

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-67076; File No. SR-NASDAQ-2012-062)

May 30, 2012

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change to Modify its Corporate Governance Rules

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 17, 2012, The NASDAQ Stock Market LLC (“Nasdaq”) 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. 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 exception that allows a non-independent director to serve on a listed company’s audit committee, compensation committee or nominations committee under exceptional and limited circumstances. The text of the proposed rule change is available on Nasdaq’s Website at <http://www.nasdaq.cchwallstreet.com>, at Nasdaq’s principal office, and at the Commission’s Public Reference Room. Nasdaq will implement the proposed rule change upon approval.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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’s rules generally require that a listed company’s audit, compensation and nominations committees consist of “independent directors,” as defined in Listing Rule 5605(a)(2).³ Under this definition, a company’s board must determine affirmatively that a director does not have any relationship which, in the opinion of the board, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. In addition, there are certain categories of directors who cannot be considered independent, such as a director who is currently, or was during the prior three years, employed by the company, or a director who is a family member⁴ of an individual who is, or at any time during the past three years was, employed as an executive officer⁵ by the company.⁶ A director is not barred from being independent if he or she has a family member employed by the company, provided that the family member is not an executive officer of the company.

Nasdaq’s rules also include an exception (the “Exception”) to permit a listed company, under exceptional and limited circumstances and with proper disclosure, to allow one non-independent director to serve on the audit, compensation or nominations committee for up to two

³ See Nasdaq Listing Rules 5605(c)(2), 5605(d)(2)(B) and 5605(e)(1)(B).

⁴ “Family Member” is defined as “a person’s spouse, parents, children and siblings, whether by blood, marriage or adoption, or anyone residing in such person’s home.” Nasdaq Listing Rule 5605(a)(2).

⁵ “Executive Officer” is defined as an officer “covered in Rule 16a-1(f) under the [Exchange] Act.” Nasdaq Listing Rule 5605(a)(1).

⁶ See Nasdaq Listing Rules 5605(a)(2)(A) and 5605(a)(2)(C).

years.⁷ The Exception, which is used infrequently by Nasdaq-listed companies,⁸ was first adopted for audit committees in December 1999,⁹ when the audit committee requirements were significantly enhanced following the release of the report of the Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committees (the “Blue Ribbon Report”).¹⁰ When Nasdaq implemented rules regarding independent director oversight of executive officer compensation and director nominations in 2003, these new rules included the Exception for compensation and nominations committees.¹¹

The Blue Ribbon Report identified examples of relationships that may interfere with an audit committee member’s exercise of independence but also specifically recommended adopting an exception for a director “who has one or more of these relationships” if the company’s board of directors, under exceptional and limited circumstances, determines that membership on the committee by the individual is required by the best interests of the company and its stockholders and the board discloses, in the next annual proxy statement subsequent to such determination, the nature of the relationship and the reasons for that determination.¹² The Exception allows a listed company greater flexibility as to board and committee membership and composition. This is

⁷ See Nasdaq Listing Rules 5605(c)(2)(B), 5605(d)(3) and 5605(e)(3).

⁸ On December 31, 2011, nine companies were using the Exception: six companies for the audit committee only, two companies for the nominations committee only and one company for both the nominations and compensation committees. In the two-year period from January 1, 2010 to December 31, 2011, 37 companies used the Exception for one or more of their committees.

⁹ See Securities Exchange Act Release No. 42231 (December 14, 1999), 64 FR 71523 (December 21, 1999).

¹⁰ See Report and Recommendations of the Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committees (February 1999).

¹¹ See Securities Exchange Act Release No. 48745 (November 4, 2003), 68 FR 64154 (November 12, 2003).

¹² See the Blue Ribbon Report at 24.

particularly important for a smaller company that may have relationships with large investors that may require such flexibility.¹³

Currently, a listed company cannot utilize the Exception for a director who has a family member who is an employee of the listed company, even if that family member is not an executive officer of the company, if the director is not independent for an unrelated reason. However, that same family relationship would not otherwise preclude the director from being considered independent.¹⁴ To provide an example, consider a director who, until one year ago, was employed by a listed company and who has a son who is a non-executive employee of the listed company. That director cannot be considered independent until three years after the end of her employment.¹⁵ However, it is solely the prior employment relationship that precludes her from being considered independent; the son's employment does not preclude her from being considered independent and the company's board can determine that she is independent three years after the end of her employment even if her son is still a non-executive employee of the company at that time. Nonetheless, if the listed company sought to appoint this same director to one of its committees pursuant to the Exception prior to the expiration of the three-year lookback period, it would be unable to do so solely because of the son's employment.

¹³ Id. at 23. The Blue Ribbon Report proposed to exempt smaller companies (i.e., those with a market capitalization below \$200 million) from the proposed audit committee requirements. Id. at 12 and 23. Thus, while the Blue Ribbon Committee's recommendation to adopt the Exception was not primarily targeted towards smaller companies, and the Blue Ribbon Committee recognized the utility of the Exception for companies of all sizes, the Exception is more important today for smaller companies given that they are now subject to all the same board composition requirements as larger companies.

