

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-63110; File No. SR-NASDAQ-2010-107)

October 14, 2010

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval to a Proposed Rule Change to Modify the Eligibility Criteria for the Second Compliance Period for a Bid Price Deficiency on the Nasdaq Capital Market

I. Introduction

On August 25, 2010, The NASDAQ Stock Market LLC (“Nasdaq”) 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 modify the eligibility criteria in order for a listed company to qualify for the second compliance period for a bid price deficiency on the Nasdaq Capital Market. The proposed rule change was published for comment in the Federal Register on September 2, 2010.³ The Commission received no comment letters on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

Nasdaq is proposing, in order for a company to receive a second compliance period for a bid price deficiency on the Nasdaq Capital Market (“Capital Market”), to modify the eligibility criteria concerning market value of publicly held shares. Under the current Nasdaq rules, when a company has a closing bid price below \$1 for 30 consecutive days it is deemed deficient under Nasdaq’s bid price continued listing standard, and promptly receives written notice that it has 180 calendar days from such

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 62782 (August 27, 2010), 75 FR 53994 (“Notice”).

notification to regain compliance.⁴ Compliance can be achieved by maintaining a minimum \$1 closing bid price for ten consecutive days. At the expiration of the 180 day compliance period, a company can receive an additional 180 day compliance period,⁵ provided it is either already listed on the Capital Market or transfers to that market and satisfies all of the Capital Market's initial listing criteria, except for bid price.⁶

Nasdaq has observed that many companies fail to qualify for the second compliance period because they do not meet the market value of publicly held shares requirement for initial listing on the Capital Market. Nasdaq therefore is proposing to ease the requirements for the second compliance period on the Capital Market by allowing a company to qualify if it satisfies the lower continued listing requirement for market value of publicly held shares, thereby enabling more companies to be eligible for the second compliance period.⁷ The company would still need to meet all of the other initial listing criteria for Capital Market other than bid price.⁸

Under the proposal, the company will need to notify Nasdaq of its intent to cure the bid price deficiency. If a company does not indicate its intent to cure the deficiency, or if it does not appear to Nasdaq staff that it is possible for the company to cure the

⁴ See Nasdaq Rule 5810(c)(3)(A).

⁵ In its filing, Nasdaq refers to the 180 day compliance period as a "grace" period.

⁶ See Nasdaq Rule 5810(c)(3)(A)(i)-(ii).

⁷ The initial listing requirements for market value of publicly held shares for common stock on the Capital Market range from \$5 million to \$15 million, depending on the listing standard under which the company qualifies; the continued listing requirement is \$1 million. See Nasdaq Rules 5505(b) and 5555(a)(4).

⁸ The initial listing standards for the Capital Market are set forth in Nasdaq Rule 5505 and include an equity standard, market value of listed securities standard, and a net income standard. See Nasdaq Rule 5505.

deficiency, the company would not be eligible for the second compliance period under the Capital Market rules. Under the proposal, a company listed on Nasdaq's Global or Global Select Markets would be permitted to transfer to the Capital Market if it meets the applicable market value of publicly held shares requirement for continued listing and all other applicable requirements for initial listing on the Capital Market (except for the bid price requirement), and notifies Nasdaq of its intent to cure the bid price deficiency.⁹ Once on the Capital Market, the company would be eligible for the second compliance period on the Capital Market, unless it does not appear to Nasdaq staff that it is possible for the Company to cure the deficiency.¹⁰ In its filing, Nasdaq noted that under the proposal, while certain companies that do not currently qualify for the second compliance period could receive an additional 180 days to comply with the bid price requirement, the proposed rule change would not extend the overall maximum time of 360 days that is currently available to qualifying companies.

Nasdaq also proposes to remove language in Rule 5810(c)(3) referencing the payment of fees by a company which transfers to the Capital Market. The current language implies that there are fees applicable to such a company. However, no fees are applicable under Rule 5920(a) to such a company. Nasdaq is proposing to delete the

⁹ As noted above, Nasdaq Global and Global Select companies can currently receive the additional 180 day compliance period, provided they meet all the applicable Capital Market initial requirements and transfer to that market.

¹⁰ According to Nasdaq, once a company transfers to the Capital Market, Nasdaq would assess whether it is possible for the company to cure the deficiency. If not, the company would be denied the second 180 day compliance period, and Nasdaq would commence delisting proceedings for the company as a Capital Market listing.

language, to remove any confusion, and has also proposed some other clarifying and non-substantive changes to the rule.¹¹

III. Discussion and Commission Findings

After careful consideration, 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 exchange¹² and, in particular, the requirements of Section 6 of the Act.¹³ Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,¹⁴ which requires, among other things, that the rules of a national securities exchange be 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 and are not designed to permit unfair discrimination between customers, issuers, brokers or dealers.

