

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-62135; File No. SR-NASDAQ-2010-060)

May 19, 2010

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Require Companies to Provide Notification to Nasdaq of Any Noncompliance with the Corporate Governance Requirements

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 May 14, 2010, 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. 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 the Substance of the Proposed Rule Change

Nasdaq proposes to require companies to provide notification to Nasdaq of any noncompliance with the corporate governance requirements. Nasdaq will implement the proposed rule change thirty days after the date of the filing. The text of the proposed rule change is below. Proposed new language is in *italics*; 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 C.F.R. 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>.

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

### (a) Obligation to Provide Information to Nasdaq

(1) Nasdaq may request any additional information or documentation, public or non-public, deemed necessary to make a determination regarding a Company's continued listing, including, but not limited to, any material provided to or received from the Commission or Other Regulatory Authority. A Company may be denied continued listing if it fails to provide such information within a reasonable period of time or if any communication to Nasdaq contains a material misrepresentation or omits material information necessary to make the communication to Nasdaq not misleading. The Company shall provide full and prompt responses to requests by Nasdaq or by FINRA acting on behalf of Nasdaq for information related to unusual market activity or to events that may have a material impact on trading of its securities in Nasdaq.

[ (1)] (2) As set forth in Rule 5625, a Company must provide Nasdaq with prompt notification after an Executive Officer of the Company becomes aware of any [material] noncompliance by the Company with the requirements of the Rule 5600 Series.

(b) – (f) No change.

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## **5615. Exemptions from Certain Corporate Governance Requirements**

This rule provides the exemptions from the corporate governance rules afforded to certain types of Companies, and sets forth the phase-in schedules for initial public offerings, Companies emerging from bankruptcy and Companies transferring from other markets. This rule also

describes the applicability of the corporate governance rules to Controlled Companies and sets forth the phase-in schedule afforded to Companies ceasing to be Controlled Companies.

**(a) Exemptions to the Corporate Governance Requirements**

(1) No change

IM-5615-1. No change.

(2) No change.

IM-5615-2. No change.

(3) Foreign Private Issuers

(A) A Foreign Private Issuer may follow its home country practice in lieu of the requirements of the Rule 5600 Series, the requirement to distribute annual and interim reports set forth in Rule 5250(d), and the Direct Registration Program requirement set forth in Rules 5210(c) and 5255, provided, however, that such a Company shall: comply with the Notification of [Material] Noncompliance requirement ( Rule 5625), the Voting Rights requirement ( Rule 5640), have an audit committee that satisfies Rule 5605(c)(3), and ensure that such audit committee's members meet the independence requirement in Rule 5605(c)(2)(A)(ii). Except as provided in this paragraph, a Foreign Private Issuer must comply with the requirements of the Rule 5000 Series.

(B) No change

IM-5615-3. Foreign Private Issuers

A Foreign Private Issuer (as defined in Rule 5005) listed on Nasdaq may follow the practice in such Company's home country (as defined in General Instruction F of Form 20-F) in lieu of the provisions of the Rule 5600 Series, Rule 5250(d), and Rules 5210(c) and 5255, subject to several

important exceptions. First, such an issuer shall comply with Rule 5625 (Notification of [Material] Noncompliance). Second, such a Company shall have an audit committee that satisfies Rule 5605(c)(3). Third, members of such audit committee shall meet the criteria for independence referenced in Rule 5605(c)(2)(A)(ii) (the criteria set forth in Rule 10A-3(b)(1) under the Act, subject to the exemptions provided in Rule 10A-3(c) under the Act). Fourth, a Foreign Private Issuer must comply with Rules 5210(c) and 5255 (Direct Registration Program) unless prohibited from complying by a law or regulation in its home country. Finally, a Foreign Private Issuer that elects to follow home country practice in lieu of a requirement of Rules 5600, 5250(d), 5210(c) or 5255 shall submit to Nasdaq a written statement from an independent counsel in such Company's home country certifying that the Company's practices are not prohibited by the home country's laws and, in the case of a Company prohibited from complying with Rules 5210(c) and 5255, certifying that a law or regulation in the home country prohibits such compliance. In the case of new listings, this certification is required at the time of listing. For existing Companies, the certification is required at the time the Company seeks to adopt its first noncompliant practice. In the interest of transparency, the rule requires a Foreign Private Issuer to make appropriate disclosures in the Company's annual filings with the Commission (typically Form 20-F or 40-F), and at the time of the Company'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, a Company that is not required to file an annual report on Form 20-F may provide these disclosures in English on its website in addition to, or instead of, providing these disclosures on its registration statement or annual report. The Company shall disclose each requirement that it does not follow and include a brief statement of the home country practice the Company 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. Companies that must file annual reports on Form 20-F are encouraged to provide these disclosures on their websites, in addition to the required Form 20-F disclosures, to provide maximum transparency about their practices.

