

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-62285; File No. SR-NASDAQ-2008-014)

June 11, 2010

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change and Amendments No. 1 and 2 Thereto to Amend Certain Corporate Governance Disclosure Requirements for Listed Companies

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on February 27, 2008, The NASDAQ Stock Market LLC (“Nasdaq”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. Nasdaq filed Amendment No. 1 to the proposed rule change on December 18, 2009 and Amendment No. 2 to the proposed rule change on April 30, 2010.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

Nasdaq proposes changes to Listing Rules 5605 and 5610, as well as IM-5605-4 and IM-5610, to replace certain disclosure requirements with references to the applicable disclosure requirements of Regulation S-K, require the same disclosure as required by SEC Rules 10A-3(d)(1) and (2) and permit disclosure through a website and/or a press release to satisfy certain Nasdaq disclosure requirements.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Amendment No. 1 replaced and superseded the original filing in its entirety, and Amendment No. 2 replaced and superseded Amendment No. 1 in its entirety.

The text of the proposed rule change is below. Proposed new language is underlined; proposed deletions are in [brackets].<sup>4</sup>

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5605. Boards of Directors and Committees.

(a) No change.

IM-5605. No change.

(b) No change.

IM-5605-1 and IM-5605-2. No change.

(c) Audit Committee Requirements

(1) No change.

IM-5605-3. No change.

(2) Audit Committee Composition

(A) No change.

(B) Non-Independent Director for Exceptional and Limited Circumstances

Notwithstanding paragraph (2)(A)(i), one director who: (i) is not independent as defined in Rule 5605(a)(2); (ii) meets the criteria set forth in Section 10A(m)(3) under the Act and the rules thereunder; and (iii) is not a current officer or employee or a Family Member of such officer or employee, may be appointed to the audit committee, if the board, under exceptional and limited circumstances, determines that membership on the committee by the individual is required by the best interests of the Company and its Shareholders[, and the board discloses, in the next annual proxy statement subsequent to such determination (or, if the

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<sup>4</sup> Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at <http://nasdaqomx.cchwallstreet.com/>.

Company does not file a proxy, in its Form 10-K or 20-F), the nature of the relationship and the reasons for that determination]. A Company, other than a Foreign Private Issuer, that relies on this exception must comply with the disclosure requirements set forth in Item 407(d)(2) of Regulation S-K. A Foreign Private Issuer that relies on this exception must disclose in its next annual report (e.g., Form 20-F or 40-F) the nature of the relationship that makes the individual not independent and the reasons for the board's determination. A member appointed under this exception may not serve longer than two years and may not chair the audit committee.

#### IM-5605-4. Audit Committee Composition

Audit committees are required to have a minimum of three members and be comprised only of Independent Directors. In addition to satisfying the Independent Director requirements under Rule 5605(a)(2), audit committee members must meet the criteria for independence set forth in Rule 10A-3(b)(1) under the Act (subject to the exemptions provided in Rule 10A-3(c) under the Act): they must not accept any consulting, advisory, or other compensatory fee from the Company other than for board service, and they must not be an affiliated person of the Company. As described in Rule 10A-3(d)(1) and (2), a Company must disclose reliance on certain exceptions from Rule 10A-3 and disclose an assessment of whether, and if so, how, such reliance would materially adversely affect the ability of the audit committee to act independently and to satisfy the other requirements of Rule 10A-3. It is recommended also that a Company disclose in its annual proxy (or, if the Company does not file a proxy, in its Form

10-K or 20-F) if any director is deemed independent but falls outside the safe harbor provisions of Rule 10A-3(e)(1)(ii) under the Act. A director who qualifies as an audit committee financial expert under Item 407(d)(5)(ii) and (iii) of Regulation S-K is presumed to qualify as a financially sophisticated audit committee member under Rule 5605(c)(2)(A).

(3) No change.

IM-5605-5. No change.

(4) – (5) No change.

