

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-52645; File No. SR-NASD-2005-116)

October 20, 2005

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change to Modify Nasdaq's Auditor Peer Review Requirement

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 September 29, 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. 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(k) to reflect changes to the oversight of auditors mandated by the Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act")³ and to make a conforming amendment to NASD Rule 4200(a). Nasdaq will implement the proposed rule immediately upon Commission approval. The text of the proposed rule change is below.

Proposed new language is in *italics*; proposed deletions are in [brackets].

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¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Pub. L. No. 107-204, 116 Stat. 745 (2002).

4200. Definitions

(a) For purposes of the Rule 4000 Series, unless the context requires otherwise:

(1) No change

(2) Reserved. [“AICPA” means the American Institute of Certified Public Accountants.]

(3) – (38) No change

(b) No change

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

(a) - (j) No change

(k) **[Peer Review] Auditor Registration**

[(1) Each listed issuer must be audited by an independent accountant that[.] is registered as a public accounting firm with the Public Company Accounting Oversight Board, as provided for in Section 102 of the Sarbanes-Oxley Act of 2002 [15 U.S.C. 7212].

[(A) has received an external quality control review by an independent public accountant ("peer review") that determines whether the auditor's system of quality control is in place and operating effectively and whether established policies and procedures and applicable auditing standards are being followed; or]

[(B) is enrolled in a peer review program and within 18 months receives a peer review that meets acceptable guidelines.]

[(2) The following guidelines are acceptable for purposes of this paragraph:]

[(A) The peer review should be comparable to AICPA standards included in Standards for Performing on Peer Reviews, codified in the AICPA's SEC Practice Section Reference Manual;]

[(B) The peer review program should be subject to oversight by an independent body comparable to the organizational structure of the Public Oversight Board as codified in the AICPA's SEC Practice Section Reference Manual; and]

[(C) The administering entity and the independent oversight body of the peer review program must, as part of their rules of procedure, require the retention of the peer review working papers for 90 days after acceptance of the peer review report and allow Nasdaq access to those working papers.]

(l) – (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

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

NASD Rule 4350(k) currently requires that issuers be audited by an independent public accountant that has received an external quality control review by another independent public accountant (a "peer review") or is enrolled in a peer review program. However, as part of the Sarbanes-Oxley Act, Congress created the Public Company Accounting Oversight Board (the "PCAOB") and prohibited accounting firms that are not registered with the PCAOB from preparing or issuing audit reports on U.S. public companies and from participating in such audits.⁴ The Sarbanes-Oxley Act also requires the PCAOB to conduct a continuing program of inspections of registered public accounting firms.⁵ Pursuant to these requirements, the PCAOB is required to conduct inspections annually for firms that provide audit reports for more than 100 issuers and at least triennially for firms that provide audit reports for fewer issuers.⁶

In light of these new requirements, the American Institute of Certified Public Accountants ("AICPA") has modified its peer review program. The new AICPA peer review program, which succeeds the SEC Practice Section Peer Review Program currently referred to in NASD Rule 4350(k), is designed to review and evaluate only the non-SEC issuer practice of the firm.⁷ As a

⁴ Section 102 of the Sarbanes-Oxley Act, 15 U.S.C. 7212.

⁵ Section 104 of the Sarbanes-Oxley Act, 15 U.S.C. 7214.

⁶ See Section 104 of the Sarbanes-Oxley Act, 15 U.S.C. 7214(b).

⁷ See Web site for the AICPA's Center for Public Company Audit Firms Peer Review Program at: <http://www.aicpa.org/centerprp/index.htm>.

result, this peer review program is no longer relevant with respect to the audits of Nasdaq-listed issuers.

Given these changes to the oversight and inspection of auditors, the proposed rule change is designed to modify existing NASD Rule 4350(k) to reflect the new role of the PCAOB and change the existing requirement to a requirement that each issuer's auditor be registered as a public accounting firm with the PCAOB. As a result, auditors of Nasdaq companies will be subject to the PCAOB's program of continuing inspections.⁸

Under the proposed rule change, an issuer seeking to list on Nasdaq would be permitted to continue to use historical financial statements that were audited by a non-registered firm at a time when the applicant was not a public company. Nasdaq believes that this view is consistent with an interpretation adopted by the PCAOB, which provides that an auditor does not have to register with the PCAOB merely because it issues a consent to include an audit report for a prior period, if the auditor does not have or expect to have an ongoing role in the auditing engagement.⁹ Of course, if the issuer was a public company immediately prior to listing on Nasdaq, the company's financial statements must have been audited and/or reviewed by a public accounting firm that was registered with the PCAOB, as required by the Sarbanes-Oxley Act and the rules of the PCAOB.

Finally, Nasdaq proposes to make a conforming amendment to the language of NASD Rule 4200(a) to delete the definition of "AICPA," which would no longer be necessary.

⁸ See Sections 4000 – 4012 of the PCAOB Rules. Note that in the case of non-U.S. auditors, where the PCAOB determines it appropriate, the PCAOB may rely instead on non-U.S. inspections. See Section 4012 of the PCAOB Rules.

⁹ See PCAOB Rule 2100, Note 2.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,¹⁰ in general, and with Section 15A(b)(6) of the Act,¹¹ in particular, in that the proposal is designed to remove impediments to a free and open market and a national market system, prevent fraudulent and manipulative acts and practices, and, in general, to protect investors and the public interest. Specifically, the proposed rule change will remove a redundant listing requirement, thereby removing an impediment to a free and open market, and will align Nasdaq's listing standards with the requirements of the Sarbanes-Oxley Act, thereby allowing Nasdaq to further the investor protection goals of that Act.

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

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 such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which Nasdaq consents, the Commission will:

- (A) by order approve such proposed rule change, or

¹⁰ 15 U.S.C. 78o-3.

¹¹ 15 U.S.C. 78o-3(b)(6).

- (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 Number SR-NASD-2005-116 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number SR-NASD-2005-116. 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 the

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-2005-116 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.¹²

Jonathan G. Katz
Secretary

¹² 17 CFR 200.30-3(a)(12).