



9600 Blackwell Road • Rockville, MD 20850

Arnold P. Golub

Vice President & Associate General Counsel

P: +1 301 978 8075

F: +1 301 978 8472

E: arnold.golub@nasdaqomx.com

December 28, 2009

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-9303

Re: SR-NASDAQ-2009-077

Dear Ms. Murphy:

The NASDAQ Stock Market LLC (“Nasdaq”) appreciates this opportunity to respond to the three comments submitted on the above captioned proposed rule change.¹ Based upon our experience in applying our continued listing requirements, Nasdaq has determined that certain of the existing periods for determining non-compliance, and the ensuing compliance periods, are too short, particularly given the extraordinary volatility that the securities markets have experienced over the past decade and the resulting changes this has brought to the capital-raising process. The proposed rule change responds to this changed environment by seeking to modify those compliance periods to make them more consistent and, in some cases, to provide additional time to companies to regain compliance. In addition, the proposed rule change would modify the time available to a company to provide a plan to regain compliance with certain listing requirements and the length of the extension that Nasdaq staff can allow a company to regain compliance. Nasdaq’s proposal would provide consistency among its price-related tests, prevent short-term market-wide declines from causing companies to become non-compliant, and provide reasonable extensions to periods within the rules that today are unnecessarily and unreasonably short.

Nasdaq has adopted transparent listing standards and a transparent, independent enforcement process to support those standards. Under these rules, Nasdaq staff has very limited discretion to grant an extension to a company that does not comply with a listing requirement, and many rules provide automatic compliance periods, instead of requiring Nasdaq staff to determine the appropriate length of a compliance period. Notwithstanding these automatic compliance periods, Nasdaq staff always has the ability to apply additional and more stringent criteria to shorten a compliance period or delist a company before the end of the compliance or exception period if it believes that the continued listing of a particular company would be contrary to the

¹ The Commission received comments from Barbara Roper, Director of Investor Protection, Consumer Federation of America, dated Sep. 28, 2009 (the “CFA Letter”); Alan F. Eisenberg, Executive Vice President, Emerging Companies and Business Development, Biotechnology Industry Organization, dated Sep. 29, 2009 (the “BIO Letter”); and Jason S. Frankl, Senior Managing Director, FTI Consulting, dated Oct. 2, 2009 (the “FTI Letter”).

public interest.² We believe that this approach to regulation best protects investors by providing those investors, and the companies they invest in, with certainty and transparency as to the application of the rules. An objective process also serves to minimize any perceived conflicts of Nasdaq staff. The administration of Nasdaq's listing regulatory process is subject to oversight by the Regulatory Oversight Committee of Nasdaq's Board of Directors, as well to internal and external oversight examinations.

An overly aggressive delisting process, based upon short-term non-compliance with the listing rules, is harmful not only to the issuers affected, but to their existing investors, employees and customers. Following such a delisting, the company is forced to trade on the less regulated, less transparent over-the-counter markets and must comply with the higher initial listing standards to return to Nasdaq. A delisting may force institutional or other shareholders to sell their securities, placing even more pressure on the company's price, and may trigger onerous financial covenants, placing greater stress on the company and potentially threatening its ability to remain viable.

Under the proposed rule change to the compliance periods for price-based listing requirements, a company would be found to be non-compliant only after its security was below the applicable threshold for 30 days, consistent with our existing bid price rule.³ The company would be notified immediately of this non-compliance and required to make public disclosure.⁴ Thereafter, the company would be afforded 180 days to regain compliance. This too is consistent with our existing bid price rules. At the end of that 180-day period, if the company has not regained compliance, Nasdaq staff would have no discretion to allow the company to continue trading and would be required to issue a delisting letter, which also would have to be disclosed by the company. The company could appeal that delisting letter to a Hearings Panel, which is independent of Nasdaq and includes no Nasdaq employees. This independent panel could allow the company up to 180 additional days to regain compliance, for a total of 360 days. This too is consistent with our existing bid price rule and in certain cases would be shorter than the available compliance periods at other markets. Thereafter, as noted in the rule filing, the only way the company could remain listed is if the Nasdaq Listing and Hearing Review Council, another independent body, were to call the matter for review, stay the company's delisting, and determine to grant additional time. It would be highly unusual for the Listing Council to do that, and we do not believe the Listing Council has ever exercised its discretion to stay a delisting to allow a company additional time to regain compliance with a price-based requirement, but even in this unusual circumstance, the maximum additional time the company could remain listed would be an additional 180 days, or 18 months total, which would match the available compliance periods at other markets.⁵

² Rule 5100 and IM-5100-1.