The development and enforcement of adequate standards governing the initial and continued listing of securities on an exchange is an activity of critical importance to financial markets and the investing public. Listing standards serve as a means for an

¹¹ See Notice, supra note 3.

¹² In approving this proposed rule change the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹³ 15 U.S.C. 78f.

¹⁴ 15 U.S.C. 78f(b)(5).

exchange to screen issuers and to provide listed status only to bona fide companies that have, or in the case of an initial public offering will have, sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets. Adequate standards are especially important given the expectations of investors regarding exchange trading and the imprimatur of listing on a particular market. Once a security has been approved for initial listing, maintenance criteria allow an exchange to monitor the status and trading characteristics of that issue to ensure that it continues to meet the exchange's standards for market depth and liquidity so that fair and orderly markets can be maintained, and so that only companies suitable for listing remain listed on a national securities exchange.

The Commission believes that the proposal to modify the eligibility criteria for the second compliance period for a bid price deficiency on the Capital Market is reasonable and consistent with the Act, and furthers investor protection and the public interest. As stated above, Nasdaq has observed that many companies fail to qualify for the second compliance period because they do not meet the market value of publicly held shares requirement for initial listing on the Capital Market. The Commission notes that to qualify for a second compliance period, the company would still need to meet all of the other initial listing criteria for Capital Market other than bid price, as well as the continued listing requirement for market value of publicly held shares.¹⁵ These standards should help continue to ensure that only companies that meet the minimum requirements for adequate depth and liquidity remain listed for an extended period of time on the Capital Market.

¹⁵ See supra note 8.

In addition, the company will need to notify Nasdaq of its intent to cure the bid price deficiency. If a Capital Market company does not indicate its intent to cure the deficiency, or if it does not appear to Nasdaq staff that it is possible for the company to cure the deficiency, the company would not be eligible for the second compliance period. Similarly, a company listed on the Global or Global Select Markets would be permitted to transfer to the Capital Market if it meets the applicable market value of publicly held shares requirement for continued listing and all other applicable requirements for initial listing on the Capital Market (except for the bid price requirement) and notifies Nasdaq of its intent to cure the bid price deficiency. Once on the Capital Market, the company would be eligible for the second compliance period on the Capital Market, unless it does not appear to Nasdaq staff that it is possible for the Company to cure the deficiency.

The Commission believes that requiring a company to affirmatively state its intent to cure the bid price deficiency and Nasdaq staff to determine whether it is possible for the company to cure that deficiency, provides further protections to investors, by helping to ensure that only companies that are serious and capable of gaining compliance with the Capital Market listing standards within the timeframe provided qualify for the second compliance period. In this regard, the Commission would expect a thorough review to ensure that it is possible for the bid price deficiency to be cured at the end of the second 180 day compliance period and, if not, would expect Nasdaq to immediately commence delisting proceedings.

In approving the Nasdaq's proposal, the Commission recognizes that certain companies that do not currently qualify for the second compliance period could receive additional time to remain listed on a public market. The proposal, however, does not

extend the overall maximum time of 360 days that a company may remain listed before delisting proceedings will commence. Moreover, the proposal eliminates the automatic nature of the second 180 day bid price compliance period that exists under the current rules. Further, notwithstanding the change in eligibility criteria for a second compliance period, the Commission expects Nasdaq to monitor companies closely that are out of compliance and use its authority to delist issuers in a prompt, efficient, and fair manner where necessary and appropriate, in accordance with Nasdaq Rule 5100, including where there are public interest or other concerns such as low price or market value, that make continued listing unwarranted.

Finally, the Commission finds that Nasdaq's proposal to remove language in Rule 5810(c)(3) will reduce confusion regarding the application of the rule by clarifying that there are no fees applicable to a company which transfer to the Capital Market. The additional changes proposed by Nasdaq to the text of Rule 5810(c)(3)(A)(i)-(ii) conform the rule language and format of the two paragraphs and clarify that Nasdaq will assess a company for compliance with applicable listing requirements based on the company's most recent public filings and market information. The Commission believes that these changes either clarify the rule or are non-substantive.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁶ that the proposed rule change (SR-NASDAQ-2010-107), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁷

Florence E. Harmon
Deputy Secretary

¹⁶ 15 U.S.C. 78s(b)(2).

¹⁷ 17 CFR 200.30-3(a)(12).