

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-64633; File No. SR-NASDAQ-2011-073)

June 8, 2011

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt Additional Listing Requirements for Reverse Mergers

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on May 26, 2011, 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. 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 adopt additional listing requirements for a company that has become public through a combination with a public shell, whether through a reverse merger, exchange offer, or otherwise (a “Reverse Merger”).³ Nasdaq will implement the proposed rule for applications received after approval.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ This proposed rule change replaces a previous filing by Nasdaq in order to eliminate the previously proposed exception for a Reverse Merger that was also conducting a firm commitment, underwritten public offering and to clarify other portions of the original proposal. See Securities Exchange Act Release No. 64371 (April 29, 2011), 76 FR 25730 (May 5, 2011) (SR-NASDAQ-2011-056). The Commission notes that SR-NASDAQ-2011-056 was withdrawn on May 26, 2011.

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

5005. Definitions

(a) The following is a list of definitions used throughout the Nasdaq Listing Rules. This section also lists various terms together with references to other rules where they are specifically defined. Unless otherwise specified by the Rules, these terms shall have the meanings set forth below. Defined terms are capitalized throughout the Listing Rules.

(1) – (34) No change.

(35) “Reverse Merger” means any transaction whereby an operating company becomes public by combining with a public shell, whether through a reverse merger, exchange offer, or otherwise. However, a Reverse Merger does not include the acquisition of an operating company by a listed company satisfying the requirements of IM-5101-2 or a business combination described in Rule 5110(a). In determining whether a Company is a shell, Nasdaq will look to a number of factors, including but not limited to: whether the Company is considered a “shell company” as defined in Rule 12b-2 under the Act; what percentage of the Company’s assets are active versus passive; whether the Company generates revenues, and if so, whether the revenues are passively or actively generated; whether the Company’s expenses are reasonably related to the revenues being generated; how many employees support the Company’s revenue-generating business operations; how long the Company has been without material business operations; and whether the Company has publicly announced a plan to begin operating activities or generate revenues, including through a near-term acquisition or transaction.

(36) “Round Lot” or “Normal Unit of Trading” means 100 shares of a security unless, with respect to a particular security, Nasdaq determines that a normal unit of trading shall constitute other than 100 shares. If a normal unit of trading is other than 100 shares, a special identifier shall be appended to the Company's Nasdaq symbol.

~~[(36)]~~ (37) “Round Lot Holder” means a holder of a Normal Unit of Trading. The number of beneficial holders will be considered in addition to holders of record.

~~[(37)]~~ (38) “Shareholder” means a record or beneficial owner of a security listed or applying to list. For purposes of the Rule 5000 Series, the term “Shareholder” includes, for example, a limited partner, the owner of a depository receipt, or unit.

~~[(38)]~~ (39) “Substantial Shareholder” is defined in Rule 5635(e)(3).

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

[(39)] (40) "Substitution Listing Event" means: a reverse stock split, re-incorporation or a change in the Company's place of organization, the formation of a holding company that replaces a listed Company, reclassification or exchange of a Company's listed shares for another security, the listing of a new class of securities in substitution for a previously-listed class of securities, or any technical change whereby the Shareholders of the original Company receive a share-for-share interest in the new Company without any change in their equity position or rights.

[(40)] (41) "Total Holders" means holders of a security that includes both beneficial holders and holders of record.

5110. Change of Control, Bankruptcy and Liquidation, and Reverse Mergers

(a) – (b) No change

(c) Reverse Mergers

A Company that is formed by a Reverse Merger shall be eligible to submit an application for initial listing only if the combined entity has, immediately preceding the filing of the initial listing application: (i) traded for at least six months in the U.S. over-the-counter market, on another national securities exchange, or on a foreign exchange, following the filing with the Commission or Other Regulatory Authority of all required information about the transaction, including audited financial statements for the combined entity; and (ii) maintained a Bid Price of \$4 per share or higher on at least 30 of the most recent 60 trading days.

