

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61713; File No. SR-NASDAQ-2010-006)

March 15, 2010

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of Proposed Rule Change to Modify the Press Release Requirements for Listed Companies

I. Introduction

On January 13, 2010, The NASDAQ Stock Market LLC (“Nasdaq” or the “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 modify certain of Nasdaq’s rules pertaining to its press release requirements for listed companies. The proposed rule change was published for comment in the Federal Register on February 8, 2010.³ The Commission received no comments on the proposed rule change. This order approves the proposed rule change.

II. Description of Proposed Rule Change

Nasdaq is proposing to modify certain of its rules related to the issuer compliance process that currently require a company to disclose information in a press release or through the news media. Nasdaq notes that these rules were generally adopted to address inconsistent issuer disclosure practices and reflected the view that issuing a press release was the only way to assure wide dissemination of an important event. However, in 2002, the Commission adopted Regulation FD,⁴ and Nasdaq amended its rules to allow listed companies to provide disclosure of

¹ 15 U.S.C. 78s(b)(1)

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 61461 (February 1, 2010), 75 FR 6241 (“Notice”).

⁴ 17 CFR 243.100-103.

material news via any Regulation FD compliant means.⁵ Nasdaq asserts that there is now broad acceptance of Regulation FD compliant methods of disclosure, such as through the use of a Form 8-K. Additionally, Nasdaq argues that its requirements in some instances are duplicative of the Form 8-K requirements, and notes that Form 8-K disclosures are readily available to investors and the information contained in them is widely reported on by the news media. As such, Nasdaq is proposing to modify certain of its rules, as described below, to permit disclosure either through a press release or by filing a Form 8-K where required by Commission rules.⁶

First, Nasdaq proposes to amend Rules 5250(b)(3), 5810(b), 5840(k) and IM-5810-1, which require disclosure of notifications from Nasdaq staff or an Adjudicatory Body⁷ regarding a company's compliance with the listing standards. Rules 5250(b)(3) and 5810(b) require a company to “make a public announcement through the news media”⁸ disclosing the receipt of a notice that the company does not meet a listing standard, that staff has determined to delist the company, or that the company has received a Public Reprimand Letter. IM-5810-1 provides the time frame for companies to make these disclosures and describes the consequences of failing to do so. Rule 5840(k) requires that a company that receives a Public Reprimand Letter from an

⁵ See Securities Exchange Act Release No. 46901 (November 25, 2002), 67 FR 72011 (December 3, 2002).

⁶ The Commission notes that Nasdaq is not proposing any change to Rule 5840(j), regarding the voluntary delisting of a company, because the press release requirement in that rule is required by Exchange Act Rule 12d2-2(c); 17 CFR 240.12d2-2(c). Nasdaq is also maintaining the requirements in Rule 5635(c)(4) and IM-5365-1, which require that a company relying on the inducement exception to the requirement to obtain shareholder approval for equity compensation awards must “disclose in a press release” specific information about the equity award. Finally, as noted above, late filers will still be required to issue a press release. See Rule 5250(b)(2) and Rule 5810(b).

⁷ Rule 5805(a) defines an “Adjudicatory Body” as the Hearings Panel, the Nasdaq Listing and Hearing Review Council, or the Nasdaq Board, or a member thereof.

⁸ Nasdaq interprets the requirement to disclose information through the news media to be satisfied by the issuance of a press release.

Adjudicatory Body must make “a public announcement through the news media” disclosing receipt of that letter. Nasdaq proposes to modify these rules to allow the company, in each case, to make a public announcement by “filing a Form 8-K, where required by SEC rules, or by issuing a press release.”⁹ However, Nasdaq proposes that a company that is late in filing a required periodic report with the Commission would still be required to issue a press release announcing that it has received notice that it does not meet that requirement, and would not be permitted to fulfill this requirement by only filing a Form 8-K. Nasdaq also proposes to clarify in each of these rules that notification of these disclosures should be made to the Nasdaq MarketWatch Department through Nasdaq's electronic disclosure submission system at least ten minutes prior to the notification to the public.¹⁰

Second, Nasdaq proposes to modify Rule 5635(f), which requires a company to “make a public announcement through the news media” when it receives an exception to the shareholder approval requirements because compliance would jeopardize the company's financial viability. Nasdaq proposes instead to allow companies to make this announcement “by filing a Form 8-K, where required by SEC rules, or by issuing a press release.” Nasdaq is retaining its current requirement that companies that receive an exemption are also required to mail this notice to all

⁹ The Commission notes that under Item 3.01 of Form 8-K, a company is required to file a Form 8-K when it receives notice from Nasdaq that the company does not satisfy a listing standard or when Nasdaq issues a Public Reprimand Letter to the company.

