

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-62782; File No. SR-NASDAQ-2010-107)

August 27, 2010

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change to Modify the Eligibility Criteria for the Second Compliance Period for a Bid Price Deficiency on the Nasdaq Capital 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 August 25, 2010, The NASDAQ Stock Market LLC (“Nasdaq”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been substantially prepared by Nasdaq. 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 the eligibility criteria for a company to receive a second compliance period for a bid price deficiency on the Nasdaq Capital Market. The text of the proposed rule change is below. Proposed new language is underlined; proposed deletions are in brackets.³

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5810. Notification of Deficiency by the Listing Qualifications Department

When the Listing Qualifications Department determines that a Company does not meet a listing standard set forth in the Rule 5000 Series, it will immediately notify the Company

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at <http://nasdaqomx.cchwallstreet.com>.

of the deficiency. As explained in more detail below, deficiency notifications are of four types:

(1) – (4) No change.

Notifications of deficiencies that allow for submission of a compliance plan or an automatic cure or compliance period may result, after review of the compliance plan or expiration of the cure or compliance period, in issuance of a Staff Delisting Determination or a Public Reprimand Letter.

(a) – (b) No change.

IM-5810-1 No change.

(c) Types of Deficiencies and Notifications

The type of deficiency at issue determines whether the Company will be immediately suspended and delisted, or whether it may submit a compliance plan for review or is entitled to an automatic cure or compliance period before a Staff Delisting Determination is issued. In the case of a deficiency not specified below, Staff will issue the Company a Staff Delisting Determination or a Public Reprimand Letter.

(1) – (2) No change.

IM-5810-2 No change.

(3) Deficiencies for which the Rules Provide a Specified Cure or Compliance Period

With respect to deficiencies related to the standards listed in (A) - (E) below, Staff's notification will inform the Company of the applicable cure or compliance period provided by these Rules and discussed below. If the Company does not regain

compliance within the specified cure or compliance period, the Listing Qualifications Department will immediately issue a Staff Delisting Determination letter.

(A) Bid Price

A failure to meet the continued listing requirement for minimum bid price shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the Company shall be notified promptly and shall have a period of 180 calendar days from such notification to achieve compliance. Compliance can be achieved during any compliance period by meeting the applicable standard for a minimum of 10 consecutive business days during the applicable compliance period, unless Staff exercises its discretion to extend this 10 day period as discussed in Rule 5810(c)(3)(F).

(i) Global Select Market and Global Market

If a Company listed on The Nasdaq Global Market has not been deemed in compliance prior to the expiration of the 180 day compliance period, it may transfer to The Nasdaq Capital Market, provided that 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 [, other than the minimum] (except for the bid price requirement) based on the Company's most recent public filings and market information and notifies Nasdaq of its intent to cure this deficiency. [A Company listed on The Nasdaq Global Market transferring to The Nasdaq Capital Market must pay any applicable entry fees set forth in Rule 5920(a). The Company may also request a hearing to remain on The Nasdaq Global Market pursuant to the

Rule 5800 Series.]Following a transfer to The Nasdaq Capital Market, the Company will be afforded the remainder of [any] the applicable compliance period set forth in [Rule 5810(c)(3)(A) or] Rule 5810(c)(3)(A)(ii) [as if the Company had been listed on The Nasdaq Capital Market], unless it does not appear to Nasdaq that it is possible for the Company to cure the deficiency. The Company may also request a hearing to remain on The Nasdaq Global Market pursuant to the Rule 5800 Series. Any time spent in the hearing process will not extend the length of the remaining applicable compliance periods on The Nasdaq Capital Market afforded by this rule.

