

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-55832; File No. SR-NASDAQ-2007-040)

May 31, 2007

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval to a Proposed Rule Change Relating to the Waiver of Fees upon Relisting of Companies Removed for Late Filings

On April 4, 2007, 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 waive fees upon the relisting of companies removed for late filings. The proposed rule change was published for comment in the Federal Register on April 25, 2007.³ The Commission received no comments on the proposal. This order approves the proposed rule change.

In its filing, Nasdaq proposed to allow, in certain circumstances, a company to relist without paying a new entry and application fee if the company was delisted solely for the failure to file a required periodic report with the Commission or other appropriate regulatory authority. In addition, Nasdaq proposed to delete separate, duplicative provisions in its rules.

Nasdaq has proposed to waive the entry and application fee for any company that was suspended⁴ and/or delisted from the Nasdaq Stock Market solely for its failure to file a required periodic report with the Commission or other appropriate regulatory authority, if the company regains compliance with this requirement and applies to relist on Nasdaq within one year of the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 55645 (April 19, 2007), 72 FR 20572.

⁴ Nasdaq Rule 4802(f) requires a security to meet the requirements for initial listing (which include the requirement to pay the applicable listing fees) if the security has been the subject of a decision to delist by a Listing Qualifications Panel, the Nasdaq Listing and Hearing Review Council or the Nasdaq Board.

date it was delisted from Nasdaq.⁵ In addition, if such a company relists during the same calendar year that it has previously paid an annual fee, the company will not be subject to a second annual fee in that same year.

Nasdaq believes that this waiver is appropriate given that, on average, the review of such an issuer is likely to be simpler than the typical application for several reasons. First, because these companies were previously listed on Nasdaq and compliant with all requirements except the filing requirement, Nasdaq believes it is more likely that they will be compliant with all other quantitative and qualitative requirements. Further, Nasdaq notes that relevant information about these companies is already contained in Nasdaq's compliance systems. Finally, in its filing, Nasdaq states that it anticipates there would be fewer questions concerning the company's financial statements given that these companies will often have undergone extensive review by their auditors and, in some cases, by independent investigators and the Commission or other regulatory entities, in order to resolve the issues that caused the late filings.⁶

Nasdaq is implementing these waivers as an incentive for companies to re-list on Nasdaq upon regaining compliance with the periodic filing requirement. Nasdaq believes that this waiver is appropriate since Nasdaq's rules governing the delisting of companies that are delinquent in periodic reports are generally stricter than those of other markets. Nasdaq believes

⁵ The Commission notes that Nasdaq has the authority under its rules to waive fees on a case-by-case basis. See Securities Exchange Release No. 28731 (January 2, 1991), 56 FR 906 (January 9, 1991) (SR-NASD-90-61). The Commission notes that it is not, as a general matter, appropriate to allow for the waiver of fees to one class of non-members, while excluding other non-members from such class, without first providing interested persons an opportunity to comment on the proposed rule change pursuant to section 19(b)(2) under the Act.

⁶ The Commission notes that the timely filing of accurate financial reports under the Act is critical to investors and our national market and assures that investors receive up to date financial information about listed companies.

that the proposed waivers will promote competition between Nasdaq and other exchange markets.

After careful review, 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 exchange.⁷ In particular, the Commission finds that the proposal is consistent with Section 6(b)(4) of the Act,⁸ which requires that an exchange have rules that provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Commission also finds that the proposal is consistent with Section 6(b)(5) of the Act,⁹ which requires, *inter alia*, that the rules of a national securities exchange be designed to remove impediments to and perfect the mechanism of a free and open market and a national market system and not designed to permit unfair discrimination between issuers.

The Commission notes that Nasdaq has represented that the waiver of listing fees should not have a material financial impact on the exchange, or impact Nasdaq's resource commitment to its regulatory oversight of the listing process or its regulatory programs.

In addition, the proposal does not have any impact on whether a company is actually eligible to list on Nasdaq. Nasdaq has represented that a complete review of compliance with listing standards will be conducted for any company seeking to take advantage of the fee waiver, just as for any company that applies for listing on Nasdaq. Nasdaq has also represented that any

⁷ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁸ 15 U.S.C. 78f(b)(4).

⁹ 15 U.S.C. 78f(b)(5).

fee waiver granted under this rule is predicated upon the company successfully completing the review process and demonstrating compliance with the initial listing standards.

Finally, the Commission notes that companies eligible for the fee waiver have previously paid entry and annual fees to Nasdaq. Under the fee waiver, companies must reapply within one year of delisting and are eligible for the waiver of the annual fee only if they relist during the same year for which the annual fee had previously been paid. The Commission believes it reasonable for Nasdaq to conclude that eligible companies should not be charged duplicate fees if they relist within such time periods.

Based on the above, the Commission agrees that the proposed waiver does not constitute an inequitable allocation of reasonable dues, fees, and other charges, does not permit unfair discrimination between issuers, and is generally consistent with the Act.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁰ that the proposed rule change (File No. SR-NASDAQ-2007-040) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Florence E. Harmon
Deputy Secretary

¹⁰ 15 U.S.C. 78s(b)(2).

¹¹ 17 CFR 200.30-3(a)(12).