

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61757; File No. SR-NASDAQ-2010-036)

March 22, 2010

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Clarify and Modify the Applicability of Nasdaq Rule 5615 to Exchange Traded Funds

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹, and Rule 19b-4² thereunder, notice is hereby given that on March 11, 2010, The NASDAQ Stock Market LLC (“Nasdaq” or “the Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. Nasdaq has designated the proposed rule change as constituting a non-controversial rule change under Rule 19b-4(f)(6) under the Act,³ which renders the proposal 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

The Exchange proposes to clarify and modify the applicability of Nasdaq Rule 5615 to Exchange Traded Funds. The text of the proposed rule change is below. Proposed new language is underlined; proposed deletions are in brackets.⁴

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5615. Exemptions from Certain Corporate Governance Requirements

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 17 CFR 240.19b-4(f)(6).

⁴ Changes are marked to the rules of The NASDAQ Stock Market LLC found at <http://nasdaq.cchwallstreet.com>.

This rule provides the exemptions from the corporate governance rules afforded to certain types of Companies, and sets forth the phase-in schedules for initial public offerings, Companies emerging from bankruptcy and Companies transferring from other markets. This rule also describes the applicability of the corporate governance rules to controlled companies and sets forth the phase-in schedule afforded to Companies ceasing to be controlled companies.

(a) Exemptions to the Corporate Governance Requirements

(1) Asset-backed Issuers and Other Passive Issuers

The following are exempt from the requirements relating to Majority Independent Board {Rule 5605(b)}, Audit Committee {Rule 5605(c)}, Independent Director Oversight of Executive Officer Compensation {Rule 5605(d)} and Director Nominations {Rule 5605(e)}, the Controlled Company Exemption {Rule 5615(c)(2)}, and Code of Conduct {Rule 5610}:

(A) No change.

(B) issuers, such as unit investment trusts, including Portfolio Depository Receipts, which [that] are organized as trusts or other unincorporated associations that do not have a board of directors or persons acting in a similar capacity and whose activities are limited to passively owning or holding (as well as administering and distributing amounts in respect of) securities, rights, collateral or other assets on behalf of or for the benefit of the holders of the listed securities.

* * *

(2) – (4) No change.

(5) Management Investment Companies

Management investment companies (including business development companies) are subject to all the requirements of the Rule 5600 Series, except that management investment companies registered under the Investment Company Act of 1940 are exempt from the Independent Directors requirement, the Independent Director Oversight of Executive Officer Compensation and Director Nominations requirements, and the Code of Conduct requirement, set forth in Rules 5605(b), (d) and (e) and 5610, respectively. In addition, management investment companies that are Index Fund Shares and Managed Fund Shares, as defined in Rules 5705(b) and 5735, are exempt from the Audit Committee requirements set forth in Rule 5605(c), except for the applicable requirements of SEC Rule 10A-3.

IM-5615-4. Management Investment Companies

Management investment companies registered under the Investment Company Act of 1940 are already subject to a pervasive system of federal regulation in certain areas of corporate governance covered by 5600. In light of this, Nasdaq exempts from Rules 5605(b), (d), (e) and 5610 management investment companies registered under the Investment Company Act of 1940. Business development companies, which are a type of closed-end management investment company defined in Section 2(a)(48) of the Investment Company Act of 1940 that are not registered under that Act, are required to comply with all of the provisions of the Rule 5600 Series. Management investment companies that are Index Fund Shares and Managed Fund Shares are exempt from the Audit Committee requirements set forth in Rule 5605(c), except for the applicable requirements of SEC Rule 10A-3.

(b) – (c) 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

Nasdaq is proposing to clarify and modify the applicability of certain of its corporate governance requirements to exchange traded funds (“ETFs”). Nasdaq currently lists ETFs formed as unit investment trusts (“UITs”) or as management investment companies.⁵ ETFs organized as UITs are listed under Rule 5705(a) and called Portfolio Depository Receipts, while ETFs organized as management investment companies are listed under Rule 5705(b) and called Index Fund Shares or listed under Rule 5735 and called Managed Fund Shares. However, the exemptions available to the corporate governance requirements are not presently consistent among ETFs organized under these different legal structures.

Nasdaq Rule 5615(a)(1)(B) exempts UITs from certain corporate governance

⁵ Section 4 of the Investment Company Act of 1940 classifies investment companies in three principal classes: face-amount certificate companies, UITs, and management companies. 15 U.S.C. 80a-4. Management companies are further divided into open-end and closed-end companies. 15 U.S.C. 80a-5(a). All ETFs are open-end companies.

requirements.⁶ Because Portfolio Depository Receipts are UITs, they are exempt from, among other things, the requirements in Rule 5605(b) - (e) and Rule 5610 related to majority independent board, audit committees, independent director oversight of executive officer compensation and director nominations, and the code of conduct under the corporate governance requirements, respectively. Nasdaq proposes to amend Rule 5615(a)(1)(B) to specifically add a reference to Portfolio Depository Receipts in order to remove any ambiguity about the applicability of these exemptions to Portfolio Depository Receipts.