In addition, such a Company may only be approved for listing if, at the time of approval, it has timely filed: (i) in the case of a domestic issuer, its most recent two required periodic financial reports with the Commission or Other Regulatory Authority (Forms 10-Q or 10-K) containing at least six months of information about the combined entity; or (ii) in the case of a Foreign Private Issuer, comparable information as described in (i) above on Forms 6-K, 20-F or 40-F. In the case of a Foreign Private Issuer, a Form 6-K would be considered timely if, consistent with Rule 5250(c)(2), it includes an interim balance sheet and income statement, which must be presented in English, and is filed no later than six months following the end of the applicable quarter.

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5210. Prerequisites for Applying to List on The Nasdaq Stock Market

(a) – (h) No change

(i) Reverse Mergers

A security issued by a Company formed through a Reverse Merger shall be eligible for initial listing only if the conditions set forth in Rule 5110(c) are satisfied.

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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

In recent months there has been an extraordinary level of public attention to listed companies that went public via a Reverse Merger, where an unlisted operating company becomes a public company by merging with a public shell.⁵ The financial press, short sellers and others have raised allegations of widespread fraudulent behavior by these companies, leading to concerns that their financial statements cannot be relied upon. Concerns have also been raised that certain individuals who aggressively promote these transactions have significant regulatory histories or have engaged in transactions that are disproportionately beneficial to them at the expense of public shareholders. The Public Company Accounting Oversight Board ("PCAOB") has also identified issues with the audits of these companies and, in response, has issued Staff Audit Practice Alert No. 6/July 12, 2010 and Staff Research Note #2011-P1/March 2011, cautioning registered accounting firms to follow certain specified auditing practices. The

⁵ See, e.g., Beware This Chinese Export, Barron's (August 28, 2010), available at <http://online.barrons.com/article/SB50001424052970204304404575449812943183940.html>. See also Speech by SEC Commissioner by Commissioner Luis A. Aguilar: Facilitating Real Capital Formation (April 4, 2011), available at <http://www.sec.gov/news/speech/2011/spch040411laa.htm>.

SEC recently took an enforcement action based on a firm's audit of a Reverse Merger company.⁶ In addition, Nasdaq is aware of situations where it appeared that promoters and others intended to manipulate prices higher to satisfy Nasdaq's initial listing bid price requirement and where companies have, for example, gifted stock to artificially satisfy the 300 round lot public holder requirement. Nasdaq does not list companies in instances such as these, where it appears the company has achieved compliance with a requirement in an inappropriate manner.

In response to these concerns, Nasdaq staff has, over the past year, adopted heightened review procedures for Reverse Merger applicants. However, Nasdaq also believes that additional requirements for listing Reverse Merger companies are appropriate to discourage inappropriate behavior on the part of companies, promoters and others. Accordingly, Nasdaq proposes to adopt certain "seasoning" requirements for Reverse Mergers.⁷

Specifically, Nasdaq proposes to prohibit a company going public by combining with a public shell⁸ from applying to list until six months after the combined entity submits all required

⁶ In re Moore Stephens Wurth Frazer and Torbet, Order Instituting Public Administrative and Cease-and-Desist Proceedings, Securities Act Release No. 9166 (December 20, 2010).

⁷ Even if a company meets these proposed new requirements, Nasdaq could still deny listing based on the authority described in Rule 5101 to apply additional or more stringent criteria in order to maintain the quality of and public confidence in the market, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest.