¹⁴ See Nasdaq Listing Rules 5605(c)(2)(B), 5605(d)(3) and 5605(e)(3).

¹⁵ See Nasdaq Listing Rule 5605(a)(2)(A), which provides that a director who is, or at any time during the past three years was, employed by a listed company may not be considered independent.

Nasdaq believes this distinction in its rules is incongruous. If employment of a director's family member, other than as an executive officer, does not disqualify a director from being considered independent, Nasdaq sees no policy basis for precluding a listed company from relying on the Exception for that same director where the company's board has determined that the director's membership on the relevant committee is required by the best interests of the company and its stockholders. Accordingly, Nasdaq proposes to amend Listing Rules 5605(c)(2)(B), 5605(d)(3) and 5605(e)(3) to allow a director who is a family member of a non-executive employee of a listed company to serve on the listed company's audit committee, compensation committee or nominations committee under exceptional and limited circumstances. This proposed change is consistent with the recommendation contained in the Blue Ribbon Report, which, as described above, would allow any non-independent director to serve under exceptional and limited circumstances with a proper board finding and disclosure.

Under both the current and proposed versions of the Exception, a listed company's board of directors must make an affirmative determination that the non-independent director's membership on a committee is required by the best interests of the company and its stockholders. In making this determination, Nasdaq expects that a board of directors would consider any family relationship between the non-independent director and a non-executive employee of the company. However, Nasdaq does not believe that the mere existence of this family relationship alone should create an outright prohibition on the use of the Exception.

Under both the current and proposed versions of the Exception, a listed company could not rely on the Exception for a director who has a family member who is an executive officer of the listed company. In addition, under both the current and proposed versions of the Exception for audit committees, a listed company could not rely on the Exception for a director who does

not meet the criteria set forth in Section 10A(m)(3) of the Exchange Act and the rules thereunder to allow the director to serve on the audit committee.¹⁶

Finally, under both the current and proposed versions of the Exception, a listed company, other than a foreign private issuer, that relies on the Exception for an audit committee member must comply with the disclosure requirements set forth in Item 407(d)(2) of Regulation S-K.¹⁷ A foreign private issuer that relies on the Exception for an audit committee member must disclose in its next annual report (e.g., Form 20-F or 40-F) the nature of the relationship that makes the committee member not independent and the reasons for the board's determination to rely on the Exception.¹⁸ A listed company that relies on the Exception for a compensation or nominations committee member must disclose either on or through the company's website or in the proxy statement for the next annual meeting (or, if the company does not file a proxy, in its Form 10-K or 20-F), the nature of the relationship that makes the committee member not independent and the reasons for the determination to rely on the Exception.¹⁹ A listed company that relies on the Exception for a compensation or nominations committee member also must provide any disclosure required by Instruction 1 to Item 407(a) of Regulation S-K regarding its reliance on the Exception.²⁰

The proposed rule change also would substitute "Executive Officer," which is a defined term, for "officer," which is now used in the Exception but is not defined. Nasdaq always has interpreted these terms in the same way.

¹⁶ See 15 U.S.C. 78j-1(m)(3) and 17 C.F.R. 240.10A-3(b)(1).

¹⁷ See Nasdaq Listing Rule 5605(c)(2)(B).

¹⁸ Id.

¹⁹ See Nasdaq Listing Rules 5605(d)(3) and 5605(e)(3).

²⁰ Id.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,²¹ in general, and with Section 6(b)(5) of the Act,²² in particular. Section 6(b)(5) requires, among other things, that a national securities exchange's rules must be 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. The proposed rule change would modify Nasdaq's rules to allow a listed company to utilize the Exception for a very narrow category of additional directors: those who have a family member who is a non-executive employee of the listed company. Nasdaq believes that the proposed change will reduce confusion about the application of the Exception, given that the same family relationship does not otherwise preclude the director from being considered independent, and will thereby promote just and equitable principles of trade and remove an impediment to the mechanism of a free and open market. The proposed rule change is designed to protect investors and the public interest because a company's board will continue to be required to conclude that the use of the Exception is in the best interests of the company and its stockholders and the use of the Exception will continue to be required to be disclosed as set forth in Listing Rules 5605(c)(2)(B), 5605(d)(3) and 5605(e)(3).

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.

²¹ 15 U.S.C. 78f.

²² 15 U.S.C. 78f(b)(5) and (8).

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 45 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 or disapprove the proposed rule change, or
- (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-NASDAQ-2012-062 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-2012-062. 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 website (<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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at Nasdaq's principal office. 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-2012-062 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.²³

Kevin M. O'Neill
Deputy Secretary

²³ 17 CFR 200.30-3(a)(12).