SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-57930; File No. SR-NASDAQ-2008-017)

June 5, 2008

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval to Proposed Rule Change, as Modified by Amendment No. 1, to Clarify the Listing of Additional Shares Notification Process

I. Introduction

On March 6, 2008, 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 Nasdaq's listing of additional shares notification process.[3] The proposed rule change was published for comment in the Federal Register on April 10, 2008.[4] The Commission received no comments on the proposal as published. On May 7, 2008, the Exchange filed Amendment No. 1 to the proposed rule change.[5] This order provides notice of the proposed rule

1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 As part of the proposed rule filing, the Exchange submitted a revised Listing of Additional Shares Notification Form conforming the instructions on the Form to the corresponding proposed rule changes.

4 See Securities Exchange Act Release No. 57616 (April 3, 2008), 73 FR 19540.

5 In Amendment No. 1, the Exchange modified the proposed notice requirement in Rules 4310(c)(17)(A) and 4320(e)(15)(A) relating to companies relying on the exception to shareholder approval for inducement grants to new employees contained in Rule 4350(i)(1)(A)(iv). In the original filing, Nasdaq proposed that notice of such an inducement grant would be required no later than five calendar days after entering into the agreement to issue securities. In Amendment No. 1, Nasdaq proposed to modify this notification requirement so that notice of an inducement grant must be provided no later than the earlier of: (1) five calendar days after entering into the agreement to issue securities; or (2) the date of the public announcement of the award required by Rule 4350(i)(1)(A)(iv).

change, as modified by Amendment No. 1, and approves the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description of the Proposal

Pursuant to Nasdaq Rules 4310(c)(17) and 4320(e)(15), a company is required to provide 15 days notice to Nasdaq prior to issuing securities or entering into transactions that would result in the issuance of securities in certain specified situations set forth in the rules. These notification requirements are intended to allow Nasdaq to make compliance determinations regarding stock issuances that are potentially subject to the shareholder approval rules.

Nasdaq proposes to make certain modifications to its rules governing the notification process for the listing of additional shares. First, Nasdaq proposes to clarify the timing of the notice requirement contained in Rules 4310(c)(17)(D) and 4320(e)(15)(D). Currently, the rules provide that notifications under these subparagraphs are required prior to "entering into" a transaction that may result in the potential issuance of common stock (or securities convertible into common stock) greater than 10% of either the total shares outstanding or the voting power outstanding on a pre-transaction basis. Nasdaq states that, in practice, it has treated this requirement as being satisfied if the company files the required notification 15 days before issuing the securities, rather than 15 days prior to entering into the transaction. Because such interpretation is not transparent from the rule, Nasdaq proposes to revise these provisions so that it is clear that notice will instead be required prior to "issuing" such securities.

Second, Nasdaq proposes to modify the notice requirement contained in Rules 4310(c)(17)(A) and 4320(e)(15)(A) as it relates to companies relying on the exception to shareholder approval for inducement grants to new employees contained in Rule

4350(i)(1)(A)(iv).[6] Currently, the rule provides that an issuer is required to notify Nasdaq at least 15 calendar days prior to establishing or materially amending a stock option plan, purchase plan or other equity compensation arrangement pursuant to which stock may be acquired by officers, directors, employees, or consultants without shareholder approval. Nasdaq asserts that, because inducement grants can be made at the time the employment offer is accepted, companies may not be able to provide 15 days advance notice. Therefore, Nasdaq proposes to modify the notice requirement to require notification of such inducement grants no later than the earlier of: (1) five calendar days after entering into the agreement to issue the securities; or (2) the date of the public announcement of the award required by Rule 4350(i)(l)(A)(iv).[7]

Third, Nasdaq proposes to amend Rules 4310(c)(17) and 4320(e)(15) to clarify that the notifications required by these rules must be made on a Listing of Additional Shares ("LAS") Notification Form[8] and that Nasdaq encourages companies to file the form as soon as practicable. In addition, in an effort to provide transparency to the consequences of failing to timely file LAS notifications, Nasdaq proposes to amend the rules to specifically state that if a company fails to timely file the LAS notification, Nasdaq may issue a Staff Determination (pursuant to the Rule 4800 Series) that is a public reprimand letter or a delisting determination. Nasdaq notes that, in determining whether to issue a Staff Determination, and whether such a Staff Determination

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6 Rule 4350(i)(1)(A)(iv) allows an exception to the requirement to obtain shareholder approval for equity compensation for certain "issuances to a person not previously an employee or director of the company, or following a bona fide period of non-employment, as an inducement material to the individual's entering into employment with the company."

7 See Amendment No. 1, supra note 5.

8 See supra note 3.

would be a delisting determination or a public reprimand letter, Nasdaq would consider whether the issuer has demonstrated a pattern of late filings, the length of such filing delays, the reason for the delays, whether the issuer has been contacted concerning previous violations, whether the underlying transactions were themselves non-compliant, and whether the issuer has taken steps to assure that future violations will not occur.

III. Discussion and Commission Findings

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,[9] 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.[10]

The Commission believes that amending the timing requirement in Rules 4310(c)(17)(D) and 4320(e)(15)(D) to require that notification be made 15 days prior to issuing securities, rather than prior to entering into the specified transactions, will provide issuers certainty as to what point in a transaction the latest notification can be provided under Nasdaq's rule, as well as eliminate any ambiguity surrounding the application of this rule. Further, this proposed rule change will make the timing requirement in subparagraph (D) of Rules 4310(c)(17) and 4320(e)(15) consistent with the timing requirement for notification of other types of issuances of

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9 15 U.S.C. 78f(b)(5).

