

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-49660; File No. SR-NASD-2004-070)

May 6, 2004

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. to Permit Shareholder Action by Written Consent

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 April 23, 2004, 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. Pursuant to Section 19(b)(3)(A)(iii) of the Act³ and Rule 19b-4(f)(6) thereunder,⁴ Nasdaq has designated this proposal as non-controversial, which renders the proposed rule change effective immediately upon filing. 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 clarify that listed companies may solicit written consents from shareholders in lieu of a special shareholder meeting.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(iii).

⁴ 17 CFR 240.19b-4(f)(6).

Below is the text of the proposed rule change. Proposed new language is italicized; proposed deletions are in brackets.⁵

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

(a) - (h) No Change.

(i) Shareholder Approval

(1) - (5) No Change.

(6) Where shareholder approval is required, the minimum vote which will constitute shareholder approval shall be a majority of the total votes cast on the proposal. These votes may be cast in person, [or] by proxy at a meeting of shareholders or by written consent in lieu of a special meeting to the extent permitted by applicable state and federal law and rules (including interpretations thereof), including, without limitation, SEC Regulations 14A and 14C. Nothing contained in this Rule 4350(i)(6) shall affect an issuer’s obligation to hold an annual meeting of shareholders as required by Rule 4350(e).

(j) - (n) No Change.

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

⁵ Nasdaq represents that the proposed rule change is marked to show changes to NASD Rule 4350(i)(6) as currently reflected in the electronic NASD manual available at www.nasdaq.com. No other pending or approved rule filings would affect the text of the Rule.

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 represents that the proposed rule change is designed to clarify that listed companies may solicit written consents from shareholders in lieu of a shareholder meeting.

In general, state law provides two ways in which matters may be brought before the shareholders of a corporation for their consideration. Shareholders either can take action via a meeting of shareholders (voting in person or by proxy) or by written consent of shareholders in lieu of a meeting. NASD Rule 4350 contains a number of provisions related to shareholder meetings,⁶ proxy solicitations⁷ and specific actions and transactions that require shareholder approval.⁸ State law and a company's charter and bylaws often require shareholder approval of other corporate actions. To the extent an issuer seeks shareholder approval by convening a special meeting of shareholders, NASD Rule 4350 requires that the issuer provide shareholders with a proxy solicitation that conforms to SEC requirements, primarily Rule 14a-1 et seq. and

⁶ NASD Rule 4350(e) requires that each issuer must hold an annual meeting of shareholders and provide written notice to Nasdaq.

⁷ NASD Rule 4350(g) requires that each issuer solicit proxies and provide proxy statements for all meetings of shareholders and provide copies of such proxy solicitations to Nasdaq.

Regulation 14A under the Act. Many states permit corporate action without a shareholder meeting upon the written consent of specified percentage of shareholders. In certain circumstances, federal securities laws do not require that the corporation solicit the consent of all shareholders. Instead, Section 14(c) of the Act and Regulation 14C under the Act require that the corporation furnish all shareholders with an information statement that contains substantially the same disclosure as a proxy prior to the date the corporate action is taken.⁹

Nasdaq believes that it is appropriate that its listing standards under NASD Rule 4350(i) permit action by written consent in lieu of a special meeting when such action is permitted by state and federal law. While in the past Nasdaq has interpreted NASD Rule 4350(i) to permit action by written consent in lieu of a special meeting, this interpretation is not clear from the text of the rule. In this regard, Nasdaq believes that its interpretation is consistent with standard corporate practice that has long been sanctioned by law. Therefore, Nasdaq believes that the proposed amendment provides greater transparency by inserting this interpretation into the text of the rule. Nasdaq notes that the SEC has approved similar proposed rule changes by the New York Stock Exchange, Inc. (“NYSE”) and the American Stock Exchange LLC (“Amex”) to permit shareholder action by written consent.¹⁰

Nasdaq believes that annual meetings serve a useful purpose by providing shareholders with the opportunity to meet with representatives of management and the board of directors.

⁸ NASD Rule 4350(i) requires shareholder approval of a variety of transactions including equity compensation plans and arrangements, transactions involving a change in control and sales of discounted stock and other potentially dilutive transactions.

⁹ 15 U.S.C. 78n(c) and 17 CFR 240.14C.

¹⁰ See Securities Exchange Act Release Nos. 46654 (October 11, 2002), 67 FR 64687 (October 21, 2002) (NYSE) and 46904 (November 25, 2002), 67 FR 7244 (December 4, 2002) (Amex).

Therefore, written consent would only be permitted in lieu of special meetings of shareholders and NASD Rule 4350(e) will continue to require that issuers hold annual meetings of shareholders.

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 the proposal is designed to prevent fraudulent and manipulative acts and practices, and, in general, to protect investors and the public interest. Specifically, Nasdaq believes that the proposed rule change will provide greater clarity to Nasdaq's listing standards, thereby allowing it to more efficiently address listing and policy matters that often involve investor protection issues and providing greater uniformity with the rules of the NYSE and Amex.

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

Nasdaq neither solicited nor received written comments with respect to the proposed rule change.

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

The foregoing proposed rule change has become effective upon filing on April 23, 2004 pursuant to Section 19(b)(3)(A)¹³ of the Act and Rule 19b-4(f)(6)¹⁴ thereunder because the proposal: (1) does not significantly affect the protection of investors or the public interest; (2)

¹¹ 15 U.S.C. 78o-3.

¹² 15 U.S.C. 78o-3(6).

¹³ 15 U.S.C. 78s(b)(3)(A).

does not impose any significant burden on competition; and (3) does not become operative for 30 days from the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest; provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the filing date of the proposed rule change.¹⁵

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative prior to 30 days after the date of filing. However, pursuant to Rule 19b-4(f)(6)(iii),¹⁶ the Commission may designate a shorter time if such action is consistent with the protection of investors and public interest. Nasdaq has requested that the Commission waive the 30-day pre-operative waiting period to permit Nasdaq to implement the amendment immediately, thereby enhancing transparency for its listed companies and investors and increasing uniformity in listing standards among stock markets.

The Commission, consistent with the protection of investors and the public interest, has waived the 30-day operative date requirement for this proposed rule change, and has determined to designate the proposed rule change as operative on April 23, 2004, the date it was submitted to the Commission, in order to implement the rule immediately for consistency in listing standards among the NYSE, Amex, and Nasdaq.¹⁷ 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

¹⁴ 17 CFR 240.19b-4(f)(6).

¹⁵ As required under Rule 19b-4(f)(6)(iii), Nasdaq provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to the filing date.

¹⁶ 17 CFR 240.19b-4(f)(6)(iii).

¹⁷ For the purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rules impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f)

Commission that such action is 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, 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. Please include File Number SR-NASD-2004-070 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 Number SR-NASD-2004-070. 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 Section, 450 Fifth Street, NW, Washington, DC 20549. Copies of 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-2004-070 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.¹⁸

Margaret H. McFarland
Deputy Secretary

¹⁸ 17 CFR 200.30-3(a)(12).