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SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No. SR - 2005 - 080
Amendment No. 4

Proposed Rule Change by National Association of Securities Dealers

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial	Amendment	Withdrawal
☐	☑	☐

Section 19(b)(2)	Section 19(b)(3)(A)	Section 19(b)(3)(B)
☑	☐	☐

Pilot	Extension of Time Period for Commission Action	Date Expires
☐	☐	

Rule

☐ 19b-4(f)(1) ☐ 19b-4(f)(2) ☐ 19b-4(f)(3) ☐ 19b-4(f)(4) ☐ 19b-4(f)(5) ☐ 19b-4(f)(6)

Exhibit 2 Sent As Paper Document ☐

Exhibit 3 Sent As Paper Document ☐

Description

Provide a brief description of the proposed rule change (limit 250 characters).

Contact Information

Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name	Kathryn	Last Name	Moore
Title	Assistant General Counsel		
E-mail	kathryn.moore@nasd.com		
Telephone	(202) 974-2974	Fax	(202) 728-8264

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized officer.

Date 06/07/2007

By Gary L. Goldsholle
(Name)

Vice President and Associate General Counsel
(Title)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

Gary Goldsholle,

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

Form 19b-4 Information

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change

Add Remove View

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

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Exhibit Sent As Paper Document ☐

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit 3 - Form, Report, or Questionnaire

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Exhibit Sent As Paper Document ☐

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit 4 - Marked Copies

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

Add Remove View

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

Add Remove View

If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] the National Association of Securities Dealers, Inc. ("NASD") is filing with the Securities and Exchange Commission ("SEC" or "Commission") Amendment No. 4 to SR-NASD-2005-080 to establish new NASD Rule 2290 to address disclosures and procedures concerning the issuance of fairness opinions. This amendment to SR-NASD-2005-080 revises the proposed rule change as proposed in the original filing and previous amendments.[2] The purpose of Amendment No. 4 is to address the comments the Commission received in response to the publication of the proposed rule change in the Federal Register[3] and to propose amendments responsive to the comments where appropriate. Below is the text of the proposed rule change. Proposed new language is underlined.

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

2 SR-NASD-2005-080 was originally filed on June 22, 2005. On November 30, 2005, NASD filed Amendment No. 1 to the proposed rule change, which supplemented the original filing by modifying the scope of the proposed rule change, and made certain clarifications to the rule text. Amendment No. 2 was filed on January 25, 2006 and added clarifying language to the rule text. Amendment No. 3, filed on March 1, 2006, was a technical amendment and replaced and superseded the original filing, as amended, in its entirety.

3 See Securities Exchange Act Release No. 53598 (April 4, 2006), 71 FR 18395 (April 11, 2006) (Notice of Filing of SR-NASD-2005-080).

2200. COMMUNICATIONS WITH CUSTOMERS AND THE PUBLIC

* * * * *

2290. Fairness Opinions

(a) Disclosures

If at the time a fairness opinion is issued to the board of directors of a company the member issuing the fairness opinion knows or has reason to know that the fairness opinion will be provided or described to the company's public shareholders, the member must disclose in the fairness opinion:

(1) if the member has acted as a financial advisor to any party to the transaction that is the subject of the fairness opinion, and, if applicable, that it will receive compensation that is contingent upon the successful completion of the transaction, for rendering the fairness opinion and/or serving as an advisor;

(2) if the member will receive any other significant payment or compensation contingent upon the successful completion of the transaction;

(3) any material relationships that existed during the past two years or that are mutually understood to be contemplated in which any compensation was received or is intended to be received as a result of the relationship between the member and any party to the transaction that is the subject of the fairness opinion;

(4) if any information that formed a substantial basis for the fairness opinion that was supplied to the member by the company requesting the opinion concerning the companies that are parties to the transaction has been

independently verified by the member, and if so, a description of the information or categories of information that were verified;

(5) whether or not the fairness opinion was approved or issued by a fairness committee; and

(6) whether or not the fairness opinion expresses an opinion about the fairness of the amount or nature of the compensation to any of the company's officers, directors or employees, or class of such persons, relative to the compensation to the public shareholders of the company.

(b) Procedures

Any member issuing a fairness opinion must have written procedures for approval of a fairness opinion by the member, including:

(1) the types of transactions and the circumstances in which the member will use a fairness committee to approve or issue a fairness opinion, and in those transactions in which it uses a fairness committee:

(A) the process for selecting personnel to be on the fairness committee;

(B) the necessary qualifications of persons serving on the fairness committee;

(C) the process to promote a balanced review by the fairness committee, which shall include the review and approval by persons who do not serve on the deal team to the transaction; and

(2) the process to determine whether the valuation analyses used in the fairness opinion are appropriate.

* * * * *

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by the Board of Directors of NASD Regulation, Inc. at its meeting on April 21, 2004, which authorized the filing of the rule change with the SEC. The Board of Governors of NASD had an opportunity to review the proposed rule change at its meeting on April 22, 2004. No other action by NASD is necessary for the filing of the proposed rule change. Section 1(a)(ii) of Article VII of the NASD By-Laws permits the Board of Governors of NASD to adopt NASD Rules without recourse to the membership for approval.

NASD will announce the effective date of the proposed rule change in a Notice to Members to be published no later than 60 days following Commission approval. The effective date will be 30 days following publication of the Notice to Members announcing Commission approval.

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

(a) Purpose

This Amendment No. 4 to SR-NASD-2005-080 responds to the comments received by the Commission in response to the notice of proposed rulemaking published

in April 2006 in the Federal Register[4] regarding proposed new NASD Rule 2290 to address disclosures and procedures concerning the issuance of fairness opinions ("Original Proposal"), and makes several amendments to the text of the proposed rule change. NASD proposed new Rule 2290 because it has been concerned that the disclosures provided in fairness opinions may not sufficiently inform public shareholders about potential conflicts of interest that may exist between the firm rendering the fairness opinion and the parties to the transaction that is the subject of the fairness opinion. NASD believes that rules for disclosure about potential conflicts of interest aimed at broker-dealers rendering fairness opinions that are complementary to the SEC's current proxy rules, which apply to issuers, would be beneficial. In addition, NASD believes that broker-dealers should develop greater specificity in their written supervisory procedures to identify and manage potential conflicts of interest in rendering fairness opinions.