³ Today a company is considered non-compliant after its securities are below the market value of listed securities requirement for just 10 days, which Nasdaq believes is too short a period to subject a company to delisting proceedings.

⁴ Nasdaq also includes the company on the list of non-compliant companies on www.nasdaq.com and displays that information to investors viewing the company's quotation. In addition, Nasdaq has a display requirement for vendors that display Nasdaq's data feed, which requires them to show the company's non-compliance, although, as noted in the CFA Letter, vendors that do not obtain quotation data from Nasdaq are not subject to this requirement and may not display this information.

⁵ See, e.g., Section 802.02 of the NYSE Listed Company Manual.

The BIO Letter, submitted on behalf of its 1,200 members including biotechnology companies, academic institutions, state biotechnology centers and related organizations in the United States and 30 other nations, supported Nasdaq's proposed changes described above. Their experience, which is consistent with Nasdaq's experience, is that the existing time periods do not sufficiently account for the daily market fluctuations and that the proposed changes "will allow companies to regain some stability during these tough economic times."⁶ The CFA Letter, on the other hand, argues that extending these compliance periods would result in "a large number of non-compliant companies remaining listed for extended periods of time with little or no oversight." This position is simply unfounded. In fact, Nasdaq continuously monitors each and every listed company for compliance with the listing rules, as well as for any public interest concerns that may make continued listing inappropriate. This includes staff review of virtually every SEC filing made by listed companies, with an emphasis on proxies and quarterly and annual financial reports. Further, given this continuous monitoring, and the transparency around Nasdaq's listing process, we do not believe that the proposed time periods are overly long. Indeed, as noted above, and reinforced by the BIO Letter, given the changes which have taken place in the financial markets it is our view that the existing time periods are unreasonably short. This was highlighted by Nasdaq's need to suspend certain price-based requirements in response to that crisis.⁷

The overly aggressive nature of the current timeframes can also be seen by comparing the proposed periods with those of other markets. For example, a company is not considered non-compliant with NYSE Amex's market value of publicly held shares requirement until it has been below that market's \$1 million requirement for 90 consecutive days.⁸ The NYSE Amex staff can then grant the company up to 18 months to regain compliance with the requirement.⁹ Thereafter, if the company is still not in compliance, it could appeal the matter to a Listing Qualifications Panel and the NYSE Amex Committee on Securities to obtain additional time.¹⁰ A company is considered non-compliant with the NYSE's market capitalization requirement after its average market capitalization is below the requirement for 30 consecutive trading days,¹¹ after which the NYSE staff can allow the company up to 18 months to regain compliance.¹² Unlike the NYSE and NYSE Amex rules, however, a company could only receive an 18 month exception under the proposed Nasdaq rule after review by two independent bodies – the Hearings Panel and the Listing Council.

⁶ The Commission also received a letter from the National Venture Capital Association ("NVCA"), which supports the views of Nasdaq and BIO concerning the ongoing difficulties faced by certain companies in the current market environment. See letter from Mark Heesen, President, NVCA, to Mary Schapiro, Chair, SEC, dated September 29, 2009 (available at <http://www.sec.gov/comments/sr-nasdaq-2009-069/nasdaq2009069-1.pdf>).

⁷ See Securities Exchange Act Release No. 58809 (October 17, 2008), 73 FR 63222 (October 23, 2008) (SR-NASDAQ-2008-082).

⁸ Section 1003(b)(i)(C) of the NYSE Amex Company Guide.

