

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51221; File No. SR-NASD-2005-018)

February 17, 2005

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Permit Foreign Private Issuers to Follow Certain Home Country Practices

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 31, 2005, the National Association of Securities Dealers, Inc. (“NASD”), through its subsidiary, The Nasdaq Stock Market, Inc. (“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 the proposed rule change pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6) thereunder,⁴ which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

Nasdaq proposes to modify NASD Rule 4350(a)(1) and (5) and Interpretive Material (“IM”) 4350-6(1) to permit foreign private issuers to follow certain home country practices.

The text of the proposed rule change is below. Proposed new language is in *italics*;

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

proposed deletions are in [brackets].

4350. Qualitative Listing Requirements for Nasdaq National Market and Nasdaq Small Cap Market Issuers Except for Limited Partnerships

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(a) Applicability

(1) **Foreign Private Issuers.** [Nasdaq shall have the ability to provide exemptions from Rule 4350 to a foreign private issuer when provisions of this Rule are contrary to a law, rule or regulation of any public authority exercising jurisdiction over such issuer or contrary to generally accepted business practices in the issuer's country of domicile, except to the extent that such exemptions would be contrary to the federal securities laws, including without limitation those rules required by Section 10A(m) of the Act and Rule 10A-3 thereunder. A foreign issuer that receives an exemption under this subsection] A foreign private issuer may follow its home country practice in lieu of the requirements of Rule 4350, provided, however, that such an issuer shall: comply with Rules 4350(b)(1)(B), 4350(j) and 4350(m), have an audit committee that satisfies Rule 4350(d)(3), and ensure that such audit committee's members meet the independence requirement in Rule 4350(d)(2)(A)(ii). A foreign private issuer that follows a home country practice in lieu of one or more provisions of Rule 4350 shall disclose in its annual reports filed with the Commission each requirement of Rule 4350 that it does not follow [from which it is exempted] and describe the home country practice[, if any,] followed by the issuer in lieu of such requirements. In addition, a foreign private issuer making its initial public offering or first U.S. listing on Nasdaq shall [disclose any such

exemptions] make the same disclosures in its registration statement.

(2) through (4) No change.

(5) **Effective Dates/Transition.** In order to allow companies to make necessary adjustments in the course of their regular annual meeting schedule, and consistent with SEC Rule 10A-3, Rules 4200 and 4350 are effective as set out in this subsection. During the transition period between November 4, 2003 and the effective date of Rules 4200 and 4350, companies that have not brought themselves into compliance with these Rules shall continue to comply with Rules 4200-1 and 4350-1, which consist of sunseting sections of previously existing Rules 4200 and 4350.

The provisions of Rule 4200(a) and Rule 4350(c), (d) and (m) regarding director independence, independent committees, and notification of noncompliance shall be implemented by the following dates:

* July 31, 2005 for foreign private issuers and small business issuers (as defined in SEC Rule 12b-2); and

* For all other listed issuers, by the earlier of: (1) the listed issuer's first annual shareholders meeting after January 15, 2004; or (2) October 31, 2004.

In the case of an issuer with a staggered board, with the exception of the audit committee requirements, the issuer shall have until their second annual meeting after January 15, 2004, but not later than December 31, 2005, to implement all new requirements relating to board composition, if the issuer would be required to change a director who would not normally stand for election at an earlier annual meeting. Such issuers shall comply with the audit committee requirements pursuant to the

implementation schedule bulleted above.

A company listing in connection with its initial public offering shall be permitted to phase in its compliance with the independent committee requirements set forth in Rule 4350(c) on the same schedule as it is permitted to phase in its compliance with the independent audit committee requirement pursuant to SEC Rule 10A-3(b)(1)(iv)(A). Accordingly, a company listing in connection with its initial public offering shall be permitted to phase in its compliance with the independent committee requirements set forth in Rule 4350(c) as follows: (1) one independent member at the time of listing; (2) a majority of independent members within 90 days of listing; and (3) all independent members within one year of listing. Furthermore, a company listing in connection with its initial public offering shall have twelve months from the date of listing to comply with the majority independent board requirement in Rule 4350(c). It should be noted, however, that pursuant to SEC Rule 10A-3(b)(1)(iii) investment companies are not afforded the exemptions under SEC Rule 10A-3(b)(1)(iv). Issuers may choose not to adopt a compensation or nomination committee and may instead rely upon a majority of the independent directors to discharge responsibilities under Rule 4350(c). For purposes of Rule 4350 other than Rule 4350(d)(2)(A)(ii) and Rule 4350(m), a company shall be considered to be listing in conjunction with an initial public offering if, immediately prior to listing, it does not have a class of common stock registered under the Act. For purposes of Rule 4350(d)(2)(A)(ii) and Rule 4350(m), a company shall be considered to be listing in conjunction with an initial public offering only if it meets the conditions in SEC Rule 10A-3(b)(1)(iv)(A) under the Act, namely, that the company was not,

immediately prior to the effective date of a registration statement, required to file reports with the Commission pursuant to Section 13(a) or 15(d) of the Act.