(ii) Capital Market

If a Company listed on the Capital Market is not deemed in compliance before the expiration of the 180 day compliance period, it will be afforded an additional 180 day compliance period, provided that on the 180th day of the first compliance period[, the Company demonstrates that] it meets the applicable market value of publicly held shares requirement for continued listing and all other applicable standards for initial listing on the Capital Market (except the bid price requirement) based on the Company's most recent public filings and market information and notifies Nasdaq of its intent to cure this deficiency. If a Company does not indicate its intent to cure the deficiency, or if it does not appear to Nasdaq that it is possible for the Company to cure the deficiency, the Company will not be eligible for the second grace period. If the Company has publicly announced information (e.g., in an earnings release) indicating that it no longer satisfies the applicable

[initial] listing criteria, it shall not be eligible for the additional compliance period under this rule.

(B) – (F) No change.

(4) No change.

(d) No change.

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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 proposes to modify the requirements for the second compliance period available to companies that fall below the continued listing price requirement. Under the present rules, once a company has a closing bid price below \$1 for 30 consecutive days it becomes deficient and receives written notice that it has a 180 day “grace” period to regain compliance. Compliance can be achieved by maintaining a minimum \$1 closing bid price for ten consecutive days. At the expiration of the 180 day period, a company can receive an additional 180 day grace period, 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.

Nasdaq has observed that many companies fail to qualify for the second grace period because they do not meet the market value of publicly held shares requirement for initial listing on the Capital Market. Eligibility for the second grace period is quite important as it allows more time to regain compliance before the company must undertake a reverse stock split to increase its stock price, and therefore frees company management to focus on running their business and not on remaining listed or addressing related investor concerns.

The link between failure to comply with the bid price requirement and failure to meet the initial listing requirement for market value of publicly held shares – and thus qualify for the second grace period – is clear, given that the market value of publicly held shares is directly derived from the price of the security.⁴ Accordingly, Nasdaq proposes to ease the requirements for the second grace 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 grace period.⁵ The company would still need to meet all of the other initial listing criteria for Capital Market other than bid price. In addition, the company will need to notify Nasdaq of its intent to cure the bid price deficiency. If a company does not indicate its

⁴ Nasdaq has previously recognized this link in other contexts. See, e.g., Securities Exchange Act Release No. 58809 (October 17, 2008), 73 FR 63222 (October 23, 2008) (SR-NASDAQ-2008-082, suspending both the bid price and market value of publicly held shares requirements in light of the financial crisis).

⁵ 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 Rules 5505(b) and 5555(a)(4).

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 grace period. 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 grace period on the Capital Market, unless it does not appear to Nasdaq staff that it is possible for the Company to cure the deficiency.

While certain companies that do not currently qualify for the second grace period could receive additional time, the proposed rule change would not extend the overall maximum of 360 days available to companies. Further, Nasdaq's grace periods would remain stricter than those of NYSE Amex, which has no \$1 continued listing requirement and therefore permits companies to remain listed indefinitely at a price below \$1.⁶

Nasdaq is also proposing non-substantive changes to Rule 5810(c)(3)(A)(i) and (ii) to clarify and reorder the rule language and conform the language in these two sections. These changes are consistent with how Nasdaq currently interprets the rule. Nasdaq also proposes to remove language about the payment of fees by a company which

⁶ Cf. Section 1003(f)(v) of the NYSE Amex Company Guide (stating that NYSE Amex would consider delisting a common stock that sells for a substantial period of time at a low price per share, if the issuer fails to effect a reverse split of such shares within a reasonable time after being notified that the Exchange deems such action to be appropriate under all the circumstances).

transfers to the Capital Market because no fees are applicable under Rule 5920(a) to such a company, making the existing language confusing.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁷ in general and with Section 6(b)(5) of the Act,⁸ 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 these requirements in that it would permit reasonable periods of time for companies to address instances of noncompliance with Nasdaq's price requirement and would not adversely affect investors or the national market system.

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.

⁷ 15 U.S.C. 78f.

⁸ 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate 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:

- (A) by order approve or disapprove the 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-NASDAQ-2010-107 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 Number SR-NASDAQ-2010-107. 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 website (<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 website 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 website viewing and printing 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 Number SR-NASDAQ-2010-107 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.⁹

Florence E. Harmon
Deputy Secretary

⁹ 17 CFR 200.30-3(a)(12).