¹⁰ The Commission notes that Nasdaq recently changed its rules to provide that if the public release of material information is made outside of Nasdaq market hours, companies must notify MarketWatch of the material information prior to 6:50 a.m. ET. See Securities Exchange Act Release No. 61521 (February 16, 2010), 75 FR 8156 (February 23, 2010). The Exchange has represented that once this proposed rule change (SR-NASDAQ-2010-006) is approved by the Commission, it will file a separate filing pursuant to Section 19(b) of the Act to make corresponding changes to the rule provisions adopted in this filing to reflect the previously adopted changes.

shareholders at least ten days before issuing securities in reliance on the exception.

Third, Nasdaq proposes to revise Rule 5225(a)(3), which requires a company to “publicize through, at a minimum, a public announcement through the news media” any change in the terms of a listed unit. Nasdaq proposes to modify this rule to allow the company to “make a public announcement by filing a Form 8-K, where required by SEC rules, or by issuing a press release” of any change in the terms of the unit.

Nasdaq is also proposing to make a number of other modifications to its rules requiring public disclosure through press releases. In particular, Nasdaq proposes to amend Rule 5250(c)(2), which requires a company that is a foreign private issuer to disclose interim financial results “in a press release and on a Form 6-K.” Nasdaq proposes to eliminate the requirement that this information be published in a press release, while maintaining the requirement that it be on a Form 6-K. A foreign private issuer would still be free to disclose this information in a press release if it chooses.

Nasdaq also proposes to eliminate the requirement contained in Rule 5250(b)(2) that a company must issue a press release announcing the receipt of an audit opinion that expresses doubt about the ability of the company to continue as a going concern. Nasdaq argues that this requirement, which was adopted in 2003,¹¹ is duplicative of disclosure already provided in the Company's annual filing with the Commission, which must be made available to all shareholders under Nasdaq rules, and which must be distributed to shareholders under the Commission's Proxy Rules. Nasdaq noted in its Notice, however, that if a company fails to include the audit opinion in its annual filing, Nasdaq would consider the filing deficient and would move to delist

¹¹ See Securities Exchange Act Release No. 48745 (November 4, 2003), 68 FR 64154 (November 12, 2003).

the company on that basis.

In addition, Nasdaq proposes to revise Rules 5810(b) and 5840(k), which require companies to notify multiple Nasdaq departments before they issue certain disclosures.¹²

Nasdaq proposes to modify these rules to require companies to provide these disclosures to the MarketWatch Department using the electronic disclosure submission system accessible at www.nasdaq.net.¹³ Nasdaq noted that MarketWatch will notify other Nasdaq departments when necessary.¹⁴

III. Discussion

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,¹⁵ 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.¹⁶

¹² Under these rules, a company must notify the MarketWatch, Listing Qualifications, and Hearings Departments.

¹³ Companies are already required to use the electronic disclosure submission service to notify MarketWatch prior to the distribution of material news. See Rule 5250(b)(1) and IM-5250-1. See also Exchange Act Release No. 55856 (June 4, 2007), 72 FR 32383 (June 12, 2007).

¹⁴ Nasdaq also proposes to: (i) add a title to Rule 5250(b)(1) to clarify the text; and (ii) use capitalization for a defined term in Rule 5615. The Commission notes that these are non-substantive changes.

¹⁵ 15 U.S.C. 78f(b)(5).

¹⁶ 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).

The Commission notes that full and fair disclosure of information by issuers of securities to the public is of critical importance to financial markets and the investing public. As such, the Commission believes that exchange compliance standards requiring a company to disclose information should be designed to provide broad public access to such information. As discussed below, the Commission believes that Nasdaq's proposal to modify certain of its rules pertaining to its press release requirements for listed companies will eliminate duplicative requirements from Nasdaq's disclosure rules in certain situations where a company is already required by Commission rules to file a Form 8-K, while still ensuring that issuers disseminate material information to the public in a broad and inclusive manner.

In 2000, the Commission adopted Regulation FD to curtail the selective disclosure of material non-public information by issuers to analysts and institutional investors.¹⁷ Regulation FD provides that public disclosure by issuers can be made by filing a Form 8-K with the Commission or through another method (or combination of methods) of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of information to the public.¹⁸ The Commission is cognizant, in reviewing Nasdaq's proposal, that in approving Regulation FD, the Commission specifically noted that it was not intended to alter or supplement self-regulatory organization rules that typically require companies to issue a press release to announce material developments.¹⁹ Despite this, the Commission believes that, in many instances, the filing of a Form 8-K provides an effective, broad, and non-exclusionary means of distributing material disclosures. The Commission notes that the information required to be

¹⁷ See Securities Exchange Act Release No. 43154 (August 15, 2000), 65 FR 51716 (August 24, 2000) ("Regulation FD Adopting Release").

