the Nasdaq National Market, the New York Stock Exchange, and the American Stock Exchange.

<sup>2</sup> Transaction reporting plans under Section 11A were declared effective prior to January 1, 1991 for the Nasdaq National Market, the New York Stock Exchange, and the American Stock Exchange.

### **IM-4200. Definition of Independence — Rule 4200(a)(15)**

It is important for investors to have confidence that individuals serving as independent directors do not have a relationship with the listed company that would impair their independence. The board has a responsibility to make an affirmative determination that no such relationships exist through the application of Rule 4200. Rule 4200 also provides a list of certain relationships that preclude a board finding of independence. These objective measures provide transparency to investors and companies, facilitate uniform application of the rules, and ease administration. Because Nasdaq does not believe that ownership of company stock by itself would preclude a board finding of independence, it is not included in the aforementioned objective factors. It should be noted that there are additional, more stringent requirements that apply to directors serving on audit committees, as specified in Rule 4350.

The Rule's reference to the "company" includes any parent or subsidiary of the company. The term "parent or subsidiary" is intended to cover entities the issuer controls and consolidates with the issuer's financial statements as filed with the Commission (but not if the issuer reflects such entity solely as an investment in its financial statements). The reference to executive officer means those officers covered in SEC Rule 16a-1(f) under the Act. In the context of the definition of Family Member under Rule 4200(a)(14), the reference to marriage is intended to capture relationships specified in the Rule (parents, children and siblings) that arise as a result of marriage, such as "in-law" relationships.

The three year look-back periods referenced in paragraphs (A), (C), (E) and (F) of the Rule commence on the date the relationship ceases. For example, a director employed by the company is not independent until three years after such employment terminates.

For purposes of paragraph (A) of the Rule, employment by a director as an executive officer on an interim basis shall not disqualify that director from being considered independent following such employment, provided the interim employment did not last longer than one year. A director would not be considered independent while serving as an interim officer. Similarly, for purposes of paragraph (B) of the Rule, compensation received by a director for former service as an interim executive officer need not be considered as compensation in determining independence after such service, provided such interim employment did not last longer than one year. Nonetheless, the issuer's board of directors still must consider whether such former employment and any compensation received would interfere with the director's exercise of independent judgment in carrying out the responsibilities of a director. In addition, if the director participated in the preparation of the company's financial

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statements while serving as an interim executive officer. Rule 4350(d)(2)(A)(iii) would preclude service on the audit committee for three years.

Paragraph (B) of the Rule is generally intended to capture situations where a compensation is made directly to (or for the benefit of) the director or a Family Member of the director. For example, consulting or personal service contracts with a director or Family Member of the director would be analyzed under paragraph (B) of the Rule. In addition, political contributions to the campaign of a director or a Family Member of the director would be considered indirect compensation under paragraph (B). Non-preferential payments made in the ordinary course of providing business services (such as payments of interest or proceeds related to banking services or loans by an issuer that is a financial institution or payment of claims on a policy by an issuer that is an insurance company), payments arising solely from investments in the company's securities and loans permitted under Section 13(k) of the Act will not preclude a finding of director independence as long as the payments are non-compensatory in nature. Depending on the circumstances, a loan or payment could be compensatory if, for example, it is not on terms generally available to the public.

Paragraph (D) of the Rule is generally intended to capture payments to an entity with which the director or Family Member of the director is affiliated by serving as a partner, controlling shareholder or executive officer of such entity. Under exceptional circumstances, such as where a director has direct, significant business holdings, it may be appropriate to apply the corporate measurements in paragraph (D), rather than the individual measurements of paragraph (B). Issuers should contact Nasdaq if they wish to apply the Rule in this manner. The reference to a partner in paragraph (D) is not intended to include limited partners. It should be noted that the independence requirements of paragraph (D) of the Rule are broader than SEC Rule 10A-3(e)(8) under the Act.

Under paragraph (D), a director who is, or who has a Family Member who is, an executive officer of a charitable organization may not be considered independent if the company makes payments to the charity in excess of the greater of 5% of the charity's revenues or \$200,000. However, Nasdaq encourages companies to consider other situations where a director or their Family Member and the company each have a relationship with the same charity when assessing director independence.

For purposes of determining whether a lawyer is eligible to serve on an audit committee, SEC Rule 10A-3 under the Act generally provides that any partner in a law firm that receives payments from the issuer is ineligible to serve on that issuer's audit committee. In determining whether a director may be considered independent for purposes other than the audit committee, payments to a law firm would generally be considered under Rule 4200(a)(15)(D), which looks to whether the payment exceeds the greater of 5% of the recipient's gross revenues or \$200,000; however, if the firm is a sole proprietorship, Rule 4200(a)(15)(B), which looks to whether the payment exceeds \$120,000, applies.

Paragraph (G) of the Rule provides a different measurement for independence for investment companies in order to harmonize with the Investment Company Act of 1940. In particular, in lieu of paragraphs (A)-(F), a director who is an "interested person" of the company as defined in Section 2(a)(19) of the Investment Company Act of 1940, other than in his or her capacity as a member of the board of directors or any board committee, shall not be considered independent.

Adopted by SEC Release 34-53128 (Jan. 13, 2006). Amended by SR-NASDAQ-2006-021 eff. Oct. 6, 2006; amended by SR-NASDAQ-2006-041 eff. Mar. 13, 2007; amended by SR-NASDAQ-2008-053 eff. August 8, 2008.

**4200-1. [Deleted]**

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Adopted by SEC Release 34-53128 (Jan. 13, 2006); deleted by SR-NASDAQ-2006-033 eff. August 25, 2006.

#### **4300. Listing Requirements for Nasdaq Securities**

##### **Listing Requirements for Nasdaq Securities**

Nasdaq is entrusted with the authority to preserve and strengthen the quality of and public confidence in its market. Nasdaq stands for integrity and ethical business practices in order to enhance investor confidence, thereby contributing to the financial health of the economy and supporting the capital formation process. Nasdaq issuers, from new public companies to companies of international stature, are publicly recognized as sharing these important objectives.

Nasdaq, therefore, in addition to applying the enumerated criteria set forth in the Rule 4300 and 4400 Series, has broad discretionary authority over the initial and continued listing of securities in Nasdaq in order to maintain the quality of and public confidence in its market, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest. Nasdaq may use such discretion to deny initial listing, apply additional or more stringent criteria for the initial or continued listing of particular securities, or suspend or delist particular securities based on any event, condition, or circumstance that exists or occurs that makes initial or continued listing of the securities on Nasdaq inadvisable or unwarranted in the opinion of Nasdaq, even though the securities meet all enumerated criteria for initial or continued listing on Nasdaq. In all circumstances where the Listing Department (as defined in Rule 4801) exercises its authority under Rule 4300, the Listing Department shall issue a Staff Determination under Rule 4804, and in all circumstances where an Adjudicatory Body (as defined in Rule 4801) exercises such authority, the use of the authority shall be described in the written decision of the Adjudicatory Body.

Adopted by SEC Release 34-53128 (Jan. 13, 2006).

##### **IM-4300-1. Use of Discretionary Authority**

In order to further issuers' understanding of Rule 4300, Nasdaq is 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 will consider a variety of factors, including:

- 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;



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- 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 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 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

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standards. Such determinations 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.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2007-024 eff Aug. 21, 2007; amended by SR-NASDAQ-2008-013 eff. July 25, 2008.

### **IM-4300-2. Listing of Companies Whose Business Plan is to Complete One or More Acquisitions**

Generally, Nasdaq will not permit the initial or continued listing of a company that has no specific business plan or that has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies.

However, in the case of a company whose business plan is to complete an initial public offering and engage in a merger or acquisition with one or more unidentified companies within a specific period of time, Nasdaq will permit the listing if the company meets all applicable initial listing requirements, as well as the conditions described below.

- (a) At least 90% of the gross proceeds from the initial public offering and any concurrent sale by the company of equity securities must be deposited in a trust account maintained by an independent trustee, an escrow account maintained by an "insured depository institution," as that term is defined in Section 3(c)(2) of the Federal Deposit Insurance Act or in a separate bank account established by a registered broker or dealer (collectively, a "deposit account").
- (b) Within 36 months of the effectiveness of its IPO registration statement, or such shorter period that the company specifies in its registration statement, the company must complete one or more business combinations having an aggregate fair market value of at least 80% of the value of the deposit account (excluding any deferred underwriters fees and taxes payable on the income earned on the deposit account) at the time of the agreement to enter into the initial combination.
- (c) Until the company has satisfied the condition in paragraph (b) above, each business combination must be approved by a majority of the company's independent directors.
- (d) Until the company has satisfied the condition in paragraph (b) above, each business combination must be approved by a majority of the shares of common stock voting at the meeting at which the combination is being considered.
- (e) Until the company has satisfied the condition in paragraph (b) above, public shareholders voting against a business combination must have the right to convert their shares of common stock into a pro rata share of the aggregate amount then in the deposit account (net of taxes payable and amounts distributed to management for working capital purposes) if the business combination is approved and consummated. A company may establish a limit (set no lower than 10% of the shares sold in the IPO) as to the maximum number of shares with respect to which any shareholder, together with any affiliate of such shareholder or any person with whom such shareholder is acting as a "group" (as such term is used in Sections 13(d) and 14(d) of the

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Exchange Act), may exercise such conversion rights. For purposes of this paragraph (e), public shareholder excludes officers and directors of the company, the company's sponsor, the founding shareholders of the company, and any Family Member or affiliate of any of the foregoing persons.

Until the company completes a business combination where all conditions in paragraph (b) above are met, the company must notify Nasdaq on the appropriate form about each proposed business combination. Following each business combination, the combined company must meet the requirements for initial listing. If the company does not meet the requirements for initial listing following a business combination or does not comply with one of the requirements set forth above, Nasdaq will issue a Staff Determination under Rule 4804 to delist the company's securities.

Adopted by SEC Release 34-58228 (July 25, 2008).

**4305. Transition of Securities Included on the Market Operated by The Nasdaq Stock Market, Inc.**

**(a)** Notwithstanding any of the criteria for listing on the Nasdaq Global Market contained in the other rules within the Rule 4300 and 4400 Series, a security included on the Nasdaq Global Market, as operated by The Nasdaq Stock Market, Inc. as a facility of the NASD on the day prior to the first date on which Nasdaq commences operations as a national securities exchange (the "Operation Date") shall be listed on the Nasdaq Global Market on the Operation Date.

**(b)** Notwithstanding any of the criteria for listing on the Nasdaq Capital Market contained in the other rules within the Rule 4300 Series, a security included on the Nasdaq Capital Market, as operated by The Nasdaq Stock Market, Inc. as a facility of the NASD on the day prior to Operation Date shall be listed on the Nasdaq Capital Market on the Operation Date.

**(c)** Nothing in this rule shall be deemed to limit the authority of Nasdaq under the Rule 4000 Series with respect to proceedings to delist issuers following the Operation Date.

**(d)** Any issuer listed on the Nasdaq Global Market or the Nasdaq Capital Market pursuant to paragraphs (a) or (b) above that had received any notice or was subject to any Rule of The Nasdaq Stock Market, Inc. as a facility of the NASD shall be treated as though such notice or such Rule was a notice from or a rule of Nasdaq in computing applicable time frames.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-007 eff. May 8, 2006; amended by SR-NASDAQ-2006-019 eff. July 28, 2006.

**4310. Listing Requirements for Domestic and Canadian Securities**

To qualify for listing in Nasdaq, a security of a domestic or Canadian issuer shall satisfy all applicable requirements contained in paragraphs (a), (b), and (c) hereof. Issuers that meet these requirements, but that are not listed on the Nasdaq Global Market, are listed on the Nasdaq Capital Market.

**(a)** A security shall be considered for listing on Nasdaq provided that it is:

**(1)** registered pursuant to Section 12(b) of the Act; or

**(2)** subject to an exemption issued by the Commission that permits the listing of the security notwithstanding its failure to be registered pursuant to Section 12(b).

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**(b)** An issuer that wishes to have a security listed on Nasdaq shall submit to Nasdaq a listing application that provides the information required by Section 12(b) of the Act on the form designated by Nasdaq. Upon approval of a listing application, Nasdaq shall certify to the Commission, pursuant to Section 12(d) of the Act and the rules thereunder, that it has approved the security for listing and registration. Listing can commence only upon effectiveness of the security's registration pursuant to Section 12(d).

**(c)** In addition to the requirements contained in paragraph (a) and (b) above, and unless otherwise indicated, a security shall satisfy the following criteria for listing on Nasdaq:

**(1)** For initial listing, the issue shall have three registered and active market makers, and for continued listing, the issue shall have two registered and active market makers, one of which may be a market maker entering a stabilizing bid.

**(2)** For initial listing, the issuer shall have either:

**(A)** (i) stockholders' equity of \$5 million; and

**(ii)** a market value of publicly held shares of \$15 million; and

**(iii)** an operating history of at least two years; or

**(B)** (i) stockholders' equity of \$4 million; and

**(ii)** market value of listed securities of \$50 million (currently traded issuers must meet this requirement and the bid price requirement under Rule 4310(c)(4) for 90 consecutive trading days prior to applying for listing); and

**(iii)** a market value of publicly held shares of \$15 million; or

**(C)** (i) stockholders' equity of \$4 million; and

**(ii)** net income from continuing operations of \$750,000 in the most recently completed fiscal year or in two of the last three most recently completed fiscal years; and

**(iii)** a market value of publicly held shares of \$5 million.

**(3)** For continued listing, the issuer shall maintain either:

**(A)** stockholders' equity of \$2.5 million; or

**(B)** market value of listed securities of \$35 million; or

**(C)** net income from continuing operations of \$500,000 in the most recently completed fiscal year or in two of the last three most recently completed fiscal years.

**(4)** For initial listing, common stock, preferred stock and secondary classes of common stock shall have a minimum bid price of \$4 per share. For continued listing the minimum bid price per share shall be \$1.

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**(5)** (A) In the case of a convertible debt security, for initial listing, there shall be a principal amount outstanding of at least \$10 million.

**(B)** In addition, for the initial listing of convertible debt, one of the following conditions must be satisfied:

**(i)** the issuer of the debt must have an equity security that is listed on Nasdaq, the American Stock Exchange or the New York Stock Exchange;

**(ii)** an issuer whose equity security is listed on Nasdaq, the American Stock Exchange or the New York Stock Exchange, directly or indirectly owns a majority interest in, or is under common control with, the issuer of the debt security, or has guaranteed the debt security;

**(iii)** a nationally recognized securities rating organization (an "NRSRO") has assigned a current rating to the debt security that is no lower than an S&P Corporation "B" rating or equivalent rating by another NRSRO; or,

**(iv)** if no NRSRO has assigned a rating to the issue, an NRSRO has currently assigned: (1) an investment grade rating to an immediately senior issue; or (2) a rating that is no lower than an S&P Corporation "B" rating, or an equivalent rating by another NRSRO, to a pari passu or junior issue.

**(C)** For initial and continued listing of convertible debt, current last sale information must be available in the United States with respect to the underlying security into which the bond or debenture is convertible.

**(D)** For continued listing of a convertible debt security, there shall be a principal amount outstanding of at least \$5 million.

**(6)**

**(A)** In the case of common stock, for initial listing there shall be at least 300 round lot holders of the security and for continued listing there shall be at least 300 public holders of the security.

**(B)** In the case of preferred stock and secondary classes of common stock, for initial listing there shall be at least 100 round lot holders of the security and for continued listing there shall be at least 100 public holders of the security, provided in each case that the issuer's common stock or common stock equivalent equity security must be listed on Nasdaq or be a covered security. In the event the issuer's common stock or common stock equivalent security either is not listed on Nasdaq or is not a covered security, the preferred stock and/or secondary class of common stock may be listed on Nasdaq so long as the security satisfies the listing criteria for common stock.

**(C)** An account of a member that is beneficially owned by a customer (as defined in Rule 0120) will be considered a holder of a security upon appropriate verification by the member.

**(7)**

**(A)** In the case of common stock, there shall be at least 1,000,000 publicly held shares for initial listing and 500,000 publicly held shares for continued listing. For initial listing such shares shall have a market value as provided in the applicable provision of Rule 4310(c)(2). For continued listing such shares shall have a market value of at least \$1 million.

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**(B)** In the case of preferred stock and secondary classes of common stock, there shall be at least 200,000 publicly held shares having a market value of at least \$3.5 million for initial listing and 100,000 publicly held shares having a market value of \$1 million for continued listing. In addition, the issuer's common stock or common stock equivalent security must be listed on Nasdaq or be a covered security. In the event the issuer's common stock or common stock equivalent security either is not listed on Nasdaq or is not a covered security, the preferred stock and/or secondary class of common stock may be traded on Nasdaq so long as the security satisfies the listing criteria for common stock.

**(C)** Shares held directly or indirectly by any officer or director of the issuer and by any person who is the beneficial owner of more than 10 percent of the total shares outstanding are not considered to be publicly held.

**(8)**

**(A)** A failure to meet the continued listing requirement for a number of market makers shall be determined to exist only if the deficiency continues for a period of 10 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 30 calendar days from such notification to achieve compliance. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 30 day compliance period.

**(B)** A failure to meet the continued listing requirement for market value of publicly held shares shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 90 calendar days from such notification to achieve compliance. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 90 day compliance period.

**(C)** A failure to meet the continued listing requirement for market value of listed securities shall be determined to exist only if the deficiency continues for a period of 10 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 90 calendar days from such notification to achieve compliance. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 90 day compliance period.

**(D)** A failure to meet the continued listing requirement for minimum bid price on The Nasdaq Capital Market shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 180 calendar days from such notification to achieve compliance. If the issuer has not been deemed in compliance prior to the expiration of the 180 day compliance period, it will be afforded an additional 180 day compliance period, provided, that on the 180th day of the first compliance period, the issuer demonstrates that it meets the criteria for initial listing set forth in Rule 4310(c) (except for the bid price requirement set forth in Rule 4310(c)(4)), based on the issuer's most recent public filings and market information. If the issuer has publicly announced information (e.g., in an earnings release) indicating that it no longer satisfies the applicable initial listing criteria, it shall not be eligible for the additional compliance period under this rule.

Compliance can be achieved during any compliance period by meeting the applicable standard for a minimum of 10 consecutive business days.

**(E)** Nasdaq may, in its discretion, require an issuer to maintain a bid price of at least \$1.00 per share for a period in excess of ten consecutive business days, but generally no more than 20 consecutive business days, before determining that the issuer has demonstrated an ability to maintain long-term compliance. In determining whether to monitor bid price beyond ten business days, Nasdaq will

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consider the following four factors: (i) margin of compliance (the amount by which the price is above the \$1.00 minimum standard); (ii) trading volume (a lack of trading volume may indicate a lack of bona fide market interest in the security at the posted bid price); (iii) the market maker montage (the number of market makers quoting at or above \$1.00 and the size of their quotes); and, (iv) the trend of the stock price (is it up or down).

### **(9)**

**(A)** In the case of rights and warrants, for initial listing only, there shall be at least 400,000 issued and the underlying security must be listed on Nasdaq or be a covered security. For continued listing, the underlying security must remain listed on Nasdaq or be a covered security.

**(B)** In the case of put warrants (that is, instruments that grant the holder the right to sell to the issuing company a specified number of shares of the Company's common stock, at a specified price until a specified period of time), for initial listing only, there shall be at least 400,000 issued and the underlying security must be listed on Nasdaq or be a covered security. For continued listing, the underlying security must remain listed on Nasdaq or be a covered security.

**(C)** In the case of index warrants, the criteria established in the Rule 4400 Series for Nasdaq Global Market securities shall apply.

### **(10)**

**(A)** In the case of units, all component parts shall meet the requirements for initial and continued listing.

**(B)** In the case of units, the minimum period for listing of the units shall be 30 days from the first day of listing, except the period may be shortened if the units are suspended or withdrawn for regulatory purposes. Issuers and underwriters seeking to withdraw units from listing must provide Nasdaq with notice of such intent at least 15 days prior to withdrawal.

**(11)** The security shall not currently be suspended from trading by the Commission pursuant to Section 12(k) of the Act.

**(12)** The issuer shall certify, at or before the time of qualification, that all applicable listing criteria have been satisfied.

**(13)** The issuer shall pay the Nasdaq Issuer Listing Fee described in the Rule 4500 Series.

**(14)** An issuer that has applied for listing on Nasdaq or that is listed on Nasdaq shall file with Nasdaq three (3) copies of all reports and other documents filed or required to be filed with the Commission. This requirement is considered fulfilled for purposes of this paragraph if the issuer files the report or document with the Commission through the Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") system. An issuer that is not required to file reports with the Commission shall file with Nasdaq three (3) copies of reports required to be filed with the appropriate regulatory authority. All required reports shall be filed with Nasdaq on or before the date they are required to be filed with the Commission or appropriate regulatory authority. Annual reports filed with Nasdaq shall contain audited financial statements.

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**(15)** The issuer shall provide full and prompt responses to requests by Nasdaq for information related to unusual market activity or to events that may have a material impact on trading of its securities in Nasdaq.

**(16)** Except in unusual circumstances, a Nasdaq-listed issuer shall make prompt disclosure to the public through any Regulation FD compliant method (or combination of methods) of disclosure of any material information that would reasonably be expected to affect the value of its securities or influence investors' decisions. The issuer shall, prior to the release of the information, provide notice of such disclosure to Nasdaq's Market Watch Department if the information involves any of the events set forth in IM-4120-1.

**(17)** A listed company is required to notify Nasdaq at least 15 calendar days prior to:

**(A)** (i) establishing or materially amending a stock option plan, purchase plan or other equity compensation arrangement pursuant to which stock may be acquired by officers, directors, employees, or consultants without shareholder approval.

(ii) Nasdaq recognizes that when an issuer makes an equity grant to induce an individual to accept employment, as permitted by the exception contained in Rule 4350(i)(1)(A)(iv), it may not be practical to provide the advance notice otherwise required by this Rule. Therefore, when an issuer relies on that exception to make such an inducement grant without shareholder approval, it is sufficient to notify Nasdaq about the grant and the use of the exception no later than the earlier of: (x) five calendar days after entering into the agreement to issue the securities; or (y) the date of the public announcement of the award required by Rule 4350(i)(1)(A)(iv); or

**(B)** issuing securities that may potentially result in a change of control of the issuer; or

**(C)** issuing any common stock or security convertible into common stock in connection with the acquisition of the stock or assets of another company, if any officer or director or substantial shareholder of the issuer has a 5% or greater interest (or if such persons collectively have a 10% or greater interest) in the company to be acquired or in the consideration to be paid; or

**(D)** issuing any common stock, or any security convertible into common stock in a transaction that may result in the potential issuance of common stock, greater than 10% of either the total shares outstanding or the voting power outstanding on a pre-transaction basis.

The notifications required by this paragraph must be made on the Notification Form: Listing of Additional Shares and Nasdaq encourages companies to file this form as soon as practicable, even if all of the relevant terms are not yet known. Nasdaq reviews these forms to determine compliance with applicable Nasdaq rules, including the shareholder approval requirements. Therefore, if a company fails to file timely the form required by this paragraph, Nasdaq may issue a Staff Determination (pursuant to the Rule 4800 Series) that is either a public reprimand letter or a delisting determination.

**(18)** The issuer of any class of securities listed on Nasdaq shall notify Nasdaq promptly in writing of any change in the issuer's transfer agent or registrar.

**(19)** The issuer shall comply with any obligation of any person regarding filing or disclosure of information material to the issuer or the security, whether such obligation arises under the federal securities laws and the rules and regulations promulgated thereunder or other applicable federal or state statutes or rules.



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**(20)** The issuer shall notify Nasdaq promptly in writing of any change in the general character or nature of its business and any change in the address of its principal executive offices. The issuer also shall file on a form designated by Nasdaq notification of any corporate name change, or other change requiring payment of a record-keeping fee, no later than 10 days after the change.

**(21)** [Reserved]

**(22)** The issuer of units shall include in its prospectus or other offering document used in connection with any offering of securities that is required to be filed with the Commission under the federal securities law and the rules and regulations thereunder a statement regarding any intention to delist the units immediately after the minimum listing period.

**(23)**

**(A)** For initial listing, a security, except for the security of a Canadian issuer, shall have a CUSIP number identifying the securities included in the file of eligible issues maintained by a securities depository registered as a clearing agency under Section 17A of the Act ("securities depository" or "securities depositories"), in accordance with the rules and procedures of such securities depository; except that this subparagraph shall not apply to a security if the terms of the security do not and cannot be reasonably modified to meet the criteria for depository eligibility at all securities depositories.

**(B)** A security depository's inclusion of a CUSIP number identifying a security in its file of eligible issues does not render the security "depository eligible" under Rule 11310 until:

**(i)** in the case of any new issue distributed by an underwriting syndicate on or after the date a securities depository system for monitoring repurchases of distributed shares by the underwriting syndicate is available, the date of the commencement of trading in such security on Nasdaq; or

**(ii)** in the case of any new issue distributed by an underwriting syndicate prior to the date a securities depository system for monitoring repurchases of distributed shares by the underwriting syndicate is available where the managing underwriter elects not to deposit the securities on the date of the commencement of trading in such security on Nasdaq, such later date designated by the managing underwriter in a notification submitted to the securities depository; but in no event more than three (3) months after the commencement of trading in such security on Nasdaq.

**(24)** The issuer shall file, on a form designated by Nasdaq no later than 10 days after the occurrence, any aggregate increase or decrease of any class of securities listed on Nasdaq that exceeds 5% of the amount of securities of the class outstanding.

**(25)** In the case of any dividend action or action relating to a stock distribution of a listed stock the issuer shall, no later than 10 calendar days prior to the record date of such action:

(i) notify Nasdaq by filing the appropriate form as designated by Nasdaq;

(ii) provide public notice using a Regulation FD compliant method.

Notice to Nasdaq should be given as soon as possible after declaration and, in any event, no later than simultaneously with the public notice.

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(26) [Reserved]

(27) [Reserved]

(28) [Reserved]

(29) [Reserved]

(30) The issuer shall notify Nasdaq of a Substitution Listing Event (other than a re-incorporation or a change to an issuer's place of organization) no later than 15 calendar days prior to the implementation of such event by filing the appropriate form as designated by Nasdaq. For a re-incorporation or change to an issuer's place of organization, an issuer shall notify Nasdaq as soon as practicable after such event has been implemented by filing the appropriate form as designated by Nasdaq. Issuers shall also pay the appropriate fee associated with Substitution Listing Events. The Substitution Listing Event fee shall not apply to securities that are listed on a national securities exchange other than Nasdaq and not designated by Nasdaq as Nasdaq national market system securities.

(d) Nasdaq issuers which distribute interim reports to shareholders should distribute such reports to both registered and beneficial shareholders. Nasdaq issuers are also encouraged to consider additional technological methods to communicate such information to shareholders in a timely and less costly manner as such technology becomes available.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-007 eff. May 8, 2006; amended by SR-NASDAQ-2006-019 eff. July 28, 2006; amended by SR-NASDAQ-2006-032 eff. Apr. 18, 2007; amended by SR-NASDAQ-2007-094 eff. Nov. 30, 2007; amended by SR-NASDAQ-2008-017 eff. June 5, 2008; amended by SR-NASDAQ-2008-037 eff. June 17, 2008; amended by SR-NASDAQ-2009-002 eff. January 13, 2009.

**4320. Listing Requirements for Non-Canadian Foreign Securities and American Depositary Receipts**

To qualify for listing on Nasdaq, a security of a non-Canadian foreign issuer, an American Depositary Receipt (ADR) or similar security issued in respect of a security of a foreign issuer shall satisfy the requirements of paragraphs (a), (b), and (e) of this Rule. Issuers that meet these requirements, but that are not listed on the Nasdaq Global Market, are listed on the Nasdaq Capital Market.

(a) A security of a foreign issuer, an ADR or similar security issued in respect of a security of a foreign issue shall be considered for listing provided that it is:

(1) registered pursuant to Section 12(b) of the Act; or

(2) subject to an exemption issued by the Commission that permits the listing of the security notwithstanding its failure to be registered pursuant to Section 12(b).

(b) An issuer that wishes to have a security listed on Nasdaq shall submit to Nasdaq a listing application that provides the information required by Rule 12(b) of the Act on the form designated by Nasdaq. Upon approval of a listing application, Nasdaq shall certify to the Commission, pursuant to Section 12(d) of the Act and the rules thereunder, that it has approved the security for listing and registration. Listing can commence only upon effectiveness of the security's registration pursuant to Section 12(d).

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(c) Reserved.

(d) Reserved.

(e) In addition to the requirements contained in paragraphs (a) and (b), the security shall satisfy the criteria set out in this subsection for listing on Nasdaq. In the case of ADRs, the underlying security will be considered when determining the ADR's qualification for initial or continued listing on Nasdaq.

(1) For initial listing, the issue shall have three registered and active market makers, and for continued listing, the issue shall have two registered and active market makers. A failure to meet the continued listing requirement for number of market makers shall be determined to exist only if the deficiency continues for a period of 10 consecutive business days. Upon such failure the issuer shall be notified promptly and shall have a period of 30 calendar days from such notification to achieve compliance with the market maker requirements.

(2)

(A) For initial listing, the issue shall meet the requirements of Rule 4310(c)(2)(A), (B) or (C).

(B) For continued listing, the issuer shall meet the requirements of Rule 4310(c)(3)(A), (B) or (C).

(C) An issuer's qualifications will be determined on the basis of financial statements that are either: (i) prepared in accordance with U.S. generally accepted accounting principles; or (ii) reconciled to U.S. generally accepted accounting principles as required by the Commission's rules; or (iii) prepared in accordance with International Financial Reporting Standards, as issued by the International Accounting Standards Board, for companies that are permitted to file financial statements using those standards consistent with the Commission's rules.

(D) A failure to meet the continued listing requirements for market value of listed securities shall be determined to exist only if the deficiency continues for a period of 10 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 90 calendar days from such notification to achieve compliance with the applicable continued listing standard. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 90 day compliance period.

(E)

(i) For initial listing, common stock, preferred stock and secondary classes of common stock, or their equivalents, shall have a minimum bid price of \$4 per share.

(ii) For continued listing, the minimum bid price per share shall be \$1. A failure to meet the continued listing requirement for minimum bid price on The Nasdaq Capital Market shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 180 calendar days from such notification to achieve compliance. If the issuer has not been deemed in compliance prior to the expiration of the 180 day compliance period, it shall be afforded an additional 180 day compliance period, provided, that on the 180th day of the first compliance period, the issuer demonstrates that it meets the criteria for initial listing set forth in Rule 4320(e) (except for the bid price requirement set forth in this Rule 4320(e)(2)(E)(ii)) based on the issuer's most recent public filings and market information. If the issuer has publicly announced information (e.g., in an earnings release) indicating that it no longer

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satisfies the applicable initial listing criteria, it shall not be eligible for the additional compliance period under this rule. Compliance can be achieved during any compliance period by meeting the applicable standard for a minimum of 10 consecutive business days.

**(iii)** Nasdaq may, in its discretion, require an issuer to maintain a bid price of at least \$1.00 per share for a period in excess of ten consecutive business days, but generally no more than 20 consecutive business days, before determining that the issuer has demonstrated an ability to maintain long-term compliance. In determining whether to monitor bid price beyond ten business days, Nasdaq will consider the following four factors: (i) margin of compliance (the amount by which the price is above the \$1.00 minimum standard); (ii) trading volume (a lack of trading volume may indicate a lack of bona fide market interest in the security at the posted bid price); (iii) the market maker montage (the number of market makers quoting at or above \$1.00 and the size of their quotes); and, (iv) the trend of the stock price (is it up or down).

**(3) (A)** In the case of a convertible debt security, for initial listing, there shall be a principal amount outstanding of at least U.S. \$10 million.

**(B)** In addition, for the initial listing of convertible debt, one of the following conditions must be satisfied:

**(i)** the issuer of the debt must have an equity security that is listed on Nasdaq, the American Stock Exchange or the New York Stock Exchange;

**(ii)** an issuer whose equity security is listed on Nasdaq, the American Stock Exchange or the New York Stock Exchange, directly or indirectly owns a majority interest in, or is under common control with, the issuer of the debt security, or has guaranteed the debt security;

**(iii)** a nationally recognized securities rating organization (an "NRSRO") has assigned a current rating to the debt security that is no lower than an S&P Corporation "B" rating or equivalent rating by another NRSRO; or,

**(iv)** if no NRSRO has assigned a rating to the issue, an NRSRO has currently assigned: (1) an investment grade rating to an immediately senior issue; or (2) a rating that is no lower than an S&P Corporation "B" rating, or an equivalent rating by another NRSRO, to a pari passu or junior issue.

**(C)** For initial and continued listing of convertible debt, current last sale information must be available in the United States with respect to the underlying security into which the bond or debenture is convertible.

**(D)** For continued listing of a convertible debt security, there shall be a principal amount outstanding of at least \$5 million.

**(4)**

**(A)** In the case of common stock, for initial listing there shall be at least 300 round lot holders of the security and for continued listing there shall be at least 300 public holders of the security.

**(B)** In the case of preferred stock and secondary classes of common stock, for initial listing there shall be at least 100 round lot holders of the security and for continued listing there shall be at least 100 public holders of the security, provided in each case that the issuer's common stock or common stock

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equivalent equity security must be listed on Nasdaq or be a covered security. In the event the issuer's common stock or common stock equivalent security either is not listed on Nasdaq or is not a covered security, the preferred stock and/or secondary class of common stock may be listed on Nasdaq so long as the security satisfies the listing criteria for common stock.

**(C)** An account of a member that is beneficially owned by a customer (as defined in Rule 0120) will be considered a holder of a security upon appropriate verification by the member.

**(5)** There shall be at least 1,000,000 publicly held shares for initial listing and 500,000 publicly held shares for continued listing. For initial listing, such shares shall have a market value as provided in the applicable provision of Rule 4310(c)(2). For continued listing, such shares shall have a market value of at least \$1 million. In the case of preferred stock and secondary classes of common stock, there shall be at least 200,000 publicly held shares having a market value of at least \$3.5 million for initial listing and 100,000 publicly held shares having a market value of \$1 million for continued listing. In addition, the issuer's common stock or common stock equivalent security must be listed on either Nasdaq or be a covered security. In the event the issuer's common stock or common stock equivalent security either is not listed on Nasdaq or is not a covered security, the preferred stock and/or secondary class of common stock may be traded on Nasdaq so long as the security satisfies the listing criteria for common stock. Shares held directly or indirectly by any officer or director of the issuer and by any person who is the beneficial owner of more than 10 percent of the total shares outstanding are not considered to be publicly held.

**(6)** In the case of rights, warrants and ADRs for initial listing only, at least 400,000 shall be issued. Issuers of ADRs must also meet the round lot holders and publicly held shares requirements set forth in the applicable provisions of Rules 4310(c)(2), 4320(e)(4) and 4320(e)(5).

**(7)** In the case of rights and warrants, for initial and continued listing, the underlying security shall be listed on Nasdaq or be a covered security.

**(8)** In the case of units, all component parts shall meet the requirements for initial and continued listing.

**(9)** The security shall not currently be suspended from trading by the Commission pursuant to Section 12(k) of the Act or by the appropriate regulatory authorities of the issuer's country of domicile.

**(10)** The issuer shall certify, at or before the time of listing, that all applicable listing criteria have been satisfied.

**(11)** The issuer shall pay the Nasdaq Issuer Listing Fee described in the Rule 4500 Series.

**(12)** An issuer that has applied for listing on Nasdaq or that is listed on Nasdaq shall file with Nasdaq three (3) copies of all reports and other documents filed or required to be filed with the Commission. This requirement is considered fulfilled for purposes of this paragraph if the issuer files the report or document with the Commission through the Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") system. All required reports must be filed with Nasdaq on or before the date they are required to be filed with the Commission.

**(13)** The issuer shall provide full and prompt responses to requests by Nasdaq for information related to unusual market activity or to events that may have a material impact on trading of its securities in Nasdaq.

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**(14)** Except in unusual circumstances, a Nasdaq-listed issuer shall make prompt disclosure to the public in the United States through any Regulation FD compliant method (or combination of methods) of disclosure of any material information that would reasonably be expected to affect the value of its securities or influence investors' decisions. The issuer shall, prior to the release of the information, provide notice of such disclosure to Nasdaq if the information involves any of the events set forth in IM-4120-1.

**(15)** The issuer of any class of securities listed on Nasdaq, except for American Depositary Receipts, is required to notify Nasdaq at least 15 calendar days prior to:

**(A)** (i) establishing or materially amending a stock option plan, purchase plan or other equity compensation arrangement pursuant to which stock may be acquired by officers, directors, employees, or consultants without shareholder approval.

(ii) Nasdaq recognizes that when an issuer makes an equity grant to induce an individual to accept employment, as permitted by the exception contained in Rule 4350(i)(1)(A)(iv), it may not be practical to provide the advance notice otherwise required by this Rule. Therefore, when an issuer relies on that exception to make such an inducement grant without shareholder approval, it is sufficient to notify Nasdaq about the grant and the use of the exception no later than the earlier of: (x) five calendar days after entering into the agreement to issue the securities; or (y) the date of the public announcement of the award required by Rule 4350(i)(1)(A)(iv); or

**(B)** issuing securities that may potentially result in a change of control of the issuer; or

**(C)** issuing any common stock or security convertible into common stock in connection with the acquisition of the stock or assets of another company, if any officer or director or substantial shareholder of the issuer has a 5% or greater interest (or if such persons collectively have a 10% or greater interest) in the company to be acquired or in the consideration to be paid; or

**(D)** issuing any common stock, or any security convertible into common stock in a transaction that may result in the potential issuance of common stock, greater than 10% of either the total shares outstanding or the voting power outstanding on a pre-transaction basis.

The notifications required by this paragraph must be made on the Notification Form: Listing of Additional Shares and Nasdaq encourages companies to file this form as soon as practicable, even if all of the relevant terms are not yet known. Nasdaq reviews these forms to determine compliance with applicable Nasdaq rules, including the shareholder approval requirements. Therefore, if a company fails to file timely the form required by this paragraph, Nasdaq may issue a Staff Determination (pursuant to the Rule 4800 Series) that is either a public reprimand letter or a delisting determination.

**(16)** The issuer of any class of securities listed on Nasdaq, except for American Depositary Receipts, shall notify Nasdaq promptly in writing of any change in the issuer's transfer agent or registrar.

**(17)** The issuer shall comply with any obligation of any person regarding filing or disclosure of information material to the issuer or the security, whether such obligation arises under the securities laws of the United States or the issuer's country of domicile, or other applicable federal or state statutes or rules.

**(18)** The issuer shall notify Nasdaq promptly in writing of any change in the general character or nature of its business and any change in the address of its principal executive offices. The issuer also

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shall file on a form designated by Nasdaq notification of any corporate name change, or other change requiring payment of a record-keeping fee, no later than 10 days after the change.

**(19)** [Reserved]

**(20)** The issuer shall file, on a form designated by Nasdaq no later than 10 days after the occurrence, any aggregate increase or decrease of any class of securities listed on Nasdaq that exceeds 5% of the amount of securities of the class outstanding.

**(21)** In the case of any dividend action or action relating to a stock distribution of a listed stock the issuer shall, no later than 10 calendar days prior to the record date of such action:

(i) notify Nasdaq by filing the appropriate form as designated by Nasdaq; and

(ii) provide public notice using a Regulation FD compliant method.

Notice to Nasdaq should be given as soon as possible after declaration and, in any event, no later than simultaneously with the public notice.

**(22)** [Reserved]

**(23)** [Reserved]

**(24)** [Reserved]

**(25)** [Reserved]

**(26)** The issuer shall notify Nasdaq of a Substitution Listing Event (other than a re-incorporation or a change to an issuer's place of organization) no later than 15 calendar days prior to the implementation of such event by filing the appropriate form as designated by Nasdaq. For a re-incorporation or change to an issuer's place of organization, an issuer shall notify Nasdaq as soon as practicable after such event has been implemented by filing the appropriate form as designated by Nasdaq. Issuers shall also pay the appropriate fee associated with Substitution Listing Events. The Substitution Listing Event fee shall not apply to securities that are listed on a national securities exchange other than Nasdaq and not designated by Nasdaq as Nasdaq national market system securities.

**(f)** Nasdaq issuers which distribute interim reports to shareholders should distribute such reports to both registered and beneficial shareholders. Nasdaq issuers are also encouraged to consider additional technological methods to communicate such information to shareholders in a timely and less costly manner as such technology becomes available.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-007 eff. May 8, 2006; amended by SR-NASDAQ-2006-019 eff. July 28, 2006; amended by SR-NASDAQ-2006-033 eff. August 25, 2006; amended by SR-NASDAQ-2006-032 eff. Apr. 18, 2007; amended by SR-NASDAQ-2007-094 eff. Nov. 30, 2007; amended by SR-NASDAQ-2007-090 eff. March 6, 2008; amended by SR-NASDAQ-2008-017 eff. June 5, 2008; amended by SR-NASDAQ-2008-037 eff. June 17, 2008; amended by SR-NASDAQ-2009-002 eff. January 13, 2009.

**4330. Obligation to Provide Information**

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Nasdaq may request any additional information or documentation, public or non-public, deemed necessary to make a determination regarding a security's initial or continued listing, including, but not limited to, any material provided to or received from the Commission or other appropriate regulatory authority. An issuer may be delisted or denied initial listing if it fails to provide such information within a reasonable period of time or if any communication to Nasdaq contains a material misrepresentation or omits material information necessary to make the communication to Nasdaq not misleading.

Adopted by SEC Release 34-53128 (Jan. 13, 2006).

### **4340. Application for Re-Listing by Listed Issuers**

**(a) Business Combinations with non-Nasdaq Entities Resulting in a Change of Control.** An issuer must apply for initial listing in connection with a transaction whereby the issuer combines with a non-Nasdaq entity, resulting in a change of control of the issuer and potentially allowing the non-Nasdaq entity to obtain a Nasdaq Listing. In determining whether a change of control has occurred, Nasdaq shall consider all relevant factors including, but not limited to, changes in the management, board of directors, voting power, ownership, and financial structure of the issuer. Nasdaq shall also consider the nature of the businesses and the relative size of the Nasdaq issuer and non-Nasdaq entity. The issuer must submit an application for the post-transaction entity with sufficient time to allow Nasdaq to complete its review before the transaction is completed. If the issuer's application for initial listing has not been approved prior to consummation of the transaction, Nasdaq will issue a Staff Determination Letter as set forth in Rule 4804 and begin delisting proceedings pursuant to the Rule 4800 Series.

**(b) Bankruptcy.** Nasdaq may use its discretionary authority under Rule 4300 to deny listing to an issuer that has filed for protection under any provision of the federal bankruptcy laws or comparable foreign laws, even though the issuer's securities otherwise meet all enumerated criteria for continued listing on Nasdaq. In the event that Nasdaq determines to continue the listing of such an issuer during a bankruptcy reorganization, the issuer shall nevertheless be required to satisfy all requirements for initial listing, including the payment of initial listing fees, upon emerging from bankruptcy proceedings.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-047 eff. Jan. 5, 2007; amended by SR-NASDAQ-2008-062 eff. August 27, 2008.

### **4350. Qualitative Listing Requirements for Nasdaq Issuers Except for Limited Partnerships**

#### **(a) Applicability**

**(1) Foreign Private Issuers.** A foreign private issuer may follow its home country practice in lieu of the requirements of Rule 4350, provided, however, that such an issuer shall: comply with Rules 4350(b)(1)(B), 4350(j) and 4350(m), have an audit committee that satisfies Rule 4350(d)(3), and ensure that such audit committee's members meet the independence requirement in Rule 4350(d)(2)(A)(ii). In addition, a foreign private issuer must be eligible to participate in a Direct Registration Program, as required by Rule 4350(l), unless prohibited from complying by a law or regulation in its home country. A foreign private issuer that follows a home country practice in lieu of one or more provisions of Rule 4350 shall disclose in its annual reports filed with the Commission or on its website each requirement of Rule 4350 that it does not follow and describe the home country practice followed by the issuer in lieu of such requirements. In addition, a foreign private issuer making its initial public offering or first U.S. listing on Nasdaq shall make the same disclosures in its registration statement or on its website.

**(2) Management Investment Companies.** Management investment companies (including business development companies) are subject to all the requirements of Rule 4350, except that management



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investment companies registered under the Investment Company Act of 1940 are exempt from the requirements of Rule 4350(c) and (n).

**(3) Asset-backed Issuers and Other Passive Issuers.** The following are exempt from the requirements of Rule 4350(c), (d) and (n): (a) asset-backed issuers; and (b) issuers, such as unit investment trusts, that are organized as trusts or other unincorporated associations that do not have a board of directors or persons acting in a similar capacity and whose activities are limited to passively owning or holding (as well as administering and distributing amounts in respect of) securities, rights, collateral or other assets on behalf of or for the benefit of the holders of the listed securities.

**(4) Cooperatives.** Cooperative entities, such as agricultural cooperatives, that are structured to comply with relevant state law and federal tax law and that do not have a publicly traded class of common stock are exempt from Rule 4350(c). However, such entities must comply with all federal securities laws, including without limitation those rules required by Section 10A(m) of the Act and Rule 10A-3 thereunder.

**(5) Phase-in Periods.**

A company listing in connection with its initial public offering shall be permitted to phase in its compliance with the independent committee requirements set forth in Rule 4350(c) on the same schedule as it is permitted to phase in its compliance with the independent audit committee requirement pursuant to SEC Rule 10A-3(b)(1)(iv)(A). Accordingly, a company listing in connection with its initial public offering shall be permitted to phase in its compliance with the independent committee requirements set forth in Rule 4350(c) as follows: (1) one independent member at the time of listing; (2) a majority of independent members within 90 days of listing; and (3) all independent members within one year of listing. Furthermore, a company listing in connection with its initial public offering shall have twelve months from the date of listing to comply with the majority independent board requirement in Rule 4350(c). It should be noted, however, that pursuant to SEC Rule 10A-3(b)(1)(iii) investment companies are not afforded the exemptions under SEC Rule 10A-3(b)(1)(iv). Issuers may choose not to adopt a compensation or nomination committee and may instead rely upon a majority of the independent directors to discharge responsibilities under Rule 4350(c). For purposes of Rule 4350 other than Rule 4350(d)(2)(A)(ii) and Rule 4350(m), a company shall be considered to be listing in conjunction with an initial public offering if, immediately prior to listing, it does not have a class of common stock registered under the Act. For purposes of Rule 4350(d)(2)(A)(ii) and Rule 4350(m), a company shall be considered to be listing in conjunction with an initial public offering only if it meets the conditions in SEC Rule 10A-3(b)(1)(iv)(A) under the Act, namely, that the company was not, immediately prior to the effective date of a registration statement, required to file reports with the Commission pursuant to Section 13(a) or 15(d) of the Act.

Companies that are emerging from bankruptcy or have ceased to be Controlled Companies within the meaning of Rule 4350(c)(5) shall be permitted to phase-in independent nomination and compensation committees and majority independent boards on the same schedule as companies listing in conjunction with their initial public offering. It should be noted, however, that a company that has ceased to be a Controlled Company within the meaning of Rule 4350(c)(5) must comply with the audit committee requirements of Rule 4350(d) as of the date it ceased to be a Controlled Company. Furthermore, the executive sessions requirement of Rule 4350(c)(2) applies to Controlled Companies as of the date of listing and continues to apply after it ceases to be controlled.

Companies transferring from other markets with a substantially similar requirement shall be afforded the balance of any grace period afforded by the other market. Companies transferring from other listed markets that do not have a substantially similar requirement shall be afforded one year from the

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date of listing on Nasdaq. This transition period is not intended to supplant any applicable requirements of Rule 10A-3 under the Act.

**(b)** Distribution of Annual and Interim Reports

**(1)**

**(A)** Each issuer shall make available to shareholders of such securities an annual report containing audited financial statements of the company and its subsidiaries, which may be on Form 10-K, 20-F, 40-F or N-CSR. An issuer may comply with this requirement either:

(i) by mailing the report to shareholders; or

(ii) by satisfying the requirements for furnishing an annual report contained in Exchange Act Rule 14a-16; or

(iii) by posting the annual report to shareholders on or through the company's website (or, in the case of an issuer that is an investment company that does not maintain its own website, on a website that the company is allowed to use to satisfy the website posting requirement in Exchange Act Rule 16a-3(k)), along with a prominent undertaking in the English language to provide shareholders, upon request, a hard copy of the company's annual report free of charge. An issuer that chooses to satisfy this requirement pursuant to this paragraph (iii) must, simultaneous with this posting, issue a press release stating that its annual report has been filed with the Commission (or other appropriate regulatory authority). This press release must also state that the annual report is available on the company's website and include the website address and that shareholders may receive a hard copy free of charge upon request. An issuer must provide such hard copies within a reasonable period of time following the request.

**(B)** An issuer that receives an audit opinion that expresses doubt about the ability of the company to continue as a going concern for a reasonable period of time must make a public announcement through the news media disclosing the receipt of such opinion. Prior to the release of the public announcement, the issuer must provide the text of the public announcement to the StockWatch section of Nasdaq's MarketWatch Department ("Nasdaq StockWatch"). The public announcement shall be provided to Nasdaq StockWatch and released to the media not later than seven calendar days following the filing of such audit opinion in a public filing with the Securities and Exchange Commission.

