

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-55854; File No. SR-NASDAQ-2006-045)

June 4, 2007

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto to Allow the Use of a Company's Web Site to Distribute an Annual Report and Meet Other Nasdaq Listing Requirements

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 October 31, 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 substantially prepared by Nasdaq. On April 25, 2007, Nasdaq submitted Amendment No. 1, which replaced the text of the original filing in its entirety. 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 changes to Rule 4350 to facilitate the use of technology to satisfy Nasdaq listing requirements and to make certain clarifying and technical corrections. Nasdaq will implement the proposed rule immediately upon approval.

The text of the proposed rule change is below. Proposed new language is underlined; proposed deletions are in brackets.³

* * * * *

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

(a) Applicability

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at www.complinet.com/nasdaq.

(1) Foreign Private Issuers. A foreign private issuer may follow its home country practice in lieu of the requirements of Rule 4350, provided, however, that such an issuer shall: comply with Rules 4350(b)(1)(B), 4350(j) and 4350(m), have an audit committee that satisfies Rule 4350(d)(3), and ensure that such audit committee's members meet the independence requirement in Rule 4350(d)(2)(A)(ii). A foreign private issuer that follows a home country practice in lieu of one or more provisions of Rule 4350 shall disclose in its annual reports filed with the Commission or on its Website each requirement of Rule 4350 that it does not follow and describe the home country practice followed by the issuer in lieu of such requirements. In addition, a foreign private issuer making its initial public offering or first U.S. listing on Nasdaq shall make the same disclosures in its registration statement or on its Website.

(2) – (5) No change.

(b) Distribution of Annual and Interim Reports

(1)(A) Each issuer with common stock or voting preferred stock (or their equivalents) listed on Nasdaq shall [distribute] make available to shareholders of such securities [copies of] an annual report containing audited financial statements of the company and its subsidiaries, which may be on Form 10-K, 20-F, 40-F or N-CSR. [The report shall be distributed to shareholders a reasonable period of time prior to the company's annual meeting of shareholders and shall be filed with Nasdaq at the time it is distributed to shareholders.] An issuer may comply with this requirement either: (i) by mailing the report to shareholders, or (ii) by posting the annual report to shareholders on or through the company's Website (or, in the case of an issuer that is an investment company that does not maintain its own Website, on a Website that the issuer is allowed to use to satisfy the Website posting requirement in Exchange Act Rule 16a-3(k)), along with a prominent undertaking in the English language to provide shareholders, upon

request, a hard copy of the company's annual report free of charge. An issuer that chooses to satisfy this requirement via a Website posting must, simultaneous with this posting, issue a press release stating that its annual report has been filed with the Commission (or other appropriate regulatory authority). This press release must also state that the annual report is available on the company's Website and include the Website address and that shareholders may receive a hard copy free of charge upon request. An issuer must provide such hard copies within a reasonable period of time following the request.

(B) An issuer that receives an audit opinion that [contains a going concern qualification] expresses doubt about the ability of the company to continue as a going concern for a reasonable period of time must make a public announcement through the news media disclosing the receipt of such [qualification] opinion. Prior to the release of the public announcement, the issuer must provide the text of the public announcement to the StockWatch section of Nasdaq's MarketWatch Department ("Nasdaq StockWatch"). The public announcement shall be provided to Nasdaq StockWatch and released to the media not later than seven calendar days following the filing of such audit opinion in a public filing with the Securities and Exchange Commission.

(2) – (4) No change.

(c) – (n) No change.

* * * * *

IM 4350-6. Applicability

1. Foreign Private Issuer Exception and Disclosure. A foreign private issuer (as defined in Rule 3b-4 under the Act) listed on Nasdaq may follow the practice in such issuer's home country (as defined in General Instruction F of Form 20-F) in lieu of some of the provisions of Rule 4350, subject to several important exceptions. First, such an issuer shall comply with Rule

4350(b)(1)(B) (Disclosure of Going Concern Opinion), Rule 4350(j) (Listing Agreement) and Rule 4350(m) (Notification of Material Noncompliance). Second, such an issuer shall have an audit committee that satisfies Rule 4350(d)(3). Third, members of such audit committee shall meet the criteria for independence referenced in Rule 4350(d)(2)(A)(ii) (the criteria set forth in Rule 10A-3(b)(1), subject to the exemptions provided in Rule 10A-3(c) under the Act). Finally, a foreign private issuer that elects to follow home country practice in lieu of a requirement of Rule 4350 shall submit to Nasdaq a written statement from an independent counsel in such issuer's home country certifying that the issuer's practices are not prohibited by the home country's laws. In the case of new listings, this certification is required at the time of listing. For existing issuers, the certification is required at the time the company seeks to adopt its first non-compliant practice. In the interest of transparency, the rule requires a foreign private issuer to make appropriate disclosures in the issuer's annual filings with the Commission (typically Form 20-F or 40-F), and at the time of the issuer's original listing in the United States, if that listing is on Nasdaq, in its registration statement (typically Form F-1, 20-F, or 40-F); alternatively, the issuer may provide these disclosures in English on its Website. The issuer shall disclose each requirement of Rule 4350 that it does not follow and include a brief statement of the home country practice the issuer follows in lieu of these corporate governance requirement(s). If the disclosure is only available on the Website, the annual report and registration statement should so state and provide the Web address at which the information may be obtained.

(2) – (4) 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 proposes to make changes to its rules to facilitate the use of technology to satisfy Nasdaq listing requirements and to make certain clarifying and technical corrections.

