

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-56319; File No. SR-NASDAQ-2006-045)

August 24, 2007

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment No. 2, and Order Granting Accelerated Approval of Proposed Rule Change as Modified by Amendment Nos. 1 and 2, to Allow the Use of a Company's Web Site to Distribute an Annual Report and Meet Other Nasdaq Listing Requirements

I. Introduction

On October 31, 2006, the Nasdaq Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to allow the use of a Nasdaq-listed company's Web site to distribute its annual report and meet other Nasdaq listing requirements. On April 25, 2007, Nasdaq filed Amendment No. 1 to the proposed rule change.³ The proposed rule change was published for comment in the Federal Register on June 12, 2007.⁴ The Commission did not receive any comment letters on the proposal. On August 24, 2007, the Exchange filed Amendment No. 2 to the proposed rule change.⁵ This order approves the proposed rule change, as amended by Amendment Nos. 1 and 2, provides notice of Amendment No. 2, and solicits comments from interested persons on Amendment No. 2.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Amendment No. 1 dated April 25, 2007.

⁴ See Securities Exchange Act Release No. 55854 (June 4, 2007), 72 FR 32384.

⁵ See Amendment No. 2 dated August 24, 2007 ("Amendment No. 2").

II. Description of the Proposal

Nasdaq proposes to make changes to its rules to facilitate the use of technology to satisfy Nasdaq listing requirements and to make certain clarifying and technical corrections.

Annual Reports

Pursuant to Nasdaq Rule 4350(b)(1)(A), each Nasdaq issuer is currently required to distribute to shareholders a copy of an annual report containing audited financial statements.⁶ Nasdaq proposes to modify its rules to permit a company to distribute its annual report by posting it on a Web site and issuing a press release stating that the annual report has been filed with the Commission (or other appropriate regulatory authority), that such annual report is available on the company's publicly available Web site, and that shareholders can receive a hard-copy free of charge upon request.⁷ The proposal requires that the hard copy be provided within a reasonable time period following the request. Nasdaq notes that this proposal is most meaningful to foreign private issuers because they are exempt from the Commission's proxy solicitation rules under Rule 3a12-3(b) of the Act.⁸

In the initial version of the rule change, Nasdaq proposed that the annual report requirement is applicable only to issuers of common stock and voting preferred stock (and their

⁶ A foreign private issuer can follow its home country practice regarding distribution of annual reports instead of Nasdaq's rule, if it follows the procedures set forth in Rule 4350(a) regarding disclosure of this non-conforming practice.

⁷ This proposal is similar to a recent change by the New York Stock Exchange LLC to Section 203.01 of its Listed Company Manual. See Securities Exchange Act Release No. 54344 (August 21, 2006), 71 FR 51260 (August 29, 2006) (approving SR-NYSE-2005-68).

⁸ 17 CFR 240.3a12-3(b).

equivalents).⁹ In Amendment No. 2, Nasdaq decided to retain the current formulation of Rule 4350(b)(1)(A), so it will apply to all Nasdaq issuers and not just issuers of common stock and voting preferred stock (and their equivalents).¹⁰ The proposed rule change also provides that the annual report requirement can be satisfied by making available to shareholders the company's annual filing with the Commission, including but not limited to Forms 10-K, 20-F, 40-F, or N-CSR.¹¹ Further, Nasdaq proposes to remove a provision related to the timing for delivery of the annual report, because the Exchange notes that the Commission's proxy rules already require that such information be provided before the annual meeting.¹² Nasdaq is also removing the rule provision that the annual report be filed with Nasdaq at the same time that it is made available to shareholder. According to the Exchange, it does not require a copy of the company's annual report with audited financial statements to be filed with it because it has access to company filings through the Commission's EDGAR database. Nasdaq obtains access to these filings through an online vendor subscription service. The vendor receives all electronically-filed

⁹ Common stock equivalents include, but are not limited to: ordinary shares, shares or certificates of beneficial interest of Trust, American depositary receipts and American depositary shares.

¹⁰ See Amendment No. 2, supra note 5.