The Commission received eight comment letters in response to the proposed rulemaking.[5] Four commenters expressed support for the proposed rule change and four expressed no opinion. Many of the commenters, however, expressed concerns regarding particular provisions of the proposed rule change. NASD staff's response to the

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4 See Securities Exchange Act Release No. 53598 (April 4, 2006), 71 FR 18395 (April 11, 2006) (Notice of Filing of SR-NASD-2005-080).

5 Letter from The Committee on Securities Regulation, New York Bar Association, dated May 11, 2006; Letter from The Special Committee on Mergers, Acquisitions and Corporate Control Contests of the Association of the Bar of the City of New York dated May 3, 2006; Letter from Houlihan Lokey Howard & Zukin dated May 2, 2006; Letter from Securities Industry Association dated May 2, 2006 ("SIA Letter"); Letter from Council of Institutional Investors dated May 1, 2006; Letter from Sutter Securities Incorporated dated May 1, 2006 ("Sutter Letter"); Letter from Columbia University graduate School of Business dated May 1, 2006; and Letter from Kane & Company, Inc. dated May 1, 2006.

comment letters is provided below.

(1) Disclosures

In paragraph (a)(1) of the Original Proposal, NASD proposed that a member disclose in any fairness opinion that may be provided, or described, or otherwise referenced to public shareholders, whether it has acted as a financial advisor to any transaction that is the subject of the fairness opinion, and, if applicable, that it will receive compensation for: (A) rendering the fairness opinion that is contingent upon the successful completion of the transaction, or (B) serving as an advisor that is contingent upon the successful completion of the transaction. Two commenters were concerned that a member may not know at the time it issues the fairness opinion that the opinion will be given to shareholders and could unknowingly violate the rule if the opinion is later distributed to shareholders. The commenters sought greater clarity as to when the additional disclosures would be required. In response to these comments, NASD has amended the proposed rule change to require the additional disclosures specified in Rule 2290(a)(1) through (6) only if at the time the fairness opinion is issued to the board of directors of the company the member knows or has reason to know that the fairness opinion will be provided or described to public shareholders of the company that is receiving the fairness opinion. A member will be deemed to have a reason to know that the fairness opinion will be provided or described to public shareholders if, for example, the structure of the transaction will require a shareholder vote. NASD has deleted the "otherwise referenced" language as it believes that the existing language is sufficient to illustrate the situations in which the Rule would apply. NASD also believes that

reference to the board of directors would include any special committee or other subset or committee of the board of directors that receives the fairness opinion. Further, NASD has revised the rule language to provide that the disclosures are required when the fairness opinion is provided or described to *the company's* public shareholders.

Two commenters also recommended amending the rule text throughout the proposed rule change to clarify that advisors act for a party, not a transaction. NASD staff has made this clarification. Accordingly, in paragraph (a)(1), the proposed rule change has been amended to provide "if the member has acted as a financial advisor to any party to the transaction that is the subject of the fairness opinion . . . ." Similar clarifying changes have been made in additional sections of the proposed rule change.

One commenter generally supported the proposed disclosures in paragraphs (a)(1) through (3) but recommended that NASD clarify that disclosure regarding contingent compensation and material relationships does not constitute an acknowledgement that a conflict of interest exists. NASD does not believe that the recommended clarification is necessary. The purpose of the disclosures in the proposed rule change is to inform shareholders about the existence of any contingent compensation and/or material relationships between the member issuing the fairness opinion and the companies that are parties to the transaction to allow the shareholders to evaluate whether a conflict of interest exists, and if so, the extent of that conflict.

One commenter suggested that the disclosures of contingent compensation arrangements and material compensation relationships in paragraphs (a)(1) through (3) should be expanded to include the actual dollar amounts. As noted in the Original

Proposal, NASD intends that the disclosures in paragraphs (a)(1) through (3) of the proposal be descriptive rather than quantitative. Moreover, the Commission specifically sought comment on whether the disclosures required by Rule 2290(a)(1) through (3) should be quantified and while two commenters favored quantifying these disclosures, NASD continues to believe it is sufficient for investors to be informed that such contingent compensation and/or material relationships exist.

Paragraph (a)(2) in the Original Proposal would require disclosure of whether a member issuing a fairness opinion will receive any other payment or compensation contingent upon the successful completion of the transaction. One commenter was concerned that this provision was overbroad and that firms would be unable to comply with the provision. The commenter believed that "member firms do not have the ability to track whether they would receive any payment or compensation, no matter how small or remotely related to the transaction, from any client of that firm contingent upon the successful completion of the transaction" (emphasis in original).[6] The purpose of paragraph (a)(2) is to avoid attempts to circumvent the rule by re-characterizing payments as something other than for advisory services. NASD continues to believe the "catch-all" provision is necessary to achieve the purposes of the rule, but has sought to alleviate compliance burdens by requiring disclosure of only "significant" payments or compensation contingent upon the successful completion of the transaction. NASD has chosen not to establish a particular dollar or percentage figure out of a concern that establishing a specific figure may become a de facto standard for such payments.

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6 SIA Letter at 4.

Moreover, any specified figure may be too high or low depending on the particular facts and circumstances. Given the nature of the proposed rule change is to inform investors of conflicts of interest, and that paragraph (a)(2) is to prevent circumvention of the provisions in paragraph (a)(1), the existence of the types of de minimis fees noted by commenters (such as trading fees or other small incremental fees from account assets or activity) would not be required to be disclosed. NASD believes that a "significant" payment or contingent compensation is one that a reasonable reader of the fairness opinion would have an interest in knowing about in order to assess whether the member authoring the fairness opinion has a potential conflict of interest.

In addition, the commenter was concerned that the disclosure requirement in Paragraph (a)(2) would compel members to collect confidential information over internal walls or other information barriers established specifically to maintain confidentiality. This commenter raised similar concerns with respect to other disclosure requirements of this Rule. NASD acknowledges the commenter's concern and believes that none of the Rule's disclosure provisions would require a member to breach any of its confidentiality obligations.

