

REPORT OF THE NASDAQ LISTING AND HEARING REVIEW COUNCIL ON CORPORATE GOVERNANCE

JUNE 2010

I. INTRODUCTION

Early last year, as the United States suffered the worst economic decline since the Great Depression, the NASDAQ Listing and Hearing Review Council initiated a review of NASDAQ'S corporate governance listing standards. In the course of our review, we identified a number of emerging governance practices that we believed could assist boards, and issued a Solicitation for Comments from NASDAQ Companies and others. The Comment Solicitation sought views on whether these or other governance practices ought to be designated as "best practices," subject to ongoing disclosure requirements. Twenty-three listed companies and eleven other parties responded to the Comment Solicitation.

As discussed below, a number of the comments expressed concerns with the adoption of a "best practices" approach. In light of those concerns and, more particularly, because pending legislation and rule-making could override any recommendations we might make at this time, the Listing Council is not presently inclined to recommend that NASDAQ change its governance listing standards. The Listing Council is issuing this report because we believe a discussion of our deliberative process and the issues we considered may prove helpful to listed companies and others. We are heartened that many companies have voluntarily acted to adopt new governance practices and hope this report will be a resource to other companies as they consider these issues.

II. NASDAQ, REGULATION AND CORPORATE GOVERNANCE

The NASDAQ Stock Market is the home to several thousand companies, ranging from some of the largest public companies in the world to some of the smallest. The diversity of companies we list requires that our corporate governance rules be written with the understanding that a "one-size-fits-all" approach is often not practical. Our rules also reflect our belief that objective listing rules best serve regulatory ends and that application of these rules should be transparent.

The NASDAQ Board of Directors has long recognized the importance of soliciting independent input from a variety of constituencies in determining how best to regulate listed companies and market participants. In that spirit, the Listing Council was established in 1990 as a permanent standing committee and NASDAQ'S by-laws were later amended to specifically empower the Listing Council to advise the Board on listing and corporate governance matters.

NASDAQ Listing and Hearing Review Council. The Listing Council is comprised of individuals with diverse credentials and includes institutional investors, company representatives, lawyers, accountants, securities industry professionals and academics. (See the 2009 and 2010 rosters attached as Appendix A). Each Listing Council member is a respected leader in his or her field, committed to working with NASDAQ to enhance investor protection and the integrity of the NASDAQ Stock Market.

The Listing Council has two primary responsibilities. The first is to review the application of NASDAQ's listing rules and public policy issues related to listing, and, where appropriate, suggest new or modified rules for consideration by the NASDAQ Board. Over the years, the Listing Council has made recommendations to the Board on a wide variety of issues and played an important role in the evolution of listing standards in the United States. In addition to its advisory role, the Listing Council also serves as an appellate body to which companies may appeal a delisting determination by a NASDAQ Hearing Panel. This role assures that the Listing Council is familiar with emerging issues facing public companies and with the practical application of the listing rules.

Corporate Governance Reforms: The Last Decade. NASDAQ's corporate governance listing standards have evolved significantly since the late 1990s. Rules put in place in 1999, subsequent to the issuance of the "Report and Recommendations of the Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committees," strengthened the role of audit committees by requiring that they be entirely independent and comprised of least three members. These rules, for the first time, defined "independence" by spelling out specific bright-line relationships that could disqualify a director from being considered independent. Subsequently, in 2002 and 2003, in the wake of several high profile corporate failures, the Listing Council engaged in a wide-ranging study of corporate governance. This study led to the adoption of many new rules that gave independent directors, audit committees and shareholders a stronger voice.

In establishing governance listing standards, the Listing Council and NASDAQ have been guided by several core principles, among them, a preference in favor of bright-line, objective and transparent listing rules. At the same time, in recognition of the diverse population of NASDAQ companies, the Listing Council has taken a "one-size does *not* fit all" approach where that is appropriate, to afford flexibility and avoid overly prescriptive rules. For example, while NASDAQ requires boards to be comprised of a majority of independent directors, who are required to hold executive sessions apart from non-independent directors, it does not prescribe a minimum number of board members or a fixed number of executive sessions. Similarly, while

the listing rules require that executive compensation and board nominations be approved by independent directors, NASDAQ's listing rules permit smaller companies to have these decisions made by separate committees or by the independent directors collectively.