Annual Reports

Pursuant to Nasdaq Rule 4350(b)(1)(A), each Nasdaq issuer is currently required to distribute to shareholders a copy of an annual report containing audited financial statements.⁴ Nasdaq proposes to modify its rules to permit a company to distribute its annual report by posting it on a Web site and issuing a press release stating that the annual report has been filed with the Commission (or other appropriate regulatory authority), that such annual report is available on the company's publicly available Web site, and that shareholders can receive a hard-copy free of charge upon request.⁵ Nasdaq believes that allowing companies to rely on the

⁴ A foreign private issuer can follow its home country practice regarding distribution of annual reports instead of Nasdaq's rule, if it follows the procedures set forth in Rule 4350(a) regarding disclosure of this non-conforming practice.

⁵ This proposal is similar to a recent change by the New York Stock Exchange LLC to Section 203.01 of its Listed Company Manual. See Securities Exchange Act Release No. 54344 (August 21, 2006), 71 FR 51260 (August 29, 2006) (approving SR-NYSE-2005-68).

Internet to satisfy the requirement to provide shareholders with an annual report containing audited financial statements will allow companies to provide investors with information in a more timely, efficient and cost effective manner. At present, this proposal would only be meaningful to foreign private issuers because they are exempt from the Commission's proxy solicitation rules under Rule 3a12-3(b) of the Act.⁶ However, the Commission recently approved rules that will permit issuers to rely on the Internet to deliver proxy materials, effective July 1, 2007,⁷ and is considering further expanding those rules to require the use of the Internet to deliver proxy materials.⁸

Nasdaq also proposes to specify that the annual report requirement is applicable only to issuers of common stock and voting preferred stock (and their equivalents)⁹ and that the annual report requirement can be satisfied by providing the company's annual filing with the Commission, such as on Form 10-K, 20-F, 40-F, or N-CSR. Further, Nasdaq proposes to remove a provision related to the timing for delivery of the annual report, because the Commission's proxy rules already require that such information be provided before the annual meeting.¹⁰

⁶ 17 CFR 240.3a12-3(b).

⁷ See Securities Exchange Act Release No. 55146 (January 22, 2007), 72 FR 4148 (January 29, 2007).

⁸ See Securities Exchange Act Release No. 55147 (January 22, 2007), 72 FR 4176 (January 29, 2007).

⁹ Common stock equivalents include, but are not limited to: ordinary shares, shares or certificates of beneficial interest of Trust, American depository receipts and American depository shares.

¹⁰ Pursuant to Rule 14a-3(b), 17 CFR 240.14a-3(b), the proxy statement for a company's annual meeting must be accompanied or preceded by an annual report. State law requirements also govern the timing that notice of the meeting must be provided. See, e.g., Section 222(b) of the Delaware General Corporation Law, which requires notice of a meeting not less than 10 nor more than 60 days prior to the meeting.

In addition, Nasdaq proposes to make a technical correction to Rule 4350(b)(1)(B), relating to the disclosure required when the audit opinion of a company's annual financial statements contains a "going concern qualification."¹¹ The proposed change removes the term "going concern qualification," which is undefined in the accounting literature, and replaces it with language from Statement on Auditing Standard Number 59, which relates to the auditor's consideration of an entity's ability to continue as a going concern. Nasdaq believes that this clarification will remove confusion as to when the rule applies.

Disclosure of non-conforming governance practices

Nasdaq requires that foreign private issuers disclose all non-conforming governance practices in their Form F-1, 20-F, or 40-F.¹² Nasdaq proposes to expand the existing Nasdaq rule to allow this disclosure to be made either in the Form F-1, 20-F, or 40-F, as applicable, or, in the alternative, the foreign private issuer may provide these disclosures in English on its Web site. If, however, the disclosure is only available on the foreign private issuer's Web site, the proposal requires that the issuer's annual report and registration statement should state this fact and provide the Web address at which the information may be obtained.¹³

¹¹ Conversation between Arnold Golub, Associate General Counsel, The Nasdaq Stock Market, Inc., Raymond Lombardo, Special Counsel, Division of Market Regulation ("Division"), Commission, and Molly Kim, Special Counsel, Division, Commission, on April 26, 2007.

¹² Nasdaq Rule 4350(a)(1) and IM-4350-6.

¹³ Conversation between Arnold Golub, Associate General Counsel, The Nasdaq Stock Market, Inc., Raymond Lombardo, Special Counsel, Division, Commission, and Molly Kim, Special Counsel, Division, Commission, on May 31, 2007.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,¹⁴ in general, and with Sections 6(b)(5) of the Act,¹⁵ in particular. The proposed rule change would allow additional methods of disclosure for Nasdaq-listed companies, thereby reducing costs for those companies, and allowing them to rely on technology to provide information to investors in a timelier manner. As such, the proposed rule change is designed to prevent fraudulent and manipulative acts and practices, 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.

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 the self-regulatory organization consents, the Commission will:

A. by order approve such proposed rule change, or

¹⁴ 15 U.S.C. 78f.

¹⁵ 15 U.S.C. 78f(b)(5).

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, 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-2006-045 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-NASDAQ-2006-045. 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 such filing also will be available for inspection and copying at the principal office of Nasdaq.

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-2006-045 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.¹⁶

Florence E. Harmon
Deputy Secretary

¹⁶ 17 CFR 200.30-3(a)(12).