Nasdaq Rule 5615(a)(5) and IM-5615-4 grant exemptions for ETFs that are structured as management investment companies from the requirements of Rule 5605(b) (majority independent board), Rules 5605(d) and (e) (independent director oversight of executive officer compensation and director nominations), and Rule 5610 (code of conduct). Unlike Rule 5615(a)(1), Rule 5615(a)(5) does not include an exemption from Rule 5605(c), relating to Nasdaq's audit committee requirements. As such, ETFs that are formed as management investment companies and listed as Index Fund Shares or Managed Fund Shares are currently subject to the audit committee requirements, whereas ETFs that are formed as UITs and listed as Portfolio Depository Receipts are not subject to those requirements.

Nasdaq proposes to expand the exemption in Rule 5615(a)(5) and IM-5615-4 to also exempt ETFs that are formed as management investment companies from most of the audit

⁶ Specifically, Rule 5615(a)(1)(B) exempts “issuers, such as unit investment trusts, that are organized as trusts or other unincorporated associations that do not have a board of directors or persons acting in a similar capacity and whose activities are limited to passively owning or holding (as well as administering and distributing amounts in respect of) securities, rights, collateral or other assets on behalf of or for the benefit of the holders of the listed securities.”

committee requirement of Rule 5605(c), thereby largely eliminating this difference.⁷

Notwithstanding this proposed change, one difference will remain: ETFs formed as management investment companies must comply with the applicable provisions of SEC Rule 10A-3 of the Securities Exchange Act of 1934⁸ (“SEC Rule 10A-3”) and the proposed rule change will specifically state that requirement. This proposed change will conform Nasdaq’s treatment of these ETFs that are management investment companies with that of other markets.⁹

Moreover, Nasdaq believes that it is appropriate to make these changes because, as stated in IM-5615-4, these entities are subject to the Investment Company Act of 1940 and the pervasive system of federal regulation. This includes, among other things, assigning important duties of investment company governance, such as approval of investment advisory contracts, to independent directors.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act¹⁰ in general, and furthers the objectives of Section 6(b)(5) of the Act¹¹ in particular, in that it is

⁷ Management investment companies other than ETFs must still comply with the audit committee requirement of Rule 5605(c) and SEC Rule 10A-3.

⁸ 17 CFR 240.10A-3.

⁹ NYSEArca Equities Rule 5.3, in part, details specifically which corporate governance requirements apply to “special purpose companies.” A special purpose company is defined to include a company listed under NYSEArca Equities Rule 5.2(j)(3), which contains NYSEArca’s provisions for listing ETFs, called Investment Company Units, which include registered investment companies organized as UITs or open-end management investment companies. See also NYSE Listed Company Manual Section 303A.00, which similarly provides that the NYSE’s corporate governance requirements contained in Section 303A do not apply to securities listed under Section 703.16, relating to Investment Company Units, which can be organized as unit investment trusts or open-end management investment companies.

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(5).

designed 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. The proposed change is designed to harmonize the applicability of Nasdaq's corporate governance rules to various types of ETFs and will treat similarly situated companies in the same manner.

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.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹² and Rule 19b-4(f)(6)(iii) thereunder.¹³

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

¹² 15 U.S.C. 78s(b)(3)(A).

¹³ 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that Nasdaq satisfied the five-day pre-filing notice requirement.

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

Normally, a proposed rule change filed under 19b-4(f)(6) may not become operative prior to 30 days after the date of filing. However, Rule 19b-4(f)(6)(iii)¹⁴ permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. Nasdaq has requested that the Commission waive the 30-day operative delay. In its filing, Nasdaq requested the waiver in order to provide immediate clarity to its rules and to eliminate any disparity between its rules and those of other exchanges with similar exemptions that have been previously approved by the Commission.

The Commission believes that waiver of the 30-day operative period is consistent with the protection of investors and the public interest. The proposed rule change will clarify an ambiguity in Nasdaq's rules, which should benefit investors, Nasdaq members, and regulators. In addition, the Commission notes that, as Nasdaq has pointed out, the changes proposed in this filing would conform certain of Nasdaq's corporate governance standards to those of other exchanges.¹⁵ Accordingly, the Commission designates the proposal to be operative upon filing with the Commission.¹⁶

¹⁴ 17 CFR 240.19b-4(f)(6)(iii).

¹⁵ See supra, note 9.

¹⁶ For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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 Number SR-NASDAQ-2010-036 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 Number SR-NASDAQ-2010-036. 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, 100 F Street, NE, Washington, DC 20549-1090 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. 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-2010-036 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.¹⁷

Florence E. Harmon
Deputy Secretary

¹⁷ 17 C.F.R. 200.30-3(a)(12).