

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-53578; File No. SR-NASD-2005-073)

March 30, 2006

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Granting Approval of a Proposed Rule Change and Amendment Nos. 1 and 2 Thereto and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 3 Thereto Relating to Rule 4350(e) to Amend the Annual Shareholder Meeting Requirement

On June 6, 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”), 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 amend NASD Rule 4350 in order to change its annual shareholder meeting requirement. On December 5, 2005, Nasdaq filed Amendment No. 1 to the proposed rule change.³ On December 9, 2005, Nasdaq filed Amendment No. 2 to the proposed rule change.⁴ The proposed rule change, as amended, was published for comment in the Federal Register on December 28, 2005.⁵ No comments were received regarding the proposal. On March 16, 2006, Nasdaq filed Amendment No. 3 to the proposed rule change.⁶ This order approves the proposed rule change, as amended, publishes

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ In Amendment No. 1, Nasdaq revised the proposed rule text and corresponding description of the proposal in its Form 19b-4. Amendment No. 1 replaced Nasdaq’s original filing in its entirety.

⁴ In Amendment No. 2, Nasdaq made clarifying changes to the proposed rule text of IM-4350-8 with respect to certain issuers still subject to the annual shareholder meeting requirement under NASD Rule 4350(e).

⁵ See Securities Exchange Act Release No. 52985 (December 20, 2005), 70 FR 76895.

⁶ In Amendment No.3, Nasdaq made further clarifying changes to the proposed rule text of IM-4350-8 to state that at the annual shareholder meeting, shareholders must be afforded the opportunity to discuss company affairs with management and, if required by the issuer’s governing documents, to elect directors.

notice of Amendment No. 3 to the proposed rule change, and grants accelerated approval to Amendment No. 3.

I. Description of the Proposed Rule Change

NASD Rule 4350(e) currently requires all Nasdaq issuers to hold an annual meeting of shareholders and to provide notice of such meeting to Nasdaq. Nasdaq recognizes the significance of annual shareholder meetings because they allow the equity owners of a company – typically its common stockholders – the opportunity to elect directors and meet with management to discuss company affairs.

Nasdaq, however, believes that the annual shareholder meeting requirement is not necessary for, or applicable to, an issuer with respect to certain types of its listed securities because the holders of those securities do not directly participate as equity holders and do not vote in the election of directors. Specifically, Nasdaq makes reference to securities listed pursuant to NASD Rule 4420(f) (Quantitative Designation Criteria, Other Securities), which allows for the listing of securities that possess attributes or features of more than one category of security.⁷ Nasdaq believes that these securities typically are not an issuer's primary equity security, and their holders have only limited economic interests and other rights.

Nasdaq also believes that Portfolio Depository Receipts (listed pursuant to NASD Rule 4420(i)) and Index Fund Shares (listed pursuant to NASD Rule 4420(j)), which are securities issued by unit investment trusts and open-end management investment companies, respectively, that are organized as exchange-traded funds, should not be required to hold an annual

⁷ Securities currently listed under Rule 4420(f) include: (i) Trust Preferred Securities, the payments on which are linked to the performance of another security; (ii) Index Linked Notes, the payments on which are linked to the performance of an underlying index; and (iii) Contingent Value Rights, the performance of which are tied to the performance of another security, a particular division of the company, or the occurrence of a certain event.

shareholder meeting. According to Nasdaq, these exchange-traded funds are generally passive investment vehicles that seek to match the performance of an index and must obtain an exemptive order from the Commission before they offer securities. As a result, Nasdaq notes that the operations of the issuers of these securities are circumscribed by numerous representations and conditions of the applicable orders, and that the issuers of these securities do not typically experience the need for operational or other changes requiring a shareholder vote, and, by extension, a shareholder meeting.

Finally, Nasdaq would exclude from its annual shareholder meeting requirement those issuers listing Trust Issued Receipts (listed pursuant to NASD Rule 4420(l)), which are securities issued by a trust that holds, but does not manage, specific securities on behalf of the investors in the trust. Nasdaq notes that these trusts do not hold shareholder (or unitholder) meetings because the trusts have no boards of directors and essentially serve only as conduits for the investors' indirect investments in the underlying securities of the trusts.