¹⁸ See Regulation FD, 17 CFR 243.100-103.

¹⁹ See Regulation FD Adopting Release, *supra* note 17 at n.70.

reported on a Form 8-K is material information that could impact an investor's decision to buy, sell or hold a security. For this reason, the Form 8-K is made easily obtainable by investors on the Commission's EDGAR Web site, as well as many major financial web sites, and the information it provides is also commonly reported by the news media. The Commission also believes that the public has become more familiar with the Form 8-K method of dissemination since the original adoption of Regulation FD.

The Commission notes that since investors have broad access to the information provided by the Form 8-K, in certain instances where a company is required to file a Form 8-K pursuant to Commission rules as well as issue a press release under Nasdaq rules, the information provided may overlap, resulting in duplicate disclosures of the same information. Although the Commission would prefer to ensure that investors have as many channels as possible to receive material disclosures, in these particular situations, the Commission recognizes that requiring both a Form 8-K and a press release may be unnecessary and may place an additional burden on issuers while providing no additional significant benefit to investors. The Commission notes, however, that while it believes that it is appropriate to eliminate the requirement to make these duplicate disclosures, in certain situations it continues to believe that there are benefits to the market and investors to issuing a press release when disclosing material information that issuers should consider.²⁰ Thus, a company would, of course, be permitted to issue a press release in addition to their filing of a required Form 8-K.

The Commission also notes that, in those cases where a Form 8-K is not required to be filed under Commission rules, under its proposal, Nasdaq rules will still require an issuer to make public disclosures through a press release. We believe these requirements adequately

²⁰ See Regulation FD Adopting Release, *supra* note 17.

balance the situation where investors, the public and the press have an expectation to find information about a company in a Form 8-K, since the information is required to be filed with the Commission in that format, with the need to provide adequate disclosure to the public through a press release on other matters as required under Nasdaq rules.²¹ For the aforementioned reasons, the Commission believes that Nasdaq's proposal to modify certain of its rules to permit disclosure either through a press release or by filing a Form 8-K where required by Commission rules is reasonable and consistent with the Act.

In particular, the Commission believes that Nasdaq's proposed changes to Rules 5250(b)(3), 5810(b), 5840(k) and IM-5810-1 – requiring disclosure of notifications regarding a company's compliance with listing standards – to allow the company, in each case, to make a public announcement by “filing a Form 8-K, where required by SEC rules, or by issuing a press release,” are examples where the filing of a single Form 8-K is an appropriate alternative to requiring both a Form 8-K and a press release. The Commission notes that Item 3.01 of Form 8-K would require a company to file a Form 8-K when it receives notice that the company does not satisfy a listing standard or when Nasdaq issues a Public Reprimand Letter to the company. The Commission believes that the Form 8-K, in these instances, addresses the Commission's material disclosure concerns for investors, as investors could easily obtain the information in the Form 8-K and the information may likely result in media coverage. In addition, the Commission notes that Nasdaq is not proposing that this change will be applicable to its late filer rules and instead will continue to require that a company that is late in filing a required periodic report

²¹ The Commission would generally be concerned if, on matters not required under Commission rules to be filed on Form 8-K, Nasdaq rules required such matters to be disclosed in that format because such Form 8-K filings would become a requirement through Nasdaq rules, even though the requirement had not been adopted by the Commission.

with the Commission must issue a press release, even though they are also required to file a Form 8-K, which is consistent with the Commission's current treatment of late filers.²²

Similarly, the Commission believes that Nasdaq's proposal to permit either the filing of a Form 8-K where required by SEC rules or the issuance of a press release when a company receives an exception to the shareholder approval requirements because compliance would jeopardize the company's financial viability is appropriate and consistent with the Act. The Commission notes that, in addition to the Form 8-K or a press release, Nasdaq will continue to require that notice be provided to shareholders by mail at least ten days before issuing securities in reliance on this exception.

Finally, the Commission believes that Nasdaq's proposal to allow the filing of a Form 8-K where required by Commission rules in lieu of issuing a press release where there is any change in the terms of a unit is another instance where the duplicate disclosure is unnecessary and an extra burden on listed companies. As such, the Commission believes that this proposed rule change is appropriate and consistent with the Act.

