

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-52385; File No. SR-NASD-2005-082)

September 7, 2005

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto to Clarify the Listing Standards Applicable to Companies in Bankruptcy Proceedings

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 June 22, 2005, the National Association of Securities Dealers, Inc. (“NASD”), through its subsidiary, The Nasdaq Stock Market, Inc. (“Nasdaq”), filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. On August 23, 2005, Nasdaq filed Amendment No. 1 to the proposed rule change.³ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to clarify the listing standards applicable to companies in bankruptcy proceedings. Nasdaq will implement the proposed rule immediately upon approval.

The text of the proposed rule change is set forth below. Proposed new language is italicized.⁴

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ In Amendment No. 1, Nasdaq made a non-substantive correction to the text of the proposed rule and a correction to the stated purpose of the proposed rule change.

⁴ Changes to NASD Rule 4340 are marked to the rule text, which the Commission recently approved in Securities Exchange Act Release No. 52342 (August 26, 2005), 70 FR 52456 (September 2, 2005) (SR-NASD-2004-125). Changes to NASD Rule 4350 are marked to the current version of the rule text. No other pending rule filings would affect the text of

4340. Application for Re-inclusion by Listed Issuers

(a) Reverse Mergers. An issuer must apply for initial inclusion following a transaction whereby the issuer combines with a non-Nasdaq entity, resulting in a change of control of the issuer and potentially allowing the non-Nasdaq entity to obtain a Nasdaq Listing (for purposes of this rule, such a transaction is referred to as a "Reverse Merger"). In determining whether a Reverse Merger has occurred, Nasdaq shall consider all relevant factors including, but not limited to, changes in the management, board of directors, voting power, ownership, and financial structure of the issuer. Nasdaq shall also consider the nature of the businesses and the relative size of the Nasdaq issuer and non-Nasdaq entity.

(b) Bankruptcy. Nasdaq may use its discretionary authority under Rule 4300 to deny listing to an issuer that has filed for protection under any provision of the federal bankruptcy laws or comparable foreign laws, even though the issuer's securities otherwise meet all enumerated criteria for continued inclusion in Nasdaq. In the event that Nasdaq determines to continue the listing of such an issuer during a bankruptcy reorganization, the issuer shall nevertheless be required to satisfy all requirements for initial inclusion, including the payment of initial listing fees, upon emerging from bankruptcy proceedings.

4350. Qualitative Listing Requirements for Nasdaq National Market and Nasdaq**SmallCap Market Issuers Except for Limited Partnerships**

(a) – (h) No change.

(i) Shareholder Approval

(1) – (6) No change.

these rules. Telephone conversation of September 7, 2005, between Arnold Golub, Associate Vice President, Nasdaq and David Michehl, Attorney, Division of Market Regulation, Commission.

(7) Shareholder approval shall not be required for any share issuance by a company if such issuance is part of a court-approved reorganization under the federal bankruptcy laws or comparable foreign laws.

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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

When a Nasdaq-listed issuer files for protection under the bankruptcy laws, Nasdaq staff generally notifies the company that its securities are subject to delisting.⁵ The company is afforded an opportunity to request review of that decision before a Nasdaq Listing Qualifications Hearing Panel (“Panel”), which stays its delisting. On occasion, Panels have allowed companies to retain their listing through the bankruptcy proceeding, provided they demonstrate: their ability to maintain compliance with the continued listing standards throughout the proceeding; a likelihood that the current equity holders will maintain a significant position in the post-bankruptcy company; and, a likelihood to emerge from the bankruptcy proceedings in the

⁵ Nasdaq’s delisting notice generally is based on one or more of the following concerns: (i) public interest concerns raised by the bankruptcy filing; (ii) concerns regarding the residual equity interest of the existing listed securities holders; or (iii) concerns about the company’s ability to sustain compliance with all requirements for continued listing.

reasonably near term, such as may be the case in a “pre-packaged” bankruptcy plan.⁶ Nonetheless, upon emerging from bankruptcy, these companies are often substantially changed, including new board members, management, financial structure, and shareholders. As such, Nasdaq believes that the reorganization could potentially lead to an entity that is effectively a new issuer. These concerns are the same ones presented when considering whether a transaction is a reverse merger and, in those cases, the company is required to reapply and meet the initial inclusion standards.⁷ Nasdaq therefore believes that a reorganized company should be required to apply for listing and meet all initial inclusion criteria upon discharge from bankruptcy proceedings.

Nasdaq also proposes to clarify that any securities issued by a Nasdaq-listed issuer pursuant to a court-approved plan of reorganization are exempt from Nasdaq’s shareholder approval rules. In such cases, the bankruptcy court has jurisdiction over the protection of shareholders, and it would be inconsistent with the overarching federal bankruptcy policy to give shareholders an ability to contradict the court’s approval of a plan of reorganization that involves the issuance of shares. This approach would be consistent with that taken in Section 1145 of Chapter 11 of the Bankruptcy Code,⁸ which exempts securities issued in bankruptcy reorganizations from Section 5 of the Securities Act of 1933.⁹

⁶ In that regard, the Commission recently approved rules that would limit a Panel’s discretion to grant exceptions to the listing standards to 90 days. See Securities Exchange Act Release No. 51268 (February 28, 2005), 70 FR 10716 (March 4, 2005) (SR-NASD-2004-125).

⁷ See NASD Rule 4330(f), which was recently renumbered in SR-NASD-2004-125 as NASD Rule 4340.

⁸ 11 U.S.C. 1145.

⁹ 15 U.S.C. 77e.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,¹⁰ in general, and with Section 15A(b)(6) of the Act,¹¹ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, remove impediments to a free and open market and a national market system, and, in general, protect investors and the public interest. Nasdaq believes that the proposed rule change is consistent with these requirements in that it is designed to remove ambiguity surrounding the standards applicable to companies involved in bankruptcy proceedings and requires such companies to meet the heightened initial inclusion standards upon emerging from bankruptcy, thereby protecting investors and the public interest.

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

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

¹⁰ 15 U.S.C. 78o-3.

¹¹ 15 U.S.C. 78o-3(b)(6).

- A. by order approve such proposed rule change; or
- B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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-NASD-2005-082 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number SR-NASD-2005-082. 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 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. Copies of

such filing also will be available for inspection and copying at the principal office of the NASD. 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-NASD-2005-082 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

Jonathan G. Katz
Secretary

¹² 17 CFR 200.30-3(a)(12).