The Current Economic Crisis. It was apparent to the Listing Council, early on, that the financial crisis was having a significant effect on NASDAQ companies. As the market downturn deepened in the fall of 2008 and the economy faltered, the Listing Council and NASDAQ acted several times to ease the application of the rules related to bid price.¹

Meanwhile, shareholders and others sought explanations for the financial crisis, and calls for change were surfacing. Some commentators suggested that failures in corporate governance, and the process whereby boards help companies manage risk, had played a major role in fostering the crisis. The Listing Council recognized the importance of these issues, and over the course of the next year, engaged in a focused discussion of governance practices, with an eye towards determining whether any of NASDAQ's listing rules ought now to be amended.

The Listing Council believes that adoption of enhanced governance practices could facilitate boards' abilities to responsibly discharge their duties, particularly with respect to their risk oversight functions. At the same time, we are sensitive to the essential role that entrepreneurial risk-taking continues to play in driving the American economic engine. Perhaps no market in the world is more aware of this than NASDAQ, the home for so many entrepreneurial companies. Thus our review was guided by the need to balance these perspectives.

III. COMMENT SOLICITATION ON CORPORATE GOVERNANCE

The Listing Council observed that in recent years a number of new governance practices were voluntarily adopted by some companies, often with positive feedback from shareholder constituencies. While the 1999 and 2002/2003 rule changes make clear that some core mandatory listing requirements are essential, a gradual and voluntary adoption of governance practices that prove effective for boards and popular among shareholders is a preferred model in other cases. This approach leaves room for adjustment of the practice to the individual circumstances of different companies and allows companies to learn from the actual experience of early adopters. Against this backdrop, the Listing Council identified a number of emerging practices and sought views on them in a Solicitation for Comments. The Listing Council had in mind at this stage the European model of corporate governance, where a company could choose to comply with a recommended best practice or disclose why it did not. Thus, the Comment

¹ On October 6, 2008, NASDAQ suspended enforcement of the \$1.00 bid price rule and the requirement for a minimum market value of publicly held shares, for a period of three months. The suspension was extended several times and ended on July 31, 2009.

Solicitation sought views on whether NASDAQ ought to adopt certain listed governance practices as “best practices,” subject to disclosure requirements. (See the text of the Comment Solicitation at Appendix B.)

We chose to exclude from the list of proposed best practices in the Comment Solicitation certain issues, such as executive compensation and proxy access, which have been the subject of much discussion, because we surmised that they will likely be addressed by legislation or agency rule-making that would override any recommendations we might make. Thus, little would be gained if the Listing Council were to interject itself into debates on those topics. We included several others that are well on their way to becoming practice norms, at least for larger companies: majority voting for directors, annual elections of all directors and shareholder votes on auditors.² We included these practices in our Comment Solicitation in part to learn the extent of voluntary adoption of these practices by smaller NASDAQ companies and to understand the views of those that have not.

We included other practices – the holding of an executive session of independent directors at all regular board meetings and the adoption of a fixed agenda for these meetings – because we believe they provide significant benefits for maximizing independent director influence while requiring minimal adjustment to a board’s practice. Other practices we suggested, such as continuing education for directors and limits on outside board memberships, arose from concerns borne of the recent economic crisis that directors could have been better prepared for their responsibilities or were distracted by competing obligations.

We sought comment on the practice of separating the roles of Chairman of the Board and Chief Executive Officer, or alternatively having an independent lead director, because this practice, widely adopted in Europe, is the subject of increasing debate among shareholders and others. Finally, we asked about the practice of establishing procedures to facilitate shareholder communication with board members because we believe that such procedures will assist boards in being more responsive to an increasingly engaged shareholder base. Collectively, the practices we included in the Comment Solicitation could help facilitate and improve independent board functioning and accountability and do so in a transparent way.

