

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-64263; File No. SR-NASDAQ-2011-050)

April 8, 2011

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify an Initial Listing Standard for the Nasdaq Global Select Market

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 April 1, 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 III 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 the Substance of the Proposed Rule Change

Nasdaq proposes to modify an initial listing standard for the Nasdaq Global Select Market. Nasdaq will implement the proposed rule change immediately.

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

5310. Definitions and Computations

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 17 C.F.R. 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>.

(a) - (i) No change.

(j) In computing total assets and stockholders' equity for purposes of Rule 5315(f)(3)(D), Nasdaq will rely on a Company's most recent publicly reported financial statements subject to the adjustments described below:

(1) Application of Use of Proceeds - If a company is in registration with the SEC and is in the process of an equity offering, adjustments should be made to reflect the net proceeds of that offering, and the specified intended application(s) of such proceeds to:

(A) Pay off existing debt or other financial instruments: The adjustment will include elimination of the actual historical interest expense on debt or other financial instruments classified as liabilities under generally accepted accounting principles being retired with offering proceeds of all relevant periods or by conversion into common stock at the time of an initial public offering occurring in conjunction with the company's listing. If the event giving rise to the adjustment occurred during a time-period such that pro forma amounts are not set forth in the SEC registration statement (typically, the pro forma effect of repayment of debt will be provided in the current registration statement only with respect to the last fiscal year plus any interim period in accordance with SEC rules), the company must prepare the relevant adjusted financial data to reflect the adjustment to its historical financial data, and its outside audit firm must provide a report of having applied agreed-upon procedures with respect to such adjustments. Such report must be prepared in accordance with the standards established by the American Institute of Certified Public Accountants.

(B) Fund an acquisition:

(i) The adjustments will include those applicable with respect to acquisition(s) to be funded with the proceeds. Adjustments will be made that are disclosed as such in accordance with Rule 3-05 "Financial Statements of Business Acquired or to be Acquired" and Article 11 of Regulation S-X. Adjustments will be made for all the relevant periods for those acquisitions for which historical financial information of the acquiree is required to be disclosed in the SEC registration statement; and

(ii) Adjustments applicable to any period for which pro forma numbers are not set forth in the registration statement shall be accompanied by the relevant adjusted financial data to combine the historical results of the acquiree (or relevant portion thereof) and acquiror, as disclosed in the company's SEC filing. Under SEC rules, the number of periods disclosed depends upon the significance level of the acquiree to the acquiror. The adjustments will include those necessary to reflect (a) the allocation of the purchase price, including adjusting assets and liabilities of the acquiree to fair value recognizing any intangibles (and associated amortization and depreciation), and (b) the effects of additional financing to complete the acquisition. The company must prepare the relevant adjusted financial data to reflect the adjustment to its historical financial data, and its outside audit firm must provide a report of having applied agreed-upon procedures with respect to such adjustments. Such report must be prepared in accordance with the standards established by the American Institute of Certified Public Accountants.

(2) Acquisitions and Dispositions – In instances other than acquisitions (and related dispositions of part of the acquiree) funded with the use of proceeds, adjustments will be made for those acquisitions and dispositions that are disclosed as such in a company's

financial statements in accordance with Rule 3-05 "Financial Statements of Business Acquired or to be Acquired" and Article 11 of Regulation S-X. If the disclosure does not specify pre-tax earnings from continuing operations, minority interest, and equity in the earnings or losses of investees, then such data must be prepared by the company's outside audit firm for the Exchange's consideration. In this regard, the audit firm would have to issue an independent accountant's report on applying agreed-upon procedures in accordance with the standards established by the American Institute of Certified Public Accountants.

5315. Initial Listing Requirements for Primary Equity Securities

Rule 5310 provides guidance about computations made under this Rule 5315.

(a) – (e) No change.

(f)

(1) – (2) No change

(3) Valuation Requirement

A Company, other than a closed end management investment company, shall meet the requirements of sub-paragraph (A), (B), (C), or (D) below:

(A) – (C) No change.

(D) (i) Market capitalization of at least \$160 million, (ii) total assets of at least \$80 million [for the most recently completed fiscal year], and (iii) stockholders' equity of at least \$55 million.

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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 recently adopted an initial listing standard for the Nasdaq Global Select Market that permits listing if the company has: (i) \$80 million in total assets; (ii) \$55 million in stockholders' equity; and (iii) \$160 million of market capitalization.⁵ Companies qualifying under this standard also have to meet all other requirements of Rule 5315, including the ownership and market value requirements contained in Rule 5315(f) and, upon listing, are subject to the Global Market continued listing standards.

Nasdaq based this listing standard on a listing standard adopted by the New York Stock Exchange ("NYSE"), though the numeric requirements of the Nasdaq standard are higher than those of the NYSE.⁶ However, unlike the NYSE requirement upon which the standard is based, Nasdaq required that the total assets portion of the requirement be met at the end of the prior

⁵ Securities Exchange Act Release No. 61904 (April 14, 2010), 75 FR 20651 (April 20, 2010) (SR-NASDAQ-2010-047).

