

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61446; File No. SR-NASDAQ-2009-077)

January 29, 2010

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change to Modify the Procedures Followed When a Listed Company Falls Below Certain Listing Requirements

I. Introduction

On August 17, 2009, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) 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 modify the length of certain compliance periods in Nasdaq’s continued listing requirements and to modify the time available for a company to provide a plan to regain compliance with certain listing requirements.³ The proposed rule change was published for comment in the Federal Register on September 8, 2009.⁴ The Commission received three

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Nasdaq is also proposing to eliminate certain abbreviations that are used inconsistently and utilize defined terms, as appropriate, in Rules 5810 and 5840, and to remove authority in Rule 5810(c)(2)(C) that is duplicated in Rule 5810(c)(2)(B).

⁴ See Securities Exchange Act Release No. 46267 (September 2, 2009), 74 FR 46267 (“Notice”).

comment letters on the proposal.⁵ On December 28, 2009 the Exchange filed a response to the comment letter.⁶ This order approves the proposed rule change.

II. Description of the Proposal

Price Related Criteria

Under Nasdaq's current continued listing requirements relating to market value of listed securities, a company is considered to be non-compliant after falling below the standard for 10 consecutive trading days.⁷ Thereafter, the company is provided 90 calendar days to regain compliance with the market value of listed securities requirement. Further, Nasdaq's current continued listing rules relating to market value of publicly held shares provide that a company is deficient if it is below the standard for 30 consecutive trading days. Upon such failure, the company is provided with 90 calendar days to regain compliance.⁸

Nasdaq proposes to modify the length of time required to trigger non-compliance with the market value of listed securities requirement and to modify the compliance periods associated with the Exchange's market value of listed securities and market value of publicly held shares

⁵ See letter from Barbara Roper, Director of Investor Protection, Consumer Federation of America, to Elizabeth M. Murphy, Secretary, Commission, dated September 28, 2009 ("CFA Comment Letter"); letter from Alan F. Eisenberg, Executive Vice President, Biotechnology Industry Organization ("BIO") to Elizabeth M. Murphy, Secretary, Commission, dated September 29, 2009 ("BIO Comment Letter"); and letter from Jason S. Frankl, Senior Managing Director, FTI Consulting ("FTI"), to Elizabeth M. Murphy, Secretary, Commission, dated October 5, 2009 ("FTI Comment Letter").

⁶ See letter from Arnold Golub, Vice President and Associate General Counsel, Nasdaq, to Elizabeth Murphy, Secretary, Commission, dated December 28, 2009 ("Nasdaq Response Letter").

⁷ Nasdaq Rule 5810(b)(3)(C). NASDAQ changed the period to regain compliance with the market value of listed securities requirement from 30 to 90 days in January of last year. Securities Exchange Act Release No. 59291 (January 23, 2009), 74 FR 5197 (January 29, 2009) (SR-NASDAQ-2009-002).

⁸ Nasdaq Rule 5810(b)(3)(D).

continued listing requirements. Nasdaq notes that, under its bid price continued listing standard, if a company's security has a closing bid price below \$1.00 for 30 consecutive trading days, it no longer meets the bid price requirement and is automatically provided 180 calendar days to regain compliance.⁹ Nasdaq asserts that because compliance with each of these rules is directly related to the price of an issuer's security, the length of time to trigger non-compliance, and the amount of time afforded as a compliance period, should be consistent. As such, Nasdaq proposes to lengthen the period that a company would need to be below the market value of listed securities requirement before being considered non-compliant from 10 to 30 consecutive trading days. Nasdaq also proposes to extend from 90 to 180 days the compliance period in which companies that are non-compliant with the market value of listed securities and market value of publicly held shares requirements can regain compliance.¹⁰ Nasdaq notes that it believes that the existing 90-day time frames do not provide sufficient time for a company to regain compliance.

As revised, the maximum amount of time that could be afforded to a company that failed to meet the market value of listed securities or market value of publicly held shares requirements would be 18 months.¹¹

⁹ Nasdaq Rule 5810(b)(3)(A).