For the foregoing reasons, Nasdaq proposes to amend NASD Rule 4350(e) such that the requirement to hold an annual shareholder meeting would be applicable only to those Nasdaq issuers as a result of listing voting and non-voting common stock and voting preferred stock, and their respective equivalents. Under the proposal, issuers of securities listed under NASD Rules 4420(f), 4420(i), 4420(j), and 4420(l) would specifically be excluded from the annual meeting requirement in proposed IM-4350-8. The proposal makes clear, however, that issuers of such securities are still required to hold an annual shareholder meeting with respect to the listing of common stock or voting preferred stock, or their equivalents.⁸ By clearly identifying those

⁸ Proposed IM-4350-8 provides that the requirement to hold an annual shareholder meeting would not be applicable as a result of an issuer listing the following types of securities: “securities listed pursuant to Rule 4420(f) (such as Trust Preferred Securities and

issuers that will be subject to the annual shareholder meeting requirement, Nasdaq believes that NASD Rule 4350(e) will be more transparent.

In addition, NASD Rule 4350(e) currently requires all Nasdaq issuers to provide notice of their annual shareholder meetings to Nasdaq. In practice, however, Nasdaq states that it does not rely on this notification to monitor compliance with the annual shareholder meeting requirement. Instead, Nasdaq represents that its staff reviews proxy statements (and, in the case of issuers that do not file proxy statements, other Commission filings) to determine compliance. For these reasons, Nasdaq proposes to further amend NASD Rule 4350(e) to eliminate the notification requirement.

Finally, while NASD Rule 4350(e) currently does not provide a deadline for holding the annual shareholder meeting, Nasdaq proposes that the annual shareholder meeting must be held within one year of the end of the issuer's fiscal year.⁹ At each such meeting, shareholders must be afforded the opportunity to discuss company affairs with management and, if required by the issuer's governing documents, to elect directors. Nasdaq believes that codifying this time frame would provide additional transparency to the annual shareholder meeting requirement.

II. Discussion and Commission Findings

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

Contingent Value Rights), unless the listed security is a common stock or voting preferred stock equivalent (e.g., a callable common stock); Portfolio Depository Receipts listed pursuant to Rule 4420(i); Index Fund Shares listed pursuant to Rule 4420(j); and Trust Issued Receipts listed pursuant to Rule 4420(l). Notwithstanding, if the issuer also lists common stock or voting preferred stock, or their equivalent, the issuer must still hold an annual meeting for the holders of that common stock or voting preferred stock, or their equivalent." See Securities Exchange Act Release No. 52985 (December 20, 2005), 70 FR 76895, 76896.

⁹ See infra note 14.

association¹⁰ and, in particular, the requirements of Section 15A(b)(6) of the Act¹¹ and the rules and regulations thereunder. Specifically, the Commission finds that the proposal to amend the annual shareholder meeting requirement is consistent with Section 15A(b)(6) of the Act because it is designed to promote just and equitable principles of trade, to remove impediments to a free and open market and a national market system, and, in general, to protect investors and the public interest, and is not designed to permit unfair discrimination between issuers.

A. Applicability of the Annual Shareholder Meeting Requirement

The proposal sets forth which Nasdaq issuers are required to hold annual shareholder meetings and excludes from the annual shareholder meeting requirement issuers listing certain types of securities with respect to which the shareholders typically have a limited interest.¹² The Commission notes that Nasdaq's proposed annual shareholder meeting requirement remains subject to any applicable state and federal securities laws that relate to such annual meetings; as a result, an issuer that lists one or more of the types of securities set forth in proposed IM-4350-8 may still be required to hold annual shareholder meetings in accordance with such state and federal securities laws. In addition, the Commission notes that issuers of Nasdaq-listed securities, including the types of securities set forth in proposed IM-4350-8, remain subject to state and federal securities laws that may require other types of shareholder meetings, such as special meetings of shareholders. For example, exchange-traded funds are registered under, and

¹⁰ In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹¹ 15 U.S.C. 78o-3(b)(6).

¹² For example, as noted above, shareholders of some of these securities have a limited economic interest in the issuer and do not even vote for a board of directors.

remain subject to, the Investment Company Act of 1940 (“Investment Company Act”), which imposes various shareholder-voting requirements that may be applicable to such funds.¹³

The proposal also clarifies that, under the NASD rules, the right not to hold an annual shareholder meeting, as set forth in proposed IM-4350-8, applies only with respect to the particular securities specified in proposed IM-4350-8. Thus, although the proposed rule change excludes a particular Nasdaq issuer from holding an annual shareholder meeting with respect to, and as a result of listing, the specific type of security specified in proposed IM-4350-8, if such issuer also lists other common stock or voting preferred-stock, or their equivalent, such issuer must nevertheless hold an annual meeting for the holders of that common stock or voting preferred-stock, or their equivalent, under the proposal. In addition, proposed IM-4350-8 makes clear that issuers listing securities under NASD Rule 4420(f) (Other Securities), which allows for the listing of Trust Preferred Securities, Index Linked Notes, and Contingent Value Rights, among others, will still be subject to the annual shareholder meeting requirement, irrespective of whether such securities are listed under NASD Rule 4420(f), if such securities have the attributes of common stock or voting preferred stock, or their equivalents.