⁶ Securities Exchange Act Release No. 58934 (November 12, 2008), 73 FR 69708 (November 19, 2008) (SR-NYSE-2008-098, modifying Section 102.01C of the Listed Company Manual). The NYSE listing standard allows a company to list if it has total assets of at least \$75 million, stockholders' equity of at least \$50 million, and a global market capitalization of at least \$150 million.

fiscal year. As a result, companies are only able to demonstrate compliance with the total assets portion of this standard based on a single point in time each year – the year-end financials. To conform with NYSE’s treatment under their comparable standard, Nasdaq proposes to delete the requirement in Rule 5315(f)(3)(D)(ii) that total assets be demonstrated as of the close of the most recent fiscal year. Nasdaq also proposes to add a definition in Rule 5310 explaining what adjustments will be made to total assets and stockholders’ equity to reflect the use of proceeds and acquisitions and dispositions. These adjustments are identical to the adjustments specified in the NYSE Listed Company Manual.⁷

Nasdaq believes that the proposed amendment to Rule 5315(f)(3)(D) does not affect the status of Global Select Market-listed securities under Securities Exchange Act Rule 3a51-1(a) (the “Penny Stock Rule”),⁸ as the amended standards satisfy the requirements of Exchange Act Rule 3a51-1(a)(2).⁹ Rule 5315(f)(3)(D) requires stockholders’ equity of at least \$55 million, which exceeds the requirement in SEC Rule 3a51-1(a)(2)(i)(A)(1) of \$5 million. Rule 5315(f)(3)(D) also requires a minimum market capitalization of \$160 million. Nasdaq believes that this meets or exceeds the requirement of SEC Rule 3a51-1(a)(2)(i)(B) that a company have a market value of listed securities of at least \$50 million, although these are not identical standards. Nasdaq believes that its Global Select Market’s rules will also exceed the Penny Stock Rules remaining stock price and distribution requirements. Rule 5315(e)(1) requires companies initially listing on Nasdaq to have a minimum bid price of \$4 per share, thereby satisfying the \$4 requirement of SEC Rule 3a51-1(a)(2)(i)(C). Rule 5315(f)(1) requires a

⁷ See Section 102.01C(IV)(ii) of the Listed Company Manual noting that total assets and stockholders’ equity are adjusted pursuant to Sections 102.01C(I)(3)(a) and (b).

⁸ 17 CFR 240.a51-1(a).

⁹ 17 CFR 240.a51-1(a)(2).

company's securities to have either 450 round lot holders or at least 2,200 total holders, although if a company is publicly traded and has an average monthly trading volume over the prior 12 months of at least 1.1 million shares per month, it can list with 550 total holders. Nasdaq believes that these requirements are comparable to, or more stringent than, the requirement of SEC Rule 3a51-1(a)(2)(i)(D) that a security have at least 300 round lot holders, and satisfy the same objective by assuring adequate liquidity in the security. Last, SEC Rule 3a51-1(a)(2)(i)(E) requires at least 1 million publicly held shares with a market value of at least \$5 million. Rule 5315(e)(2) requires all securities listing on the Nasdaq Global Select Market to have at least 1.25 million publicly held shares and Rule 5215(f)(2) requires a minimum \$45 million market value of publicly held shares. As such, Nasdaq believes its initial listing standards for the Global Select Market continue to meet or exceed the requirements of the Penny Stock Rules.¹⁰

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,¹¹ in general and with Sections 6(b)(5) of the Act,¹² 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 consistent with the investor protection objectives of the Act in that the

¹⁰ Nasdaq notes that each of these requirements exceed the comparable requirements of the NYSE. See Securities Exchange Act Release No. 58934, supra, note 6.

¹¹ 15 U.S.C. 78f.

¹² 15 U.S.C. 78f(b)(5).

proposed requirements modify and provide transparency to the calculation of total assets, but maintain the requirement at a level high enough so that only companies that are suitable for listing on the Global Select Market will qualify to list.

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, 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

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 Act¹³ and Rule 19b-4(f)(6) thereunder.¹⁴

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act¹⁵ normally does

¹³ 15 U.S.C. 78s(b)(3)(A).

¹⁴ 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 business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that the Exchange has satisfied this requirement.

¹⁵ 17 CFR 240.19b-4(f)(6).

not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)¹⁶ 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 so that companies may immediately take advantage of the proposed rule change. In support of the waiver, Nasdaq believes that its proposal is consistent with NYSE's rules, which were previously published for public comment, and raise no new issues.

The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest. In making this determination, the Commission notes that Nasdaq's proposed rule change is consistent with the NYSE's comparable listing standard in Section 102.01C(IV) of the NYSE's Listed Company Manual ("Assets and Equity Test") and applicable adjustments as set forth in Section 102.01C(I) of the NYSE's Listed Company Manual.¹⁷ The Commission believes that Nasdaq's proposed rule change does not raise any issues that were not previously considered by the Commission in its approval of the NYSE's Assets and Equities Test and does not otherwise raise any new regulatory issues. The Commission also notes that the NYSE's proposal to adopt the Assets and Equity Test listing standard, with the applicable adjustments noted above, was subject to full notice and comment, and the Commission received no comments on the NYSE's rule proposal. For these reasons, the

¹⁶ 17 CFR 240.19b-4(f)(6)(iii).

¹⁷ See supra notes 6 and 7.

Commission designates, consistent with the protection of investors and the public interest, that the proposed rule change become operative immediately upon filing.¹⁸

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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 No. SR-NASDAQ-2011-050 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 No. SR-NASDAQ-2011-050. 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

¹⁸ 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, 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 No. SR-NASDAQ-2011-050 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.¹⁹

Cathy H. Ahn
Deputy Secretary

¹⁹ 17 CFR 200.30-3(a)(12).