⁸ For purposes of this rule, Nasdaq will treat as a combination any transaction whereby an operating company becomes public by combining with a public shell, whether through a reverse merger, exchange offer, or otherwise. However, a Reverse Merger does not include the acquisition of an operating company by a listed company satisfying the requirements of IM-5101-2 (relating to companies whose business plan is to complete one or more acquisitions) or a business combination described in Rule 5110(a) (relating to a listed company that combines with a non-Nasdaq entity, resulting in a change of control of the Company and potentially allowing the non-Nasdaq entity to obtain a Nasdaq Listing, sometimes called a "back-door listing"). In these cases, FINRA is already reviewing the trading of the listed security and Nasdaq is already reviewing the

information about the transaction, including audited financial statements, to the SEC.⁹ Further, Nasdaq proposes to require that the company maintain a \$4 bid price on at least 30 of the 60 trading days immediately prior to submitting the application. Finally, under the proposed rule, Nasdaq would not approve any Reverse Merger for listing unless the company has timely filed its two most recent financial reports with the SEC if it is a domestic issuer (this could be two quarterly filings or a quarterly and an annual filing) or comparable information if it is a foreign private issuer.¹⁰ While most companies will satisfy this requirement due to the six month delay before they can apply, Nasdaq believes that it is important to assure that this requirement be satisfied in all cases.

Nasdaq believes that this proposal will result in significant investor protection benefits. Specifically, a six month seasoning requirement will allow the Financial Industry Regulatory Authority, Inc. (“FINRA”) and other regulators more time to view trading patterns and uncover

company and the individuals associated with it. Additionally, Nasdaq rules require that the company re-apply for initial listing and during that process Nasdaq would review any newly associated individuals as well as the financial information of the combined company. A Reverse Merger would also not include a Substitution Listing Event, as defined in Rule 5005(a)(39) (proposed to be renumbered as Rule 5005(a)(40), such as the formation of a holding company to replace the listed company or a merger to facilitate a re-incorporation, because in these cases the operating company is already a listed entity.

⁹ A company must file a Form 8-K within four days of completing a reverse merger. The Form 8-K must contain audited financial statements and information comparable to the information provided in a Form 10 for the registration of securities. See Form 8-K Items 2.01, 5.06, and 9.01(c). This six month period would not begin to run until the complete Form 8-K, meeting the Commission’s requirements, is filed.

¹⁰ Nasdaq’s experience has been that Reverse Merger’s typically involve domestic shells. However, in the event that the Reverse Merger involves a shell that is a foreign private issuer, the combined entity would have to timely file financial reports for the most recent annual period, or a more recent six-month period. These reports would have to reflect at least six months of information about the post-merger entity and could be an interim report on Form 6-K or an annual report on Forms 20-F or 40-F. A Form 6-K would be considered timely if, consistent with Rule 5250(c)(2), it includes an interim balance sheet and income statement, which must be presented in English, no later than six months following the end of the applicable quarter.

potentially manipulative trading.¹¹ It will also result in a more bona fide shareholder base and assure that the \$4 bid price was not satisfied through a quick manipulative scheme. Requiring additional SEC filings will tend to improve the reliability of the reported financial results, since the auditors will have reviewed several quarters, at least, of the public company's operating results, as will the company's audit committee. To the extent the company had adopted new internal controls at the time of the merger, those too will have been in place and able to exert a corrective influence over any previous flaws in the company's financial reporting process.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,¹² in general and with Section 6(b)(5) of the Act,¹³ in particular in that it is 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 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 proposed rule change is designed to enhance investor protection by imposing additional requirements on a category of companies that have raised regulatory concerns.

B. Self-Regulatory Organization's Statement on Burden on Competition

¹¹ FINRA reviews trading of companies trading in the over-the-counter market in the United States. Foreign regulators and other exchanges would similarly have more time to review trading for other companies.

¹² 15 U.S.C. 78f.

¹³ 15 U.S.C. 78f(b)(5).

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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- A. by order approve or disapprove such proposed rule change, or
- B. institute proceedings to determine whether the proposed rule change should be disapproved.

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. Please include File Number SR-NASDAQ-2011-073 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-2011-073. 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 website (<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 website viewing and printing 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-2011-073, 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.¹⁴

Cathy H. Ahn
Deputy Secretary

¹⁴ 17 CFR 200.30-3(a)(12).