The comment period remained open from August through October 2009 and a total of 34 comments were received. The 23 listed companies that responded ranged in market capitalization from \$7 million to \$16 billion and represented a broad array of industries – biotech,

² According to surveys by Shearman & Sterling and Spencer Stuart, 75 of the Top 100 companies, and over 40% of Fortune 1000 companies, have adopted a majority voting standard, while 68% of S&P 500 companies hold annual elections for all directors.

banking, telecom, healthcare, transportation, industrial and management consulting. Comments were also received from shareholder advocacy organizations, state retirement system administrators, United Kingdom fund management firms, a United States based law firm and an academic.

In the following section, we discuss the individual governance practices that were the basis for our Comment Solicitation and our views on how they may be used to strengthen boards and foster public confidence. Before turning to that discussion, however, we discuss the Listing Council's approach to its review of governance standards and some of the considerations that informed our decision not to recommend changes at this time.

IV. GOVERNANCE STANDARDS AND EMERGING PRACTICES

The view that “one size does *not* fit all” has always been a guiding principal at NASDAQ, where the diversity of size and type of listed company exceeds that of any exchange in the world. Balancing that principal with responsible regulation presents challenges. While certain commonly held values undergird our public markets and should be reflected in governance rules applicable to all, regulation that does not take into account the variations between companies runs a serious risk of overburdening them.

In weighing these dual considerations, the Listing Council revisited an assumption underlying NASDAQ's decision in 2003 to adopt firm listing standards rather than a list of recommended “best practices.” In 2003, there was a clear consensus that boards were not sufficiently independent and that mandatory standards requiring and defining independence were necessary. To have suggested only best practices, at that time and in those areas, would have compromised the regulatory goals we sought to achieve. Today, however, the Listing Council is not convinced that additional mandatory listing standards are called for.

For one thing, we did not identify any proposed practice - among the many discussed - that appeared to us to have the same universal acclaim as the independence-based governance standards adopted in 2003. For another, we did not identify a widespread, common problem with current board structures that a proposed practice was reasonably likely to fix. We hypothesized, then, that voluntary adherence to a set of governance practices designated as “best,” paired with a disclosure requirement, might best serve to guide boards, while allowing necessary flexibility. This best practices/comply or disclose approach, used in many countries outside the United States, requires companies to disclose and explain any divergences from the identified best practice.

One concern we had with this approach, which is also reflected in the responses to the Comment Solicitation, is that a best practices regime will result in *de facto* regulation. That outcome is clearly at odds with our commitment to clear and transparent regulation and to our goal of flexibility for a diverse issuer universe. Once an exchange designates a practice as “best,” listed companies may be concerned that the failure to implement the recommendation will be viewed as suspect by investors and others. This in turn may impel a company to adopt a practice that it might more thoughtfully conclude is not optimal under its particular circumstances. The adoption of a practice simply because others say it is “best” discourages board discussion about the underlying reason for the practice and a search for better ways to achieve the desired results. Finally, a comply or disclose approach may lead to rote disclosure that offers little insight into a board’s deliberative process.

On balance then, we do not believe that this is the time to advocate specific best practices. This is true as well with respect to governance practices that bear directly on risk oversight. Risk oversight, after all, is a board function that must be specifically tailored for each individual company based upon the multiple variables that constitute the company’s risk profile. In this area, especially, one size cannot fit all.

Rather than urge a best practices/comply or disclose scheme at this time, then, we believe that enhanced disclosure about governance practices and boards’ deliberative processes will best serve shareholders and the diverse issuer base on NASDAQ. This is the approach taken by the Securities and Exchange Commission in recent amendments to its rules, which focus, in part, on the risk oversight function. Under the new rules, for example, companies must provide enhanced disclosure about the board’s role in a company’s risk management process, including whether it administers this function through the whole board, a separate risk committee or the audit committee.³ The rules leave no doubt that accountability regarding risk oversight is a core function of the board, but allow companies to design their processes based on individual circumstances. We stress, however, that companies, boards and investors alike are best served under this approach when disclosure is clear and complete – that is, when companies communicate information about their governance practices in plain language, discuss the underlying purpose behind each practice and provide an explanation of why the chosen practice will best meet the desired goal.

