

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-61521; File No. SR-NASDAQ-2010-008)

February 16, 2010

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify the Prior Notification Requirements When Companies Release Material Information Outside of Nasdaq Market Hours

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 15, 2010, The NASDAQ Stock Market LLC (“Nasdaq” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. Nasdaq has designated the proposed rule change as effecting a change described under Rule 19b-4(f)(6) under the Act,<sup>3</sup> which renders the proposal effective upon filing with the Commission. 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 the requirement for companies to provide prior notification to Nasdaq when releasing material information outside of Nasdaq market hours.

The text of the proposed rule change is below. Proposed new language is underlined; proposed deletions are in brackets.<sup>4</sup>

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 17 CFR 240.19b-4(f)(6).

<sup>4</sup> Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at <http://nasdaqomx.cchwallstreet.com>.

## 5250. Obligations for Companies Listed on The Nasdaq Stock Market

(a) No change

(b) Obligation to Make Public Disclosure

(1) Except in unusual circumstances, a Nasdaq-listed Company shall make prompt disclosure to the public through any Regulation FD compliant method (or combination of methods) of disclosure of any material information that would reasonably be expected to affect the value of its securities or influence investors' decisions. The Company shall, prior to the release of the information, provide notice of such disclosure to Nasdaq's MarketWatch Department at least ten minutes prior to public announcement if the information involves any of the events set forth in IM-5250-1 and the public release of the material information is made during Nasdaq market hours. If the public release of the material information is made outside of Nasdaq market hours, Nasdaq Companies must notify MarketWatch of the material information prior to 6:50 a.m. ET. As described in IM-5250-1, prior notice to the MarketWatch Department must be made through the electronic disclosure submission system available at [www.nasdaq.net](http://www.nasdaq.net), except in emergency situations.

(2) – (3) No change

(c) – (f) No change

### IM-5250-1. Disclosure of Material Information

Rule 5250(b)(1) requires that, except in unusual circumstances, Nasdaq Companies disclose promptly to the public through any Regulation FD compliant method (or combination of methods) of disclosure any material information that would reasonably be expected to affect the value of their securities or influence investors' decisions. Nasdaq Companies must notify Nasdaq

at least ten minutes prior to the release to the public of material information that involves any of the events set forth below when the public release of the information is made during Nasdaq market hours (7:00 a.m. to 8:00 pm. ET). If the public release of the material information is made outside of Nasdaq market hours, Nasdaq Companies must notify MarketWatch of the material information prior to 6:50 a.m. ET. Under unusual circumstances Companies may not be required to make public disclosure of material events; for example, where it is possible to maintain confidentiality of those events and immediate public disclosure would prejudice the ability of the Company to pursue its legitimate corporate objectives. However, Nasdaq Companies remain obligated to disclose this information to Nasdaq upon request pursuant to Rule 5250(a).

Paragraph 2. No change.

Notification to Nasdaq MarketWatch Department

Nasdaq Companies must notify Nasdaq's MarketWatch Department prior to the distribution of certain material news at least ten minutes prior to public announcement of the news when the public release of the information is made during Nasdaq market hours (7:00 a.m. to 8:00 pm. ET). If the public release of the material information is made outside of Nasdaq market hours, Nasdaq Companies must notify MarketWatch of the material information prior to 6:50 a.m. ET.

Except in emergency situations, this notification must be made through Nasdaq's electronic disclosure submission system available at [www.nasdaq.net](http://www.nasdaq.net). In emergency situations, Companies may instead provide notification by telephone or facsimile. Examples of an emergency situation include: lack of computer or internet access; technical problems on either the Company or Nasdaq system or an incompatibility between those systems; and a material development such

that no draft disclosure document exists, but immediate notification to MarketWatch is important based on the material event.

If a Nasdaq Company repeatedly fails to either notify Nasdaq at least ten minutes prior to the distribution of material news during market hours or prior to 6:50 a.m. ET for material news distributed outside of market hours, or repeatedly fails to use the electronic disclosure submission system when Nasdaq finds no emergency situation existed, Nasdaq may issue a Public Reprimand Letter (as defined in Rule 5805(j)) or, in extreme cases, a Staff Delisting Determination (as defined in Rule 5805(h)). In determining whether to issue a Public Reprimand Letter, Nasdaq will consider whether the Company has demonstrated a pattern of failures, whether the Company has been contacted concerning previous violations, and whether the Company has taken steps to assure that future violations will not occur.

#### Trading Halts

Paragraphs 1 – 3. No change.

Companies are required to notify the MarketWatch Department of the release of material information included in the following list of events at least ten minutes prior to the release of such information to the public when the public release of the information is made during Nasdaq market hours (7:00 a.m. to 8:00 pm. ET). If the public release of the material information is made outside of Nasdaq market hours, Nasdaq Companies must notify MarketWatch of the material information prior to 6:50 a.m. ET. It should also be noted that every development that might be reported to Nasdaq in these areas would not necessarily be deemed to warrant a trading halt. In addition to the following list of events, Nasdaq encourages Companies to avail themselves of the opportunity for advance notification to the MarketWatch Department in

situations where they believe, based upon their knowledge of the significance of the information, that a temporary trading halt may be necessary or appropriate.

(a) – (h) No change.

