

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-52985; File No. SR-NASD-2005-073)

December 20, 2005

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto Relating to Rule 4350(e) to Amend the Annual Shareholder Meeting 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 June 6, 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. On December 5, 2005, Nasdaq filed Amendment No. 1 to the proposed rule change.³ On December 9, 2005, Nasdaq filed Amendment No. 2 to the proposed rule change.⁴ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to amend NASD Rule 4350 in order to change its annual shareholder meeting requirement. Nasdaq would implement the proposed rule change, as amended,

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ In Amendment No. 1, Nasdaq revised the proposed rule text and corresponding description of the proposal in its Form 19b-4. Amendment No. 1 replaced Nasdaq’s original filing in its entirety.

⁴ In Amendment No. 2, Nasdaq made further clarifying changes to the proposed rule text of IM-4350-8 with respect to certain issuers still subject to the annual shareholder meeting requirement under NASD 4350(e).

immediately upon approval by the Commission. Below is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in [brackets].

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

(a) – (d) No change.

(e) Shareholder Meetings

Each issuer listing common stock or voting preferred stock, and their equivalents, shall hold an annual meeting of shareholders [and shall provide notice of such meeting to Nasdaq.] no later than one year after the end of the issuer's fiscal year-end.

(f) – (n) No change.

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IM-4350-8. Shareholder Meetings

Rule 4350(e) requires that each issuer listing common stock or voting preferred stock, and their equivalents, hold an annual meeting of shareholders within one year of the end of each fiscal year. At each such meeting, shareholders must be afforded the opportunity to discuss company affairs with management and to elect directors, if required by the issuer's governing documents. A new listing that was not previously subject to a requirement to hold an annual meeting is required to hold its first meeting within one-year after its first fiscal year-end following listing. Of course, Nasdaq's meeting requirement does not supplant any applicable state or federal securities laws concerning annual meetings.

This requirement is not applicable as a result of an issuer listing the following types of securities: securities listed pursuant to Rule 4420(f) (such as Trust Preferred Securities and Contingent Value Rights), unless the listed security is a common stock or voting preferred stock equivalent (e.g., a callable common stock); Portfolio Depository Receipts listed pursuant to Rule 4420(i); Index Fund Shares listed pursuant to Rule 4420(j); and Trust Issued Receipts listed pursuant to Rule 4420(l). Notwithstanding, if the issuer also lists common stock or voting preferred stock, or their equivalent, the issuer must still hold an annual meeting for the holders of that common stock or voting preferred stock, or their equivalent.

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The text of the proposed rule change, as amended, is also available on Nasdaq's Internet Web site (<http://www.nasdaq.com>), at Nasdaq's principal office, and at the Commission's Public Reference Room.

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

NASD Rule 4350(e) currently requires all Nasdaq issuers to hold an annual meeting of shareholders and to provide notice of such meeting to Nasdaq.⁵ An annual meeting allows the equity owners of a company – typically its common stockholders – the opportunity to elect directors and meet with management to discuss company affairs.⁶

This requirement, however, is not necessary for an issuer as a result of listing certain securities because the holders of those securities do not directly participate as equity holders and do not vote in the election of directors. For example, Nasdaq lists a number of securities pursuant to NASD Rule 4420(f) (Quantitative Designation Criteria, Other Securities), which allows for the listing of securities that possess attributes or features of more than one category of security.⁷ Typically, these securities are not an issuer's primary equity security, and their holders have only limited economic interests and other rights.

Nasdaq also lists Portfolio Depository Receipts and Index Fund Shares, securities issued by unit investment trusts and open-end management investment companies, respectively, that are organized as exchange-traded funds. These exchange-traded funds, which are generally passive

⁵ Nasdaq's annual shareholder meeting requirement applies in addition to any applicable state and federal securities laws concerning such annual meetings.

⁶ Nasdaq permits the use of webcasts instead of, or in addition to, a physical meeting, provided such webcasts are permissible under the applicable state law and that shareholders have the opportunity to ask questions of management.

⁷ Securities currently listed under Rule 4420(f) include: (i) Trust Preferred Securities, the payments on which are linked to the performance of another security; (ii) Index Linked Notes, the payments on which are linked to the performance of an underlying index; and (iii) Contingent Value Rights, the performance of which are tied to the performance of another security, a particular division of the company, or the occurrence of a certain event.

investment vehicles that seek to match the performance of an index, must obtain an exemptive order from the Commission before they offer securities. As a result, their operations are circumscribed by numerous representations and conditions of the applicable orders, and they do not typically experience the need for operational or other changes requiring a shareholder vote, and, by extension, a shareholder meeting.⁸ These entities are also extremely sensitive to expenses, and as a result, some of these entities have stated to Nasdaq that the imposition of an annual shareholder meeting requirement could impact the ability of some exchange-traded funds to compete with other investment types, such as typical open-end funds.

In addition, Nasdaq lists Trust Issued Receipts, which are securities issued by a trust that holds, but does not manage, specific securities on behalf of the investors in the trust. These trusts typically do not hold shareholder (or unitholder) meetings because the trusts have no boards of directors and essentially serve only as conduits for the investors' indirect investments in the underlying securities of the trusts.

For these reasons, in the past, Nasdaq has not required certain issuers to hold annual shareholder meetings as a result of listing these securities. Nasdaq now proposes to amend NASD Rule 4350(e) such that only issuers of voting and non-voting common and voting preferred stock, and their equivalents, would be required to hold an annual shareholder meeting, except as set forth in proposed IM-4350-8. By clearly identifying those issuers that will be subject to the annual shareholder meeting requirement, Nasdaq believes that the rule will be more transparent.

⁸ These exchange-traded funds are registered under, and remain subject to, the Investment Company Act of 1940, which imposes various shareholder-voting requirements that may be applicable to the funds.

In addition, NASD Rule 4350(e) currently requires all issuers to provide notice of their annual meetings to Nasdaq. Nasdaq, however, does not rely on this notification to monitor compliance with the annual shareholder meeting requirement. Instead, the Nasdaq staff reviews proxy statements (and, in the case of issuers that do not file proxy statements, other Commission filings) to determine compliance. As such, Nasdaq believes that the current notification requirement is redundant and proposes to eliminate it.

Finally, while the current rule does not provide a deadline for holding the annual shareholder meeting, Nasdaq proposes that the annual shareholder meeting must be held within one year of the end of the issuer's fiscal year. Nasdaq believes that codifying this time frame would provide additional transparency to the annual meeting requirement.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,⁹ in general, and with Section 15A(b)(6) of the Act,¹⁰ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to a free and open market and a national market system, and, in general, to protect investors and the public interest. Nasdaq asserts that the proposed rule change is consistent with these requirements in that it will provide transparency to its annual shareholder meeting rule and eliminate an unnecessary notification requirement.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

⁹ 15 U.S.C. 78o-3.

¹⁰ 15 U.S.C. 78o-3(b)(6).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

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, as amended, or
- (B) institute proceedings to determine whether the proposed rule change, as amended, 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-NASD-2005-073 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NASD-2005-073. 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 Section, 100 F Street, NE, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal offices 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-NASD-2005-073 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.¹¹

Jonathan G. Katz
Secretary

¹¹ 17 CFR 200.30-3(a)(12).