In the Original Proposal, paragraph (a)(3) would require disclosure of any material relationships that existed during the past two years or is mutually understood to be contemplated, in which any compensation was received or is intended to be received as a result of the relationship between the member and the companies that are involved in the transaction that is the subject of the fairness opinion. One commenter recommended that the disclosure of any future relationship should be limited to three months from the

date of the transaction. Several commenters noted concerns that the requirement was overbroad and implies that members must breach confidential obligations or make premature disclosures of non-public information. NASD notes that this provision is based on Item 1015(b)(4) of the Commission's Regulation M-A.[7] Thus, NASD does not believe that this requirement will cause any confidential information to be disclosed. Further, NASD notes, as stated in the Original Proposal, that the disclosures are even less specific than Item 1015(b)(4) inasmuch as the disclosures of "material relationships" in the proposed rule change are descriptive rather than quantitative. Consequently, NASD has not modified this provision as suggested by the commenters. NASD did, however, amend the provision to clarify that each of the material relationships should be identified in the fairness opinion.

In addition, in the Original Proposal, NASD indicated that it would review the comment letters to determine whether to require disclosure regarding material relationships between the member and affiliates of the companies that are party to the transaction. The commenters were generally opposed to this change and NASD is not proposing such a disclosure requirement.

Paragraph (a)(4) in the Original Proposal would require disclosure of the categories of information that formed a substantial basis for the fairness opinion that was

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[7] 17 CFR 229.1015(b)(4). In the Original Proposal, NASD noted that proposed rule change differs slightly from Item 1015(b)(4) in that the proposed rule change applies to a material relationship between "the member and the companies" involved in the transaction, whereas Item 1015(b)(4) applies only to the member (and its affiliates) and the company (and its affiliates) for which the member is rendering the fairness opinion. NASD believes that investors should be informed of material relationships between the firm authoring the fairness opinion and the companies involved on both sides of the transaction.

supplied to the member by the company requesting the opinion concerning the companies involved in the transaction and whether any such information has been independently verified by the member. Two commenters believed that this requirement should be deleted stating that it is not clear what it would mean to "verify" the information. One commenter asserted that in most cases this information could not be verified so the disclosure of the categories of information would be meaningless for the investor. As noted in the Original Proposal, NASD did not intend to require members to independently verify information provided to the member. Rather, the disclosure was intended to provide a public shareholder with information concerning the extent to which information relied on by the member was verified. Upon further review, however, NASD believes that disclosing the categories of information that formed a substantial basis for the fairness opinion would not provide meaningful guidance to the investor, particularly when this information is not "verified." Accordingly, NASD proposes to modify this requirement to retain the provision requiring disclosure if any information that formed a substantial basis for the fairness opinion that was supplied by the company requesting the opinion has been verified and, if so, requiring a description of the verified information or categories of this information. NASD proposes to eliminate the requirement to list each category of information when such information has not been verified. When no information has been verified, a blanket statement to that effect, as is common practice today, would be sufficient. On the other hand, those firms that do independently verify the information supplied to them concerning the companies that are parties to the transaction must disclose that fact. In those instances, NASD believes that a member

making such a representation may also wish to explain in the fairness opinion its process or standards for independent verification.

Paragraph (a)(5) of the Original Proposal would require disclosure of whether the fairness opinion was approved or issued by a fairness committee. Two commenters noted that most firms already have such a committee. One commenter believed that the disclosure was not material and may create a misleading impression that a fairness opinion rendered by fairness committee is substantively better than one not approved by a committee. The commenter suggested, however, that if the provision is retained, NASD should revise the rule text to acknowledge that a fairness committee may not always be called a "fairness committee" within a particular firm. NASD believes that fairness opinions that are approved by a fairness committee that follows the procedures in the proposed rule generally are less susceptible to conflicts and that fairness opinions should include disclosure regarding whether a fairness committee was used. Regarding the term "fairness committee," NASD also believes that the term would include any committee or group that approves a fairness opinion in accordance with the requirements of paragraph (b) regardless of whether the member calls it a "fairness committee." In addition, NASD is amending the rule language to clarify that members must specifically disclose whether or not a fairness committee approved or issued the fairness opinion.

Finally, NASD proposes to add a disclosure requirement in new paragraph (a)(6) to require the member to disclose whether or not the fairness opinion expresses an opinion about the fairness of the amount or nature of the compensation to any of the company's officers, directors or employees, or class of such persons, relative to the compensation to the public shareholders of the company. This provision was added in light of the proposed revisions to paragraph (b)(3), which are discussed below.

(2) Procedures

In the Original Proposal, paragraph (b)(1) contains the procedures members must follow in approving a fairness opinion, including the types of transactions and the circumstances in which the member will use a fairness committee to approve or issue a fairness opinion, and in those transactions in which it uses a fairness committee: (A) the process for selecting personnel to be on the fairness committee; (B) the necessary qualifications of persons serving on the fairness committee; and (C) the process to promote a balanced review by the fairness committee, including review and approval by persons who do not serve on or advise the "deal team" to the transaction. One commenter suggested requiring "written" procedures since NASD refers to having written procedures in the rule filing but this is not indicated in the rule text itself. NASD agrees and has made the recommended change.

In addition, two commenters recommended revising paragraph (b)(1)(C). They noted that persons who advise the deal team often consult with the fairness committee regarding, for instance, valuation techniques, and that this advice should not be impaired. They further believe that that the proposed rule change implies that consultation is not

permissible. They suggested deleting the phrase "or advise." NASD believes that these commenters misunderstand this provision of the proposed rule change. Paragraph (b)(1)(C) does not require that the fairness committee be comprised entirely of persons not serving on or advising the deal team. Rather, the provision requires that the member have procedures to promote a balanced review by including on the fairness committee persons who are not serving on or advising the deal team. Nevertheless, NASD believes that the deletion of the phrase "or advise" as well as revising the rule text to provide that a member have procedures "to promote a balanced review by the fairness committee, which shall include the review and approval of persons who do not serve on the deal team" may help alleviate confusion. NASD notes, however, that whether a person is considered to be part of the deal team requires an analysis of the particular facts and circumstances, and would not be determined by whether a person is included on all document distributions or participated in certain meetings. The determination of whether a person is part of a deal team would depend on the nature and substance of his or her contacts and the advice rendered to the firm.