Although we are not recommending that NASDAQ designate best practices at this time, we urge all boards to engage in periodic review of board functions, procedures and responsibilities. We

³ The rules also require disclosure as to how compensation policies impact risk, and justification of the board’s leadership structure, including whether there are separate board chair and CEO positions, or a lead independent director. See “Proxy Disclosure Enhancements” adopted by the SEC on December 16, 2009.

urge NASDAQ companies to look with fresh eyes at their disclosures, including those relating to the governance practices included in the Comment Solicitation, and renew a commitment to provide clear and complete information.

Regular Executive Sessions of Independent Directors/Fixed Agendas. In 2003, NASDAQ adopted a governance rule requiring independent directors to meet in “regularly scheduled” executive sessions. As noted in the commentary to the rule, “[r]egularly scheduled executive sessions encourage and enhance communication among Independent Directors. It is contemplated that executive sessions will occur at least twice a year, and perhaps more frequently, in conjunction with regularly scheduled board meetings.” The Board of The NASDAQ OMX Group, Inc., the parent of the NASDAQ Stock Market, has adopted the practice of holding an executive session of independent directors at every regularly scheduled board meeting, consistent with its belief that this facilitates freer and more meaningful discussions throughout the year about important issues such as CEO performance, succession plans, executive compensation and risk oversight. Some companies have adopted a fixed agenda for these sessions, to establish a common understanding of the responsibilities of the independent members, and ensure that important but recurring issues are not overlooked, regardless of how busy the directors may otherwise be.

Some NASDAQ issuers suggested that adding an executive session to *every* board meeting may be the “straw” that breaks the back of an otherwise well-functioning board or undermines needed collegiality. Others suggested that an executive session should be a standing agenda item, subject to a decision by the independent directors not to hold one. A number of issuers opined that the adoption of a set agenda would be counterproductive, as it could undermine the purpose of the executive session, which is to encourage free flowing ideas and discussion. Company respondents also did not agree on what the agenda should contain: some felt that certain issues are better handled in other committees and even those comfortable with the items suggested in the Comment Solicitation did not find them exhaustive. There was also no consensus on the merits of disclosing the number of executive sessions held, reflecting the tension inherent in the disclosure process: some believe that more disclosure is always better, other that too much detailed disclosure about executive sessions would tend to devolve into boiler-plate.

We agree with one respondent that the number of executive sessions is not as important as whether or not a board has a clear, consistent practice for independent directors to meet independent of management. Anecdotally, many issuers report that the requirement of an executive session adopted in the 2003 rule reform was transformative and we believe this is a

powerful means to facilitate independent board member influence. The Listing Council believes that, except in exceptional circumstances, the additional time taken for regularly holding executive sessions is well worth the benefit gained.

Limit on Number of Boards for Directors. The practice of formally limiting the number of boards on which a director may sit is also a growing trend. Non-issuer respondents tended to support limits on board service, noting that “over-boarded” directors may be associated with weak corporate governance. Listed companies were less convinced that a limit would fit all situations, pointing out that the number of boards a director can serve varies considerably, depending upon the commitment level, experience, personality and time-management skills of the individual. Concerned that they are less able to compete for sophisticated directors, smaller companies fear that limiting board service will leave them with a diminished pool of qualified, interested directors, forcing them to rely upon less experienced ones. Finally, the problem of over-boarded directors, some said, would be easily solved if boards were willing to use their authority to push off ineffective members.

Whether or not the imposition of a specific limit for all companies is necessary, we recognize that concerns about over-boarding are well-founded. We encourage companies to integrate into their recruiting processes and orientations a clear declaration of the expectations and demands associated with board membership. Boards should cultivate a collegial but professional environment that incentivizes fully engaged members and does not tolerate the opposite. Periodic self-evaluations by the board as a whole and by individual board members can be useful to highlight potential or actual problems in these areas. And, if the periodic review suggests that a specific limit on outside memberships is called for, we think each board is best situated to set the appropriate limit for itself.

Requiring Continuing Board Member Education. Board member education is a concern for many companies, particularly so for those less able to attract experienced directors. Our respondents viewed on-going board member education as important, but overwhelmingly noted the need for flexibility in customizing educational programs to fit individual needs. Most companies that responded were opposed to the concept of mandatory training, perceiving it as costly and a burden to experienced directors. Others suggested that if this practice were to result in the use of “off-the-shelf” training modules, it would be counterproductive, as opposed to a program that could be tailored to the needs of a given board member. Some respondents suggested that targeted and independent training on fiduciary responsibilities should be required and one noted that enhanced disclosure of director qualifications would serve as an incentive for

directors to maintain appropriate credentials. Others differentiated between education about corporate governance generally and specific training on the business or industry of the company.