Companies that are emerging from bankruptcy or have ceased to be Controlled Companies within the meaning of Rule 4350(c)(5) shall be permitted to phase-in independent nomination and compensation committees and majority independent boards on the same schedule as companies listing in conjunction with their initial public offering. It should be noted, however, that a company that has ceased to be a Controlled Company within the meaning of Rule 4350(c)(5) must comply with the audit committee requirements of Rule 4350(d) as of the date it ceased to be a Controlled Company. Furthermore, the executive sessions requirement of Rule 4350(c)(2) applies to Controlled Companies as of the date of listing and continues to apply after it ceases to be controlled.

Companies transferring from other markets with a substantially similar requirement shall be afforded the balance of any grace period afforded by the other market. Companies transferring from other listed markets that do not have a substantially similar requirement shall be afforded one year from the date of listing on Nasdaq. This transition period is not intended to supplant any applicable requirements of Rule 10A-3 under the Act.

[The limitations on corporate governance exemptions to foreign private issuers shall be effective July 31, 2005. However, the] The requirement that a foreign private issuer disclose that it does not follow an otherwise applicable provision of Rule 4350 [the receipt of a corporate governance exemption from Nasdaq] shall be effective for new listings and filings made after January 1, 2004.

Rule 4350(n), requiring issuers to adopt a code of conduct, shall be effective May 4, 2004.

Rule 4350(h), requiring audit committee approval of related party transactions, shall be effective January 15, 2004.

The remainder of Rule 4350(a) and Rule 4350(b) are effective November 4, 2003.

(b) through (n) No change.

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IM-4350-6. Applicability

1. **Foreign Private Issuer Exception [Exemptions] and Disclosure.** A foreign private issuer (as defined in Rule 3b-4 under the Act) listed on Nasdaq may [obtain exemptions from Nasdaq's corporate governance standards if such rules would require the issuer to do anything contrary to the laws, rules, regulations or generally accepted business practices of its home country. Issuers may request exemptions under this provision by submitting a letter from their home country counsel briefly describing the company's practice and the applicable laws, rules, regulations or generally accepted business practices of the home country.] follow the practice in such issuer's home country (as defined in General Instruction F of Form 20-F) in lieu of some of the provisions of Rule 4350, subject to several important exceptions. First, such an issuer shall comply with Rule 4350(b)(1)(B) (Disclosure of Going Concern Opinion), Rule 4350(j) (Listing Agreement) and Rule 4350(m) (Notification of Material Noncompliance). Second, such an issuer shall have an audit committee that satisfies Rule 4350(d)(3). Third, members of such audit committee shall meet the criteria for independence referenced in Rule 4350(d)(2)(A)(ii) (the criteria set forth in Rule 10A-3(b)(1), subject to the exemptions provided in Rule 10A-3(c)

under the Act). Finally, a foreign private issuer that elects to follow home country practice in lieu of a requirement of Rule 4350 shall submit to Nasdaq a written statement from an independent counsel in such issuer's home country certifying that the issuer's practices are not prohibited by the home country's laws. In the case of new listings, this certification is required at the time of listing. For existing issuers, the certification is required at the time the company seeks to adopt its first non-compliant practice. In the interest of transparency, the rule requires a foreign private issuer to [disclose the receipt of a corporate governance exemption] make appropriate disclosures in the issuer's annual filings with the Commission (typically Form 20-F or 40-F), and at the time of the issuer's original listing in the United States, if that listing is on Nasdaq, in its registration statement (typically Form F-1, 20-F, or 40-F). [The disclosure should] The issuer shall disclose each requirement of Rule 4350 that it does not follow and include a brief statement of [what alternative measures, if any, the issuer has taken] the home country practice the issuer follows in lieu of [the] these corporate governance requirement(s) [from which it was exempted. For example, the issuer might state that it complies with the relevant standards of its home market].

(2) through (5) No change.