¹⁰ In its filing, Nasdaq noted that it could apply its authority described in Nasdaq Rule 5100 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.

¹¹ A company could only receive an extension up to this 18-month maximum length if: (i) it failed to comply during the automatic 180-day compliance period; (ii) the company appealed to a Hearings Panel; and (iii) the Nasdaq Listing and Hearing Review Council ("Listing Council") determined to call the matter for review, stay the company's delisting, and, after reviewing the company's compliance plan, provide the company with the maximum 360-day period from the date of the Staff Delisting Determination to regain compliance.

Requirements with Respect to Compliance Plans

Nasdaq also proposes to modify the periods applicable in cases where a company can provide Nasdaq staff with a plan to regain compliance, such as when a company fails to meet the minimum requirements for stockholders' equity, the number of publicly held shares, or the number of shareholders.¹² Currently, companies are provided 15 calendar days to submit a plan to regain compliance. Following a review of the plan, staff can grant the company a period of up to 105 calendar days from the initial notification of non-compliance for the company to regain compliance. Nasdaq proposes to increase the number of calendar days a company has to present its plan from 15 to 45, and to permit staff to grant up to a 5-day extension of this period upon good cause shown.¹³ Nasdaq asserts that 15 days is often insufficient for a company to formulate a meaningful plan, particularly in the current market and economic conditions. Further, Nasdaq proposes to increase from 105 to 180 the number of calendar days for which staff can grant an extension of time to regain compliance from its initial notification of non-compliance.¹⁴ Nasdaq states that this additional time will better allow companies to implement a plan to regain compliance.

¹² Nasdaq Rule 5810(c)(2) and IM-5810-2 provide the procedures governing deficiencies for which a company may submit a plan of compliance to Nasdaq staff. Nasdaq has posted frequently asked questions at <http://www.nasdaq.com/about/faqs-listing-information-questions.stm#continued>, which discuss the information a company should consider in preparing its plan of compliance.

¹³ Nasdaq anticipates that this authority would be used to address cases where the company could not timely submit its plan due to events outside the control of the company, such as when severe weather interferes with the company's ability to provide the necessary information before the deadline.

¹⁴ Nasdaq states that staff will determine whether to allow the company additional time, and if so how much time to allow, based on a review of the company's plan of compliance.

As revised, the maximum amount of time that could be afforded to a company that failed to meet a listing requirement that allows the submission of a plan to regain compliance would be 18 months.¹⁵

Implementation

Nasdaq states that any company that had not yet been notified that it was non-compliant with the market value of listed securities requirement upon Commission approval of the proposed rule change will not be notified until they are below the requirement for 30 consecutive trading days.¹⁶ Any company that has already been notified that it was non-compliant with either the market value of listed securities requirement or the market value of publicly held shares requirement and that is still in the 90 calendar day compliance period for such failure will have their compliance period extended until 180 calendar days from the date they were originally notified of the deficiency.¹⁷ No additional time will be provided to a company that has received a

¹⁵ A company could only receive an extension up to this 18-month maximum length if: (i) after reviewing the company's compliance plan, Nasdaq staff granted the company the maximum 180-day period to regain compliance; (ii) the company failed to comply within the time allowed by staff and appealed to a Hearings Panel; and (iii) the Nasdaq Listing Council determined to call the matter for review, stay the company's delisting, and, after reviewing the company's compliance plan, provide the company with the maximum 360-day period from the date of the Staff Delisting Determination to regain compliance.

¹⁶ For example, if a security is below the market value of listed securities requirement for 7 consecutive trading days when the proposed rule is approved, the company would not be notified that it is deficient unless and until the security remains below the requirement for another 23 consecutive trading days, such that it remained below for a total of 30 consecutive trading days.

¹⁷ For example, if a company had been notified that its security was below either the market value of listed securities or market value of publicly held shares requirement 30 days before the proposed rule is approved, such that it had 60 days remaining in its compliance period, that compliance period would be extended by 90 days so that the company would have 150 days remaining in the compliance period.