(4) Limited Partnerships

(A) – (I) No change.

(J) Notification of [Material] Noncompliance.

Each Company that is a limited partnership must provide Nasdaq with prompt notification after an Executive Officer of the Company, or a person performing an equivalent role, becomes aware of any [material] noncompliance by the Company with the requirements of this Rule 5600 Series.

(5) No change.

IM-5615-4. No change.

(b) – (c) No change.

IM-5615-5. No change.

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**5625. Notification of [Material] Noncompliance**

A Company must provide Nasdaq with prompt notification after an Executive Officer of the Company becomes aware of any [material] noncompliance by the Company with the requirements of this Rule 5600 Series.

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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

Nasdaq rules require that a listed company notify Nasdaq when an executive officer of the company becomes aware of any material noncompliance with Nasdaq's corporate governance requirements contained in the Rule 5600 Series.<sup>5</sup> Nasdaq has consistently interpreted this requirement such that any noncompliance with these rules would be considered material and now proposes to modify the rule to make this clear by requiring notification of any noncompliance. When Nasdaq receives notice of noncompliance, it will review the matter in accordance with the Rule 5800 Series, which provides the procedures applicable when a company fails to meet a listing standard, and provide appropriate notice on [www.nasdaq.com](http://www.nasdaq.com).<sup>6</sup>

Nasdaq also proposes to make conforming changes to Rule 5615(a)(3) and IM-5615-3, which, among other things, require a foreign private issuer to provide notice of noncompliance, and to Rule 5250, which cross references the requirement to provide notice of noncompliance.

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<sup>5</sup> Rule 5615(a)(4)(J) imposes this requirement on limited partnerships and Rule 5625 imposes this requirement on all other listed entities.

<sup>6</sup> Nasdaq also monitors public filings made by listed companies and will review any noncompliance it discovers in the same manner.

## 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, which requires that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest. The proposed rule change is consistent with these requirements in that it will assure that Nasdaq receives notice of any noncompliance with the corporate governance requirements, thereby helping 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, 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

The proposed rule change is effective upon filing pursuant to Section 19(b)(3)(A) of the Act and paragraph (f)(6) of Rule 19b-4 thereunder, in that the proposed rule change: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any

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

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

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; provided the self-regulatory organization has given 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.<sup>9</sup>

The proposed rule change will clarify the notice required from listed companies regarding noncompliance with the corporate governance requirements, consistent with Nasdaq's historical interpretation of that requirement, and is closely modeled after similar rules of another national securities exchange.<sup>10</sup> Therefore Nasdaq believes it does not significantly affect the protection of investors or the public interest or raise any novel or significant regulatory issues.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such 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.

#### 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:

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<sup>9</sup> The Commission notes that Nasdaq has satisfied the pre-filing requirement.

<sup>10</sup> Section 303A.12(b) of the NYSE Listed Company Manual, requires a listed company's CEO to "promptly notify the NYSE in writing after any executive officer of the listed company becomes aware of any non-compliance with any applicable provisions of this Section 303A."



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-2010-060 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-2010-060. 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, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such 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-2010-060 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>11</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>11</sup> 17 CFR 200.30–3(a)(12).