Given the limited rights and other interests of the holders of those securities specified in proposed IM-4350-8 and the applicability of federal and state securities laws that govern shareholder meetings, the Commission believes that the proposed rule change reasonably sets forth the scope of the annual shareholder meeting requirement and will ensure that the appropriate Nasdaq-listed companies are required to hold annual shareholder meetings under NASD rules, for the benefit of investors and the public interest.

¹³ See e.g., Section 16 of the Investment Company Act, which requires, among others, an investment company’s initial board of directors to be elected by the shareholders at an annual or special meeting. 15 U.S.C. 80a-16(a).

B. Notification of the Annual Shareholder Meeting

With respect to Nasdaq's proposal to eliminate the notice requirement in NASD Rule 4350(e), the Commission believes that, because Nasdaq's practice to monitor the annual shareholder meeting requirement involves the review of proxy statements and other Commission filings, the current notification requirement is redundant and its elimination from NASD Rule 4350(e) would be reasonable. Of course, Nasdaq will still be required to ensure compliance with the annual shareholder meeting requirement and is simply eliminating a notification requirement which Nasdaq claims is not necessary. The proposed change would be consistent with Section 15A(b)(6) of the Act because the elimination of a redundancy and an unnecessary obligation of Nasdaq issuers removes impediments to the mechanism of a free and open market and a national market system, while continuing to ensure the protection of investors and the public interest.

C. Timing of the Annual Shareholder Meeting

Finally, the provision concerning the holding of an annual meeting is being amended to require that the annual meeting must be held within one year after the end of the fiscal year. The Commission believes that such proposed change reasonably establishes a time frame to the annual shareholder meeting requirement that is consistent with the Act, and in particular, Section 15A(b)(6) thereof. The Commission notes that this change makes explicit that the annual meeting must be held within a year of the fiscal year-end of the company.¹⁴ In addition, the Commission notes that the date a company holds its annual meeting must be consistent with state law. The Commission also notes that the provision requires those issuers that must hold an annual shareholder meeting under NASD Rule 4350(e) to hold such meetings within a certain

¹⁴ The proposed rule text of IM-4350-8 also states that for a new listing that was not previously subject to a requirement to hold an annual meeting, the company is required to hold its first meeting within one year after its first fiscal year-end following such listing.

time frame, for the benefit of the security holders, the investors, and the public interest, consistent with Section 15A(b)(6) of the Act.¹⁵

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 3, including whether Amendment No. 3 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-2005-073 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NASD-2005-073. 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. Copies of

¹⁵ 15 U.S.C. 78o-3(b)(6).

such filing also will 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 Number SR-NASD-2005-073 and should be submitted on or before [insert date 21 days from the date of publication in the Federal Register].

IV. Accelerated Approval of Amendment No. 3

Pursuant to Section 19(b)(2) of the Act,¹⁶ the Commission may not approve any proposed rule change, or amendment thereto, prior to the 30th day after the date of publication of notice of the filing thereof, unless the Commission finds good cause for so doing and publishes its reasons for so finding. The Commission hereby finds good cause for approving Amendment No. 3 to the proposal, prior to the 30th day after publishing notice of Amendment No. 3 in the Federal Register. The revisions made to the proposal in Amendment No. 3 are typographical changes intended to clarify that at the annual shareholder meeting shareholders must be afforded the opportunity to discuss company affairs with management. In addition, if required by the issuer's governing documents, shareholders must be afforded the opportunity to elect directors. This was the intent of the provision as originally proposed. The Commission believes that accelerating Amendment No. 3 is appropriate because these revisions are clarifying and do not raise new regulatory issues. Accordingly, pursuant to Section 19(b)(2) of the Act,¹⁷ the Commission finds good cause to approve Amendment No. 3 prior to the thirtieth day after notice of the Amendment is published in the Federal Register.

¹⁶ 15 U.S.C. 78s(b)(2).

¹⁷ Id.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁸ that the proposed rule change (File No. SR-NASD-2005-073), as amended, is approved, and Amendment No. 3 to the proposed rule change is hereby granted accelerated approval.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁹

Nancy M. Morris
Secretary

¹⁸ Id.

¹⁹ 17 CFR 200.30-3(a)(12).