



Consumer Federation of America

September 28, 2009

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: File Number SR-NASDAQ-2009-077

Dear Ms. Murphy:

I am writing on behalf of the Consumer Federation of America (CFA) to express the grave reservations we have with regard to the proposal by The NASDAQ Stock Market LLC (NASDAQ) to lengthen the amount of time that non-compliant companies may remain listed.¹ While we recognize that the difficult economic cycle we have just come through has had a profound impact on a great many NASDAQ listed companies, we are concerned that NASDAQ's proposals may not be an appropriate response. Given the importance of these proposals, we believe that there are a number of questions that should be answered before the Commission considers issuing an approval order.

The NASDAQ proposal would lead to a proliferation of lengthy automatic grace periods for companies that fall below listing standards. While we agree that companies should not necessarily be summarily delisted once they fall below the listing requirements, we question the wisdom of this approach. It has the potential to result in large numbers of non-compliant companies remaining listed for extended periods of time with little or no oversight.

In making this proposal, NASDAQ has indicated that it is simply attempting to harmonize its grace periods and ensure consistency across all grace periods provided for in its rules. However, NASDAQ has selected its least restrictive grace period, the 180-day grace period applicable to issuers trading for less than \$1 per share, as the basis for this "harmonization," and now seeks to apply this roughly six-month delisting delay to its requirements regarding market value of listed securities and market value of publicly held

¹ CFA is a non-profit association of 280 organizations that, since 1968, has sought to advance the consumer interest through research, advocacy, and education.

securities. If harmonization is needed, we believe standards should be harmonized up, not down.

Market Value Proposal Raises Particular Concerns

The proposal to allow an automatic 180-day grace period for the market value requirement is particularly troubling. The market value standard itself is an alternative to the stockholders' equity requirement. By definition, a company relying on the market value alternative does not meet the minimum stockholders' equity requirement for listing on NASDAQ. In fact, it is possible that many of these companies actually have a negative net worth. As we understand it, prior to 1998, all NASDAQ companies were required to meet a minimum net tangible assets standard, subject to some very narrow exceptions reserved for large issuers with significant operations. The market value standard greatly expanded those exceptions.

Prior to January of this year, a company that fell below the minimum market value requirement for 10 days was provided a 30-day grace period to regain compliance before delisting procedures commenced. If compliance could not be achieved within the grace period, the issuer would then be afforded a hearing before an independent panel, which had the authority to grant the company up to an additional 180 days to regain compliance based on the particular facts and circumstances of the company. In January, that 30-day grace period was extended to 90 days. NASDAQ now proposes requiring 30 days of non-compliance, rather than the earlier 10 days, to start the clock. It would then afford the company an automatic additional 180 calendar days to regain compliance, rather than the earlier 30 days. Upon the expiration of that 180-day grace period, the company could then enter the hearings process and seek a second 180-day extension based on its unique compliance plan. Thus, the original 40 days of non-compliance *before a hearing* would balloon to 210, and the total period of non-compliance before delisting for a company that fails to regain compliance could stretch to more than a year (390 days).

We seriously question the wisdom of granting companies that cannot meet the stockholders' equity requirement an automatic 180-day grace period to regain compliance with the market value requirement. Under the current proposal, for example, an insolvent issuer trading for pennies a share could remain listed for at least 180 calendar days before the initiation of delisting proceedings.

- Before the Commission considers granting this request, we believe NASDAQ should be required to demonstrate why any automatic grace period for market value would be preferable to a case-by-case review.

NASDAQ Should Be Required To Provide Additional Information

The following are among the additional questions we believe NASDAQ should be required to answer before the Commission considers approving this proposal.

As a general matter, we believe NASDAQ should be required to offer a more compelling rationale than the need for “harmonization” to justify its proposal. In particular, we believe NASDAQ should be asked to state:

- Why it shouldn’t simply transfer the listing of a NASDAQ Global Market issuer to the NASDAQ Capital Market if it were unable to regain compliance with the \$5 million market value of publicly held shares requirement within the currently allotted 90-day grace period?
- What is the rationale for automatically continuing the listing of an issuer for 180 days if it cannot meet the \$1 million market value of publicly held shares requirement for continued listing on the NASDAQ Capital Market, particularly given that a panel has the authority to grant the company up to an additional 180 days at the end of the 90-day period if the facts and circumstances warrant it?

NASDAQ indicates (in footnote 8 of the rule filing) that it could apply its discretionary authority “to delist a security during a compliance period if the market value of listed securities or market value of publicly held shares was so low that delisting is necessary to maintain the quality of and public confidence in the market, to prevent fraudulent and manipulative acts and practices, and to protect investors and the public interest.” Accordingly, before granting this proposal, we believe the SEC should ask NASDAQ whether they have taken such action in the past and, if so:

- what the circumstances of such actions were;
- the total number of grace periods granted during the period in question; and
- whether the delisted issuers had been cited for any other rule violations.

NASDAQ is also proposing to increase the amount of time that its staff may grant to a company which has submitted a plan to regain compliance with the stockholders’ equity requirement from 105 days to 180 days. Further, NASDAQ is asking to extend the amount of time companies are given to submit the plan of compliance from 15 days to 45 days. In support of its request, NASDAQ states that “15 days is often insufficient for a company to formulate a meaningful plan.” Accordingly, we believe that NASDAQ should be asked to provide statistics to the Commission staff:

- identifying the number of plans that were rejected, in comparison to the number of plans submitted, and the reasons they were rejected;
- the length of the grace periods granted by the staff; and
- the number of companies that ultimately regained compliance.

