

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58125; File No. SR-NASDAQ-2008-031)

July 9, 2008

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of a Proposed Rule Change to Amend Rule 4350 Related to the Direct Registration Program

I. Introduction

On April 1, 2008, The NASDAQ Stock Market LLC (“NASDAQ”) filed with the Securities and Exchange Commission (“Commission”) a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”).¹ Notice of the proposal was published in the Federal Register on May 29, 2008.² No comment letters were received. For the reasons discussed below, the Commission is granting approval of the proposed rule change.

II. Description

Pursuant to Nasdaq Rule 4350(l), Nasdaq requires that all listed securities be eligible to participate in a Direct Registration Program (generally referred to as the Direct Registration System or “DRS”).³ However, Rule 4350(a) allowed foreign private issuers to follow its home country practice in lieu of complying with certain provisions of Rule 4350, including those pertaining to DRS under Section (l) of the rule.

Nasdaq is amending its rules to modify the requirement for a foreign private issuer to be eligible to rely on an exception to the requirement to participate in DRS and to clarify the

¹ 15 U.S.C. 78s(b)(1).

² Securities Exchange Act Release No. 57842 (May 20, 2008), 73 FR 30990 (May 29, 2008) [File No. SR-NASDAQ-2008-031].

³ For more information on Nasdaq’s DRS listing requirement and DRS generally, see Securities Exchange Act Release Nos. 54288 (August 8, 2006), 71 FR 47276 (August 16, 2006) [File No. SR-NASDAQ-2006-008] and 57062 (December 28, 2007), 73 FR 900 (January 4, 2008) [File No. SR-NASDAQ-2007-101].

applicability of the DRS-eligibility requirement to book-entry-only securities. Nasdaq will implement the proposed change related to book-entry-only securities immediately upon approval and the proposed change affecting foreign private issuers on March 31, 2009.

The text of the new rule change is below. New rule language is underlined; deletions are in brackets.⁴

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

(a) Applicability

(1) **Foreign Private Issuers.** A foreign private issuer may follow its home country practice in lieu of the requirements of Rule 4350, provided, however, that such an issuer shall: comply with Rules 4350(b)(1)(B), 4350(j) and 4350(m), have an audit committee that satisfies Rule 4350(d)(3), and ensure that such audit committee's members meet the independence requirement in Rule 4350(d)(2)(A)(ii). In addition, a foreign private issuer must be eligible to participate in a Direct Registration Program, as required by Rule 4350(l), unless prohibited from complying by a law or regulation in its home country. A foreign private issuer that follows a home country practice in lieu of one or more provisions of Rule 4350 shall disclose in either its annual reports filed with the Commission or on its website each requirement of Rule 4350 that it does not follow and shall describe the home country practice followed by the issuer in lieu of such requirements. In addition, a foreign private issuer making its initial public offering or first U.S. listing on Nasdaq shall make the same disclosures in either its registration statement or on its website.

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

(2) – (5) No change.

(b) – (k) No change.

(l) Direct Registration Program

(1) All securities initially listing on Nasdaq on or after January 1, 2007, must be eligible for a Direct Registration Program operated by a clearing agency registered under Section 17A of the Exchange Act. This provision does not extend to: (i) additional classes of securities of companies which already have securities listed on Nasdaq; (ii) companies which immediately prior to such listing had securities listed on another registered securities exchange in the U.S; or, (iii) [non-equity] securities which are book-entry-only.

(2)(A) Except as indicated in paragraph (2)(B) below, on [On] and after March 31, 2008, all securities listed on Nasdaq (except [non-equity] securities which are book-entry-only) must be eligible for a Direct Registration Program operated by a clearing agency registered under Section 17A of the Exchange Act.

(B) Until March 31, 2009, a foreign private issuer may follow its home country practice in lieu of the requirements of this Rule 4350(l), provided, however, that such an issuer must follow the requirements of Rule 4350(a) and IM-4350-6 for doing so. Thereafter, the listed securities of such issuers (except securities which are book-entry-only) must be eligible for a Direct Registration Program operated by a clearing agency registered under Section 17A of the Exchange Act unless prohibited from complying by a law or regulation in its home country.

(3) No change.

(m) – (n) No change.

IM 4350-6 Applicability

1. **Foreign Private Issuer Exception and Disclosure.** A foreign private issuer (as defined in Rule 3b-4 under the Exchange Act) listed on Nasdaq may follow the practice in such issuer's home country (as defined in General Instruction F of Form 20-F) in lieu of some of the provisions of Rule 4350, subject to several important exceptions. First, such an issuer shall comply with Rule 4350(b)(1)(B) (Disclosure of Going Concern Opinion), Rule 4350(j) (Listing Agreement) and Rule 4350(m) (Notification of Material Noncompliance). Second, such an issuer shall have an audit committee that satisfies Rule 4350(d)(3). Third, members of such audit committee shall meet the criteria for independence referenced in Rule 4350(d)(2)(A)(ii) (the criteria set forth in Rule 10A-3(b)(1), subject to the exemptions provided in Rule 10A-3(c) under the Exchange Act). Fourth, a foreign private issuer must comply with Rule 4350(l) (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 Rule 4350 shall submit to Nasdaq a written statement from an independent counsel in such issuer's home country certifying that the issuer's practices are not prohibited by the home country's laws and, in the case of a company prohibited from complying with Rule 4350(l), 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 issuers, the certification is required at the time the company seeks to adopt its first non-compliant practice. In the interest of transparency, the rule requires a foreign private issuer to make appropriate disclosures in the issuer's annual filings with the Commission (typically Form 20-F or 40-F), and at the time of the issuer'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, the issuer may provide these disclosures in English on its website. The issuer shall

disclose each requirement of Rule 4350 that it does not follow and include a brief statement of the home country practice the issuer follows in lieu of the requirements of Rule 4350. 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.

2. – 4. No change.

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III. Discussion

Section 6(b)(5) of the Act requires, among other things, that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.⁵ After careful consideration, the Commission find that the proposed rule change is consistent with the provisions of the Act because it requires foreign private issuers to comply with the same DRS-eligibility rules required of other equity issuers unless the foreign private issuer is prohibited from doing so under its home country laws. The rule change relating to clarification that the DRS-eligibility requirement excludes all book-entry-only securities is consistent with the Act because it allows issuers, broker-dealers, and investors to better determine which securities are required to be facilitated in DRS and which securities are not.

⁵ 15 U.S.C. 78f(b)(5).

Accordingly, for the reasons stated above the Commission finds that the rule change, is consistent with Nasdaq's obligation under Section 6(b) of the Act to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.⁶

V. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular with the requirements of Section 6(b)(5) of the Act and the rules and regulations thereunder.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR-NASDAQ-2008-031) be and hereby is approved.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.⁷

Florence E. Harmon
Acting Secretary

⁶ In approving the proposed rule change, the Commission notes that it has considered the impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁷ 17 CFR 200.30-3(a)(12).