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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

The purpose of the proposed rule change is to permit foreign private issuers to follow their home country corporate governance practices in lieu of certain practices prescribed by NASD Rule 4350 without the need to seek an individual exemption from Nasdaq. The proposed exception is not intended to exempt issuers from complying with those aspects of NASD Rule 4350 that are mandated by the U.S. securities laws and regulations. As such, issuers would still be required to maintain an audit committee that has the responsibilities and the authority, and sets the procedures referenced in NASD Rule 4350(d)(3).⁵ Members of such an audit committee would have to meet the criteria for independence referenced in NASD Rule 4350(d)(2)(A)(ii) (i.e., the criteria set forth in Rule 10A-3(b)(1) under the Act, subject to the exemptions provided in Rule 10A-3(c) under the Act). The proposed exception would also not be applicable to the requirement to disclose the receipt of a going concern opinion,⁶ to the requirement of a Listing Agreement in the form designated by Nasdaq,⁷ and, as of July 31, 2005, to the requirement of prompt notification of material non-compliance with the requirements of NASD Rule 4350.⁸

⁵ The audit committee requirement will not become applicable to foreign private issuers and, thus, will not be a condition to the proposed exception until July 31, 2005.

⁶ See NASD Rule 4350(b)(1)(B).

⁷ See NASD Rule 4350(j).

⁸ See NASD Rule 4350(m).

A foreign private issuer wishing to follow its home country practices, rather than the practices set forth in NASD Rule 4350, would need to make the appropriate disclosures in its annual reports filed with the Commission and, if applicable, in its registration statement. Such an issuer would also need to provide Nasdaq with a letter from an outside counsel in that issuer's home country certifying that the issuer's practices are not prohibited by the home country's laws.

A foreign private issuer that previously received from Nasdaq an exemption pursuant to the existing NASD Rule 4350(a) may continue to rely on that exemption. However, if an issuer wishes to be exempted from any requirement of NASD Rule 4350 not covered by the previously granted exemption, then this issuer must fully comply with the procedures of the proposed rule. Of course, an issuer may not rely on a previously provided exemption if the requirement to which this exemption applies was changed after the exemption was issued.

The proposed rule change follows closely the related practices of the New York Stock Exchange ("NYSE") and the American Stock Exchange ("Amex") but would provide for additional public disclosure concerning issuers' practices.⁹ Both of these exchanges permit a foreign private issuer to follow its home country practices in lieu of the exchanges' own corporate governance rules (except where that would be contrary to the U.S. securities laws) without seeking a formal exemption from the exchange. Both exchanges also require disclosures of "significant" non-complying practices and a certification from home country counsel that the issuer's practices are not prohibited by the home country's laws. Once the proposed rule change is implemented, Nasdaq's process with respect to foreign private issuers will become

⁹ See NYSE Listed Company Manual Sections 103.00, 303A.00 and 303A.11, and Amex Company Guide Section 110.

substantially similar to those of the NYSE and Amex, except that the proposed rule would call for public disclosure of “each requirement” that the issuer does not follow, while the rules of the NYSE and Amex only require disclosure of “any significant ways in which . . . [the issuer’s] corporate governance practices differ.”¹⁰ In addition, the proposed rule would not permit a foreign private issuer to avoid the requirement of NASD Rule 4350(b)(1)(B) that it publicly disclose the receipt of a going concern opinion. This disclosure is not required by the NYSE. The proposed rule change also makes clear that a foreign issuer that is not a foreign private issuer must comply with each of the applicable requirements of NASD Rule 4350 and is not eligible for any exception based on its country’s practice.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,¹¹ in general and with Section 15A(b)(6) of the Act,¹² in particular, in that it is designed to promote just and equitable principles of trade, and to remove impediments to a free and open market and a national market system. Specifically, the proposal will facilitate listings on Nasdaq by foreign private issuers, thereby increasing the level of competition for such listings among U.S. markets.

¹⁰ See NYSE Listed Company Manual Section 303A.11 and Amex Company Guide Section 110.

¹¹ 15 U.S.C. 78o-3.

¹² 15 U.S.C. 78o-3(b)(6).

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

Nasdaq does not believe that the proposed rule change will impose 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 on the proposed rule change were neither solicited nor received.

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

The proposed rule change has been designated by Nasdaq as a “non-controversial” rule change pursuant to Section 19(b)(3)(A) of the Act¹³ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹⁴

The foregoing rule change: (1) does not significantly affect the protection of investors or the public interest, (2) does not impose any significant burden on competition, and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest. Consequently, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁵ and Rule 19b-4(f)(6) thereunder.¹⁶

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is

¹³ 15 U.S.C. 78s(b)(3)(A).

¹⁴ 17 CFR 240.19b-4(f)(6).

¹⁵ 15 U.S.C. 78s(b)(3)(A).

¹⁶ 17 CFR 240.19b-4(f)(6).

necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

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

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-NASD-2005-018 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File No. SR-NASD-2005-018. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be

available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW, Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File No. SR-NASD-2005-018 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁷

Margaret H. McFarland
Deputy Secretary

¹⁷ 17 CFR 200.30-3(a)(12).