#### Use of Regulation FD Compliant Methods in the Disclosure of Material Information

Regardless of the method of disclosure that a Company chooses to use, Companies are required to notify the MarketWatch Department of the release of material information that involves any of the events set forth above at least ten minutes prior to its release to the public when the public release of the information is made during Nasdaq market hours (7:00 a.m. to 8:00 pm. ET). If the public release of the material information is made outside of Nasdaq market hours, Nasdaq Companies must notify MarketWatch of the material information prior to 6:50 a.m. ET. When a Company chooses to utilize a Regulation FD compliant method for disclosure other than a press release or Form 8-K, the Company will be required to provide prior notice to the MarketWatch Department of: 1) the press release announcing the logistics of the future disclosure event; and 2) a descriptive summary of the material information to be announced during the disclosure event if the press release does not contain such a summary.

Paragraph 2. 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

Pursuant to Rule 5250(b)(1) and IM-5250-1, a Nasdaq-listed company is required, except in unusual circumstances, to make prompt disclosure to the public through any Regulation FD compliant method (or combination of methods) of disclosure of any material information that would reasonably be expected to affect the value of its securities or influence investors’ decisions. These rules also require the company to provide notice of such disclosure to Nasdaq’s MarketWatch Department at least ten minutes prior to public announcement if the information involves any of the events set forth in IM-5250-1. Among other things, this prior notice allows the MarketWatch Department to assess whether it is appropriate to implement a trading halt to allow full dissemination of the news by the public and to maintain an orderly trading market.<sup>5</sup> Rule 5250(b)(1) and IM-5250-1 do not currently distinguish the prior notification requirement when public release of the information is made during or outside of Nasdaq market hours.

Nasdaq proposes to amend Rule 5250(b)(1) and IM-5250-1 to distinguish notifications made outside of market hours, when Nasdaq would not need to implement a trading halt. As revised, when the material information is made public outside of Nasdaq market hours, Nasdaq companies would be required to provide notification of the information to MarketWatch by 6:50 a.m. ET, which is ten minutes prior to the start of Nasdaq market hours. No change would be made for disclosures made during Nasdaq market hours (7:00 a.m. to 8:00 p.m. ET), when Nasdaq companies must provide notification to MarketWatch at least ten minutes prior to the public release of the information.

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<sup>5</sup> See Rule 4120 for the Exchange’s procedures with respect to trading halts pending dissemination of material news.

Nasdaq believes the proposed change is appropriate as there is no regulatory benefit to receiving the pre-notifications outside of market hours. In addition, Nasdaq believes that the proposed change would limit a potential conflict between the existing rule and the requirements in certain foreign jurisdictions, which may prohibit providing Nasdaq with advance notice of material disclosures.<sup>6</sup> The revised requirement would permit such disclosures outside of market hours without pre-notification to Nasdaq. Nonetheless, while advance notice is not required, Nasdaq believes it is important for listed companies to continue to provide notification to the Exchange of material information, even when the public release of the announcement is made outside of Nasdaq market hours, so that Nasdaq can evaluate any potential impact of the news on the company's listing.

## 2. Statutory Basis

Nasdaq believes the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>7</sup> in general and with Section 6(b)(5) of the Act,<sup>8</sup> in particular. The proposed change would continue to facilitate Nasdaq's ability to conduct timely reviews of company disclosures, thereby facilitating the operation of a free and open market, and protecting investors and the public interest, while eliminating an unnecessary procedural requirement.

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<sup>6</sup> For example, Nasdaq has been informed that pursuant to the Netherlands Act on the Supervision of the Securities Trade and the Netherlands Autoriteit Financiële Markten, when a company intentionally discloses material non-public information to a third party as part of the normal course of business, including to regulators or an exchange upon which the company's shares are listed, the Company must simultaneously disclose the information publicly.

<sup>7</sup> 15 U.S.C. 78f.

<sup>8</sup> 15 U.S.C. 78f(b)(5).

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

Because the proposed rule change: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>9</sup> and Rule 19b-4(f)(6) thereunder.<sup>10</sup>

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act<sup>11</sup> normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)<sup>12</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay.

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<sup>9</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>10</sup> 17 CFR 240.19b-4(f)(6). Pursuant to Rule 19b-4(f)(6)(iii) under the Act, the Exchange is required to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>11</sup> 17 CFR 240.19b-4(f)(6).

<sup>12</sup> 17 CFR 240.19b-4(f)(6)(iii).



The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. In making this determination, the Commission notes that Nasdaq's proposed rule change is similar to and consistent with the NYSE's rule regarding pre-notification to the Exchange for release of material information,<sup>13</sup> and the Commission believes that the Nasdaq's proposed rule change raises no new regulatory issues. The Commission also believes that providing pre-notification to Nasdaq outside of market hours, except ten minutes prior to opening, provides no regulatory benefit, since such notifications would not be reviewed by Nasdaq staff overnight or until such time that Nasdaq staff was on duty, which is likely only shortly prior to the beginning of market hours. In addition, given that one of the primary purposes of this notice is to allow MarketWatch staff to assess whether it is appropriate to implement a trading halt, such notification would only be necessary shortly before the opening, as the rule contemplates, to allow Nasdaq staff to make this determination. For these reasons, the Commission designates that the proposed rule change become operative immediately upon filing.<sup>14</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the 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.

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<sup>13</sup> See Section 202.06 of the NYSE Listed Company Manual, which requires pre-notification to the NYSE for disclosures "made shortly before the opening or during market hours (presently 9:30 A.M. to 5:00 P.M., New York time)."

<sup>14</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

#### 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2010-008 on the subject line.

##### Paper Comments:

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

All submissions should refer to File Number SR-NASDAQ-2010-008. 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 Web site viewing and printing in the Commission's Public Reference Room, on official business days between the hours of 10:00 am and 3:00 pm. 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-2010-008 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>15</sup> 17 CFR 200.30-3(a)(12).