Paragraph (b)(2) of the Original Proposal would require members to have a process to determine whether the valuation analyses used in the fairness opinion are appropriate. In addition, paragraph (b)(2) originally provided that the member's procedures would have to state the extent to which the appropriateness of the use of such valuation analyses is determined by the type of company or transaction that is the subject of the fairness opinion. However, upon further review, NASD staff has deleted this second requirement as it believes that a specific requirement addressing the detail

regarding the impact of the type of company or transaction on the valuation analyses is not necessary.

Finally, paragraph (b)(3) in the Original Proposal would require members to have a process to evaluate whether the amount and nature of the compensation from the transaction underlying the fairness opinion benefiting any individual officers, directors or employees, or class of such persons, relative to the benefits to shareholders of the company, is a factor in reaching a fairness determination. Three commenters believed that this paragraph should be deleted because, in their view, the rule implies that members must make a judgment as to the appropriateness of compensation to insiders relative to the compensation to be paid to shareholders. They noted that members issuing fairness opinions do not have the expertise to evaluate executive compensation matters and that the appropriateness of management compensation is beyond the scope of a fairness opinion. They represented that an insider's compensation in general is not a factor in rendering a fairness opinion and, therefore, this provision does not make sense in terms of how members perform a fairness opinion evaluation. One commenter was concerned that such a requirement would result in significant delay and additional expense in the negotiation of M&A transactions. The commenter further believed that current SEC rules already require extensive disclosure of the interests of the insiders in the proposed transaction and that such rules better address NASD's concern over conflicts of interest. One commenter believed that this provision was uniquely prescriptive in an otherwise non-prescriptive approach in the balance of the rule in that

the provision highlights one aspect of the transaction that may raise many financial issues and requires that it must be specifically addressed through internal procedures.

NASD believes that these commenters generally misunderstood the proposed requirement. NASD does not believe that members issuing fairness opinions should review the propriety of preexisting arrangements (such as golden parachutes) as such matters should be treated like any other preexisting fixed or contingent liability of the corporation that cannot be altered by the terms of any change of control transaction. The intent of the proposed requirement was that firms consider the extent to which the differential in remuneration between management and other shareholders accruing from the deal proceeds, for which there was no prior contractual commitment, is a factor in determining the fairness of the transaction to shareholders. In addition, the procedure required by the original provision was intended to guard against the potential conflict of interest between the member issuing the fairness opinion and those insiders who would be gaining an economic benefit from the transaction, and who generally are in a position to make determinations about which member will perform the fairness opinion evaluation. At the same time, NASD does not believe its members should opine on matters outside their expertise. Therefore, upon further analysis, NASD proposes to delete the procedures in (b)(3) and instead require the new disclosure in paragraph (a)(6). As noted above, the new disclosure in paragraph (a)(6) would require a member to disclose whether or not the fairness opinion expresses an opinion about the fairness of the amount or nature of the compensation to any of the company's officers, directors or employees, or class of such persons, relative to the compensation to the public

shareholders of the company. NASD believes that the disclosure suitably highlights to the investor the potential conflict of interest between the member issuing the fairness opinion and the issuer receiving the opinion by requiring disclosure of whether the member did or did not take into account the amount and nature of compensation flowing to certain insiders relative to the benefits to shareholders in reaching a fairness determination.

(3) Additional Comments

One commenter suggested that NASD should require members to establish procedures to determine under what circumstances their fairness opinions should be updated, and to address, prior to public distribution of an opinion, whether that opinion should be reaffirmed or withdrawn. The commenter further suggested that in the event a non-updated fairness opinion is included in materials sent to shareholders, the member should be required to disclose the basis on which it determined not to update the opinion.[8] The need to update fairness opinions is not germane to the primary purpose of the proposed rule, which is to address potential conflicts of interest. Of course, the board of directors could request an updated opinion as a part of engaging a firm to provide the fairness opinion.

In addition, in the proposed rule change published in the Federal Register, the Commission solicited comments on several additional proposed disclosures. In general, the commenters did not support these additional disclosure items. In the NASD's view, the proposed rule change requiring fairness opinion disclosures and procedures would

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[8] Sutter Letter at 2.

adequately and appropriately address potential conflicts of interest by members issuing fairness opinions. Accordingly, the additional proposed disclosures do not appear to be necessary at this time to effect the regulatory purposes of the proposed rule.

As noted in Item 2 above, NASD will announce the effective date of the proposed rule change in a Notice to Members to be published no later than 60 days following Commission approval. The effective date will be 30 days following publication of the Notice to Members announcing Commission approval.

(b) Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[9] which requires, among other things, that NASD rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that investors and the public interest will benefit from additional disclosure of potential conflicts of interest in connection with fairness opinions rendered by broker-dealers. NASD also believes that members should develop and adhere to more detailed procedures to mitigate potential conflicts in rendering fairness opinions.

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

NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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[9] 15 U.S.C. 78o–3(b)(6).

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Commission published the proposed rule change in the Federal Register on April 11, 2006. The comment period closed on May 2, 2006. The Commission received eight comments in response to the Federal Register publication of the proposal. The comments are summarized above.

6. Extension of Time Period for Commission Action

NASD consented to an extension of the time period for Commission action until July 23, 2007, or such later date as may be consented to by NASD.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Exhibits

Exhibit 1. Completed notice of proposed rule change for publication in the Federal Register.

Exhibit 4. Exhibit 4 shows the full text of the rule change marking changes from the originally filed proposed rule change and Amendments Nos. 1, 2 and 3, with the original language changes shown as if adopted and the new language market to show additions and deletions.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- ; File No. SR-NASD-2005-080)

Self-Regulatory Organizations: National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change Relating to Fairness Opinions

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on , the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("SEC" or "Commission") and amended on November 30, 2005, January 25, 2006 and March 1, 2006[3] the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

NASD is proposing to establish new NASD Rule 2290 to address disclosures and procedures concerning the issuance of fairness opinions. Below is the text of the

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

2 17 CFR 240.19b-4.

