

## Majority Voting - Proposed Listing Standards for the NASDAQ

### **5606. Election of Directors**

#### **(a) Majority Voting Standard**

(1) Unless the Company's charter requires a greater number of affirmative votes, in any uncontested election of directors at a meeting at which a quorum is present, each director of a listed company will be elected only if such director receives the affirmative vote of a majority of the votes cast ("majority voting standard"). However, the majority voting standard shall not apply in the event of a contested election.

#### **IM-5606. Majority Voting Standard**

A majority voting standard for the election of directors is important not only to provide shareholders with more meaningful voting power but also to make boards more accountable to their shareholders.

If fewer than the minimum number of directors, as defined in the Company's charter or by-laws, is elected under the majority voting standard, the Company may fill such vacancies according to the provisions of its charter or by-laws. A reasonable transition period may be appropriate under certain circumstances.

An "uncontested" election of directors refers to an election of directors that is not "contested." An election is "contested" if there are more nominees for director than available seats on the board. In the event of a contested election, directors will be elected by a plurality of the votes cast by the shares entitled to vote.

#### **(b) Director Resignation Policy**

Any incumbent director who fails to receive a majority of votes cast in any uncontested election of directors will tender his or her resignation, promptly following the certification of election results.

#### **IM-5606-1. Director Resignation Policy**

The Board may not reject a director's offer to resign under the director resignation policy unless the Board determines that such director's continuing service on the board is necessary or required to (i) maintain compliance with securities regulations, (ii) avoid a violation of a contractual provision, or (iii) avoid a violation of state law or of a provision of the company's governing documents.

#### **(c) Phase-in**

A Company shall have twelve months from the date of date of effectiveness of this Rule to comply with the majority voting standard and director resignation policy requirements.

## **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, Companies transferring from other markets and Companies ceasing to be Smaller Reporting Companies. 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. During the transition period before Companies are subject to revised Rule 5605(d) and IM-5605-6, a reference in this Rule 5615 to Rule 5605(d) or IM-5605-6 shall be deemed to refer to Rule 5605A(d) or IM-5605A-6.

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

#### **(1) Asset-backed Issuers and Other Passive Issuers**

The following are exempt from the requirements relating to Majority Independent Board (Rule 5605(b)), Audit Committee (Rule 5605(c)), Compensation Committee (Rule 5605(d)), Director Nominations (Rule 5605(e)), **the Election of Directors (Rule 5606)**, the Controlled Company Exemption (Rule 5615(c)(2)), and Code of Conduct (Rule 5610):

**(A)** asset-backed issuers; and

**(B)** issuers, such as unit investment trusts, including Portfolio Depository Receipts, which are organized as trusts or other unincorporated associations that do not have a board of directors or persons acting in a similar capacity and whose activities are limited to passively owning or holding (as well as administering and distributing amounts in respect of) securities, rights, collateral or other assets on behalf of or for the benefit of the holders of the listed securities.

#### **IM-5615-1. Asset-backed Issuers and Other Passive Issuers**

Because of their unique attributes, Rules 5605(b), 5605(c), 5605(d), 5605(e), **5606** and 5610 do not apply to asset-backed issuers and issuers, such as unit investment trusts, that are organized as trusts or other unincorporated associations that do not have a board of directors or persons acting in a similar capacity and whose activities are limited to passively owning or holding (as well as administering and distributing amounts in respect of) securities, rights, collateral or other assets on behalf of or for the benefit of the holders of the listed securities. This is consistent with Nasdaq's traditional approach to such issuers.

#### **(2) Cooperatives**

Cooperative entities, such as agricultural cooperatives, that are structured to comply with relevant state law and federal tax law and that do not have a publicly traded class of common stock are exempt from Rules 5605(b), (d), (e), **5606** and 5615(c)(2). However, such entities must comply with all federal securities laws, including without limitation those rules required by Section 10A(m) of the Act and Rule 10A-3 thereunder.

#### **IM-5615-2. Cooperatives**

Certain member-owned cooperatives that list their preferred stock are required to have their common stock owned by their members. Because of their unique structure and the fact that they do not have a publicly traded class of common stock, such entities are exempt from Rule 5605(b), (d), and (e) **and 5606**. This is consistent with Nasdaq's traditional approach to such Companies.