¹¹ In Amendment No. 2, Nasdaq modified the proposed rule language to make it clear that the aforementioned forms are not an exhaustive list. For example, the rule can be satisfied by making available other forms, such as the 10-KSB. See Amendment No. 2, supra note 5.

¹² Pursuant to Rule 14a-3(b), 17 CFR 240.14a-3(b), the proxy statement for a company's annual meeting at which directors are to be elected must be accompanied or preceded by an annual report. State law requirements also govern the amount of notice that must be provided for a meeting. See, e.g., Section 222(b) of the Delaware General Corporation Law, which requires notice of a meeting not less than 10 nor more than 60 days prior to the meeting.

documents within seconds of their submission to the EDGAR system and provides Nasdaq staff immediate access to these filings through the internet.¹³

In addition, Nasdaq proposes to make a technical correction to Rule 4350(b)(1)(B), relating to the disclosure required when the audit opinion of a company's annual financial statements contains a "going concern qualification." The proposed change removes the term "going concern qualification," which is undefined in the accounting literature, and replaces it with language from Statement on Auditing Standard Number 59, which relates to the auditor's consideration of an entity's ability to continue as a going concern.

Disclosure of non-conforming governance practices

Nasdaq requires that foreign private issuers disclose all non-conforming governance practices in their Form F-1, 20-F, or 40-F.¹⁴ Nasdaq proposes to expand the existing Nasdaq rule to allow this disclosure to be made either in the Form F-1, 20-F, or 40-F, as applicable, or, in the alternative, the foreign private issuer may provide these disclosures in English on its Web site. If, however, the disclosure is only available on the foreign private issuer's Web site, the proposal requires that the issuer's annual report and registration statement should state this fact and provide the Web address at which the information may be obtained.

III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁵

¹³ See email from Arnold Golub, Associate General Counsel, Nasdaq, to Sharon Lawson, Senior Special Counsel, Division, Commission, on August 23, 2007.

¹⁴ Nasdaq Rule 4350(a)(1) and IM-4350-6.

¹⁵ The Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

In particular, the Commission believes that it is consistent with Section 6(b)(5) of the Act,¹⁶ which requires, among other things, that the rules of a national securities exchange be designed 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 Exchange has proposed to amend Nasdaq Rule 4350 to permit a company to distribute its annual report by posting it on a Web site and issuing a press release stating that the annual report has been filed with the Commission (or other appropriate regulatory authority), that such annual report is available on the company's publicly available Web site, and that shareholders can receive a hard-copy free of charge upon request. Nasdaq's proposal also states that the annual report requirement is applicable only to issuers of common stock, voting preferred stock, and their equivalents, and that the annual report requirement can be satisfied by providing the company's annual filing with the Commission. The Commission believes that the proposed changes are reasonable because electronic delivery may offer shareholders immediate access to financial information and greater ability to search such information. The Commission also believes that the proposed rule change may lead to significant cost savings for Nasdaq-listed companies, savings that will ultimately accrue to those companies' shareholders.¹⁷

The Commission also notes that the proposed rule change requires the listed company to issue a press release simultaneously with the posting of the annual report, stating that the annual

¹⁶ 15 U.S.C. 78f(b)(5).

¹⁷ The Commission adopted new Rule 14a-16, 17 CFR 240.14a-16, to facilitate the electronic furnishing of proxy materials to shareholders, including the annual report required by Rule 14a-3(b), 17 CFR 240.14a-3(b). One of the requirements in Rule 14a-16 is that the company must send a Notice of Internet Availability of Proxy Materials to shareholders. See Securities Exchange Act Release Nos. 34-55746 (January 22, 2007) and 34-56135 (July 26, 2007).

report is available, listing the Web site where the annual report may be accessed, and requiring the listed company to send paper copies to those shareholders that request one within a reasonable time at no charge. The Commission believes that these steps provide reasonable assurance that stockholders will either be able to access the Web site of the listed company to access the annual report or request a free paper copy.