3 SR-NASD-2005-080 was originally filed on June 22, 2005. On November 30, 2005, NASD filed Amendment No. 1 to the proposed rule change, which supplemented the original filing by modifying the scope of the proposed rule change, and made certain clarifications to the rule text. Amendment No. 2 was filed on January 25, 2006 and added clarifying language to the rule text. Amendment No. 3, filed on March 1, 2006, was a technical amendment and replaced and superseded the original filing, as amended, in its entirety.

proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

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2200. COMMUNICATIONS WITH CUSTOMERS AND THE PUBLIC

* * * * *

2290. Fairness Opinions

(a) Disclosures

If at the time a fairness opinion is issued to the board of directors of a company the member issuing the fairness opinion knows or has reason to know that the fairness opinion will be provided or described to the company's public shareholders, the member must disclose in the fairness opinion:

(1) if the member has acted as a financial advisor to any party to the transaction that is the subject of the fairness opinion, and, if applicable, that it will receive compensation that is contingent upon the successful completion of the transaction, for rendering the fairness opinion and/or serving as an advisor;

(2) if the member will receive any other significant payment or compensation contingent upon the successful completion of the transaction;

(3) any material relationships that existed during the past two years or that are mutually understood to be contemplated in which any compensation was received or is intended to be received as a result of the relationship between the member and any party to the transaction that is the subject of the fairness opinion;

(4) if any information that formed a substantial basis for the fairness opinion that was supplied to the member by the company requesting the opinion concerning the companies that are parties to the transaction has been independently verified by the member, and if so, a description of the information or categories of information that were verified;

(5) whether or not the fairness opinion was approved or issued by a fairness committee; and

(6) whether or not the fairness opinion expresses an opinion about the fairness of the amount or nature of the compensation to any of the company's officers, directors or employees, or class of such persons, relative to the compensation to the public shareholders of the company.

(b) Procedures

Any member issuing a fairness opinion must have written procedures for approval of a fairness opinion by the member, including:

(1) the types of transactions and the circumstances in which the member will use a fairness committee to approve or issue a fairness opinion, and in those transactions in which it uses a fairness committee:

(A) the process for selecting personnel to be on the fairness committee;

(B) the necessary qualifications of persons serving on the fairness committee;

(C) the process to promote a balanced review by the fairness committee, which shall include the review and approval by persons who do not serve on the deal team to the transaction; and

(2) the process to determine whether the valuation analyses used in the fairness opinion are appropriate.

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

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

This Amendment No. 4 to SR-NASD-2005-080 responds to the comments received by the Commission in response to the notice of proposed rulemaking published in April 2006 in the Federal Register[4] regarding proposed new NASD Rule 2290 to address disclosures and procedures concerning the issuance of fairness opinions ("Original Proposal"), and makes several amendments to the text of the proposed rule

[4] See Securities Exchange Act Release No. 53598 (April 4, 2006), 71 FR 18395 (April 11, 2006) (Notice of Filing of SR-NASD-2005-080).

change. NASD proposed new Rule 2290 because it has been concerned that the disclosures provided in fairness opinions may not sufficiently inform public shareholders about potential conflicts of interest that may exist between the firm rendering the fairness opinion and the parties to the transaction that is the subject of the fairness opinion. NASD believes that rules for disclosure about potential conflicts of interest aimed at broker-dealers rendering fairness opinions that are complementary to the SEC's current proxy rules, which apply to issuers, would be beneficial. In addition, NASD believes that broker-dealers should develop greater specificity in their written supervisory procedures to identify and manage potential conflicts of interest in rendering fairness opinions.

The Commission received eight comment letters in response to the proposed rulemaking.[5] Four commenters expressed support for the proposed rule change and four expressed no opinion. Many of the commenters, however, expressed concerns regarding particular provisions of the proposed rule change. NASD staff's response to the comment letters is provided below.

(1) Disclosures

In paragraph (a)(1) of the Original Proposal, NASD proposed that a member disclose in any fairness opinion that may be provided, or described, or otherwise

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5 Letter from The Committee on Securities Regulation, New York Bar Association, dated May 11, 2006; Letter from The Special Committee on Mergers, Acquisitions and Corporate Control Contests of the Association of the Bar of the City of New York dated May 3, 2006; Letter from Houlihan Lokey Howard & Zukin dated May 2, 2006; Letter from Securities Industry Association dated May 2, 2006 ("SIA Letter"); Letter from Council of Institutional Investors dated May 1, 2006; Letter from Sutter Securities Incorporated dated May 1, 2006 ("Sutter Letter"); Letter from Columbia University graduate School of Business dated May 1, 2006; and Letter from Kane & Company, Inc. dated May 1, 2006.

referenced to public shareholders, whether it has acted as a financial advisor to any transaction that is the subject of the fairness opinion, and, if applicable, that it will receive compensation for: (A) rendering the fairness opinion that is contingent upon the successful completion of the transaction, or (B) serving as an advisor that is contingent upon the successful completion of the transaction. Two commenters were concerned that a member may not know at the time it issues the fairness opinion that the opinion will be given to shareholders and could unknowingly violate the rule if the opinion is later distributed to shareholders. The commenters sought greater clarity as to when the additional disclosures would be required. In response to these comments, NASD has amended the proposed rule change to require the additional disclosures specified in Rule 2290(a)(1) through (6) only if at the time the fairness opinion is issued to the board of directors of the company the member knows or has reason to know that the fairness opinion will be provided or described to public shareholders of the company that is receiving the fairness opinion. A member will be deemed to have a reason to know that the fairness opinion will be provided or described to public shareholders if, for example, the structure of the transaction will require a shareholder vote. NASD has deleted the "otherwise referenced" language as it believes that the existing language is sufficient to illustrate the situations in which the Rule would apply. NASD also believes that reference to the board of directors would include any special committee or other subset or committee of the board of directors that receives the fairness opinion. Further, NASD has revised the rule language to provide that the disclosures are required when the fairness opinion is provided or described to *the company's* public shareholders.