Staff Delisting Determination for failure to meet either of those requirements before the proposed rule change is approved.¹⁸

With respect to the proposed changes to the compliance plan process, if a company has not yet submitted its plan of compliance when the proposed rule change is approved, the deadline to submit that plan will be extended until 45 days from the date of staff's notification of the deficiency. If the company has submitted its plan of compliance when the proposed rule change is approved, but staff has not yet made a determination with respect to whether to grant additional time, staff will be permitted to grant the company up to 180 days from staff's notification of the deficiency to regain compliance. If the company has already received an extension of time to regain compliance from staff when the proposed rule change is approved,¹⁹ at the end of that extension staff could, based on a review of the company at the time, grant additional time for the company to regain compliance, up to 180 days from staff's original notification of the deficiency.²⁰ No additional time will be provided to a company that has

¹⁸ For example, if a company had been notified that its security was below either the market value of listed securities or market value of publicly held shares requirement 95 days before the proposed rule is approved, the company would not receive any additional time as a result of the proposed rule change. Such companies would continue through the Hearings and Appeals process, however, and could receive additional time as provided for in Nasdaq Rules 5815(c)(1)(A) and 5820(d)(1).

¹⁹ Nasdaq Rule 5810(c)(2)(B)(i).

²⁰ The proposal to allow a company additional time at the end of its extension based on staff's further review of the company is consistent with Nasdaq's current practice of potentially allowing a company additional time if it was not initially granted the full 105 days allowed by current Nasdaq Rule 5810(c)(2)(B)(i).

already received a Staff Delisting Determination at the time the proposed rule change is approved.²¹

III. Comment Summary

In its comment letter, CFA raises several concerns regarding the Exchange's proposal.²² First, CFA argues that the Exchange's proposal will lead to a proliferation of lengthy automatic compliance periods for companies that fall below listing standards, potentially allowing large numbers of non-compliant companies to remain listed for extended periods of time with little or no oversight.²³ In response, the Exchange states that it continuously monitors each listed company for compliance with the listing rules and determines whether any public interest concerns exist that may make continued listing inappropriate.²⁴ In particular, the Exchange notes that notwithstanding the automatic compliance periods, Nasdaq staff has the authority to apply additional and more stringent criteria to shorten a compliance period or delist a company before the end of the compliance period if it believes that the continued listing of a company would be contrary to the public interest.²⁵

In addition, CFA notes that while Nasdaq has stated that the proposed rule change is intended to harmonize and ensure consistency in the compliance periods across its continued

²¹ Such companies would continue through the Hearings and Appeals process, however, and could receive additional time as provided for in Nasdaq Rules 5815(c)(1)(A) and 5820(d)(1).

²² See CFA Comment Letter, supra note 5.

²³ Id.

²⁴ The Exchange notes that such monitoring includes staff review of virtually every SEC filing made by listing companies, including proxies and annual and quarterly financial reports. See Nasdaq Response Letter, supra note 6, at 3.

²⁵ See Nasdaq Response Letter, supra note 6, at 1-2.

listing rules, Nasdaq has chosen to apply its least restrictive compliance period (i.e., its longest compliance period of 180 days).²⁶ The CFA asserts that if harmonization is needed, Nasdaq should instead “harmonize up, not down” and apply its shorter compliance periods consistently across its rules.²⁷ In the Nasdaq Response Letter, the Exchange asserts that its experience has shown that many of the current compliance periods are too short, particularly given the extraordinary volatility in the securities markets over the past decade.²⁸ Specifically, the Exchange notes that in its experience, and as also noted in the BIO Comment Letter, the existing time periods do not sufficiently account for daily market fluctuations, and given the changes that have taken place in the financial markets, the existing time periods are unreasonably short.²⁹ Further, the Exchange notes that the proposed longer compliance periods are in line with the compliance periods afforded by other exchanges.³⁰ For example, Nasdaq states that the NYSE Amex rules provide that staff can grant a company up to 18 months to regain compliance with its market value of publicly held shares requirement, and the NYSE rules allow staff to provide a company with up to 18 months to regain compliance with its market capitalization requirement.³¹

CFA also argues that the proposal to allow an automatic 180-day grace period for the market value of publicly held shares and market value of listed securities requirements raises particular concerns.³² Specifically, CFA states that the market value standard is an alternative to

²⁶ See CFA Comment Letter, supra note 5.

