

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58182; File No. SR-NASDAQ-2008-062)

July 17, 2008

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change to Clarify the Application of Nasdaq Rules when a Listed Company Combines with a non-Nasdaq Entity

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on July 10, 2008, 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 clarify the application of Nasdaq rules when a listed company combines with a non-Nasdaq entity. 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.³

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4340. Application for Re-Listing by Listed Issuers

(a) [Reverse Mergers] Business Combinations with non-Nasdaq Entities Resulting in a Change of Control. An issuer must apply for initial listing in connection with a transaction

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at www.complinet.com/nasdaq.

whereby the issuer combines with a non-Nasdaq entity, resulting in a change of control of the issuer and potentially allowing the non-Nasdaq entity to obtain a Nasdaq Listing [(for purposes of this rule, such a transaction is referred to as a "Reverse Merger")]. In determining whether a [Reverse Merger] change of control has occurred, Nasdaq shall consider all relevant factors including, but not limited to, changes in the management, board of directors, voting power, ownership, and financial structure of the issuer. Nasdaq shall also consider the nature of the businesses and the relative size of the Nasdaq issuer and non-Nasdaq entity. The issuer must submit an application for the post-transaction entity with sufficient time to allow Nasdaq to complete its review before the transaction is completed. If the issuer's application for initial listing has not been approved prior to consummation of the transaction, Nasdaq will issue a Staff Determination Letter as set forth in Rule 4804 and begin delisting proceedings pursuant to the Rule 4800 Series.

(b) Bankruptcy.

No change.

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IM-4350-1. Interpretive Material Regarding Future Priced Securities

Summary

No change.

How the Rules Apply

Shareholder Approval

No change.

Voting Rights

No change.

The Bid Price Requirement

No change.

Listing of Additional Shares

No change.

Public Interest Concerns

No change.

[Reverse Merger] Business Combinations with non-Nasdaq Entities Resulting in a Change of Control

Rule 4340(a) provides:

An issuer must apply for initial listing in connection with a transaction whereby the issuer combines with a non-Nasdaq entity, resulting in a change of control of the issuer and potentially allowing the non-Nasdaq entity to obtain a Nasdaq Listing [(for purposes of this rule, such a transaction is referred to as a "Reverse Merger")]. In determining whether a [Reverse Merger] change of control has occurred, Nasdaq shall consider all relevant factors including, but not limited to, changes in the management, board of directors, voting power, ownership, and financial structure of the issuer. Nasdaq shall also consider the nature of the businesses and the relative size of the Nasdaq issuer and non-Nasdaq entity. The issuer must submit an application for the post-transaction entity with sufficient time to allow Nasdaq to complete its review before the transaction is completed. If the issuer's application for initial listing has not been approved prior to consummation of the transaction, Nasdaq will issue a Staff Determination Letter as set forth in Rule 4804 and begin delisting proceedings pursuant to the Rule 4800 Series.

This provision, which applies regardless of whether the issuer obtains shareholder approval for the transaction, requires issuers to qualify under the initial listing standards in connection with a [Reverse Merger] combination that results in a change of control.^[4] It is important for issuers to realize that in certain instances, the conversion of a Future Priced Security may implicate this provision. For example, if there is no limit on the number of common shares issuable upon conversion, or if the limit is set high enough, the exercise of conversion rights under a Future Priced Security could result in [a Reverse Merger with] the holders of the Future Priced Securities obtaining control of the listed company. In such event, an issuer may be required to re-apply for initial listing and satisfy all initial listing requirements.

Footnotes to IM-4350-1:

¹ – ³ No change.

[⁴ This provision is designed to address situations where a company attempts to obtain a "backdoor listing" on Nasdaq by merging with a Nasdaq issuer with minimal assets and/or operations.]