Two commenters also recommended amending the rule text throughout the proposed rule change to clarify that advisors act for a party, not a transaction. NASD staff has made this clarification. Accordingly, in paragraph (a)(1), the proposed rule change has been amended to provide "if the member has acted as a financial advisor to any party to the transaction that is the subject of the fairness opinion . . . ." Similar clarifying changes have been made in additional sections of the proposed rule change.

One commenter generally supported the proposed disclosures in paragraphs (a)(1) through (3) but recommended that NASD clarify that disclosure regarding contingent compensation and material relationships does not constitute an acknowledgement that a conflict of interest exists. NASD does not believe that the recommended clarification is necessary. The purpose of the disclosures in the proposed rule change is to inform shareholders about the existence of any contingent compensation and/or material relationships between the member issuing the fairness opinion and the companies that are parties to the transaction to allow the shareholders to evaluate whether a conflict of interest exists, and if so, the extent of that conflict.

One commenter suggested that the disclosures of contingent compensation arrangements and material compensation relationships in paragraphs (a)(1) through (3) should be expanded to include the actual dollar amounts. As noted in the Original Proposal, NASD intends that the disclosures in paragraphs (a)(1) through (3) of the proposal be descriptive rather than quantitative. Moreover, the Commission specifically sought comment on whether the disclosures required by Rule 2290(a)(1) through (3) should be quantified and while two commenters favored quantifying these disclosures,

NASD continues to believe it is sufficient for investors to be informed that such contingent compensation and/or material relationships exist.

Paragraph (a)(2) in the Original Proposal would require disclosure of whether a member issuing a fairness opinion will receive any other payment or compensation contingent upon the successful completion of the transaction. One commenter was concerned that this provision was overbroad and that firms would be unable to comply with the provision. The commenter believed that "member firms do not have the ability to track whether they would receive any payment or compensation, no matter how small or remotely related to the transaction, from any client of that firm contingent upon the successful completion of the transaction" (emphasis in original).[6] The purpose of paragraph (a)(2) is to avoid attempts to circumvent the rule by re-characterizing payments as something other than for advisory services. NASD continues to believe the "catch-all" provision is necessary to achieve the purposes of the rule, but has sought to alleviate compliance burdens by requiring disclosure of only "significant" payments or compensation contingent upon the successful completion of the transaction. NASD has chosen not to establish a particular dollar or percentage figure out of a concern that establishing a specific figure may become a de facto standard for such payments. Moreover, any specified figure may be too high or low depending on the particular facts and circumstances. Given the nature of the proposed rule change is to inform investors of conflicts of interest, and that paragraph (a)(2) is to prevent circumvention of the provisions in paragraph (a)(1), the existence of the types of de minimis fees noted by

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[6] SIA Letter at 4.

commenters (such as trading fees or other small incremental fees from account assets or activity) would not be required to be disclosed. NASD believes that a "significant" payment or contingent compensation is one that a reasonable reader of the fairness opinion would have an interest in knowing about in order to assess whether the member authoring the fairness opinion has a potential conflict of interest.

In addition, the commenter was concerned that the disclosure requirement in Paragraph (a)(2) would compel members to collect confidential information over internal walls or other information barriers established specifically to maintain confidentiality. This commenter raised similar concerns with respect to other disclosure requirements of this Rule. NASD acknowledges the commenter's concern and believes that none of the Rule's disclosure provisions would require a member to breach any of its confidentiality obligations.

In the Original Proposal, paragraph (a)(3) would require disclosure of any material relationships that existed during the past two years or is mutually understood to be contemplated, in which any compensation was received or is intended to be received as a result of the relationship between the member and the companies that are involved in the transaction that is the subject of the fairness opinion. One commenter recommended that the disclosure of any future relationship should be limited to three months from the date of the transaction. Several commenters noted concerns that the requirement was overbroad and implies that members must breach confidential obligations or make premature disclosures of non-public information. NASD notes that this provision is

based on Item 1015(b)(4) of the Commission's Regulation M-A.[7] Thus, NASD does not believe that this requirement will cause any confidential information to be disclosed. Further, NASD notes, as stated in the Original Proposal, that the disclosures are even less specific than Item 1015(b)(4) inasmuch as the disclosures of "material relationships" in the proposed rule change are descriptive rather than quantitative. Consequently, NASD has not modified this provision as suggested by the commenters. NASD did, however, amend the provision to clarify that each of the material relationships should be identified in the fairness opinion.

In addition, in the Original Proposal, NASD indicated that it would review the comment letters to determine whether to require disclosure regarding material relationships between the member and affiliates of the companies that are party to the transaction. The commenters were generally opposed to this change and NASD is not proposing such a disclosure requirement.

Paragraph (a)(4) in the Original Proposal would require disclosure of the categories of information that formed a substantial basis for the fairness opinion that was supplied to the member by the company requesting the opinion concerning the companies involved in the transaction and whether any such information has been independently

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[7] 17 CFR 229.1015(b)(4). In the Original Proposal, NASD noted that proposed rule change differs slightly from Item 1015(b)(4) in that the proposed rule change applies to a material relationship between "the member and the companies" involved in the transaction, whereas Item 1015(b)(4) applies only to the member (and its affiliates) and the company (and its affiliates) for which the member is rendering the fairness opinion. NASD believes that investors should be informed of material relationships between the firm authoring the fairness opinion and the companies involved on both sides of the transaction.

verified by the member. Two commenters believed that this requirement should be deleted stating that it is not clear what it would mean to "verify" the information. One commenter asserted that in most cases this information could not be verified so the disclosure of the categories of information would be meaningless for the investor. As noted in the Original Proposal, NASD did not intend to require members to independently verify information provided to the member. Rather, the disclosure was intended to provide a public shareholder with information concerning the extent to which information relied on by the member was verified. Upon further review, however, NASD believes that disclosing the categories of information that formed a substantial basis for the fairness opinion would not provide meaningful guidance to the investor, particularly when this information is not "verified." Accordingly, NASD proposes to modify this requirement to retain the provision requiring disclosure if any information that formed a substantial basis for the fairness opinion that was supplied by the company requesting the opinion has been verified and, if so, requiring a description of the verified information or categories of this information. NASD proposes to eliminate the requirement to list each category of information when such information has not been verified. When no information has been verified, a blanket statement to that effect, as is common practice today, would be sufficient. On the other hand, those firms that do independently verify the information supplied to them concerning the companies that are parties to the transaction must disclose that fact. In those instances, NASD believes that a member making such a representation may also wish to explain in the fairness opinion its process or standards for independent verification.

