

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-60611; File No. SR-NASDAQ-2009-077)

September 2, 2009

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

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 August 17, 2009, The NASDAQ Stock Market LLC (“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. 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 modify the procedures followed when a listed company falls below certain listing requirements. Nasdaq will implement the proposed rule upon approval.

The text of the proposed rule change is below. Proposed new language is underlined; proposed deletions are in brackets.<sup>3</sup>

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

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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://nasdaqomx.cchwallstreet.com>.

(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) No change.

(2) Deficiencies for which a Company may Submit a Plan of Compliance for Staff Review

(A) Unless the Company is currently under review by an Adjudicatory Body for a Staff Delisting Determination, the Listing Qualifications Department may accept and review a plan to regain compliance when a Company is deficient with respect to one of the standards listed in subsections (i) through (iv) below. In accordance with Rule 5810(c)(2)(C), plans provided pursuant to subsections (i) through (iii) below must be provided generally within [15] 45 calendar days, and in

accordance with Rule 5810(c)(2)(F), plans provided pursuant to subsection (iv) must be provided generally within 60 calendar days.

(i) – (iv) No change.

IM-5810-2. No change.

(B) Staff Alternatives Upon Review of Plan

Staff may request such additional information from the Company as is necessary to make a determination, as described below. In cases other than filing delinquencies, which are governed by Rule 5810(c)(2)(F) below, upon review of a plan of compliance, Staff may either:

(i) grant an extension of time to regain compliance not greater than [105] 180 calendar days from the date of Staff's initial notification, unless the Company is currently under review by an Adjudicatory Body for a Staff Delisting Determination. If Staff grants an extension, it will inform the Company in writing of the basis for granting the extension and the terms of the extension;

(ii) - (iii) No change.

(C) Timeline for Submission of Compliance Plans

Except for deficiencies from the standards of Rule 5250(c)(1) or (2), Staff's notification of deficiencies that allow for compliance plan review will inform the Company that it has [15] 45 calendar days to submit a plan to regain compliance with Nasdaq's listing standard(s). [Within the restrictions of paragraph (B),] Staff may extend this deadline for up to an additional 5 calendar days upon good cause

shown and may request such additional information from the Company as is necessary to make a determination regarding whether to grant such an extension.], and upon receipt of the Company's plan, may request additional information from the Company to help it determine the Company's ability to regain compliance.]

(D) – (F) 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) – (B) No change.

(C) Market Value of Listed Securities [(MVLS)]

A failure to meet the continued listing requirements for [MVLS] Market Value of Listed Securities shall be determined to exist only if the deficiency continues for a period of [10] 30 consecutive business days. Upon such failure, the Company shall be notified promptly and shall have a period of [90] 180 calendar days from such notification to achieve compliance [with the applicable continued listing standard]. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the [90] 180 day compliance period.

(D) Market Value of Publicly Held Shares [(MVPHS)]

A failure to meet the continued listing requirement for Market Value of Publicly Held Shares 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 [90] 180 calendar days from such notification to achieve compliance. [

]Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the [90] 180 day compliance period.

(E) – (F) No change.

(4) No change.

(d) No change.

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#### 5840. Adjudicatory Process: General Information

(a) – (d) No change.

(e) Computation and Adjustment of Time

(1) No change.

(2) When Staff determines whether a deficiency has occurred with respect to [bid price, market value of listed securities] the Bid Price, Market Value of Listed Securities or [market value of publicly held shares] Market Value of Publicly Held Shares requirements, the first trading day that the [bid price or market value] Bid Price or Market Value is below required standards is included in computing the total number of consecutive trading days of default. Similarly, when Staff determines whether a Company has regained compliance with the [bid price, MVLS or MVPHS] Bid Price,

Market Value of Listed Securities, or Market Value of Publicly Held Shares

requirements, the first trading day that the [bid price or market value] Bid Price or Market Value is at or above required standards is included in computing the total number of consecutive trading days.

(3) - (4) No change.

(f) – (k) 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 is proposing to modify certain of the listing rules that provide the compliance periods associated with Nasdaq’s continued listing rules to make them more consistent and, in some cases, to provide additional time to companies to regain compliance. In addition, Nasdaq is proposing to modify the time available to a company to provide a plan to regain compliance

with certain listing requirements and the length of the extension that Nasdaq staff can allow a company to regain compliance.<sup>4</sup>

### Price Related Criteria

Under Nasdaq rules, if a company's security has a closing bid price below \$1 for 30 consecutive trading days, it no longer meets the bid price requirement and is automatically provided 180 calendar days to regain compliance.<sup>5</sup> However, under other requirements that are derived, in part, from the company's price, the company may be found non-compliant based on fewer days below the applicable threshold or have less time to regain compliance. Specifically, under the current rules related to market value of listed securities, a company is non-compliant after being below the standard for 10 consecutive trading days and, thereafter, is provided only 90 calendar days to regain compliance.<sup>6</sup> Similarly, while the rules for market value of publicly held shares provide that a company is not deficient until it is below the standard for 30 consecutive trading days, the company is only provided with 90 calendar days to regain compliance.<sup>7</sup> Because compliance with each of these rules is directly related to the price of an issuer's security, Nasdaq believes that the length of time to trigger non-compliance, and the amount of time afforded as a compliance period, should be consistent with each other and with the periods applicable under the bid price rules. Therefore Nasdaq proposes to extend the period that a company would need to be below the minimum market value of listed securities

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<sup>4</sup> 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).

<sup>5</sup> Rule 5810(b)(3)(A).

<sup>6</sup> Rule 5810(b)(3)(C). NASDAQ recently changed the period to regain compliance with the market value of listed securities requirement from 30 to 90 days. Securities Exchange Act Release No. 59291 (January 23, 2009), 74 FR 5197 (January 29, 2009) (SR-NASDAQ-2009-002).