We think it important that boards dedicate time and resources to ensuring that directors have the requisite qualifications and knowledge, as well as training on governance issues and responsibilities. Annual board retreats may be appropriate for some companies while tutorials targeted to individual directors or on specific topics may work for others. New directors should receive comprehensive orientations, which may include site visits and training from outside advisors.

Shareholder Vote for Outside Auditor. Today, it is increasingly common for public companies to ask their shareholders to ratify the appointment of the independent auditing firm. This practice allows for shareholder oversight to help assure an independent relationship. With recent rule changes, which have eliminated broker discretionary voting in uncontested director elections, this practice is likely to become even more widespread, as inclusion of a vote on the auditor in the proxy can assist companies in obtaining a quorum for their annual meetings.

Shareholder Communication with Directors. We encourage companies that do not have in place communications policies and mechanisms to facilitate communications between shareholders and independent directors, to establish them. Practices that facilitate shareholder communication with the board include: proxy disclosure of a process for shareholders to send communications to board members; board responses directly to shareholder communications; and, attendance and participation by all directors at the annual shareholders' meeting.

Independent Chair/Lead Director. NASDAQ OMX has separated the positions of Board Chair and CEO on its own board, as have an increasing number of companies. Though an independent Chair is considered the best practice norm in many parts of the world, this concept has not yet been embraced in the United States, where a majority of companies of all sizes still combine the Chair and CEO roles. Some argue that separating these positions increases the accountability of the CEO to the board and maximizes independent leadership. They also argue that corporations today are too complex to be effectively run by one person occupying both of these roles. Others argue that separating these roles would be inimical to shareholder value and would divide the corporation's leadership. The appointment of a lead independent director has gained traction, at least in part, as a response to those objections.

Most issuer respondents to our solicitation favored a company's ability to choose whether to separate the CEO and Chair positions, but supported appointment of a lead independent director in those cases where companies chose not to separate the positions. The SEC's new disclosure rules do not go so far as to mandate either separation of the positions or appointment of a lead

director. Instead, they require disclosure about the particular leadership structure the board has chosen, including whether the CEO and Chair positions are combined or a lead independent director appointed, and why that structure is appropriate under the circumstances. The rule appropriately establishes this issue as an important one for boards and shareholders alike, and requires a company to consider, explain and disclose its reasoning. At the same time, it recognizes that various approaches may achieve the same ends and allows flexibility for those companies that decide not to separate the positions. We hope that this approach will result in thoughtful consideration and leadership structures that are finely tailored to each company.

Classified Boards/Majority Voting. An increasing number of companies are declassifying their boards, holding annual elections for all directors. Similarly, more companies are requiring a majority vote for directors in uncontested elections and adopting procedures that require a director who fails to receive a majority vote to tender his or her resignation. These trends have been strongly supported by institutional shareholders. Some smaller companies, on the other hand, argue that classified boards provide greater continuity of leadership and avoid potential disruptions. Others argue that majority voting would penalize them disproportionately, due to the smaller size of their boards and their limited resources for recruiting new directors, and that this practice could lead to greater difficulty in obtaining votes at shareholder meetings.

We note that majority voting and annual elections of all directors would be required by various legislative proposals. Consistent with our “one-size-does-not-fit-all” regulatory philosophy, we hope that if these proposals are adopted, they will include a degree of flexibility, recognizing the needs of smaller public companies.

V. CONCLUSION

Regulatory changes implemented throughout the course of the past decade by the SEC, Congress, NASDAQ and the other national securities exchanges are continuing to lead to significant changes in corporate governance in the United States. Following every reform, new events occur that reopen the debate on corporate governance practices. While we are not recommending that NASDAQ change its governance listing standards or designate best practices at this time, we urge all boards to engage in periodic review of board functions, procedures, and responsibilities. We also urge NASDAQ-listed and other companies to follow closely the current debates about governance issues. This evolutionary pattern, by which our corporate governance system continuously readjusts and reassesses itself, is, as we discuss in this Report, a healthy one. The Listing Council is committed to continuing to play an integral role in that evolution and will continue to monitor and assess developments.