(d) Independent Director Oversight of Executive Officer Compensation

(1) – (2) No change.

(3) Non-Independent Committee Member under Exceptional and

Limited Circumstances

Notwithstanding paragraphs 5605(d)(1)(B) and 5605(d)(2)(B) above, if the compensation committee is comprised of at least three members, one director who is not independent as defined in Rule 5605(a)(2) and is not a current officer or employee or a Family Member of an officer or employee, may be appointed to the compensation committee if the board, under exceptional and limited circumstances, determines that such individual's membership on the committee is required by the best interests of the Company and its [shareholders, and the board discloses,] Shareholders. A Company that relies on this exception must disclose either on or through the Company's website or in the proxy statement for the next annual meeting subsequent to such determination (or, if the Company does not file a proxy, in its Form 10-K or 20-F), the nature of the relationship and the

reasons for the determination. In addition, the Company must provide any disclosure required by Instruction 1 to Item 407(a) of Regulation S-K regarding its reliance on this exception. A member appointed under this exception may not serve longer than two years.

IM-5605-6. No change.

(e) Independent Director Oversight of Director Nominations

(1) – (2) No change.

(3) Non-Independent Committee Member under Exceptional and Limited Circumstances

Notwithstanding paragraph 5605(e)(1)(B) above, if the nominations committee is comprised of at least three members, one director, who is not independent as defined in Rule 5605(a)(2) and is not a current officer or employee or a Family Member of an officer or employee, may be appointed to the nominations committee if the board, under exceptional and limited circumstances, determines that such individual's membership on the committee is required by the best interests of the Company and its Shareholders[, and the board discloses,]. A Company that relies on this exception must disclose either on or through the Company's website or in the proxy statement for next annual meeting subsequent to such determination (or, if the Company does not file a proxy, in its Form 10-K or 20-F), the nature of the relationship and the reasons for the determination. In addition, the Company must provide any disclosure required by Instruction 1 to Item 407(a) of Regulation S-K regarding its reliance on this exception. A member appointed under this exception may not serve longer than two years.

(4) – (5) No change.

IM-5605-7. No change.

5610. Code of Conduct

Each Company shall adopt a code of conduct applicable to all directors, officers and employees, which shall be publicly available. A code of conduct satisfying this rule must comply with the definition of a "code of ethics" set out in Section 406(c) of the Sarbanes-Oxley Act of 2002 ("the Sarbanes-Oxley Act") and any regulations promulgated thereunder by the Commission. See 17 C.F.R. 228.406 and 17 C.F.R. 229.406. In addition, the code must provide for an enforcement mechanism. Any waivers of the code for directors or Executive Officers must be approved by the Board. Companies, other than Foreign Private Issuers, shall disclose such waivers [in a]within four business days by filing a current report on Form 8-K with the Commission [within four business days]or, in cases where a Form 8-K is not required, by distributing a press release. Foreign Private Issuers shall disclose such waivers either by distributing a press release or including disclosure in a Form 6-K or in the next Form 20-F or 40-F. Alternatively, a Company, including a Foreign Private Issuer, may disclose waivers on the Company's website in a manner that satisfies the requirements of Item 5.05(c) of Form 8-K.

IM-5610. Code of Conduct

Ethical behavior is required and expected of every corporate director, officer and employee whether or not a formal code of conduct exists. The requirement of a publicly available code of conduct applicable to all directors, officers and employees of a Company is intended to demonstrate to investors that the board and management of Nasdaq Companies

have carefully considered the requirement of ethical dealing and have put in place a system to ensure that they become aware of and take prompt action against any questionable behavior. For Company personnel, a code of conduct with enforcement provisions provides assurance that reporting of questionable behavior is protected and encouraged, and fosters an atmosphere of self-awareness and prudent conduct.