10 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).

stock under the rules, which require notification 15 days prior to the issuance of securities.[11] At the same time, Nasdaq has assured the Commission that 15 days notice prior to issuance should continue to give Nasdaq enough time to review the LAS notifications to ensure that stock issuances comply with the Nasdaq rules and, in particular, Nasdaq's shareholder approval requirements. As such, the Commission believes that the proposed rule change is consistent with the protection of investors and the public interest. The Commission also notes that the proposed rule language and the instructions to the LAS Notification Form urge issuers to file the form as soon as practicable, even if all of the relevant terms of the transaction or required documentation are not yet available. The Commission would hope that issuers would provide the required LAS Notification Form to Nasdaq as soon as possible to ensure timely compliance with any shareholder approval that may be required.

The Commission also believes that the modification to the timing requirement for companies making an inducement grant is appropriate for this narrow category of stock issuances. The Commission notes that Nasdaq has represented that, as a practical matter, it often is not possible for companies to provide advance notice of inducement grants, because such grants are often made at the time the employment offer is accepted. Accordingly, modifying the timing requirement to require companies to provide notice to Nasdaq no later than the earlier of: five calendar days after entering into the agreement to issue the securities; or the date of the

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11 In particular, paragraph (B) of Rules 4310(c)(17) and 4320(e)(15) require issuers to notify Nasdaq 15 calendar days <u>prior to issuing securities</u> that may potentially result in a change of control of the issuer. Further, paragraph (C) requires issuers to notify Nasdaq 15 calendar days <u>prior to issuing any common stock</u> in connection with the acquisition of the stock or assets of another company, if any officer or director or substantial shareholder of the issuer has a 5% or greater interest in the company to be acquired or in the consideration to be paid. (emphasis added)

public announcement of the award,[12] should make it more feasible for companies to timely meet the notification requirement. At the same time, the Commission believes that the modified timing requirement is consistent with the protection of investors and the public interest because such inducement grants are permitted without shareholder approval pursuant to Nasdaq Rule 4350(i)(1)(A)(iv). Therefore, unlike other stock issuances under Nasdaq's shareholder approval rules, Nasdaq does not need to make a compliance determination as to whether shareholder approval is required prior to the issuance. The Commission notes, however, that Nasdaq still would need to make a determination that the inducement grant meets the requirements of the exception provided in Nasdaq Rule 4350(i)(1)(A)(iv).[13] As such, the Commission believes that the modified timing requirement for inducement grants is appropriate and balances the timing needs of issuers relying on the inducement grant exception with Nasdaq's compliance responsibility to ensure that the issuer is appropriately relying on the inducement grant exception, and has met the Rule 4350(i)(1)(A)(iv) requirements for doing so.

Finally, the Commission believes that the additional proposed changes provide clarity and transparency to the operation of the notification requirements. In particular, the proposed

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12 See Nasdaq Rule 4350(i)(1)(A)(iv), which requires that, promptly following the issuance of any employment inducement grant made in reliance on the exception in such rule, a company must disclose in a press release the material terms of the grant.

13 Specifically, Rule 4350(i)(1)(A)(iv) provides that shareholder approval is not required for issuances to a person not previously an employee or director of the company, or following a bona fide period of non-employment, as an inducement material to the individual's entering into employment with the company, provided such issuances are approved by either the issuer's independent compensation committee or a majority of the issuer's independent directors. Promptly following an issuance of any employment inducement grant in reliance on this exception, a company must disclose in a press release the material terms of the grant, including the recipient(s) of the grant and the number of shares involved.

changes clarify that notifications must be made on the LAS Notification Form and that Nasdaq encourages companies to file the form as soon as practicable even if all of the relevant terms are not yet known. The Commission also notes that it reviewed Nasdaq's revised LAS Notification Form and believes that the instructions on the form appropriately reflect the corresponding proposed rule changes. Further, the proposed changes clarify the consequences of failing to timely file the form by expressly stating that in such instances, Nasdaq may issue a Staff Determination that is either a public reprimand letter or a delisting determination. In this regard, the Commission notes that it expects Nasdaq to carefully monitor compliance with the notification requirements and to take appropriate action as necessary. In particular, because of the importance of shareholder approval, the Commission expects that in cases where failure to timely file the notification form is coupled with a failure to meet the shareholder approval requirements, Nasdaq will take action that is suitable for violations of such rules.

The Commission finds good cause for approving the proposed rule change, as modified by Amendment No. 1, before the thirtieth day after the date of publication of notice of filing thereof in the Federal Register. In Amendment No. 1, the Exchange modified the proposed notice requirement for companies issuing inducement grants to new employees. In the original filing, Nasdaq proposed that notice of such an inducement grant would be required no later than five calendar days after entering into the agreement to issue securities. In Amendment No. 1, Nasdaq proposed to modify this notification requirement so that notice of an inducement grant must provided no later than the earlier of: (1) five calendar days after entering into the agreement to issue securities; or (2) the date of the public announcement of the award required by Rule 4350(i)(1)(A)(iv). The Commission believes that the changes in Amendment No. 1 ensure that

Nasdaq receives appropriate notice about an inducement grant no later than the date that the public is notified about such issuance pursuant to Rule 4350(i)(1)(A). As such, the Commission believes that Amendment No. 1 raises no new or novel regulatory issues and is consistent with the protection of investors and the public interest. Accordingly, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,[14] to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

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 modified by Amendment No. 1, 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-2008-017 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NASDAQ-2008-017. 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

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14 15 U.S.C. 78s(b)(2).

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, 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 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-2008-017 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,[15] that the proposed rule change (SR-NASDAQ-2008-017), as modified by Amendment No. 1, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Florence E. Harmon
Acting Secretary

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15 15 U.S.C. 78s(b)(2).

16 17 CFR 200.30-3(a)(12).