**(2)** Each issuer which is subject to SEC Rule 13a-13 shall make available copies of quarterly reports including statements of operating results to shareholders either prior to or as soon as practicable following the company's filing of its Form 10-Q with the Commission. If the form of such quarterly report differs from the Form 10-Q, the issuer shall file one copy of the report with Nasdaq in addition to filing its Form 10-Q pursuant to Rule 4310(c)(14). The statement of operations contained in quarterly reports shall disclose, as a minimum, any substantial items of an unusual or nonrecurrent nature and net income before and after estimated federal income taxes or net income and the amount of estimated federal taxes.

**(3)** Each issuer which is not subject to SEC Rule 13a-13 and which is required to file with the Commission, or another federal or state regulatory authority, interim reports relating primarily to operations and financial position, shall make available to shareholders reports which reflect the information contained in those interim reports. Such reports shall be made available to shareholders either before or as soon as practicable following filing with the appropriate regulatory authority. If the

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form of the interim report provided to shareholders differs from that filed with the regulatory authority, the issuer shall file one copy of the report to shareholders with Nasdaq in addition to the report to the regulatory authority that is filed with Nasdaq pursuant to Rule 4310(c)(14).

**(4)** Each foreign private issuer shall publish, in a press release, which would also be submitted on a Form 6-K, an interim balance sheet and income statement as of the end of its second quarter. This information, which must be presented in English but does not have to be reconciled to U.S. GAAP, must be provided not later than six months following the end of the issuer's second quarter.

### **(c) Independent Directors**

**(1)** A majority of the board of directors must be comprised of independent directors as defined in Rule 4200. The company must disclose in its annual proxy (or, if the issuer does not file a proxy, in its Form 10-K or 20-F) those directors that the board of directors has determined to be independent under Rule 4200. If an issuer fails to comply with this requirement due to one vacancy, or one director ceases to be independent due to circumstances beyond their reasonable control, the issuer shall regain compliance with the requirement by the earlier of its next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply with this requirement. provided, however, that if the annual shareholders meeting occurs no later than 180 days following the event that caused the failure to comply with this requirement, the issuer shall instead have 180 days from such event to regain compliance. An issuer relying on this provision shall provide notice to Nasdaq immediately upon learning of the event or circumstance that caused the non-compliance.

**(2)** Independent directors must have regularly scheduled meetings at which only independent directors are present ("executive sessions").

### **(3) Compensation of Officers**

**(A)** Compensation of the chief executive officer of the company must be determined, or recommended to the Board for determination, either by:

**(i)** a majority of the independent directors, or

**(ii)** a compensation committee comprised solely of independent directors.

The chief executive officer may not be present during voting or deliberations.

**(B)** Compensation of all other executive officers must be determined, or recommended to the Board for determination, either by:

**(i)** a majority of the independent directors, or

**(ii)** a compensation committee comprised solely of independent directors.

**(C)** Notwithstanding paragraphs (3)(A)(ii) and (3)(B)(ii) above, if the compensation committee is comprised of at least three members, one director who is not independent as defined in Rule 4200 and is not a current officer or employee or a Family Member of an officer or employee, may be appointed to the compensation committee if the board, under exceptional and limited circumstances, determines that such individual's membership on the committee is required by the best interests of the company and its shareholders, and the board discloses, in the proxy statement for the next annual meeting

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subsequent to such determination (or, if the issuer does not file a proxy, in its Form 10-K or 20-F), the nature of the relationship and the reasons for the determination. A member appointed under this exception may not serve longer than two years.

**(4) Nomination of Directors**

**(A)** Director nominees must either be selected, or recommended for the Board's selection, either by:

**(i)** a majority of the independent directors, or

**(ii)** a nominations committee comprised solely of independent directors.

**(B)** Each issuer must certify that it has adopted a formal written charter or board resolution, as applicable, addressing the nominations process and such related matters as may be required under the federal securities laws.

**(C)** Notwithstanding paragraph (4)(A)(ii) above, if the nominations committee is comprised of at least three members, one director, who is not independent as defined in Rule 4200 and is not a current officer or employee or a Family Member of an officer or employee, may be appointed to the nominations committee if the board, under exceptional and limited circumstances, determines that such individual's membership on the committee is required by the best interests of the company and its shareholders, and the board discloses, in the proxy statement for next annual meeting subsequent to such determination (or, if the issuer does not file a proxy, in its Form 10-K or 20-F), the nature of the relationship and the reasons for the determination. A member appointed under this exception may not serve longer than two years.

**(D)** Independent director oversight of director nominations shall not apply in cases where the right to nominate a director legally belongs to a third party. However, this does not relieve a company's obligation to comply with the committee composition requirements under Rule 4350(c) and (d).

**(E)** This Rule 4350(c)(4) is not applicable to a company if the company is subject to a binding obligation that requires a director nomination structure inconsistent with this rule and such obligation pre-dates the approval date of this rule.

**(5)** A Controlled Company is exempt from the requirements of this Rule 4350(c), except for the requirements of subsection (c)(2) which pertain to executive sessions of independent directors. A Controlled Company is a company of which more than 50% of the voting power for the election of directors is held by an individual, a group or another company. A Controlled Company relying upon this exemption must disclose in its annual meeting proxy statement (or, if the issuer does not file a proxy, in its Form 10-K or 20-F) that it is a Controlled Company and the basis for that determination.

**(d) Audit Committee**

**(1) Audit Committee Charter**

Each Issuer must certify that it has adopted a formal written audit committee charter and that the audit committee has reviewed and reassessed the adequacy of the formal written charter on an annual basis. The charter must specify:

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**(A)** the scope of the audit committee's responsibilities, and how it carries out those responsibilities, including structure, processes, and membership requirements;

**(B)** the audit committee's responsibility for ensuring its receipt from the outside auditors of a formal written statement delineating all relationships between the auditor and the company, consistent with Independence Standards Board Standard 1, and the audit committee's responsibility for actively engaging in a dialogue with the auditor with respect to any disclosed relationships or services that may impact the objectivity and independence of the auditor and for taking, or recommending that the full board take, appropriate action to oversee the independence of the outside auditor; and

**(C)** the committee's purpose of overseeing the accounting and financial reporting processes of the issuer and the audits of the financial statements of the issuer;

**(D)** the specific audit committee responsibilities and authority set forth in Rule 4350(d)(3).

### **(2)** Audit Committee Composition

**(A)** Each issuer must have, and certify that it has and will continue to have, an audit committee of at least three members, each of whom must: (i) be independent as defined under Rule 4200(a)(15); (ii) meet the criteria for independence set forth in Rule 10A-3(b)(1) under the Act (subject to the exemptions provided in Rule 10A-3(c)); (iii) not have participated in the preparation of the financial statements of the company or any current subsidiary of the company at any time during the past three years; and (iv) be able to read and understand fundamental financial statements, including a company's balance sheet, income statement, and cash flow statement. Additionally, each issuer must certify that it has, and will continue to have, at least one member of the audit committee who has past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background which results in the individual's financial sophistication, including being or having been a chief executive officer, chief financial officer or other senior officer with financial oversight responsibilities.

**(B)** Notwithstanding paragraph (2)(A)(i), one director who: (i) is not independent as defined in Rule 4200; (ii) meets the criteria set forth in Section 10A(m)(3) under the Act and the rules thereunder; and (iii) is not a current officer or employee or a Family Member of such officer or employee, may be appointed to the audit committee, if the board, under exceptional and limited circumstances, determines that membership on the committee by the individual is required by the best interests of the company and its shareholders, and the board discloses, in the next annual proxy statement subsequent to such determination (or, if the issuer does not file a proxy, in its Form 10-K or 20-F), the nature of the relationship and the reasons for that determination. A member appointed under this exception may not serve longer than two years and may not chair the audit committee.

### **(3)** Audit Committee Responsibilities and Authority

The audit committee must have the specific audit committee responsibilities and authority necessary to comply with Rule 10A-3(b)(2), (3), (4) and (5) under the Act (subject to the exemptions provided in Rule 10A-3(c)), concerning responsibilities relating to: (i) registered public accounting firms, (ii) complaints relating to accounting, internal accounting controls or auditing matters, (iii) authority to engage advisors, and (iv) funding as determined by the audit committee. Audit committees for investment companies must also establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting or auditing matters by employees of the investment adviser, administrator, principal underwriter, or any other provider of accounting related services for the investment company, as well as employees of the investment company.

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### **(4) Cure Periods**

**(A)** If an issuer fails to comply with the audit committee composition requirement under Rule 10A-3(b)(1) under the Act and Rule 4350(d)(2) because an audit committee member ceases to be independent for reasons outside the member's reasonable control, the audit committee member may remain on the audit committee until the earlier of its next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply with this requirement. An issuer relying on this provision must provide notice to Nasdaq immediately upon learning of the event or circumstance that caused the non-compliance.

**(B)** If an issuer fails to comply with the audit committee composition requirement under Rule 4350(d)(2)(A) due to one vacancy on the audit committee, and the cure period in paragraph (A) is not otherwise being relied upon for another member, the issuer will have until the earlier of the next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply with this requirement; provided, however, that if the annual shareholders meeting occurs no later than 180 days following the event that caused the vacancy, the issuer shall instead have 180 days from such event to regain compliance. An issuer relying on this provision must provide notice to Nasdaq immediately upon learning of the event or circumstance that caused the non-compliance.

### **(5) Exception**

At any time when an issuer has a class of common equity securities (or similar securities') that is listed on another national securities exchange or national securities association subject to the requirements of SEC Rule 10A-3 under the Act, the listing of classes of securities of a direct or indirect consolidated subsidiary or an at least 50% beneficially owned subsidiary of the issuer (except classes of equity securities, other than non-convertible, non-participating preferred securities, of such subsidiary) shall not be subject to the requirements of this paragraph (d).

### **(e) Shareholder Meetings**

Each issuer listing common stock or voting preferred stock, and their equivalents, shall hold an annual meeting of shareholders no later than one year after the end of the issuer's fiscal year-end.

### **(f) Quorum**

Each issuer shall provide for a quorum as specified in its by-laws for any meeting of the holders of common stock; provided, however, that in no case shall such quorum be less than 33 1/3 % of the outstanding shares of the company's common voting stock.

### **(g) Solicitation of Proxies**

Each issuer shall solicit proxies and provide proxy statements for all meetings of shareholders and shall provide copies of such proxy solicitation to Nasdaq.

### **(h) Conflicts of Interest**

Each issuer shall conduct appropriate review and oversight of all related party transactions for potential conflict of interest situations on an ongoing basis by the company's audit committee or another independent body of the board of directors. For purposes of this rule, the term "related party transaction" shall refer to transactions required to be disclosed pursuant to SEC Regulation S-K, Item

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404. However, in the case of small business issuers (as that term is defined in SEC Rule 12b-2), the term "related party transactions" shall refer to transactions required to be disclosed pursuant to SEC Regulation S-B, Item 404, and in the case of non-U.S. issuers, the term "related party transactions" shall refer to transactions required to be disclosed pursuant to Form 20-F, Item 7.B.

**(i)** Shareholder Approval

**(1)** Each issuer shall require shareholder approval or prior to the issuance of 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 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 bona fide 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.

**(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:

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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 together with sales by officers, directors or substantial shareholders of the company equals 20% or more of common stock or 20% or more of the voting power outstanding before the issuance; 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)** An exception applicable to a specified issuance of securities may be made upon prior written application to Nasdaq's Listing Qualifications Department when:

**(A)** the delay in securing stockholder approval would seriously jeopardize the financial viability of the enterprise; and

**(B)** reliance by the company on this exception is expressly approved by the audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors. The Listing Qualifications Department shall respond to each application for such an exception in writing.

A company that receives such an exception must mail to all shareholders not later than ten days before issuance of the securities a letter alerting them to its omission to seek the shareholder approval that would otherwise be required. Such notification shall disclose the terms of the transaction (including the number of shares of common stock that could be issued and the consideration received), the fact that the issuer is relying on a financial viability exception to the stockholder approval rules, and that the audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors has expressly approved reliance on the exception. The issuer shall also make a public announcement through the news media disclosing the same information as promptly as possible, but no later than ten days before the issuance of the securities.

**(3)** Only shares actually issued and outstanding (excluding treasury shares or shares held by a subsidiary) are to be used in making any calculation provided for in this paragraph (i). Unissued shares reserved for issuance upon conversion of securities or upon exercise of options or warrants will not be regarded as outstanding.

**(4)** Voting power outstanding as used in this Rule refers to the aggregate number of votes which may be cast by holders of those securities outstanding which entitle the holders thereof to vote generally on all matters submitted to the company's security holders for a vote.



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**(5)** An interest consisting of less than either 5% of the number of shares of common stock or 5% of the voting power outstanding of an issuer or party shall not be considered a substantial interest or cause the holder of such an interest to be regarded as a substantial security holder.

**(6)** Where shareholder approval is required, the minimum vote which will constitute shareholder approval shall be a majority of the total votes cast on the proposal. These votes may be cast in person, by proxy at a meeting of shareholders or by written consent in lieu of a special meeting to the extent permitted by applicable state and federal law and rules (including interpretations thereof), including, without limitation, SEC Regulations 14A and 14C. Nothing contained in this Rule 4350(i)(6) shall affect an issuer's obligation to hold an annual meeting of shareholders as required by Rule 4350(e).

**(7)** Shareholder approval shall not be required for any share issuance if such issuance is part of a court-approved reorganization under the federal bankruptcy laws or comparable foreign laws.

**(j)** Listing Agreement

Each issuer shall execute a Listing Agreement in the form designated by Nasdaq.

**(k)** Auditor Registration

Each listed issuer must be audited by an independent public accountant that is registered as a public accounting firm with the Public Company Accounting Oversight Board, as provided for in Section 102 of the Sarbanes-Oxley Act of 2002 [ 15 U.S.C. 7212].

**(l)** Direct Registration Program

**(1)** All securities initially listing on Nasdaq on or after January 1, 2007 must be eligible for a Direct Registration Program operated by a clearing agency registered under Section 17A of the Exchange Act. This provision does not extend to: (i) additional classes of securities of companies which already have securities listed on Nasdaq; (ii) companies which immediately prior to such listing had securities listed on another registered securities exchange in the U.S.; or, (iii) securities which are book-entry only.

**(2)(A)** Except as indicated in paragraph (2)(B) below, on and after March 31, 2008, all securities listed on Nasdaq (except securities which are book-entry only) must be eligible for a Direct Registration Program operated by a clearing agency registered under Section 17A of the Exchange Act.

(B) Until March 31, 2009, a foreign private issuer may follow its home country practice in lieu of the requirements of this Rule 4350(l), provided, however, that such an issuer must follow the requirements of Rule 4350(a) and IM-4350-6 for doing so. Thereafter, the listed securities of such issuers (except securities which are book-entry only) must be eligible for a Direct Registration Program operated by a clearing agency registered under Section 17A of the Exchange Act unless prohibited from complying by a law or regulation in its home country.

**(3)** If an issuer establishes or maintains a Direct Registration Program for its shareholders, the issuer shall, directly or through its transfer agent, participate in an electronic link with a clearing agency registered under Section 17A of the Exchange Act to facilitate the electronic transfer of securities held pursuant to such program.

**(m)** Notification of Material Noncompliance

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An issuer must provide Nasdaq with prompt notification after an executive officer of the issuer becomes aware of any material noncompliance by the issuer with the requirements of this Rule 4350.

### **(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. Issuers, other than foreign private issuers, shall disclose such waivers in a Form 8-K within four 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.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-007 eff. May 8, 2006; amended by SR-NASDAQ-2006-019 eff. July 28, 2006; amended by SR-NASDAQ-2006-008 eff. August 8, 2006; amended by SR-NASDAQ-2006-033 eff. Aug. 25, 2006; amended by SR-NASDAQ-2006-011 eff. Sept. 11, 2006; amended by SR-NASDAQ-2006-021 eff. Oct. 6, 2006; amended by SR-NASDAQ-2007-022 eff. May 29, 2007; amended by SR-NASDAQ-2006-045 eff. Aug. 24, 2007; amended by SR-NASDAQ-2007-101 eff. Dec. 28, 2007; amended by SR-NASDAQ-2008-031 eff. July 9, 2008; amended by SR-NASDAQ-2009-003 eff. January 15, 2009; amended by SR-NASDAQ-2009-009 eff. February 10, 2009.

### **IM-4350-1. Interpretive Material Regarding Future Priced Securities Summary**

Future Priced Securities are private financing instruments which were created as an alternative means of quickly raising capital for issuers. The security is generally structured in the form of a convertible security and is often issued via a private placement. Issuers will typically receive all capital proceeds at the closing. The conversion price of the Future Priced Security is generally linked to a percentage discount to the market price of the underlying common stock at the time of conversion and accordingly the conversion rate for Future Priced Securities floats with the market price of the common stock. As such, the lower the price of the issuer's common stock at the time of conversion, the more shares into which the Future Priced Security is convertible. The delay in setting the conversion price is appealing to issuers who believe that their stock will achieve greater value after the financing is received. However, the issuance of Future Priced Securities may be followed by a decline in the common stock price, creating additional dilution to the existing holders of the common stock. Such a price decline allows holders to convert the Future Priced Security into large amounts of the issuer's common stock. As these shares are issued upon conversion of the Future Priced Security, the common stock price may tend to decline further.

For example, an issuer may issue \$10 million of convertible preferred stock (the Future Priced Security), which is convertible by the holder or holders into \$10 million of common stock based on a conversion price of 80% of the closing price of the common stock on the date of conversion. If the closing price is \$5 on the date of conversion, the Future Priced Security holders would receive 2,500,000 shares of common stock. If, on the other hand, the closing price is \$1 on the date of conversion, the Future Priced Security holders would receive 12,500,000 shares of common stock.

Unless the issuer carefully considers the terms of the securities in connection with several Nasdaq Rules, the issuance of Future Priced Securities could result in a failure to comply with Nasdaq listing standards and the concomitant delisting of the issuer's securities from Nasdaq. Nasdaq's experience

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has been that issuers do not always appreciate this potential consequence. Nasdaq Rules that bear upon the continued listing qualification of an issuer and that must be considered when issuing Future Priced Securities include:

1. the shareholder approval rules
2. the voting rights rules
3. the bid price requirement
4. the listing of additional shares rules
5. the change in control rules
6. Nasdaq's discretionary authority rules

It is important for issuers to clearly understand that failure to comply with any of these rules could result in the delisting of the issuer's securities.

This notice is intended to be of assistance to companies considering financings involving Future Priced Securities. By adhering to the above requirements, issuers can avoid unintended listing qualifications problems. Issuers having any questions about this notice should contact the Nasdaq Office of General Counsel at (301) 978-8400 or Listing Qualifications Department at (301) 978-8008. Nasdaq will provide an issuer with a written interpretation of the application of Nasdaq Rules to a specific transaction, upon request of the issuer.

### **How the Rules Apply**

#### **Shareholder Approval**

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

Each issuer shall require shareholder approval prior to the issuance of 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 together with sales by officers, directors 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. <sup>1</sup>

When Nasdaq staff is unable to determine the number of shares to be issued in a transaction, it looks to the maximum potential issuance of shares to determine whether there will be an issuance of 20 percent or more of the common stock outstanding. In the case of Future Priced Securities, the actual conversion price is dependent on the market price at the time of conversion and so the number of shares that will be issued is uncertain until the conversion occurs. Accordingly, staff will look to the maximum potential issuance of common shares at the time the Future Priced Security is issued. Typically, with a Future Priced Security, the maximum potential issuance will exceed 20 percent of the common stock outstanding because the Future Priced Security could, potentially, be converted into common stock based on a share price of one cent per share, or less. Further, for purposes of this calculation, the lowest possible conversion price is below the book or market value of the stock at the time of issuance of the Future Priced Security. Therefore, shareholder approval must be obtained prior

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to the issuance of the Future Priced Security. Issuers should also be cautioned that obtaining shareholder ratification of the transaction after the issuance of a Future Priced Security does not satisfy the shareholder approval requirements.

Some Future Priced Securities may contain features to obviate the need for shareholder approval by: (1) placing a cap on the number of shares that can be issued upon conversion, such that the holders of the Future Priced Security cannot, without prior shareholder approval, convert the security into 20% or more of the common stock or voting power outstanding before the issuance of the Future Priced Security,<sup>2</sup> or (2) placing a floor on the conversion price, such that the conversion price will always be at least as high as the greater of book or market value of the common stock prior to the issuance of the Future Priced Securities. Even when a Future Priced Security contains these features, however, shareholder approval is still required under Rule 4350(i)(1)(B) if the issuance will result in a change of control.

### **Voting Rights**

Rule 4351 provides:

Voting rights of existing shareholders of publicly traded common stock registered under Section 12 of the Act cannot be disparately reduced or restricted through any corporate action or issuance.

IM-4351 also provides rules relating to voting rights of Nasdaq issuers.

Under the voting rights rules, an issuer cannot create a new class of security that votes at a higher rate than an existing class of securities or take any other action that has the effect of restricting or reducing the voting rights of an existing class of securities. The voting rights rules are typically implicated when the holders of the Future Priced Security are entitled to vote on an as-converted basis or when the holders of the Future Priced Security are entitled to representation on the Board of Directors. Staff will consider whether a voting rights violation exists by comparing the Future Priced Security holders' voting rights to their relative contribution to the company based on the company's overall book or market value at the time of the issuance of the Future Priced Security. The percentage of the overall vote attributable to the Future Priced Security holders and the Future Priced Security holders' representation on the board of directors must not exceed their relative contribution to the company based on the company's overall book or market value at the time of the issuance of the Future Priced Security. If the voting power or the board percentage exceeds that percentage interest, a violation exists because a new class of securities has been created that votes at a higher rate than an already existing class. Future Priced Securities that vote on an as-converted basis also raise voting rights concerns because of the possibility that, due to a decline in the price of the underlying common stock, the Future Priced Security holder will have voting rights disproportionate to its investment in the Company.

It is important to note that compliance with the shareholder approval rules prior to the issuance of a Future Priced Security does not affect whether the transaction is in violation of the voting rights rule. Furthermore, shareholders can not otherwise agree to permit a voting rights violation by the issuer. Because a violation of the voting rights requirement can result in delisting of the issuer's securities from Nasdaq, careful attention must be given to this issue to prevent a violation of the rule.

### **The Bid Price Requirement**

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The bid price requirement establishes a minimum bid price for issues listed on Nasdaq. Rules 4310(c)(4), 4320(e)(2)(E), 4450(a)(5) and 4450(b)(4) provide that, for an issue to be eligible for continued listing on Nasdaq, the minimum bid price per share shall be \$1. An issue is subject to delisting from Nasdaq if its bid price falls below \$1.

The bid price rules must be thoroughly considered because the characteristics of Future Priced Securities often exert downward pressure on the bid price of the issuer's common stock. Specifically, dilution from the discounted conversion of the Future Priced Security may result in a significant decline in the price of the common stock. Furthermore, there appear to be instances where short selling has contributed to a substantial price decline, which, in turn, could lead to a failure to comply with the bid price requirement.<sup>3</sup>

### **Listing of Additional Shares**

Rule 4310(c)(17) provides:

The issuer shall be required to notify Nasdaq on the appropriate form no later than 15 calendar days prior to: . . . issuing securities that may potentially result in a change of control of the issuer; or . . . entering into a transaction that may result in the potential issuance of common stock (or securities convertible into common stock) greater than 10% of either the total shares outstanding or the voting power outstanding on a pre-transaction basis.

Issuers should be cognizant that under this rule notification is required at least 15 days prior to issuing any security (including a Future Priced Security) convertible into shares of a class of securities already listed on Nasdaq. Failure to provide such notice can result in an issuer's removal from Nasdaq.

### **Public Interest Concerns**

Rule 4300 provides:

Nasdaq is entrusted with the authority to preserve and strengthen the quality of and public confidence in its market. Nasdaq stands for integrity and ethical business practices in order to enhance investor confidence, thereby contributing to the financial health of the economy and supporting the capital formation process. Nasdaq issuers, from new public companies to companies of international stature, are publicly recognized as sharing these important objectives.

Nasdaq, therefore, in addition to applying the enumerated criteria set forth in the Rule 4300 and 4400 Series, has broad discretionary authority over the initial and continued listing of securities in Nasdaq in order to maintain the quality of and public confidence in its market, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest. Nasdaq may use such discretion to deny initial listing, apply additional or more stringent criteria for the initial or continued listing of particular securities, or suspend or delist particular securities based on any event, condition, or circumstance that exists or occurs that makes initial or continued listing of the securities on Nasdaq inadvisable or unwarranted in the opinion of Nasdaq, even though the securities meet all enumerated criteria for initial or continued listing on Nasdaq.

The returns on Future Priced Securities may become excessive compared with those of public investors in the issuer's common securities. In egregious situations, the use of a Future Priced Security may raise public interest concerns under Rule 4300. In addition to the demonstrable business

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purpose of the transaction, other factors that Nasdaq staff will consider in determining whether a transaction raises public interest concerns include: (1) the amount raised in the transaction relative to the issuer's existing capital structure; (2) the dilutive effect of the transaction on the existing holders of common stock; (3) the risk undertaken by the Future Priced Security investor; (4) the relationship between the Future Priced Security investor and the issuer; (5) whether the transaction was preceded by other similar transactions; and (6) whether the transaction is consistent with the just and equitable principles of trade.

Some Future Priced Securities may contain features that address the public interest concerns. These features tend to provide incentives to the investor to hold the security for a longer time period and limit the number of shares into which the Future Priced Security may be converted. Such features may limit the dilutive effect of the transaction and increase the risk undertaken by the Future Priced Security investor in relationship to the reward available.

### **Business Combinations with non-Nasdaq Entities Resulting in a Change of Control**

Rule 4340(a) provides:

An issuer must apply for initial listing in connection with a transaction whereby the issuer combines with a non-Nasdaq entity, resulting in a change of control of the issuer and potentially allowing the non-Nasdaq entity to obtain a Nasdaq Listing. In determining whether a change of control has occurred, Nasdaq shall consider all relevant factors including, but not limited to, changes in the management, board of directors, voting power, ownership, and financial structure of the issuer. Nasdaq shall also consider the nature of the businesses and the relative size of the Nasdaq issuer and non-Nasdaq entity. The issuer must submit an application for the post-transaction entity with sufficient time to allow Nasdaq to complete its review before the transaction is completed. If the issuer's application for initial listing has not been approved prior to consummation of the transaction, Nasdaq will issue a Staff Determination Letter as set forth in Rule 4804 and begin delisting proceedings pursuant to the Rule 4800 Series.

This provision, which applies regardless of whether the issuer obtains shareholder approval for the transaction, requires issuers to qualify under the initial listing standards in connection with a combination that results in a change of control. It is important for issuers to realize that in certain instances, the conversion of a Future Priced Security may implicate this provision. For example, if there is no limit on the number of common shares issuable upon conversion, or if the limit is set high enough, the exercise of conversion rights under a Future Priced Security could result in the holders of the Future Priced Securities obtaining control of the listed company. In such event, an issuer may be required to re-apply for initial listing and satisfy all initial listing requirements.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-047 eff. Jan. 5, 2007; amended by SR-NASDAQ-2008-062 eff. August 27, 2008.

<sup>1</sup> Nasdaq may make exceptions to this requirement when the delay in securing stockholder approval would seriously jeopardize the financial viability of the enterprise and reliance by the company on this exception is expressly approved by the Audit Committee or a comparable body of the Board of Directors.

<sup>2</sup> See IM-4350-2, Interpretative Material Regarding the Use of Share Caps to Comply with Rule 4350(i).

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<sup>3</sup> If used to manipulate the price of the stock, short selling by the holders of the Future Priced Security is prohibited by the antifraud provisions of the securities laws and by Nasdaq Rules and may be prohibited by the terms of the placement.

### **IM-4350-2. Interpretative Material Regarding the Use of Share Caps to Comply with Rule 4350(i)**

Rule 4350(i) limits the number of shares or voting power that can be issued or granted without shareholder approval prior to the issuance of certain securities. <sup>1</sup> Generally, this limitation applies to issuances of 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance. <sup>2</sup> Issuers sometimes comply with the 20% limitation in this rule by placing a "cap" on the number of shares that can be issued in the transaction, such that there cannot, under any circumstances, be an issuance of 20% or more of the common stock or voting power previously outstanding without prior shareholder approval. If an issuer determines to defer a shareholder vote in this manner, shares that are issuable under the cap (in the first part of the transaction) must not be entitled to vote to approve the remainder of the transaction. In addition, a cap must apply for the life of the transaction, unless shareholder approval is obtained. For example, caps that no longer apply if a company is not listed on Nasdaq are not permissible under the Rule. Of course, if shareholder approval is not obtained, then the investor will not be able to acquire 20% or more of the common stock or voting power outstanding before the transaction and would continue to hold the balance of the original security in its unconverted form.

Nasdaq has observed situations where issuers have attempted to cap the issuance of shares at below 20% but have also provided an alternative outcome based upon whether shareholder approval is obtained, such as a "penalty" or a "sweetener." For example, a company issues a convertible preferred stock or debt instrument that provides for conversions of up to 20% of the total shares outstanding with any further conversions subject to shareholder approval. However, the terms of the instrument provide that if shareholders reject the transaction, the coupon or conversion ratio will increase or the issuer will be penalized by a specified monetary payment. Likewise, a transaction may provide for improved terms if shareholder approval is obtained. Nasdaq believes that in such situations the cap is defective because the related penalty or sweetener has a coercive effect on the shareholder vote, and thus may deprive shareholders of their ability to freely exercise their vote. Accordingly, Nasdaq will not accept a cap that defers the need for shareholder approval in such situations. Instead, if the terms of a transaction can change based upon the outcome of the shareholder vote, no shares may be issued prior to the approval of the shareholders. Issuers that engage in transactions with defective caps may be subject to delisting.

Issuers having questions regarding this policy are encouraged to contact the Nasdaq Listing Qualifications Department at (301) 978-8008, which will provide a written interpretation of the application of Nasdaq Rules to a specific transaction, upon prior written request of the issuer.

Adopted by SEC Release 34-53128 (Jan. 13, 2006).

<sup>1</sup> An exception to this rule is available to issuers when the delay in securing stockholder approval would seriously jeopardize the financial viability of the enterprise. Rule 4350(i)(2). However, a share cap is not permissible in conjunction with the financial viability exception provided in Rule 4350(i)(2), because the application to Nasdaq and the notice to shareholders required in the rule must occur prior to the issuance of any common stock or securities convertible into or exercisable for common stock.

<sup>2</sup> While Nasdaq's experience is that this issue is generally implicated with respect to these situations, it may also arise with respect to the 5% threshold set forth in Rule 4350(i)(1)(C)(i).

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**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."

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.

Adopted by SEC Release 34-53128 (Jan. 13, 2006).

**IM-4350-4. Board Independence and Independent Committees**  
**Independent Directors and Independent Committees — Rule 4350(c)**

**Majority Independent Board.** Independent directors (as defined in Rule 4200(a)(15)) play an important role in assuring investor confidence. Through the exercise of independent judgment, they act on behalf of investors to maximize shareholder value in the companies they oversee and guard against conflicts of interest. Requiring that the board be comprised of a majority of independent directors empowers such directors to carry out more effectively these responsibilities.

**Executive Sessions of Independent Directors.** Regularly scheduled executive sessions encourage and enhance communication among independent directors. It is contemplated that executive sessions



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will occur at least twice a year, and perhaps more frequently, in conjunction with regularly scheduled board meetings.

**Independent Director Oversight of Executive Compensation.** Independent director oversight of executive officer compensation helps assure that appropriate incentives are in place, consistent with the board's responsibility to maximize shareholder value. The rule is intended to provide flexibility for an issuer to choose an appropriate board structure and to reduce resource burdens, while ensuring independent director control of compensation decisions.

**Independent Director Oversight of Director Nominations.** Independent director oversight of nominations enhances investor confidence in the selection of well-qualified director nominees, as well as independent nominees as required by the rules. This rule is also intended to provide flexibility for a company to choose an appropriate board structure and reduce resource burdens, while ensuring that independent directors approve all nominations.

This rule does not apply in cases where the right to nominate a director legally belongs to a third party. For example, investors may negotiate the right to nominate directors in connection with an investment in the company, holders of preferred stock may be permitted to nominate or appoint directors upon certain defaults, or the company may be a party to a shareholder's agreement that allocates the right to nominate some directors. Because the right to nominate directors in these cases does not reside with the company, independent director approval would not be required. This rule is not applicable if the company is subject to a binding obligation that requires a director nomination structure inconsistent with the rule and such obligation pre-dates the approval date of this rule.

**Controlled Company Exemption.** This exemption recognizes that majority shareholders, including parent companies, have the right to select directors and control certain key decisions, such as executive officer compensation, by virtue of their ownership rights. In order for a group to exist for purposes of this rule, the shareholders must have publicly filed a notice that they are acting as a group (e.g., a Schedule 13D). A Controlled Company not relying upon this exemption need not provide any special disclosures about its controlled status. It should be emphasized that this controlled company exemption does not extend to the audit committee requirements under Rule 4350(d) or the requirement for executive sessions of independent directors under Rule 4350(c)(2).

### **Audit Committees — Rule 4350(d)**

**Audit Committee Charter.** Each issuer is required to adopt a formal written charter that specifies the scope of its responsibilities and the means by which it carries out those responsibilities; the outside auditor's accountability to the audit committee; and the audit committee's responsibility to ensure the independence of the outside auditor. Consistent with this, the charter must specify all audit committee responsibilities set forth in Rule 10A-3(b)(2), (3), (4) and (5) under the Act. Rule 10A-3(b)(3)(ii) requires that each audit committee must establish procedures for the confidential, anonymous submission by employees of the listed issuer of concerns regarding questionable accounting or auditing matters. The rights and responsibilities as articulated in the audit committee charter empower the audit committee and enhance its effectiveness in carrying out its responsibilities.

Rule 4350(d)(3) imposes additional requirements for investment company audit committees that must also be set forth in audit committee charters for these issuers.

**Audit Committee Composition.** Audit committees are required to have a minimum of three members and be comprised only of independent directors. In addition to satisfying the independent director requirements under Rule 4200, audit committee members must meet the criteria for

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independence set forth in Rule 10A-3(b)(1) under the Act (subject to the exemptions provided in Rule 10A-3(c)): they must not accept any consulting, advisory, or other compensatory fee from the company other than for board service, and they must not be an affiliated person of the company. It is recommended that an issuer disclose in its annual proxy (or, if the issuer does not file a proxy, in its Form 10-K or 20-F) if any director is deemed independent but falls outside the safe harbor provisions of Rule 10A-3(e)(1)(ii) under the Act. A director who qualifies as an audit committee financial expert under Item 401(h) of Regulation S-K or Item 401(e) of Regulation S-B is presumed to qualify as a financially sophisticated audit committee member under Rule 4350(d)(2)(A).

**The Audit Committee Responsibilities and Authority.** Audit committees must have the specific audit committee responsibilities and authority necessary to comply with Rule 10A-3(b)(2), (3), (4) and (5) under the Act (subject to the exemptions provided in Rule 10A-3(c)), concerning responsibilities relating to registered public accounting firms; complaints relating to accounting; internal accounting controls or auditing matters; authority to engage advisors; and funding. Audit committees for investment companies must also establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting or auditing matters by employees of the investment adviser, administrator, principal underwriter, or any other provider of accounting related services for the investment company, as well as employees of the investment company.

**Executive Officers.** References to executive officers in Rule 4350 mean those officers covered in Rule 16a-1(f) under the Act.

Adopted by SEC Release 34-53128 (Jan. 13, 2006).

### **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.

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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

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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).

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. [Acirc ]§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.

Adopted by SEC Release 34-53128 (Jan. 13, 2006).

### **IM-4350-6. Applicability**

1. Foreign Private Issuer Exception and Disclosure. A foreign private issuer (as defined in Rule 3b-4 under the Act) listed on Nasdaq may follow the practice in such issuer's home country (as defined in General Instruction F of Form 20-F) in lieu of some of the provisions of Rule 4350, subject to several important exceptions. First, such an issuer shall comply with Rule 4350(b)(1)(B) (Disclosure of Going Concern Opinion), Rule 4350(j) (Listing Agreement) and Rule 4350(m) (Notification of Material Noncompliance). Second, such an issuer shall have an audit committee that satisfies Rule 4350(d)(3). Third, members of such audit committee shall meet the criteria for independence referenced in Rule 4350(d)(2)(A)(ii) (the criteria set forth in Rule 10A-3(b)(1), subject to the exemptions provided in Rule 10A-3(c) under the Exchange Act). Fourth, a foreign private issuer must comply with Rule 4350(l) (Direct Registration Program) unless prohibited from complying by a law or regulation in its home country. Finally, a foreign private issuer that elects to follow home country practice in lieu of a requirement of Rule 4350 shall submit to Nasdaq a written statement from an independent counsel in such issuer's home country certifying that the issuer's practices are not prohibited by the home country's laws and, in the case of a company prohibited from complying with Rule 4350(l), certifying that a law or regulation in the home country prohibits such compliance. In the case of new listings, this certification is required at the time of listing. For existing issuers, the certification is required at the time the company seeks to adopt its first non-compliant practice. In the interest of transparency, the rule requires a foreign private issuer to make appropriate disclosures in the issuer's annual filings with the Commission (typically Form 20-F or 40-F), and at the time of the issuer's original listing in the United States, if that listing is on Nasdaq, in its registration statement (typically Form F-1, 20-F, or 40-F); alternatively, the issuer may provide these disclosures in English on its website. The issuer shall disclose each requirement of Rule 4350 that it does not follow and include a brief statement of

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the home country practice the issuer follows in lieu of these corporate governance requirement(s). If the disclosure is only available on the website, the annual report and registration statement should so state and provide the web address at which the information may be obtained.

2. Management Investment Companies. Management investment companies registered under the Investment Company Act of 1940 are already subject to a pervasive system of federal regulation in certain areas of corporate governance covered by Rule 4350. In light of this, Nasdaq exempts from Rule 4350(c) and (n) management investment companies registered under the Investment Company Act of 1940. Business development companies, which are a type of closed-end management investment company defined in Section 2(a)(48) of the Investment Company Act of 1940 that are not registered under that Act, are required to comply with all of the provisions of Rule 4350.

3. Asset-backed Issuers and Other Passive Issuers. Because of their unique attributes, Rule 4350(c), (d) and (n) do not apply to asset-backed issuers and issuers, such as unit investment trusts, that are organized as trusts or other unincorporated associations that do not have a board of directors or persons acting in a similar capacity and whose activities are limited to passively owning or holding (as well as administering and distributing amounts in respect of) securities, rights, collateral or other assets on behalf of or for the benefit of the holders of the listed securities. This is consistent with Nasdaq's traditional approach to such issuers.

4. Cooperatives. Certain member-owned cooperatives that list their preferred stock are required to have their common stock owned by their members. Because of their unique structure and the fact that they do not have a publicly traded class of common stock, such entities are exempt from Rule 4350(c). Again, this is consistent with Nasdaq's traditional approach to such issuers.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-033 eff. August 25, 2006; amended by SR-NASDAQ-2006-045 eff. Aug. 24, 2007; amended by SR-NASDAQ-2008-031 eff. July 9, 2008.

### **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 questionable behavior. For company personnel, a code of conduct with enforcement provisions provides assurance that reporting of questionable behavior is protected and encouraged, and fosters an atmosphere of self-awareness and prudent conduct.

Rule 4350(n) requires issuers to adopt a code of conduct complying with the definition of a "code of ethics" under 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. Thus, the code must include such standards as are reasonably necessary to promote the ethical handling of conflicts of interest, full and fair disclosure, and compliance with laws, rules and regulations, as specified by the Sarbanes-Oxley Act. However, the code of conduct required by Rule 4350(n) must apply to all directors, officers, and employees. Issuers can satisfy this obligation by adopting one or more codes of conduct, such that all directors, officers and employees are subject to a code that satisfies the definition of a "code of ethics."

As the Sarbanes-Oxley Act recognizes, investors are harmed when the real or perceived private interest of a director, officer or employee is in conflict with the interests of the company, as when the

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individual receives improper personal benefits as a result of his or her position with the company, or when the individual has other duties, responsibilities or obligations that run counter to his or her duty to the company. Also, the disclosures an issuer makes to the Commission are the essential source of information about the company for regulators and investors — there can be no question about the duty to make them fairly, accurately and timely. Finally, illegal action must be dealt with swiftly and the violators reported to the appropriate authorities. Each code of conduct must require that any waiver of the code for executive officers or directors may be made only by the board and must be disclosed to shareholders, along with the reasons for the waiver. All issuers, other than foreign private issuers, must disclose such waivers in a Form 8-K within four business days. Foreign private issuers must disclose such waivers either in a Form 6-K or in the next Form 20-F or 40-F. This disclosure requirement provides investors the comfort that waivers are not granted except where they are truly necessary and warranted, and that they are limited and qualified so as to protect the company and its shareholders to the greatest extent possible.

Each code of conduct must also contain an enforcement mechanism that ensures prompt and consistent enforcement of the code, protection for persons reporting questionable behavior, clear and objective standards for compliance, and a fair process by which to determine violations.

Adopted by SEC Release 34-53128 (Jan. 13, 2006).

### **IM-4350-8. Shareholder Meetings**

Rule 4350(e) requires that each issuer listing common stock or voting preferred stock, and their equivalents, hold an annual meeting of shareholders within one year of the end of each fiscal year. At each such meeting, shareholders must be afforded the opportunity to discuss company affairs with management and, if required by the issuer's governing documents, to elect directors. A new listing that was not previously subject to a requirement to hold an annual meeting is required to hold its first meeting within one-year after its first fiscal year-end following listing. Of course, Nasdaq's meeting requirement does not supplant any applicable state or federal securities laws concerning annual meetings.

This requirement is not applicable as a result of an issuer listing the following types of securities: securities listed pursuant to Rule 4420(f) (such as Trust Preferred Securities and Contingent Value Rights), unless the listed security is a common stock or voting preferred stock equivalent (e.g., a callable common stock); Portfolio Depository Receipts listed pursuant to Rule 4420(i); Index Fund Shares listed pursuant to Rule 4420(j); and Trust Issued Receipts listed pursuant to Rule 4420(l). Notwithstanding, if the issuer also lists common stock or voting preferred stock, or their equivalent, the issuer must still hold an annual meeting for the holders of that common stock or voting preferred stock, or their equivalent.

Adopted by SR-NASDAQ-2006-019 eff. July 28, 2006.

### **4350-1 [Deleted]**

[Deleted by SR-NASDAQ-2006-033 eff. August 25, 2006.]

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-007 eff. May 8, 2006; deleted by SR-NASDAQ-2006-033 eff. August 25, 2006.

### **4351. Voting Rights**

Voting rights of existing shareholders of publicly traded common stock registered under Section 12 of the Act cannot be disparately reduced or restricted through any corporate action or issuance.

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Examples of such corporate action or issuance include, but are not limited to, the adoption of time-phased voting plans, the adoption of capped voting rights plans, the issuance of super-voting stock, or the issuance of stock with voting rights less than the per share voting rights of the existing common stock through an exchange offer.

Adopted by SEC Release 34-53128 (Jan. 13, 2006).

### **IM-4351. Voting Rights Policy**

The following Voting Rights Policy is based upon, but more flexible than, former SEC Rule 19c-4. Accordingly, Nasdaq will permit corporate actions or issuances by Nasdaq issuers that would have been permitted under Rule 19c-4, as well as other actions or issuances that are not inconsistent with this policy. In evaluating such other actions or issuances, Nasdaq will consider, among other things, the economics of such actions or issuances and the voting rights being granted. Nasdaq's interpretations under the policy will be flexible, recognizing that both the capital markets and the circumstances and needs of Nasdaq issuers change over time. The text of the Nasdaq Voting Rights Policy is as follows:

#### *Issuers with Dual Class Structures*

The restriction against the issuance of super voting stock is primarily intended to apply to the issuance of a new class of stock, and issuers with existing dual class capital structures would generally be permitted to issue additional shares of the existing super voting stock without conflict with this policy.

#### *Consultation with Nasdaq*

Violation of the Nasdaq Voting Rights Policy could result in the loss of an issuer's Nasdaq or public trading market. The policy can apply to a variety of corporate actions and securities issuances, not just super voting or so-called "time phase" voting common stock. While the policy will continue to permit actions previously permitted under Rule 19c-4, it is extremely important that Nasdaq issuers communicate their intentions to their Nasdaq representatives as early as possible before taking any action or committing to take any action that may be inconsistent with the policy. Nasdaq urges issuers of securities listed on Nasdaq not to assume, without first discussing the matter with the Nasdaq staff, that a particular issuance of common or preferred stock or the taking of some other corporate action will necessarily be consistent with the policy. It is suggested that copies of preliminary proxy or other material concerning matters subject to the policy be furnished to Nasdaq for review prior to formal filing.

#### *Review of Past Voting Rights Activities*

In reviewing an application for initial qualification for listing of a security in Nasdaq, Nasdaq will review the issuer's past corporate actions to determine whether another self-regulatory organization (SRO) has found any of the issuer's actions to have been a violation or evasion of the SRO's voting rights policy. Based on such review, Nasdaq may take any appropriate action, including the denial of the application or the placing of restrictions on such listing. Nasdaq will also review whether an issuer seeking initial listing of a security in Nasdaq has requested a ruling or interpretation from another SRO regarding the application of that SRO's voting rights policy with respect to a proposed transaction. If so, Nasdaq will consider that fact in determining its response to any ruling or interpretation that the issuer may request on the same or similar transaction.

#### *Non-U.S. Companies*

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Nasdaq will accept any action or issuance relating to the voting rights structure of a non-U.S. issuer that is in compliance with Nasdaq's requirements for domestic companies or that is not prohibited by the issuer's home country law.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-019 eff. July 28, 2006.

**4360. Qualitative Listing Requirements for Nasdaq Issuers That Are Limited Partnerships**

**(a) Applicability**

No provision of this Rule shall be construed to require any foreign issuer that is a partnership to do any act that is contrary to a law, rule or regulation of any public authority exercising jurisdiction over such issuer or that is contrary to generally accepted business practices in the issuer's country of domicile. Nasdaq shall have the ability to provide exemptions from applicability of these provisions as may be necessary or appropriate to carry out this intent.

**(b) Distribution of Annual and Interim Reports**

**(1)** Each issuer that is a limited partnership shall distribute to limited partners copies of an annual report containing audited financial statements of the limited partnership. The report shall be distributed to limited partners within a reasonable period of time after the end of the limited partnership's fiscal year end and shall be filed with Nasdaq at the time it is distributed to limited partners. A limited partnership may comply with this requirement either:

(A) by mailing the report to the limited partners; or

(B) by satisfying the requirements for furnishing an annual report contained in Exchange Act Rule 14a-16; or

(C) by posting the annual report on or through the limited partnership's website, along with a prominent undertaking in the English language to provide limited partners, upon request, a hard copy of the partnership's annual report free of charge. A limited partnership that chooses to satisfy this requirement pursuant to this paragraph (C) must, simultaneous with this posting, issue a press release stating that its annual report has been filed with the Commission (or other appropriate regulatory authority). This press release must also state that the annual report is available on the limited partnership's website and include the website address and that limited partners may receive a hard copy free of charge upon request. A limited partnership must provide such hard copies within a reasonable period of time following the request.

**(2)**

**(A)** Each issuer that is a limited partnership which is subject to SEC Rule 13a-13 shall make available copies of quarterly reports including statements of operating results to limited partners either prior to or as soon as practicable following the partnership's filing of its Form 10-Q with the Commission. Such reports shall be distributed to limited partners if required by statute or regulation in the state in which the limited partnership is formed or doing business or by the terms of the partnership's limited partnership agreement. If the form of such quarterly report differs from the Form 10-Q, the issuer shall file one copy of the report with Nasdaq in addition to filing its Form 10-Q pursuant to Rule 4310(c)(14). The statement of operations contained in quarterly reports shall disclose, at a minimum,



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any substantial items of an unusual or nonrecurrent nature and net income before and after estimated federal income taxes or net income and the amount of estimated federal taxes.

**(B)** Each issuer that is a limited partnership which is not subject to SEC Rule 13a-13 and which is required to file with the Commission, or another federal or state regulatory authority, interim reports relating primarily to operations and financial position, shall make available to limited partners reports which reflect the information contained in those interim reports. Such reports shall be distributed to limited partners if required by statute or regulation in the state in which the limited partnership is formed or doing business or by the terms of the partnership's limited partnership agreement. Such reports shall be distributed to limited partners either before or as soon as practicable following filing with the appropriate regulatory authority. If the form of the interim report provided to limited partners differs from that filed with the regulatory authority, the issuer shall file one copy of the report to limited partners with Nasdaq in addition to the report to the regulatory authority that is filed with Nasdaq pursuant to Rule 4310(c)(14).

**(C)** Each foreign private issuer that is a limited partnership shall publish, in a press release, which would also be submitted on a Form 6-K, an interim balance sheet and income statement as of the end of its second quarter. This information, which must be presented in English but does not have to be reconciled to U.S. GAAP, must be provided not later than six months following the end of the issuer's second quarter. Such information shall be distributed to limited partners if required by statute or regulation in the jurisdiction in which the limited partnership is formed or doing business or by the terms of the partnership's limited partnership agreement.

**(c)** *Corporate General Partner/Independent Directors*

Each issuer that is a limited partnership shall maintain a corporate general partner or co-general partner, which shall have the authority to manage the day-to-day affairs of the partnership. Such corporate general or co-partner shall maintain a sufficient number of independent directors on its board of directors to satisfy the audit committee requirement set forth in Rule 4350(d)(2).