Rule 5610 requires Companies to adopt a code of conduct complying with the definition of a "code of ethics" under Section 406(c) of the Sarbanes-Oxley Act of 2002 ("the Sarbanes-Oxley Act") and any regulations promulgated thereunder by the Commission. See 17 C.F.R. 228.406 and 17 C.F.R. 229.406. Thus, the code must include such standards as are reasonably necessary to promote the ethical handling of conflicts of interest, full and fair disclosure, and compliance with laws, rules and regulations, as specified by the Sarbanes-Oxley Act. However, the code of conduct required by Rule 5610 must apply to all directors, officers, and employees. Companies can satisfy this obligation by adopting one or more codes of conduct, such that all directors, officers and employees are subject to a code that satisfies the definition of a "code of ethics."

As the Sarbanes-Oxley Act recognizes, investors are harmed when the real or perceived private interest of a director, officer or employee is in conflict with the interests of the Company, as when the individual receives improper personal benefits as a result of his or her position with the Company, or when the individual has other duties, responsibilities or obligations that run counter to his or her duty to the Company. Also, the disclosures a Company makes to the Commission are the essential source of information about the Company for regulators and investors — there can be no question about the duty to make them fairly, accurately and timely. Finally, illegal action must be dealt with swiftly and the

violators reported to the appropriate authorities. Each code of conduct must require that any waiver of the code for Executive Officers or directors may be made only by the board and must be disclosed to Shareholders, along with the reasons for the waiver. All Companies, other than Foreign Private Issuers, must disclose such waivers [in a]within four business days by filing a current report on Form 8-K with the Commission [within four business days], providing website disclosure that satisfies the requirements of Item 5.05(c) of Form 8-K, or, in cases where a Form 8-K is not required, by distributing a press release. Foreign Private Issuers must disclose such waivers either by providing website disclosure that satisfies the requirements of Item 5.05(c) of Form 8-K, by including disclosure in a Form 6-K or in the next Form 20-F or 40-F or by distributing a press release. This disclosure requirement provides investors the comfort that waivers are not granted except where they are truly necessary and warranted, and that they are limited and qualified so as to protect the Company and its Shareholders to the greatest extent possible.

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

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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, Nasdaq 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. Nasdaq 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

Nasdaq proposes to make changes to its rules to replace certain disclosure requirements with references to the applicable disclosure requirements of Regulation S-K, require the same disclosure as required by SEC Rules 10A-3(d)(1) and (2) and permit disclosure through a website and/or a press release to satisfy certain Nasdaq disclosure requirements.

Nasdaq currently requires a listed company to disclose in its proxy statement (or if the company does not file a proxy, in its Form 10-K or 20-F) any reliance on the provisions of Nasdaq's audit, compensation and nominating committee requirements that allow a company to have one non-independent director on the committee under exceptional and limited circumstances.<sup>5</sup> With respect to the audit committee, Nasdaq proposes to replace its current disclosure requirement in Listing Rule 5605(c)(2)(B) with a reference to the disclosure requirement in Item 407(d)(2) of Regulation S-K, which requires similar disclosure.<sup>6</sup> A foreign private issuer, which is not subject to Item 407(d)(2), would continue to be required to comply with Nasdaq's current disclosure requirements. Nasdaq believes that this proposed change will avoid duplication and confusion, given that the current Nasdaq disclosure requirement is duplicative of the disclosure required by Item 407(d)(2) and will facilitate compliance for listed companies while continuing to provide transparency to investors. Nasdaq also proposes to add a

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<sup>5</sup> Nasdaq Listing Rules 5605(c)(2)(B), 5605(d)(3) and 5605(e)(3).

<sup>6</sup> See 17 C.F.R. 229.407(d)(2) (requiring a company that is relying on the exceptional and limited circumstances exception to disclose the nature of the relationship that makes an individual not independent and the reasons for the board of directors' determination to appoint the individual to the audit committee).

reference to IM-5605-4 to require the disclosures specified in SEC Rules 10A-3(d)(1) and (2), which require disclosure of reliance on certain exceptions contained in SEC Rule 10A-3.<sup>7</sup> Nasdaq believes that this addition will highlight listed companies' disclosure requirements and help facilitate compliance.

