

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59291; File No. SR-NASDAQ-2009-002)

January 23, 2009

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify the Compliance Period Applicable to Companies that Fail to Meet the Market Value of Listed Securities Requirement

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 January 13, 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,³ 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 Substance of the Proposed Rule Change

Nasdaq proposes to modify the compliance period applicable to listed companies that fail to meet the market value of listed securities requirement.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 17 CFR 240.19b-4(f)(6).

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

4310. Listing Requirements for Domestic and Canadian Securities

To qualify for listing in Nasdaq, a security of a domestic or Canadian issuer shall satisfy all applicable requirements contained in paragraphs (a), (b), and (c) hereof. Issuers that meet these requirements, but that are not listed on the Nasdaq Global Market, are listed on the Nasdaq Capital Market.

(a) – (b) No change

(c) In addition to the requirements contained in paragraph (a) and (b) above, and unless otherwise indicated, a security shall satisfy the following criteria for listing on Nasdaq:

(1) – (7) No change.

(8) (A) – (B) No change.

(C) A failure to meet the continued listing requirement for market value of listed securities shall be determined to exist only if the deficiency continues for a period of 10 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of [30] 90 calendar days from such notification to achieve compliance. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the [30] 90 day compliance period.

(D) – (E) No change.

(9) – (30) No change.

(d) No change.

4320. Listing Requirements for Non-Canadian Foreign Securities and American Depositary Receipts

To qualify for listing on Nasdaq, a security of a non-Canadian foreign issuer, an American Depositary Receipt (ADR) or similar security issued in respect of a security of a foreign issuer shall satisfy the requirements of paragraphs (a), (b), and (e) of this Rule. Issuers that meet these requirements, but that are not listed on the Nasdaq Global Market, are listed on the Nasdaq Capital Market.

(a) – (d) No change.

(e) In addition to the requirements contained in paragraphs (a) and (b), the security shall satisfy the criteria set out in this subsection for listing on Nasdaq. In the case of ADRs, the underlying security will be considered when determining the ADR's qualification for initial or continued listing on Nasdaq.

(1) No change.

(2) (A) – (C) No change.

(D) A failure to meet the continued listing requirements for market value of listed securities shall be determined to exist only if the deficiency continues for a period of 10 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of [30] 90 calendar days from such notification to achieve compliance with the applicable continued listing standard. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the [30] 90 day compliance period.

(E) No change.

(3) – (26) No change.

(f) No change.

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4450. Quantitative Maintenance Criteria

After listing as a Nasdaq Global Market security, a security must substantially meet the criteria set forth in paragraphs (a) or (b), and (c), (d), (e) (f), (g), (h) or (i) below to continue to remain listed on the Nasdaq Global Market. A security maintaining its listing under paragraph (b) need not also be in compliance with the quantitative maintenance criteria in the Rule 4300 series.

(a) – (d) No change.

(e) Compliance Periods

(1) – (3) No change.

(4) A failure to meet the continued listing requirements for market [capitalization] value of listed securities shall be determined to exist only if the deficiency continues for a period of 10 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of [30] 90 calendar days from such notification to achieve compliance with the applicable continued listing standard. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the [30] 90 day compliance period.

(f) – (i) 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

Nasdaq proposes to modify the procedures applicable to listed companies that fail to meet the market value of listed securities requirement. A company fails to meet the continued listing requirement for market value of listed securities if the market value of listed securities is below the applicable threshold for a period of 10 consecutive business days.⁵ Upon such a failure, the company is currently provided a “compliance period” of 30 calendar days to achieve compliance. Compliance is achieved by meeting the requirement for a minimum of 10 consecutive business days during the 30 day compliance period.

Nasdaq has come to believe that the 30 day compliance period afforded by the existing rules is too short a period, especially during periods of market turmoil. Further, while companies are only allowed a 30 day period to regain compliance with the market value of listed securities requirement, they are allowed a 90 day compliance period to regain compliance with the requirement for market value of publicly held securities,⁶ which is a subset of all listed securities.⁷ As such, Nasdaq proposes to modify the compliance period applicable to a company

⁵ See Rules 4310(c)(8)(C), 4320(e)(2)(D) and 4450(e)(4).