**(d)** *Audit Committee*

The corporate general partner or co-general partner of each issuer that is a limited partnership must satisfy the audit committee requirements set forth in Rule 4350(d).

**(e)** *Partner Meetings*

An issuer that is a limited partnership shall not be required to hold an annual meeting of limited partners unless required by statute or regulation in the state in which the limited partnership is formed or doing business or by the terms of the partnership's limited partnership agreement.

**(f)** *Quorum*

In the event that a meeting of limited partners is required pursuant to paragraph (e), the quorum for such meeting shall be not less than 33-1/3 percent of the limited partnership interests outstanding.

**(g)** *Solicitation of Proxies*

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In the event that a meeting of limited partners is required pursuant to paragraph (e), the issuer shall provide all limited partners with proxy or information statements and if a vote is required shall solicit proxies thereon.

**(h)** *Listing Agreement*

Each issuer that is a limited partnership shall execute a Listing Agreement in the form designated by Nasdaq.

**(i)** *Conflict of Interest*

Each issuer which is a limited partnership shall conduct an appropriate review of all related party transactions on an ongoing basis and shall utilize the Audit Committee or a comparable body of the Board of Directors for the review of potential material conflict of interest situations where appropriate.

**(j)** Each issuer that is a limited partnership must comply with the requirements to be eligible for a Direct Registration Program, as described in Rule 4350(l).

**(k)** *Shareholder Approval.* Each issuer that is a limited partnership must obtain shareholder approval 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 stock may be acquired by officers, directors, employees, or consultants, as would be required under Rule 4350(i)(1)(A) and IM-4350-5.

**(l)** *Auditor Registration.* Each issuer that is a limited partnership must be audited by an independent public accountant that is registered as a public accounting firm with the Public Company Accounting Oversight Board, as provided for in Section 102 of the Sarbanes-Oxley Act of 2002 [15 U.S.C. 7212].

**(m)** *Notification of Material Noncompliance.* Each issuer that is a limited partnership must provide Nasdaq with prompt notification after an executive officer of the issuer, or a person performing an equivalent role, becomes aware of any material noncompliance by the issuer with the requirements of this Rule 4360.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-019 eff. July 28, 2006; amended by SR-NASDAQ-2007-066 eff. July 12, 2007; amended by SR-NASDAQ-2008-084 eff. January 6, 2009; amended by SR-NASDAQ-2009-003 eff. January 15, 2009.

**4370. Additional Requirements for Nasdaq-Listed Securities Issued by Nasdaq or its Affiliates**

**(a)** For purposes of this Rule 4370, the terms below are defined as follows:

**(1)** "Nasdaq Affiliate" means The Nasdaq Stock Market, Inc. and any entity that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with The Nasdaq Stock Market, Inc., where "control" means that the one entity possesses, directly or indirectly, voting control of the other entity either through ownership of capital stock or other equity securities or through majority representation on the board of directors or other management body of such entity.

**(2)** "Affiliate Security" means any security issued by a Nasdaq Affiliate, with the exception of Portfolio Depository Receipts as defined in Rule 4420(i)(1)(A) and Index Fund Shares as defined in Rule 4420(j)(1)(A).

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**(b)** Upon initial and throughout continued listing of the Affiliate Security on The Nasdaq Stock Market, Nasdaq shall:

**(1)** file a report quarterly with the Commission detailing Nasdaq's monitoring of:

**(A)** the Nasdaq Affiliate's compliance with the listing requirements contained in the Rule 4200, 4300 and 4400 Series; and

**(B)** the trading of the Affiliate Security, which shall include summaries of all related surveillance alerts, complaints, regulatory referrals, trades cancelled or adjusted pursuant to Rule 11890, investigations, examinations, formal and informal disciplinary actions, exception reports and trading data of such security.

**(2)** engage an independent accounting firm once a year to review and prepare a report on the Affiliate Security to ensure that the Nasdaq Affiliate is in compliance with the listing requirements contained in the Rule 4200, 4300 and 4400 Series and promptly forward to the Commission a copy of the report prepared by the independent accounting firm.

**(c)** In the event that Nasdaq determines that the Nasdaq Affiliate is not in compliance with any of the listing requirements contained in the Rule 4200, 4300 and 4400 Series, Nasdaq shall file a report with the Commission within five business days of providing notice to the Nasdaq Affiliate of its non-compliance. The report shall identify the date of non-compliance, type of non-compliance and any other material information conveyed to the Nasdaq Affiliate in the notice of non-compliance. Within five business days of receipt of a plan of compliance from the Nasdaq Affiliate, Nasdaq shall notify the Commission of such receipt, whether the plan of compliance was accepted by Nasdaq or what other action was taken with respect to the plan and the time period provided to regain compliance with the Rule 4200, 4300 and 4400 Series, if any.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-039 eff. Sept. 28, 2006.

**4380. Termination Procedure**

**(a)** Failure to maintain compliance with the applicable provisions of the Rule 4300, 4400 and 4500 Series will result in the termination of an issue's listing unless an exception is granted as provided in the Rule 4800 Series. Termination shall become effective in accordance with the procedures set forth in the Rule 4800 Series, including IM-4800.

**(b)(1)** An issuer may voluntarily terminate its listing upon compliance with all requirements of Rule 12d2-2(c) under the Exchange Act. In part, Rule 12d2-2(c) requires that the issuer may delist by filing an application on Form 25 with the Commission, provided that the issuer: (i) complies with all applicable laws in effect in the state in which it is incorporated and with the applicable Nasdaq Rules; (ii) provides notice to Nasdaq no fewer than 10 days before the issuer files the Form 25 with the Commission, including a statement of the material facts relating to the reasons for delisting; and (iii) contemporaneous with providing notice to Nasdaq, publishes notice of its intent to delist, along with its reasons therefore, via a press release and on its web site, if it has one. Any notice provided on the issuer's web site pursuant to Rule 12d2-2(c) must remain available until the delisting has become effective. The issuer must also provide a copy of the Form 25 to Nasdaq simultaneously with its filing with the Commission. Nasdaq will provide notice on its web site of the issuer's intent to delist as required by Rule 12d2-2(c)(3).

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(2) An issuer that seeks to voluntarily delist a class of securities pursuant to Rule 4380(b)(1) that has received notice from Nasdaq, pursuant to the Rule 4800 Series or otherwise, that it fails to comply with one or more requirements for continued listing, or that is aware that it is below such continued listing requirements notwithstanding that it has not received such notice from Nasdaq, must disclose this fact (including the specific continued listing requirement that it is below) in: (i) its statement of all material facts relating to the reasons for withdrawal from listing provided to Nasdaq along with written notice of its determination to withdraw from listing required by Rule 12d2-2(c)(2)(ii) under the Exchange Act; and (ii) its press release and web site notice required by Rule 12d2-2(c)(2)(iii) under the Exchange Act.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-005 eff. July 26, 2006; amended by SR-NASDAQ-2008-054 eff. June 13, 2008.

### **4390. Issuer Designation Requirements**

Pursuant to SEC Rule 600, those securities for which transaction reporting is required by an effective transaction reporting plan are designated as national market system securities. A transaction reporting plan has been filed with the Commission covering securities listed on Nasdaq.

Adopted by SEC Release 34-53128 (Jan. 13, 2006).

### **IM-4390. Impact of Non-Designation of Dually Listed Securities**

To foster competition among markets and further the development of the national market system following the repeal of NYSE Rule 500, Nasdaq shall permit issuers whose securities are listed on the New York Stock Exchange to apply also to list those securities on the Nasdaq Global Market ("NGM"). Nasdaq shall make an independent determination of whether such issuers satisfy all applicable listing requirements and shall require issuers to enter into a dual listing agreement with Nasdaq.

While Nasdaq shall certify such dually listed securities for listing on the NGM, Nasdaq shall not exercise its authority under Rule 4390 separately to designate or register such dually listed securities as Nasdaq national market system securities within the meaning of Section 11A of the Act or the rules thereunder. As a result, these securities, which are already designated as national market system securities under the Consolidated Quotation Service ("CQS") and Consolidated Tape Association national market system plans ("CQ and CTA Plans"), shall remain subject to those plans and shall not become subject to the Nasdaq UTP Plan, the national market system plan governing securities designated by Nasdaq. For purposes of the national market system, such securities shall continue to trade under their current one, two, or three-character ticker symbol. Nasdaq shall continue to send all quotations and transaction reports in such securities to the processor for the CTA Plan.

Through this interpretation, Nasdaq also resolves any potential conflicts that arise under Nasdaq rules as a result of a single security being both a security subject to the CQ and CTA Plans (a "CQS security"), which is subject to one set of rules, and a listed NGM security, which is subject to a different set of rules. Specifically, dually listed securities shall be Nasdaq securities for purposes of rules related to listing and delisting, and shall remain as CQS securities under all other Nasdaq rules. Treating dually listed securities as CQS securities under Nasdaq rules is consistent with their continuing status as CQS securities under the CTA and CQ national market system plans, as described above. This interpretation also preserves the status quo and avoids creating potential confusion for investors and market participants that currently trade these securities on Nasdaq.

For example, Nasdaq shall continue to honor the trade halt authority of the primary market under the CQ and CT Plans. Nasdaq Rule 4120(a)(2) and (3) governing CQS securities shall apply to dually listed

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securities, whereas Nasdaq Rule 4120(a)(1), (4), (5), (6), and (7) shall not. The fees applicable to CQS securities set forth in Nasdaq Rule 7000 Series shall continue to apply to dually listed issues.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SEC Release SR-NASDAQ-2006-007 eff. May 8, 2006; amended by SR-NASDAQ-2007-065 eff. Oct. 15, 2007; amended by SR-NASDAQ-2008-054 eff. June 13, 2008.

### **4400. Nasdaq Global Market**

#### **4410. Applications for Listing**

**(a)** Application for listing on the Nasdaq Global Market shall be on a form supplied by Nasdaq and signed by a corporate officer of the issuer. Compliance with the listing criteria will be determined on the basis of information filed with the appropriate regulatory authority and the records of Nasdaq as of the application date. Nasdaq may require the issuer to submit such other information as is relevant to a listing determination.

**(b)** Upon approval of a listing application, Nasdaq shall certify to the Commission, pursuant to Section 12(d) of the Act and the rules thereunder, that it has approved the security for listing and registration. Listing can commence only upon effectiveness of the security's registration pursuant to Section 12(d).

**(c)** The security of an issuer that applies for listing on the Nasdaq Global Market and meets the requirements contained in Rules 4425 through 4427, shall be listed on the Nasdaq Global Select Market.

**(d)** Issuers that are listed on Nasdaq pursuant to the Rule 4300 Series but that are not listed on the Nasdaq Global Market are listed on the Nasdaq Capital Market.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-007 eff. May 8, 2006; amended by SR-NASDAQ-2006-019 eff. July 28, 2006.

#### **4420. Additional Quantitative Listing Criteria**

In order to be listed on the Nasdaq Global Market, an issuer shall be required to meet the criteria set forth in paragraphs (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n) or (o) below.

**(a) Entry Standard 1** — First Class of Common Stock, Shares or Certificates of Beneficial Interest of Trusts, Limited Partnership Interests in Foreign or Domestic Issues and American Depositary Receipts

**(1)** The issuer of the security had annual income from continuing operations before income taxes of at least \$1,000,000 in the most recently completed fiscal year or in two of the last three most recently completed fiscal years.

**(2)** There are at least 1,100,000 publicly held shares.

**(3)** The market value of publicly held shares is at least \$8 million.

**(4)** The bid price per share is \$4 or more.

**(5)** The issuer of the security has stockholders' equity of at least \$15 million.

**(6)** The issuer has a minimum of 400 round lot shareholders.

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(7) There are at least three registered and active market makers with respect to the security.

**(b) Entry Standard 2** — First Class of Common Stock, Shares or Certificates of Beneficial Interest of Trusts, Limited Partnership Interests in Foreign or Domestic Issues and American Depositary Receipts

(1) The issuer of the security has stockholders' equity of at least \$30 million.

(2) There are at least 1,100,000 publicly held shares.

(3) The market value of publicly held shares is at least \$18 million.

(4) The bid price per share is \$4 or more.

(5) There are at least three registered and active market makers with respect to the security.

(6) The issuer has a two-year operating history.

(7) The issuer has a minimum of 400 round lot shareholders.

**(c) Entry Standard 3** — First Class of Common Stock, Shares or Certificates of Beneficial Interest of Trusts, Limited Partnership Interests in Foreign or Domestic Issues and American Depositary Receipts

An issuer listed under this paragraph does not also need to be in compliance with the quantitative criteria for initial listing in the Rule 4300 series.

(1) There are at least 1,100,000 publicly held shares.

(2) The market value of publicly held shares is at least \$20 million.

(3) The bid price per share is \$4 or more.

(4) There are at least four registered and active market makers with respect to the security.

(5) The issuer has a minimum of 400 round lot shareholders.

(6) The issuer has:

**(A)** a market value of listed securities of \$75 million (currently traded issuers must meet this requirement and the bid price requirement under Rule 4420(c)(3) for 90 consecutive trading days prior to applying for listing); or

**(B)** total assets and total revenue of \$75 million each for the most recently completed fiscal year or two of the last three most recently completed fiscal years.

**(d) Rights and Warrants**

(1) Rights or warrants to purchase listed securities may be listed if they substantially meet the above criteria; provided, however, that they shall not be subject to the publicly held shares, market value of publicly held shares, or bid price requirements and shall not be required to meet the criteria set forth

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in paragraph (a)(2) if immediately after the distribution, there are at least 450,000 rights or warrants outstanding.

**(2)** An index warrant may be listed if it substantially meets the following criteria:

**(A)** The minimum public distribution shall be at least 1 million warrants.

**(B)** The minimum number of public holders shall be at least 400.

**(C)** The aggregate market value of the outstanding index warrants shall be at least \$4 million.

**(D)** The issuer of the index warrants must have a minimum tangible net worth in excess of \$150 million.

**(E)** The term of the index warrant shall be for a period from one to five years.

**(F)** Limitations on Issuance — Where an issuer has a minimum tangible net worth in excess of \$150 million but less than \$250 million, Nasdaq will not list stock index warrants of the issuer if the value of such warrants plus the aggregate value, based upon the original issuing price, of all outstanding stock index, currency index and currency warrants of the issuer and its affiliates combined that are listed for trading on Nasdaq or another national securities exchange exceeds 25% of the issuer's net worth.

**(G)** A.M. Settlement — The terms of stock index warrants for which 25% or more of the value of the underlying index is represented by securities that are traded primarily in the United States must provide that the opening prices of the stocks comprising the index will be used to determine (i) the final settlement value (i.e., the settlement value for warrants that are exercised at expiration) and (ii) the settlement value for such warrants that are valued on either of the two business days preceding the day on which the final settlement value is to be determined.

**(H)** Automatic Exercise — All stock index warrants and any other cash-settled warrants must include in their terms provisions specifying (i) the time by which all exercise notices must be submitted and (ii) that all unexercised warrants that are in the money (or that are in the money by a stated amount) will be automatically exercised on their expiration date or on or promptly following the date on which such warrants are delisted by Nasdaq (if such warrant issue has not been listed on another national securities exchange).

**(I)** Foreign Country Securities — In instances where the stock index underlying a warrant is comprised in whole or in part with securities traded outside the United States, the foreign country securities or American Depositary Receipts ("ADRs") thereon that (i) are not subject to a comprehensive surveillance agreement, and (ii) have less than 50% of their global trading volume in dollar value within the United States, shall not, in the aggregate represent more than 20% of the weight of the index, unless such index is otherwise approved for warrant or option trading.

**(J)** Changes in Number of Warrants Outstanding — Issuers of stock index warrants either will make arrangements with warrant transfer agents to advise Nasdaq immediately of any change in the number of warrants outstanding due to the early exercise of such warrants or will provide this information themselves. With respect to stock index warrants for which 25% or more of the value of the underlying index is represented by securities traded primarily in the United States, such notice shall be filed with Nasdaq no later than 4:30 p.m. Eastern Time, on the date when the settlement

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value for such warrants is determined. Such notice shall be filed in such form and manner as may be prescribed by Nasdaq from time to time.

**(K)** Only eligible broad-based indexes can underlie index warrants. For purposes of this subparagraph, eligible broad-based indexes shall include those indexes approved by the Commission to underlie index warrants or index options traded on Nasdaq or another national securities exchange.

Any index warrant listed pursuant to this paragraph shall not be required to meet the requirements of Rule 4430, 4440, or 4450. Nasdaq may apply additional or more stringent criteria as necessary to protect investors and the public interest.

### **(e) Computations**

The computations required by paragraph (a)(1), (a)(5), and (b)(1) shall be taken from the issuer's most recent financial information filed with Nasdaq. The computations required in paragraphs (a)(2), (a)(3), (b)(2), (b)(3), (c)(1), and (c)(2) shall be as of the date of application of the issuer. Determinations of beneficial ownership for purposes of paragraphs (a)(2), (b)(2), and (c)(1) shall be made in accordance with SEC Rule 13d-3. In the case of American Depositary Receipts, the computations required by paragraphs (a)(1), (a)(5), and (b)(1) shall relate to the foreign issuer and not to any depository or any other person deemed to be an issuer for purposes of Form S-12 under the Securities Act of 1933. In the case of American Depositary Receipts, the underlying security will be considered when determining the computations required by paragraphs (a)(1), (a)(2), (a)(3), (a)(5), (a)(6), (b)(1), (b)(2), (b)(3), (b)(6), (b)(7), (c)(1), (c)(2), (c)(5), and (c)(6) of this rule.

### **(f) Other Securities**

**(1)** Nasdaq will consider listing any security not otherwise covered by the criteria in paragraphs (a), (b), (c), or (d) of this Rule, provided the instrument is otherwise suited to trade through the facilities of Nasdaq. Such securities will be evaluated for listing against the following criteria:

**(A)** The issuer shall have assets in excess of \$100 million and stockholders' equity of at least \$10 million. In the case of an issuer which is unable to satisfy the income criteria set forth in paragraph (a)(1), Nasdaq generally will require the issuer to have the following: (i) assets in excess of \$200 million and stockholders' equity of at least \$10 million; or (ii) assets in excess of \$100 million and stockholders' equity of at least \$20 million.

**(B)** There must be a minimum of 400 holders of the security, provided, however, that if the instrument is traded in \$1,000 denominations, there must be a minimum of 100 holders.

**(C)** For equity securities listed pursuant to this paragraph, there must be a minimum public distribution of 1,000,000 trading units.

**(D)** The aggregate market value/principal amount of the security shall be at least \$4 million.

**(2)** Issuers of securities listed pursuant to this paragraph (f) must be listed on the Nasdaq Global Market or the New York Stock Exchange (NYSE) or be an affiliate of a company listed on the Nasdaq Global Market or the NYSE; provided, however, that the provisions of Rule 4450 will be applied to sovereign issuers of "other" securities on a case-by-case basis.



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**(3)** Prior to the commencement of trading of securities listed pursuant to this paragraph, Nasdaq will evaluate the nature and complexity of the issue and, if appropriate, distribute a circular to the membership providing guidance regarding Nasdaq member firm compliance responsibilities and requirements when handling transactions in such securities.

**(g)** Nasdaq will consider listing on the Nasdaq Global Market Selected Equity-linked Debt Securities (SEEDS), pursuant to 19b-4(e) of the Act, that generally meet the criteria of this paragraph (g). SEEDS are limited-term, non-convertible debt securities of an issuer where the value of the debt is based, at least in part, on the value of up to thirty (30) other issuers' common stock or non-convertible preferred stock (or sponsored American Depositary Receipts (ADRs) overlying such equity securities).

### **(1)** Issuer Listing Standards

**(A)** The issuer of a SEEDS must be an entity that:

**(i)** is listed on the Nasdaq Global Market or the New York Stock Exchange (NYSE) or is an affiliate of a company listed on the Nasdaq Global Market or the NYSE; provided, however, that the provisions of Rule 4450 will be applied to sovereign issuers of SEEDS on a case-by-case basis; and

**(ii)** has a minimum net worth of \$150 million.

**(B)** In addition, the market value of a SEEDS offering, when combined with the market value of all other SEEDS offerings previously completed by the issuer and traded on the Nasdaq Global Market or another national securities exchange, may not be greater than 25 percent of the issuer's net worth at the time of issuance.

### **(2)** Equity-Linked Debt Security Listing Standards

The issue must have:

**(A)** a minimum public distribution of one million SEEDS;

**(B)** a minimum of 400 holders of the SEEDS, provided, however, that if the SEEDS is traded in \$1,000 denominations, there is no minimum number of holders;

**(C)** a minimum market value of \$4 million; and

**(D)** a minimum term of one year.

### **(3)** Minimum Standards Applicable to the Linked Security

An equity security on which the value of the SEEDS is based must:

**(A)**

**(i)** have a market value of listed securities of at least \$3 billion and a trading volume in the United States of at least 2.5 million shares in the one-year period preceding the listing of the SEEDS;

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(ii) have a market value of listed securities of at least \$1.5 billion and a trading volume in the United States of at least 10 million shares in the one-year period preceding the listing of the SEEDS; or

(iii) have a market value of listed securities of at least \$500 million and a trading volume in the United States of at least 15 million shares in the one-year period preceding the listing of the SEEDS.

(B) be issued by a company that has a continuous reporting obligation under the Act, and the security must be listed on the Nasdaq Global Market or another national securities exchange and be subject to last sale reporting; and

(C) be issued by:

(i) a U.S. company; or

(ii) a non-U.S. company (including a company that is traded in the United States through sponsored ADRs) (for purposes of this paragraph (g), a non-U.S. company is any company formed or incorporated outside of the United States) if:

a. Nasdaq or its subsidiaries has a comprehensive surveillance sharing agreement in place with the primary exchange in the country where the security is primarily traded (in the case of an ADR, the primary exchange on which the security underlying the ADR is traded);

b. the combined trading volume of the non-U.S. security (a security issued by a non-U.S. company) and other related non-U.S. securities occurring in the U.S. market and in markets with which Nasdaq or its subsidiaries has in place a comprehensive surveillance sharing agreement represents (on a share equivalent basis for any ADRs) at least 50% of the combined world-wide trading volume in the non-U.S. security, other related non-U.S. securities, and other classes of common stock related to the non-U.S. security over the six month period preceding the date of listing; or

c.

1. the combined trading volume of the non-U.S. security and other related non-U.S. securities occurring in the U.S. market represents (on a share equivalent basis) at least 20% of the combined world-wide trading volume in the non-U.S. security and in other related non-U.S. securities over the six-month period preceding the date of selection of the non-U.S. security for a SEEDS listing.

2. the average daily trading volume for the non-U.S. security in the U.S. markets over the six-month period preceding the date of selection of the non-U.S. security for a SEEDS listing is 100,000 or more shares; and

3. the trading volume for the non-U.S. security in the U.S. market is at least 60,000 shares per day for a majority of the trading days for the six-month period preceding the date of selection of the non-U.S. security for a SEEDS listing.

d. If the underlying security to which the SEEDS is to be linked is the stock of a non-U.S. company which is traded in the U.S. market as a sponsored ADR, ordinary shares or otherwise, then the minimum number of holders of the underlying linked security shall be 2,000.

(4) Limits on the Number of SEEDS Linked to a Particular Security

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**(A)** The issuance of SEEDS relating to any underlying U.S. security may not exceed five percent of the total outstanding shares of such underlying security. The issuance of SEEDS relating to any underlying non-U.S. security or sponsored ADR may not exceed: (i) two percent of the total shares outstanding worldwide if at least 30 percent of the worldwide trading volume in such security occurs in the U.S. market during the six-month period preceding the date of listing; <sup>1</sup> (ii) three percent of the total shares outstanding worldwide if at least 50 percent of the worldwide trading volume in such security occurs in the U.S. market during the six-month period preceding the date of listing; (iii) five percent of the total shares outstanding worldwide if at least 70 percent of the worldwide trading volume in such security occurs in the U.S. market during the six-month period preceding the date of listing.

**(B)** If an issuer proposes to issue SEEDS that relate to more than the allowable percentages of the underlying security specified above, then Nasdaq, with the concurrence of the staff of the Division of Market Regulation of the Commission, will evaluate the maximum percentage of SEEDS that may be issued on a case-by-case basis.

**(5)** Prior to the commencement of trading of a particular SEEDS listed pursuant to this subsection, Nasdaq or its subsidiaries will distribute a circular to the membership providing guidance regarding Nasdaq member firm compliance responsibilities (including suitability recommendations and account approval) when handling transactions in SEEDS.

### **(h) Units**

#### **(1) Initial and Continued Listing Requirements**

**(a)** All units shall have at least one equity component. All components of such units shall satisfy the requirements for initial and continued listing under Rules 4420 and 4450, as applicable, or, in the case of debt components, satisfy the requirements of 4420(h)(1)(b).

**(b)** All debt components of a unit, if any, shall meet the following requirements:

**(i)** the debt issue must have an aggregate market value or principal amount of at least \$5 million;

**(ii)** the issuer of the debt security must have equity securities listed on the Nasdaq Global Market;  
and

**(iii)** in the case of convertible debt, the equity into which the debt is convertible must itself be subject to real-time last sale reporting in the United States, and the convertible debt must not contain a provision which gives the company the right, at its discretion, to reduce the conversion price for periods of time or from time to time unless the company establishes a minimum period of ten business days within which such price reduction will be in effect.

**(c)** All components of the unit shall be issued by the same issuer. All units and issuers of such units shall comply with the initial and continued listing requirements under Rules 4420 and 4450, as applicable.

#### **(2) Minimum Listing Period and Notice of Withdrawal**

In the case of units, the minimum listing period of the units shall be 30 days from the first day of listing, except the period may be shortened if the units are suspended or withdrawn for regulatory

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purposes. Issuers and underwriters seeking to withdraw units from listing must provide Nasdaq with notice of such intent at least 15 days prior to withdrawal.

### **(3) Disclosure Requirements for Units**

Each Nasdaq Global Market issuer of units shall include in its prospectus or other offering document used in connection with any offering of securities that is required to be filed with the Commission under the federal securities laws and the rules and regulations promulgated thereunder a statement regarding any intention to delist the units immediately after the minimum inclusion period. The issuer of a unit shall further provide information regarding the terms and conditions of the components of the unit (including information with respect to any original issue discount or other significant tax attributes of any component) and the ratio of the components comprising the unit. An issuer shall also disclose when a component of the unit is separately listed on Nasdaq. These disclosures shall be made on the issuer's website, or if it does not maintain a website, in its annual report provided to unit holders. An issuer shall also immediately publicize through, at a minimum, a public announcement through the news media, any change in the terms of the unit, such as changes to the terms and conditions of any of the components (including changes with respect to any original issue discount or other significant tax attributes of any component), or to the ratio of the components within the unit. Such public notification shall be made as soon as practicable in relation to the effective date of the change.

#### **(i) Portfolio Depository Receipts**

**(1) Definitions.** The following terms shall, unless the context otherwise requires, have the meanings herein specified:

**(A) Portfolio Depository Receipt.** The term "Portfolio Depository Receipt" means a security:

**(i)** that is based on a unit investment trust ("Trust") which holds the securities which comprise an index or portfolio underlying a series of Portfolio Depository Receipts;

**(ii)** that is issued by the Trust in a specified aggregate minimum number in return for a "Portfolio Deposit" consisting of specified numbers of shares of stock and/or a cash amount, a specified portfolio of fixed income securities and/or a cash amount and/or a combination of the above;

**(iii)** that, when aggregated in the same specified minimum number, may be redeemed from the Trust which will pay to the redeeming holder the stock and/or cash, fixed income securities and/or cash and/or a combination thereof then comprising the "Portfolio Deposit"; and

**(iv)** that pays holders a periodic cash payment corresponding to the regular cash dividends or distributions declared with respect to the component securities of the securities index or portfolio of securities underlying the Portfolio Depository Receipts, less certain expenses and other charges as set forth in the Trust prospectus.

**(B) Reporting Authority.** The term "Reporting Authority" in respect to a particular series of Portfolio Depository Receipts means Nasdaq, a wholly-owned subsidiary of Nasdaq, an institution (including the Trustee for a series of Portfolio Depository Receipts), or a reporting service designated by Nasdaq or its subsidiary as the official source for calculating and reporting information relating to such series, including, but not limited to, any current index or portfolio value; the current value of the portfolio of securities required to be deposited to the Trust in connection with issuance of Portfolio Depository Receipts; the amount of any dividend equivalent payment or cash distribution to holders of Portfolio

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Depository Receipts, net asset value, and other information relating to the creation, redemption or trading of Portfolio Depository Receipts.

Nothing in this paragraph shall imply that an institution or reporting service that is the source for calculating and reporting information relating to Portfolio Depository Receipts must be designated by Nasdaq; the term "Reporting Authority" shall not refer to an institution or reporting service not so designated.

**(C)** US Component Stock. The term "US Component Stock" shall mean an equity security that is registered under Sections 12(b) or 12(g) of the Act, or an American Depository Receipt, the underlying equity security of which is registered under Sections 12(b) or 12(g) of the Act.

**(D)** Non-US Component Stock. The term "Non-US Component Stock" shall mean an equity security that (a) is not registered under Sections 12(b) or 12(g) of the Act, (b) is issued by an entity that is not organized, domiciled or incorporated in the United States, and (c) is issued by an entity that is an operating company (including Real Estate Investment Trusts (REITs) and income trusts, but excluding investment trusts, unit trusts, mutual funds, and derivatives).

**(2)** Nasdaq requires that members provide to all purchasers of a series of Portfolio Depository Receipts a written description of the terms and characteristics of such securities, not later than the time a confirmation of the first transaction in such series is delivered to such purchaser. In addition, members shall include such a written description with any sales material relating to a series of Portfolio Depository Receipts that is provided to customers or the public. Any other written materials provided by a member to customers or the public making specific reference to a series of Portfolio Depository Receipts as an investment vehicle must include a statement in substantially the following form: "A circular describing the terms and characteristics of [the series of Portfolio Depository Receipts] has been prepared by [Trust name] and is available from your broker or Nasdaq. It is recommended that you obtain and review such circular before purchasing [the series of Portfolio Depository Receipts]. In addition, upon request you may obtain from your broker a prospectus for [the series of Portfolio Depository Receipts]."

A member carrying an omnibus account for a non-member broker-dealer is required to inform such non-member that execution of an order to purchase a series of Portfolio Depository Receipts for such omnibus account will be deemed to constitute agreement by the non-member to make such written description available to its customers on the same terms as are directly applicable to members and member organizations under this rule.

Upon request of a customer, a member shall also provide a prospectus for the particular series of Portfolio Depository Receipts.

**(3)** Equity. Nasdaq may approve a series of Portfolio Depository Receipts for listing and trading pursuant to Rule 19b-4(e) under the Act, provided each of the following criteria is satisfied:

**(A)** Eligibility Criteria for Index Components.

**(i)** US Index or Portfolio. Upon the initial listing of a series of Portfolio Depository Receipts pursuant to Rule 19b-4(e) under the Act, the component stocks of an index or portfolio of US Component Stocks underlying such series of Portfolio Depository Receipts shall meet the following criteria:

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Component stocks that in the aggregate account for at least 90% of the weight of the index or portfolio each shall have a minimum market value of at least \$75 million;

Component stocks that in the aggregate account for at least 90% of the weight of the index or portfolio each shall have a minimum monthly trading volume during each of the last six months of at least 250,000 shares;

The most heavily weighted component stock shall not exceed 30% of the weight of the index or portfolio, and the five most heavily weighted component stocks shall not exceed 65% of the weight of the index or portfolio;

The index or portfolio shall include a minimum of 13 component stocks; and

All securities in the index or portfolio shall be US Component Stocks listed on Nasdaq (including The Nasdaq Capital Market) or another national securities exchange and shall be NMS Stocks as defined in Rule 600 of Regulation NMS under the Act.

**(ii)** International or global index or portfolio. Upon the initial listing of a series of Portfolio Depositary Receipts pursuant to Rule 19b-4(e) under the Act, the components of an index or portfolio underlying a series of Portfolio Depositary Receipts that consist of either only Non-US Component Stocks or both US Component Stocks and Non-US Component Stocks shall meet the following criteria:

Component stocks that in the aggregate account for at least 90% of the weight of the index or portfolio each shall have a minimum market value of at least \$100 million;

Component stocks that in the aggregate account for at least 90% of the weight of the index or portfolio each shall have a minimum worldwide monthly trading volume during each of the last six months of at least 250,000 shares;

The most heavily weighted component stock shall not exceed 25% of the weight of the index or portfolio, and the five most heavily weighted component stocks shall not exceed 60% of the weight of the index or portfolio;

The index or portfolio shall include a minimum of 20 component stocks; and

Each US Component shall be listed on a national securities exchange and shall be an NMS Stock as defined in Rule 600 of Regulation NMS under the Act, and each Non-US Component Stock shall be listed and traded on an exchange that has last-sale reporting.

**(iii)** Index or portfolio approved in connection with derivative securities. Upon the initial listing of a series of Portfolio Depositary Receipts pursuant to Rule 19b-4(e) under the Act, the index or portfolio underlying a series of Portfolio Depositary Receipts shall have been reviewed and approved for trading of Portfolio Depositary Receipts, Index Fund Shares, index-linked exchangeable notes, or index-linked securities by the Commission under Section 19(b)(2) of the Act and rules thereunder, and the conditions set forth in the Commission's approval order, including comprehensive surveillance sharing agreements with respect to Non-US Component Stocks and the requirements regarding dissemination of information, continue to be satisfied. Each component stock of the index or portfolio shall be either

a US Component Stock that is listed on a national securities exchange and is an NMS Stock as defined in Rule 600 of Regulation NMS under the Act, or

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a Non-US Component Stock that is listed and traded on an exchange that has last-sale reporting.

**(B) Index Methodology and Calculation.**

**(i)** If the index is maintained by a broker-dealer or fund advisor, the broker-dealer shall erect a "fire wall" around the personnel who have access to information concerning changes and adjustments to the index and the index shall be calculated by a third party who is not a broker-dealer or fund advisor;

**(ii)** The current index value for Portfolio Depository Receipts listed pursuant to:

Rule 4420(i)(3)(A)(i) will be widely disseminated by one or more major market data vendors at least every 15 seconds during Nasdaq's regular market session.

Rule 4420(i)(3)(A)(ii) will be widely disseminated by one or more major market data vendors at least every 60 seconds during Nasdaq's regular market session; or

Rule 4420(i)(3)(A)(iii) will be widely disseminated by one or more major market data vendors at least every 15 seconds with respect to indexes containing only US Component Stocks and at least every 60 seconds with respect to indexes containing Non-US Component Stocks, during Nasdaq's regular market session.

If the index value does not change during some or all of the period when trading is occurring on Nasdaq (for example, for indexes of Non-US Component Stocks because of time zone differences or holidays in the countries where such indexes' component stocks trade), then the last official calculated index value must remain available throughout Nasdaq's trading hours; and

**(iii)** Any advisory committee, supervisory board, or similar entity that advises a Reporting Authority or that makes decisions on the index or portfolio composition, methodology and related matters, must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable index.

**(C) Disseminated Information.** The Reporting Authority will disseminate for each series of Portfolio Depository Receipts an estimate, updated at least every 15 seconds, of the value of a share of each series (the "Intraday Indicative Value") during Nasdaq's regular market session. The Intraday Indicative Value may be based, for example, upon current information regarding the required deposit of securities and cash amount to permit creation of new shares of the series or upon the index value. The Intraday Indicative Value will be updated at least every 15 seconds during Nasdaq's regular market session to reflect changes in the exchange rate between the US dollar and the currency in which any component stock is denominated. If the Intraday Indicative Value does not change during some or all of the period when trading is occurring on Nasdaq, then the last official calculated Intraday Indicative Value must remain available throughout Nasdaq's trading hours.

**(D) Initial Shares Outstanding.** A minimum of 100,000 shares of a series of Portfolio Depository Receipts is required to be outstanding at start-up of trading.

**(E) Surveillance Procedures.** NASD Regulation will implement written surveillance procedures for Portfolio Depository Receipts.

**(F) Creation and redemption.** For Portfolio Depository Receipts listed pursuant to Rule 4420(i)(3)(A)(ii) or (iii) above, the statutory prospectus or the application for exemption from provisions of the

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Investment Company Act of 1940 for the series of Portfolio Depository Receipts must state that the Trust must comply with the federal securities laws in accepting securities for deposits and satisfying redemptions with redemption securities, including that the securities accepted for deposits and the securities used to satisfy redemption requests are sold in transactions that would be exempt from registration under the Securities Act of 1933.

**(4) Fixed Income.** Fixed Income Securities are debt securities that are notes, bonds, debentures or evidence of indebtedness that include, but are not limited to, U.S. Department of Treasury securities ("Treasury Securities"), government-sponsored entity securities ("GSE Securities"), municipal securities, trust preferred securities, supranational debt and debt of a foreign country or subdivision thereof. Nasdaq may approve a series of Portfolio Depository Receipts based on Fixed Income Securities for listing and trading pursuant to Rule 19b-4(e) under the Securities Exchange Act of 1934 provided such portfolio or index: (i) has been reviewed and approved for the trading of options, Portfolio Depository Receipts, Index Fund Shares, Index-Linked Exchangeable Notes or Index-Linked Securities by the Commission under Section 19(b)(2) of the Securities Exchange Act of 1934 and the rules thereunder and the conditions set forth in the Commission's approval order continue to be satisfied; or (ii) the following criteria are satisfied:

**(A) Eligibility Criteria for Index Components.** Upon the initial listing of a series of Portfolio Depository Receipts pursuant to Rule 19b-4(e) under the Securities Exchange Act of 1934, each component of an index or portfolio that underlies a series of Portfolio Depository Receipts shall meet the following criteria:

**(i)** The index or portfolio must consist of Fixed Income Securities;

**(ii)** Components that in aggregate account for at least 75% of the weight of the index or portfolio must have a minimum original principal amount outstanding of \$100 million or more;

**(iii)** A component may be a convertible security, however, once the convertible security component converts to an underlying equity security, the component is removed from the index or portfolio;

**(iv)** No component fixed-income security (excluding Treasury Securities) will represent more than 30% of the weight of the index or portfolio, and the five highest weighted component fixed-income securities do not in the aggregate account for more than 65% of the weight of the index or portfolio;

**(v)** An underlying index or portfolio (excluding exempted securities) must include securities from a minimum of 13 non-affiliated issuers; and

**(vi)** Component securities that in aggregate account for at least 90% of the weight of the index or portfolio must be either: (a) from issuers that are required to file reports pursuant to Sections 13 and 15(d) of the Exchange Act; (b) from issuers that have a worldwide market value of its outstanding common equity held by non-affiliates of \$700 million or more; (c) from issuers that have outstanding securities that are notes, bonds, debentures, or evidence of indebtedness having a total remaining principal amount of at least \$1 billion; (d) exempted securities as defined in section 3(a)(12) of the Securities Exchange Act of 1934; or (e) from issuers that are a government of a foreign country or a political subdivision of a foreign country.

**(B) Index Methodology and Calculation.**



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**(i)** If the index is maintained by a broker-dealer or fund advisor, the broker-dealer or fund advisor shall erect a "fire wall" around the personnel who have access to information concerning changes and adjustments to the index;

**(ii)** The current index value will be widely disseminated by one or more major market data vendors at least once per day; and

**(iii)** Any advisory committee, supervisory board, or similar entity that advises a Reporting Authority or that makes decisions on the index composition, methodology and related matters, must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the applicable index.

**(5)** Nasdaq may approve a series of Portfolio Depositary Receipts based on a combination of indexes or an index or portfolio of component securities representing the U.S. equity market, the international equity market, and the fixed income market for listing and trading pursuant to Rule 19b-4(e) under the Securities Exchange Act of 1934 provided: (i) each index has been reviewed and approved for the trading of options, Portfolio Depositary Receipts, Index Fund Shares, Index-Linked Exchangeable Notes or Index-Linked Securities by the Commission under Section 19(b)(2) of the Securities Exchange Act of 1934 and rules thereunder and the conditions set forth in the Commission's approval order continue to be satisfied; or (ii) each index or portfolio of equity and fixed income component securities separately meets either the criteria set forth in Rule 4420(i)(3) or (4) above.

**(A)** Index Methodology and Calculation.

**(i)** If an index is maintained by a broker-dealer or fund advisor, the broker-dealer or fund advisor shall erect a "fire wall" around the personnel who have access to information concerning changes and adjustments to the index;

**(ii)** The current composite index value will be widely disseminated by one or more major market data vendors at least once every 15 seconds during the regular market session, provided however, that (a) with respect to the Non-US Component Stocks of the combination index, the impact on the index is only required to be updated at least every 60 seconds during the regular market session, and (b) with respect to the fixed income components of the combination index the impact on the index is only required to be updated at least once each day; and

**(iii)** Any advisory committee, supervisory board, or similar entity that advises a Reporting Authority or that makes decisions on index composition, methodology and related matters, must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the applicable index.

**(6)** The following provisions shall apply to all series of Portfolio Depositary Receipts listed pursuant Rules 4420(i)(4) and (5) above:

**(A)** Disseminated Information. The Reporting Authority will disseminate for each series of Portfolio Depositary Receipts an estimate, updated at least every 15 seconds, of the value of a share of each series (the "Intraday Indicative Value"). The Intraday Indicative Value may be based, for example, upon current information regarding the required deposit of securities and cash amount to permit creation of new shares of the series or upon the index value. The Intraday Indicative Value may be calculated by Nasdaq or by an independent third party throughout the day using prices obtained from

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independent market data providers or other independent pricing sources such as a broker-dealer or price evaluation services.

**(B)** Initial Shares Outstanding. A minimum of 100,000 shares of a series of Portfolio Depository Receipts is required to be outstanding at start-up of trading.

**(C)** Surveillance Procedures. NASD Regulation will implement written surveillance procedures for Portfolio Depository Receipts.

**(7)** Regular market session trading will occur between 9:30 a.m. and either 4:00 p.m. or 4:15 p.m. for each series of Portfolio Depository Receipts, as specified by Nasdaq. In addition, Nasdaq may designate each series of Portfolio Depository Receipts for trading during a pre-market session beginning at 7:00 a.m. and/or a post-market session ending at 8:00 p.m.

**(8)** Nasdaq may list and trade Portfolio Depository Receipts based on one or more indexes or portfolios. The Portfolio Depository Receipts based on each particular index or portfolio, or combination thereof, shall be designated as a separate series and shall be identified by a unique symbol. The components of an index or portfolio on which Portfolio Depository Receipts are based shall be selected by Nasdaq or its agent, a wholly-owned subsidiary of Nasdaq, or by such other person as shall have a proprietary interest in and authorized use of such index or portfolio, and may be revised from time to time as may be deemed necessary or appropriate to maintain the quality and character of the index or portfolio.

**(9)** A Trust upon which a series of Portfolio Depository Receipts is based will be listed and traded on Nasdaq subject to application of the following criteria:

**(A)** Initial Listing —

**(i)** for each Trust, Nasdaq will establish a minimum number of Portfolio Depository Receipts required to be outstanding at the time of commencement of trading on Nasdaq.

**(ii)** Nasdaq will obtain a representation from the issuer of each series of Portfolio Depository Receipts that the net asset value per share will be calculated daily and will be made available to all market participants at the same time.

**(B)** Continued Listing —

**(i)** Nasdaq will consider the suspension of trading in or removal from listing of a Trust upon which a series of Portfolio Depository Receipts is based under any of the following circumstances:

if, following the initial twelve month period after the formation of a Trust and commencement of trading on Nasdaq, the Trust has more than 60 days remaining until termination and there are fewer than 50 record and/or beneficial holders of Portfolio Depository Receipts for 30 or more consecutive trading days;

if the value of the index or portfolio of securities on which the Trust is based is no longer calculated or available or the index or portfolio on which the Trust is based is replaced with a new index or portfolio, unless the new index or portfolio meets the requirements of this Rule 4420(i) for listing either pursuant to Rule 19b-4(e) under the Securities Exchange Act of 1934 (including the filing of a Form

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19b-4(e) with the Commission) or by Commission approval of a filing pursuant to Section 19(b)(2) of the Securities Exchange Act of 1934; or

if such other event shall occur or condition exists which in the opinion of Nasdaq, makes further dealings on Nasdaq inadvisable.

Upon termination of a Trust, Nasdaq requires that Portfolio Depository Receipts issued in connection with such Trust be removed from listing. A Trust may terminate in accordance with the provisions of the Trust prospectus, which may provide for termination if the value of securities in the Trust falls below a specified amount.

**(C)** Term — the stated term of the Trust shall be as stated in the Trust prospectus. However, a Trust may be terminated under such earlier circumstances as may be specified in the Trust prospectus.

**(D)** Voting — voting rights shall be as set forth in the Trust prospectus. The Trustee of a Trust may have the right to vote all of the voting securities of such Trust.

**(10)** Neither Nasdaq, the Reporting Authority nor any agent of Nasdaq shall have any liability for damages, claims, losses or expenses caused by any errors, omissions, or delays in calculating or disseminating any current index or portfolio value, the current value of the portfolio of securities required to be deposited to the Trust; the amount of any dividend equivalent payment or cash distribution to holders of Portfolio Depository Receipts; net asset value; or other information relating to the creation, redemption or trading of Portfolio Depository Receipts, resulting from any negligent act or omission by Nasdaq, the Reporting Authority, or any agent of Nasdaq or any act, condition or cause beyond the reasonable control of Nasdaq, its agent, or the Reporting Authority, including, but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction; or any error, omission or delay in the reports of transactions in one or more underlying securities.

**(j) Index Fund Shares**

**(1)** Definitions. The following terms shall, unless the context otherwise requires, have the meanings herein specified:

**(A)** Index Fund Share. The term "Index Fund Share" means a security:

**(i)** that is issued by an open-end management investment company based on a portfolio of stocks or fixed income securities or a combination thereof, that seeks to provide investment results that correspond generally to the price and yield performance or total return performance of a specified foreign or domestic stock index, fixed income securities index or combination thereof;

**(ii)** that is issued by such an open-end management investment company in a specified aggregate minimum number in return for a deposit of specified numbers of shares of stock and/or a cash amount, a specified portfolio of fixed income securities and/or a cash amount and/or a combination of the above, with a value equal to the next determined net asset value; and

**(iii)** that, when aggregated in the same specified minimum number, may be redeemed at a holder's request by such open-end investment company which will pay to the redeeming holder the stock

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and/or cash, fixed income securities and/or cash and/or a combination thereof, with a value equal to the next determined net asset value.

**(B)** (i) The term "Index Fund Share" includes a security issued by an open-end management investment company that seeks to provide investment results that either exceed the performance of a specified domestic equity, international or global equity, or fixed income index or a combination thereof by a specified multiple or that correspond to the inverse (opposite) of the performance of a specified domestic equity, international or global equity, or fixed income index or a combination thereof by a specified multiple. Such a security is issued in a specified aggregate number in return for a deposit of a specified number of shares of stock, a specified portfolio of fixed income securities or a combination of the above and/or cash as defined in subparagraph (1)(B)(ii) of this rule with a value equal to the next determined net asset value. When aggregated in the same specified minimum number, Index Fund Shares may be redeemed at a holder's request by such open-end investment company which will pay to the redeeming holder the stock, fixed income securities or a combination thereof and/or cash with a value equal to the next determined net asset value.

(ii) In order to achieve the investment result that it seeks to provide, such an investment company may hold a combination of financial instruments, including, but not limited to, stock index futures contracts; options on futures contracts; options on securities and indices; equity caps, collars and floors; swap agreements; forward contracts; repurchase agreements and reverse repurchase agreements (the "Financial Instruments"), but only to the extent and in the amounts or percentages as set forth in the registration statement for such Index Fund Shares.

(iii) Any open-end management investment company which issues Index Fund Shares referenced in this subparagraph (1)(B) that seeks to provide investment results, before fees and expenses, in an amount that exceeds -300% of the percentage performance on a given day of a particular domestic equity, international or global equity or fixed income securities index or a combination thereof shall not be approved by the Exchange for listing and trading pursuant to Rule 19b-4(e) under the Securities Exchange Act of 1934.

(iv) For the initial and continued listing of a series of Index Fund Shares referenced in the provisions of this subparagraph (1)(B) of this rule, the following requirements must be adhered to:

Daily public website disclosure of portfolio holdings that will form the basis for the calculation of the net asset value by the issuer of such series, including, as applicable, the following instruments:

- a. The identity and number of shares held of each specific equity security;
- b. The identity and amount held for each specific fixed income security;
- c. The specific types of Financial Instruments and characteristics of such Financial Instruments; and
- d. Cash equivalents and the amount of cash held in the portfolio.

If the Exchange becomes aware that the net asset value related to an Index Fund Shares included in the provisions of this subparagraph (1)(B)(ii) of this rule, is not being disseminated to all market participants at the same time or the daily public website disclosure of portfolio holdings does not occur, the Exchange shall halt trading in such series of Index Fund Share, as appropriate. The Exchange may resume trading in such Index Fund Shares only when the net asset value is disseminated to all market

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participants at the same time or the daily public website disclosure of portfolio holdings occurs, as appropriate.