²⁷ Id.

²⁸ See Nasdaq Response Letter, supra note 6, at 1 and 3.

²⁹ See Nasdaq Response Letter, supra note 6, at 3.

³⁰ See Nasdaq Response Letter, supra note 6, at 3.

³¹ See Nasdaq Response Letter, supra note 6, at 3.

³² See CFA Comment Letter, supra note 5.

the stockholders' equity requirement, and thus companies listing under this standard are companies that fail to meet the minimum stockholders' equity requirement.³³ Further, CFA notes that Nasdaq recently extended the period to regain compliance with the market value of listed securities requirement from 30 to 90 days, and that this proposed rule change would now allow a company a total of 210 days of non-compliance before a hearing.³⁴ CFA also questions why the 180-day automatic grace period is preferable to a case-by-case review.³⁵

The Exchange responds that these revised time periods are consistent with the Exchange's current bid price rule.³⁶ Specifically, like the bid price rule, a company would be found to be non-compliant only after it falls below the current threshold for 30 days and would thereafter be afforded 180 days to regain compliance.³⁷ Nasdaq also notes that the maximum total time period that a company that failed to meet the market value of listed securities or market value of publicly held shares requirements could remain listed would be 18 months, which is consistent with the compliance periods available at other markets.³⁸ With regard to CFA's

³³ Id.

³⁴ In arriving at this figure, CFA is including in its calculation the 30-day period required to trigger non-compliance.

³⁵ See CFA Comment Letter, supra note 5.

³⁶ See Nasdaq Response Letter, supra note 6, at 2.

³⁷ See Nasdaq Response Letter, supra note 6, at 2.

³⁸ See Nasdaq Response Letter, supra note 6, at 2 (citing Section 802.02 of the NYSE Listed Company Manual). Nasdaq notes that, as described in the notice of the proposed rule change, a company that receives a delisting letter after the 180-day compliance period may appeal the delisting decision to the Hearings Panel, which can grant up to an additional 180 day to regain compliance. Thereafter, the company could remain listed for an additional 180 days if the Nasdaq Listing Council were to call the matter for review, stay the company's delisting, and determine to grant additional time. In the Nasdaq Response Letter, the Exchange states that it would be highly unusual for the Listing

suggestion that Nasdaq should consider a case-by-case review of companies below the requirements rather than granting an automatic 180-day compliance period, Nasdaq states that for price-related listing requirements, automatic periods provide a transparent, objective process, which is more appropriate than subjective reviews.³⁹ Further, it notes that such a process provides clear guidance to companies and their investors.⁴⁰

CFA also asserts that Nasdaq should be required to provide a variety of additional information to support its proposal.⁴¹ For example, CFA suggests that Nasdaq should provide further data regarding its discretionary authority to delist a security during a compliance period;⁴² supplementary information regarding compliance plans and compliance periods granted by staff; and statistics on the 180-day plan process that was adopted last fall for companies that are late in filing their periodic reports.⁴³ The FTI Comment Letter expressed support for this portion of CTA's comment letter asserting that Nasdaq should be required to provide additional information and rationale in support of its proposal.⁴⁴ In response, the Exchange states that the request for additional information is not appropriate or necessary for consideration of the proposed rule change. Rather, Nasdaq asserts that the proposed rule change satisfies the relevant statutory standards, and data concerning Nasdaq's historic enforcement of listing standards is already

Council to take such action and noted that it does not believe that the Listing Council has ever exercised its discretion to stay a delisting to allow a company additional time to regain compliance with a price-based listing requirement.

³⁹ See Nasdaq Response Letter, supra note 6, at 4.

⁴⁰ Id.

⁴¹ See CFA Comment Letter, supra note 5.

⁴² See supra note 10.

⁴³ See CFA Comment Letter, supra note 5.

