

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-53941; File No. SR-NASDAQ-2006-011)

June 5, 2006

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of a Proposed Rule Change to Modify the Cure Period Available to an Issuer that Loses an Independent Director or Audit Committee Member

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 May 23, 2006, 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 the cure period available to a listed issuer that loses an independent director or audit committee member within approximately six months prior to its annual meeting.³ Nasdaq will implement the proposed rule immediately upon approval.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ On January 26, 2006, the National Association of Securities Dealers, Inc. filed a similar proposal, SR-NASD-2006-10, to modify the cure period available to an issuer that loses an independent director or audit committee member. The instant proposed rule change replaces SR-NASD-2006-10, which was withdrawn on May 23, 2006, given Nasdaq’s expectation that it will begin operating as a national securities exchange in the near term. See Securities Exchange Act Release No. 53128 (Jan. 13, 2006), 71 FR 3550 (Jan. 23, 2006) (“Exchange Approval Order”).

The text of the proposed rule change is below. Proposed new language is underlined; proposed deletions are in [brackets].⁴

* * * * *

4350. Qualitative Listing Requirements for Nasdaq Issuers Except for Limited Partnerships

(a) – (b) No change

(c) Independent Directors

(1) A majority of the board of directors must be comprised of independent directors as defined in Rule 4200. The company must disclose in its annual proxy (or, if the issuer does not file a proxy, in its Form 10-K or 20-F) those directors that the board of directors has determined to be independent under Rule 4200. If an issuer fails to comply with this requirement due to one vacancy, or one director ceases to be independent due to circumstances beyond their reasonable control, the issuer shall regain compliance with the requirement by the earlier of its next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply with this requirement; provided, however, that if the annual shareholders meeting occurs no later than 180 days following the event that caused the failure to comply with this requirement, the issuer shall instead have 180 days from such event to

⁴ Changes are marked to the rule text that appears in the electronic manual of The NASDAQ Stock Market, LLC found at www.nasdaqtrader.com, as amended by SR-NASDAQ-2006-007, which was effective upon filing on May 8, 2006. See Securities Exchange Act Release No. 53799 (May 12, 2006), 71 FR 29195. These rules will become effective when Nasdaq fulfills certain conditions and commences operations as a national securities exchange, as set forth in the Exchange Approval Order.

regain compliance. An issuer relying on this provision shall provide notice to Nasdaq immediately upon learning of the event or circumstance that caused the non-compliance.

(2) – (5) No change

(d) Audit Committee

(1) – (3) No change

(4) Cure Periods

(A) No change

(B) If an issuer fails to comply with the audit committee composition requirement under Rule 4350(d)(2)(A) due to one vacancy on the audit committee, and the cure period in paragraph (A) is not otherwise being relied upon for another member, the issuer will have until the earlier of the next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply with this requirement; provided, however, that if the annual shareholders meeting occurs no later than 180 days following the event that caused the vacancy, the issuer shall instead have 180 days from such event to regain compliance. An issuer relying on this provision must provide notice to Nasdaq immediately upon learning of the event or circumstance that caused the non-compliance.

(e) – (n) No change

* * * * *

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 Rule 4350 requires each listed issuer to have a majority independent board and an audit committee that consists of at least three independent members. Issuers who lose an independent board or audit committee member, either because the member ceases to be independent for reasons outside the member’s reasonable control, or because a vacancy arises, are afforded a cure period. The cure period lasts until the earlier of the company’s next annual shareholders’ meeting or one year from the date of the event that caused the non-compliance. This cure period tracks language in Rule 10A-3 under the Act,⁵ which states that a self-regulatory organization may provide a cure period to allow a director who ceases to be independent through reasons outside the audit committee member’s reasonable control to remain on the audit committee “until the earlier of the next annual shareholders meeting of the listed issuer or one year from the occurrence of the event that caused the member to be no longer independent.”⁶

⁵ 17 CFR 240.10A-3.

⁶ 17 CFR 240.10A-3(a)(3).

The cure period in Nasdaq Rules 4350(c) and 4350(d)(4)(B) has caused anomalous results.⁷ For example, if a director who serves on the audit committee resigns just after the company's annual meeting, thus creating a vacancy on the board and the audit committee, the company would have almost a year to recruit a new director and regain compliance. At the other extreme, if the same situation occurs just before the company's annual meeting, the company would have only days or weeks to recruit a new director. Similarly, if a company fails to meet the majority independent board requirement because a director ceases to be independent through no fault of the director, the timing of the event causing the director to cease to be independent, in relation to the timing of the annual meeting, could result in widely varying cure periods. This can create a hardship, particularly on smaller companies, which may have more difficulty attracting and recruiting new independent directors. In addition, the annual shareholder meeting has little to do with the date by which a company can add a new independent director or audit committee member, since new board and committee members generally can be appointed by the existing board of directors without a shareholder meeting.

Given the disparate periods available under the existing cure period, Nasdaq proposes to adopt a minimum 180-day cure period in cases where within 180 days before the company's annual meeting: (i) a vacancy arises on the audit committee or board, or (ii) the company ceases to have a majority of independent directors on its board because a

⁷ Nasdaq's experience with these rules comes from its application of the identical NASD rules, under which Nasdaq has operated. See NASD Rules 4350(c) and 4350(d)(4)(B).

director loses his or her independence through no fault of the director.⁸ The 180-day minimum will help assure adequate time for companies (particularly small to mid-size companies) who lose an independent director just before their annual meeting to conduct an appropriate search process for a qualified replacement independent director and/or audit committee member. It would not, however, shorten the compliance time for companies who fall out of compliance just after their annual meeting, since those companies will still have as long as a year to regain compliance. The 180-day minimum would not apply to allow a non-independent director to remain on the audit committee beyond the period contemplated in Rule 10A-3 under the Act;⁹ this provision is codified in Nasdaq Rule 4350(d)(4)(A), which is not being modified.

Upon approval of this proposed rule change, Nasdaq will allow any company then eligible to utilize the the new 180-day minimum period from the date of the vacancy or the event that caused non-compliance, even if the vacancy or non-compliance arose before the date of approval, provided that such company has not exceeded the cure period provided for in the rule as in effect prior to the proposed rule change.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of

⁸ This 180-day minimum period is consistent with: (i) Nasdaq's understanding that the process of recruiting and retaining an independent board member, particularly an audit committee member with financial expertise, can take four to five months or more; and (ii) Nasdaq's analysis of the length of time it has taken for Nasdaq listed companies that have fallen out of compliance with the independent director and/or audit committee requirements to regain compliance.

⁹ 17 CFR 240.10A-3.

Section 6 of the Act,¹⁰ in general and with Section 6(b)(5) of the Act,¹¹ in particular, which requires that Nasdaq's rules be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market, and to protect investors and the public interest. Nasdaq believes that the proposed change is consistent with these requirements in that it will facilitate transparent application of Nasdaq's rules, while allowing issuers a sufficient cure period.

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 such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange 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.

¹⁰ 15 U.S.C. 78f.

¹¹ 15 U.S.C. 78f(b)(5).

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-NASDAQ-2006-011 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NASDAQ-2006-011. 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

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-2006-011 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

Nancy M. Morris
Secretary

¹² 17 CFR 200.30-3(a)(12).