**(C) Reporting Authority.** The term "Reporting Authority" in respect of a particular series of Index Fund Shares means Nasdaq, a wholly-owned subsidiary of Nasdaq, or an institution or reporting service designated by Nasdaq or its subsidiary as the official source for calculating and reporting information relating to such series, including, but not limited to, any current index or portfolio value; the current value of the portfolio of any securities required to be deposited in connection with issuance of Index Fund Shares; the amount of any dividend equivalent payment or cash distribution to holders of Index Fund Shares, net asset value, and other information relating to the issuance, redemption or trading of Index Fund Shares.

Nothing in this paragraph shall imply that an institution or reporting service that is the source for calculating and reporting information relating to Index Fund Shares must be designated by Nasdaq; the term "Reporting Authority" shall not refer to an institution or reporting service not so designated.

**(D) US Component Stock.** The term "US Component Stock" shall mean an equity security that is registered under Sections 12(b) or 12(g) of the Act, or an American Depository Receipt, the underlying equity security of which is registered under Sections 12(b) or 12(g) of the Act.

**(E) Non-US Component Stock.** The term "Non-US Component Stock" shall mean an equity security that (a) is not registered under Sections 12(b) or 12(g) of the Act, (b) is issued by an entity that is not organized, domiciled or incorporated in the United States, and (c) is issued by an entity that is an operating company (including Real Estate Investment Trusts (REITs) and income trusts, but excluding investment trusts, unit trusts, mutual funds, and derivatives).

**(2)** Nasdaq requires that members provide to all purchasers of a series of Index Fund Shares a written description of the terms and characteristics of such securities, in a form prepared by the open-end management investment company issuing such securities, not later than the time a confirmation of the first transaction in such series is delivered to such purchaser. In addition, members shall include such a written description with any sales material relating to a series of Index Fund Shares that is provided to customers or the public. Any other written materials provided by a member to customers or the public making specific reference to a series of Index Fund Shares as an investment vehicle must include a statement in substantially the following form: "A circular describing the terms and characteristics of [the series of Index Fund Shares] has been prepared by the [open-end management investment company name] and is available from your broker or Nasdaq. It is recommended that you obtain and review such circular before purchasing [the series of Index Fund Shares]. In addition, upon request you may obtain from your broker a prospectus for [the series of Index Fund Shares]."

A member carrying an omnibus account for a non-member broker-dealer is required to inform such non-member that execution of an order to purchase a series of Index Fund Shares for such omnibus account will be deemed to constitute agreement by the non-member to make such written description available to its customers on the same terms as are directly applicable to members and member organizations under this rule.

Upon request of a customer, a member shall also provide a prospectus for the particular series of Index Fund Shares.

**(3) Equity.** Nasdaq may approve a series of Index Fund Shares for listing and trading pursuant to Rule 19b-4(e) under the Act provided each of the following criteria is satisfied:

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**(A)** Eligibility Criteria for Index Components.

**(i)** US Index or Portfolio. Upon the initial listing of a series of Index Fund Shares pursuant to 19b-4(e) under the Act, the component stocks of an index or portfolio of US Component Stocks underlying a series of Index Fund Shares shall meet the following criteria:

Component stocks that in the aggregate account for at least 90% of the weight of the index or portfolio shall each have a minimum market value of at least \$75 million;

Component stocks that in the aggregate account for at least 90% of the weight of the index or portfolio each shall have a minimum monthly trading volume during each of the last six months of at least 250,000 shares;

The most heavily weighted component stock shall not exceed 30% of the weight of the index or portfolio, and the five most heavily weighted component stocks shall not exceed 65% of the weight of the index or portfolio;

The index or portfolio shall include a minimum of 13 component stocks; and

All securities in the index or portfolio shall be US Component Stocks listed on Nasdaq (including The Nasdaq Capital Market) or another national securities exchange and shall be NMS Stocks as defined in Rule 600 of Regulation NMS under the Act.

**(ii)** International or global index or portfolio. Upon the initial listing of a series of Index Fund Shares pursuant to Rule 19b-4(e) under the Act, the components of an index or portfolio underlying a series of Index Fund Shares that consist of either only Non-US Component Stocks or both US Component and US Component Stocks shall meet the following criteria:

Component stocks that in the aggregate account for at least 90% of the weight of the index or portfolio each shall have a minimum market value of at least \$100 million;

Component stocks that in the aggregate account for at least 90% of the weight of the index or portfolio each shall have a minimum worldwide monthly trading volume during each of the last six months of at least 250,000 shares;

The most heavily weighted component stock shall not exceed 25% of the weight of the index or portfolio, and the five most heavily weighted component stocks shall not exceed 60% of the weight of the index or portfolio;

The index or portfolio shall include a minimum of 20 component stocks; and

Each US Component shall be listed on a national securities exchange and shall be an NMS Stock as defined in Rule 600 of Regulation NMS under the Act, and each Non-US Component Stock shall be listed and traded on an exchange that has last-sale reporting.

**(iii)** Index or portfolio approved in connection with derivative securities. Upon the initial listing of a series of Index Fund Shares pursuant to Rule 19b-4(e) under the Act, the index or portfolio underlying a series of Index Fund Shares shall have been reviewed and approved for trading of Portfolio Depository Receipts, Index Fund Shares, or Index-Linked Securities by the Commission under Section 19(b)(2) of the Act and rules thereunder, and the conditions set forth in the Commission's approval

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order, including comprehensive surveillance sharing agreements with respect to Non-US Component Stocks and the requirements regarding dissemination of information, continue to be satisfied. Each component stock of the index or portfolio shall be either

a US Component Stock that is listed on a national securities exchange and is an NMS Stock as defined in Rule 600 of Regulation NMS under the Act, or

a Non-US Component Stock that is listed and traded on an exchange that has last-sale reporting.

### **(B)** Index Methodology and Calculation

**(i)** If the index is maintained by a broker-dealer, or fund advisor, the broker-dealer or fund advisor shall erect a "fire wall" around the personnel who have access to information concerning changes and adjustments to the index and the index shall be calculated by a third party who is not a broker-dealer or fund advisor;

**(ii)** The current index value for Index Fund Shares listed pursuant to:

Rule 4420(j)(3)(A)(i) will be widely disseminated by one or more major market data vendors at least every 15 seconds during Nasdaq's regular market session;

Rule 4420(j)(3)(A)(ii) will be widely disseminated by one or more major market data vendors at least every 60 seconds during Nasdaq's regular market session; or

Rule 4420(j)(3)(A)(iii) will be widely disseminated by one or more major market data vendors at least every 15 seconds with respect to indexes containing only US Component Stocks and at least every 60 seconds with respect to indexes containing Non-US Component Stocks, during Nasdaq's regular market session.

If the index value does not change during some or all of the period when trading is occurring on Nasdaq (for example, for indexes of Non-US Component Stocks because of time zone differences or holidays in the countries where such indexes' component stocks trade), then the last official calculated index value must remain available throughout Nasdaq's trading hours; and

**(iii)** Any advisory committee, supervisory board, or similar entity that advises a Reporting Authority or that makes decisions on the index or portfolio composition, methodology and related matters, must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable index.

**(C)** Disseminated Information. The Reporting Authority will disseminate for each series of Index Fund Shares an estimate, updated at least every 15 seconds, of the value of a share of each series (the "Intraday Indicative Value") during Nasdaq's regular market session. The Intraday Indicative Value may be based, for example, upon current information regarding the required deposit of securities and cash amount to permit creation of new shares of the series or upon the index value. The Intraday Indicative Value will be updated at least every 15 seconds during Nasdaq's regular market session to reflect changes in the exchange rate between the US dollar and the currency in which any component stock is denominated. If the Intraday Indicative Value does not change during some or all of the period when trading is occurring on Nasdaq, then the last official calculated Intraday Indicative Value must remain available throughout Nasdaq's trading hours.

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**(D)** Initial Shares Outstanding. A minimum of 100,000 shares of a series of Index Fund Shares is required to be outstanding at start-up of trading.

**(E)** Surveillance Procedures. NASD Regulation will implement written surveillance procedures for Index Fund Shares.

**(F)** Creation and redemption. For Index Fund Shares listed pursuant to Rule 4420(j)(3)(A)(ii) or (iii) above, the statutory prospectus or the application for exemption from provisions of the Investment Company Act of 1940 for the series of Index Fund Shares must state that the Index Fund Shares must comply with the federal securities laws in accepting securities for deposits and satisfying redemptions with redemption securities, including that the securities accepted for deposits and the securities used to satisfy redemption requests are sold in transactions that would be exempt from registration under the Securities Act of 1933.

**(4)** Fixed Income. Fixed Income Securities are debt securities that are notes, bonds, debentures or evidence of indebtedness that include, but are not limited to, U.S. securities ("GSE Securities"), municipal securities, trust preferred securities, supranational debt and debt of a foreign country or subdivision thereof. Nasdaq may approve a series of Index Fund Shares based on Fixed Income Securities for listing and trading pursuant to Rule 19b-4(e) under the Securities Exchange Act of 1934 provided such portfolio or index: (i) has been reviewed and approved for the trading of options, Portfolio Depository Receipts, Index Fund Shares, Index-Linked Exchangeable Notes or Index-Linked Securities by the Commission under Section 19(b)(2) of the Securities Exchange Act of 1934 and the rules thereunder and the conditions set forth in the Commission's approval order continue to be satisfied; or (ii) the following criteria are satisfied:

**(A)** Eligibility Criteria for Index Components. Upon the initial listing of Index Fund Shares pursuant to Rule 19b-4(e) under the Securities Exchange Act of 1934, each component of an index or portfolio that underlies a series of Index Fund Shares shall meet the following criteria:

**(i)** The index or portfolio must consist of Fixed Income Securities;

**(ii)** Components that in aggregate account for at least 75% of the weight of the index or portfolio must have a minimum original principal amount outstanding of \$100 million or more;

**(iii)** A component may be a convertible security, however, once the convertible security component converts to an underlying equity security, the component is removed from the index or portfolio;

**(iv)** No component fixed-income security (excluding Treasury Securities) will represent more than 30% of the weight of the index or portfolio, and the five highest weighted component fixed-income securities do not in the aggregate account for more than 65% of the weight of the index or portfolio;

**(v)** An underlying index or portfolio (excluding exempted securities) must include securities from a minimum of 13 non-affiliated issuers; and

**(vi)** Component securities that in aggregate account for at least 90% of the weight of the index or portfolio must be either: (a) from issuers that are required to file reports pursuant to Sections 13 and 15(d) of the Exchange Act; (b) from issuers that have a worldwide market value of its outstanding common equity held by non-affiliates of \$700 million or more; (c) from issuers that have outstanding securities that are notes, bonds, debentures, or evidence of indebtedness having a total remaining principal amount of at least \$1 billion; (d) exempted securities as defined in section 3(a)(12) of the



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Securities Exchange Act of 1934; or (e) from issuers that are a government of a foreign country or a political subdivision of a foreign country.

**(B)** Index Methodology and Calculation.

**(i)** If the index is maintained by a broker-dealer or fund advisor, the broker-dealer or fund advisor shall erect a "fire wall" around the personnel who have access to information concerning changes and adjustments to the index;

**(ii)** The current index value will be widely disseminated by one or more major market data vendors at least once per day; and

**(iii)** Any advisory committee, supervisory board, or similar entity that advises a Reporting Authority or that makes decisions on the index composition, methodology and related matters, must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the applicable index.

**(5)** Nasdaq may approve a series of Index Fund Shares based on a combination of indexes or an index or portfolio of component securities representing the U.S. equity market, the international equity market, and the fixed income market for listing and trading pursuant to Rule 19b-4(e) under the Securities Exchange Act of 1934 provided: (i) such portfolio or combination of indexes has been reviewed and approved for the trading of options, Portfolio Depository Receipts, Index Fund Shares, Index-Linked Exchangeable Notes or Index-Linked Securities by the Commission under Section 19(b)(2) of the Securities Exchange Act of 1934 and rules thereunder and the conditions set forth in the Commission's approval order continue to be satisfied; or (ii) each index or portfolio of equity and fixed income component securities separately meets either the criteria set forth in Rule 4420(j)(3) or (4) above.

**(A)** Index Methodology and Calculation.

**(i)** If an index is maintained by a broker-dealer or fund advisor, the broker-dealer or fund advisor shall erect a "fire wall" around the personnel who have access to information concerning changes and adjustments to the index;

**(ii)** The current composite index value will be widely disseminated by one or more major market data vendors at least once every 15 seconds during regular market session, provided however, that (a) with respect to the Non-US Component Stocks of the combination index, the impact on the index is only required to be updated at least every 60 seconds during the regular market session, and (b) with respect to the fixed income components of the combination index the impact on the index is only required to be updated at least once each day; and

**(iii)** Any advisory committee, supervisory board, or similar entity that advises a Reporting Authority or that makes decisions on index composition, methodology and related matters, must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the applicable index.

**(6)** The following provisions shall apply to all series of Index Fund Shares listed pursuant Rules 4420(j)(4) and (5) above:

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**(A)** Disseminated Information. The Reporting Authority will disseminate for each series of Index Fund Shares an estimate, updated at least every 15 seconds, of the value of a share of each series (the "Intraday Indicative Value"). The Intraday Indicative Value may be based, for example, upon current information regarding the required deposit of securities and cash amount to permit creation of new shares of the series or upon the index value. The Intraday Indicative Value may be calculated by Nasdaq or by an independent third party throughout the day using prices obtained from independent market data providers or other independent pricing sources such as a broker-dealer or price evaluation services.

**(B)** Initial Shares Outstanding. A minimum of 100,000 shares of a series of Index Fund Shares is required to be outstanding at start-up of trading.

**(C)** Surveillance Procedures. NASD Regulation will implement written surveillance procedures for Index Fund Shares.

**(7)** Regular market session trading will occur between 9:30 a.m. and either 4:00 p.m. or 4:15 p.m. for each series of Index Fund Shares, as specified by Nasdaq. In addition, Nasdaq may designate each series of Index Fund Shares for trading during a pre-market session beginning at 7:00 a.m. and/or a post-market session ending at 8:00 p.m.

**(8)** Nasdaq may list and trade Index Fund Shares based on one or more foreign or domestic indexes or portfolios. Each issue of Index Fund Shares based on each particular index or portfolio, or combination thereof, shall be designated as a separate series and shall be identified by a unique symbol. The components that are included in an index or portfolio on which a series of Index Fund Shares are based shall be selected by such person, which may be Nasdaq or an agent or wholly-owned subsidiary thereof, as shall have authorized use of such index or portfolio. Such index or portfolio may be revised from time to time as may be deemed necessary or appropriate to maintain the quality and character of the index or portfolio.

**(9)** Each series of Index Fund Shares will be listed and traded on Nasdaq subject to application of the following criteria:

**(A)** Initial Listing —

**(i)** for each series, Nasdaq will establish a minimum number of Index Fund Shares required to be outstanding at the time of commencement of trading on Nasdaq.

**(ii)** Nasdaq will obtain a representation from the issuer of each series of Index Fund Shares that net asset value per share will be calculated daily and will be made available to all market participants at the same time.

**(B)** Continued Listing —

**(i)** Nasdaq will consider the suspension of trading in or removal from listing of a series of Index Fund Shares under any of the following circumstances:

if, following the initial twelve month period after commencement of trading on Nasdaq of a series of Index Fund Shares, there are fewer than 50 beneficial holders of the series of Index Fund Shares for 30 or more consecutive trading days;

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if the value of the index or portfolio of securities on which the series of Index Fund Shares is based is no longer calculated or available or the index or portfolio on which the series of Index Fund Shares is based is replaced with a new index or portfolio, unless the new index or portfolio meets the requirements of this Rule 4420(j) for listing either pursuant to Rule 19b-4(e) under the Securities Exchange Act of 1934 (including the filing of a Form 19b-4(e) with the Commission) or by Commission approval of a filing pursuant to Section 19(b)(2) of the Securities Exchange Act of 1934; or

if such other event shall occur or condition exists which in the opinion of Nasdaq, makes further dealings on Nasdaq inadvisable.

Upon termination of an open-end management investment company, Nasdaq requires that Index Fund Shares issued in connection with such entity be removed from listing.

**(C) Voting** — voting rights shall be as set forth in the applicable open-end management investment company prospectus.

**(10)** Neither Nasdaq, the Reporting Authority, nor any agent of Nasdaq shall have any liability for damages, claims, losses or expenses caused by any errors, omissions, or delays in calculating or disseminating any current index or portfolio value, the current value of the portfolio of securities required to be deposited to the open-end management investment company in connection with issuance of Index Fund Shares; the amount of any dividend equivalent payment or cash distribution to holders of Index Fund Shares; net asset value; or other information relating to the purchase, redemption or trading of Index Fund Shares, resulting from any negligent act or omission by Nasdaq, the Reporting Authority or any agent of Nasdaq, or any act, condition or cause beyond the reasonable control of Nasdaq, its agent, or the Reporting Authority, including, but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction; or any error, omission or delay in the reports of transactions in one or more underlying securities.

### **(k) Quantitative Listing Criteria — Preferred Stock and Secondary Classes of Common Stock**

For initial listing, if the common stock or common stock equity equivalent security of the issuer is listed on Nasdaq or another national securities exchange, the issue shall have:

- (1)** At least 200,000 publicly held shares;
- (2)** A market value of publicly held shares of at least \$4,000,000;
- (3)** A minimum bid price per share of \$4;
- (4)** A minimum of 100 round lot shareholders;
- (5)** At least three registered and active market makers.

Alternatively, in the event the issuer's common stock or common stock equivalent security is not listed on either Nasdaq or another national securities exchange, the preferred stock and/or secondary class of common stock may be traded on Nasdaq so long as the security satisfies the listing criteria for common stock.

### **(l) Trust Issued Receipts**

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**(1)** Definition. The term "Trust Issued Receipt" means a security (a) that is issued by a trust ("Trust") which holds specified securities deposited with the Trust; (b) that, when aggregated in some specified minimum number, may be surrendered to the trust by the beneficial owner to receive the securities; and (c) that pays beneficial owners dividends and other distributions on the deposited securities, if any are declared and paid to the trustee by an issuer of the deposited securities.

**(2)** Nasdaq requires that members provide to all purchasers of newly issued Trust Issued Receipts a prospectus for the series of Trust Issued Receipts.

**(3)** The eligibility requirements for component securities that are represented by a series of Trust Issued Receipts and that became part of the Trust Issued Receipt when the security was either: (a) distributed by a company already included as a component security in the series of Trust Issued Receipts; or (b) received in exchange for the securities of a company previously included as a component security that is no longer outstanding due to a merger, consolidation, corporate combination or other event, shall be as follows:

**(A)** the component security must be listed on Nasdaq or another national securities exchange;

**(B)** the component security must be registered under Section 12 of the Act; and

**(C)** the component security must have a Standard & Poor's Sector Classification that is the same as the Standard & Poor's Sector Classification represented by the component securities included in the Trust Issued Receipt at the time of the distribution or exchange.

**(4)** Transactions in Trust Issued Receipts may be effected until 4:00 p.m. each business day.

**(5)** Nasdaq may list and trade Trust Issued Receipts based on one or more securities. The Trust Issued Receipts based on particular securities shall be designated as a separate series and shall be identified by a unique symbol. The securities that are included in a series of Trust Issued Receipts shall be selected by Nasdaq or its agent, a wholly-owned subsidiary of Nasdaq, or by such other person as shall have a proprietary interest in such Trust Issued Receipts.

**(6)** Trust Issued Receipts will be listed and traded on Nasdaq subject to application of the following criteria:

**(A)** Initial Listing — for each Trust, Nasdaq will establish a minimum number of Trust Issued Receipts required to be outstanding at the time of the commencement of trading on Nasdaq.

**(B)** Continued Listing — following the initial twelve month period following formation of a Trust and commencement of trading on Nasdaq, Nasdaq will consider the suspension of trading in or removal from listing of a Trust upon which a series of Trust Issued Receipts is based under any of the following circumstances:

**(i)** if the Trust has more than 60 days remaining until termination and there are fewer than 50 record and/or beneficial holders of Trust Issued Receipts for 30 or more consecutive trading days;

**(ii)** if the Trust has fewer than 50,000 receipts issued and outstanding;

**(iii)** if the market value of all receipts issued and outstanding is less than \$1 million; or

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(iv) if such other event shall occur or condition exists which, in the opinion of Nasdaq, makes further dealings on Nasdaq inadvisable.

Upon termination of a Trust, Nasdaq requires that Trust Issued Receipts issued in connection with such Trust be removed from listing. A Trust may terminate in accordance with the provisions of the Trust prospectus, which may provide for termination if the value of securities in the Trust falls below a specified amount.

(C) Term — the stated term of the Trust shall be as stated in the Trust prospectus. However, a Trust may be terminated under such earlier circumstances as may be specified in the Trust prospectus.

(D) Trustee — the following requirements apply:

(i) the trustee of a Trust must be a trust company or banking institution having substantial capital and surplus and the experience and facilities for handling corporate trust business. In cases where, for any reason, an individual has been appointed as trustee, a qualified trust company or banking institution must be appointed co-trustee.

(ii) no change is to be made in the trustee of a listed issue without prior notice to and approval of Nasdaq.

(E) Voting — voting rights shall be as set forth in the Trust prospectus.

(7) Unit of Trading — transactions in Trust Issued Receipts may only be made in round lots of 100 receipts or round lot multiples.

(8) Nasdaq may approve a series of Trust Issued Receipts for trading on Nasdaq pursuant to Rule 19b-4(e) under the Act, provided each of the component securities satisfies the following criteria:

(A) each component security must be registered under Section 12 of the Act;

(B) each component security must have a minimum public float of at least \$150 million;

(C) each component security must be listed on Nasdaq or another national securities exchange;

(D) each component security must have an average daily trading volume of at least 100,000 shares during the preceding sixty-day trading period;

(E) each component security must have an average daily dollar value of shares traded during the preceding sixty-day trading period of at least \$1 million; and

(F) the most heavily weighted component security may not initially represent more than 20% of the overall value of the Trust Issued Receipt.

### **(m) Securities Linked to the Performance of Indexes and Commodities (Including Currencies)**

Nasdaq will consider for listing and trading equity index-linked securities ("Equity Index- Linked Securities") and commodity-linked securities ("Commodity-Linked Securities" and, together with

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Equity Index-Linked Securities, "Linked Securities") that in each case meet the applicable criteria of this Rule. Equity Index-linked securities are securities that provide for the payment at maturity of a cash amount based on the performance of an underlying equity index or indexes. The payment at maturity with respect to Commodity-Linked Securities is based on one or more physical Commodities or Commodity futures, options or other Commodity derivatives, Commodity-Related Securities, or a basket or index of any of the foregoing (any such basis for payment is referred to below as the "Reference Asset"). The terms "Commodity" and "Commodity-Related Security" are defined in Rule 4630.

Linked Securities may or may not provide for the repayment of the original principal investment amount. Nasdaq may submit a rule filing pursuant to Section 19(b)(2) of the Securities Exchange Act of 1934 to permit the listing and trading of Linked Securities that do not otherwise meet the standards set forth below in paragraphs (1) through (12). Nasdaq will consider Linked Securities for listing and trading pursuant to Rule 19b-4(e) under the Securities Exchange Act of 1934, provided:

**(1)** Both the issue and the issuer of such security meet the criteria for other securities set forth in paragraph (f) of this rule, except that if the security is traded in \$1,000 denominations or is redeemable at the option of holders thereof on at least a weekly basis, then no minimum number of holders and no minimum public distribution of trading units shall be required..

**(2)** The issue has a term of not less than one (1) year and not greater than thirty (30) years.

**(3)** The issue must be the non-convertible debt of the issuer.

**(4)** The payment at maturity may or may not provide for a multiple of the direct or inverse performance of an underlying index, indexes or Reference Asset; however, in no event will a loss (negative payment) at maturity be accelerated by a multiple that exceeds twice the performance of an underlying index, indexes or Reference Asset.

**(5)** The issuer will be expected to have a minimum tangible net worth in excess of \$250,000,000 and to exceed by at least 20% the earnings requirements set forth in paragraph (a)(1) of this Rule. In the alternative, the issuer will be expected: (i) to have a minimum tangible net worth of \$150,000,000 and to exceed by at least 20% the earnings requirement set forth in paragraph (a)(1) of this Rule, and (ii) not to have issued securities where the original issue price of all the issuer's other index-linked note offerings (combined with index-linked note offerings of the issuer's affiliates) listed on a national securities exchange exceeds 25% of the issuer's net worth.

**(6)** The issuer is in compliance with Rule 10A-3 under the Securities Exchange Act of 1934.

**(7)** Equity Index Criteria- In the case of an Equity Index-Linked Security, each underlying index is required to have at least ten (10) component securities. In addition, the index or indexes to which the security is linked shall either (A) have been reviewed and approved for the trading of options or other derivatives by the Commission under Section 19(b)(2) of the 1934 Act and rules thereunder and the conditions set forth in the Commission's approval order, including comprehensive surveillance sharing agreements for non-U.S. stocks, continue to be satisfied, or (B) the index or indexes meet the following criteria:

**(i)** Each component security has a minimum market value of at least \$75 million, except that for each of the lowest weighted component securities in the index that in the aggregate account for no more than 10% of the weight of the index, the market value can be at least \$50 million;

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**(ii)** Each component security shall have trading volume in each of the last six months of not less than 1,000,000 shares, except that for each of the lowest weighted component securities in the index that in the aggregate account for no more than 10% of the weight of the index, the trading volume shall be at least 500,000 shares in each of the last six months;

**(iii)** Indexes based upon the equal-dollar or modified equal-dollar weighting method will be rebalanced at least semiannually;

**(iv)** In the case of a capitalization-weighted or modified capitalization-weighted index, the lesser of the five highest weighted component securities in the index or the highest weighted component securities in the index that in the aggregate represent at least 30% of the total number of component securities in the index, each have an average monthly trading volume of at least 2,000,000 shares over the previous six months;

**(v)** No underlying component security will represent more than 25% of the weight of the index, and the five highest weighted component securities in the index do not in the aggregate account for more than 50% of the weight of the index (60% for an index consisting of fewer than 25 component securities);

**(vi)** 90% of the index's numerical value and at least 80% of the total number of component securities will meet the then current criteria for standardized option trading on a national securities exchange or a national securities association, provided, however, that an index will not be subject to this requirement if (a) no underlying component security represents more than 10% of the dollar weight of the index and (b) the index has a minimum of 20 components;

**(vii)** All component securities shall be either (A) securities (other than securities of a foreign issuer and American Depositary Receipts ("ADRs")) that are (i) issued by a 1934 Act reporting company or by an investment company registered under the Investment Company Act of 1940 that, in each case, has securities listed on a national securities exchange and (ii) an "NMS stock" (as defined in Rule 600 of SEC Regulation NMS) or (B) securities of a foreign issuer or ADRs, provided that securities of a foreign issuer (including when they underlie ADRs) whose primary trading market outside the United States is not a member of the Intermarket Surveillance Group ("ISG") or a party to a comprehensive surveillance sharing agreement with Nasdaq will not in the aggregate represent more than 20% of the dollar weight of the index.

**(8)** Reference Asset Criteria-- In the case of a Commodity-Linked Security, the Reference Asset shall meet the criteria in either subparagraph (A) or subparagraph (B) below:

(A) The Reference Asset to which the security is linked shall have been reviewed and approved for the trading of Commodity-Related Securities or options or other derivatives by the Commission under Section 19(b)(2) of the 1934 Act and rules thereunder and the conditions set forth in the Commission's approval order, including with respect to comprehensive surveillance sharing agreements, continue to be satisfied.

(B) The pricing information for each component of a Reference Asset other than a Currency must be derived from a market which is an ISG member or affiliate or with which Nasdaq has a comprehensive surveillance sharing agreement. Notwithstanding the previous sentence, pricing information for gold and silver may be derived from the London Bullion Market Association. The pricing information for each component of a Reference Asset that is a Currency must be either (1) the generally accepted spot price for the currency exchange rate in question or (2) derived from a market which (x) is an ISG member or affiliate or with which Nasdaq has a comprehensive

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surveillance sharing agreement and (y) is the pricing source for a currency component of a Reference Asset that has previously been approved by the Commission. A Reference Asset may include components representing not more than 10% of the dollar weight of such Reference Asset for which the pricing information is derived from markets that do not meet the requirements of this subparagraph (B), provided, however, that no single component subject to this exception exceeds 7% of the dollar weight of the Reference Asset. The term "Currency" as used in this subparagraph, shall mean one or more currencies, or currency options, futures, or other currency derivatives, Commodity-Related Securities if their underlying Commodities are currencies or currency derivatives, or a basket or index of any of the foregoing.

**(9) Maintenance and Dissemination**—(i) If the index is maintained by a broker-dealer, the broker-dealer shall erect a "firewall" around the personnel who have access to information concerning changes and adjustments to the index and the index shall be calculated by a third party who is not a broker-dealer. (ii) Unless the Commission order applicable under clause 7(A) or 8(A) hereof provides otherwise, the current value of the index or the Reference Asset (as applicable) will be widely disseminated at least every 15 seconds during Nasdaq's regular market session, except as provided in the next clause (iii). (iii) The values of the following indexes need not be calculated and widely disseminated at least every 15 seconds if, after the close of trading, the indicative value of the Equity Index-Linked Security based on one or more of such indexes is calculated and disseminated to provide an updated value: CBOE S&P 500 BuyWrite Index(sm), CBOE DJIA Buy Write Index(sm), CBOE Nasdaq-100 BuyWrite Index(sm). (iv) If the value of a Linked Security is based on more than one index, then the dissemination requirement of this paragraph 9 applies to the composite value of such indexes. (v) In the case of a Commodity-Linked Security that is periodically redeemable, the indicative value of the subject Commodity-Linked Security must be calculated and widely disseminated by one or more major market data vendors on at least a 15-second basis during Nasdaq's regular market session.

**(10) Trading Halts.** In the case of Commodity-Linked Securities, if the indicative value (if required to be disseminated) or the Reference Asset value is not being disseminated as required, or, in the case of Equity Index-Linked Securities, if the value of the index is not being disseminated as required, Nasdaq may halt trading during the day on which such interruption occurs. Nasdaq will halt trading no later than the beginning of trading following the trading day when the interruption commenced if such interruption persists at this time.

**(11) Surveillance Procedures.** NASD will implement on behalf of Nasdaq written surveillance procedures for Linked Securities. Nasdaq will enter into adequate comprehensive surveillance sharing agreements for non-U.S. securities, as applicable.

**(12) Linked Securities** will be treated as equity instruments. Furthermore, for the purpose of fee determination, Linked Securities shall be deemed and treated as Other Securities.

### **(n) NASD Regulation**

Nasdaq and NASD Regulation, an affiliate of NASD, are parties to the Regulatory Contract pursuant to which NASD Regulation has agreed to perform certain functions described in this Rule on behalf of Nasdaq. Functions performed by NASD Regulation, NASD Regulation departments, and NASD Regulation staff under Nasdaq Rule 4420 are being performed by NASD Regulation on behalf of Nasdaq. Notwithstanding the fact that Nasdaq has entered into the Regulatory Contract with NASD Regulation to perform some of Nasdaq's functions, Nasdaq shall retain ultimate legal responsibility for, and control of, such functions.



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**(o) Managed Fund Shares**

(1) Nasdaq will consider listing Managed Fund Shares that meet the criteria of Rule 4420(o).

(2) Applicability. Rule 4420(o) is applicable only to Managed Fund Shares. Except to the extent inconsistent with Rule 4420(o), or unless the context otherwise requires, the rules and procedures of the Board of Directors shall be applicable to the trading on Nasdaq of such securities. Managed Fund Shares are included within the definition of "security" or "securities" as such terms are used in the Rules of Nasdaq.

(A) Nasdaq will file separate proposals under Section 19(b) of the Act before the listing of Managed Fund Shares.

(B) Transactions in Managed Fund Shares will occur throughout Nasdaq's trading hours.

(C) Minimum Price Variance. The minimum price variation for quoting and entry of orders in Managed Fund Shares is \$0.01.

(D) Surveillance Procedures. Nasdaq will implement written surveillance procedures for Managed Fund Shares.

(E) Creation and Redemption. For Managed Fund Shares based on an international or global portfolio, the statutory prospectus or the application for exemption from provisions of the Investment Company Act of 1940 for the series of Managed Fund Shares must state that such series must comply with the federal securities laws in accepting securities for deposits and satisfying redemptions with redemption securities, including that the securities accepted for deposits and the securities used to satisfy redemption requests are sold in transactions that would be exempt from registration under the Securities Act of 1933.

(3) Definitions. The following terms as used in the Rules shall, unless the context otherwise requires, have the meanings herein specified:

(A) Managed Fund Share. The term "Managed Fund Share" means a security that (a) represents an interest in a registered investment company ("Investment Company") organized as an open-end management investment company or similar entity, that invests in a portfolio of securities selected by the Investment Company's investment adviser consistent with the Investment Company's investment objectives and policies; (b) is issued in a specified aggregate minimum number in return for a deposit of a specified portfolio of securities and/or a cash amount with a value equal to the next determined net asset value; and (c) when aggregated in the same specified minimum number, may be redeemed at a holder's request, which holder will be paid a specified portfolio of securities and/or cash with a value equal to the next determined net asset value.

(B) Disclosed Portfolio. The term "Disclosed Portfolio" means the identities and quantities of the securities and other assets held by the Investment Company that will form the basis for the Investment Company's calculation of net asset value at the end of the business day.

(C) Intraday Indicative Value. The term "Intraday Indicative Value" is the estimated indicative value of a Managed Fund Share based on current information regarding the value of the securities and other assets in the Disclosed Portfolio.

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(D) Reporting Authority. The term "Reporting Authority" in respect of a particular series of Managed Fund Shares means Nasdaq, an institution, or a reporting service designated by Nasdaq or by the exchange that lists a particular series of Managed Fund Shares (if Nasdaq is trading such series pursuant to unlisted trading privileges) as the official source for calculating and reporting information relating to such series, including, but not limited to, the Intraday Indicative Value; the Disclosed Portfolio; the amount of any cash distribution to holders of Managed Fund Shares, net asset value, or other information relating to the issuance, redemption or trading of Managed Fund Shares. A series of Managed Fund Shares may have more than one Reporting Authority, each having different functions.

(4) Initial and Continued Listing -- Managed Fund Shares will be listed and traded on Nasdaq subject to application of the following criteria:

(A) Initial Listing -- Each series of Managed Fund Shares will be listed and traded on Nasdaq subject to application of the following initial listing criteria:

- (i) For each series, Nasdaq will establish a minimum number of Managed Fund Shares required to be outstanding at the time of commencement of trading on Nasdaq.
- (ii) Nasdaq will obtain a representation from the issuer of each series of Managed Fund Shares that the net asset value per share for the series will be calculated daily and that the net asset value and the Disclosed Portfolio will be made available to all market participants at the same time.

(B) Continued Listing -- Each series of Managed Fund Shares will be listed and traded on Nasdaq subject to application of the following continued listing criteria:

(i) Intraday Indicative Value. The Intraday Indicative Value for Managed Fund Shares will be widely disseminated by one or more major market data vendors at least every 15 seconds during the time when the Managed Fund Shares trade on Nasdaq.

(ii) Disclosed Portfolio.

(a) The Disclosed Portfolio will be disseminated at least once daily and will be made available to all market participants at the same time.

(b) The Reporting Authority that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the actual components of the portfolio.

(iii) Suspension of trading or removal. Nasdaq will consider the suspension of trading in or removal from listing of a series of Managed Fund Shares under any of the following circumstances:

(a) if, following the initial twelve-month period after commencement of trading on Nasdaq of a series of Managed Fund Shares, there are fewer than 50 beneficial holders of the series of Managed Fund Shares for 30 or more consecutive trading days;

(b) if the value of the Intraday Indicative Value is no longer calculated or available or the Disclosed Portfolio is not made available to all market participants at the same time;

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(c) if the Investment Company issuing the Managed Fund Shares has failed to file any filings required by the Commission or if Nasdaq is aware that the Investment Company is not in compliance with the conditions of any exemptive order or no-action relief granted by the Commission to the Investment Company with respect to the series of Managed Fund Shares;  
or

(d) if such other event shall occur or condition exists which, in the opinion of Nasdaq, makes further dealings on Nasdaq inadvisable.

(iv) Trading Halt. If the Intraday Indicative Value of a series of Managed Fund Shares is not being disseminated as required, Nasdaq may halt trading during the day in which the interruption to the dissemination of the Intraday Indicative Value occurs. If the interruption to the dissemination of the Intraday Indicative Value persists past the trading day in which it occurred, Nasdaq will halt trading no later than the beginning of the trading day following the interruption. In addition, if Nasdaq becomes aware that the net asset value or the Disclosed Portfolio with respect to a series of Managed Fund Shares is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the net asset value or the Disclosed Portfolio is available to all market participants.

(v) Termination. Upon termination of an Investment Company, Nasdaq requires that Managed Fund Shares issued in connection with such entity be removed from listing on Nasdaq.

(vi) Voting. Voting rights shall be as set forth in the applicable Investment Company prospectus.

(5) Limitation of Liability. Neither Nasdaq, the Reporting Authority, nor any agent of Nasdaq shall have any liability for damages, claims, losses or expenses caused by any errors, omissions, or delays in calculating or disseminating any current portfolio value; the current value of the portfolio of securities required to be deposited to the open-end management investment company in connection with issuance of Managed Fund Shares; the amount of any dividend equivalent payment or cash distribution to holders of Managed Fund Shares; net asset value; or other information relating to the purchase, redemption, or trading of Managed Fund Shares, resulting from any negligent act or omission by Nasdaq, the Reporting Authority or any agent of Nasdaq, or any act, condition, or cause beyond the reasonable control of Nasdaq, its agent, or the Reporting Authority, including, but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction; or any error, omission, or delay in the reports of transactions in one or more underlying securities.

(6) Disclosures. The provisions of this subparagraph apply only to series of Managed Fund Shares that are the subject of an order by the Securities and Exchange Commission exempting such series from certain prospectus delivery requirements under Section 24(d) of the Investment Company Act of 1940 and are not otherwise subject to prospectus delivery requirements under the Securities Act of 1933. Nasdaq will inform its members regarding application of these provisions of this subparagraph to a particular series of Managed Fund Shares by means of an information circular prior to commencement of trading in such series.

Nasdaq requires that members provide to all purchasers of a series of Managed Fund Shares a written description of the terms and characteristics of those securities, in a form prepared by the open-end management investment company issuing such securities, not later than the time a confirmation of the first transaction in such series is delivered to such purchaser. In addition, members shall include such a written description with any sales material relating to a series of Managed Fund Shares that is provided to customers or the public. Any other written materials provided by a member to customers

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or the public making specific reference to a series of Managed Fund Shares as an investment vehicle must include a statement in substantially the following form: "A circular describing the terms and characteristics of (the series of Managed Fund Shares) has been prepared by the (open-end management investment company name) and is available from your broker. It is recommended that you obtain and review such circular before purchasing (the series of Managed Fund Shares)"

A member carrying an omnibus account for a non-member broker-dealer is required to inform such non-member that execution of an order to purchase a series of Managed Fund Shares for such omnibus account will be deemed to constitute agreement by the non-member to make such written description available to its customers on the same terms as are directly applicable to members under this rule.

Upon request of a customer, a member shall also provide a prospectus for the particular series of Managed Fund Shares.

(7) If the investment adviser to the Investment Company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect a "fire wall" between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such Investment Company portfolio. Personnel who make decisions on the Investment Company's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Investment Company portfolio.

Adopted by SEC Release 34-53128 Jan. 13, 2006; amended by SR-NASDAQ-2006-007 eff. May 8, 2006; amended by SR-NASDAQ-2006-002 eff. July 18, 2006; amended by SR-NASDAQ-2006-035 eff. Sept. 15, 2006; amended by SR-NASDAQ-2006-050 eff. February 9, 2007; amended by SR-NASDAQ-2007-027 eff. May 25, 2007; amended by SR-NASDAQ-2007-071 eff. Dec. 5, 2007; amended by SR-NASDAQ-2007-098 eff. Dec. 18, 2007; amended by SR-NASDAQ-2008-008 eff. Feb. 05, 2008; amended by SR-NASDAQ-2008-044 eff. May 27, 2008; amended by SR-NASDAQ-2008-039 eff. June 13, 2008; amended by SR-NASDAQ-2008-071 eff. August 28, 2008; amended by SR-NASDAQ-2008-093 eff. December 1, 2008; amended by SR-NASDAQ-2008-096 eff. January 7, 2009; amended by SR-NASDAQ-2009-004 eff. January 30, 2009.

<sup>1</sup> The two percent limit, based on 20 percent of the worldwide trading volume in the non-U.S. security or sponsored ADR, applies only if there is a comprehensive surveillance sharing agreement in place with the primary exchange in the country where the security is primarily traded (in the case of an ADR, the primary exchange on which the security underlying the ADR is traded). If there is no such agreement, subparagraph (3) above requires that the combined trading volume of such security and other related securities occurring in the U.S. market represents (on a share equivalent basis for any ADRs) at least 50% of the combined world-wide trading volume in such security, other related securities, and other classes of common stock related to such security over the six month period preceding the date of listing.

### **4421. Derivative Securities Traded under Unlisted Trading Privileges.**

Nasdaq may extend unlisted trading privileges to any security that is an NMS Stock (as defined in Rule 600 of Regulation NMS) that is listed on another national securities exchange. Any such security will be subject to all Nasdaq trading rules applicable to NMS Stocks, unless otherwise noted, including provisions of Rules 4120, 4420, 4421, and 4630.

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(a) Any security that is a "new derivative securities product" as defined in Rule 19b-4(e) under the Exchange Act (a "UTP Derivative Security") and traded under unlisted trading privileges pursuant to Rule 19b-4(e) under the Act shall be subject to the additional following rules:

(1) Form 19b-4(e). Nasdaq shall file with the Commission a Form 19b-4(e) with respect to each UTP Derivative Security.

(2) Information Circular. Nasdaq shall distribute an information circular prior to the commencement of trading in each such UTP Derivative Security that generally includes the same information as contained in the information circular provided by the listing exchange, including: (a) the special risks of trading the new derivative securities product; (b) the Rules of Nasdaq that will apply to the new derivative securities product, including Equity Rule 2310; (c) information about the dissemination of the value of the underlying assets or indexes; and (d) the applicable trading hours for the UTP Derivative Security and the risks of trading during the period from 8:00 a.m. to 9:30 a.m. and from 4:00 p.m. to 7:00 p.m. due to the lack of calculation or dissemination of the underlying index value, the Intra-Day Indicative Value (as defined in Equity Rule 4420) or a similar value.

(3) Product Description.

Members are subject to the prospectus delivery requirements under the Securities Act of 1933, unless the UTP Derivative Security is the subject of an order by the Commission exempting the product from certain prospectus delivery requirements under Section 24(d) of the Investment Company Act of 1940 and the product is not otherwise subject to prospectus delivery requirements under the Securities Act of 1933.

Nasdaq shall inform Members of the application of the provisions of this subparagraph to UTP Derivative Securities by means of an information circular. Nasdaq requires that Members provide all purchasers of UTP Derivative Securities a written description of the terms and characteristics of those securities, in a form approved by Nasdaq or prepared by the openended management company issuing such securities, not later than the time a confirmation of the first transaction in such series is delivered to such purchaser. In addition, Members shall include a written description with any sales material relating to UTP Derivative Securities that is provided to customers or the public. Any other written materials provided by a Member to customers or the public making specific reference to the UTP Derivative Securities as an investment vehicle must include a statement substantially in the following form:

"A circular describing the terms and characteristics of [ *the UTP Derivative Securities*] has been prepared by the [ *open-ended management investment company name*] and is available from your broker. It is recommended that you obtain and review such circular before purchasing [ *the UTP Derivative Securities*]."

A Member carrying an omnibus account for a non-Member is required to inform such non-Member that execution of an order to purchase UTP Derivative Securities for such omnibus account will be deemed to constitute an agreement by the non-Member to make such written description available to its customers on the same terms as are directly applicable to the Member under this Rule.

Upon request of a customer, a Member shall also provide a prospectus for the particular UTP Derivative Securities.

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- (4) Trading Halts. Trading halts of UTP Derivative Securities shall be governed by Equity Rule 4120.
- (5) Limitations on Market Makers. Market makers in a UTP Derivative Security that is a Commodity-Related Security (as defined in Equity Rule 4630) shall comply with Rule 4630.
- (6) Surveillance. Nasdaq shall enter into a comprehensive surveillance sharing agreement with markets trading components of the index or portfolio on which the UTP Derivative Security is based to the same extent as the listing exchange's rules require the listing exchange to enter into a comprehensive surveillance sharing agreement with such markets.

Adopted by SR-NASDAQ-2009-004 eff. January 30, 2009.

**4425. Nasdaq Global Market**

- (a)** An issuer that applies for listing on the Nasdaq Global Market and meets the requirements for initial listing contained in Rule 4426 shall be listed on the Nasdaq Global Select Market.
- (b)** Each October, beginning in October 2007, Nasdaq will review the qualifications of all securities listed on the Nasdaq Global Market that are not included in the Nasdaq Global Select Market. Any security that meets the requirements for initial listing on the Nasdaq Global Select Market contained in Rule 4426 at the time of this review will be transferred to the Global Select Market the following January, provided it meets the continued listing criteria at that time. An issuer will not owe any application or entry fees in connection with such a transfer.
- (c)** At any time, an issuer may apply to transfer a security listed on the Nasdaq Global Market to the Nasdaq Global Select Market. Such an application will be approved and effected as soon as practicable if the security meets the requirements for initial listing contained in Rule 4426. An issuer will not owe any application or entry fees in connection with such a transfer.
- (d)** At any time, an issuer may apply to transfer a security listed on the Nasdaq Capital Market to the Nasdaq Global Select Market. Such an application will be approved and effected as soon as practicable if the security meets the requirements for initial listing contained in Rule 4426. An issuer transferring from the Nasdaq Capital Market to the Nasdaq Global Select Market will be required to pay the applicable fees contained in Rule 4510.
- (e)** After initial inclusion on the Nasdaq Global Select Market, an issuer will remain on the Nasdaq Global Select Market provided it continues to meet the applicable requirements of the Rule 4300 and 4400 Series, including the qualitative requirements of Rule 4350 and IM-4300.
- (f)** Notwithstanding any provision to the contrary, the securities of any issuer that is non-compliant with a qualitative listing requirement that does not provide for a grace period, or where Nasdaq staff has raised a public interest concern, will not be permitted to transfer to the Global Select Market until the underlying deficiency is resolved. In addition, any security that is below a quantitative continued listing requirement for the Nasdaq Global Market, even if the issuer has not been below the requirement for a sufficient period of time to be considered non-compliant, and any issuer in a grace or compliance period with respect to a quantitative listing requirement, will not be allowed to transfer from the Nasdaq Global or Capital Markets to the Nasdaq Global Select Market until the underlying deficiency is resolved. Nor will any issuer before a Nasdaq Listing Qualifications Panel be allowed to transfer to the Global Select Market until the underlying deficiency is resolved. An issuer that is in a grace or compliance period with respect to a qualitative listing standard, such as the cure period for

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filling an audit committee vacancy, will be allowed to transfer to the Global Select Market, subject to the continuation of that grace period.

Adopted by SR-NASDAQ-2006-007 eff. May 8, 2006; amended by SR-NASDAQ-2006-020 eff. July 28, 2006.

**IM-4425. Launch of the Nasdaq Global Select Market**

In connection with the initial launch of the Nasdaq Global Select Market in July 2006, Nasdaq will review all issuers' qualifications and assign qualified Global Market companies to the new Global Select segment. In addition, qualified Capital Market companies will be given the opportunity to be included in the new segment. In connection with this initial transfer to the Global Select Market, Nasdaq will begin to make its assessment using the most recent financial data filed as of April 28, 2006, and market data as of April 28, 2006. Nasdaq will treat as an IPO any company that initially listed as an IPO since May 1, 2005 for purposes of the liquidity tests, because these companies would have insufficient market data to establish a 12-month trading history and may have had insufficient time to satisfy the market value of public float requirement applicable to other companies. Similarly, for purposes of the market capitalization requirements of Rules 4426(c)(2) and (c)(3), any company that initially listed as an IPO since May 1, 2005 must have the applicable average market capitalization from the date of listing. Nasdaq also notes that certain Nasdaq-listed issuers that qualify to initially list on the New York Stock Exchange (NYSE) will not be eligible to list on the Global Select Market. Nasdaq will allow (but not require) any Nasdaq-listed issuer that meets the NYSE initial listing standards as of July 2006 but that does not qualify for the Global Select segment when it is adopted to be included in the Global Select Market, subject to a grace period until January 1, 2008 to achieve compliance with all listing criteria for the Global Select Market. Any issuer that avails itself of this grace period that has not achieved compliance with all listing criteria for the Global Select Market by January 1, 2008 will be moved to the Nasdaq Global Market. In addition, any issuer that avails itself of this grace period will remain subject to delisting in the event it fails to satisfy any of the continued listing requirements for the Nasdaq Global Market.

Adopted by SR-NASDAQ-2006-007 eff. May 8, 2006.

**4426. Nasdaq Global Select Market Listing Requirements**

**(a)** For inclusion in the Nasdaq Global Select Market, an issuer must meet the requirements of paragraphs (b), (c), and (d) of this rule, and all applicable requirements of the Rule 4300 and 4400 Series, including the qualitative requirements of Rule 4350 and IM-4300. Rule 4427 provides guidance about computations made under this Rule 4426.