Paragraph (a)(5) of the Original Proposal would require disclosure of whether the fairness opinion was approved or issued by a fairness committee. Two commenters noted that most firms already have such a committee. One commenter believed that the disclosure was not material and may create a misleading impression that a fairness opinion rendered by fairness committee is substantively better than one not approved by a committee. The commenter suggested, however, that if the provision is retained, NASD should revise the rule text to acknowledge that a fairness committee may not always be called a "fairness committee" within a particular firm. NASD believes that fairness opinions that are approved by a fairness committee that follows the procedures in the proposed rule generally are less susceptible to conflicts and that fairness opinions should include disclosure regarding whether a fairness committee was used. Regarding the term "fairness committee," NASD also believes that the term would include any committee or group that approves a fairness opinion in accordance with the requirements of paragraph (b) regardless of whether the member calls it a "fairness committee." In addition, NASD is amending the rule language to clarify that members must specifically disclose whether or not a fairness committee approved or issued the fairness opinion.

Finally, NASD proposes to add a disclosure requirement in new paragraph (a)(6) to require the member to disclose whether or not the fairness opinion expresses an opinion about the fairness of the amount or nature of the compensation to any of the company's officers, directors or employees, or class of such persons, relative to the compensation to the public shareholders of the company. This provision was added in light of the proposed revisions to paragraph (b)(3), which are discussed below.

(2) Procedures

In the Original Proposal, paragraph (b)(1) contains the procedures members must follow in approving a fairness opinion, including the types of transactions and the circumstances in which the member will use a fairness committee to approve or issue a fairness opinion, and in those transactions in which it uses a fairness committee: (A) the process for selecting personnel to be on the fairness committee; (B) the necessary qualifications of persons serving on the fairness committee; and (C) the process to promote a balanced review by the fairness committee, including review and approval by persons who do not serve on or advise the "deal team" to the transaction. One commenter suggested requiring "written" procedures since NASD refers to having written procedures in the rule filing but this is not indicated in the rule text itself. NASD agrees and has made the recommended change.

In addition, two commenters recommended revising paragraph (b)(1)(C). They noted that persons who advise the deal team often consult with the fairness committee regarding, for instance, valuation techniques, and that this advice should not be impaired. They further believe that that the proposed rule change implies that consultation is not permissible. They suggested deleting the phrase "or advise." NASD believes that these commenters misunderstand this provision of the proposed rule change. Paragraph (b)(1)(C) does not require that the fairness committee be comprised entirely of persons not serving on or advising the deal team. Rather, the provision requires that the member have procedures to promote a balanced review by including on the fairness committee persons who are not serving on or advising the deal team. Nevertheless, NASD believes

that the deletion of the phrase "or advise" as well as revising the rule text to provide that a member have procedures "to promote a balanced review by the fairness committee, which shall include the review and approval of persons who do not serve on the deal team" may help alleviate confusion. NASD notes, however, that whether a person is considered to be part of the deal team requires an analysis of the particular facts and circumstances, and would not be determined by whether a person is included on all document distributions or participated in certain meetings. The determination of whether a person is part of a deal team would depend on the nature and substance of his or her contacts and the advice rendered to the firm.

Paragraph (b)(2) of the Original Proposal would require members to have a process to determine whether the valuation analyses used in the fairness opinion are appropriate. In addition, paragraph (b)(2) originally provided that the member's procedures would have to state the extent to which the appropriateness of the use of such valuation analyses is determined by the type of company or transaction that is the subject of the fairness opinion. However, upon further review, NASD staff has deleted this second requirement as it believes that a specific requirement addressing the detail regarding the impact of the type of company or transaction on the valuation analyses is not necessary.

Finally, paragraph (b)(3) in the Original Proposal would require members to have a process to evaluate whether the amount and nature of the compensation from the transaction underlying the fairness opinion benefiting any individual officers, directors or employees, or class of such persons, relative to the benefits to shareholders of the

company, is a factor in reaching a fairness determination. Three commenters believed that this paragraph should be deleted because, in their view, the rule implies that members must make a judgment as to the appropriateness of compensation to insiders relative to the compensation to be paid to shareholders. They noted that members issuing fairness opinions do not have the expertise to evaluate executive compensation matters and that the appropriateness of management compensation is beyond the scope of a fairness opinion. They represented that an insider's compensation in general is not a factor in rendering a fairness opinion and, therefore, this provision does not make sense in terms of how members perform a fairness opinion evaluation. One commenter was concerned that such a requirement would result in significant delay and additional expense in the negotiation of M&A transactions. The commenter further believed that current SEC rules already require extensive disclosure of the interests of the insiders in the proposed transaction and that such rules better address NASD's concern over conflicts of interest. One commenter believed that this provision was uniquely prescriptive in an otherwise non-prescriptive approach in the balance of the rule in that the provision highlights one aspect of the transaction that may raise many financial issues and requires that it must be specifically addressed through internal procedures.