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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

Marketplace Rule 4340(a) requires that an issuer must apply for initial listing following a transaction whereby the issuer combines with a non-Nasdaq entity, resulting in a change of control of the issuer and potentially allowing the non-Nasdaq entity to obtain a Nasdaq listing. This rule was originally adopted in 1993 to address concerns associated with non-Nasdaq entities seeking a “backdoor listing” on Nasdaq through a business combination involving a Nasdaq issuer.⁴ In these combinations, a non-Nasdaq entity purchased a Nasdaq issuer in a transaction that resulted in the non-Nasdaq entity obtaining a Nasdaq listing without qualifying for initial listing or being subject to the background checks and scrutiny normally applied to issuers seeking initial listing. The rule was amended in 2001 to define “Reverse Merger” and to provide clarification regarding the factors used by Staff to determine if a transaction should be considered a Reverse Merger.⁵ In 2006, Nasdaq amended the rule to clarify the timing of the application of the rule.⁶

While this Rule was originally focused on companies seeking a “backdoor listing” by acquiring a listed shell company, its language is not limited in that regard, and Nasdaq has applied the rule to any transaction where there is a change of control potentially allowing a non-Nasdaq entity to obtain a Nasdaq listing. As such, Nasdaq has applied the rule to mergers involving operating companies in substantially similar businesses and, in appropriate cases, to

⁴ Securities Exchange Act Release No. 32264 (May 4, 1993), 58 FR 27760 (May 11, 1993) (approving SR-NASD-93-07).

⁵ Securities Exchange Act Release No. 44067 (March 13, 2001), 66 FR 15515 (March 19, 2001) (approving SR-NASD-01-01).

⁶ Securities Exchange Act Release No. 55052 (January 5, 2007), 72 FR 1569 (January 12, 2007) (approving SR-NASDAQ-2006-047).

mergers of “equals,” where the companies are approximately the same size.⁷ This allows Nasdaq staff to review the post-transaction entity, including any new officers, directors and control persons, before the transaction is consummated, thereby allowing staff to confirm that the post-transaction entity will meet all initial listing criteria and that there are no public interest concerns. Nonetheless, given the use of the term “Reverse Merger” within Rule 4340(a), and the existence of a footnote in IM-4350-1 speaking of “backdoor listings,” companies have expressed confusion as to the scope of the rule. As such, Nasdaq proposes to remove these references from Rule 4340(a) and IM-4350-1.⁸ As revised, Nasdaq believes the rule will more clearly reflect that a company must satisfy the initial listing requirements whenever it enters into a transaction with a non-Nasdaq entity, resulting in a change of control of the listed company and potentially allowing the non-Nasdaq entity to obtain a Nasdaq listing.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁹ in general and with Sections 6(b)(5) of the Act,¹⁰ in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in

⁷ See, e.g., Decision 2002/2003-9 of the Nasdaq Listing and Hearing Review Council (December 2002), available at: <http://www.nasdaq.com/about/NLHRCDecisions20022003.pdf>.

⁸ Nasdaq has confirmed that the rule would still, of course, apply to “backdoor listings” or “reverse mergers,” and that this proposed change is intended to clarify that the rule also applies to a broader category of business combinations that result in a change of control of the issuer. See Telephone conversation between Arnold Golub, Associate General Counsel, Nasdaq, and Sara Gillis, Special Counsel, Division of Trading and Markets, Commission, on July 15, 2008.

⁹ 15 U.S.C. 78f.

¹⁰ 15 U.S.C. 78f(b)(5).

securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change would clarify Nasdaq's listing requirements related to change of control transactions, and thereby provide additional transparency to the rules. This proposed clarification is designed to protect investors and the public interest by allowing Nasdaq to confirm that the post-transaction entity will meet all initial listing criteria and that there are no public interest concerns associated with individuals or entities newly joining the company.

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 Exchange 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. Please include File Number SR-NASDAQ-2008-062 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-2008-062. 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 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-2008-062 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.¹¹

Florence E. Harmon
Acting Secretary

¹¹ 17 CFR 200.30-3(a)(12).