APPENDIX A**NASDAQ LISTING AND HEARING REVIEW COUNCIL
2009 AND 2010 Membership**

Steven E. Bochner, Co-Chair (2009 and 2010)
Chief Executive Officer and Director
Wilson Sonsini Goodrich & Rosati

Sam Scott Miller, Co-Chair (2009)
Senior Counsel
Orrick

Brian Borders, Co-Chair (2010),
Member (2009)
Founder and Principal
Borders Law Group

Michael J. Callahan (2009)
Executive Vice President, General Counsel
and Secretary
Yahoo! Inc.

Peter Clapman (2009)
Chairman & President, Governance for
Owners USA
Board member and Chair of Governance
Committee, iPass, Inc.
TIAA-CREF

John C. Giese (2009 and 2010)
President & Chief Executive Officer
Security Traders Association, Inc.

Gary Illiano (2009 and 2010)
National Partner-in-Charge, International &
Domestic Accounting
Grant Thornton LLP

Jeong Kim (2009 and 2010)
President
Alcatel-Lucent Bell Labs

April Klein (2009 and 2010)
Professor of Accounting
Leonard N. Stern School of Business
New York University

Peter J. Millones (2009 and 2010)
Executive Vice President,
General Counsel and Corporate Secretary
priceline.com, Inc.

Brett Pletcher (2010)
Vice President and General Counsel
Gilead Sciences Inc.

Anne Sheehan (2010)
Director of Corporate Governance
California State Teachers Retirement
System

Ann Yerger (2009 and 2010)
Executive Director
Council of Institutional Investors

APPENDIX B

STATEMENT AND SOLICITATION OF COMMENTS BY THE NASDAQ LISTING AND HEARING REVIEW COUNCIL ABOUT CORPORATE GOVERNANCE “BEST PRACTICES”

We have recently experienced unprecedented turmoil and crisis in the financial markets and in the global economy. This has created many serious problems, the full consequences of which cannot yet be realized. These issues are the subject of close scrutiny by the Administration, Congress and the press. Many changes are taking place and the regulatory climate in this country will be fundamentally reshaped.

The nation’s exchanges have a defined but important role to play in this process. The regulatory reach of any one market is, of course, limited to the universe of public companies it lists and trades. The Nasdaq Listing and Hearing Review Council (“Listing Council”) is appointed by the Board of Directors of the Nasdaq Stock Market LLC to provide advice on public policy issues related to listed companies. The Listing Council has long embraced a robust, dynamic and transparent approach to regulation. These rules are constantly reexamined and major revisions have occurred from time to time.

Most recently, Nasdaq adopted wide-reaching reforms in 2003 in response to the governance debate precipitated by the collapse of Enron and other public companies. These reforms elevated the role of independent directors by adopting stricter, more objective criteria for director independence, and by requiring, among other things, that listed companies have a majority independent board and an independent board nominations and executive compensation process. Importantly, independent directors were, for the first time, required to meet regularly in executive session, apart from management and non-independent directors. Shareholders in turn were empowered to approve stock-based compensation. These changes strengthened the governance process at public companies.

The financial crisis has many causes, but unlike the events leading to the 2003 reforms, few have suggested that their root cause is attributable to breakdowns in the internal governance structure at public companies. Yet, shareholders and others are, we believe, appropriately examining how well boards of directors prepared for, and today are dealing with the consequences of, this crisis. Some have asked whether boards have paid sufficient attention to issues such as risk management and whether shareholders should be further empowered by advisory votes on executive pay. Others have questioned, for example, whether directors should be elected by a majority vote and whether all directors should be elected annually. Legislation has been introduced to address certain of these issues, the Securities and Exchange Commission is considering various rulemaking proceedings and a number of state legislatures are debating similar issues.

Yet, it is difficult to argue with the proposition that corporate boards of directors, and their many independent directors, are today busier than they have ever been before. The various requirements imposed by the Sarbanes-Oxley Act of 2002 and the new exchange listing standards, when combined with our litigious legal environment, have imposed a heavy workload on corporate boards. In this context, we are concerned that the adoption of new mandatory listing requirements could distract boards and consume valuable resources, and, thus, prove counterproductive.