## **b) Phase-In Schedules**

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### **(2) Companies Emerging from Bankruptcy**

Companies that are emerging from bankruptcy shall be permitted to phase-in independent nomination and compensation committees and majority independent boards on the same schedule as Companies listing in conjunction with their initial public offering. **Companies emerging from bankruptcy shall have twelve months from the date of listing to comply with the majority voting standard and director resignation policy requirements.**

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### **(4) Phase-In Schedule for a Company Ceasing to be a Smaller Reporting Company**

Pursuant to Rule 12b-2 under the Act, a Company tests its status as a Smaller Reporting Company on an annual basis as of the last business day of its most recently completed second fiscal quarter (for purposes of this Rule, the "Determination Date"). A Company with a public float of \$75 million or more as of the Determination Date will cease to be a Smaller Reporting Company as of the beginning of the fiscal year following the Determination Date (the "Start Date").

By six months from the Start Date, a Company must comply with Rule 5605(d)(3) and certify to Nasdaq that: (i) it has complied with the requirement in Rule 5605(d)(1) to adopt a formal written compensation committee charter including the content specified in Rule 5605(d)(1)(A)- (D); and (ii) it has complied, or within the applicable phase-in schedule will comply, with the additional requirements in Rule 5605(d)(2)(A) regarding compensation committee composition. **By one year from the Start Date, a Company must comply with Rule 5606.**

A Company shall be permitted to phase in its compliance with the additional compensation committee eligibility requirements of Rule 5605(d)(2)(A) relating to compensatory fees and affiliation as follows: (i) one member must satisfy the requirements by six months from the Start Date; (ii) a majority of members must satisfy the requirements by nine months from the Start Date; and (iii) all members must satisfy the requirements by one year from the Start Date.

Since a Smaller Reporting Company is required to have a compensation committee comprised of at least two Independent Directors, a Company that has ceased to be a Smaller Reporting Company may not use the phase-in schedule for the requirements of Rule 5605(d)(2)(A) relating to minimum committee size or that the committee consist only of Independent Directors as defined under Rule 5605(a)(2).

During this phase-in schedule, a Company that has ceased to be a Smaller Reporting Company must continue to comply with Rule 5605(d)(5).

## **(c) How the Rules Apply to a Controlled Company**

### **(1) Definition**

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.

## **(2) Exemptions Afforded to a Controlled Company**

A Controlled Company is exempt from the requirements of Rules 5605(b), (d) and (e) **and 5606**, except for the requirements of subsection **5605(b)(2)** which pertain to executive sessions of Independent Directors. A Controlled Company, other than a Foreign Private Issuer, relying upon this exemption must comply with the disclosure requirements set forth in Instruction 1 to Item 407(a) of Regulation S-K. A Foreign Private Issuer must disclose in its next annual report (e.g., Form 20-F or 40-F) that it is a Controlled Company and the basis for that determination.

## **(3) Phase-In Schedule for a Company Ceasing to be a Controlled Company**

A Company that has ceased to be a Controlled Company within the meaning of Rule 5615(c)(1) shall be permitted to phase-in its independent nomination and compensation committees and majority independent board on the same schedule as Companies listing in conjunction with their initial public offering. **A Company that has ceased to be a Controlled Company within the meaning of Rule 5615(c)(1) shall have twelve months to comply with the majority voting standard and director resignation policy requirements of Rule 5606.** It should be noted, however, that a Company that has ceased to be a Controlled Company within the meaning of Rule 5615(c)(1) must comply with the audit committee requirements of Rule 5605(c) as of the date it ceased to be a Controlled Company. Furthermore, the executive sessions requirement of Rule 5605(b)(2) applies to Controlled Companies as of the date of listing and continues to apply after it ceases to be controlled.

### **IM-5615-5. Controlled Company Exemption**

This exemption recognizes that majority Shareholders, including parent companies, have the right to select directors and control certain key decisions, such as executive officer compensation, by virtue of their ownership rights. In order for a group to exist for purposes of this rule, the Shareholders must have publicly filed a notice that they are acting as a group (e.g., a Schedule 13D). A Controlled Company not relying upon this exemption need not provide any special disclosures about its controlled status. It should be emphasized that this controlled company exemption does not extend to the audit committee requirements under Rule 5605(c) or the requirement for executive sessions of Independent Directors under Rule 5605(b)(2).