⁴⁴ See FTI Comment letter, supra note 5.

disclosed in Nasdaq OMX's public filings with the Commission and is not necessary for consideration of this proposal.⁴⁵

Finally, the CFA Comment Letter suggests that the Commission should review the economic impact of the proposed rule change on the exchange and should require greater independence in Nasdaq's delisting process if such rule changes are found to benefit Nasdaq's financial position.⁴⁶ FTI also expressed support for this portion of the CFA Comment Letter.⁴⁷ In its response, Nasdaq states that it has a transparent, independent enforcement process in place to support its listing standards.⁴⁸ Specifically, Nasdaq notes that its staff has very limited discretion to grant an extension to a company that does not comply with a listing requirement, and many rules provide for automatic compliance periods rather than compliance periods determined by Nasdaq staff.⁴⁹ The Nasdaq Response Letter also describes the independence of the delisting process with regard to price-based listing requirements.⁵⁰ In particular, Nasdaq

⁴⁵ See Nasdaq Response Letter, supra note 6, at 5.

⁴⁶ See CFA Comment Letter, supra note 5. The CFA Comment Letter also provides an additional recommendation that is not aimed at this particular rule proposal. Specifically, CFA argues that more should be done to require exchanges to identify and alert investors of noncompliant companies. Nasdaq responded to this assertion in its Response Letter by noting that companies are required to make public disclosure that they are non-compliant with listing standards, and Nasdaq includes the company on the list of non-compliant companies on its website and displays such information to investors viewing the company's quotation. Further, Nasdaq has a display requirement for vendors that display Nasdaq's data feed, which requires them to show the company's noncompliance. Nasdaq did acknowledge that vendors that do not obtain quotation information from Nasdaq may not display this information. See Nasdaq Response Letter, supra note 6, at footnote 4.

⁴⁷ See FTI Comment Letter, supra note 5, at 1.

⁴⁸ See Nasdaq Response Letter, supra note 6, at 1.

⁴⁹ See Nasdaq Response Letter, supra note 6, at 1.

⁵⁰ See id. at 2.

notes that after the 180-day automatic compliance periods runs, Nasdaq staff has no discretion to allow the company to continue trading and must issue a delisting letter.⁵¹ A company may appeal that delisting letter to a Hearings Panel, which is independent of Nasdaq and includes no Nasdaq employees.⁵² Thereafter, another independent body, the Nasdaq Listing and Hearing Review Council (“Listing Council”), would be the only body with the ability to call the matter for review and determine to grant additional time to the company.⁵³ Nasdaq also states that its Listing Qualifications Department is housed in a regulation group that is organizationally and institutionally separate than its business lines and is directly accountable to the Regulatory Oversight Committee of the Nasdaq Board.⁵⁴

The BIO Comment Letter generally supported the Exchange’s proposal.⁵⁵ In particular, the BIO Comment Letter stated that extending the number of days from 10 to 30 to trigger non-compliance with the market value of listed securities requirement would allow biotechnology companies to regain some stability during daily market fluctuations that persist for emerging biotechnology companies.⁵⁶ The BIO Comment Letter also expressed support for the portion of the proposal providing companies 45 days to submit a plan to regain compliance, noting that this

⁵¹ See id.

⁵² See id.

⁵³ See id. Nasdaq notes, however, that it would be highly unusual for the Listing Council to take such action.

⁵⁴ See id.

⁵⁵ See BIO Comment Letter, supra note 5.

⁵⁶ Id.

increase will provide companies the necessary time to work with their investors to secure a long-term plan that will bring them back into compliance with listing standards.⁵⁷

IV. Discussion

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 and, in particular, with Section 6(b)(5) of the Act,⁵⁸ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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.⁵⁹

The Commission notes that the development and enforcement of adequate standards governing the initial and continued listing of securities on an exchange is an activity of critical importance to financial markets and the investing public. The Commission continues to believe that enforcement of continued listing standards are important to ensure that only companies suitable for listing remain trading on national securities exchanges. While the Commission would be concerned about any national securities exchange's proposal that would allow companies falling below continued listing standards to remain listed for an extended period of

⁵⁷ Id. In addition, the BIO Comment Letter provided requests for Nasdaq to further modify certain of its continued listing standards and compliance periods. Because those requests do not relate to the current proposed rule change before the Commission, they will not be discussed in this Order.