**(b) Liquidity Requirements**

**(1)** The security must demonstrate either:

**(A)**

**(i)** a minimum of 550 total shareholders, and

**(ii)** an average monthly trading volume over the prior 12 months of at least 1,100,000 shares per month; or

**(B)** a minimum of 2,200 total shareholders; or

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(C) a minimum of 450 round-lot shareholders.

(2) The security must have at least 1,250,000 publicly held shares; and

(3) The publicly held shares must have either:

(A) a market value of at least \$110 million; or

(B) a market value of at least \$100 million, if the issuer has stockholders' equity of at least \$110 million; or

(C) a market value of at least \$70 million in the case of: (i) an issuer listing in connection with its initial public offering; (ii) an issuer that is affiliated with, or a spin-off from, another company listed on the Global Select Market; and (iii) a closed end management investment company registered under the Investment Company Act of 1940 or exempt from registration as a business development company as defined in Section 2 of the Investment Company Act of 1940.

(c) Financial Requirements. An issuer, other than a closed end management investment company, must meet the requirements of one of subparagraphs (1), (2) or (3) of this paragraph.

(1) The issuer must have:

(A) aggregate income from continuing operations before income taxes of at least \$ 11 million over the prior three fiscal years;

(B) positive income from continuing operations before income taxes in each of the prior three fiscal years; and

(C) at least \$2.2 million income from continuing operations before income taxes in each of the two most recent fiscal years: or

(2) The issuer must have:

(A) aggregate cash flows of at least \$27.5 million over the prior three fiscal years;

(B) positive cash flows in each of the prior three fiscal years; and

(C) both:

(i) average market capitalization of at least \$550 million over the prior 12 months; and

(ii) total revenue of at least \$110 million in the previous fiscal year; or

(3) The issuer must have both:

(A) average market capitalization of at least \$850 million over the prior 12 months: and

(B) total revenue of at least \$90 million in the previous fiscal year.



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**(d) Price.** For inclusion in the Nasdaq Global Select Market, an issuer not listed on the Nasdaq Global Market shall have a minimum bid price of \$4 per share.

**(e) Closed End Management Investment Companies.**

**(1)** A closed end management investment company registered under the Investment Company Act of 1940 shall not be required to meet paragraph (c) of this Rule 4426.

**(2)** In lieu of the requirement in paragraph (b)(3) of this Rule 4426, a closed end management investment company that is listed concurrently with other closed end management investment companies that have a common investment adviser or whose investment advisers are "affiliated persons," as defined in the Investment Company Act of 1940 (a "Fund Family") shall be eligible if: (A) the total market value of publicly held shares in such Fund Family is at least \$220 million; (B) the average market value of publicly held shares for all funds in the Fund Family is \$50 million; and (C) each fund in the Fund Family has a market value of publicly held shares of at least \$35 million.

**(3)** A closed end management investment company that is exempt from registration as a business development company as defined in Section 2 of the Investment Company Act of 1940 shall not be required to meet paragraph (c) of this Rule 4426 but must have a market value of listed securities of at least \$80 million.

**(f) Other Classes of Securities.** If the common stock of an issuer is included in the Nasdaq Global Select Market, any other security of that same issuer, such as other classes of common or preferred stock, that qualify for listing on the Nasdaq Global Market shall also be included in the Global Select Market.

Adopted by SR-NASDAQ-2006-007 eff. May 8, 2006; amended by SR-NASDAQ-2006-020 eff. July 28, 2006; amended by SR-NASDAQ-2006-044 eff. Oct. 10, 2006; amended by SR-NASDAQ-2007-050 eff. May 10, 2007; amended by SR-NASDAQ-2008-037 eff. June 17, 2008; amended by SR-NASDAQ-2008-093 eff. December 1, 2008.

**4427. Computations and Definitions**

**(a)** In computing the number of publicly held shares for purposes of Rule 4426(b). Nasdaq will not consider shares held by an officer, director or 10% shareholder of the issuer.

**(b)** In calculating income from continuing operations before income taxes for purposes of Rule 4426(c)(1), Nasdaq will rely on an issuer's financial information as filed with the Commission in the issuer's most recent periodic report and/or registration statement.

**(c)** In calculating cash flows for purposes of Rule 4426(c)(2). Nasdaq will rely on the net cash provided by operating activities, as reported in the issuer's financial information as filed with the Commission in the issuer's most recent periodic report and/or registration statement excluding changes in working capital or in operating assets and liabilities.

**(d)** If an issuer does not have three years of publicly reported financial data, it may qualify under Rule 4426(c)(1) if it has:

**(1)** reported aggregate income from continuing operations before income taxes of at least \$11 million; and

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(2) positive income from continuing operations before income taxes in each of the reported fiscal years.

(e) If an issuer does not have three years of publicly reported financial data, it may qualify under Rule 4426(c)(2) if it has:

(1) reported aggregate cash flows of at least \$27.5 million; and

(2) positive cash flows in each of the reported fiscal years.

(f) A period of less than three months shall not be considered a fiscal year, even if reported as a stub period in the issuer's publicly reported financial statements.

(g) For purposes of Rule 4426, an issuer is affiliated with another company if that other company, directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control of the issuer. Control, for these purposes, means having the ability to exercise significant influence. Ability to exercise significant influence will be presumed to exist where the parent or affiliated company directly or indirectly owns 20% or more of the other company's voting securities, and also can be indicated by representation on the board of directors, participation in policy making processes, material intercompany transactions, interchange of managerial personnel, or technological dependency.

(h) In the case of an issuer listing in connection with its initial public offering, compliance with the market capitalization requirements of Rules 4426(c)(2) and (c)(3) will be based on the company's market capitalization at the time of listing.

Adopted by SR-NASDAQ-2006-007 eff. May 8, 2006.

**4430. Limited Partnership Rollup Listing Criteria**

In addition to meeting the quantitative criteria for Nasdaq Global Market listing, an issuer that is formed as a result of a limited partnership rollup transaction, as defined in Rule 4200, must meet the criteria set forth below in order to be listed:

(a) The limited partnership rollup transaction must provide for the right of dissenting limited partners:

(1) to receive compensation for their limited partnership units based on an appraisal of the limited partnership assets performed by an independent appraiser unaffiliated with the sponsor or general partner of the program which values the assets as if sold in an orderly manner in a reasonable period of time, plus or minus other balance sheet items, and less the cost of sale or refinancing and in a manner consistent with the appropriate industry practice. Compensation to dissenting limited partners of limited partnership rollup transactions may be cash, secured debt instruments, unsecured debt instruments, or freely-tradeable securities; provided, however, that:

(A) limited partnership rollup transactions which utilize debt instruments as compensation must provide for a trustee and an indenture to protect the rights of the debt holders and provide a rate of interest equal to at least 120% of the applicable federal rate as determined in accordance with Section 1274 of the Internal Revenue Code of 1986;

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**(B)** limited partnership rollup transactions which utilize unsecured debt instruments as compensation, in addition to the requirements of subparagraph (A), above, must limit total leverage to 70% of the appraised value of the assets;

**(C)** all debt securities must have a term no greater than 8 years and provide for prepayment with 80% of the net proceeds of any sale or refinancing of the assets previously owned by the partnership entities subject to the limited partnership rollup transaction or any part thereof; and

**(D)** freely-tradeable securities utilized as compensation to dissenting limited partners must be issued by a company listed on Nasdaq or another national securities exchange prior to the limited partnership rollup transaction, and the number of securities to be received in return for limited partnership interests must be determined in relation to the average last sale price of the freely-tradeable securities in the 20-day period following the date of the meeting at which the vote on the limited partnership rollup transaction occurs. If the issuer of the freely-tradeable securities is affiliated with the sponsor or general partner, newly issued securities to be utilized as compensation to dissenting limited partners shall not represent more than 20 percent of the issued and outstanding shares of that class of securities after giving effect to the issuance. For purposes of the preceding sentence, a sponsor or general partner is "affiliated" with the issuer of the freely tradeable securities if the sponsor or general partner receives any material compensation from the issuer or its affiliates in conjunction with the limited partnership rollup transaction or the purchase of the general partner's interest; provided, however, that nothing herein shall restrict the ability of a sponsor or general partner to receive any payment for its equity interests and compensation as otherwise provided by this Rule;

**(2)** to receive or retain a security with substantially the same terms and conditions as the security originally held. Securities received or retained will be considered to have the same terms and conditions as the security originally held if:

**(A)** there is no material adverse change to dissenting limited partners' rights with respect to the business plan or the investment, distribution and liquidation policies of the limited partnership; and

**(B)** the dissenting limited partners receive substantially the same rights, preferences and priorities as they had pursuant to the security originally held; or

**(3)** to receive other comparable rights including, but not limited to:

**(A)** approval of the limited partnership rollup transaction by 75% of the outstanding units of each of the individual participating limited partnerships and the exclusion of any individual limited partnership from the limited partnership rollup transaction which fails to reach the 75% threshold. The third-party appointed to tabulate votes and dissents pursuant to paragraph (b)(2)(D) of this Rule shall submit the results of such tabulation to Nasdaq.

**(B)** review of the limited partnership rollup transaction by an independent committee of persons not affiliated with the general partner(s) or sponsor. Whenever utilized, the independent committee:

**(i)** shall be approved by a majority of the outstanding securities of each of the participating partnerships;

**(ii)** shall have access to the books and records of the partnerships;

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**(iii)** shall prepare a report to the limited partners subject to the limited partnership rollup transaction that presents its findings and recommendations, including any minority views;

**(iv)** shall have the authority to negotiate the proposed transaction with the general partner or sponsor on behalf of the limited partners, but not the authority to approve the transaction on behalf of the limited partners;

**(v)** shall not deliberate for a period longer than 60 days, although extensions will be permitted if unanimously agreed upon by the members of the independent committee or if approved by Nasdaq;

**(vi)** may be compensated and reimbursed by the limited partnerships subject to the limited partnership rollup transaction and shall have the ability to retain independent counsel and financial advisors to represent all limited partners at the limited partnerships' expense provided the fees are reasonable; and

**(vii)** shall be entitled to indemnification to the maximum extent permitted by law from the limited partnerships subject to the limited partnership rollup transaction from claims, causes of action or lawsuits related to any action or decision made in furtherance of their responsibilities; provided, however, that general partners or sponsors may also agree to indemnify the independent committee; or

**(C)** any other comparable rights for dissenting limited partners proposed by general partners or sponsors, provided, however, that the general partner(s) or sponsor demonstrates to the satisfaction of Nasdaq or, if Nasdaq determines appropriate, to the satisfaction of an independent committee, that the rights proposed are comparable.

**(b)** Regardless of whether a limited partnership rollup transaction meets the requirements set forth in paragraph (a) above, a limited partnership rollup transaction will not be listed:

**(1)** if the general partner(s):

**(A)** converts an equity interest in any limited partnership(s) subject to a limited partnership rollup transaction for which consideration was not paid and which was not otherwise provided for in the limited partnership agreement and disclosed to limited partners, into a voting interest in the new entity (provided, however, an interest originally obtained in order to comply with the provisions of Internal Revenue Service Revenue Procedure 89-12 may be converted);

**(B)** fails to follow the valuation provisions, if any, in the limited partnership agreements of the subject limited partnerships when valuing their limited partnership interests; or

**(C)** utilizes a future value of their equity interest rather than the current value of their equity interest, as determined by an appraisal conducted in a manner consistent with paragraph (a)(1) of this Rule, when determining their interest in the new entity;

**(2)** as to voting rights, if:

**(A)** the voting rights in the entity resulting from a limited partnership rollup transaction do not generally follow the original voting rights of the limited partnerships participating in the limited partnership rollup transaction; provided, however, that changes to voting rights may be effected if

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Nasdaq determines that such changes are not unfair or if the changes are approved by an independent committee;

**(B)** a majority of the interests in an entity resulting from a limited partnership rollup transaction may not, without concurrence by the sponsor, general partner(s), board of directors, trustee, or similar governing entity, depending on the form of entity and to the extent not inconsistent with state law, vote to:

**(i)** amend the limited partnership agreement, articles of incorporation or by-laws, or indenture;

**(ii)** dissolve the entity;

**(iii)** remove the general partner, board of directors, trustee or similar governing entity, and elect a new general partner, board of directors, trustee or similar governing entity; or

**(iv)** approve or disapprove the sale of substantially all of the assets of the entity;

**(C)** the general partner(s) or sponsor(s) proposing a limited partnership rollup transaction do not provide each person whose equity interest is subject to the transaction with a document which instructs the person on the proper procedure for voting against or dissenting from the rollup; or

**(D)** the general partner(s) or sponsor(s) does not utilize an independent third party to receive and tabulate all votes and dissents in connection with the limited partnership rollup transaction, and require that the third party make the tabulation available to the general partner and any limited partner upon request at any time during and after voting occurs;

**(3)** as to transaction costs, if:

**(A)** transaction costs of a rejected limited partnership rollup transaction are not apportioned between general and limited partners of the subject limited partnerships according to the final vote on the proposed transaction as follows:

**(i)** the general partner(s) or sponsor(s) bear all transaction costs in proportion to the total number of abstentions and votes to reject the limited partnership rollup transaction; and

**(ii)** limited partners bear transaction costs in proportion to the number of votes to approve the limited partnership rollup transaction; or

**(B)** individual limited partnerships that do not approve a limited partnership rollup transaction are required to pay any of the transaction costs, and the general partner or sponsor is not required to pay the transaction costs on behalf of the non-approving limited partnerships, in a limited partnership rollup transaction in which one or more limited partnerships determines not to approve the transaction, but where the transaction is consummated with respect to one or more approving limited partnerships; or

**(4)** as to fees of general partners, if:

**(A)** general partners are not prevented from receiving both unearned management fees discounted to a present value (if such fees were not previously provided for in the limited partnership agreement and disclosed to limited partners) and new asset-based fees;

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**(B)** property management fees and other general partner fees are inappropriate, unreasonable and more than, or not competitive with, what would be paid to third parties for performing similar services; or

**(C)** changes in fees which are substantial and adverse to limited partners are not approved by an independent committee according to the facts and circumstances of each transaction.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-007 eff. May 8, 2006.

**4440. Registration Standards**

**(a)** In addition to meeting the quantitative criteria and the limited partnership rollup criteria, if applicable, for Nasdaq Global market listing, the issue must also be:

**(1)** registered under Section 12(b) of the Act; or

**(2)** subject to an exemption issued by the Commission that permits the listing of the security notwithstanding its failure to be registered pursuant to Section 12(b).

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-007 eff. May 8, 2006.

**4450. Quantitative Maintenance Criteria**

After listing as a Nasdaq Global Market security, a security must substantially meet the criteria set forth in paragraphs (a) or (b), and (c), (d), (e) (f), (g), (h) or (i) below to continue to remain listed on the Nasdaq Global Market. A security maintaining its listing under paragraph (b) need not also be in compliance with the quantitative maintenance criteria in the Rule 4300 series.

**(a) Maintenance Standard 1** — First Class of Common Stock, Shares or Certificates of Beneficial Interest of Trusts, Limited Partnership Interests in Foreign or Domestic Issues and American Depositary Receipts

**(1)** 750,000 shares publicly held;

**(2)** Market value of publicly held shares of \$5 million;

**(3)** The issuer has stockholders' equity of at least \$10 million;

**(4)** 400 total shareholders; and

**(5)** Minimum bid price per share of \$1.

**(6)** At least two registered and active market makers.

**(b) Maintenance Standard 2** — First Class of Common Stock, Shares or Certificates of Beneficial Interest of Trusts, Limited Partnership Interests in Foreign or Domestic Issues and American Depositary Receipts

**(1)** The issuer has:

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- (A) a market value of listed securities of \$50 million; or
- (B) total assets and total revenue of \$50 million each for the most recently completed fiscal year or two of the last three most recently completed fiscal years.
- (2) 1,100,000 shares publicly held;
- (3) Market value of publicly held shares of \$15 million;
- (4) Minimum bid price per share of \$1;
- (5) 400 total shareholders; and
- (6) At least four registered and active market makers.

**(c) Other Securities Listed Pursuant to Rule 4420(f) and Linked Securities**

(1) The aggregate market value or principal amount of publicly-held units (except Linked Securities that were listed pursuant to Rule 4420(m)) must be at least \$1 million.

(2) Delisting or removal proceedings will be commenced (unless the Commission has approved the continued trading) with respect to any Equity Index-Linked Security that was listed pursuant to paragraph (7)(B) of Rule 4420(m) if any of the standards set forth in paragraph (7)(B) of such rule are not continuously maintained, except that:

(i) the criteria that no single component represent more than 25% of the weight of the index and the five highest weighted components in the index may not represent more than 50% (or 60% for indexes with less than 25 components) of the weight of the Index, need only be satisfied for capitalization weighted and price weighted indexes as of the first day of January and July in each year;

(ii) the total number of components in the index may not increase or decrease by more than 33-1/3% from the number of components in the index at the time of its initial listing, and in no event may be less than ten (10) components;

(iii) the trading volume of each component security in the index must be at least 500,000 shares for each of the last six months, except that for each of the lowest weighted components in the index that in the aggregate account for no more than 10% of the weight of the index, trading volume must be at least 400,000 shares for each of the last six months; and

(iv) in a capitalization-weighted or modified capitalization-weighted index, the lesser of the five highest weighted component securities in the index or the highest weighted component securities in the index that in the aggregate represent at least 30% of the total number of stocks in the index have had an average monthly trading volume of at least 1,000,000 shares over the previous six months.

(3) With respect to an Equity Index-Linked Security that was listed pursuant to paragraph (7)(A) of Rule 4420(m), delisting or removal proceedings will be commenced (unless the Commission has approved the continued trading of the subject security) if an underlying index or indexes fails to satisfy the maintenance standards or conditions for such index or indexes as set forth by the Commission in its order under Section 19(b)(2) of the 1934 Act approving the index or indexes for the trading of options or other derivatives.

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**(4)** With respect to a Commodity-Linked Security that was listed pursuant to Rule 4420(m), delisting or removal proceedings will be commenced (unless the Commission has approved the continued trading of the subject security) if any of the listing requirements set forth in Rule 4420(m) that were applicable at the time of the initial listing of the security are no longer being met. Notwithstanding the foregoing, a security will not be delisted due to lack of comprehensive surveillance sharing agreements if the Reference Asset has at least 10 components and Nasdaq has comprehensive surveillance sharing agreements with respect to at least 90% of the dollar weight of the Reference Asset for which such agreements are otherwise required.

**(5)** Delisting or removal proceedings will also be commenced with respect to any Linked Security listed pursuant to Rule 4420(m) (unless the Commission has approved the continued trading of the subject index-linked security), under any of the following circumstances:

**(i)** if the aggregate market value or the principal amount of the Linked Security issue publicly held is less than \$400,000;

**(ii)** if the value of the index, composite value of the indexes or the value of the Reference Asset (as applicable) is no longer calculated or widely disseminated as required by Rule 4420(m)(9);

**(iii)** with respect to a Commodity-Linked Security, if the value of the Reference Asset is no longer calculated or available and a new Reference Asset is substituted, unless the new Reference Asset meets the requirements of this Rule and Rule 4420(m); or

**(iv)** if such other event shall occur or condition exists which in the opinion of Nasdaq makes further dealings on Nasdaq inadvisable.

### **(d) Rights and Warrants**

Common stock of issuer must continue to be listed on the Nasdaq Global Market.

### **(e) Compliance Periods**

**(1)** A failure to meet the continued listing requirement for market value of publicly held shares shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 90 calendar days from such notification to achieve compliance.

Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days.

**(2)** A failure to meet the continued listing requirement for minimum bid price shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 180 calendar days from such notification to achieve compliance. Compliance can be achieved during any compliance period by meeting the applicable standard for a minimum of 10 consecutive business days during the applicable compliance period.

Nasdaq may, in its discretion, require an issuer to maintain a bid price of at least \$1.00 per share for a period in excess of ten consecutive business days, but generally no more than 20 consecutive business days, before determining that the issuer has demonstrated an ability to maintain long-term



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compliance. In determining whether to monitor bid price beyond ten business days, Nasdaq shall consider the following four factors: (i) margin of compliance (the amount by which the price is above the \$1.00 minimum standard); (ii) trading volume (a lack of trading volume may indicate a lack of bona fide market interest in the security at the posted bid price); (iii) the market maker montage (the number of market makers quoting at or above \$1.00 and the size of their quotes); and, (iv) the trend of the stock price (is it up or down).

**(3)** A failure to meet the continued listing requirement for a number of market makers shall be determined to exist only if the deficiency continues for a period of 10 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 30 calendar days from such notification to achieve compliance. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 30 day compliance period.

**(4)** A failure to meet the continued listing requirements for market value of listed securities shall be determined to exist only if the deficiency continues for a period of 10 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 90 calendar days from such notification to achieve compliance with the applicable continued listing standard. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 90 day compliance period.

### **(f) Bankruptcy and/or Liquidation**

Should an issuer file under any of the sections of the Bankruptcy Act or announce that liquidation has been authorized by its board of directors and that it is committed to proceed, Nasdaq may suspend or terminate the issuer's securities unless it is determined that the public interest and the protection of investors would be served by continued listing.

### **(g) American Depositary Receipts**

In the case of American Depositary Receipts, the underlying security will be considered when determining the ADR's qualification for continued listing on Nasdaq under paragraphs (a)(1), (a)(2), (a)(3), (a)(4), (b)(1), (b)(2), (b)(3), and (b)(5) of this rule.

### **(h) Quantitative Maintenance Criteria — Preferred Stock and Secondary Classes of Common Stock**

For continued listing, if the common stock or common stock equity equivalent security of the issuer is listed on Nasdaq or another national securities exchange, the issue shall have:

- (1)** At least 100,000 publicly held shares;
- (2)** A market value of publicly held shares of at least \$1,000,000;
- (3)** A minimum bid price per share of \$1;
- (4)** A minimum of 100 public shareholders;
- (5)** At least two registered and active market makers.

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Alternatively, in the event the issuer's common stock or common stock equivalent security is not listed on either Nasdaq or another national securities exchange, the preferred stock and/or secondary class of common stock may be listed on Nasdaq so long as the security satisfies the listing criteria for common stock.

### **(i) Transfers between The Nasdaq Global and Capital Markets For Bid Price Deficient Issuers**

**(1)** If a Global Market issuer has not been deemed in compliance prior to the expiration of the compliance period for bid price provided in Rule 4450(e)(2), it may transfer to The Nasdaq Capital Market, provided that it meets all applicable requirements for initial listing on the Capital Market set forth in Rule 4310(c) or Rule 4320(e), as applicable, other than the minimum bid price requirement. A Nasdaq Global Market issuer transferring to The Nasdaq Capital Market must pay the entry fee set forth in Rule 4520(a). The issuer may also request a hearing to remain on The Nasdaq Global Market pursuant to the Rule 4800 Series.

**(2)** Following a transfer to The Nasdaq Capital Market pursuant to paragraph (1), a Nasdaq Global Market issuer will be afforded the remainder of any compliance period set forth in Rule 4310(c)(8)(D) or Rule 4320(e)(2)(E)(ii) as if the issuer had been listed on The Nasdaq Capital Market. The compliance periods afforded by this rule and any time spent in the hearing process will be deducted in determining the length of the remaining applicable compliance periods on The Nasdaq Capital Market.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-007 eff. May 8, 2006; amended by SR-NASDAQ-2006-002 eff. July 18, 2006; amended by SR-NASDAQ-2006-019 eff. July 28, 2006; amended by SR-NASDAQ-2007-071 eff. Dec. 5, 2007; amended by SR-NASDAQ-2008-037 eff. June 17, 2008; amended by SR-NASDAQ-2009-002 eff. January 13, 2009.

### **4460. Reserved**

#### **[Rule 4460 Reserved]**

Reserved by SEC Release 34-53128 (Jan. 13, 2006).

### **4470. Reserved**

#### **[Rule 4470 Reserved]**

Reserved by SEC Release 34-53128 (Jan. 13, 2006).

### **4500. Issuer Listing Fees**

#### **IM-4500-1. Waiver of Fees upon Application in Certain Merger Situations**

Rules 4510(c)(2), 4510(d)(3), 4520(c)(3), 4530(b)(2), and 4540(b)(3) provide Nasdaq with the discretion to waive all or part of the annual listing fees prescribed in this Rule 4500 series. Pursuant to that authority, Nasdaq has determined to waive fees in the following situations involving mergers.

(a) Nasdaq will permit a Nasdaq issuer that completes a merger with another Nasdaq issuer during the first 90 days of a calendar year to apply for and receive a waiver for 75% of the annual fees assessed to the acquired Nasdaq issuer. Issuers must apply for the credit no later than June 30 of the year in which the merger occurred.

(b) Nasdaq will permit a non-Nasdaq issuer that completes a merger with a Nasdaq issuer that results in the non-Nasdaq issuer being the surviving entity and listing on Nasdaq to apply for and receive a

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waiver of the pro rated annual fees previously paid by the Nasdaq issuer for the period of time remaining in the year after the merger.

Applications pertaining to the waivers described in paragraphs (a) and (b) above should be addressed to: Finance Department CCG Billing Operations, The Nasdaq Stock Market Inc., 9600 Blackwell Road, Rockville Maryland, 20850.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-040 eff. Jan. 30, 2007.

**IM-4500-2. Reserved**

Reserved by SEC Release 34-53128 (Jan. 13, 2006).

**IM-4500-3. Reserved**

Reserved

Adopted by SEC Release 34-53128 (Jan. 13, 2006); reserved by SR-NASDAQ-2006-019 eff. July 28, 2006.

**IM-4500-4. Waiver of Certain Annual Fees Upon Transfer of a Non-Nasdaq Exchange Listed Security**

Rules 4510(c)(2), 4510(d)(5), and 4520(c)(4) provide Nasdaq with the discretion to waive all or part of the annual listing fees prescribed in this Rule 4500 series. Pursuant to that authority, Nasdaq has determined to waive a portion of the annual fee in the case of securities that (i) are listed on a national securities exchange but not listed on Nasdaq, if the issuer of such securities transfers their listing exclusively to Nasdaq; or (ii) are listed on the New York Stock Exchange and Nasdaq, if the issuer of such securities ceases to maintain their listing on the New York Stock Exchange and the securities instead are designated under the plan governing Nasdaq securities. In the year such a transfer is made, the issuer shall receive a credit in the pro-rated amount of any annual listing fees paid to the relevant exchange for the period of time after the transfer, which will be used to offset (and shall not exceed) the fee otherwise payable for that period under Rules 4510(c), 4510(d), or 4520(c). This credit will be applied after the credit described in Rules 4510(c)(5) and 4520(c)(8).

Adopted by SR-NASDAQ-2006-019 eff. July 28, 2006.

**IM-4500-5. Waiver of Fees upon Relisting for Companies Removed for Late Filings**

**Entry Fees.** Pursuant to Nasdaq's authority to waive certain fees, Nasdaq has determined to waive the entry fee (including the application fee) in the following circumstances:

- (1) the company was suspended and/or delisted from the Nasdaq Stock Market solely for its failure to file a required periodic report with the Commission or other appropriate regulatory authority, pursuant to Rule 4310(c)(14) or 4320(e)(12); and
- (2) the company has regained compliance with this requirement and applies to relist on Nasdaq within one year of the date it is delisted from Nasdaq.

**Annual Fees.** A company that meets the above requirements and relists during the same year that it has previously paid an annual fee will not be subject to a second annual fee in that same year.

Adopted by SR-NASDAQ-2007-040 eff. May 31, 2007.

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**IM-4500-6. Waiver of Fees for Companies Emerging from Bankruptcy**

(a) **Entry Fees.** Any company that lists on Nasdaq upon emerging from bankruptcy is not required to pay the entry fee (including the application fee) set forth in Rules 4510(a) and 4520(a).

(b) **Annual Fees.**

(1) The annual fee for any company that lists on the Nasdaq Global Market (including the Nasdaq Global Select Market) upon emerging from bankruptcy will be the minimum annual listing fee specified in Rule 4510(c)(1) for the first (pro rated) year that such a company is listed and for each of the subsequent two full years.

(2) Any company listing on Nasdaq upon emerging from bankruptcy that relists during the same year that it had previously paid an annual fee will not be subject to a second annual fee in that year.

Adopted by SR-NASDAQ-2007-042 eff. April 13, 2007.

**4510. The NASDAQ Global Market**

**(a) Entry Fee**

(1) An issuer that submits an application to list any class of its securities (not otherwise identified in this Rule 4500 series) on the Nasdaq Global Market, shall pay to Nasdaq a fee calculated on total shares outstanding, according to the following schedule. This fee will be assessed on the date of listing on the Nasdaq Global Market, except for \$5,000 which represents a non-refundable, application fee, and which must be submitted with the issuer's application.

Up to 30 million shares	\$100,000
30+ to 50 million shares	\$125,000
Over 50 million shares	\$150,000

(2) Total shares outstanding means the aggregate of all classes of equity securities to be listed on the Nasdaq Global Market as shown in the issuer's most recent periodic report or in more recent information held by Nasdaq or, in the case of new issues, as shown in the offering circular, required to be filed with the issuer's appropriate regulatory authority. In the case of foreign issuers, total shares outstanding shall include only those shares issued and outstanding in the United States.

(3) A closed-end management investment company registered under the Investment Company Act of 1940, as amended (a "Closed-End Fund"), that submits an application for listing on the Nasdaq Global Market shall pay to Nasdaq an entry fee of \$5,000 (of which \$1,000 represents a non-refundable, application fee).

(4) An issuer that submits an application to list any class of rights on the Nasdaq Global Market, shall pay, at the time of its application, a non-refundable application fee of \$1,000 to Nasdaq.

(5) The Nasdaq Board of Directors or its designee may, in its discretion, defer or waive all or any part of the entry fee prescribed herein.

(6) If the application is withdrawn or is not approved, the entry fee (less the non-refundable application fee) shall be refunded.

## Text of the Nasdaq Rule 4000 Series

*This version of the 4000 series is effective until April 13, 2009.*

**(7)** The fees described in this Rule 4510(a) shall not be applicable with respect to any securities that: (i) are listed on another national securities exchange but not listed on Nasdaq, if the issuer of such securities transfers their listing exclusively to the Nasdaq Global Market; (ii) are listed on the New York Stock Exchange and Nasdaq, if the issuer of such securities ceases to maintain their listing on the New York Stock Exchange and the securities instead are designated as national market securities under Rule 4390; or (iii) are listed on another national securities exchange but not listed on Nasdaq, if the issuer of such securities is acquired by an unlisted company and, in connection with the acquisition, the unlisted company lists exclusively on the Nasdaq Global Market.

**(8)** The fees described in this Rule 4510(a) shall not be applicable to an issuer (i) whose securities are listed on the New York Stock Exchange and designated as national market securities pursuant to the plan governing New York Stock Exchange securities at the time such securities are approved for listing on Nasdaq, and (ii) that maintains such listing and designation after it lists such securities on Nasdaq.

**(9)** An issuer that transfers its listing from the Nasdaq Capital Market to the Nasdaq Global Market shall not be required to pay the entry or application fees described in this Rule 4510(a), provided: (i) the issuer listed on the Nasdaq Capital Market prior to January 1, 2007; or (ii) the issuer listed on the Nasdaq Capital Market on or after January 1, 2007 and did not qualify for the Nasdaq Global Market at the time of its initial listing on the Nasdaq Capital Market. An issuer that transfers its listing from the Nasdaq Capital Market to the Nasdaq Global Market shall not be required to pay the application fee, but shall pay the entry fee described in this Rule 4510(a) less the entry fee that was previously paid by the issuer to Nasdaq in connection with listing on The Nasdaq Capital Market.

**(10)** An issuer that submits an application for listing on The Nasdaq Capital Market, but prior to listing revises its application to seek listing on The Nasdaq Global Market, is not required to pay the application fee described in Rule 4510(a) in connection with the revised application.

### **(b) Additional Shares**

**(1)** The issuer of each class of security that is a domestic issue which is listed on the Nasdaq Global Market shall pay to Nasdaq a fee in connection with the issuance of additional shares in the amount of \$5,000 or \$.01 per additional share, whichever is higher, up to an annual maximum of \$65,000 per issuer. There shall be no fee, however, for issuances of up to 49,999 additional shares per quarter.

**(2)** The issuer of each class of securities that is a non-U.S. issue that is listed on the Nasdaq Global Market shall pay to Nasdaq a fee in connection with the issuance of additional shares, or in the case of ADRs, the issuance of additional shares underlying the ADRs. The fee in connection with additional shares shall be \$5,000 for any amount of additional shares listed on an annual basis. This fee will be assessed annually based on the issuer's total shares outstanding as reported on its periodic reports filed with the SEC. There shall be no fee, however, for issuances of up to 49,999 additional shares per year.

**(3)** The fee will be calculated and assessed quarterly based on the issuer's total shares outstanding as reported on its periodic reports filed with the SEC. In the event that a company does not timely file a required periodic report with the SEC, the company must instead provide Nasdaq with the change in its total shares outstanding and the fee will be calculated based on that change. When the company files its delinquent periodic report, Nasdaq will reconcile the change in shares reported on the periodic report with the number previously provided to Nasdaq and, if necessary, adjust the company's bill.

**(4)** The Nasdaq Board of Directors or its designee may, in its discretion, defer or waive all or any part of the additional shares fee prescribed herein.

Text of the Nasdaq Rule 4000 Series

*This version of the 4000 series is effective until April 13, 2009.*

(5) The fees described in this Rule 4510(b) shall not be applicable to an issuer (i) whose securities are listed on the New York Stock Exchange and designated as national market securities pursuant to the plan governing New York Stock Exchange securities at the time such securities are approved for listing on Nasdaq, and (ii) that maintains such listing and designation after it lists such securities on Nasdaq.

**(c) Annual Fee — Domestic and Foreign Issues**

(1) The issuer of each class of securities (not otherwise identified in this Rule 4500 Series) that is a domestic or foreign issue listed on the Nasdaq Global Market shall pay to Nasdaq an annual fee calculated on total shares outstanding according to the following schedule:

Up to 10 million shares	\$30,000
10+ to 25 million shares	\$35,000
25+ to 50 million shares	\$37,500
50+ to 75 million shares	\$45,000
75+ to 100 million shares	\$65,500
100+ to 150 million shares	\$85,000
Over 150 million shares	\$95,000

(2) The Nasdaq Board of Directors or its designee may, in its discretion, defer or waive all or any part of the annual fee prescribed herein.

(3) If a class of securities is removed from the Nasdaq Global Market that portion of the annual fees for such class of securities attributable to the months following the date of removal shall not be refunded, except such portion shall be applied to the Nasdaq Capital Market fees for that calendar year.

(4) Total shares outstanding means the aggregate of all classes of equity securities listed on the Nasdaq Global Market as shown in the issuer's most recent periodic report required to be filed with the issuer's appropriate regulatory authority or in more recent information held by Nasdaq. In the case of foreign issuers, total shares outstanding shall include only those shares issued and outstanding in the United States.

(5) In lieu of the fees described in Rules 4510(c)(1), 4510(d)(1), and 4510(d)(3), the annual fee shall be \$15,000 for each issuer (i) whose securities are listed on the New York Stock Exchange and designated as national market securities pursuant to the plan governing New York Stock Exchange securities at the time such securities are approved for listing on Nasdaq, and (ii) that maintains such listing and designation after it lists such securities on Nasdaq. Such annual fee shall be assessed on the first anniversary of the issuer's listing on Nasdaq. If an Issuer of such securities ceases to maintain such listing and designation and the securities are instead designated under the Rule 4400 Series, that portion of the fee described in this section attributable to the months following the date of removal shall not be refunded, except such fee shall be applied to The Nasdaq Global Market fees due for the calendar year of the transfer.

**(d) Annual Fee — American Depositary Receipts (ADRs) and Closed-End Funds**

## Text of the Nasdaq Rule 4000 Series

*This version of the 4000 series is effective until April 13, 2009.*

**(1)** The issuer of each class of securities that is an ADR listed on The Nasdaq Global Market shall pay to Nasdaq an annual fee calculated on ADRs outstanding according to the following schedule not to exceed \$30,000 per issuer:

Up to 10 million ADRs	\$21,225
10+ to 25 million ADRs	\$26,500
25+ to 50 million ADRs	\$29,820
Over 50 million ADRs	\$30,000

**(2)** ADRs outstanding means the aggregate of all classes of ADRs listed on the Nasdaq Global Market as shown in the issuer's most recent periodic report required to be filed with the issuer's appropriate regulatory authority or in more recent information held by Nasdaq.

**(3)** A Closed-End Fund listed on the Nasdaq Global Market shall pay to Nasdaq an annual fee calculated based on total shares outstanding according to the following schedule:

Up to 5 million shares	\$15,000
5+ to 10 million shares	\$17,500
10+ to 25 million shares	\$20,000
25+ to 50 million shares	\$22,500
50+ to 100 million shares	\$30,000
100+ to 250 million shares	\$50,000
Over 250 million shares	\$75,000

**(4)** For the purpose of determining the total shares outstanding, fund sponsors may aggregate shares outstanding of all Closed-End Funds in the same fund family listed on the Nasdaq Global Market or the Nasdaq Capital Market, as shown in the issuer's most recent periodic reports required to be filed with the appropriate regulatory authority or in more recent information held by Nasdaq. The maximum annual fee applicable to a fund family shall not exceed \$75,000. For purposes of this rule, a "fund family" is defined as two or more Closed-End Funds that have a common investment adviser or have investment advisers who are "affiliated persons" as defined in Section 2(a)(3) of the Investment Company Act of 1940, as amended.

**(5)** The Nasdaq Board of Directors or its designee may, in its discretion, defer or waive all or any part of the annual fee prescribed herein.

**(6)** If a class of securities is removed from the Nasdaq Global Market, that portion of the annual fees for such class of securities attributable to the months following the date of removal shall not be refunded, except such portion shall be applied to the Nasdaq Capital Market fees for that calendar year.

### **(e) Record-Keeping Fee**

An issuer that makes a change such as a change to its name, the par value or title of its security, or its symbol shall pay a fee of \$2,500 to Nasdaq and submit the appropriate form as designated by Nasdaq.

Text of the Nasdaq Rule 4000 Series  
*This version of the 4000 series is effective until April 13, 2009.*

**(f) Substitution Listing Fee**

An issuer that implements a Substitution Listing Event shall pay a fee of \$7,500 to Nasdaq and submit the appropriate form as designated by Nasdaq. Notwithstanding the foregoing, this substitution listing fee shall not apply to securities that are listed on a national securities exchange other than Nasdaq and not designated by Nasdaq as Nasdaq national market system securities.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-007 eff. May 8, 2006; amended by SR-NASDAQ-2006-019 eff. July 28, 2006; amended by SR-NASDAQ-2006-040 eff. Jan. 30, 2007; amended by SR-NASDAQ-2007-074 eff. Aug. 23, 2007.

**4520. The Nasdaq Capital Market**

**(a) Entry Fee**

**(1)** An issuer that submits an application to list any class of its securities (not otherwise identified in this Rule 4500 series) on the Nasdaq Capital Market, shall pay to Nasdaq a fee calculated on total shares outstanding, according to the following schedule. This fee will be assessed on the date of entry on the Nasdaq Capital Market, except for a non-refundable, application fee of \$5,000, which must be submitted with the issuer's application.

Up to 15 million shares	\$50,000
Over 15 million shares	\$75,000

**(2)** An issuer that submits an application to list any class of convertible debentures on the Nasdaq Capital Market, shall pay to Nasdaq a non-refundable application fee of \$5,000 and a fee of \$1,000 or \$50 per million dollars face amount of debentures outstanding, whichever is higher.

**(3)** A closed-end management investment company registered under the Investment Company Act of 1940, as amended (a "Closed-End Fund"), that submits an application for listing on the Nasdaq Capital Market shall pay to Nasdaq an entry fee of \$5,000 (of which \$1,000 represents a non-refundable, application fee).

**(4)** The Nasdaq Board of Directors or its designee may, in its discretion, defer or waive all or any part of the entry fee prescribed herein.

**(5)** Total shares outstanding means the aggregate of all classes of equity securities to be listed on the Nasdaq Capital Market as shown in the issuer's most recent periodic report or in more recent information held by Nasdaq or, in the case of new issues, as shown in the offering circular, required to be filed with the issuer's appropriate regulatory authority.

**(6)** An issuer that submits an application to list any class of rights on the Nasdaq Capital Market, shall pay, at the time of its application, a non-refundable application fee to Nasdaq of \$1,000.

**(7)** The fees described in this Rule 4520(a) shall not be applicable with respect to any securities that: (i) are listed on the Nasdaq Global Market or another national securities exchange, if the issuer of such securities transfers their listing exclusively to the Nasdaq Capital Market; (ii) are listed on the New York Stock Exchange and Nasdaq, if the issuer of such securities ceases to maintain their listing on the New York Stock Exchange and the securities instead are designated under the plan applicable to Nasdaq Capital Market securities; or (iii) are listed on another national securities exchange, if the



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*This version of the 4000 series is effective until April 13, 2009.*

issuer of such securities is acquired by an unlisted company and, in connection with the acquisition, the unlisted company lists exclusively on the Nasdaq Capital Market.

**(8)** The fees described in this Rule 4520(a) shall not be applicable to an issuer (i) whose securities are listed on the New York Stock Exchange and designated as national market securities pursuant to the plan governing New York Stock Exchange securities at the time such securities are approved for listing on Nasdaq, and (ii) that maintains such listing and designation after it lists such securities on Nasdaq.

**(9)** An issuer that submits an application for listing on The Nasdaq Global Market, but prior to listing revises its application to seek listing on The Nasdaq Capital Market, is not required to pay the application fee described in Rule 4520(a) in connection with the revised application

### **(b) Additional Shares**

**(1)** The issuer of each class of security that is a domestic issue which is listed on The Nasdaq Capital Market shall pay to Nasdaq a fee in connection with the issuance of additional shares in the amount of \$5,000 or \$.01 per additional share, whichever is higher, up to an annual maximum of \$65,000 per issuer. There shall be no fee, however, for issuances of up to 49,999 additional shares per quarter.

**(2)** The issuer of each class of securities that is a non-U.S. issue that is listed on the Nasdaq Capital Market shall pay to Nasdaq a fee in connection with the issuance of additional shares, or in the case of ADRs, the issuance of additional shares underlying the ADRs. The fee in connection with additional shares shall be \$5,000 for any amount of additional shares listed on an annual basis. This fee will be assessed annually based on the issuer's total shares outstanding as reported on its periodic reports filed with the SEC. There shall be no fee, however, for issuances of up to 49,999 additional shares per year.

**(3)** The fee will be calculated and assessed quarterly based on the issuer's total shares outstanding as reported on its periodic reports filed with the SEC. In the event that a company does not timely file a required periodic report with the SEC, the company must instead provide Nasdaq with the change in its total shares outstanding and the fee will be calculated based on that change. When the company files its delinquent periodic report, Nasdaq will reconcile the change in shares reported on the periodic report with the number previously provided to Nasdaq and, if necessary, adjust the company's bill.

**(4)** The Nasdaq Board of Directors or its designee may, in its discretion, defer or waive all or any part of the additional shares fee prescribed herein.

**(5)** The fees described in this Rule 4520(b) shall not be applicable to an issuer (i) whose securities are listed on the New York Stock Exchange and designated as national market securities pursuant to the plan governing New York Stock Exchange securities at the time such securities are approved for listing on Nasdaq, and (ii) that maintains such listing and designation after it lists such securities on Nasdaq.

### **(c) Annual Fee**

**(1)** (A.) The issuer of each class of securities that is a domestic or foreign issue, other than American Depositary Receipts (ADRs), listed on the Nasdaq Capital Market shall pay to Nasdaq an annual fee in the amount of \$27,500.

(B) The issuer of each class of securities that is an ADR listed on The Nasdaq Capital Market shall pay to Nasdaq an annual fee calculated on ADRs outstanding according to the following schedule:

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Up to 10 million ADRs	\$17,500
Over 10 million ADRs	\$21,000

**(2)** Notwithstanding paragraph (1), the issuer of each class of convertible debentures listed on the Nasdaq Capital Market shall pay to Nasdaq an annual fee of \$500 or \$25 per million dollars face amount of debentures outstanding, whichever is higher.

**(3)** Notwithstanding paragraph (1), a Closed-End Fund listed on the Nasdaq Capital Market shall pay to Nasdaq an annual fee calculated based on total shares outstanding according to the following schedule:

Up to 5 million shares	\$15,000
5+ to 10 million shares	\$17,500
10+ to 25 million shares	\$20,000
25+ to 50 million shares	\$22,500
50+ to 100 million shares	\$30,000
100+ to 250 million shares	\$50,000
Over 250 million shares	\$75,000

**(4)** The Nasdaq Board of Directors or its designee may, in its discretion, defer or waive all or any part of the annual fee prescribed herein.

**(5)** If a class of securities is removed from the Nasdaq Capital Market, that portion of the annual fees for such class of securities attributable to the months following the date of removal shall not be refunded, except such portion shall be applied to Nasdaq Global Market fees for that calendar year.

**(6)** Total shares outstanding means the aggregate of all classes of equity securities listed on the Nasdaq Capital Market as shown in the issuer's most recent periodic report required to be filed with the issuer's appropriate regulatory authority or in more recent information held by Nasdaq. In the case of foreign issuers, total shares outstanding shall include only those shares issued and outstanding in the United States. ADRs outstanding means the aggregate of all classes of ADRs listed on the Nasdaq Capital Market as shown in the issuer's most recent periodic report required to be filed with the issuer's appropriate regulatory authority or in more recent information held by Nasdaq.

**(7)** Notwithstanding paragraph (6), for the purpose of determining the total shares outstanding, fund sponsors may aggregate shares outstanding of all Closed-End Funds in the same fund family listed on the Nasdaq Global Market and the Nasdaq Capital Market, as shown in the issuer's most recent periodic reports required to be filed with the appropriate regulatory authority or in more recent information held by Nasdaq. The maximum annual fee applicable to a fund family shall not exceed \$75,000. For purposes of this rule, a "fund family" is defined as two or more Closed-End Funds that have a common investment adviser or have investment advisers who are "affiliated persons" as defined in Section 2(a)(3) of the Investment Company Act of 1940, as amended.

**(8)** In lieu of the fees described in Rules 4520(c)(1) and 4520(c)(3), the annual fee shall be \$15,000 for each issuer (i) whose securities are listed on the New York Stock Exchange and designated as national market securities pursuant to the plan governing New York Stock Exchange securities at the time such securities are approved for listing on Nasdaq, and (ii) that maintains such listing and

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designation after it lists such securities on Nasdaq. Such annual fee shall be assessed on the first anniversary of the issuer's listing on Nasdaq. If an issuer of such securities ceases to maintain such listing and designation and the securities instead are designated under the plan governing Nasdaq Capital Market securities, that portion of the fee described in this section attributable to the months following the date of removal shall not be refunded, except such fee shall be applied to The Nasdaq Capital Market fees due for the calendar year of the transfer.

### **(d) Record-Keeping Fee**

An issuer that makes a change such as a change to its name, the par value or title of its security, or its symbol shall pay a fee of \$2,500 to Nasdaq and submit the appropriate form as designated by Nasdaq.

### **(e) Substitution Listing Fee**

An issuer that implements a Substitution Listing Event shall pay a fee of \$7,500 to Nasdaq and submit the appropriate form as designated by Nasdaq. Notwithstanding the foregoing, this substitution listing fee shall not apply to securities that are listed on a national securities exchange other than Nasdaq and not designated by Nasdaq as Nasdaq national market system securities.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-007 eff. May 8, 2006; amended by SR-NASDAQ-2006-019 eff. July 28, 2006; amended by SR-NASDAQ-2006-040 eff. Jan. 30, 2007; amended by SR-NASDAQ-2007-040 eff. May 31, 2007; amended by SR-NASDAQ-2007-074 eff. Aug. 23, 2007.

### **IM-4520-1. Foreign Exempt Securities**

Rules 4520(b)(4) and 4520(c)(4) provide Nasdaq with the discretion to waive all or part of the additional share and annual listing fees otherwise due. Pursuant to that authority, Nasdaq has determined to waive any additional share or annual fee that otherwise would be due from any foreign issuer whose securities or underlying ADRs were exempt from registration under Section 12(g) of the Act pursuant to SEC Rule 12g3-2(b) prior to Nasdaq's registration as a national securities exchange and whose securities are also subject to an exemption issued by the Commission that permits the listing the security notwithstanding its failure to be registered pursuant to Section 12(b).

Adopted by SEC Release 34-53128 (Jan. 13, 2006).

### **4530. Other Securities**

#### **(a) Application Fee and Entry Fee**

**(1)** When an issuer submits an application to list any Other Security or SEEDS on the Nasdaq Global Market qualified for listing under Rule 4420(f) or 4420(g), it shall pay a non-refundable Application Fee of \$1,000.

**(2)** When an issuer submits an application to list any Other Security or SEEDS on the Nasdaq Global Market qualified for listing under Rule 4420(f) or 4420(g), it shall pay an Entry Fee calculated based on total shares outstanding according to the following schedule:

Up to 1 million shares

\$5,000

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1+ to 2 million shares	\$10,000
2+ to 3 million shares	\$15,000
3+ to 4 million shares	\$17,500
4+ to 5 million shares	\$20,000
5+ to 6 million shares	\$22,500
6+ to 7 million shares	\$25,000
7+ to 8 million shares	\$27,500
8+ to 9 million shares	\$30,000
9+ to 10 million shares	\$32,500
10+ to 15 million shares	\$37,500
Over 15 million shares	\$45,000

The applicable Entry Fee shall be reduced by any Entry Fees paid previously in connection with the initial listing during the current calendar year of any of the issuer's Other Securities and SEEDS on the Nasdaq Global Market.