⁹ Section 1009 of the NYSE Amex Company Guide.

¹⁰ Section 1009 and Part 12 of the NYSE Amex Company Guide.

¹¹ Section 802.01(B) of the NYSE Listed Company Manual.

¹² Section 802.02 of the NYSE Listed Company Manual.

The CFA Letter suggests that a bankrupt company could remain listed on Nasdaq for an extended period of time under the proposed rule change. In fact, Nasdaq has separate listing standards governing the continued listing of such companies, contained in Rule 5110(b), pursuant to which Nasdaq, except in unusual circumstances, immediately moves to delist such companies, notwithstanding any compliance period to which the company might otherwise be entitled.

The CFA Letter further suggests that a subjective, case-by-case review of companies below these requirements would be more appropriate than a transparent, objective process including automatic compliance periods. Nasdaq strongly believes that in the case of requirements tied to the price of the security, compliance periods are more appropriate than subjective reviews of company compliance plans. Such a process provides clear guidance to companies and their investors.

The proposed rule change would also provide additional time for a company to submit to Nasdaq's staff a plan to regain compliance with a listing standard that does not have an automatic compliance period and would allow Nasdaq staff to grant a longer time for the company to implement that plan if it is found acceptable. This provision would apply, for example, to failures to meet the stockholder's equity, income, total assets, total revenues, holders, or publicly held shares requirements. As revised, a company would have 45 days (instead of the current 15 days) from the date it is notified of the deficiency to submit the plan and Nasdaq staff could grant up to 180 days (instead of the current 105 days) from the date the company is notified of the deficiency for the company to regain compliance. These changes are directly responsive to our experience during the recent financial crisis in which companies faced frozen credit and equity markets and struggled to submit, within two weeks, a detailed and credible plan to staff. Moreover, as we noted before, these changes would simply operate to conform our rules to those in place at the other listed markets.¹³

Finally, the CFA and FTI Letters raise questions about the independence of Nasdaq's listing review process. As noted above, Nasdaq's rules, which have been approved by the Commission, establish a transparent, independent listing review process, which Nasdaq believes is superior to the model of any other marketplace and that minimizes any conflicts of interest that may exist. The proposed rule change continues this reliance on transparent processes, limited staff discretion, and independent review, while making reasonable adjustments to reflect Nasdaq's experience with the application of its rules in a variety of market conditions. Further, Nasdaq's Listing Qualifications Department is housed in a regulation group that is organizationally and institutionally separate from its business lines. This regulatory group is directly accountable to the Regulatory Oversight Committee of the Nasdaq Board. In addition, the independent Nasdaq Listing and Hearing Review Council provides advice and recommendations to the Nasdaq Board concerning listing standard changes and reviews and provides recommendations concerning the Listing Qualifications Department's compliance

¹³ See Section 802.02 of the NYSE Listed Company Manual. See also Section 8 of the Form 19b-4 for this proposed rule change, submitted on August 17, 2009.

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programs. The overall effectiveness of Nasdaq's regulatory program is, of course, also subject to periodic Commission examination.¹⁴

The Commission's statutory mandate, as set forth in Section 6(b)(5) of the Securities Exchange Act of 1934, is to ensure that the rules of an exchange are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest. As described above, the proposed rule change is consistent with these requirements in that it provides reasonable periods of time for companies to address instances of non-compliance with Nasdaq rules, thereby protecting both current and prospective investors.

If the SEC staff has any questions concerning this submission, please feel free to contact me at (301) 978-8075.

Very truly yours,



¹⁴ The CFA Letter also requested that the Commission seek numerous historic data elements concerning Nasdaq's application of its listing rules. The FTI Letter supported this request. Nasdaq does not believe this request is appropriate. The proposed changes are reasonable and satisfy the relevant statutory standards, and are supportable on their own, as described above. As such, data concerning the historic enforcement of Nasdaq's listing standards, which is subject to Commission oversight, and concerning Nasdaq's revenues, which is already disclosed in NASDAQ OMX's public filings with the Commission, is not necessary for the consideration of the proposed rule change.