⁵⁸ 15 U.S.C. 78f(b)(5).

⁵⁹ 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).

time, the Commission has determined to approve the Nasdaq's proposal for the reasons discussed below.

The Commission believes that the Exchange's proposal to extend from 90 to 180 days the period in which companies, that are non-compliant with the market value of listed securities and market value of publicly held shares requirements, can regain compliance, will better align the compliance period for these continued listing standards with the automatic 180 day compliance period already provided in Nasdaq's rules for noncompliance with the bid price requirement, as well as the rules of other markets. As such, the Commission believes that the proposal should reduce investor confusion over the compliance periods available under Nasdaq's price-related continued listing requirements.⁶⁰ Further, the change should provide companies with additional time to take actions that may be necessary to regain compliance, such as obtaining shareholder approval and registering shares.

The CFA Comment Letter takes issue with the extension of the automatic compliance period for these continued listing standards to 180 days, expressing concern about non-compliant companies remaining listed on the Exchange for extended periods of time. However, as the Exchange has represented in the Notice and in the Nasdaq Response Letter, the maximum amount of time that could be afforded to a company that falls out of compliance with the market value of listed securities or market value of publicly held shares requirements would be 18

⁶⁰ Under Nasdaq's current rules, if a company's security has a closing bid price below \$1 for 30 consecutive trading days, it is deemed to be non-compliant with the bid price requirement and is automatically provided 180 calendar days to regain compliance. See Nasdaq Rule 5810(b)(3)(A).

months.⁶¹ The Exchange further stated in its Response Letter that it is highly unusual for the Listing Council to stay a company's delisting and grant additional time to regain compliance and that it does not believe that the Listing Council has ever exercised its discretion to take such action for a price-based delisting decision.⁶² The Commission also notes that this maximum length of time of 18 months⁶³ is consistent with the maximum amount of time that the NYSE and NYSE Amex can provide for a listed company to regain compliance with its similar continued listing standards.⁶⁴ Further, the Exchange has represented that it has the authority under Nasdaq Rule 5100 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. Notwithstanding the lengthened automatic compliance periods afforded to issuers under the proposed rule change, the Commission expects Nasdaq to use its authority to delist issuers in a prompt, efficient and fair manner where necessary and appropriate in accordance with Nasdaq Rule 5100, especially in those situations where the market value of a company's stock is so low as to make continued trading unwarranted.

The Commission also believes that Nasdaq's proposal to extend the period that a

⁶¹ As noted, this maximum 18 month compliance time only exists assuming every maximum compliance period is granted and an appeal was called for review by Nasdaq's Listing Council. See supra note 11.

⁶² See supra note 38.

⁶³ See supra note 11.

⁶⁴ See Section 802.02 of the NYSE Listed Company Manual and Section 1009 of the NYSE Amex Company Guide.

company would need to be below the minimum market value of listed securities requirement before being deemed non-compliant from 10 to 30 consecutive trading days is appropriate and consistent with the Act. The Commission notes that this change will further harmonize Nasdaq's price-related continued listing requirements, as the bid price and market value of publicly held shares requirements currently provide that a company is not deficient until it falls below the respective standard for 30 consecutive trading days. Further, as noted in the Nasdaq Response Letter, this time period is consistent with, and in some cases more stringent than, the threshold time periods on other exchanges. Specifically, on NYSE Amex, a company is deemed to be non-compliant with the market value of publicly held shares requirement only after it has been below the standard for 90 consecutive days.⁶⁵ In addition, a company is considered non-compliant with the NYSE's market capitalization requirement after the company falls below the standard for 30 consecutive trading days.⁶⁶

With regard to deficiencies for which a company can provide staff with a plan to regain compliance,⁶⁷ the Commission believes that increasing from 105 to 180 the maximum number of calendar days for which staff can grant an extension of time from its initial notification of non-compliance will provide companies with additional time that may be necessary to implement a plan to regain compliance where appropriate. The Commission notes that the maximum time period of 180 days is not an automatic grace period, but rather each company's compliance period will be determined by Nasdaq staff after review of the company's compliance plan.