NASD believes that these commenters generally misunderstood the proposed requirement. NASD does not believe that members issuing fairness opinions should review the propriety of preexisting arrangements (such as golden parachutes) as such matters should be treated like any other preexisting fixed or contingent liability of the corporation that cannot be altered by the terms of any change of control transaction. The

intent of the proposed requirement was that firms consider the extent to which the differential in remuneration between management and other shareholders accruing from the deal proceeds, for which there was no prior contractual commitment, is a factor in determining the fairness of the transaction to shareholders. In addition, the procedure required by the original provision was intended to guard against the potential conflict of interest between the member issuing the fairness opinion and those insiders who would be gaining an economic benefit from the transaction, and who generally are in a position to make determinations about which member will perform the fairness opinion evaluation. At the same time, NASD does not believe its members should opine on matters outside their expertise. Therefore, upon further analysis, NASD proposes to delete the procedures in (b)(3) and instead require the new disclosure in paragraph (a)(6). As noted above, the new disclosure in paragraph (a)(6) would require a member to disclose whether or not the fairness opinion expresses an opinion about the fairness of the amount or nature of the compensation to any of the company's officers, directors or employees, or class of such persons, relative to the compensation to the public shareholders of the company. NASD believes that the disclosure suitably highlights to the investor the potential conflict of interest between the member issuing the fairness opinion and the issuer receiving the opinion by requiring disclosure of whether the member did or did not take into account the amount and nature of compensation flowing to certain insiders relative to the benefits to shareholders in reaching a fairness determination.

(3) Additional Comments

One commenter suggested that NASD should require members to establish procedures to determine under what circumstances their fairness opinions should be updated, and to address, prior to public distribution of an opinion, whether that opinion should be reaffirmed or withdrawn. The commenter further suggested that in the event a non-updated fairness opinion is included in materials sent to shareholders, the member should be required to disclose the basis on which it determined not to update the opinion.[8] The need to update fairness opinions is not germane to the primary purpose of the proposed rule, which is to address potential conflicts of interest. Of course, the board of directors could request an updated opinion as a part of engaging a firm to provide the fairness opinion.

In addition, in the proposed rule change published in the Federal Register, the Commission solicited comments on several additional proposed disclosures. In general, the commenters did not support these additional disclosure items. In the NASD's view, the proposed rule change requiring fairness opinion disclosures and procedures would adequately and appropriately address potential conflicts of interest by members issuing fairness opinions. Accordingly, the additional proposed disclosures do not appear to be necessary at this time to effect the regulatory purposes of the proposed rule.

NASD will announce the effective date of the proposed rule change in a Notice to Members to be published no later than 60 days following Commission approval. The

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[8] Sutter Letter at 2.

effective date will be 30 days following publication of the Notice to Members announcing Commission approval.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[9] which requires, among other things, that NASD rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that investors and the public interest will benefit from additional disclosure of potential conflicts of interest in connection with fairness opinions rendered by broker-dealers. NASD also believes that members should develop and adhere to more detailed procedures to mitigate potential conflicts in rendering fairness opinions.

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

NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Commission published the proposed rule change in the Federal Register on April 11, 2006. The comment period closed on May 2, 2006. The Commission received eight comments in response to the Federal Register publication of the proposal. The comments are summarized above.

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9 15 U.S.C. 78o–3(b)(6).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASD- 2005-080 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NASD- 2005-080. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of NASD.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASD- 2005-080 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Nancy M. Morris

Secretary

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[10] 17 CFR 200.30-3(a)(12).

EXHIBIT 4

Exhibit 4 shows the changes to previously filed rule language as proposed in Amendment No. 4. The changes proposed in the initial filing, and Amendments Nos. 1, 2 and 3 are shown as if previously adopted, and the new language proposed in Amendment No. 4 is underlined; proposed deletions in Amendment No. 4 are bracketed.

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2200. COMMUNICATIONS WITH CUSTOMERS AND THE PUBLIC

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2290. Fairness Opinions

(a) Disclosures

If at the time a fairness opinion is issued to the board of directors of a company [Any]the member issuing [a]the fairness opinion [that]knows or has as reason to know that the fairness opinion will[may] be provided[,] or described[, or otherwise referenced] to the company's public shareholders, the member must disclose[, to the extent not otherwise required,] in [such]the fairness opinion:

(1) [whether such] if the member has acted as a financial advisor to any party to the transaction that is the subject of the fairness opinion, and, if applicable, that it will receive compensation that is contingent upon the successful completion of the transaction for[:]

[(A)] rendering the fairness opinion and/or[that is contingent upon the successful completion of the transaction;]

[(B)] serving as an advisor [that is contingent upon the successful completion of the transaction];

(2) [whether such]if the member will receive any other significant payment or compensation contingent upon the successful completion of the transaction;

(3) [whether there is]any material relationships that existed during the past two years or [is]that are mutually understood to be contemplated in which any compensation was received or is intended to be received as a result of the relationship between the member and any party to [the companies that are involved in] the transaction that is the subject of the fairness opinion;

(4) [the categories of]if any information that formed a substantial basis for the fairness opinion that was supplied to the member by the company requesting the opinion concerning the companies [involved in]that are parties to the transaction [and whether any such information in each such category] has been independently verified by the member, and if so, a description of the information or categories of information that were verified; [and]

(5) whether or not the fairness opinion was approved or issued by a fairness committee[.]; and

(6) whether or not the fairness opinion expresses an opinion about the fairness of the amount or nature of the compensation to the company's officers, directors or employees, or class of such persons, relative to the compensation to the public shareholders of the company.

(b) Procedures

Any member issuing a fairness opinion must have written procedures for approval of [that address the process by which] a fairness opinion [is approved] by [a firm] the member, including:

(1) the types of transactions and the circumstances in which the member will use a fairness committee to approve or issue a fairness opinion, and in those[such] transactions [where]in which it uses a fairness committee:

(A) the process for selecting personnel to be on the fairness committee;

(B) the necessary qualifications of persons serving on the fairness committee; and

(C) the process to promote a balanced review by the fairness committee, which shall include the [including] review and approval by persons who do not serve on [or advise] the [“]deal team[”] to the transaction; and

(2) the process to determine whether the valuation analyses used in the fairness opinion are appropriate[, and the procedures should state the extent to which the appropriateness of the use of such valuation analyses is determined by the type of company or transaction that is the subject of the fairness opinion; and].

[(3) the process to evaluate whether the amount and nature of the compensation from the transaction underlying the fairness opinion benefiting any individual officers, directors or employees, or class of such persons, relative to the

benefits to shareholders of the company, is a factor in reaching a fairness determination.]