**(3)** For the sole purpose of determining the Entry Fee, total shares outstanding means the aggregate of all classes of Other Securities and SEEDS of the issuer to be listed on the Nasdaq Global Market in the current calendar year as shown in the issuer's most recent periodic report or in more recent information held by Nasdaq or, in the case of new issues, as shown in the offering circular, required to be filed with the issuer's appropriate regulatory authority.

**(4)** The Nasdaq Board of Directors or its designee may, in its discretion, defer or waive all or any part of the Application Fee or Entry Fee prescribed herein.

**(5)** If the application is withdrawn or is not approved, the Entry Fee shall be refunded.

**(b) Annual Fee**

**(1)** The issuer of Other Securities or SEEDS qualified under Rule 4420(f) or 4420(g) for listing on the Nasdaq Global Market shall pay to Nasdaq an Annual Fee calculated based on total shares outstanding according to the following schedule:

Up to 5 million shares	\$15,000
5+ to 10 million shares	\$17,500
10+ to 25 million shares	\$20,000
25+ to 50 million shares	\$22,500
Over 50 million shares	\$30,000

**(2)** The Nasdaq Board of Directors or its designee may, in its discretion, defer or waive all or any part of the Annual Fee prescribed herein.

**(3)** For the sole purpose of determining the Annual Fee, total shares outstanding means the aggregate of all classes of Other Securities and SEEDS of the issuer listed on the Nasdaq Global Market, as shown in the issuer's most recent periodic report required to be filed with the issuer's appropriate regulatory authority or in more recent information held by Nasdaq.

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Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-007 eff. May 8, 2006.

**4540. Portfolio Depository Receipts, Index Fund Shares and Managed Fund Shares**

**(a) Entry Fee**

**(1)** When an issuer submits an application for listing a series of Portfolio Depository Receipts, Index Fund Shares or Managed Fund Shares on the Nasdaq Global Market, it shall pay to Nasdaq a listing fee of \$5,000 (which shall include a \$1,000 non-refundable processing fee).

**(2)** The Nasdaq Board of Directors or its designee may, in its discretion, defer or waive all or any part of the entry fee prescribed herein.

**(3)** If the application is withdrawn or is not approved, the entry fee (less the non-refundable processing fee) shall be refunded.

**(b) Annual Fee**

**(1)** The issuer of a series of Portfolio Depository Receipts, Index Fund Shares or Managed Fund Shares listed on The Nasdaq Global Market shall pay to Nasdaq an annual fee calculated on total shares outstanding according to the following schedule:

Up to 1 million shares	\$6,500
1+ to 2 million shares	\$7,000
2+ to 3 million shares	\$7,500
3+ to 4 million shares	\$8,000
4+ to 5 million shares	\$8,500
5+ to 6 million shares	\$9,000
6+ to 7 million shares	\$9,500
7+ to 8 million shares	\$10,000
8+ to 9 million shares	\$10,500
9+ to 10 million shares	\$11,000
10+ to 11 million shares	\$11,500
11+ to 12 million shares	\$12,000
12+ to 13 million shares	\$12,500
13+ to 14 million shares	\$13,000
14+ to 15 million shares	\$13,500
15+ to 16 million shares	\$14,000
Over 16 million shares	\$14,500

**(2)** Total shares outstanding means the aggregate number of shares in all series of Portfolio Depository Receipts or Index Fund Shares to be listed on The Nasdaq Global Market as shown in the issuer's most recent periodic report required to be filed with the issuer's appropriate regulatory authority or in more recent information held by Nasdaq.

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**(3)** The Nasdaq Board of Directors or its designee may, in its discretion, defer or waive all or any part of the annual fee prescribed herein.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-007 eff. May 8, 2006; amended by SR-NASDAQ-2008-039 eff. June 13, 2008.

### **4550. Written Interpretations of Nasdaq Listing Rules**

**(a)** An issuer listed on the Nasdaq Capital Market or the Nasdaq Global Market may request from Nasdaq a written interpretation of the Rules contained in the 4000 through 4500 Series. In connection with such a request, the issuer must submit to Nasdaq a non-refundable fee of \$5,000. A response to such a request generally will be provided within four weeks from the date Nasdaq receives all information necessary to respond to the request.

**(b)** Notwithstanding paragraph (a), an issuer may request a written interpretation of the Rules contained in the 4000 through 4500 Series by a specific date that is less than four weeks, but at least one week, after the date Nasdaq receives all information necessary to respond to the request. In connection with such a request for an expedited response, the issuer must submit to Nasdaq a non-refundable fee of \$15,000.

**(c)** An applicant to Nasdaq that has submitted the applicable entry fee under Rule 4510 or Rule 4520 will not also be required to submit a fee in connection with a request for a written interpretation involving the applicant's initial listing on Nasdaq. In addition, an issuer is not required to submit a fee in connection with a request for an exception from the Nasdaq shareholder approval rules pursuant to Rule 4350(i)(2).

**(d)** The Nasdaq Board of Directors or its designee may, in its discretion, defer or waive all or any part of the written interpretation fee prescribed herein.

**(e)** Nasdaq shall publish on its website a summary of each interpretation within 90 days from the date such interpretation is issued.

**(f)** An issuer is eligible to request a written interpretation from Nasdaq pursuant to paragraphs (a) or (b), subject to payment of the appropriate fee, if it has a class of securities that has been suspended or delisted from the Nasdaq Capital Market or the Nasdaq Global Market, but the suspension or delisting decision is under review pursuant to the Rule 4800 Series.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-007 eff. May 8, 2006; amended by SR-NASDAQ-2006-040 eff. Jan. 30, 2007.

### **4600. Requirements for Nasdaq Market Makers and Other Nasdaq Market Center Participants**

#### **4601. Scope**

Unless otherwise specified, the rules set forth in this 4600 Series apply only to the quoting and trading of System securities via the Nasdaq Market Center.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

#### **4602. Reserved**

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*This version of the 4000 series is effective until April 13, 2009.*

Reserved

Adopted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006; amended by SR-NASDAQ-2008-054 eff. June 13, 2008.

**4610. Registration and Other Requirements**

**4611. Nasdaq Market Center Participant Registration**

**(a)** Participation in the Nasdaq Market Center as a Nasdaq Market Maker, Nasdaq ECN or Order Entry Firm requires current registration as such with Nasdaq. Such registration shall be conditioned upon the participant's initial and continuing compliance with the following requirements:

- (1)** execution of applicable agreements with Nasdaq;
- (2)** membership in, or access arrangement with a participant of, a clearing agency registered with the Commission which maintains facilities through which Nasdaq Market Center compared trades may be settled;
- (3)** compliance with all applicable rules and operating procedures of Nasdaq and the Commission in their use of the System;
- (4)** maintenance of the physical security of the equipment located on the premises of the Nasdaq Market Maker, Nasdaq ECN or Order Entry Firm to prevent the improper use or access to Nasdaq systems, including unauthorized entry of information into the Nasdaq Market Center;
- (5)** acceptance and settlement of each Nasdaq Market Center trade that the Nasdaq Market Center identifies as having been effected by such participant, or if settlement is to be made through another clearing member, guarantee of the acceptance and settlement of such identified Nasdaq Market Center trade by the clearing member on the regularly scheduled settlement date; and
- (6)** input of accurate information into the System, including, but not limited to, whether the member acted in a principal, agent, or riskless principal capacity.

A member's registration shall become effective upon receipt by the member of notice of an approval of registration by Nasdaq. The registration required hereunder will apply solely to the qualification of a Participant to participate in the System. Such registration shall not be conditioned upon registration in any particular Nasdaq Market Center securities.

**(b)** Each Nasdaq Market Maker, Nasdaq ECN or Order Entry Firm shall be under a continuing obligation to inform Nasdaq of noncompliance with any of the registration requirements set forth above.

**(c)** Nasdaq may impose upon any Nasdaq Market Maker, Nasdaq ECN or Order Entry Firm such temporary restrictions upon the automated entry or updating of orders or Quotes/Orders as Nasdaq may determine to be necessary to protect the integrity of Nasdaq's systems. For example, such temporary restrictions may be necessary to address a system problem at a particular Nasdaq Market Maker, Nasdaq ECN or Order Entry Firm or at Nasdaq, or an unexpected period of extremely high message traffic. The scope of any such restrictions shall be communicated to the affected Nasdaq Market Maker, Nasdaq ECN or Order Entry Firm in writing.

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**(d)** Sponsored Participants. A Sponsored Participant may obtain authorized access to the Nasdaq Market Center only if such access is authorized in advance by one or more Nasdaq members as follows:

**(1)** Sponsored Participants must enter into and maintain customer agreements with one or more Sponsoring Members establishing proper relationship(s) and account(s) through which the Sponsored Participant may trade on the Nasdaq Market Center. Such customer agreement(s) must incorporate the Sponsorship Provisions set forth in paragraph (2) below.

**(2)** For a Sponsored Participant to obtain and maintain authorized access to the Nasdaq Market Center, a Sponsored Participant and its Sponsoring Member must agree in writing to the following Sponsorship Provisions:

**(A)** Sponsored Participant and its Sponsoring Member must have entered into and maintained a User Agreement with The NASDAQ Stock Market LLC. The Sponsoring Member must designate the Sponsored Participant by name in its User Agreement as such.

**(B)** Sponsoring Member acknowledges and agrees that

**(i)** All orders entered by the Sponsored Participants and any person acting on behalf of or in the name of such Sponsored Participant and any executions occurring as a result of such orders are binding in all respects on the Sponsoring Member and

**(ii)** Sponsoring Member is responsible for any and all actions taken by such Sponsored Participant and any person acting on behalf of or in the name of such Sponsored Participant.

**(C)** Sponsoring Member shall comply with the Nasdaq Certificate of Incorporation, Bylaws, Rules and procedures with regard to the Nasdaq Market Center and Sponsored Participant shall comply with Nasdaq Certificate of Incorporation, Bylaws, Rules and procedures with regard to the Nasdaq Market Center, as if Sponsored Participant were a Nasdaq Member.

**(D)** Sponsored Participant shall maintain, keep current and provide to the Sponsoring Member a list of individuals authorized to obtain access to the Nasdaq Market Center on behalf of the Sponsored Participant.

**(E)** Sponsored Participant shall familiarize its authorized individuals with all of the Sponsored Participant's obligations under this Rule and will assure that they receive appropriate training prior to any use or access to the Nasdaq Market Center.

**(F)** Sponsored Participant may not permit anyone other than authorized individuals to use or obtain access to the Nasdaq Market Center.

**(G)** Sponsored Participant shall take reasonable security precautions to prevent unauthorized use or access to the Nasdaq Market Center, including unauthorized entry of information into the Nasdaq Market Center, or the information and data made available therein. Sponsored Participant understands and agrees that Sponsored Participant is responsible for any and all orders, trades and other messages and instructions entered, transmitted or received under identifiers, passwords and security codes of authorized individuals, and for the trading and other consequences thereof.



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**(H)** Sponsored Participant acknowledges its responsibility to establish adequate procedures and controls that permit it to effectively monitor its employees', agents' and customers' use and access to the Nasdaq Market Center for compliance with the terms of this agreement.

**(I)** Sponsored Participant shall pay when due all amounts, if any, payable to Sponsoring Member, Nasdaq, or any other third parties that arise from the Sponsored Participant's access to and use of the Nasdaq Market Center. Such amounts include, but are not limited to applicable exchange and regulatory fees.

**(3)** The Sponsoring Member must provide Nasdaq with a Notice of Consent acknowledging its responsibility for the orders, executions and actions of its Sponsored Participant at issue.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-001 eff. Oct. 16, 2006; amended by SR-NASDAQ-2006-061 eff Jan. 21, 2007; amended by SR-NASDAQ-2007-010 eff. Feb. 23, 2007; amended by SR-NASDAQ-2008-054 eff. June 13, 2008; amended by SR-NASDAQ-2009-014 eff. February 23, 2009.

### **IM-4611-1. Deleted**

Adopted by SR-NASDAQ-2006-061 eff. Jan. 21, 2007; deleted by SR-NASDAQ-2007-010 eff. Feb.23, 2007.

### **4612. Registration as a Nasdaq Market Maker**

**(a)** Quotations and quotation sizes may be entered into the Nasdaq Market Center only by a member registered as a Nasdaq Market Maker or other entity approved by Nasdaq to function in a market-making capacity.

**(b)** A Nasdaq Market Maker may become registered in an issue by entering a registration request via a Nasdaq approved electronic interface with Nasdaq's systems or by contacting Nasdaq Market Operations. Registration shall become effective on the day the registration request is entered.

**(c)** A Nasdaq Market Maker's registration in an issue shall be terminated by Nasdaq if the market maker fails to enter quotations in the issue within five (5) business days after the market maker's registration in the issue becomes effective.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

### **4613. Character of Quotations**

A member registered as a Nasdaq Market Maker shall engage in a course of dealings for its own account to assist in the maintenance, insofar as reasonably practicable, of fair and orderly markets in accordance with this Rule.

#### **(a) Quotation Requirements and Obligations**

**(1)** Two-Sided Quote Obligation. For each security in which a member is registered as a Nasdaq Market Maker, the member shall be willing to buy and sell such security for its own account on a continuous basis and shall enter and maintain a two-sided quotation ("Principal Quote"), which is attributed to the market maker by a special maker participant identifier ("MPID") and is displayed in the Nasdaq Market Center at all times, subject to the procedures for excused withdrawal set forth in Rule 4619.

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**(A)** A registered market maker must display a quotation size for at least one normal unit of trading (or a larger multiple thereof) when it is not displaying a limit order in compliance with SEC Rule 604, provided, however, that a registered Nasdaq Market Maker may augment its displayed quotation size to display limit orders priced at the market maker's quotation. Unless otherwise designated, a "normal unit of trading" shall be 100 shares.

**(B)** The minimum quotation increment for quotations of \$1.00 or above in all System Securities shall be \$0.01. The minimum quotation increment in the System for quotations below \$1.00 in System Securities shall be \$0.0001.

**(2)** The first MPID issued to a member pursuant to subparagraph (1) of this rule, or Rule 4623, shall be referred to as the member's "Primary MPID." Market makers and ECNs may request the use of additional MPIDs that shall be referred to as "Supplemental MPIDs." A market maker may request the use of Supplemental MPIDs for displaying Attributable Quotes/Orders in the Nasdaq Quotation Montage for any security in which it is registered and meets the obligations set forth in subparagraph (1) of this rule. An ECN may request the use of Supplemental MPIDs for displaying Attributable Quotes/Orders in the Nasdaq Quotation Montage for any security in which it meets the obligations set forth in Rule 4623. A market maker or ECN that ceases to meet the obligations appurtenant to its Primary MPID in any security shall not be permitted to use a Supplemental MPID for any purpose in that security.

**(3)** Market makers and ECNs that are permitted the use of Supplemental MPIDs for displaying Attributable Quotes/Orders pursuant to subparagraph (2) of this rule are subject to the same rules applicable to the members' first quotation, with two exceptions: (a) the continuous two-sided quote requirement and excused withdrawal procedures described in subparagraph (1) above do not apply to market makers' Supplemental MPIDs; and (b) Supplemental MPIDs may not be used by market makers to engage in passive market making or to enter stabilizing bids pursuant to Nasdaq Rules 4614 and 4619.

### **(b) Firm Quotations**

**(1)** All quotations and orders to buy and sell entered into the System by Nasdaq Market Makers, Nasdaq ECNs, and Nasdaq Order Entry firms are firm and automatically executable for their displayed and non-displayed size in the System.

### **(c) Impaired Ability to Enter or Update Quotations**

In the event that a Nasdaq Market Maker's ability to enter or update quotations is impaired, the market maker shall immediately contact Nasdaq Market Operations to request the withdrawal of its quotations.

In the event that a Nasdaq Market Maker's ability to enter or update quotations is impaired and the market maker elects to remain in Nasdaq, the Nasdaq Market Maker shall execute an offer to buy or sell received from another member at its quotations as disseminated through the Nasdaq Market Center.

### **(d) Reserved**

### **(e) Locked and Crossed Markets**

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**(1)** Locked and Cross Markets within the System: Any quotes or orders that are entered into the System that would lock or cross another order in the System will be executed by the System. This processing, set forth in Rule 4757, ensures that no locked or crossed markets can exist within the System and that price improvement is allocated fairly.

**(2)** Inter-market Locked and Crossed Markets. Beginning March 5, 2007, the provisions of this subsection (e)(2) shall apply to the trading of securities governed by Regulation NMS.

**(A)** Definitions. For purposes of this Rule, the following definitions shall apply:

(i) The terms automated quotation, effective national market system plan, intermarket sweep order, manual quotation, NMS stock, protected quotation, regular trading hours, and trading center shall have the meanings set forth in Rule 600(b) of Regulation NMS under the Securities Exchange Act of 1934.

(ii) The term crossing quotation shall mean the display of a bid for an NMS stock during regular trading hours at a price that is higher than the price of an offer for such NMS stock previously disseminated pursuant to an effective national market system plan, or the display of an offer for an NMS stock during regular trading hours at a price that is lower than the price of a bid for such NMS stock previously disseminated pursuant to an effective national market system plan.

(iii) The term locking quotation shall mean the display of a bid for an NMS stock during regular trading hours at a price that equals the price of an offer for such NMS stock previously disseminated pursuant to an effective national market system plan, or the display of an offer for an NMS stock during regular trading hours at a price that equals the price of a bid for such NMS stock previously disseminated pursuant to an effective national market system plan.

**(B)** Prohibition. Except for quotations that fall within the provisions of paragraph (D) of this Rule, Nasdaq members shall reasonably avoid displaying, and shall not engage in a pattern or practice of displaying any quotations that lock or cross a protected quotation, and any manual quotations that lock or cross a quotation previously disseminated pursuant to an effective national market system plan.

**(C)** Manual quotations. If a member of the Exchange displays a manual quotation that locks or crosses a quotation previously disseminated pursuant to an effective national market system plan, such member of the Exchange shall promptly either withdraw the manual quotation or route an intermarket sweep order to execute against the full displayed size of the locked or crossed quotation.

**(D)** Exceptions.

(i) The locking or crossing quotation was displayed at a time when the trading center displaying the locked or crossed quotation was experiencing a failure, material delay, or malfunction of its systems or equipment.

(ii) The locking or crossing quotation was displayed at a time when a protected bid was higher than a protected offer in the NMS stock.

(iii) The locking or crossing quotation was an automated quotation, and the Nasdaq member displaying such automated quotation simultaneously routed an intermarket sweep order to execute against the full displayed size of any locked or crossed protected quotation.

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- (iv) The locking or crossing quotation was a manual quotation that locked or crossed another manual quotation, and the member of the Exchange displaying the locking or crossing manual quotation simultaneously routed an intermarket sweep order to execute against the full displayed size of the locked or crossed manual quotation.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-019 eff. August 1, 2006; amended by SR-NASDAQ-2006-027 eff. Aug. 2, 2006; amended by SR-NASDAQ-2006-001 eff. Oct. 16, 2006; amended by SR-NASDAQ-2007-005 eff. Feb. 5, 2005; amended by SR-NASDAQ-2007-069 eff. Nov. 7, 2007; amended by SR-NASDAQ-2008-004 eff. Mar. 7, 2008; amended by SR-NASDAQ-2008-054 eff. June 13, 2008.

### **IM-4613. Deleted**

Deleted by SR-NASDAQ-2008-004 eff. March 7, 2008. Adopted by SR-NASDAQ-2006-019 eff. July 28, 2006.

### **4614. Stabilizing Bids**

#### **(a) Nasdaq Market Maker Obligation/Identifier**

A Nasdaq Market Maker that intends to stabilize the price of a security that is a subject or reference security under SEC Rule 101 shall submit a request to Nasdaq MarketWatch for the entry of a one-sided bid that is identified on Nasdaq as a stabilizing bid in compliance with the standards set forth in this Rule and SEC Rules 101 and 104.

#### **(b) Eligibility**

Only one Nasdaq Market Maker in a security may enter a stabilizing bid.

#### **(c) Limitations on Stabilizing Bids**

(1) A stabilizing bid shall not be entered in Nasdaq unless at least one other Nasdaq Market Maker in addition to the market maker entering the stabilizing bid is registered as a Nasdaq Market Maker in the security and entering quotations that are considered an independent bid under SEC Rule 104.

(2) A stabilizing bid must be available for all freely tradable outstanding securities of the same class being offered.

#### **(d) Submission of Request to Nasdaq**

(1) A Nasdaq Market Maker that wishes to enter a stabilizing bid shall submit a request to Nasdaq MarketWatch for entry on Nasdaq of a one-sided bid identified as a stabilizing bid. The Nasdaq Market Maker shall confirm its request in writing no later than the close of business the day the stabilizing bid is entered by submitting an Underwriting Activity Report to Nasdaq MarketWatch that includes the information required by subparagraph (d)(2).

(2) In lieu of submitting the Underwriting Activity Report as set forth in subparagraph (d)(1), the market maker may provide written confirmation to Nasdaq MarketWatch that shall include:

(A) the identity of the security and its symbol;

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(B) the contemplated effective date of the offering and the date when the offering will be priced;

(C) the date and time that an identifier should be included on Nasdaq; and

(D) a copy of the cover page of the preliminary or final prospectus or similar offering document, unless Nasdaq determines otherwise.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

**4615. Reserved**

Reserved by SEC Release 34-53128 (Jan. 13, 2006).

**4616. Reports**

A Nasdaq Market Maker, Nasdaq ECN, or Order Entry Firm shall make such reports to Nasdaq as may be prescribed from time to time by Nasdaq.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

**4617. Normal Business Hours**

The System operates from 7:00 a.m. to 8:00 p.m. Eastern. Time on each business day, unless modified by Nasdaq. A Nasdaq Market Maker shall be open for business as of 9:30 a.m. Eastern Time and shall close no earlier than 4:00 p.m. Eastern Time. A Nasdaq Market Maker may voluntarily open for business prior to 9:30 a.m. and remain open for business later than 4:00 p.m. Eastern Time. Nasdaq Market Makers whose quotes are open prior to 9:30 a.m. Eastern Time or after 4:00 p.m. Eastern Time shall be obligated to comply, while their quotes are open, with all Nasdaq Rules that are not by their express terms, or by an official interpretation of Nasdaq, inapplicable to any part of the 7:00 a.m. to 9:30 a.m. or 4:00 p.m. to 8:00 p.m. Eastern Time period.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

**4618. Clearance and Settlement**

(a) All transactions through the facilities of the Nasdaq Market Center shall be cleared and settled through a registered clearing agency using a continuous net settlement system. This requirement may be satisfied by direct participation, use of direct clearing services, or by entry into a correspondent clearing arrangement with another member that clears trades through such an agency.

(b) Notwithstanding paragraph (a), transactions may be settled "ex-clearing" provided that both parties to the transaction agree.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-001 eff. Oct. 16, 2006; amended by SR-NASDAQ-2008-054 eff. June 13, 2008.

**4619. Withdrawal of Quotations and Passive Market Making**

(a) Except as provided in paragraph (b) of this Rule, a market maker that wishes to withdraw quotations in a security or have its quotations identified as the quotations of a passive market maker shall contact Nasdaq MarketWatch to obtain excused withdrawal status prior to withdrawing its quotations or identification as a passive market maker. Withdrawals of quotations or identifications of

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quotations as those of a passive market maker shall be granted by Nasdaq MarketWatch only upon satisfying one of the conditions specified in this Rule.

**(b)** A Nasdaq Market Maker that wishes to obtain excused withdrawal status based on a market maker's systemic equipment problems, such as defects in a Nasdaq Market Maker's software or hardware systems or connectivity problems associated with the circuits connecting Nasdaq Market Center systems with the Nasdaq Market Maker's systems, shall contact Nasdaq Market Operations. Nasdaq Market Operations may grant excused withdrawal status based on systemic equipment problems for up to five (5) business days, unless extended by Nasdaq Market Operations.

**(c)** (1) For Nasdaq-listed securities, excused withdrawal status based on circumstances beyond the Nasdaq Market Maker's control, other than systemic equipment problems, may be granted for up to five (5) business days, unless extended by Nasdaq MarketWatch. Excused withdrawal status based on demonstrated legal or regulatory requirements, supported by appropriate documentation and accompanied by a representation that the condition necessitating the withdrawal of quotations is not permanent in nature, may, upon notification, be granted for not more than sixty (60) days (unless such request is required to be made pursuant to paragraph (e) below). Excused withdrawal status based on religious holidays may be granted only if written notice is received by Nasdaq one business day in advance and is approved by Nasdaq. Excused withdrawal status based on vacation may be granted only if:

**(A)** The written request for withdrawal is received by Nasdaq one business day in advance, and is approved by Nasdaq

**(B)** The request includes a list of the securities for which withdrawal is requested; and

**(C)** The request is made by a Nasdaq Market Maker with three (3) or fewer Nasdaq level 3 terminals. Excused withdrawal status may be granted to a Nasdaq Market Maker that has withdrawn from an issue prior to the public announcement of a merger or acquisition and wishes to re-register in the issue pursuant to the same-day registration procedures contained in Rule 4611 above, provided the Nasdaq Market Maker has remained registered in one of the affected issues. The withdrawal of quotations because of pending news, a sudden influx of orders or price changes, or to effect transactions with competitors shall not constitute acceptable reasons for granting excused withdrawal status.

**(2)** For securities listed on exchanges other than Nasdaq, a Nasdaq Market Maker that wishes to withdraw quotations shall contact Nasdaq MarketWatch to obtain excused withdrawal status prior to withdrawing its quotations. Excused withdrawal status based on illness, vacations or physical circumstances beyond the Market Maker's control may be granted for up to five (5) business days, unless extended by Nasdaq MarketWatch. Excused withdrawal status based on investment activity or advice of legal counsel, accompanied by a representation that the condition necessitating the withdrawal of quotations is not permanent in nature, may, upon written request, be granted for not more than sixty (60) days. The withdrawal of quotations because of pending news, a sudden influx of orders or price changes, or to effect transactions with competitors shall not normally constitute acceptable reasons for granting excused withdrawal status, unless Nasdaq has initiated a trading halt for Market Makers in the security, pursuant to Rule 4120.

**(d)** Excused withdrawal status may be granted to a Nasdaq Market Maker that fails to maintain a clearing arrangement with a registered clearing agency or with a member of such an agency and is withdrawn from participation in the trade reporting service of the Nasdaq Market Center, thereby terminating its registration as a Nasdaq Market Maker. Provided however, that if Nasdaq finds that the

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Nasdaq Market Maker's failure to maintain a clearing arrangement is voluntary, the withdrawal of quotations will be considered voluntary and unexcused pursuant to Rule 4620 and the Rule 4700 Series governing the Nasdaq Market Center. Nasdaq Market Makers that fail to maintain a clearing relationship will have their Nasdaq Market Center system status set to "suspend" and be thereby prevented from entering, or executing against, any quotes/orders in the system.

**(e)** Excused withdrawal status or passive market maker status may be granted to a Nasdaq Market Maker that is a distribution participant (or, in the case of excused withdrawal status, an affiliated purchaser) in order to comply with SEC Rule 101, 103, or 104 under the Act on the following conditions:

**(1)** A member acting as a manager (or in a similar capacity) of a distribution of a security that is a subject security or reference security under SEC Rule 101 and any member that is a distribution participant or an affiliated purchaser in such a distribution that does not have a manager shall provide written notice to Nasdaq MarketWatch and the Market Regulation Department of FINRA no later than the business day prior to the first entire trading session of the one-day or five-day restricted period under SEC Rule 101, unless later notification is necessary under the specific circumstances.

**(A)** The notice required by subparagraph (e)(1) of this Rule shall be provided by submitting a completed Underwriting Activity Report that includes a request on behalf of each Nasdaq Market Maker that is a distribution participant or an affiliated purchaser to withdraw the Nasdaq Market Maker's quotations, or that includes a request on behalf of each Nasdaq Market Maker that is a distribution participant (or an affiliated purchaser of a distribution participant) that its quotations be identified as those of a passive market maker and includes the contemplated date and time of the commencement of the restricted period.

**(B)** The managing underwriter shall advise each Nasdaq Market Maker that it has been identified as a distribution participant or an affiliated purchaser to Nasdaq MarketWatch and that its quotations will be automatically withdrawn or identified as passive market maker quotations, unless a market maker that is a distribution participant (or an affiliated purchaser of a distribution participant) notifies Nasdaq MarketWatch as required by subparagraph (e)(2), below.

**(2)** A Nasdaq Market Maker that has been identified to Nasdaq MarketWatch as a distribution participant (or an affiliated purchaser of a distribution participant) shall promptly notify Nasdaq MarketWatch and the manager of its intention not to participate in the prospective distribution or not to act as a passive market maker in order to avoid having its quotations withdrawn or identified as the quotations of a passive market maker.

**(3)** If a Nasdaq Market Maker that is a distribution participant withdraws its quotations in a Nasdaq security in order to comply with the net purchases limitation of SEC Rule 103 or with any other provision of SEC Rules 101, 103, or 104 and promptly notifies Nasdaq MarketWatch of its action, the withdrawal shall be deemed an excused withdrawal. Nothing in this subparagraph shall prohibit Nasdaq from taking such action as is necessary under the circumstances against a member and its associated persons for failure to contact Nasdaq MarketWatch to obtain an excused withdrawal as required by subparagraphs (a) and (e) of this Rule.

**(4)** The quotations of a passive market maker shall be identified on Nasdaq as those of a passive market maker.

**(5)** A member acting as a manager (or in a similar capacity) of a distribution subject to subparagraph (e)(1) of this Rule shall submit a request to Nasdaq MarketWatch and the Market Regulation

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Department of FINRA to rescind the excused withdrawal status or passive market making status of distribution participants and affiliated purchasers, which request shall include the date and time of the pricing of the offering, the offering price, and the time the offering terminated, and, if not in writing, shall be confirmed in writing no later than the close of business the day the offering terminates. The request by this subparagraph may be submitted on the Underwriting Activity Report.

**(f)** The Market Operations Review Committee shall have jurisdiction over proceedings brought by Nasdaq Market Makers seeking review of the denial of an excused withdrawal pursuant to this Rule 4619, or the conditions imposed on their reentry.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-019 eff. August 1, 2006; amended by SR-NASDAQ-2006-001 eff. Oct. 16, 2006; amended by SR-NASDAQ-2008-054 eff. June 13, 2008.

### **4620. Voluntary Termination of Registration**

**(a)** A market maker may voluntarily terminate its registration in a security by withdrawing its two-sided quotation from the Nasdaq Market Center. A Nasdaq Market Maker that voluntarily terminates its registration in a security may not re-register as a market maker in that security for twenty (20) business days in the case of Nasdaq-listed securities or for one (1) business day in the case of ITS securities. Withdrawal from participation as a Nasdaq Market Maker in the Nasdaq Market Center shall constitute termination of registration as a market maker in that security for purposes of this Rule; provided, however, that a Nasdaq Market Maker that fails to maintain a clearing arrangement with a registered clearing agency or with a member of such an agency and is withdrawn from participation in the Nasdaq Market Center and thereby terminates its registration as a Nasdaq Market Maker may register as a market maker at any time after a clearing arrangement has been reestablished unless Nasdaq finds that the Nasdaq Market Maker's failure to maintain a clearing arrangement is voluntary, in which case the withdrawal of quotations will be considered voluntary and unexcused.

**(b)** Notwithstanding the above, a Nasdaq Market Maker that accidentally withdraws as a Nasdaq Market Maker may be reinstated if:

**(1)** the Nasdaq Market Maker notified MarketWatch of the accidental withdrawal as soon as practicable under the circumstances, but within at least one hour of such withdrawal, and immediately thereafter provided written notification of the withdrawal and reinstatement request;

**(2)** it is clear that the withdrawal was inadvertent and the market maker was not attempting to avoid its market making obligations; and

**(3)** the Nasdaq Market Maker's firm would not exceed the following reinstatement limitations:

**(A)** for firms that simultaneously made markets in less than 250 stocks during the previous calendar year, the firm can receive no more than two (2) reinstatements per year;

**(B)** for firms that simultaneously made markets in 250 or more but less than 500 stocks during the previous calendar year, the firm can receive no more than three (3) reinstatements per year; and

**(C)** for firms that simultaneously made markets in 500 or more stocks during the previous calendar year, the firm can receive no more than six (6) reinstatements per year.



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(c) Factors that Nasdaq will consider in granting a reinstatement under paragraph (b) of this rule include, but are not limited to:

(1) the number of accidental withdrawals by the Nasdaq Market Maker in the past, as compared with Nasdaq Market Makers making markets in a comparable number of stocks;

(2) the similarity between the symbol of the stock that the Nasdaq Market Maker intended to withdraw from and the symbol of the stock that the Nasdaq Market Maker actually withdrew from;

(3) market conditions at the time of the withdrawal;

(4) whether, given the market conditions at the time of the withdrawal, the withdrawal served to reduce the exposure of the member's position in the security at the time of the withdrawal to market risk; and

(5) the timeliness with which the Nasdaq Market Maker notified MarketWatch of the error.

(d) For purposes of paragraph (a) of this Rule, a market maker shall not be deemed to have voluntarily terminated its registration in a security by voluntarily withdrawing its two-sided quotation from the Nasdaq Market Center if the Nasdaq Market Maker's two-sided quotation in the subject security is withdrawn by Nasdaq's systems due to issuer corporate action related to a dividend, payment or distribution, or due to a trading halt, and one of the following conditions is satisfied:

(1) the Nasdaq Market Maker enters a new two-sided quotation prior to the close of the regular market session on the same day when Nasdaq's systems withdrew such a quotation;

(2) the Nasdaq Market Maker enters a new two-sided quotation on the day when trading resumes following a trading halt, or, if the resumption of trading occurs when the market is not in regular session, the Nasdaq Market Maker enters a new two-sided quotation prior to the opening of the next regular market session; or

(3) upon request from the market maker, Nasdaq MarketWatch authorizes the market maker to enter a new two-sided quotation, provided that Nasdaq MarketWatch receives the market maker's request prior to the close of the regular market session on the next regular trading day after the day on which the market maker became eligible to re-enter a quotation pursuant to subparagraph (d)(1) or (d)(2) hereof and determines that the market maker was not attempting to avoid its market making obligations by failing to re-enter such a quotation earlier.

(e) The Market Operations Review Committee shall have jurisdiction over proceedings brought by market makers seeking review of their denial of a reinstatement pursuant to paragraphs (b) or (d) of this Rule.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-019 eff. August 1, 2006; amended by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

**4621. Suspension and Termination of Quotations**

Nasdaq may, pursuant to the procedures set forth in the Rule 9000 Series, suspend, condition, limit, prohibit or terminate the authority of a Nasdaq Market Maker, Nasdaq ECN, or Order Entry Firm to enter quotations in one or more authorized securities for violations of applicable requirements or prohibitions.

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Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

### **4622. Termination of Nasdaq Service**

Nasdaq may, upon notice, terminate Nasdaq service in the event that a Nasdaq Market Maker, Nasdaq ECN, or Order Entry Firm fails to qualify under specified standards of eligibility or fails to pay promptly for services rendered by Nasdaq.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

### **4623. Alternative Trading Systems**

(a) Nasdaq may provide a means to permit alternative trading systems ("ATs"), as such term is defined in Regulation ATS, and electronic communications networks ("ECNs"), as such term is defined in SEC Rule 600,

(1) to comply with SEC Rule 301(b)(3);

(2) to comply with the terms of the ECN display alternative provided for in SEC Rule 602(b)(5)(ii)(A) and (B) ("ECN display alternatives"); or

(3) to provide orders to Nasdaq voluntarily.

In providing any such means, Nasdaq shall establish a mechanism that permits the ATS or ECN to display the best prices and sizes of orders entered into the ATS or ECN by subscribers of the ATS or ECN, if the ECN or ATS so chooses or is required by SEC Rule 301(b)(3) to display a subscriber's order in Nasdaq, and allows any Nasdaq member the electronic ability to effect a transaction with such priced orders that is equivalent to the ability to effect a transaction with a Nasdaq market maker quotation in Nasdaq operated systems.

(b) An ATS or ECN that seeks to utilize the Nasdaq-provided means to comply with SEC Rule 301(b)(3), the ECN display alternatives, or to provide orders to Nasdaq voluntarily shall:

(1) demonstrate to Nasdaq that it is in compliance with Regulation ATS or that it qualifies as an ECN meeting the definition in the SEC Rule 600;

(2) be registered as a Nasdaq member;

(3) enter into and comply with the terms of applicable agreements with Nasdaq;

(4) agree to provide for Nasdaq's dissemination in the quotation data made available to quotation vendors the prices and sizes of subscriber orders of the ATS or ECN, if the ATS or ECN so chooses or is required by SEC Rule 301(b)(3) to display a subscriber's order in Nasdaq, at the highest buy price and the lowest sell price for each Nasdaq security entered in and widely disseminated by the ATS or ECN; and prior to entering such prices and sizes, register with Nasdaq Market Operations as an ATS or ECN;

(5) provide an automatic execution of any quote or order entered into the System by the ATS or ECN.

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Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

### **4624. Penalty Bids and Syndicate Covering Transactions**

(a) A Nasdaq Market Maker acting as a manager (or in a similar capacity) of a distribution of a security that is a subject or reference security under SEC Rule 101 shall provide written notice to the Corporate Financing Department of FINRA of its intention to impose a penalty bid on syndicate members or to conduct syndicate covering transactions pursuant to SEC Rule 104 prior to imposing the penalty bid or engaging in the first syndicate covering transaction. A Nasdaq Market Maker that intends to impose a penalty bid on syndicate members may request that its quotation be identified as a penalty bid on Nasdaq pursuant to paragraph (c) below.

(b) The notice required by paragraph (a) shall include:

(1) the identity of the security and its symbol;

(2) the date the member is intending to impose the penalty bid and/or conduct syndicate covering transactions.

(c) Notwithstanding paragraph (a), a Nasdaq Market Maker may request that its quotation be identified as a penalty bid on Nasdaq display by providing notice to Nasdaq MarketWatch, which notice shall include the date and time that the penalty bid identifier should be entered on Nasdaq and, if not in writing, shall be confirmed in writing no later than the close of business the day the penalty bid identifier is entered on Nasdaq.

(d) The written notice required by this Rule may be submitted on the Underwriting Activity Report.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-001 eff. Oct. 16, 2006; amended by SR-NASDAQ-2008-054 eff. June 13, 2008.

### **4625. Obligation to Provide Information**

(a) A Nasdaq Market Maker, Nasdaq ECN, or Order Entry Firm operating in or participating in the Nasdaq Market Center or other Nasdaq-operated system shall provide information orally, in writing, or electronically (if such information is, or is required to be, maintained in electronic form) to the staff of Nasdaq when:

(1) Nasdaq MarketWatch staff makes an oral, written, or electronically communicated request for information relating to a specific Nasdaq rule, SEC rule, or provision of a joint industry plan (e.g., UTP, CTA, and CQA) (as promulgated and amended from time-to-time) that Nasdaq MarketWatch is responsible for administering or to other duties and/or obligations imposed on Nasdaq MarketWatch by Nasdaq; this shall include, but not be limited to, information relating to:

(A) a locked or crossed market; or

(B) trading activity, rumors, or information that a member may possess that may assist in determining whether there is a basis to initiate a trading halt, pursuant to Nasdaq Rule 4120 and IM-4120-1; or

(C) a clearly erroneous transaction, pursuant to Nasdaq Rule 11890; or

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(D) a request for an excused withdrawal or reinstatement, pursuant to Nasdaq Rules 4619, and 4620; or

(E) trade-throughs; or

(F) a request to submit a stabilizing bid, pursuant to Nasdaq Rule 4614, or a request to have a quotation identified as a penalty bid on Nasdaq, pursuant to Nasdaq Rule 4624.

(2) Nasdaq Market Operations staff makes an oral, written, or electronically communicated request for information relating to a specific Nasdaq rule, SEC rule, provision of a joint industry plan (e.g., UTP, CTA, and CQA) (as promulgated and amended from time-to-time) that Nasdaq Market Operations is responsible for administering or to other duties and/or obligations for which Nasdaq Market Operations is responsible; this shall include, but not be limited to, information relating to an equipment failure.

(b) A failure to comply in a timely, truthful, and/or complete manner with a request for information made pursuant to this rule may be deemed conduct inconsistent with just and equitable principles of trade.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-001 eff. Oct. 16, 2006; amended by SR-NASDAQ-2008-054 eff. June 13, 2008.

**4626. Limitation of Liability**

(a) Except as provided for in paragraph (b) below, Nasdaq and its affiliates shall not be liable for any losses, damages, or other claims arising out of the Nasdaq Market Center or its use. Any losses, damages, or other claims, related to a failure of the Nasdaq Market Center to deliver, display, transmit, execute, compare, submit for clearance and settlement, adjust, retain priority for, or otherwise correctly process an order, Quote/Order, message, or other data entered into, or created by, the Nasdaq Market Center shall be absorbed by the member, or the member sponsoring the customer, that entered the order, Quote/Order, message, or other data into the Nasdaq Market Center.

(b) Nasdaq, subject to the express limits set forth below, may compensate users of the Nasdaq Market Center for losses directly resulting from the systems' actual failure to correctly process an order, Quote/Order, message, or other data, provided the Nasdaq Market Center has acknowledged receipt of the order, Quote/Order, message, or data.

(1) For one or more claims made by a single market participant related to the use of the Nasdaq Market Center on a single trading day, Nasdaq's liability shall not exceed the larger of \$100,000, or the amount of any recovery obtained by Nasdaq under any applicable insurance policy.

(2) For the aggregate of all claims made by all market participants related to the use of the Nasdaq Market Center on a single trading day, Nasdaq's liability shall not exceed the larger of \$250,000, or the amount of the recovery obtained by Nasdaq under any applicable insurance policy.

(3) For the aggregate of all claims made by all market participants related to the use of the Nasdaq Market Center during a single calendar month, Nasdaq's liability shall not exceed the larger of \$500,000, or the amount of the recovery obtained by Nasdaq under any applicable insurance policy.

(4) In the event all of the claims arising out of the use of the Nasdaq Market Center cannot be fully satisfied because in the aggregate they exceed the maximum amount of liability provided for in this

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Rule, then the maximum amount will be proportionally allocated among all such claims arising on a single trading day, or during a single calendar month, as applicable.

(5) All claims for compensation pursuant to this Rule shall be in writing and must be submitted no later than the opening of trading on the next business day following the day on which the use of the Nasdaq Market Center gave rise to such claims. Nothing in this rule shall obligate Nasdaq to seek recovery under any applicable insurance policy.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

### **4627. Obligation to Honor System Trades**

(a) If a Participant, or clearing member acting on a Participant's behalf, is reported by the System, or shown by the activity reports generated by the System, as constituting a side of a System trade, such Participant, or clearing member acting on its behalf, shall honor such trade on the scheduled settlement date.

(b) Nasdaq shall have no liability if a Participant, or a clearing member acting on the Participant's behalf, fails to satisfy the obligations in paragraph (a).

Adopted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

### **4628. Compliance with Rules and Registration Requirements**

(a) Failure by a Participant to comply with any of the rules or registration requirements applicable to the Nasdaq Market Center identified herein shall subject such Participant to censure, fine, suspension or revocation of its registration as a Nasdaq Market Maker, Order Entry Firm, and/or Nasdaq ECN or any other fitting penalty under the Nasdaq Rules.

(b) (1) If a Participant fails to maintain a clearing relationship as required under paragraphs (a)(2) of Rule 4611, it shall be removed from the Nasdaq Market Center until such time as a clearing arrangement is reestablished.

(2) A Participant that is not in compliance with its obligations under paragraphs (a)(2) of Rule 4611 shall be notified when Nasdaq exercises its authority under paragraph (b)(1) above.

(3) The authority and procedures contained in this paragraph (b) do not otherwise limit Nasdaq's authority, contained in other provisions of the Nasdaq Rules, to enforce its rules or impose any fitting sanction.

Adopted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

### **4630. Trading in Commodity-Related Securities**

(a) Nasdaq will consider for trading pursuant to unlisted trading privileges, a Commodity-Related Security that meets the criteria of this Rule. Unless otherwise noted, a Commodity-Related Security approved for trading under this rule is eligible for trading during all Nasdaq market sessions if members comply with Nasdaq Rule 4631 when accepting Commodity-Related Security orders for execution in the pre-market session or post-market session.

(b) Applicability. This Rule is applicable only to Commodity-Related Securities. Except to the extent inconsistent with this Rule, or unless the context otherwise requires, the provisions of all other Nasdaq

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Rules shall be applicable to the trading on Nasdaq of such securities. Commodity-Related Securities are included within the definition of "security" or "securities" as such terms are used in the Nasdaq Rules.

**(c)** Definitions. The following terms shall, unless the context otherwise requires, have the meaning herein specified:

**(1)** *Commodity-Related Security*. The term "Commodity-Related Security" means a security that is issued by a trust, partnership, commodity pool or similar entity that invests, directly or through another entity, in any combination of commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives, or the value of which is determined by the value of commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives.

**(2)** *Commodity*. The term "commodity" is defined in Section 1(a)(4) of the Commodity Exchange Act.

**(d)** Information Barriers. A member acting as a registered market maker in a Commodity-Related Security is obligated to establish adequate information barriers when such market maker engages in inter-departmental communications. Members should refer to NASD/NYSE Joint Memo on Chinese Wall Policies and Procedures ( NASD Notice to Members 91-45) for guidance on the "' minimum elements' of adequate Chinese Wall policy and procedures." For purposes of a Commodity-Related Security only, "inter-departmental communications" shall include communications to other departments within the same firm or the firm's affiliates that involve trading in commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives underlying such Commodity-Related Security.

**(e)** Market Maker Accounts. A member acting as a registered market maker in a Commodity-Related Security must file with Nasdaq Regulation in a manner prescribed by Nasdaq Regulation and keep current a list identifying all accounts for trading in commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives underlying such Commodity- Related Security, in which the market maker holds an interest, over which it may exercise investment discretion, or in which it shares in the profits and losses. No market maker shall trade in, or exercise investment discretion with respect to, such underlying commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives, in an account in which a market maker, directly or indirectly, controls trading activities, or has an interest in the profits or losses thereof, that has not been reported as required by this Rule. A member acting as a registered market maker in a Commodity-Related Security shall not act or register as a market maker in any commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives underlying such Commodity-Related Security.

**(f)** The member acting as a registered market maker in a Commodity-Related Security shall make available to Nasdaq Regulation such books, records or other information pertaining to transactions by such entity or registered or non-registered employee affiliated with such entity for its or their own accounts for trading commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives underlying such Commodity-Related Security, as may be requested by Nasdaq Regulation.

**(g)** In connection with trading a Commodity-Related Security or commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives underlying a Commodity-Related Security, the member acting as a market maker in a Commodity-

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Related Security shall not use any material nonpublic information received from any person associated with the member or employee of such person regarding trading by such person or employee in the commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives underlying such Commodity- Related Security.

**(h)** Nasdaq requires that members provide all purchasers of a newly issued Commodity-Related Security a prospectus for such Commodity-Related Security.

Adopted by SR-NASDAQ-2006-009 eff. Nov. 16, 2006; amended by SR-NASDAQ-2007-016 eff. Mar. 5, 2007; amended by SR-NASDAQ-2007-098 eff. Dec. 18, 2007; amended by SR-NASDAQ-2009-004 eff. January 30, 2009.

### **4631. Customer Disclosures**

No member may accept an order from a customer for execution in the premarket session or post-market session without disclosing to such customer that extended hours trading involves material trading risks, including the possibility of lower liquidity, high volatility, changing prices, unlinked markets, an exaggerated effect from news announcements, wider spreads and any other relevant risk. The absence of an updated underlying index value or intraday indicative value is an additional trading risk in extended hours for Derivative Securities Products.

The disclosures required pursuant to this rule may take the following form or such other form as provides substantially similar information:

- (1) Risk of Lower Liquidity. Liquidity refers to the ability of market participants to buy and sell securities. Generally, the more orders that are available in a market, the greater the liquidity. Liquidity is important because with greater liquidity it is easier for investors to buy or sell securities, and as a result, investors are more likely to pay or receive a competitive price for securities purchased or sold. There may be lower liquidity in extended hours trading as compared to regular market hours. As a result, your order may only be partially executed, or not at all.
- (2) Risk of Higher Volatility. Volatility refers to the changes in price that securities undergo when trading. Generally, the higher the volatility of a security, the greater its price swings. There may be greater volatility in extended hours trading than in regular market hours. As a result, your order may only be partially executed, or not at all, or you may receive an inferior price in extended hours trading than you would during regular market hours.
- (3) Risk of Changing Prices. The prices of securities traded in extended hours trading may not reflect the prices either at the end of regular market hours, or upon the opening of the next morning. As a result, you may receive an inferior price in extended hours trading than you would during regular market hours.
- (4) Risk of Unlinked Markets. Depending on the extended hours trading system or the time of day, the prices displayed on a particular extended hours system may not reflect the prices in other concurrently operating extended hours trading systems dealing in the same securities. Accordingly, you may receive an inferior price in one extended hours trading system than you would in another extended hours trading system.
- (5) Risk of News Announcements. Normally, issuers make news announcements that may affect the price of their securities after regular market hours. Similarly, important financial information is frequently announced outside of regular market hours. In extended hours trading, these

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announcements may occur during trading, and if combined with lower liquidity and higher volatility, may cause an exaggerated and unsustainable effect on the price of a security.

