

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-59424; File No. SR-NASDAQ-2009-009)

February 19, 2009

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Clarify Nasdaq's Definition of "Controlled Company"

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 February 10, 2009, 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. 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 clarify its definition of a "controlled company." Nasdaq will implement the proposed rule upon approval [sic]. The text of the proposed rule change is below. Proposed new language is underlined.<sup>4</sup>

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

(a) – (b) No change.

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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>.

(c) Independent Directors

(1) – (4) No change.

(5) A Controlled Company is exempt from the requirements of this Rule 4350(c), except for the requirements of subsection (c)(2) which pertain to executive sessions of independent directors. A Controlled Company is a company of which more than 50% of the voting power for the election of directors is held by an individual, a group or another company. A Controlled Company relying upon this exemption must disclose in its annual meeting proxy statement (or, if the issuer does not file a proxy, in its Form 10-K or 20-F) that it is a Controlled Company and the basis for that determination.

(d) – (n) 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

The purpose of this rule filing is to clarify the definition of a “controlled company.”<sup>5</sup>

Nasdaq currently allows a “controlled company” to exempt itself from the requirements to have a

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<sup>5</sup> Nasdaq previously proposed this change in SR-NASDAQ-2008-005, which was withdrawn as of the date of this current filing.

majority of independent directors on its board and to have independent compensation and nomination committees.<sup>6</sup> Under Nasdaq’s rules, a “controlled company” is a company of which more than 50% of the voting power is held by an individual, group, or another company, and, in order for a group to exist, the shareholders comprising the group must have publicly filed a notice that they are acting as a group (e.g., a Schedule 13D).<sup>7</sup>

Under Nasdaq’s current practice, in order for a company to be deemed a controlled company, more than 50% of the voting power for the election of directors must be held by an individual, group or another company. Nasdaq proposes to amend its definition of “controlled company” to provide transparency to this interpretation and to provide clarity to companies and investors about the availability of the “controlled company” exception. In applying the rule in this manner, Nasdaq intends to limit the controlled company exception to companies with shareholders who truly control that company and its board composition. For example, the controlled company exception would not apply where a shareholder agreement exists relating only to the disposition of assets.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>8</sup> in general and with Section 6(b)(5) of the Act,<sup>9</sup> in particular. Section 6(b)(5) requires, among other things, that Nasdaq’s rules 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

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<sup>6</sup> Nasdaq Rule 4350(c)(5).

<sup>7</sup> Nasdaq Rule 4350(c)(5) and Nasdaq IM-4350-7.

<sup>8</sup> 15 U.S.C. 78f.

<sup>9</sup> 15 U.S.C. 78f(b)(5).

system and, in general, to protect investors and the public interest. The proposed change is consistent with these requirements in that it will prevent issuers from relying on the exception when they are not truly a “controlled company.” The proposed rule change also will provide a standard that is clear, straightforward and uniform for issuers to understand and apply.

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 foregoing rule does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become

effective pursuant to Section 19(b)(3)(A) of the Act<sup>10</sup> and Rule 19b-4(f)(6) thereunder.<sup>11</sup>

Normally, a proposed rule change filed under 19b-4(f)(6) may not become operative prior to 30 days after the date of 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. Nasdaq requests that the Commission waive the 30-day waiting period.<sup>13</sup>

Nasdaq believes that the proposed rule change does not significantly affect the protection of investors or the public interest because it provides transparency to Nasdaq's existing interpretation of this Rule. Nasdaq requests the waiver so that companies that file their annual reports and proxy statements with the Commission during that period will have the benefit of this clarification. In that regard, Nasdaq notes that, depending on their filing deadline under the Commission's rules, companies with fiscal year ends between September 30, 2008 and December 31, 2008, either just filed, or are about to file, their annual reports with the Commission and generally file their proxy statements shortly thereafter.

The Commission believes that waiver of the operative date delay is appropriate, particularly because companies whose fiscal year recently ended just filed, or are about to file, their annual reports with the Commission, and proxy statements shortly thereafter, would have clarity regarding the controlled company provision. Therefore, the Commission believes that

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<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>11</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires that a self-regulatory organization submit to 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 Commission notes that Nasdaq has satisfied the five-day pre-filing notice requirement.

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

<sup>13</sup> 17 CFR 240.19b-4(f)(6)(iii).

waiving the 30-day operative delay is consistent with the protection of investors and the public interest and designates the proposed rule change to be operative upon filing.<sup>14</sup>

At any time within 60 days of the filing of such 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, 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2009-009 on the subject line.

##### Paper comments:

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

All submissions should refer to File Number SR-NASDAQ-2009-009. 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

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

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 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 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-2009-009 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).