

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-55645; File No. SR-NASDAQ-2007-040)

April 19, 2007

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

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 4, 2007, 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 Substance of the Proposed Rule Change

Nasdaq proposes 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. Nasdaq also proposes to delete a separate, duplicative provision in the rules. The text of the proposed rule change appears below. Proposed new language is underlined and proposed deletions are in brackets.<sup>3</sup>

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

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

IM-4500-5. Waiver of Fees upon Relisting for Companies Removed for Late Filings

Entry Fees. Pursuant to Nasdaq's authority to waive certain fees, Nasdaq has determined to waive the entry fee (including the application fee) in the following circumstances:

- 1) the company was suspended 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, pursuant to Rule 4310(c)(14) or 4320(e)(12); and
- 2) the company has regained compliance with this requirement and applies to relist on Nasdaq within one year of the date it is delisted from Nasdaq.

Annual Fees. A company that meets the above requirements and relists during the same year that it has previously paid an annual fee will not be subject to a second annual fee in that same year.

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4520. The Nasdaq Capital Market

(a) No change

(b) No change

(1) – (5) No change

[(6) The issuer of each class of securities that is a non-U.S. issue that is listed on the Nasdaq Capital Market shall pay to Nasdaq a fee in connection with the issuance of additional shares, or in the case of ADRs, the listing of additional shares underlying the ADRs. The fee in connection with additional shares shall be \$5,000 for any amount of additional shares listed on an annual basis. This fee will be assessed annually based on the

issuer's total shares outstanding as reported on its periodic reports filed with the SEC. There shall be no fee, however, for issuances of up to 49,999 additional shares per year.]

(c) – (e) 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 III 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

Existing Nasdaq rules provide the authority to waive entry, application and annual fees.<sup>4</sup>

Pursuant to this authority, Nasdaq has determined to waive the entry and application fee for any company that was suspended<sup>5</sup> and/or delisted from the Nasdaq Stock Market solely for its failure

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<sup>4</sup> Nasdaq Rules 4510(a)(5), 4520(a)(4), 4530(a)(4) and 4540(a)(2) provide authority to waive entry and application fees and Nasdaq Rules 4510(c)(2), 4510(d)(5), 4520(c)(4), 4530(b)(2) and 4540(b)(3) provide authority to waive annual fees. Nasdaq notes that in several prior instances, the predecessor market operated by The Nasdaq Stock Market, Inc. as a facility of the NASD filed listing fee waivers of general applicability on an immediately effective basis, pursuant to SEC Rule 19b-4(f)(1), 17 CFR 240.19b-4(f)(1), as a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of these existing rules. See, e.g., Securities Exchange Act Release No. 49133 (January 28, 2004), 69 FR 5630 (February 5, 2004) (SR-NASD-2003-198); Securities Exchange Act Release No. 49286 (February 19, 2004), 69 FR 8999 (February 26, 2004) (SR-NASD-2004-004). More recently, the New York Stock Exchange has submitted a filing to waive listing fees subject to Commission approval under Section 19(b)(2) of the Act, 15 U.S.C. 78s(b)(2). See Securities Exchange Release No. 55421 (March 8, 2007), 72 FR 11925 (March 14, 2007) (SR-NYSE-2007-19). As a result, Market Regulation staff has advised Nasdaq that this proposed rule change should also be filed under Section 19(b)(2). Although Nasdaq is following staff's guidance in this case, Nasdaq notes that the rules authorizing waivers of listing fees have been in effect for an extensive period of time, having first been approved as NASD rules in 1991, and then re-approved by the Commission as rules of Nasdaq during its registration as a national securities exchange. Accordingly, it is Nasdaq's view that nothing in this filing should be construed to restrict Nasdaq's approved authority to waive listing fees with respect to particular issuers in appropriate circumstances, nor should this filing be construed to restrict the submission of filings on an immediately effective basis in appropriate circumstances.

The Commission notes that the waiver authority referred to in the Nasdaq Rules was specifically intended to grant Nasdaq flexibility 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 does not believe it is, as a general matter, appropriate to allow for the waiver of fees to a class of non-members without first providing interested persons an opportunity to comment on the proposed rule change pursuant to Section 19(b)(2) under the Act.

<sup>5</sup> 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

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 date it is delisted from Nasdaq. 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, it is more likely that they will be compliant with all other quantitative and qualitative requirements. Further, relevant information about these companies is already contained in Nasdaq's compliance systems. Finally, Nasdaq anticipates that 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.

Nasdaq is implementing these waivers to incent companies to re-list on Nasdaq once they regain compliance with the periodic filing requirement, rather than seek a listing elsewhere. Nasdaq believes that this waiver is appropriate, especially because Nasdaq's rules governing the delisting of companies that are delinquent in periodic reports are generally stricter than those of other markets. As such, the proposed waivers will promote competition between Nasdaq and other exchange markets.

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subject of a decision to delist by a Listing Qualifications Panel, the Nasdaq Listing and Hearing Review Council or the Nasdaq Board.

The proposed rule change will not affect Nasdaq's commitment of resources to its regulatory oversight of the listing process or its other regulatory programs. Specifically, Nasdaq will still conduct a complete review of these companies for compliance with Nasdaq listing standards in the same manner as any other company applying for listing on Nasdaq. Any fee waiver under this proposed rule is predicated on the Company successfully completing that review process and demonstrating compliance with the initial listing requirements.

Finally, Nasdaq proposes to delete a duplicative provision in Rule 4520(b). Currently, Rule 4520(b)(6) is identical to Rule 4520(b)(2). As such, Nasdaq proposes to delete Rule 4520(b)(6).

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>6</sup> in general, and with Section 6(b)(4) of the Act,<sup>7</sup> in particular. Nasdaq believes that the proposed waivers are equitable and reasonable because these companies previously paid entry and annual fees to Nasdaq and to again charge such fees would impose duplicative costs.

### B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

### 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.

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<sup>6</sup> 15 U.S.C. 78f.

<sup>7</sup> 15 U.S.C. 78f(b)(4).

### III. 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2007-040 on the subject line.

#### Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2007-040. 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 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-2007-040 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.<sup>8</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>8</sup> 17 CFR 200.30-3(a)(12).