

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59203; File No. SR-NASDAQ-2008-084)

January 6, 2009

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change to Require Limited Partnerships to Obtain Shareholder Approval for the Use of Equity Compensation and Make Other Clarifying Changes to the Listing Requirements for Limited Partnerships

I. Introduction

On November 18, 2008, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to require limited partnerships to obtain shareholder approval for the use of equity compensation and to make other clarifying changes to the listing requirements for limited partnerships. The proposed rule change was published for comment in the Federal Register on December 2, 2008.³ The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

Nasdaq’s current listing requirements provide that issuers must obtain shareholder approval for a variety of corporate actions, including the issuance of equity compensation.⁴ However, these requirements do not currently apply to Limited Partnerships (“LPs”).⁵ Nasdaq is proposing to expand the requirement to obtain shareholder approval for equity compensation to

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 59014 (November 25, 2008), 73 FR 73358.

⁴ See Nasdaq Rule 4350(i)(1)(A).

⁵ See Nasdaq Rules 4350(i)(1)(A) and 4360.

entities that are LPs. As such, the proposed rule would provide that each issuer that is a limited partnership must obtain shareholder approval when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement is to be made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants, as would be required under Nasdaq Rule 4350(i)(1)(A) and IM-43540-5.⁶

In addition, Nasdaq proposes to make two other changes to the listing requirements for LPs. Specifically, the Exchange proposes to amend the rules applicable to LPs to require that: (1) the auditor of a listed LP must be registered as a public accounting firm with the Public Company Accounting Oversight Board (“PCAOB”), as provided for in the Sarbanes-Oxley Act of 2002;⁷ and (2) an LP must notify Nasdaq of any material non-compliance with the qualitative listing requirements for LPs in Rule 4360. Nasdaq states that when it adopted these requirements for other companies in 2003 in response to requirements imposed by the Sarbanes-Oxley Act, Nasdaq inadvertently excluded LPs from these requirements. The Exchange notes, however, that these requirements are already applicable to LPs. Specifically, with respect to the proposed auditor registration requirement, it is unlawful for an auditor to participate in the preparation or issuance of an audit report with respect to any listed company, including an LP, unless it is registered with the PCAOB.⁸ With respect to the proposed notification requirement, each listed company is required to sign a listing agreement prior to listing on Nasdaq in which the company has agreed to promptly notify Nasdaq in writing of any corporate action or other event which will

⁶ See proposed Nasdaq Rule 4360(k).

⁷ Section 102 of the Sarbanes Oxley Act, 15 U.S.C. 7212.

⁸ Id.

cause the company to cease to be in compliance with Nasdaq listing requirements.⁹ As such, Nasdaq asserts that these changes are simply clarifying changes designed to highlight the requirements and facilitate understanding and compliance of the rules by LPs.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, with Section 6(b)(5) of the Act,¹⁰ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest, and are not designed to permit unfair discrimination between issuers.¹¹

The Commission notes the importance of shareholder approval rules, as such rules provide shareholders with a voice in transactions that are material to, and may have an effect on, their respective investments. With respect to equity compensation plans, shareholder approval rules also help to protect investors against the potential dilutive effect of such plans. The Commission acknowledges that treating LPs differently with respect to certain limited types of shareholder approval rules may be appropriate given the structure and use of LPs and the

⁹ See http://www.nasdaq.com/about/Listing_Agreement.pdf.

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

expectations of investors in such entities.¹² However, as the Commission has indicated previously, it believes that the rationale for treating an LP differently from other types of issuers with respect to shareholder input on equity compensation is less compelling.¹³ Accordingly, the Commission believes that it is consistent with the protection of investors and the public interest to require LPs to obtain shareholder approval for the issuance of equity compensation, as it will ensure that investors in LP securities have a check on the potential dilution that may result from the issuance of equity-based awards. Further, by requiring LPs to obtain shareholder approval for stock option or other equity compensation plans under the same terms and conditions as other Nasdaq listed companies, the new rule will ensure that shareholders of all Nasdaq companies will have the same protections against the potential dilutive effects of such plans.

The Commission also believes that the proposed clarifying changes specifying that an auditor of a listed LP must be registered with the PCAOB and that an LP must notify Nasdaq of any material non-compliance with the corporate governance rules should eliminate any confusion regarding the requirements for LPs. As noted above, Nasdaq asserts that LPs are already subject to these requirements, but these proposed changes will ensure that such requirements are part of Nasdaq's rulebook governing the listing requirements for LPs and thus are transparent to

¹² For a detailed discussion of the reasons that LPs differ from other issuers and may be appropriately excluded from certain shareholder approval rules, see Securities Exchange Act Release No. 55796 (May 22, 2007), 72 FR 29566 (SR-NYSE-2007-28) (approving NYSE's proposal to exempt LPs from certain of its shareholder approval rules, excluding its equity compensation requirement).

¹³ See id., 72 FR at 29567.

issuers.¹⁴ Accordingly, the Commission finds that the proposed rule change is consistent with the Act.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁵ that the proposed rule change (SR-NASDAQ-2008-084) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁶

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Deputy Secretary

¹⁴ See supra notes 8 and 9 and accompanying text.

¹⁵ 15 U.S.C. 78s(b)(2).

¹⁶ 17 CFR 200.30-3(a)(12).