Nasdaq also proposes to remove a provision related to the timing for delivery of the annual report, because the Exchange notes that the Commission's proxy rules already require that such information be provided before the annual meeting. The Commission believes that this proposal is reasonable, given that state corporate law and Commission rules operate together to determine the timetable for the delivery of annual reports to shareholders.¹⁸

Nasdaq is also removing the rule provision that the annual report be filed with Nasdaq at the same time that it is made available to shareholders. As noted earlier, the Exchange receives immediate notification of listed issuers' filings, and the Commission believes that the proposed change to eliminate this particular filing requirement is reasonable.¹⁹

Further, Nasdaq proposes to make a technical correction to Rule 4350(b)(1)(B), by removing the term "going concern qualification," which is undefined in the accounting literature, and replacing it with language from Statement on Auditing Standard Number 59, which relates to the auditor's consideration of an entity's ability to continue as a going concern. The

¹⁸ Pursuant to Rule 14a-3(b), 17 CFR 240.14a-3(b), the proxy statement for a company's annual meeting at which directors are to be elected must be accompanied or preceded by an annual report. State law requirements also govern the timing that notice of the meeting must be provided. See, e.g., Section 222(b) of the Delaware General Corporation Law, which requires notice of a meeting not less than 10 nor more than 60 days prior to the meeting.

¹⁹ See supra note 13 and accompanying text.

Commission agrees with Nasdaq that this change is reasonable because it will remove confusion as to when the rule will apply.

Pursuant to Exchange Rule 4350(a) and IM-4350-6, Nasdaq requires that foreign private issuers disclose all non-conforming governance practices in their Form F-1, 20-F, or 40-F.

Nasdaq proposes to expand the existing Nasdaq rule to allow this disclosure to be made either in the Form F-1, 20-F, or 40-F, as applicable, or, in the alternative, the foreign private issuer may provide these disclosures in English on its Web site. If, however, the disclosure is only available on the foreign private issuer's Web site, the proposal requires that the issuer's annual report and registration statement should state this fact and provide the Web address at which the information may be obtained. The Commission believes this proposed change is also reasonable because it will permit investors to utilize the Web to quickly determine if a foreign private issue has any non-conforming corporate governance practices. The Commission also expects that foreign private issuers would update these disclosures to keep them current and accurate.

IV. Notice of Filing of Amendment No. 2, and Order Granting Accelerated Approval to the Proposed Rule Change as Amended by Amendments Nos. 1 and 2

In Amendment No. 2, the Exchange modified the proposal to retain the current formulation of Rule 4350(b)(1)(A), so it will apply to all Nasdaq issuers and not just issuers of common stock and voting preferred stock (and their equivalents).²⁰ In Amendment No. 2, the Exchange also clarified that the new annual report requirement can be satisfied by making available to shareholders the company's annual filing with the Commission, including but not limited to Forms 10-K, 20-F, 40-F, or N-CSR.²¹ The Exchange's decision to revert to the rule's original language raises no regulatory issues, as does the Exchange's change to clarify that the

²⁰ See Amendment No. 2, supra note 5.

²¹ See id.

Nasdaq-listed issuer can satisfy the new requirement by making clear that the proposed rule text's mentioning of some forms and not others, such as Form 10-KSB, was merely for purposes of illustration and not limitation. Therefore, the Commission finds good cause, consistent with Section 19(b) and 6(b)(5) of the Act, to approve the proposed rule change, as modified by Amendment Nos. 1 and 2, prior to the 30th day after the amendment is published for comment in the Federal Register.

V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 2, including whether the proposed changes in Amendment No. 2 are 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-2006-045 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NASDAQ-2006-045. 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 Room between the hours of 10:00 am and 3:00 pm.. 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 publicly available. All submissions should refer to File Number SR-NASDAQ-2006-045 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²² that the proposed rule change (SR-NASDAQ-2006-045), as modified by Amendment Nos. 1 and 2, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²³

Nancy M. Morris
Secretary

²² 15 U.S.C. 78s(b)(2).

²³ 17 CFR 200.30-3(a)(12).