(6) Risk of Wider Spreads. The spread refers to the difference in price between what you can buy a security for and what you can sell it for. Lower liquidity and higher volatility in extended hours trading may result in wider than normal spreads for a particular security.

(7) Risk of Lack of Calculation or Dissemination of Underlying Index Value or Intraday Indicative Value ("IIV"). For certain Derivative Securities Products, an updated underlying index value or IIV may not be calculated or publicly disseminated in extended trading hours. Since the underlying index value and IIV are not calculated or widely disseminated during the pre-market and post-market sessions an investor who is unable to calculate implied values for certain Derivative Securities Products in those sessions may be at a disadvantage to market professionals.

Adopted by SR-NASDAQ-2007-098 eff. Dec. 18, 2007; amended by SR-NASDAQ-2008-006 eff. Jan. 17, 2008.

### **4700. Nasdaq Market Center — Execution Services**

#### **4701. Reserved**

Reserved

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-007 eff. May 8, 2006; amended by SR-NASDAQ-2006-019 eff. July 28, 2006; deleted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

#### **4703. Reserved**

Reserved

Adopted by SR-NASDAQ-2006-019 eff. July 28, 2006; deleted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

#### **4704. Reserved**

Reserved

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-019 eff. July 28, 2006; deleted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

#### **4705. Reserved**

Reserved

Adopted by SEC Release 34-53128 (Jan. 13, 2006); deleted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

#### **4706. Reserved**

Reserved

Adopted by SEC Release 34-53128 (Jan. 13, 2006); deleted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.



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**4707. Reserved**

Reserved

Adopted by SEC Release 34-53128 (Jan. 13, 2006); deleted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

**4708. Reserved**

Reserved

Adopted by SEC Release 34-53128 (Jan. 13, 2006); deleted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

**4709. Reserved**

Reserved

Adopted by SEC Release 34-53128 (Jan. 13, 2006); deleted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

**4710. Reserved**

Reserved

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-019 eff. July 28, 2006; deleted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

**4711. Reserved**

Reserved

Adopted by SEC Release 34-53128 (Jan. 13, 2006); deleted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

**4712. Reserved**

Reserved

Adopted by SEC Release 34-53128 (Jan. 13, 2006); deleted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

**4713. Reserved**

Reserved

Adopted by SEC Release 34-53128 (Jan. 13, 2006); deleted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

**4714. Reserved**

Reserved

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-019 eff. July 28, 2006; deleted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

**4715. Reserved**

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Reserved

Adopted by SEC Release 34-53128 (Jan. 13, 2006); deleted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

**4719. Reserved**

Reserved

Adopted by SEC Release 34-53128 (Jan. 13, 2006); deleted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

**4720. Reserved**

Reserved

Adopted by SEC Release 34-53128 (Jan. 13, 2006); deleted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

**4750. Nasdaq Market Center-Execution Services**

**4751. Definitions**

The following definitions apply to the Rule 4600 and 4750 Series for the trading of securities listed on Nasdaq or a national securities exchange other than Nasdaq.

**(a)** The term "Nasdaq Market Center," or "System" shall mean the automated system for order execution and trade reporting owned and operated by The NASDAQ Stock Market LLC. The Nasdaq Market Center comprises:

**(1)** an order execution service that enables Participants to automatically execute transactions in System Securities; and provides Participants with sufficient monitoring and updating capability to participate in an automated execution environment;

**(2)** a trade reporting service that submits "locked-in" trades for clearing to a registered clearing agency for clearance and settlement; transmits last-sale reports of transactions automatically to the National Trade Reporting System, if required, for dissemination to the public and industry; and provides participants with monitoring and risk management capabilities to facilitate participation in a "locked-in" trading environment;

**(3)** a data feed(s) that can be used to display with attribution to Participants' MPIDs all Quotes and Displayed Orders on both the bid and offer side of the market for all price levels then within the Nasdaq Market Center.

**(b)** The term "System Securities" shall mean all securities listed on Nasdaq and all securities subject to the Consolidated Tape Association Plan and the Consolidated Quotation Plan.

**(c)** The term "Participant" shall mean an entity that fulfills the obligations contained in Rule 4611 regarding participation in the System, and shall include:

**(1)** "Nasdaq ECNs," members that meet all of the requirements of Rule 4623, and that participates in the System with respect to one or more System Securities.

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(2) "Nasdaq Market Makers," members that are registered as Nasdaq Market Makers for purposes of participation in the System on a fully automated basis with respect to one or more System securities.

(3) "Order Entry Firms," members that are registered as Order Entry Firms for purposes of entering orders in System Securities into the System. This term shall also include any Electronic Communications Network or Alternative Trading System that fails to meet all the requirements of Rule 4623.

(d) With respect to System-provided quotation functionality:

(1) The term "Quote" shall mean a single bid or offer quotation submitted to the System and designated for display (price and size) next to the Participant's MPID by a Participant that is eligible to submit such quotations.

(2) The term "Automatic Quote Refresh" shall mean the default price increment away from the executed price and the size to which a Participant's Quote will be refreshed if the Participant elects to utilize this functionality. If the Participant does not designate an Automatic Quote Refresh size, which must be at least one normal unit of trading, the default Automatic Quote Refresh size shall be 100 shares and the default Automatic Quote Refresh price increment shall be \$0.25.

(3) The term "Reserve Size" shall mean the System-provided functionality that permits a Participant to display in its Displayed Quote part of the full size of a proprietary or agency order, with the remainder held in reserve on an undisplayed basis. Both the displayed and non-displayed portions are available for potential execution against incoming orders. If the Displayed Quote is reduced to less than a normal unit of trading, the System will replenish the display portion from reserve up to at least a single round-lot amount. A new timestamp is created for the replenished portion of the order each time it is replenished from reserve, while the reserve portion retains the time-stamp of its original entry.

(e) The term "Order" shall mean a single order or multiple orders at the same price submitted to the System by a Participant that is eligible to submit such orders and shall include:

(1) "Attributable Orders," orders that are designated for display (price and size) next to the Participant's MPID;

(2) "Non-Attributable Orders," orders that are entered by a Participant that is designated for display (price and size) on an anonymous basis in the order display service of the System; and

(3) "Non-Displayed Orders," a limit order that is not displayed in the System, but nevertheless remains available for potential execution against all incoming orders until executed in full or cancelled.

(f) The term "Order Type" shall mean the unique processing prescribed for designated orders that are eligible for entry into the System, and shall include:

(1) "Discretionary Orders" are orders that have a displayed price and size, as well as a non-displayed discretionary price range, at which the entering party, if necessary, is also willing to buy or sell. The non-displayed trading interest is not entered into the System book but is, along with the displayed size, converted to an IOC buy (sell) order priced at the highest (lowest) price in the discretionary price range when displayed shares become available or an execution takes place at any price within the discretionary price range. The generation of this IOC order is triggered by the cancellation of the open

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shares of the Discretionary Order. If more than one Discretionary Order is available for conversion to an IOC order, the system will convert all such orders at the same time and priority will be given to the first IOC order(s) that reaches the trading interest on the other side of the market. If an IOC order is not executed in full, the unexecuted portion of the order is automatically re-posted and displayed in the System book with a new time stamp, at its original displayed price, and with its non-displayed discretionary price range.

(2) "Reserve Orders" are limit orders that have both a round-lot displayed size as well as an additional non-displayed share amount. Both the displayed and non-displayed portions of the Reserve Order are available for potential execution against incoming orders. If the round-lot displayed portion of a Reserve Order is reduced to less than a normal unit of trading, the System will replenish the display portion from reserve up to at least a single round-lot amount. A new timestamp is created for the replenished portion of the order each time it is replenished from reserve, while the reserve portion retains the time-stamp of its original entry.

(3) "Limit Orders" are orders to buy or sell a stock at a specified price or better. A limit order is marketable when, for a limit order to buy, at the time it is entered into the System, the order is priced at the current inside offer or higher, or for a limit order to sell, at the time it is entered into the System, the order is priced at the inside bid or lower.

(4) "Pegged Orders" are orders that, after entry, have their price automatically adjusted by the System in response to changes in either the Nasdaq Market Center inside bid or offer or bids or offers in the national market system, as appropriate. A Pegged Order can specify that its price will equal the inside quote on the same side of the market ("Primary Peg"), the opposite side of the market ("Market Peg"), or the midpoint of the national best bid and offer ("Midpoint Peg"). A Pegged Order may have a limit price beyond which the order shall not be executed. In addition, the Primary Peg and Market Peg Orders may also establish their pricing relative to the appropriate bids or offers by the selection of one or more offset amounts that will adjust the price of the order by the offset amount selected. A Midpoint Peg Order is priced based upon the national best bid and offer, excluding the effect that the Midpoint Peg Order itself has on the inside bid or inside offer. Midpoint Pegged Orders will never be displayed. A Midpoint Pegged Order may be executed in sub-pennies if necessary to obtain a midpoint price. A new timestamp is created for the order each time it is automatically adjusted.

(5) "Minimum Quantity Orders" are orders that require that a specified minimum quantity of shares be obtained, or the order is cancelled. Minimum Quantity Orders may only be entered with a time-in-force designation of System Hours Immediate or Cancel or Market Hours Immediate or Cancel. Minimum Quantity Orders with a Market Hours Immediate or Cancel time in force received prior to the opening cross or after 4 p.m. will be rejected.

(6) "Intermarket Sweep Order" or "ISO" are limit orders that are designated as ISOs in the manner prescribed by Nasdaq and are executed within the System by Participants at multiple price levels without respect to Protected Quotations of other market centers within the meaning of Rule 600(b) of Regulation NMS under the Act. ISOs are immediately executable within the System pursuant to Rule 4757 and shall not be eligible for routing as set out in Rule 4758.

Simultaneously with the routing of an ISO to the System, one or more additional limit orders, as necessary, are routed by the entering party to execute against the full displayed size of any protected bid or offer (as defined in Rule 600(b) of Regulation NMS under the Act) in the case of a limit order to sell or buy with a price that is superior to the limit price of the limit order identified as an intermarket sweep order (as defined in Rule 600(b) of Regulation NMS under the Act). These additional routed orders must be identified as intermarket sweep orders.

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**(7)** "Price to Comply Order" are orders that, if, at the time of entry, a Price to Comply Order would lock or cross the quotation of an external market, the order will be priced to the current low offer (for bids) or to the current best bid (for offers) and displayed at a price one minimum price increment lower than the offer (for bids) or higher than the bid (for offers). The displayed and undisplayed prices of a Price to Comply order may be adjusted once or multiple times depending upon the method of order entry and changes to the prevailing NBBO.

**(8)** "Price to Comply Post Order" are orders that, if, at the time of entry, a Price to Comply Post Order would create a violation of Rule 610(d) of Regulation NMS under the Act by locking or crossing the protected quotation of an external market or would cause a violation of Rule 611 of Regulation NMS under the Act, the order will be re-priced and displayed by the System to one minimum price increment (i.e., \$0.01 or \$0.0001) below the current low offer (for bids) or to one penny above the current best bid (for offers). Price to Comply Post Orders will not be routed outside of the System.

**(9)** "Directed Orders" are orders that are directed to an exchange other than Nasdaq as directed by the entering party without checking the Nasdaq book. If unexecuted, the order (or unexecuted portion thereof) shall be returned to the entering party. This option may only be used for orders with time-in-force parameters of IOC.

Directed Orders may be designated as intermarket sweep orders by the entering party to execute against the full displayed size of any protected bid or offer (as defined in Rule 600(b) of Regulation NMS under the Act). A broker-dealer that designates an order as an intermarket sweep order has the responsibility of complying with Rules 610 and 611 of Regulation NMS.

Directed Orders may not be directed to a facility of an exchange that is an affiliate of Nasdaq except for Directed Orders directed to the NASDAQ OMX BX Equities Market.

**(10)** "Post-Only Orders" are orders that if, at the time of entry, would lock an order on the System, the order will be re-priced and displayed by the System to one minimum price increment (i.e., \$0.01 or \$0.0001) below the current low offer (for bids) or above the current best bid (for offers).

**(g)** The term "Order Size" shall mean the number of shares up to 999,999 associated with a Quote or Order and shall include:

**(1)** "normal unit of trading": the round lot size for the security.

**(2)** "mixed lot": an order that is for more than a normal unit of trading but not a multiple thereof.

**(3)** "odd-lot": an order that is for less than a normal unit of trading.

**(h)** The term "Time in Force" shall mean the period of time that the System will hold an order for potential execution, and shall include:

**(1)** "System Hours Immediate or Cancel" or "SIOC" shall mean, for limit orders so designated, that if after entry into the System the order (or a portion thereof) is not marketable, the order (or unexecuted portion thereof) shall be canceled and returned to the entering Participant. SIOC Orders shall be available for entry and execution from 7:00 a.m. until 8:00 p.m. Eastern Time.

**(2)** "System Hours Day" or "SDAY" shall mean, for orders so designated, that if after entry into the System, the order is not fully executed, the order (or the unexecuted portion thereof) shall remain

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available for potential display and/or execution from 7:00 a.m. until 8:00 p.m. Eastern Time on the day it was submitted unless cancelled by the entering party.

**(3)** "System Hours Good-till-Cancelled" or "SGTC" shall mean, for orders so designated, that if after entry into the System, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential display and/or execution from 7:00 a.m. until 8:00 p.m. Eastern Time unless cancelled by the entering party, or until 1 year after entry, whichever comes first.

**(4)** "System Hours Expire Time" or "SHEX" shall mean, for orders so designated, that if after entry into the System, the order is not fully executed, the order (or the unexecuted portion thereof) shall remain available for potential display and/or execution for the amount of time specified by the entering Participant unless canceled by the entering party. SHEX Orders shall be available for entry and execution from 7:00 a.m. until 8:00 p.m. Eastern Time.

**(5)** "Market Hours IOC" or "MIOC" shall mean for orders so designated, that if after entry into the System a marketable limit order (or unexecuted portion thereof) becomes non-marketable, the order (or unexecuted portion thereof) shall be canceled and returned to the entering participant. MIOC Orders shall be available for entry from 7:00 a.m. until 4:00 p.m. Eastern Time and for potential execution from 9:30 a.m. until 4:00 p.m. Eastern Time. MIOC Orders entered between 7:00 a.m. and 9:30 a.m. Eastern Time will be held within the System until 9:30 a.m. at which time the System shall determine whether such orders are marketable.

**(6)** "Market Hours Day" or "MDAY" shall mean for orders so designated, that if after entry into the System, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential display and/or execution until 4:00 p.m. Eastern Time, unless canceled by the entering party, after which it shall be returned to the entering party. MDAY Orders shall be available for entry from 7:00 a.m. until 4:00 p.m. Eastern Time and for potential execution from 9:30 a.m. until 4:00 p.m. Eastern Time.

**(7)** "Market Hours GTC" or "MGTC" shall mean for orders so designated, that if after entry into System, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential display and/or execution unless cancelled by the entering party, or until 1 year after entry, whichever comes first. MGTC Orders shall be available for entry from 7:00 a.m. until 8:00 p.m. Eastern Time and for potential execution from 9:30 a.m. until 4:00 p.m. Eastern Time.

**(8)** "Good-til-market close" or "GTMC" shall mean for orders so designated, that if after entry into the System, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential display and/or execution until cancelled by the entering party, or until the completion of the Nasdaq Closing Cross, after which it shall be returned to the entering party. GTMC orders shall be available for entry and potential execution from 7:00 a.m. and 8:00 p.m. Eastern Time. GTMC orders entered after the Nasdaq Closing Cross will be treated as SIOC orders.

**(i)** The term "System Book Feed" shall mean a data feed for System eligible securities.

Adopted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006; amended by SR-NASDAQ-2006-027 eff Aug. 2, 2006; amended by SR-NASDAQ-2006-043 eff Oct. 10, 2006; amended by SR-NASDAQ-2006-058 eff. Dec. 15, 2006; amended by SR-NASDAQ-2007-005 eff. Feb. 5, 2007; amended by SR-NASDAQ-2007-020 eff. Mar. 5, 2007; amended by SR-NASDAQ-2008-021 eff. Mar. 19, 2008; amended by SR-NASDAQ-2008-049 eff. June 2, 2008; amended by SR-NASDAQ-2008-054 eff. June 13, 2008; amended by SR-NASDAQ-2008-061 eff. July 9, 2008; amended by SR-NASDAQ-2008-098 eff. December 23, 2008; amended by SR-NASDAQ-2009-006 eff. January 28, 2009.

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**4752. Opening Process**

**(a) Definitions.** For the purposes of this rule the term:

**(1)** "Imbalance" shall mean the number of shares of buy or sell MOO, LOO or Early Market Hours orders that may not be matched with other MOO, LOO, Early Market Hours, Open Eligible Interest or OIO order shares at a particular price at any given time.

**(2)** "Order Imbalance Indicator" shall mean a message disseminated by electronic means containing information about MOO, LOO, OIO, and Early Market Hours orders and the price at which those orders would execute at the time of dissemination. The Order Imbalance Indicator shall disseminate the following information:

**(A)** "Current Reference Price" shall mean:

(i) The single price that is at or within the current Nasdaq Market Center best bid and offer at which the maximum number of shares of MOO, LOO, OIO, Open Eligible Interest and Early Market Hours orders can be paired.

(ii) If more than one price exists under subparagraph (i), the Current Reference Price shall mean the price that minimizes any Imbalance.

(iii) If more than one price exists under subparagraph (ii), the Current Reference Price shall mean the entered price at which shares will remain unexecuted in the cross.

(iv) If more than one price exists under subparagraph (iii), the Current Reference Price shall mean the price that minimizes the distance from the bid-ask midpoint of the inside quotation prevailing at the time of the order imbalance indicator dissemination.

**(B)** the number of shares represented by MOO, LOO, OIO, Early Market Hours orders, and Open Eligible Interest that are paired at the Current Reference Price;

**(C)** the size of any Imbalance;

**(D)** the buy/sell direction of any Imbalance; and

**(E)** indicative prices at which the Nasdaq Opening Cross would occur if the Nasdaq Opening Cross were to occur at that time and the percent by which the indicative prices are outside the then current Nasdaq Market Center best bid or best offer, whichever is closer. The indicative prices shall be:

(i) "Near Clearing Price" which shall mean the price at which both the MOO, LOO, OIO, and Early Market Hours orders and Open Eligible Interest in the Nasdaq Market Center would execute, and

(ii) "Far Clearing Price" which shall mean the price at which the MOO, LOO, OIO, and Early Market Hours orders in the Nasdaq Opening Book would execute.

(iii) If marketable buy (sell) shares would remain unexecuted above (below) the Near Clearing Price or Far Clearing Price, Nasdaq shall disseminate an indicator for "market buy" or "market sell".

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**(3)** "Limit On Open Order" or "LOO" shall mean an order to buy or sell at a specified price or better that is to be executed only during the Nasdaq Opening Cross. LOO orders shall execute only at the price determined by the Nasdaq Opening Cross and shall be available for automatic execution. LOO orders may be entered, cancelled and cancel/replaced between 7:00 a.m. and 9:28 a.m. without restriction. LOO orders may not be cancelled or corrected after 9:28 a.m.

**(4)** "Market on Open Order" or "MOO" shall mean an order to buy or sell at the market that is to be executed only during the Nasdaq Opening Cross. MOO orders may be entered, cancelled, and cancel/replaced between 7:00 a.m. and 9:28 a.m. and shall execute only at the price determined by the Nasdaq Opening Cross.

**(5)** "Nasdaq Opening Cross" shall mean the process for determining the price at which orders shall be executed at the open and for executing those orders.

**(6)** "Opening Imbalance Only Order" or "OIO" shall mean an order to buy or sell at a specified price or better that may be executed only during the Nasdaq Opening Cross and only against MOO, LOO or Early Market Hours orders. OIO orders may be entered between 7:00 a.m. and 9:29:59 a.m., but they may not be cancelled or modified after 9:28 except to increase the number of shares. OIO sell (buy) orders shall only execute at or above (below) the 9:30 Nasdaq Market Center offer (bid).

**(7)** "Market Hours Orders" shall mean any order that may be entered into the system and designated with a time-in-force of MIOC, MDAY, MGTC. Market Hours Orders shall be designated as "Early Market Hours Orders" if entered into the system prior to 9:28 a.m. and shall be treated as market-on-open and limit-on-open orders, as appropriate, for the purposes of the Nasdaq Opening Cross. Orders entered into the system at 9:28 a.m. or after shall be designated as "Late Market Hours Orders" and shall be treated as imbalance-only orders for the purposes of the cross. Beginning at 9:28 a.m., requests to cancel or modify Market Hours Orders shall be suspended until after completion of the Opening Cross at which time such requests shall be processed, to the extent that such orders remain available within the System.

**(8)** "Open Eligible Interest" shall mean any quotation or any order that may be entered into the system and designated with a time-in-force of SDAY, SGTC, SHEX, or GTMC.

**(b)** Trading Prior To Normal Market Hours. The system shall process all eligible Quotes/Orders at 7:00 a.m.:

**(1)** At 7:00 a.m., the system shall add in time priority all eligible Orders in accordance with each order's defined characteristics.

**(2)** At 9:25 a.m., the system shall open all remaining unopened Quotes in accordance with each firm's instructions.

**(3)** Nasdaq Quoting Market Participants may instruct Nasdaq to open their Quotes as follows:

**(A)** At the price of the firm's quote when the quote was closed by the participant during the previous trading day with a normal unit of trading displayed size;

**(B)** At a price and size entered by the participant between 7:00 a.m. and 9:24:59 a.m.

**(4)** All trades executed prior to 9:30 shall be automatically appended with the ".T" modifier



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**(c)** System securities in which no Nasdaq Opening Cross occurs shall begin trading at 9:30 a.m. by integrating Market Hours orders into the book in time priority and executing in accordance with market hours rules.

**(d)** Processing of Nasdaq Opening Cross. For System securities, the Nasdaq Opening Cross shall occur at 9:30, and market hours trading shall commence when the Nasdaq Opening Cross concludes.

**(1)** Beginning at 9:28 a.m., Nasdaq shall disseminate by electronic means an Order Imbalance Indicator every 5 seconds until market open.

**(2)** (A) The Nasdaq Opening Cross shall occur at the price that maximizes the number of shares of MOO, LOO, OIO, Early Market Hours orders, and executable quotes and orders in the Nasdaq Market Center to be executed.

**(B)** If more than one price exists under subparagraph (A), the Nasdaq Opening Cross shall occur at the price that minimizes any Imbalance.

**(C)** If more than one price exists under subparagraph (B), the Nasdaq Opening Cross shall occur at the entered price at which shares will remain unexecuted in the cross.

**(D)** If more than one price exists under subparagraph (C), the Nasdaq Opening Cross shall occur at the price that minimizes the distance from the bid-ask midpoint of the inside quotation prevailing at 9:30 a.m.

**(E)** If the Nasdaq Opening Cross price established by subparagraphs (A) through (D) is outside the benchmarks established by Nasdaq by a threshold amount, the Nasdaq Opening Cross shall occur at a price within the threshold amounts that best satisfies the conditions of subparagraphs (A) through (D). Nasdaq management shall set and modify such benchmarks and thresholds from time to time upon prior notice to market participants.

**(3)** If the Nasdaq Opening Cross price is selected and fewer than all shares of MOO, LOO, OIO and Early Market Hours Orders that are available in the Nasdaq Market Center would be executed, all Quotes and Orders shall be executed at the Nasdaq Opening Cross price in the following priority:

**(A)** MOO and Early Market Hours market peg orders, with time as the secondary priority;

**(B)** LOO orders, Early Market Hours limit orders, OIO orders, SDAY limit orders, SGTC limit orders, GTMC limit orders, SHEX limit orders, displayed quotes and reserve interest priced more aggressively than the Nasdaq Opening Cross price based on limit price with time as the secondary priority;

**(C)** LOO orders, OIO Orders, Early Market Hours and displayed interest of quotes, SDAY limit orders, SGTC limit orders, GTMC limit orders, and SHEX limit orders at the Nasdaq Opening Cross price with time as the secondary priority;

**(D)** Reserve interest of quotes, SDAY limit orders, SGTC limit orders, and GTMC limit orders and SHEX limit orders at the Nasdaq Opening Cross price with time as the secondary priority; and

**(4)** All Quotes and Orders executed in the Nasdaq Opening Cross shall be executed at the Nasdaq Opening Cross price, trade reported anonymously, and disseminated via a national market system

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plan. The Nasdaq Opening Cross price shall be the Nasdaq Official Opening Price for stocks that participate in the Nasdaq Opening Cross.

Adopted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006; Amended by SR-NASDAQ-2007-008 eff. Feb. 12, 2007; amended by SR-NASDAQ-2007-047 eff. May 1, 2007.

**4753. Nasdaq Halt and Imbalance Crosses**

**(a) Definitions.**

For the purposes of this rule the term:

**(1)** "Imbalance" shall mean the number of shares of Eligible Interest that may not be matched with other order shares at a particular price at any given time.

**(2)** "Order Imbalance Indicator" shall mean a message disseminated by electronic means containing information about Eligible Interest and the price at which such interest would execute at the time of dissemination. The Order Imbalance Indicator shall disseminate the following information:

**(A)** "Current Reference Price" shall mean:

**(i)** The single price at which the maximum number of shares of Eligible Interest can be paired.

**(ii)** If more than one price exists under subparagraph (i), the Current Reference Price shall mean the price that minimizes any Imbalance.

**(iii)** If more than one price exists under subparagraph (ii), the Current Reference Price shall mean the entered price at which shares will remain unexecuted in the cross.

**(iv)** If more than one price exists under subparagraph (iii), the Current Reference Price shall mean:

(a) In the case of an IPO, the price that is closest to the Issuer's Initial Public Offering Price;

(b) In the case of another halt type in which the security has already traded during normal market hours on that trading day, the price that is closest to the last Nasdaq execution prior to the trading halt; and

(c) In the case of another halt type in which the security has not already traded during normal market hours on that trading day, the price that is closest to the previous Nasdaq Official Closing Price.

**(B)** the number of shares of Eligible Interest that are paired at the Current Reference Price;

**(C)** the size of any Imbalance;

**(D)** the buy/sell direction of any Imbalance; and

**(E)** indicative prices at which the Nasdaq Halt Cross would occur if the Nasdaq Halt Cross were to occur at that time. The indicative prices shall be:

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- (i) The Far Clearing Price which shall be the same as the Current Reference Price, and
  - (ii) The Near Clearing Price which shall be the same as the Current Reference Price.
  - (iii) If marketable buy (sell) shares would remain unexecuted above (below) the Near Clearing Price or Far Clearing Price, Nasdaq shall disseminate an indicator for "market buy" or "market sell".
- (3)** "Nasdaq Halt Cross" shall mean the process for determining the price at which Eligible Interest shall be executed at the open of trading for a halted security and for executing that Eligible Interest.
- (4)** "Eligible Interest" shall mean any quotation or any order that may be entered into the system and designated with a time-in-force of SIOC, SDAY, SGTC, MIOC, MDAY, MGTC, SHEX, or GTMC.
- (5)** "Nasdaq Imbalance Cross" shall mean the process for determining when the market for a Nasdaq security is no longer trading in an orderly fashion and for determining the price at which Eligible Interest shall be executed in order to restore orderly trading.
- (b)** Processing of Nasdaq Halt Cross. For Nasdaq-listed securities that are the subject of a trading halt initiated pursuant to Rule 4120(a)(1), (4), (5), (6) or (7), the Nasdaq Halt Cross shall occur at the time specified by Nasdaq pursuant to Rule 4120, and Market hours trading shall commence when the Nasdaq Halt Cross concludes.
- (1)** At the beginning of the Display Only Period and continuing through the resumption of trading, Nasdaq shall disseminate by electronic means an Order Imbalance Indicator every 5 seconds.
- (2)** (A) The Nasdaq Halt Cross shall occur at the price that maximizes the number of shares of Eligible Interest in the Nasdaq Market Center to be executed.
- (B)** If more than one price exists under subparagraph (A), the Nasdaq Halt Cross shall occur at the price that minimizes any Imbalance.
- (C)** If more than one price exists under subparagraph (B), the Nasdaq Halt Cross shall occur at the entered price at which shares will remain unexecuted in the cross.
- (D)** If more than one price exists under subparagraph (C), the Nasdaq Halt Cross shall occur at:
- (i) In the case of an IPO, the price that is closest to the Issuer's Initial Public Offering Price;
  - (ii) In the case of another halt type in which the security has already traded during normal market hours on that trading day, the price that is closest to the last Nasdaq execution prior to the trading halt; and
  - (iii) In the case of another halt type in which the security has not already traded during normal market hours on that trading day, the price that is closest to the previous Nasdaq Official Closing Price.
- (3)** If the Nasdaq Halt Cross price is selected and fewer than all shares of Eligible Interest that are available in the Nasdaq Market Center would be executed, all Eligible Interest shall be executed at the Nasdaq Halt Cross price in price/time priority.

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**(4)** All Eligible Interest executed in the Nasdaq Halt Cross shall be executed at the Nasdaq Halt Cross price, trade reported anonymously, and disseminated via a national market system plan. The Nasdaq Halt Cross price shall be the Nasdaq Official Opening Price for stocks that participate in the Nasdaq Halt Cross unless the stock has already been traded during normal market hours on that trading day.

**(c)** Between 9:30 a.m. and 4:00 p.m. EST, the System will automatically monitor System executions to determine whether the market is trading in an orderly fashion and whether to conduct an Imbalance Cross in order to restore an orderly market in a single Nasdaq Security.

**(1)** An Imbalance Cross shall occur if the System executes a transaction in a Nasdaq Security at a price that is beyond the Threshold Range away from the Triggering Price for that security. The Triggering Price for each Nasdaq Security shall be the price of any execution by the System in that security within the prior 30 seconds. The Threshold Range shall be determined as follows:

<b>Execution Price</b>	<b>Threshold Range Away From Triggering Price</b>
\$1.75 and under	15%
Over \$1.75 and up to \$25	10%
Over \$25 and up to \$50	5%
Over \$50	3%

**(2)** If the System determines pursuant to subsection (1) above to conduct an Imbalance Cross in a Nasdaq Security, the System shall automatically cease executing trades in that security for a 60-second Display Only Period. During that 60-second Display Only Period, the System shall:

(A) maintain all current quotes and orders and continue to accept quotes and orders in that System Security; and

(B) Disseminate by electronic means an Order Imbalance Indicator every 5 seconds.

**(3)** At the conclusion of the 60-second Display Only Period, the System shall re-open the market by executing the Nasdaq Halt Cross as set forth in subsection (b)(2) - (4) above.

**(4)** If the opening price established by the Nasdaq Halt Cross pursuant to subsection (b)(2)(A) - (D) above is outside the benchmarks established by Nasdaq by a threshold amount, the Nasdaq Halt Cross will occur at the price within the threshold amounts that best satisfies the conditions of subparagraphs (b)(2)(A) through (D) above. Nasdaq management shall set and modify such benchmarks and thresholds from time to time upon prior notice to market participants.

**(d)** Nasdaq-listed securities that are the subject of a trading halt initiated pursuant to Rule 4120(a) and in which no Halt Cross occurs, shall open for trading at the time specified by Nasdaq pursuant to Rule 4120 in the following manner:

**(1)** Orders shall be added to the book in time priority.

**(2)** The Nasdaq Official Opening Price for such securities shall be the first Nasdaq market center execution following trade resumption unless the security has already traded during Market hours on that trading day.

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Adopted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006; amended by SR-NASDAQ-2007-067 eff. August 19, 2008.

**4754. Nasdaq Closing Cross**

**(a)** Definitions. For the purposes of this rule the term:

**(1)** "Close Eligible Interest" shall mean any quotation or any order that may be entered into the system and designated with a time-in-force of SDAY, SGTC, MDAY, MGTC, SHEX, or GTMC.

**(2)** "Imbalance" shall mean the number of shares of buy or sell MOC or LOC orders that cannot be matched with other MOC or LOC, Close Eligible Interest or IO order shares at a particular price at any given time.

**(3)** "Imbalance Only Order" or "IO" shall mean an order to buy or sell at a specified price or better that may be executed only during the Nasdaq Closing Cross and only against MOC or LOC orders. IO orders can be entered between 7:00 a.m. and 3:59:59 p.m., but they cannot be modified after 3:50:00 except to increase the number of shares. IO orders can be cancelled between 3:50:00 p.m. and 3:55:00 p.m. only by requesting Nasdaq to correct a legitimate error (e.g., side, size, symbol, price or duplication of an order). IO orders cannot be cancelled after 3:55:00 p.m. for any reason. IO sell (buy) orders will only execute at or above (below) the 4:00:00 System offer (bid).

**(4)** "Limit On Close Order" or "LOC" shall mean an order to buy or sell at a specified price or better that is to be executed only during the Nasdaq Closing Cross. LOC orders can be entered, cancelled, and corrected without restriction between 7:00 a.m. and 3:50:00 p.m. LOC orders can be cancelled between 3:50:00 p.m. and 3:55:00 p.m. only by requesting Nasdaq to correct a legitimate error (e.g., side, size, symbol, price or duplication of an order). LOC orders cannot be cancelled after 3:55:00 p.m. for any reason. LOC Orders will execute only at the price determined by the Nasdaq Closing Cross. All LOC orders must be available for automatic execution.

**(5)** "Market on Close Order or MOC" shall mean an order to buy or sell at the market that is to be executed only during the Nasdaq Closing Cross. MOC orders can be entered, cancelled, and corrected between 7:00 a.m. and 3:50:00 p.m. MOC orders can be cancelled between 3:50:00 p.m. and 3:55:00 p.m. only by requesting Nasdaq to correct a legitimate error (e.g., side, size, symbol, price or duplication of an order). MOC orders cannot be cancelled after 3:55:00 p.m. for any reason. MOC orders will execute only at the price determined by the Nasdaq Closing Cross. All MOC orders must be available for automatic execution.

**(6)** "Nasdaq Closing Cross" shall mean the process for determining the price at which orders shall be executed at the close and for executing those orders.

**(7)** "Order Imbalance Indicator" shall mean a message disseminated by electronic means containing information about MOC, LOC, IO, and Close Eligible Interest and the price at which those orders would execute at the time of dissemination. The Order Imbalance Indicator shall disseminate the following information:

**(A)** "Current Reference Price" shall mean:

- (i) The single price that is at or within the current Nasdaq Market Center best bid and offer at which the maximum number of shares of MOC, LOC, IO and Close Eligible Interest can be paired.

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(ii) If more than one price exists under subparagraph (i), the Current Reference Price shall mean the price that minimizes any Imbalance.

(iii) If more than one price exists under subparagraph (ii), the Current Reference Price shall mean the entered price at which shares will remain unexecuted in the cross.

(iv) If more than one price exists under subparagraph (iii), the Current Reference Price shall mean the price that minimizes the distance from the bid-ask midpoint of the inside quotation prevailing at the time of the order imbalance indicator dissemination.

**(B)** the number of shares represented by MOC, LOC, IO, and Close Eligible Interest that are paired at the Current Reference Price;

**(C)** the size of any Imbalance;

**(D)** the buy/sell direction of any Imbalance; and

**(E)** indicative prices at which the Nasdaq Closing Cross would occur if the Nasdaq Closing Cross were to occur at that time and the percent by which the indicative prices are outside the then current Nasdaq Market Center best bid or best offer, whichever is closer. The indicative prices shall be:

(i) "Far Clearing Price" which shall mean the price at which both the MOC, LOC, and IO, orders would execute, and

(ii) "Near Clearing Price" which shall mean the price at which the MOC, LOC, IO, and Eligible Interest would execute.

(iii) If marketable buy (sell) shares would remain unexecuted above (below) the Near Clearing Price or Far Clearing Price, Nasdaq shall disseminate an indicator for "market buy" or "market sell".

**(b)** Processing of Nasdaq Closing Cross. The Nasdaq Closing Cross will begin at 4:00:00, and post-market hours trading will commence when the Nasdaq Closing Cross concludes.

**(1)** Order Imbalance Indicator. Beginning at 3:50 p.m., Nasdaq shall disseminate by electronic means an Order Imbalance Indicator every 5 seconds until market close.

**(2)** (A) The Nasdaq Closing Cross will occur at the price that maximizes the number of shares of Eligible Interest in the Nasdaq Market Center to be executed.

**(B)** If more than one price exists under subparagraph (A), the Nasdaq Closing Cross shall occur at the price that minimizes any Imbalance.

**(C)** If more than one price exists under subparagraph (B), the Nasdaq Closing Cross shall occur at the entered price at which shares will remain unexecuted in the cross.

**(D)** If more than one price exists under subparagraph (C), the Nasdaq Closing Cross shall occur at: a price that minimizes the distance from the System bid-ask midpoint at the time of the Nasdaq Closing Cross.

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**(E)** If the Nasdaq Closing Cross price established by subparagraphs (A) through (D) above is outside the benchmarks established by Nasdaq by a threshold amount, the Nasdaq Closing Cross will occur at a price within the threshold amounts that best satisfies the conditions of subparagraphs (A) through (D) above. Nasdaq management shall set and modify such benchmarks and thresholds from time to time upon prior notice to market participants.

**(3)** If the Nasdaq Closing Cross price is selected and fewer than all MOC, LOC IO and Close Eligible Interest would be executed, orders will be executed at the Nasdaq Closing Cross price in the following priority:

**(A)** MOC orders, with time as the secondary priority;

**(B)** LOC orders, limit orders, IO orders, displayed quotes and reserve interest priced more aggressively than the Nasdaq Closing Cross price based on price with time as the secondary priority;

**(C)** LOC orders, IO Orders displayed interest of limit orders, and displayed interest of quotes at the Nasdaq Closing Cross price with time as the secondary priority;

**(D)** Reserve interest at the Nasdaq Closing Cross price with time as the secondary priority; and

**(E)** Unexecuted MOC, LOC, and IO orders will be canceled.

**(4)** All orders executed in the Nasdaq Closing Cross will be executed at the Nasdaq Closing Cross price, trade reported anonymously, and disseminated via the consolidated tape. The Nasdaq Closing Cross price will be the Nasdaq Official Closing Price for stocks that participate in the Nasdaq Closing Cross.

**(5)** Auxiliary Procedures. When significant trading volume is expected at the close of Market hours, Nasdaq may apply auxiliary procedures for the Closing Cross to ensure a fair and orderly market. The determination to implement auxiliary procedures for the Closing Cross shall be made by the President of Nasdaq or any Executive Vice President designated by the President. Nasdaq shall inform market participants of such auxiliary procedures as far in advance as practicable. Auxiliary procedures shall include:

**(A)** Setting an earlier time or times for the end of the order entry periods set forth in paragraph (a) for IO, MOC, and LOC orders. Nasdaq may end the order entry period as early as 3:40 p.m.

**(B)** Setting an earlier time for the order modification and cancellation periods in paragraph (a) for IO, MOC, and LOC orders. Nasdaq may end the order modification and cancellation periods as early as 3:40 p.m.

**(C)** Setting an earlier time for the dissemination times and frequencies set forth in paragraph (b) for the Order Imbalance Indicator. Nasdaq may begin disseminating the Order Imbalance Indicator as early as 3:40 p.m. and may increase or decrease the frequency with which the Order Imbalance Indicator is disseminated.

**(D)** Adjusting the threshold values set forth in subparagraph (c)(2)(D) to no greater than 20 percent.

Adopted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

**4755. Order Entry Parameters**

## Text of the Nasdaq Rule 4000 Series

*This version of the 4000 series is effective until April 13, 2009.*

### **(a) System Orders**

**(1) General**—A System order is an order that is entered into the System for display and/or execution as appropriate. Such orders are executable against marketable contra-side orders in the System.

**(A)** All System Orders shall indicate limit price and whether they are a buy, short sale, or long sale. Systems Orders can be designated as Market Hours Immediate or Cancel ("MIOC"), Market Hours Good-till-Cancelled ("MGTC"), Market Hours Day ("MDAY"), System Hours Expire Time ("SHEX"), System Hours Day ("SDAY"), System Hours Immediate or Cancel ("SIOC"), System Hours Good-till-Cancelled ("SGTC"), or Good-til-Market Close "GTMC").

**(B)** A System order may also be designated as Reserve Order, a Pegged Order, a Non-Displayed Order, a Minimum Quantity Order, an Intermarket Sweep Order, a Price to Comply order, a Price to Comply Post order, a Discretionary Order, or a Directed Order.

**(C)** System Hours Pegged Orders, excluding System Hours Pegged orders ultimately sought to be directed to either the New York Stock Exchange ("NYSE") or the American Stock Exchange ("AMEX"), may only be entered between 9:30 a.m. and 4:00 p.m. Eastern Time.

**(2)** Reserved.

**(3) Routing**—All System orders entered by Participants directing or permitting routing to other market centers shall be routed for potential display and/or execution as set forth in Rule 4758. Beginning March 5, 2007, in connection with the trading of securities governed by Regulation NMS, System orders shall be routed for potential display and/or execution in Compliance with Regulation NMS.

**(4) Regulation NMS**—Beginning March 5, 2007, in connection with the trading of securities governed by Regulation NMS, Intermarket Sweep Orders shall be executed exclusively within the System and the entering Participants shall be responsible for compliance with Regulation NMS Order Protection Rule and Locked and Crossed market rule with respect to such orders. Orders eligible for execution outside the System shall be processed in compliance with Regulation NMS, including accessing protected quotations and resolving locked and crossed markets, as instructed.

Adopted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006; amended by SR-NASDAQ-2006-027 eff. Aug. 2, 2006; amended by SR-NASDAQ-2006-037 eff. Oct. 13, 2006; amended by SR-NASDAQ-2007-005 eff. Feb. 5, 2007; amended by SR-NASDAQ-2007-020 eff. Mar. 5, 2007; amended by SR-NASDAQ-2007-065 eff. Oct. 15, 2007.

### **4756. Entry and Display of Quotes and Orders**

**(a) Entry of Orders**—Participants can enter orders into the System, subject to the following requirements and conditions:

**(1)** Participants shall be permitted to transmit to the System multiple orders at a single as well as multiple price levels. Each order shall indicate the amount of Reserve Size (if applicable).

**(2)** The System shall time-stamp an order which shall determine the time ranking of the order for purposes of processing the order.

**(3)** Orders can be entered into the System (or previously entered orders cancelled) from 7:00 a.m. until 8:00 p.m. Eastern Time.



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**(b) Entry or Quotes**—Nasdaq Market Makers and Nasdaq ECNs can enter Quotes into the system from 7:00 a.m. to 8:00 p.m. Eastern Time. When open, Quotes will be processed as System Hours GTC Orders (SGTC). Nasdaq Market Makers and Nasdaq ECNs may elect to utilize the Automatic Quote Refresh functionality. Entry of Quotes will be subject to the requirements and conditions set forth in section (a) above.

**(c) Display of Quotes and Orders**—The System will display quotes and orders submitted to the System as follows:

**(1) System Book Feed**—quotes and orders resident in the System available for execution will be displayed via the System Book Feed.

**(2) Best Priced Order Display** - For each System Security, the aggregate size of all Quotes and Orders at the best price to buy and sell resident in the System will be transmitted for display to the appropriate network processor, unless the aggregate size is less than one round lot in which case the aggregate size will be displayed in the System Book Feed but not be transmitted to a network processor.

**(3) Exceptions**—The following exceptions shall apply to the display parameters set forth in paragraphs (1) and (2) above:

**(A) Reserve Size**—Reserve Size shall not be displayed in the System, but shall be accessible as described in Rule 4757.

**(B) Discretionary Orders**—The discretionary portion of Discretionary Orders shall not be displayed but shall be made available for execution only upon the appearance of contra-side marketable trading interest, and shall be executed pursuant to Rule 4751(f) and Rule 4757.

**(C) Non-Displayed Orders**—Non-Displayed Orders are not displayed in the System, and have lower priority within the System than an equally priced Displayed Order, regardless of time stamp, and shall be executed pursuant to Rule 4757.

**(4) Beginning March 5, 2007**, in connection with the trading of securities governed by Regulation NMS, pursuant to Rule 600(b)(4) of Regulation NMS under the Act, Nasdaq has implemented such systems, procedures, and rules as are necessary to render it capable of meeting the requirements for automated quotations, as defined in Rule 600(b)(3) of Regulation NMS under the Act; and immediately to identify its quotations as manual whenever it has reason to believe it is not capable of displaying automated quotations. Nasdaq has adopted policies and procedures for notifying members and other trading centers that it has reason to believe it is not capable of displaying automated quotations or, once manual, that it has restored the ability to display automated quotations and is preparing to identify its quotation as automated. In addition, Nasdaq has adopted policies and procedures for responding to notices that it receives from other trading centers indicating that they have elected to use the "self-help" exception of Rule 611(b)(1) of Regulation NMS under the Act.

Adopted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006; amended by SR-NASDAQ-2006-027 eff. Aug. 2, 2006; amended by SR-NASDAQ-2007-005 eff. Feb. 5, 2007; amended by SR-NASDAQ-2008-054 eff. June 13, 2008.

### **4757. Book Processing**

**(a) System orders** shall be executed through the Nasdaq Book Process set forth below:

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*This version of the 4000 series is effective until April 13, 2009.*

**(1)** Execution Algorithm - Price/Time — The System shall execute equally priced or better priced trading interest within the System in price/time priority in the following order:

**(A)** Displayed Orders;

**(B)** Non-Displayed Orders, the reserve portion of Quotes and Reserve Orders, in price/time priority among such interest;

**(C)** The discretionary portion of Discretionary Orders as set forth in Rule 4751(f).

**(2)** Decrementation—Upon execution, an order shall be reduced by an amount equal to the size of that execution.

**(3)** Price Improvement—any potential price improvement resulting from an execution in the System shall accrue to the taker of liquidity.

Example:

Buy order resides on Nasdaq book at 10.

Incoming order to sell priced at 9 comes into the System

Order executes at 10 (seller get \$1 price improvement)

Adopted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

### **4758. Order Routing**

#### **(a) Order Routing Process**

**(1)** The Order Routing Process shall be available to Participants from 7:00 a.m. until 8:00 p.m. Eastern Time, and shall route orders as described below: All routing of orders shall comply with Rule 611 of Regulation NMS under the Exchange Act.

**(A)** The System provides three routing options. Of these three, DOT is only available for orders ultimately sought to be directed to either the New York Stock Exchange ("NYSE") or the American Stock Exchange ("AMEX"). The System will consider the quotations only of accessible markets. The three System routing options are:

- (i) DOT ("DOT")—under this option, after checking the System for available shares, orders are sent to other available market centers for potential execution, per entering firm's instructions, before being sent to the destination exchange, so long as the price at such market centers would not violate the Order Protection Rule. Any un-executed portion will thereafter be sent to the NYSE or AMEX, as appropriate, at the order's original limit order price. This option may only be used for orders with time-in-force parameters of either SDAY, SIOC, MDAY, MIOC, GTMC or market-on-open/close. Notwithstanding the foregoing, orders designated for participation in the NYSE or AMEX opening or closing processes will not check the System for available shares prior to routing.
- (ii) Reactive Electronic Only ("STGY")—under this option, after checking the System for available shares, orders are sent to other available market centers for potential execution, per entering

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firm's instructions. When checking the book, the System will seek to execute at the price it would send the order to a destination market center. If shares remain un-executed after routing, they are posted on the book. Once on the book, should the order subsequently be locked or crossed by another accessible market center, the System shall route the order to the locking or crossing market center. With the exception of the Minimum Quantity order type, all time-in-force parameters and order types may be used in conjunction with this routing option.

(iii) Electronic Only Scan ("SCAN")—under this option, after checking the System for available shares, orders are sent to other available market centers for potential execution, per entering firm's instructions, in compliance with Rule 611 under Regulation NMS. When checking the book, the System will seek to execute at the price it would send the order to a destination market center. If shares remain un-executed after routing, they are posted on the book. Once on the book, should the order subsequently be locked or crossed by another market center, the System will not route the order to the locking or crossing market center. With the exception of the Minimum Quantity order type, all time-in-force parameters and order types may be used in conjunction with this routing option.

**(B) Priority of Routed Orders.** Regardless of the routing option selected, orders sent by the System to other markets do not retain time priority with respect to other orders in the System and the System shall continue to execute other orders while routed orders are away at another market center. Once routed by the System, an order becomes subject to the rules and procedures of the destination market including, but not limited to, order cancellation. If a routed order is subsequently returned, in whole or in part, that order, or its remainder, shall receive a new time stamp reflecting the time of its return to the System.

### **(b) Routing Broker**

**(1)** All routing by the System shall be performed by the Nasdaq Stock Market LLC's affiliated broker-dealer, Nasdaq Execution Services LLC, which, in turn, shall route orders to other market centers as directed by the Nasdaq Stock Market LLC.

**(2)** Nasdaq Execution Services LLC will not engage in any business other than: (a) as an outbound router for the Nasdaq Stock Market LLC and (b) any other activities it may engage in as approved by the Commission

**(3)** Nasdaq Execution Services LLC shall operate as a facility, as defined in Section 3(a)(2) of the Act, of the Nasdaq Stock Market LLC.

**(4)** For purposes of SEC Rule 17d-1, the designated examining authority of Nasdaq Execution Services LLC shall be a self-regulatory organization unaffiliated with the Nasdaq Stock Market LLC or any of its affiliates.