⁶⁵ See Nasdaq Response Letter, supra note 6, at 3.

⁶⁶ See Nasdaq Response Letter, supra note 6, at 3.

⁶⁷ See Nasdaq Rule 5810(c)(2) and IM-5812.

Accordingly, the Commission expects Nasdaq staff to conduct a thorough case-by-case review of each company's plan of compliance, and make an individualized determination as to the extension of time that is appropriate for a particular company. In addition, even with this change, the Commission notes that the total maximum amount of time that could be afforded to a company that failed to meet a listing requirement that allows for the submission of a plan to regain compliance would be 18 months, and this maximum 18 months assumes all compliance periods are extended to the permissible maximum during the appeal process by the Hearings Panel and Listing Council.⁶⁸ As discussed above, this time period is consistent with the maximum amount of time a company is permitted to regain compliance with similar continued listing standards under NYSE's rules.⁶⁹

The Commission believes that Nasdaq's proposal to increase from 15 to 45 days the length of time a company has to submit a plan to regain compliance should provide companies with additional time to devise a meaningful and workable plan to regain compliance. Further, the Commission notes that this revised time period is consistent the NYSE's rules, which generally provide a company with 45 days from receipt of a letter of non-compliance to submit a plan to regain compliance.⁷⁰ We further note that the 45 days does not extend the maximum time period the staff can allow for compliance.⁷¹

Finally, the Commission notes that while the additional, specific information that the

⁶⁸ See supra note 15.

⁶⁹ See supra note 64.

⁷⁰ Section 802.02 of the NYSE Listed Company Manual

⁷¹ For example, if the plan is submitted 45 days after notification of non-compliance, staff could only grant an additional 135 days to regain compliance.

CFA argued should be provided by Nasdaq on issues such as the historic enforcement of Nasdaq's listing standards might be useful for many purposes, it agrees with Nasdaq that such data and information is not required in order for the Commission to find that the current proposed rule change is consistent with the Act.⁷² In addition, the Commission believes that the CFA's call for greater independence in Nasdaq's delisting process is not an issue that is directly before the Commission in this proposed rule change. The rules governing and outlining the current delisting process of the Exchange have been reviewed by the Commission and approved as being consistent with the Act. As noted above, many of the changes proposed in the current rule filing involve the lengthening of automatic threshold or compliance periods that are not subject to the discretion of Nasdaq staff. While Nasdaq is lengthening from 105 to 180 the maximum number of calendar days for which staff can grant an extension of time for compliance with regard to those deficiencies for which a company can provide staff with a plan to regain compliance, the Commission does not believe that this changes the independence of the Hearings Panel and Listing Council. Although we recognize that the staff will have more discretion in setting the initial length of the compliance period for certain deficiencies, upon appeal, any delisting for non-compliance will continue to be reviewed by independent panels. In addition, as noted, the maximum length of time permitted under the proposed rule change is consistent with other markets' rules.⁷³

⁷² The Commission notes that as a registered national securities exchange, the Commission has oversight over Nasdaq's enforcement of its rules, including the delisting rules and process.

⁷³ See supra note 64.

In summary, as noted above, the Commission believes that enforcement of continued listing standards is of critical importance to our financial markets and investing public and, among other things helps to ensure that exchange traded securities have adequate depth and liquidity necessary to promote fair and orderly markets. While the Nasdaq's rule proposal does extend the time frames a company can continue to trade while out of compliance with certain continued listing standards, the changes are consistent with that of other national securities exchanges and do provide transparency to the delisting process. We also continue to expect Nasdaq, as they have represented, to monitor companies that are out of compliance and delist them promptly should there be public interest or other concerns that make continued trading unwarranted.

For the reasons noted above, the Commission believes that the proposed rule change is reasonable and consistent with the Act.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁷⁴ that the proposed rule change (SR-NASDAQ-2009-077) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁷⁵

Florence E. Harmon
Deputy Secretary

⁷⁴ 15 U.S.C. 78s(b)(2).

⁷⁵ 17 CFR 200.30-3(a)(12).