⁶ See Rules 4310(c)(8)(B) and 4450(e)(1).

⁷ Nasdaq also notes that the market value of listed securities requirement operates as an alternative to other listing requirements. See Rules 4310(c)(3), 4320(e)(2)(B), 4350(a) and 4350(b). However, while a company that previously qualified under any of the alternative listing requirements is permitted by Rule 4803(a)(1)(A) to provide Nasdaq staff with a plan to regain compliance and could receive a staff exception of up to 105 calendar days, a company that qualified under the market value of listed securities requirement is only permitted 30 calendar days to regain compliance if it becomes deficient.

that fails to meet the market value of listed securities requirement to extend the compliance period from 30 days to 90 days, making it the same as the compliance period for the market value of publicly held securities requirement.⁸

Nasdaq proposes that any company that previously received a delisting notification for failing to meet the market value of listed securities requirement would continue to be subject to delisting for that reason, unless a Hearings Panel grants the company an exception pursuant to Rule 4802(b)(2). A company that has not yet received a delisting notification from Nasdaq staff would have its compliance period extended to 90 calendar days from the date it was notified of the original deficiency. Thus, for example, if 25 days had elapsed since the company was notified of its 30-day compliance period under the old rule, the company would have an additional 65 days (including the five days remaining in the original compliance period), for a total compliance period of 90 days from the original notification.⁹

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,¹⁰ in general and with Section 6(b)(5) of the Act,¹¹ in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable

⁸ The company could also regain compliance by meeting one of the alternative listing requirements. For example, a company that fails to meet the market value of listed securities requirement could raise enough equity during the 90 day compliance period to meet the applicable equity requirement.

⁹ Nasdaq also proposes to correct a reference in Rule 4450(e)(4) that currently refers to “market capitalization” to instead refer to “market value of listed securities.” Nasdaq inadvertently failed to change this reference when it changed the description of the underlying initial and continued listing requirement. See Securities Exchange Act Release No. 45283 (January 15, 2002), 67 FR 3520 (January 24, 2002) (approving SR-NASD-2001-84).

¹⁰ 15 U.S.C. 78f.

¹¹ 15 U.S.C. 78f(b)(5).

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 would modify Nasdaq's treatment of non-compliance with the market value of listed securities requirement in order to help allow companies sufficient time to cure a deficiency, especially during turbulent market environments, thereby protecting investors, facilitating transactions in securities, and removing an impediment to a free and open market.

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.

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 proposed rule change: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹² and Rule 19b-4(f)(6) thereunder.¹³

¹² 15 U.S.C. 78s(b)(3)(A).

¹³ 17 CFR 240.19b-4(f)(6). Pursuant to Rule 19b-4(f)(6)(iii) under the Act, the Exchange is required to give 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

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act¹⁴ normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)¹⁵ permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because the proposed rule change will conform the length of the compliance period for a failure to meet the continued listing requirement for market value of listed securities with the current compliance period for a failure to meet the continued listing requirement for market value of publicly held shares. Because the publicly held shares listing requirement is merely a subset of the market value of listed securities requirement, the Commission believes that allowing companies that are deficient in the market value of listed securities requirement the same maximum time of 90 days that is currently available to cure a market value of publicly held securities deficiency raises no new regulatory issues. In addition, the Commission believes that waiving the 30-day operative delay will allow Nasdaq to immediately afford companies that may be deficient in the market value of listed securities requirement due to recent market volatility and conditions an additional 60 days to regain

business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has requested that the Commission waive the 5-day pre-filing notice requirement. The Commission has determined to waive this requirement.

¹⁴ 17 CFR 240.19b-4(f)(6).

¹⁵ 17 CFR 240.19b-4(f)(6)(iii).

compliance.¹⁶ For these reasons, the Commission designates that the proposed rule change become operative immediately upon filing.¹⁷

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the 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 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-2009-002 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-2009-002. 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

¹⁶ See discussion *supra* regarding companies already in a compliance period and companies that have already received a delisting notification.

¹⁷ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 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 am and 3:00 pm. Copies of the 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

available publicly. All submissions should refer to File Number SR-NASDAQ-2009-002 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.¹⁸

Florence E. Harmon
Deputy Secretary

¹⁸ 17 CFR 200.30-3(a)(12).