**(5)** The Nasdaq Stock Market LLC shall be responsible for filing with the Securities and Exchange Commission rule changes related to the operation of, and fees for services provided by, Nasdaq Execution Services LLC and Nasdaq Execution Services shall be subject to exchange non-discrimination requirements.

**(6)** The books, records, premises, officers, agents, directors and employees of Nasdaq Execution Services LLC as a facility of the Nasdaq Stock Market LLC shall be deemed to be the books, records, premises, officers, agents, directors and employees of the Nasdaq Stock Market LLC for purposes of,

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and subject to oversight pursuant to, the Exchange Act. The books and records of Nasdaq Execution Services LLC as a facility of the Nasdaq Stock market LLC shall be subject at all times to inspection and copying by the Commission.

(7) Use of Nasdaq Execution Services to route orders to other market centers will be optional. Parties that do not desire to use Nasdaq Execution Services LLC must enter orders into the Nasdaq Stock Market LLC as immediate-or-cancel orders or any other order-type available through the Nasdaq Stock Market LLC that is ineligible for routing.

(8) Nasdaq Execution Services LLC shall establish and maintain procedures and internal controls reasonably designed to adequately restrict the flow of confidential and proprietary information between the NASDAQ Stock Market LLC and its facilities (including Nasdaq Execution Services LLC as its routing facility) and any other entity.

Adopted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006; amended by SR-NASDAQ-2006-027 eff. Aug. 2, 2006; amended by SR-NASDAQ-2006-043 eff. Oct. 10, 2006; amended by SR-NASDAQ-2007-005 eff. Feb. 5, 2007; amended by SR-NASDAQ-2007-078 eff. Sept. 7, 2007; amended by SR-NASDAQ-2007-065 eff. Oct. 15, 2007; amended by SR-NASDAQ-2008-054 eff. June 13, 2008; amended by SR-NASDAQ-2008-079 eff. September 26, 2008; amended by SR-NASDAQ-2008-098 eff. December 23, 2008.

### **4759. Reserved**

Reserved

Adopted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006; amended by SR-NASDAQ-2006-043 eff. Oct. 10, 2006; amended by SR-NASDAQ-2007-009 eff. Feb. 20, 2007; amended by SR-NASDAQ-2007-065 eff. Oct. 15, 2007; amended by SR-NASDAQ-2008-054 eff. June 13, 2008.

### **4760. Anonymity**

(a) Transactions executed in the System shall be cleared and settled anonymously. The transaction reports produced by the System will indicate the details of the transactions, and shall not reveal contra party identities.

(b) Nasdaq shall reveal a Participant's identity in the following circumstances:

(1) when a registered clearing agency ceases to act for a participant, or the Participant's clearing firm, and the registered clearing agency determines not to guarantee the settlement of the Participant's trades;

(2) for regulatory purposes or to comply with an order of an arbitrator or court;

(3) if both Participants to the transaction consent;

(4) Unless otherwise instructed by a member, Nasdaq will reveal to a member, no later than the end of the day on the date an anonymous trade was executed, when the member's Quote or Order has been decremented by another Quote or Order submitted by that same member.

Adopted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

### **4761. Adjustment of Open Quotes and/or Orders**

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The Nasdaq Market Center will automatically adjust the price and/or size of open quotes and/or orders in all Nasdaq Market Center eligible securities (unless otherwise noted) resident in the system in response to issuer corporate actions related to a dividend, payment or distribution, on the ex-date of such actions, except where a cash dividend or distribution is less than one cent (\$0.01), as follows:

**(a) Quotes** — All bid and offer side quotes shall be purged from the system.

**(b) Sell Orders** — Sell side orders in Nasdaq-listed and NYSE-listed securities shall not be adjusted by the system and must be modified, if desired, by the entering party, except for reverse splits where such sell side orders shall be purged from the system. Sell side orders in Amex-listed securities shall be adjusted in accordance with the procedures set forth below for Buy Orders in the event of a Stock Dividend or Stock Split.

**(c) Buy Orders** — Buy side orders shall be adjusted by the system based on the particular corporate action impacting the security (i.e. cash dividend, stock dividend, both, stock split, reverse split) as set forth below:

**(1) Odd lot orders** in non-Nasdaq listed securities that result from partial execution rather than order entry shall be cancelled rather than adjusted.

**(2) Cash Dividends:** Buy side order prices shall be first reduced by the dividend amount and the resulting price will then be rounded down to the nearest penny unless marked "Do Not Reduce".

**(3) Stock Dividends and Stock Splits:** Buy side order prices shall be determined by first rounding up the dollar value of the stock dividend or split to the nearest penny. The resulting amount shall then be subtracted from the price of the buy order. Unless marked "Do Not Increase", the size of the order shall be increased by first, (A) multiplying the size of the original order by the numerator of the ratio of the dividend or split, then (B) dividing that result by the denominator of the ratio of the dividend or split, then (C) rounding that result to the next lowest share.

**(4) Dividends Payable in Either Cash or Securities at the Option of the Stockholder:** Buy side order prices shall be reduced by the dollar value of either the cash or securities, whichever is greater. The dollar value of the cash shall be determined using the formula in paragraph (2) above, while the dollar value of the securities shall be determined using the formula in paragraph (3) above. If the stockholder opts to receive securities, the size of the order shall be increased pursuant to the formula in subparagraph (3) above.

**(5) Combined Cash and Stock Dividends/Split:** In the case of a combined cash dividend and stock split/dividend, the cash dividend portion shall be calculated first as per section (1) above, and stock portion thereafter pursuant to sections (2) and/or (3) above.

**(6) Reverse Splits:** All orders (buy and sell) shall be cancelled and returned to the entering firm.

**(d) Open buy and sell orders** that are adjusted by the system pursuant to the above rules, and that thereafter continuously remain in the system, shall retain the time priority of their original entry.

Adopted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006; amended by SR-NASDAQ-2006-043 eff. Oct. 10, 2006; amended by SR-NASDAQ-2008-054 eff. June 13, 2008.

### **4762. Clearly Erroneous Transactions**

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All matters related to clearly erroneous transactions executed in the System shall be initiated and adjudicated pursuant to Rule 11890.

Adopted by SR-NASDAQ-2006-001 eff. Oct. 16, 2006.

**4770. Nasdaq Crossing Network**

**(a)** Definitions. For the purposes of this rule the term:

**(1)** "Nasdaq Reference Price Cross" shall mean the process for executing orders at a predetermined reference price at a randomly selected point in time during a five-second trading window beginning at 10:45 a.m., 12:45 p.m. and 2:45 p.m. Eastern Time during the regular hours session and at 4:30 p.m. during the after hours session.

**(2)** "Nasdaq Reference Price Cross eligible securities" shall mean Nasdaq-listed securities and securities listed on the New York Stock Exchange, the American Stock Exchange or a regional exchange.

**(3)**

**(A)** "Reference Price Cross Order" or "RPC" shall mean a market or limit order to buy or sell in Nasdaq Reference Price eligible securities that may be executed only during a Nasdaq Reference Price Cross. RPC orders shall not be displayed and must be designated with a time-in-force value to participate either:

**(i)** in the next scheduled regular hours cross with unexecuted shares being immediately canceled back to the market participant after that cross (NXT);

**(ii)** in all remaining crosses during the trading day with unexecuted shares being immediately canceled back to the market participant after the final regular hours cross (REG); or

**(iii)** in all remaining crosses in the current day with unexecuted shares immediately canceled back to the market participant after the after hours cross (ALX).

**(B)** Starting at 7:30 a.m. Eastern Time until the time of the last after hours session Reference Price Cross, participants may enter, cancel or correct RPC orders, but such orders shall not be available for execution until the next eligible Reference Price Cross. RPC orders must be entered in round lots with a minimum size of one round lot and may designate a minimum acceptable execution quantity. All RPC orders must be available for automatic execution.

**(b)** Processing of Nasdaq Reference Price Cross.

**(1)** Each Nasdaq Reference Price Cross shall occur during the regular hours session or the after hours session window commencing at such times as may be designated by Nasdaq upon prior notice to market participants.

**(2)** Nasdaq Reference Price Crosses that occur during the regular hours session shall be executed at the midpoint of the national best bid and offer, trade reported without identifying the contra party, and disseminated via the consolidated tape.

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(3) Nasdaq Reference Price Crosses that occur during the after hours session shall execute at the Nasdaq Official Closing Price for Nasdaq-listed securities or at the official closing price of the primary market for securities listed on the New York Stock Exchange, the American Stock Exchange or a regional exchange, shall be trade reported without identifying the contra party, and disseminated via the consolidated tape.

(4) RPC orders will be allocated on a pro-rata basis, such that shares will be allocated pro-rata in round lots to eligible orders based on the original size of the order. If additional shares remain after the initial pro-rata allocation, those shares will continue to be allocated pro-rata to eligible orders until a number of round lots remain that is less than the number of eligible orders. Any remaining shares will be allocated to the order which has designated the smallest minimum acceptable execution quantity. If more than one such order exists, any remaining shares will be allocated to the oldest eligible order. If the allocation to an eligible order would be less than the minimum acceptable execution quantity for that order, the order shall not be eligible for execution in that cross.

(5) If the reference price described in subparagraph (3) above is outside the benchmarks established by Nasdaq by a threshold amount at the time an after hours cross is scheduled to occur, the Nasdaq Reference Price Cross shall not occur for that security. Nasdaq management shall set and modify such benchmarks and thresholds from time to time upon prior notice to market participants.

(6) If the national best bid and offer is crossed at the time of a Reference Price Cross during the regular hours session, the cross shall be delayed for up to five minutes beyond the time the Reference Price Cross was scheduled to occur and shall execute at the midpoint of the national best bid and offer when the quote becomes uncrossed. In the event the quote remains crossed beyond five minutes after the time of the scheduled Reference Price Cross, the cross will not occur and unexecuted NXT orders shall be returned to market participants.

(7) If the national best bid and offer is locked at the time of a Reference Price Cross during the regular hours session, the cross shall execute at the lock price.

(8) If trading in a security is halted for regulatory or other reasons at the time a cross is scheduled to occur, the cross will not occur and all unexecuted NXT orders shall be returned to market participants.

Adopted by SR-NASDAQ-2006-019 eff. July 28, 2006; amended by SR-NASDAQ-2006-042 eff. Oct. 4, 2006; amended by SR-NASDAQ-2008-068 eff. Sept. 1, 2008.

### **4800. Procedures for Review of Nasdaq Listing Determinations**

#### **IM-4800 Removal from Listing**

Rules 4804(e), 4806(e), 4807(f) and 4809(c) provide that Nasdaq will delist an issuer in certain circumstances, following Nasdaq's determination that the issuer no longer meets the requirements for continued listing and after the issuer has received notice of that determination and an opportunity to appeal the determination pursuant to this Rule 4800 Series. This interpretive material describes the steps Nasdaq will follow to effect such a delisting.

Consistent with Exchange Act Rule 12d2-2, to effect a delisting, Nasdaq will provide public notice of its final determination to remove a security from listing by issuing a press release and posting notice on its web site. This public notice will be disseminated no fewer than 10 days before the delisting becomes effective and will remain posted until the delisting is effective. Following such public notification, Nasdaq will file an application on Form 25 with the Commission to delist the security, and will promptly provide a copy of that Form 25 to the issuer. The Form 25, and the delisting of the

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security, will become effective 10 days after it is filed pursuant to Exchange Act Rule 12d2-2(d)(1), unless the Commission postpones such delisting pursuant to Rule 12d2-2(d)(3).

Adopted by SR-NASDAQ-2006-005 eff. July 26, 2006.

**4801. Definitions**

**(a)** The term "Adjudicator" shall mean a member of an Adjudicatory Body.

**(b)** The term "Adjudicatory Body" shall mean a Listing Qualifications Panel, the Listing Council, or the Nasdaq Board.

**(c)** The term "Advisor" shall mean an individual employed by Nasdaq who is advising an Adjudicatory Body with respect to a proceeding under the Rule 4800 Series.

**(d)** The term "Hearings Department" shall mean the Listing Qualifications Hearings Department in the Nasdaq Office of General Counsel.

**(e)** The term "Listing Council" shall mean the Nasdaq Listing and Hearing Review Council, a committee appointed by the Nasdaq Board of Directors pursuant to Article V of the Nasdaq By-Laws whose responsibilities include the review of determinations to limit or prohibit the listing of an issuer's securities made by a Listing Qualifications Panel.

**(f)** The term "Listing Council Decision" shall mean a written decision of the Listing Council.

**(g)** The term "Listing Department" shall mean the Listing Qualifications Department, the department of Nasdaq that is responsible for evaluating the compliance of issuers with the quantitative and qualitative listing standards set forth in the Rule 4000 Series and determining the eligibility for initial or continued listing of an issuer's securities.

**(h)** The term "Listing Qualifications Panel" or "Panel" shall mean an independent panel composed of at least two persons, not employees of the Nasdaq or its affiliates, designated by the Nasdaq Board of Directors.

**(i)** The term "Nasdaq Board" shall mean the Board of Directors of Nasdaq.

**(j)** The term "Panel Decision" shall mean a written decision of a Listing Qualifications Panel.

**(k)** The term "Staff Determination" shall mean either:

**(1)** a written determination by the Listing Department to limit or prohibit the initial or continued listing of an issuer's securities pursuant to Rule 4804; or

**(2)** a public reprimand letter in a case where the Listing Department has determined that the issuer has violated a Nasdaq corporate governance or notification listing standard (other than one required by Rule 10A-3 of the Securities Exchange Act of 1934) and that delisting is not an appropriate sanction. In determining whether to issue a public reprimand letter, the Listing Department shall consider whether the violation was inadvertent, whether the violation materially adversely affected shareholders' interests, whether the violation has been cured, whether the issuer reasonably relied on an independent advisor and whether the issuer has demonstrated a pattern of violations.



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Adopted by SEC Release 34-53128 (Jan. 13, 2006).

**4802. Purpose and General Provisions**

**(a)** The purpose of this Rule 4800 Series is to provide procedures for the independent review of determinations of Nasdaq that prohibit or limit the listing of an issuer's securities on the Nasdaq based upon the Nasdaq Rules, as set forth in the Rule 4000 Series. Securities of issuers that do not meet the quantitative or qualitative listing standards set forth in the Rule 4000 Series are subject to delisting from, or denial of initial listing on, The Nasdaq Stock Market.

**(b)** (1) An issuer may file a written request for an exception to any of the standards set forth in the Rule 4000 Series at any time during the pendency of a proceeding under the Rule 4800 Series.

(2)(A) Subject to the limitation in subparagraph (B), below, a Listing Qualifications Panel may grant exceptions for a period not to exceed 180 days from the date of the Staff Determination with respect to the deficiency for which the exception is granted, and the Listing Council may grant exceptions for a period not to exceed 360 days from the date of the Staff Determination with respect to the deficiency for which the exception is granted, in each case where it deems appropriate.

(B) In the case of a company that fails to file a periodic report (e.g., Form 10-K, 10-Q, 20-F, 40-F, or N-CSR), neither a Listing Qualifications Panel nor the Listing Council may grant an exception for a period to exceed 360 days from the due date of the first such late periodic report. The company can regain compliance with the requirement by filing that periodic report and any other delinquent reports with due dates falling before the end of the exception period. In determining whether to grant an exception, and the length of any such exception, the Panel and Listing Council will consider the company's specific circumstances, including the likelihood that the filing can be made within the exception period, the company's past compliance history, the reasons for the late filing, corporate events that may occur within the exception period, the company's general financial status, and the company's disclosures to the market. This review will be based on information provided by a variety of sources, which may include the company, its audit committee, its outside auditors, the staff of the SEC and any other regulatory body.

**(c)** At each level of a proceeding under the Rule 4800 Series, the Listing Qualifications Panel, the Listing Council, or the Nasdaq Board, as part of its respective review, (1) may request additional information from the issuer or the Listing Department, and (2) may consider such additional information available from any source as the Adjudicatory Body may deem to be relevant. The issuer and the Listing Department shall be afforded written notice and an opportunity to address the significance of any such information requested or considered.

**(d)** At each level of a proceeding under the Rule 4800 Series, an Adjudicatory Body, 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 Nasdaq 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 shall be afforded written notice of such consideration and an opportunity to respond. Furthermore, an Adjudicatory Body may subject the issuer to additional or more stringent criteria for the initial or continued listing of particular securities based on any event, condition, or circumstance that exists or occurs that makes initial or continued listing of the securities inadvisable or unwarranted in the opinion of the Adjudicatory Body, even though the securities meet all enumerated criteria for initial or continued listing on Nasdaq.

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(e) The Listing Department or the Advisor to an Adjudicatory Body, as applicable, shall document the date on which a decision with respect to an issuer is implemented.

(f) A security that has been the subject of a decision by an Adjudicatory Body to delist such security shall be required, prior to re-listing, to comply with the requirements for initial listing. A security that has been suspended but that has not been the subject of such a decision shall be required, prior to re-listing, to comply with requirements for continued listing.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2007-096 eff. Mar. 6, 2008; amended by SR-NASDAQ-2008-085 eff. October 30, 2008.

**4803. Staff Review of Deficiency**

(a) Whenever staff of the Listing Department determines that an issuer does not meet a listing standard set forth in the Rule 4000 Series, staff shall immediately notify the issuer. The issuer shall make a public announcement through the news media disclosing the receipt of this notice, including the Rule(s) upon which it was based. Prior to the release of the public announcement, the issuer shall provide such disclosure to Nasdaq's Market Watch Department, the Listing Department, and the Hearings Department. The public announcement shall be made as promptly as possible, but not more than four business days following receipt of the notice from the Listing Department.

(1) In the case of

(A) all quantitative deficiencies from standards that do not provide a compliance period;

(B) deficiencies from the standards of Rules 4350(c) or (d) or 4360(c) or (d) where the cure period of the Rule is not applicable; or

(C) deficiencies from the standards of Rules 4350(f), (h), (i), (k), (l) or (n), 4360(f) or (i), or 4351;

staff's notice shall provide the issuer with fifteen calendar days to submit a plan to regain compliance with the listing standard; provided, however, that the issuer shall not be provided with an opportunity to submit such a plan if review under the Rule 4800 Series of a prior Staff Determination (other than a Staff Determination that serves as a public reprimand letter as described in Section 4801(k)(2)) with respect to the issuer is already pending. Subject to the restrictions of paragraph (b), staff may extend this deadline upon good cause shown. Upon receipt of the issuer's plan, staff in the Listing Department may request such additional information from the issuer as is necessary to make a determination regarding the likelihood that the plan will allow the issuer to meet the listing standard at issue.

(2) In the case of deficiencies from the standards of Rules 4310(c)(14) and 4320(e)(12), staff's notice shall provide the issuer with 60 calendar days to submit a plan to regain compliance with the listing standard; provided, however, that the issuer shall not be provided with an opportunity to submit such a plan if review under the Rule 4800 Series of a prior Staff Determination (other than a Staff Determination that serves as a public reprimand letter as described in Section 4801(k)(2)) with respect to the issuer is already pending. Staff in the Listing Department may extend this deadline for up to an additional 15 calendar days upon good cause shown and may request such additional information from the issuer as is necessary to make a determination regarding whether to grant such an extension.

(3) In the case of:

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(A) quantitative deficiencies from standards that do provide a compliance period: and

(B) deficiencies from the standards of Rules 4350(c) or (d) or 4360(c) or (d) where the cure period of the Rule is applicable;

staff's notice shall provide the issuer with the applicable compliance or cure period.

(4) In all other cases, staff's notice shall be in the form of a Staff Determination issued pursuant to Rule 4804(a).

(b) (1) Unless review under the Rule 4800 Series of a prior Staff Determination (other than a Staff Determination that serves as a public reprimand letter as described in Rule 4801(k)(2)) with respect to the issuer is already pending, the Listing Department may grant the issuer additional time to regain compliance with a listing standard described in paragraph (a)(1) and (a)(2). The maximum amount of time that the Listing Department may provide is described in paragraph (b)(2), below. Staff in the Listing Department may request such additional information from the issuer as is necessary to make a determination regarding whether to grant an exception. The Listing Department shall prepare a written record describing the basis for granting any exception, and shall provide the issuer with written notice as to the terms of the exception. If the issuer does not regain compliance within the time period provided by all applicable exceptions, the Listing Department shall immediately issue a Staff Determination pursuant to Rule 4804(a). If the Listing Department determines not to grant the issuer additional time to regain compliance, the Listing Department shall immediately issue a Staff Determination pursuant to Rule 4804(a) that includes a description of the basis for denying the exception.

(2) (A) The maximum additional time provided by all exceptions granted by the Listing Department for a deficiency described in Rule 4803(a)(1) is 105 calendar days from the date of staff's notification pursuant to paragraph (a).

(B) The maximum additional time provided by all exceptions granted by the Listing Department for a deficiency described in Rule 4803(a)(2) is 180 calendar days from the due date of the first late periodic report (as extended by Rule 12b-25, if applicable). In determining whether to grant an exception, and the length of any such exception, the Listing Department will consider, and the company should address in its plan of compliance, the company's specific circumstances, including the likelihood that the filing can be made within the exception period, the company's past compliance history, the reasons for the late filing, corporate events that may occur within the exception period, the company's general financial status, and the company's disclosures to the market. This review will be based on information provided by a variety of sources, which may include the company, its audit committee, its outside auditors, the staff of the SEC and any other regulatory body.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-019 eff. July 28, 2006; amended by SR-NASDAQ-2007-021 eff. Mar. 6, 2007; amended by SR-NASDAQ-2008-085 eff. October 30, 2008.

**IM-4803. Staff Review of Deficiency**

As provided in Rule 4803(a)(1)(A), the staff of the Listing Department may accept a plan to regain compliance with respect to quantitative deficiencies from standards that do not themselves provide a compliance period. Such standards include:

Rules 4310(c)(3)(A) and 4310(c)(3)(C)

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Rule 4310(c)(6)

Rule 4310(c)(7) (but only as to the number of publicly held shares, and not as to such shares' market value)

Rule 4320(e)(2)(B)

Rules 4320(e)(4) and (5) (but only as to the number of publicly held shares, and not as to such shares' market value)

Rules 4450(a)(1), (3), and (4)

Rules 4450(b)(1)(B), (b)(2), and (b)(5), and

Rules 4450(h)(1) and (4).

In a case where an issuer fails to comply with the requirement of Rules 4310(c)(3)(C) or 4450(b)(1)(B), the Listing Department shall not accept a plan to achieve compliance with those requirements in the future, since compliance requires stated levels of net income or assets and revenues during completed fiscal years and therefore can only be demonstrated through audited financial statements. Similarly, an issuer may not submit a plan relying on partial-year performance to demonstrate compliance with these standards. An issuer cited for non-compliance with these requirements may, however, submit a plan that demonstrates current or near-term compliance with Rules 4310(c)(3)(A) or 4450(a)(3) (i.e., the alternative listing requirement relating to stockholders' equity), or Rules 4310(c)(3)(B) or 4450(b)(1)(A) (i.e., the alternative listing requirement relating to market value of listed securities).

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-032 eff. Apr. 18, 2007.

**4804. Written Notice of Staff Determination**

**(a)** If the Listing Department reaches a determination to limit or prohibit the initial or continued listing of an issuer's securities or to issue a public reprimand letter, it shall prepare and provide to the issuer a Staff Determination that shall describe the specific grounds for the determination, identify the quantitative standard or qualitative consideration set forth in the Rule 4000 Series that the issuer has failed to satisfy, and provide notice that upon request the issuer shall be provided an opportunity for a hearing under this Rule 4800 Series.

**(b)** An issuer that receives a Staff Determination under Rule 4804(a) shall make a public announcement through the news media disclosing the receipt of the Staff Determination, including the Rule(s) upon which the Staff Determination was based. Prior to the release of the public announcement, an issuer shall provide such disclosure to Nasdaq's Market Watch Department, the Listing Department, and the Hearings Department. The public announcement shall be made as promptly as possible, but not more than four business days following receipt of the Staff Determination.

**(c)** If review under the Rule 4800 Series of a Staff Determination described in Rule 4801(k)(1) is pending and the Listing Department identifies the existence of one or more additional deficiencies with respect to the issuer, the Listing Department shall prepare and provide to the issuer a Staff Determination with respect to such additional deficiencies. If the new Staff Determination is issued

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prior to a Panel hearing with respect to the original Staff Determination, the new Staff Determination shall notify the issuer that it should present its views with respect to the additional deficiencies at the Panel hearing. If the new Staff Determination is issued after a Panel hearing with respect to the original Staff Determination, the new Staff Determination shall inform the issuer that it should present its views with respect to the additional deficiencies in writing within the period specified in the Staff Determination, to allow review of the additional deficiencies as provided under Rule 4802(d).

**(d)** If review under the Rule 4800 Series of a public reprimand letter is pending and the Listing Department identifies the existence of one or more additional deficiencies with respect to the issuer, the Listing Department shall review the additional deficiencies as provided in Rule 4803.

**(e)** If an issuer receives a Staff Determination (other than a Staff Determination that serves as a public reprimand letter as described in Rule 4801(k)(2)) and does not request a hearing within the period specified in Rule 4805, the securities of the issuer will be suspended and Nasdaq will follow the procedures described in IM-4800 and submit an application on Form 25 to the Securities and Exchange Commission to strike the security from listing.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-005 eff. July 26, 2006.

**4805. Request for Hearing**

**(a)** An issuer may, within seven calendar days of the date of the Staff Determination, request either a written or oral hearing to review the Staff Determination. Requests for hearings should be filed with the Hearings Department. Subject to the limitation in paragraph (b), a request for a hearing shall stay the delisting action pending the issuance of a Panel Decision. If no hearing is requested within the seven calendar day period, the right to request review is waived, and the Staff Determination shall take immediate effect. All hearings shall be held before a Listing Qualifications Panel as described in Rule 4806. All hearings shall be scheduled, to the extent practicable, within 45 days of the date that the request for hearing is filed, at a location determined by the Hearings Department. The Hearings Department shall make an acknowledgment of the issuer's hearing request stating the date, time, and location of the hearing, and the deadline for written submissions to the Listing Qualifications Panel. The issuer shall be provided at least 10 calendar days notice of the hearing unless the issuer waives such notice.

**(b)** A request for a hearing shall ordinarily stay the delisting action pending the issuance of a Panel Decision. However, if the Staff Determination relates to deficiencies from the standards of Rules 4310(c)(14) or 4320(e)(12), which require an issuer to timely file its periodic reports with the Commission, the delisting action will only be stayed for 15 calendar days from the deadline to request a hearing unless the issuer specifically requests and the Panel grants a further stay. A request for a further stay must include an explanation of why such a stay would be appropriate and should be included in the issuer's request for a hearing. Based on that submission and any recommendation provided by staff of the Listing Department, the Panel will determine whether to grant the issuer a further stay. In determining whether to grant the stay, the Panel will consider the company's specific circumstances, including the likelihood that the filing can be made within any exception period that could subsequently be granted, the company's past compliance history, the reasons for the late filing, corporate events that may occur within the exception period, the company's general financial status, and the company's disclosures to the market. The Panel will notify the company of its conclusion as soon as is practicable, but in no event more than 15 calendar days following the deadline to request the hearing. In the event the Panel determines not to grant the issuer a stay, the issuer's securities will be immediately suspended and will remain suspended unless the Panel Decision issued after the hearing determines to reinstate the securities.

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(c) The issuer may file a written submission with the Hearings Department stating the specific grounds for the issuer's contention that the Staff Determination was in error or requesting that the Listing Qualifications Panel grant an exception, as permitted by Rule 4802. The issuer may also submit any documents or other written material in support of its request for review, including any information not available at the time of the Staff Determination.

(d) Within 15 calendar days of the date of the Staff Determination, but in no event after the time of the hearing, the issuer must submit a hearing fee to The Nasdaq Stock Market, Inc., to cover the cost of holding the hearing, as follows:

(1) where consideration is on the basis of written submission from the issuer, \$4,000; or

(2) where consideration is on the basis of an oral hearing, whether in person or by telephone, \$5,000.

Adopted by SEC Release 34-53128 (Jan. 13, 2006). Amended by SR-NASDAQ-2008-085 eff. October 30, 2008.

**4806. The Listing Qualifications Panel**

(a) All hearings shall be conducted before a Listing Qualifications Panel. Prior to the hearing, the Listing Qualifications Panel shall review the written record, as defined in Rule 4811. At the hearing, the issuer may make such presentation as it deems appropriate, including the appearance by its officers, directors, accountants, counsel, investment bankers, or other persons. Hearings are generally scheduled to last one hour, but may be extended at the discretion of the Listing Qualifications Panel. The Listing Qualifications Panel may question any representative of the issuer appearing at the hearing. A transcript of oral hearings shall be kept. The record of proceedings before a Listing Qualifications Panel shall be kept by the Hearings Department.

(b) After the hearing, the Listing Qualifications Panel shall issue a Panel Decision that meets the requirements of Rule 4811, and, except as provided in paragraph (c), each member of the Listing Qualifications Panel shall affirmatively approve it. The Panel Decision shall be promptly provided to the issuer and is effective immediately unless it specifies to the contrary. If the Panel determines to delist the issuer, the securities of the issuer will be immediately suspended, unless the Panel Decision specifies to the contrary. The Panel Decision shall provide notice that the issuer may request review of the Panel Decision by the Listing Council within 15 calendar days of the date of the Panel Decision and that the Panel Decision may be called for review by the Listing Council within 45 calendar days from the date of the Panel Decision pursuant to Rule 4807.

(c) If, following the hearing, the Listing Qualifications Panel cannot reach an unanimous decision regarding the matter under review, a Panel Decision shall not be issued and the issuer shall be notified of this circumstance. Thereafter, the issuer shall be provided an additional hearing before a Listing Qualifications Panel composed of three persons who did not participate in the previous hearing. The issuer may determine whether the hearing shall be conducted based on the written record or an oral hearing, whether in person or by telephone. The issuer may submit any documents or other written material in support of its request for review, including any information not available at the time of the initial hearing before the Listing Qualifications Panel. There shall be no fee for the new hearing. After a hearing of a Listing Qualifications Panel convened pursuant to this paragraph (c), the Listing Qualifications Panel shall issue a Panel Decision that meets the requirements of Rule 4811 and that has been affirmatively approved by at least a majority of the Listing Qualifications Panel.

(d)

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(1) In the event that:

(A) a Listing Qualifications Panel exercises its authority under Rule 4802(b) to grant an exception from listing standards in the Rule 4000 Series requiring the issuer to maintain certain levels of stockholders' equity or to timely file periodic reports with the Commission; and

(B) within one year following the date on which the issuer regains compliance with such listing standard, the issuer is found by the Listing Department to be out of compliance with the requirement that was the subject of the exception, and the Panel has not opted to monitor the issuer pursuant to Rule 4806(d)(2),

then, notwithstanding Rule 4803, the issuer shall not be permitted to provide the Listing Department with a plan to regain compliance, and the Listing Department shall not be permitted to grant additional time for the issuer to regain compliance. The Listing Department shall provide the issuer with a Staff Determination, and the issuer may request review by a Panel pursuant to Rule 4805. The Panel shall consider the prior non-compliance when rendering its decision.

(2) In the event that a Listing Qualifications Panel exercises its authority under Rule 4802(b) to grant an exception from any listing standard in the Rule 4000 Series and the issuer regains compliance with all applicable listing standards, the Panel may nevertheless monitor the issuer's continued compliance for a period of up to one year following the date on which the issuer regains compliance if the Panel concludes that there is a likelihood that the issuer will fail to maintain compliance with one or more listing standards during that period. If the Panel or the Listing Department determines that an issuer that is being monitored fails to satisfy any listing standards during the monitoring period, the Panel (or a newly convened Panel if the initial Panel is unavailable) shall promptly schedule an oral hearing with respect to such failure pursuant to Rule 4806(a) (unless the issuer requests consideration based on written submission in lieu of an oral hearing). Notwithstanding Rule 4803, the issuer shall not be permitted to provide the Listing Department with a plan to regain compliance with respect to any new deficiency that arises during the monitoring period, and the Listing Department shall not be permitted to grant additional time for the issuer to regain compliance with respect to any such new deficiency. The Panel shall consider the prior non-compliance when rendering its decision.

(e) If the Panel determines to delist the issuer and the issuer does not timely request review by the Listing Council and the Listing Council does not call the matter for review or withdraws its call for review, Nasdaq will follow the procedures described in IM-4800 and submit an application on Form 25 to the Securities and Exchange Commission to strike the security from listing.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-005 eff. July 26, 2006.

**4807. Review by the Nasdaq Listing and Hearing Review Council**

(a) The issuer may initiate the Listing Council's review of any Panel Decision by making a written request within 15 calendar days of the date of the decision. Requests for review should be addressed to the Listing Council in care of the Nasdaq Office of Appeals and Review. The request shall not operate as a stay of the Panel Decision. Also within 15 calendar days of the date of the Panel Decision, the issuer must submit a fee of \$4,000 to The Nasdaq Stock Market, Inc. to cover the cost of the review. Upon receipt of the request for review and the applicable fee, the Nasdaq Office of Appeals and Review shall make an acknowledgment of the issuer's request stating the deadline for the issuer to provide any written submissions.

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(b) The Listing Council may also consider any Panel Decision upon the request of one or more members of the Listing Council within 45 calendar days of the date of the Panel Decision. The issuer shall be promptly informed of the reasons for the review and shall be provided a deadline to provide a written submission if the issuer wishes. The institution of discretionary review by the Listing Council shall not operate as a stay of the Panel Decision, unless the call for review specifies to the contrary. At the sole discretion of the Listing Council, the call for review of a Panel Decision may be withdrawn at any time prior to the issuance of a decision.

(c) The Listing Council shall consider the written record and, at its discretion, hold additional hearings. Any hearing shall be scheduled, to the extent practicable, within 45 days of the date that a request for review initiated by either the issuer or one or more members of the Listing Council, is made. The Listing Council may also recommend that the Nasdaq Board consider the matter. The record of proceedings before the Listing Council shall be kept by the Nasdaq Office of Appeals and Review.

(d) In each proceeding before the Listing Council, a subcommittee consisting of at least two members of the Listing Council shall review the complete written record. Members of the Listing Council who are not on a subcommittee shall be provided with a written summary of the record prepared by an Advisor, and may, but shall not be required to, review the complete written record.

(e) The Listing Council shall issue a Listing Council Decision that affirms, modifies, or reverses the Panel Decision or that remands the matter to the Listing Department or to the Listing Qualifications Panel for further consideration. The Listing Council Decision shall be affirmatively approved by at least a majority of the Listing Council and shall meet the requirements of Rule 4811. The Listing Council Decision shall provide notice that the Nasdaq Board may call the Listing Council Decision for review at any time before its next meeting which is at least 15 calendar days following the issuance of the Listing Council Decision. The Listing Council Decision shall be promptly provided to the issuer and shall take immediate effect unless it specifies to the contrary. If the Listing Council determines to delist the issuer, the securities of the issuer will be immediately suspended, unless the Listing Council Decision specifies to the contrary.

(f) If the Listing Council determines to delist the issuer and the Nasdaq Board does not call the matter for review or withdraws its call for review, Nasdaq will follow the procedures described in IM-4800 and submit an application on Form 25 to the Securities and Exchange Commission to strike the security from listing.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-005 eff. July 26, 2006.

**4808. Reconsideration by the Listing Qualifications Panel and the Listing and Hearing Review Council**

(a) An issuer may request that the Listing Qualifications Panel reconsider a Panel Decision only upon the basis that a mistake of material fact existed at the time of the Panel Decision. The issuer's request shall be made within seven calendar days of the date of issuance of the Panel Decision. An issuer's request for reconsideration shall not stay a Listing Qualifications Panel delisting determination unless the Listing Qualifications Panel issues a written determination staying the delisting prior to the scheduled date for delisting. An issuer's request for reconsideration shall not toll the time period set forth in Rule 4807(a) for the issuer to initiate the Listing Council's review of the Panel Decision. If the Listing Qualifications Panel grants an issuer's reconsideration request, the Listing Qualifications Panel shall issue a modified decision meeting the requirements of Rule 4806(b) within 15 calendar days following the issuance of the original Panel Decision or lose jurisdiction over the matter. If the Listing Council calls a Panel Decision for review on the same issue that the issuer has requested



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reconsideration by the Listing Qualifications Panel, the Listing Council, in its discretion, may assert jurisdiction over the Panel Decision or may permit the Listing Qualifications Panel to proceed with the reconsideration.

**(b)** An issuer may request that the Listing Council reconsider a Listing Council Decision only upon the basis that a mistake of material fact existed at the time of the Listing Council Decision. The issuer's request shall be made within seven calendar days of the date of issuance of the Listing Council Decision. An issuer's request for reconsideration shall not stay a Listing Council Decision unless the Listing Council issues a written determination staying the decision. If the Listing Council grants an issuer's reconsideration request, the Listing Council shall issue a modified decision meeting the requirements of Rule 4807(e) within 15 calendar days following the issuance of the original Listing Council Decision or lose jurisdiction over the matter.

**(c)** The Listing Qualifications Panel and the Listing Council may correct clerical or other non-substantive errors in their respective decisions either on their own motion or at the request of an issuer. A copy of any such corrected decision shall be provided to the issuer.

Adopted by SEC Release 34-53128 (Jan. 13, 2006).

**4809. Discretionary Review by Nasdaq Board**

**(a)** A Listing Council Decision or a Panel Decision, in a matter where the Listing Qualifications Panel has granted the maximum exception period and the Listing Council is precluded from granting additional time under Rule 4802(b)(2)(B), may be called for review by the Nasdaq Board solely upon the request of one or more Director not later than the next Nasdaq Board meeting that is 15 calendar days or more following the date of the Listing Council or Panel Decision. Such review shall be undertaken solely at the discretion of the Nasdaq Board and will not operate as a stay of the Listing Council or Panel Decision, unless the call for review specifies to the contrary. At the sole discretion of the Nasdaq Board, the call for review of a Listing Council or Panel Decision may be withdrawn at any time prior to the issuance of a decision.

**(b)** If the Nasdaq Board conducts a discretionary review, the review generally shall be based on the written record considered by the Listing Council or Listing Qualifications Panel. However, the Nasdaq Board may, at its discretion, request and consider additional information from the issuer and/or from staff of the Listing Department. If the Board considers additional information, the record of proceedings before the Nasdaq Board shall be kept by the Nasdaq Office of Appeals and Review.

**(c)** If the Nasdaq Board conducts a discretionary review, the issuer shall be provided with a written decision that meets the requirements of Rule 4811. The Nasdaq Board may affirm, modify or reverse the Listing Council or Panel Decision and may remand the matter to the Listing Council, Listing Qualifications Panel, or staff of the Listing Department with appropriate instructions. The decision of the Nasdaq Board will take immediate effect, unless it specifies to the contrary, and represents the final action of Nasdaq. If the Nasdaq Board determines to delist the issuer, the securities of the issuer will be immediately suspended, unless the Nasdaq Board specifies to the contrary, and Nasdaq will follow the procedures described in IM-4800 and submit an application on Form 25 to the Commission to strike the security from listing.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-005 eff. July 26, 2006; amended by SR-NASDAQ-2008-085 eff. October 30, 2008.

**4810. Reserved.**

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Reserved by SEC Release 34-53128 (Jan. 13, 2006).

**4811. Record on Review; Contents of Decisions**

**(a)** Documents in the written record may consist of the following items, as applicable: correspondence between Nasdaq and the issuer, the issuer's public filings, information released to the public by the issuer, and any written submissions or exhibits submitted by either the issuer or the Listing Department, including any written request for an exception as permitted in Rule 4802(b) and any response thereto. Any additional information requested from the issuer or staff of the Listing Department by the Listing Qualifications Panel, Listing Council, or Nasdaq Board as part of the review process shall be included in the written record. The written record shall be supplemented by the transcript of any hearings held during the review process and each decision issued. At each level of review under this Rule 4800 Series, the issuer shall be provided with a list of documents in the written record, and a copy of any documents included in the record that are not in the issuer's possession or control, at least three calendar days in advance of the deadline for issuer submissions, unless the issuer waives such production.

**(b)** In addition to the documents described in paragraph (a), if any additional information is considered as permitted in Rule 4802(c), that information, and any written submission addressing the significance of that information, shall be made part of the record.

**(c)** If additional issues arising under the Rule 4000 Series are considered, as permitted in Rule 4802, the notice of such consideration and any response to such notice shall be made a part of the record.

**(d)** Each Panel Decision, Listing Council Decision, and decision of the Nasdaq Board shall include:

**(1)** a statement describing the procedural history of the proceeding, including investigations or reviews undertaken by the Listing Department;

**(2)** the quantitative standard or qualitative consideration set forth in the Rule 4000 Series that the issuer is alleged to have failed to satisfy;

**(3)** a statement setting forth the findings of fact with respect to the issuer;

**(4)** the conclusions of the Adjudicatory Body as to whether the issuer has failed to satisfy the quantitative standards or qualitative considerations set forth in the Rule 4000 Series;

**(5)** a statement of the Adjudicatory Body in support of the disposition of the principal issues raised by the issuer in the proceeding, and, if applicable, any exception to the Rule 4000 Series as permitted by Rule 4802(b) and the rationale therefor.

**(e)** If a Panel Decision, Listing Council Decision, or decision of the Nasdaq Board concludes that the issuer has failed to satisfy the quantitative standards or qualitative considerations set forth in the Rule 4000 Series, the decision shall either:

**(1)** grant an exception to the Rule 4000 Series as permitted by Rule 4802(b);

**(2)** limit or prohibit the initial or continued listing of the issuer's securities; or

**(3)** serve as a public reprimand letter in a case where the Adjudicatory Body determines that the issuer has violated a Nasdaq corporate governance or notification listing standard (other than one

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required by Rule 10A-3 of the Securities Exchange Act of 1934) and that delisting is not an appropriate sanction. In determining whether to issue a public reprimand letter, the Adjudicatory Body shall consider whether the violation was inadvertent, whether the violation materially adversely affected shareholders' interests, whether the violation has been cured, whether the issuer reasonably relied on an independent advisor and whether the issuer has demonstrated a pattern of violations.

**(f)** An issuer that receives an Adjudicatory Body decision that serves as a public reprimand letter as described in Rule 4811(e)(3) shall make a public announcement through the news media disclosing the receipt of the decision, including the Rule(s) upon which the decision was based. Prior to the release of the public announcement, an issuer shall provide such disclosure to Nasdaq's Market Watch Department, the Listing Department, and the Hearings Department. The public announcement shall be made as promptly as possible, but not more than four business days following receipt of the decision.

Adopted by SEC Release 34-53128 (Jan. 13, 2006).

### **4812. Document Retention Procedures**

Any document submitted to Nasdaq in connection with a Rule 4800 proceeding shall be retained in accordance with applicable record retention policies.

Adopted by SEC Release 34-53128 (Jan. 13, 2006).

### **4813. Delivery of Documents**

Delivery of any document under this Rule 4800 Series may be made by electronic delivery, hand delivery, facsimile, or overnight courier. Delivery shall be considered timely if the electronic delivery, hand delivery, fax, or overnight courier is received on or before the relevant deadline. If an issuer has not specified a facsimile number, email address, or street address, delivery shall be made to the last known facsimile number, email address, and street address. If an issuer is represented by counsel or a representative, delivery may be made to the counsel or representative.

Adopted by SEC Release 34-53128 (Jan. 13, 2006); amended by SR-NASDAQ-2006-019 eff. July 28, 2006.

### **4814. Computation of Time**

**(a)** In computing any period of time under the Rule 4800 Series, the day of the act, event, or default from which the period of time begins to run is not to be included. The last day of the period so computed is included, unless it is a Saturday, Sunday, federal holiday, or Nasdaq holiday in which event the period runs until the end of the next day that is not a Saturday, Sunday, federal holiday or Nasdaq holiday.

**(b)** In the event that the Office of General Counsel determines that notice required to be provided under the Rule 4800 Series was not properly given or that other extenuating circumstances exist, the Office of General Counsel shall adjust the periods of time provided by such rules for the filing of written submissions, the scheduling of hearings, or the performance of other procedural actions by the issuer or an Adjudicator, as applicable, to allow the issuer or the Adjudicator the time contemplated by these rules.

**(c)** An issuer may waive any notice period specified by the Rule 4800 Series.

Adopted by SEC Release 34-53128 (Jan. 13, 2006).

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**4815. Ex Parte Communications; Separation of Adjudicators**

**(a) Ex Parte Communications**

(1) Unless on notice and opportunity for staff of the Listing Department and the issuer to participate, a member of the staff of the Listing Department involved in reaching a Staff Determination, counsel to the Listing Department, an issuer, or counsel to or representative of an issuer, shall not make or knowingly cause to be made an ex parte communication relevant to the merits of a proceeding under this Rule 4800 Series to an Adjudicator who is participating in a decision with respect to that proceeding, or to any Advisor with respect to that proceeding.

(2) No Adjudicator who is participating in a decision with respect to a proceeding under this Rule 4800 Series, and no Advisor with respect to such a proceeding, shall make or knowingly cause to be made an ex parte communication relevant to the merits of that proceeding to an issuer, counsel to or representative of an issuer, a member of the staff of the Listing Department involved in reaching a Staff Determination, or counsel to the Listing Department.

(3) An Adjudicator or Advisor who is participating in or advising with respect to a proceeding who receives, makes, or knowingly causes to be made an ex parte communication relevant to the merits of a proceeding shall place a copy of it, or its substance if it is an oral communication, in the record of the proceeding. Staff of the Listing Department or the issuer, as applicable, shall be permitted to respond to the ex parte communication, and any such response shall be placed in the record of the proceeding.

**(b) Separation of Adjudicators**

(1) Members of a Listing Qualifications Panel and their Advisors who are participating in a proceeding under this Rule 4800 Series are prohibited from making communications relevant to the merits of such proceeding to members of the Listing Council or the Nasdaq Board or their respective Advisors.

(2) Members of the Listing Council and their Advisors are prohibited from making communications relevant to the merits of a proceeding under this Rule 4800 Series to members of a Listing Qualifications Panel who are participating in such proceeding or their Advisors, or members of the Nasdaq Board or their Advisors.

(3) Members of the Nasdaq Board and their Advisors are prohibited from making communications relevant to the merits of a proceeding under this Rule 4800 Series to members of a Listing Qualifications Panel who are participating in such proceeding or their Advisors, or members of the Listing Council or their Advisors.

(4) An Adjudicator or Advisor who is participating in or advising with respect to a proceeding who receives, makes, or knowingly causes to be made a communication prohibited by paragraphs (b)(1)-(3) of this Rule shall place a copy of it, or its substance if it is an oral communication, in the record of the proceeding. Staff of the Listing Department and the issuer shall be permitted to respond to the communication, and any such response shall be placed in the record of the proceeding.

Adopted by SEC Release 34-53128 (Jan. 13, 2006).

**4816. Recusal or Disqualification**

(a) No person shall serve as a member of a Listing Qualifications Panel, or participate as a member of the Listing Council, the Nasdaq Board, or the staff of the Listing Department, in a matter as to which

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*This version of the 4000 series is effective until April 13, 2009.*

he or she has a conflict of interest or bias, or circumstances otherwise exist where his or her fairness might reasonably be questioned. In any such case, the person shall recuse himself or herself, or shall be disqualified as follows:

**(1) Nasdaq Board**

The Chair of the Nasdaq Board shall have authority to order the disqualification of a Director, and a majority of the Nasdaq Board excluding the Chair of the Nasdaq Board shall have authority to order the disqualification of the Chair.

**(2) Listing Council**

A Chair of the Listing Council shall have authority to order the disqualification of a member of the Listing Council, and a majority of the Listing Council excluding any Chairs of the Listing Council shall have authority to order the disqualification of a Chair of the Listing Council.

**(3) Staff of Listing Department; Panelist of Listing Qualifications Panel**

The General Counsel of Nasdaq shall have authority to order the disqualification of (A) a member of the staff of the Listing Department reviewing the qualifications of an issuer, or (B) a member of a Listing Qualifications Panel.

**(b)** At least five days prior to any proceeding under the Rule 4800 Series, the issuer shall provide the Hearings Department or the Advisor to the Listing Council or the Nasdaq Board, as applicable, with names and biographical information of each person that will appear on behalf of the issuer at the proceeding, and the Hearings Department or such Advisor, as applicable, shall provide the issuer with names and biographical information of the Adjudicators for the proceeding; provided, however, that with respect to proceedings before the Listing Council or the Nasdaq Board, the Advisor to the respective Adjudicatory Body may post names and biographical information of each Adjudicator on a publicly available website in lieu of providing them directly to the issuer.

**(c)** An issuer or the staff of the Listing Department may file a request to disqualify an Adjudicator. Such a request shall be based upon a reasonable, good faith belief that a conflict of interest or bias exists or circumstances otherwise exist where the Adjudicator's fairness might reasonably be questioned, and shall be accompanied by a statement setting forth in detail the facts alleged to constitute grounds for disqualification, and the dates on which the party learned of those facts. Such a request shall be filed (1) not later than two business days after the party was provided with the name and biographical information of the Adjudicator, or (2) if the name and biographical information of the Adjudicator has been posted on a website, not later than two business days after the issuer requested Listing Council review or received notice of discretionary review by the Listing Council or the Nasdaq Board. A request for disqualification of an Adjudicator shall be decided by the party with authority to order disqualification of such Adjudicator, who shall promptly investigate whether disqualification is required and issue a written response to the request.

Adopted by SEC Release 34-53128 (Jan. 13, 2006).