With respect to the compensation and nominating committees, Nasdaq proposes to revise Listing Rules 5605(d)(3) and 5605(e)(3) to require the disclosures described in Instruction 1 to Item 407(a) of Regulation S-K from issuers that are otherwise subject to this requirement. For further disclosures that are required by Nasdaq's rules, but not also by Instruction 1 to Item 407(a) of Regulation S-K, Nasdaq proposes to broaden the methods of disclosure available to issuers to permit website disclosure. Nasdaq believes that allowing companies to rely on the Internet to satisfy these disclosure requirements will allow companies to provide investors with information in a more timely, efficient and cost effective manner, consistent with other disclosures that may be made on the issuer's website. As such, the proposal is consistent with Nasdaq's rule that permits website postings for the distribution of an annual report to shareholders<sup>8</sup> and the Commission's recent changes to require companies to post their proxy materials on a website.<sup>9</sup> Also, allowing website disclosure would eliminate the need for a company to amend a public filing if the company discovers that it failed to make a disclosure required solely by Nasdaq's rules.

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<sup>7</sup> 17 C.F.R. 240.10A-3.

<sup>8</sup> Nasdaq Listing Rule 5250(d)(1).

<sup>9</sup> See Securities Exchange Act Release No. 56135 (July 26, 2007), 72 FR 42222 (August 1, 2007).

In addition, Nasdaq requires that each listed company adopt a code of conduct applicable to all directors, officers and employees.<sup>10</sup> Any waivers to the code of conduct must be approved by the board of directors, and issuers, other than foreign private issuers, must disclose such waivers in a Form 8-K within four business days. Foreign private issuers must disclose such waivers either in a Form 6-K or in the next Form 20-F or 40-F. In Listing Rule 5610 and IM-5610, Nasdaq proposes to broaden the methods of disclosure of waivers to a code of conduct to include distributing a press release if a Form 8-K is not required<sup>11</sup> or posting on the company's website in a manner consistent with Item 5.05 of Form 8-K.<sup>12</sup> This proposal will conform Nasdaq's rule with that of the Commission<sup>13</sup> and other markets.<sup>14</sup>

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>15</sup> in general and with Section 6(b)(5) of the Act,<sup>16</sup> in particular. The proposed rule change would remove disclosure requirements in Nasdaq's rules that duplicate Commission disclosure requirements and provide cross references to Commission requirements. In addition, the proposed rule change would allow additional methods of disclosure for Nasdaq-listed

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<sup>10</sup> Nasdaq Listing Rule 5610 and IM-5610.

<sup>11</sup> A Form 8-K is required for waivers that apply to a company's principal executive officer, principal financial officer, principal accounting officer, controller or persons performing similar functions. In these cases, the waiver cannot be disclosed only by distributing a press release.

<sup>12</sup> Item 5.05 of Form 8-K allows website disclosure of waivers to a code of ethics, provided that an issuer has disclosed in its most recently filed annual report its Internet address and its intention to provide disclosure in this manner.

<sup>13</sup> Id.

<sup>14</sup> See Section 303A.10 of the NYSE Listed Company Manual.

<sup>15</sup> 15 U.S.C. 78f.

<sup>16</sup> 15 U.S.C. 78f(b)(5).

companies for certain disclosures not required by the Commission, thereby reducing costs for those companies, and allowing them to rely on technology to provide information to investors in a timelier manner. As such, the proposed rule change is 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.

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

Nasdaq 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, as amended.

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

Written comments were neither solicited nor received.

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, as amended, 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2008-014 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2008-014. 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 Web site viewing and printing in the Commission's Public Reference Room on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of Nasdaq. 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-NASDAQ-2008-014 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

Elizabeth M. Murphy  
Secretary

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<sup>17</sup> 17 C.F.R. 200.30-3(a)(12).