

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61461; File No. SR-NASDAQ-2010-006)

February 1, 2010

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change To Modify The Press Release Requirements For Listed Companies

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 13, 2010, 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. 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 the Substance of the Proposed Rule Change

Nasdaq proposes to modify certain of the press release requirements for listed companies. Nasdaq will implement the proposed rule upon approval. The text of the proposed rule change is available from Nasdaq’s website at <http://nasdaq.cchwallstreet.com>, at Nasdaq’s principal office, and at the Commission’s Public Reference Room.

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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

There are a number of Nasdaq rules related to the issuer compliance process that require a company to disclose information in a press release or through the news media.³ These rules generally were adopted to address inconsistent issuer disclosure practices and reflected the view, prevalent at that time, that issuing a press release was the only way to assure wide dissemination of an important event. However, in 2002, after the Commission adopted Regulation FD,⁴ Nasdaq amended its rules to allow listed companies to provide disclosure of material news via any Regulation FD compliant means.⁵ Since that time Nasdaq has had the opportunity to observe market reaction to news disclosed in ways other than via a press release. Nasdaq's experience since adopting this rule indicates that there is broad acceptance of Regulation FD compliant methods of disclosure, such as through the use of a Form 8-K.

In addition, the Commission has substantially modified its rules regarding the disclosure of information on a Form 8-K.⁶ As a result Nasdaq's requirements in some instances are duplicative of the Form 8-K requirements and Nasdaq sees companies forced to make multiple disclosures regarding the same event. Nasdaq believes that investors have come to rely upon Form 8-K disclosure and notes that Form 8-K disclosures are readily available to investors and the information reported on them is widely reported on by the news media. As such, to the

³ Nasdaq interprets the requirement to disclose information through the news media to be satisfied by the issuance of a press release.

⁴ 17 CFR 243.100 – 103. Regulation FD permits a company to disclose material information using a method (or combination of methods) of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public.

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

⁶ Exchange Act Release No. 49424 (March 16, 2004), 69 FR 15594 (March 25, 2004).

extent information is reported on a Form 8-K, Nasdaq believes that duplicate disclosure through a press release is unnecessary and an extra burden on listed companies.

Given the foregoing, Nasdaq believes it is appropriate to modify the following rules to permit disclosure either through a press release or by filing a Form 8-K where required by Commission rules:

- 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" 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 is a Public Reprimand Letter.⁸ 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 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, a company that is late in

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 Current Rule 5250(b)(3) is also renumbered by this filing as Rule 5250(b)(2).

⁹ Item 3.01 of Form 8-K requires a company to file a Form 8-K when it receives notice

filing a required periodic report with the Securities and Exchange Commission would still be required to issue a press release announcing that it has received notice that it does not meet that requirement. Nasdaq also proposes to clarify in each of these rules that notification of these disclosures should be made to the MarketWatch Department through Nasdaq's electronic disclosure submission system at least ten minutes prior to the notification to the public.¹⁰

- 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 notes that companies that receive an exemption are also required to mail this notice to all shareholders at least ten days before issuing securities in reliance on the exception.
- 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

from Nasdaq that the company does not satisfy a listing standard or when Nasdaq issues a Public Reprimand Letter to the company. As such, Nasdaq’s requirements are, in some cases, duplicative of the Form 8-K disclosure requirement and a company could be required to issue a press release under Nasdaq’s rules and a Form 8-K under the Commission’s rules containing the same information. A company could satisfy the revised requirement by filing the required Form 8-K, thereby eliminating this dual disclosure and any confusion it creates, while ensuring that the information remains publicly disclosed.

¹⁰ The Commission notes that Nasdaq recently filed a proposed rule change that provides 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 NASDAQ-2010-008.

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.

Similarly, Rule 5250(c)(2) 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 proposes to eliminate the requirement contained in Rule 5250(b)(2) that a company 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. 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.¹² Under these rules, a company must include the audit opinion in its annual report, without regard to whether it expresses doubt about the ability of the company to continue as a going concern.¹³ Given that the audit opinion is already required to be publicly disclosed, Nasdaq has found that the separate press release announcing the receipt of the opinion is duplicative and therefore can be confusing to investors. Of course if a company fails to include the audit opinion in its annual filing, Nasdaq would consider the filing deficient and would move to delist the company on that basis.¹⁴

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

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

¹³ Rule 2-01 of Regulation S-X, 17 CFR 210.2-01.

¹⁴ Nasdaq is also proposing to make a conforming change to Rule 5615(a)(3) to eliminate

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).¹⁵ Nasdaq is also maintaining the requirement 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, Rules 5810(b) and 5840(k) require companies to notify multiple Nasdaq departments before they issue certain disclosures.¹⁶ These duplicative notice requirements are burdensome to listed companies and provide no regulatory benefit to Nasdaq. As a result, 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.¹⁷ MarketWatch will notify other Nasdaq departments when necessary.¹⁸

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 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.

¹⁵ 17 CFR 240.12d2-2(c).

¹⁶ Under these rules, a company must notify the MarketWatch, Listing Qualifications, and Hearings Departments.

¹⁷ 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) (approving SR-NASDAQ-2007-029).

¹⁸ 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.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,¹⁹ in general and with Sections 6(b)(5) of the Act,²⁰ in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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. The proposed rule change is designed to facilitate companies' compliance with Nasdaq rules by aligning Nasdaq's disclosure requirements with those of the Commission. Nasdaq notes that the proposed changes to permit disclosure by a Form 8-K will not eliminate or reduce information now available to investors, but will minimize duplicative disclosures.

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

¹⁹ 15 U.S.C. 78f.

²⁰ 15 U.S.C. 78f(b)(5).

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 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-NASDAQ-2010-006 on the subject line.

Paper Comments:

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

All submissions should refer to File No. SR-NASDAQ-2010-006. 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,²¹ 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, 100 F Street, NE, Washington, DC 20549, 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

²¹ The text of the proposed rule change is available on the Commission's Web site at <http://www.sec.gov>.

that you wish to make available publicly. All submissions should refer to File No. SR-NASDAQ-2010-006 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.²²

Florence E. Harmon
Deputy Secretary

²² 17 CFR 200.30-3(a)(12).