As noted above, Nasdaq also proposes several other changes to its rules pertaining to its press release requirements for listed companies. First, Nasdaq proposes to modify Rule 5250(c)(2) to require a company that is a foreign private issuer to disclose interim financial results on a Form 6-K, instead of both a Form 6-K and a press release as required under current Nasdaq rules. The Commission believes that this change also adequately addresses the Commission's investor protection concerns regarding broad availability of disclosure of material information and is consistent with the Act. The Commission notes that pursuant to Regulation FD, foreign companies are permitted to meet the requirements of Regulation FD by making

²² See NYSE Rule 802.01E.

filings on Form 6-K, rather than on a Form 8-K. Like the Form 8-K, the Form 6-K provides material disclosures and, similarly, is widely available and utilized by investors, as it is also accessible on the Commission's EDGAR Web site and its contents may be widely reported in the news media. While foreign companies will now be required to only file a Form 6-K to meet Nasdaq's disclosure requirement for interim reports, Nasdaq notes in its filing that foreign issuers would still be free to disclose this information in a press release, in addition to the filing of a Form 6-K, if it chooses.

In addition, Nasdaq proposes to eliminate the requirement from Rule 5250(b)(2), that a company must issue a press release announcing the receipt of an audit opinion expressing doubt about the ability of the company to continue as a going concern. The Commission notes that the audit opinion is required to be provided in a company's annual filing with the Commission, which must also be distributed to shareholders under the Commission's Proxy Rules,²³ and must be made available to all shareholders under the Nasdaq rules. Although the Commission understands that a negative audit opinion constitutes important material information that could impact an investor's decision to buy, sell or hold a security, the Commission, after careful consideration, also believes that publication of this opinion in the annual filing, which the Commission already requires to be distributed to all shareholders, should provide broad notice to investors. Additionally, if a company fails to include the audit opinion in its annual filing, the Commission notes that Nasdaq would consider the filing deficient and would move to delist the company on that basis, recognizing the importance of the audit opinion disclosure to investors.²⁴

²³ 17 CFR 240.14a-1. See Item 13 of Schedule 14A, 17 CFR 240.14a-101.

²⁴ Nasdaq is also proposing to make a conforming change to Rule 5615(a)(3) to eliminate the reference to the going concern requirement because it will no longer apply. In addition, Nasdaq is proposing to remove the reference in Rule 5615(a)(3) to the

Accordingly, the Commission believes that this change will eliminate unnecessary duplicate disclosures, while continuing to provide investors with sufficient notice of such material information.

Finally, Nasdaq proposes to eliminate the requirements in Rule 5810(b) and 5840(k) that companies must notify multiple Nasdaq departments before issuing certain disclosures. The Commission is satisfied that Nasdaq's proposed changes will continue to provide for adequate notification to the MarketWatch Department, as well as other departments,²⁵ since Nasdaq has represented that the MarketWatch Department will notify other Nasdaq departments of the disclosures when necessary.²⁶ As such, the Commission believes that Nasdaq's notification procedures will be streamlined, eliminating unnecessary duplicative notification requirements for listed companies, while still ensuring that the necessary departments will be notified by the MarketWatch Department if necessary for regulatory or other reasons.

For the reasons noted above, the Commission believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,²⁷ and will, among other things, protect investors and the public interest by assuring that the investing public has broad and easy access to full disclosure of corporate matters. As discussed above, the Commission believes that the changes proposed by Nasdaq will continue to require issuers to disseminate necessary information to the

requirement for a foreign private issuer to enter into a listing agreement because there is no need to single out this requirement from all the others of the requirements of the Rule 5000 Series to which a foreign private issuer is subject.

²⁵ Companies are already required to use the electronic disclosure submission service to notify MarketWatch prior to the distribution of material news. See Rule 5250(b)(1) and IM-5250-1. See also Securities Exchange Act Release No. 55856 (June 4, 2007), 72 FR 32383 (June 12, 2007) (approving SR-NASDAQ-2007-029).

²⁶ Nasdaq is also proposing: (i) to add a title to Rule 5250(b)(1) to clarify the text; and (ii) to use capitalization for a defined term in Rule 5615. These are non-substantive changes.

²⁷ 15 U.S.C. 78f(b)(5).

public in a broad and inclusive manner, while at the same time minimizing duplicative disclosures.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁸ that the proposed rule change (SR-NASDAQ-2010-006) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁹

Florence E. Harmon
Deputy Secretary

²⁸ 15 U.S.C. 78s(b)(2).

²⁹ 17 CFR 200.30-3(a)(12).