<sup>7</sup> Rule 5810(b)(3)(D).

requirement before being considered non-compliant from 10 to 30 consecutive trading days. In addition to providing consistency among the price-related tests, Nasdaq believes that this longer period will prevent a short-term market-wide decline from causing a company to become non-compliant. 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.<sup>8</sup> Nasdaq believes that the existing 90-day time frames do not provide sufficient time for a company to regain compliance. For example, if a company chooses to issue additional shares to evidence compliance, 90 calendar days is often an insufficient time to allow a company to obtain any necessary shareholder approval, register the shares, and demonstrate compliance for 10 business days.

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. 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;<sup>9</sup> (ii) the company appealed to a Hearings Panel;<sup>10</sup> and (iii) the Nasdaq Listing and Hearing Review

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<sup>8</sup> Nasdaq could apply its authority described in 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.

<sup>9</sup> Proposed Rules 5810(c)(3)(C) and 5810(c)(3)(D).

<sup>10</sup> An appeal to the Hearings Panel stays the securities delisting. Rule 5815(a)(1). The company can submit a plan to regain compliance and request that the Hearings Panel grant an exception to the listing standards for a limited time period. Rule 5815(a)(5). Based on its review of that plan, the Hearings Panel can grant the company a maximum of 180 days from the date of the staff's delisting determination to regain compliance. Rule 5815(c)(1)(A).



Council determined to call the matter for review, stay the company's delisting,<sup>11</sup> and, after reviewing the company's compliance plan,<sup>12</sup> provide the company with the maximum 360-day period from the date of the Staff Delisting Determination to regain compliance.<sup>13</sup>

#### Requirements with Respect to Compliance Plans

Nasdaq also proposes to modify the periods applicable in cases where a company can provide 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.<sup>14</sup> Currently, companies are provided 15 calendar days to submit a plan to regain compliance and, 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's experience has been that 15 days is often insufficient for a company to formulate a meaningful plan, especially given current market and economic conditions, and accordingly proposes to increase from 15 to 45 the number of calendar days a company has to present its plan. Staff would be permitted to grant up to a 5-day extension of this period upon

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<sup>11</sup> Rule 5820(a) provides that an appeal to the Nasdaq Listing and Hearings Review Council does not operate to stay a Hearings Panel's decision to delist a company. In order for a Panel decision to be stayed, the Listing Council must call the matter for review pursuant to Rule 5820(b) and affirmatively determine to stay the Panel's decision.

<sup>12</sup> When the Listing Council calls a matter for review it provides the company with a deadline to submit a written submission. Rule 5820(b). The Listing Council's review is based on the written record, including that submission. Rule 5820(e)(1).

<sup>13</sup> Rule 5820(d)(1).

<sup>14</sup> 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.

good cause shown.<sup>15</sup> Further, Nasdaq proposes to increase from 105 to 180 the number of calendar days for which staff can grant an extension of time from its initial notification of non-compliance.<sup>16</sup> Nasdaq believes that this additional time will better allow companies to implement a plan to regain 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. 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;<sup>17</sup> (ii) the company failed to comply within the time allowed by staff and appealed to a Hearings Panel;<sup>18</sup> and (iii) the Nasdaq Listing and Hearing Review 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.<sup>19</sup>

### Implementation

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

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<sup>15</sup> It is anticipated 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.

<sup>16</sup> Nasdaq 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.

<sup>17</sup> Proposed Rule 5810(c)(2)(B)(i).

<sup>18</sup> See footnote 10, supra.

<sup>19</sup> See footnotes 11-13, supra.

would not be notified until they were below the requirement for 30 consecutive trading days.<sup>20</sup>

Any company that had 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 was still in the 90 calendar day compliance period for such failure would have their compliance period extended until 180 calendar days from the date they were originally notified of the deficiency.<sup>21</sup> No additional time would be provided to a company that has received a Staff Delisting Determination for failure to meet either of those requirements before the proposed rule change is approved.<sup>22</sup>

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 would be extended until 45 days from the date of staff's notification of the deficiency. If the company had 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 would 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

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<sup>20</sup> 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.

<sup>21</sup> 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.

<sup>22</sup> 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 Rules 5815(c)(1)(A) and 5820(d)(1).

extension of time to regain compliance from staff when the proposed rule change is approved,<sup>23</sup> at the end of that exception 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.<sup>24</sup> No additional time would be provided to a company that had already received a Staff Delisting Determination at the time the proposed rule change is approved.<sup>25</sup>

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>26</sup> in general and with Sections 6(b)(5) of the Act,<sup>27</sup> in particular, which requires, among other things, that a national securities exchange's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. Nasdaq believes that the proposed rule change is consistent with these requirements in that it would enhance consistency within Nasdaq's rules and between Nasdaq and other markets, thereby reducing investor confusion and facilitating capital formation, while permitting reasonable periods of time for companies to address instances of non-compliance with Nasdaq rules.

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<sup>23</sup> Rule 5810(c)(2)(B)(i).

<sup>24</sup> 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 Rule 5810(c)(2)(B)(i).

<sup>25</sup> Such companies would continue through the Hearings and Appeals process, however, and could receive additional time as provided for in Rules 5815(c)(1)(A) and 5820(d)(1).

<sup>26</sup> 15 U.S.C. 78f.

<sup>27</sup> 15 U.S.C. 78f(b)(5).

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:

- 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 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-2009-077 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-2009-077. 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, 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 inspection and copying at the principal office of the Exchange. 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 publicly available. All submissions should refer to File

Number SR-NASDAQ-2009-077 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.<sup>28</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>28</sup> 17 CFR 200.30-3(a)(12).