NASDAQ has indicated that the changes to the stockholders’ equity plan process will align it with the 180-day plan process that was put into place last fall for companies

that are late in filing their periodic reports.² As a result, we believe that it would be helpful to obtain statistics on that process as well. In particular, we think it would be helpful to see:

- how many plans the staff has denied;
- under what circumstances; and
- how many plans have been approved for less than the full 180-day period.

Greater Independence Needed in Listing Decisions

When NASDAQ and the New York Stock Exchange first proposed becoming stand-alone, for profit public companies earlier this decade, CFA was among a number of commentators who voiced concern that the drive for profits could conflict with the regulatory obligations of the exchanges. In keeping with that concern, we believe that the economic impact on the exchange of the implementation of these rule proposals should be explored. We therefore urge the Commission to require NASDAQ to provide information relating to the impact on its revenues and net income from maintaining the listings of the non-compliant companies.³ We assume, for example, that these companies pay annual fees to NASDAQ and fees for issuing new shares while on NASDAQ. The listing of these companies must also have some indirect impact on revenues associated with trading.

If, as we suspect, the Commission finds that decisions about delisting have a potentially significant impact on NASDAQ's bottom line, we believe greater, rather than less, independence is called for in the delisting process. Specifically, we believe it would be more appropriate to have an independent body making listing determinations rather than members of NASDAQ's staff, who are presumably impacted by the financial performance of NASDAQ and may find themselves under pressure to make decisions that benefit NASDAQ's financial position.⁴

Improved Disclosures Should Be Restored

Regardless of the outcome of this rule filing, we urge the Commission to do more to require the exchanges to identify non-compliant companies. At one point, NASDAQ

² Ironically, in sharp contrast to NASDAQ and the New York Stock Exchange delisting procedures, companies trading on the OTCBB are summarily deleted in the event they become 30 days delinquent in the filing of a period report.

³ We note that a review of NASDAQ's List of Non-Compliant Companies on September 22, 2009, indicated that 175 companies were then late in filing or not in compliance with NASDAQ's numerical listing criteria. In comparison, a review of the NYSE's list of non-compliant companies indicated that only 28 companies were below the listing requirements.

⁴ We note that NASDAQ recently made a rule filing seeking to raise its listing fees across all three market tiers. See SR-NASDAQ-2009-081.

added 'E' to the symbols of companies not meeting the listing requirements. This convention was then replaced by banners on websites such as Yahoo! indicating that a company did not meet the listing requirements. Both approaches provided investors with easy and instant identification of non-compliant companies. Unfortunately, these identifiers have since been discontinued, leaving investors two inadequate options: searching on the websites of the exchanges for lists of non-compliant companies or pouring through old SEC filings looking for disclosures relating to exchange compliance.

We therefore urge the Commission to work with the exchanges to identify an appropriate means of alerting investors to the fact that a listed company is not in compliance with listing standards. This would have the dual benefit of improving transparency for investors and providing an incentive for companies to act as quickly as possible to regain compliance.

Conclusion

NASDAQ's compliance monitoring process seems to be evolving to rely more on lengthy, automatic compliance periods and on the vesting of additional authority with the staff, and less on the case-by-case reviews performed by independent panels. NASDAQ itself made a compelling case for a more restrictive approach in a 2005 letter to the SEC. In that letter, NASDAQ commented quite critically on a New York Stock Exchange proposal to grant automatic grace periods to issuers late in filing their annual reports. Making the case against such automatic grace periods, NASDAQ stated:

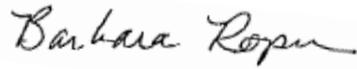
In sharp contrast to the extended time the NYSE allows delinquent filers to trade, NASDAQ begins delisting proceedings immediately when an issuer is late with a required annual or quarterly report. While a NASDAQ-listed issuer may receive a short exception to remain listed, such exceptions come from independent hearing panels and cannot exceed 90 days from the date of the panel's decision. Allowing such a company to continue to trade for an extended period ignores the emphasis that the Commission has stated should be placed on prospective investors, who have the right to assume that a listed security meets the listing requirements, and who are "peculiarly in need of the sort of protection which is afforded by delisting." [footnotes omitted]⁵

Given that NASDAQ's current proposal departs so radically from its previous approach, an approach that was based on the important protections provided prospective investors by delisting of non-compliant companies, we believe the Commission should demand a more compelling rationale for these proposed changes than NASDAQ has yet provided before considering whether to permit this change in approach. Ultimately, we question whether the Commission will conclude that these changes are in the public interest.

⁵ See letter from Edward S. Knight to Jonathan G. Katz, Secretary, Securities and Exchange Commission, December 7, 2005.

We thank you for considering our views on the NASDAQ rule proposals, and we look forward to the final resolution of this matter.

Respectfully submitted,

A handwritten signature in cursive script that reads "Barbara Roper". The signature is written in black ink on a light-colored background.

Barbara Roper
Director of Investor Protection

cc: Chairman Mary L. Schapiro
Commissioner Luis A. Aguilar
Commissioner Kathleen L. Casey
Commissioner Troy A. Paredes
Commissioner Elisse B. Walter