On the other hand, there are a number of governance practices which a prudent board should regularly consider and to which the shareholders of a public company are entitled to expect transparency. In considering the proper approach to address these areas we believe that much can be gleaned from the example of non-U.S. markets, such as the NASDAQ OMX Nordic markets. The corporate governance model widely followed around the world is often referred to as “comply or disclose” or “comply or explain.” Unlike the traditional, mandatory U.S. rule, for which delisting may be the only alternative, in a “comply or disclose” model a corporation publicly represents that it either satisfies the practice at issue, or, if it doesn’t, explains why not. This governance approach is sometimes referred to as adopting “best practices.” There are, of course, U.S. examples of “comply or disclose” regarding such matters as the SEC’s requirement to disclose whether a company has a financial expert on its audit committee. Similarly, a non-U.S. company listing on Nasdaq may choose to “comply or disclose” regarding a variety of corporate governance practices. This model offers flexibility to companies and transparency to investors and allows practices to evolve in a logical manner. In the competition for scarce investor resources, corporations with the best practices will, over time, likely emerge as the winners.

Given the foregoing, the Listing Council solicits comments from companies, investors and other interested parties, as to whether Nasdaq should adopt corporate governance “best practice” policies and, if so, what issues those ought to address. We would expect that any required disclosures would appear either in a company’s proxy, in the case of most U.S. companies, or in its annual report filed with the SEC for all other companies.

The following is a broad list of potential “best practice” recommendations. In posing this list we do not mean to suggest that Nasdaq necessarily intends to adopt recommendations in each of these categories. Accordingly, it would be helpful for commenters to identify and prioritize those issues they feel most strongly about. For those who would suggest that the exchanges adopt, instead, mandatory requirements, please explain why you believe that would be preferable to a “comply or disclose” model and which specific rules you believe should be, without exception, required of all listed companies.

Best Practice Proposals

1) We believe that one of the more important governance requirements adopted in 2003 was that independent directors meet regularly in executive session, apart from management and other directors. Should this practice be expanded such that companies would hold an executive session of independent directors at each regularly scheduled board meeting? Should companies disclose the frequency with which they hold such meetings?

2) The agenda for executive sessions will likely vary from meeting to meeting and company to company. Should companies adopt an annual agenda for their executive sessions? If so, which of the following topics are appropriate for inclusion on that agenda:

- a) Has the “tone at the top” of the company established a culture of integrity?
- b) Does the company use self-evaluations to assess whether its board, board committees and individual directors are operating competently and effectively?
- c) Do the independent directors have adequate access to information about corporate strategy and other issues and adequate input into setting the board’s agenda?
- d) Does the company have an effective business risk management strategy and are sufficient resources allocated to it? Should this responsibility be allocated to a committee other than the audit committee, given the existing responsibilities of that committee?
- e) Does the company have an effective orientation program for new directors?

Should other topics also be considered?

3) Given the demands on director’s time, should the company adopt a limit on the number of outside boards on which a director can serve, and, if so, what number is appropriate?

4) Should the company require its directors to participate, either annually or on some periodic basis, in continuing education programs, as are, for example, sponsored by various universities and certified by certain governance organizations?

5) Should shareholders vote annually on appointing the outside auditor?

6) Should the company adopt some form of advanced resignation requirement to address the circumstance where a director fails to receive a favorable vote by a majority of the shareholders?

7) Should the company develop a process to facilitate shareholder communications with directors and, if so, what role should the independent directors play in that process?

8) To facilitate independent board leadership, should the company either have an independent Chairman or an independent Lead Director?

9) Should all directors be elected annually?

Given the significance of these issues and the evolving and on-going debate regarding the economic crisis, Nasdaq has determined to hold the comment period open through Friday, October 30, 2009. Please email your comments to commentsolicitation@nasdaq.com. If you prefer, you can mail your comments to: Michael S. Emen, Senior Vice President, Listing Qualifications, The NASDAQ Stock Market, 9600 Blackwell Road, Rockville Maryland, 20850.