

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-57795; File No. SR-NASDAQ-2008-037)

May 7, 2008

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change to Modify Nasdaq's Continued Listing Requirements to Replace Round Lot Shareholders

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 April 25, 2008, The NASDAQ Stock Market LLC ("Exchange" or "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 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 change the shareholder requirements for continued listing. Nasdaq will implement the proposed rule immediately upon approval.

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

4200. Definitions

(a) For purposes of the Rule 4000 Series, unless the context requires otherwise:

(1) – (31) No change.

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 <http://nasdaq.complinet.com>.

(32) “Public holders” of a security include both beneficial holders and holders of record, but does not include any holder who is, either directly or indirectly, an executive officer, director, or the beneficial holder of more than 10% of the total shares outstanding. [“Reported Security” means an equity security for which quotations are entered into the Consolidate Quotations Service.]

(33) “Round lot holder” means a holder of a normal unit of trading. The number of beneficial holders will be considered in addition to holders of record.

(34) – (37) No change.

(38) “Total holders” of a security include both beneficial holders and holders of record.

(39) “Transaction costs” means costs incurred in connection with a limited partnership rollup transaction, including printing and mailing the proxy, prospectus or other documents; legal fees not related to the solicitation of votes or tenders; financial advisory fees; investment banking fees; appraisal fees; accounting fees; independent committee expenses; travel expenses; and all other fees related to the preparatory work of the transaction, but not including costs that would have otherwise been incurred by the subject limited partnerships in the ordinary course of business or solicitation expenses.

[(39)] (40) “Underwriting Activity Report” is a report provided by the Corporate Financing Department of NASD Regulation, Inc. in connection with a distribution of securities subject to SEC Rule 101 pursuant to NASD Rule 2710(b)(11) and includes forms that are submitted by members to comply with their notification obligations under Rules 4614, 4619, and 4623.

(b) – (c) No change.

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4310. Listing Requirements for Domestic and Canadian Securities

To qualify for listing in Nasdaq, a security of a domestic or Canadian issuer shall satisfy all applicable requirements contained in paragraphs (a), (b), and (c) hereof. Issuers that meet these requirements, but that are not listed on the Nasdaq Global Market, are listed on the Nasdaq Capital Market.

(a) – (b) No change.

(c) In addition to the requirements contained in paragraph (a) and (b) above, and unless otherwise indicated, a security shall satisfy the following criteria for listing on Nasdaq:

(1) – (5) No change.

(6) (A) In the case of common stock, for initial [and continued] listing[,] there shall be at least 300 round lot holders of the security and for continued listing there shall be at least 300 public holders of the security.

(B) In the case of preferred stock and secondary classes of common stock, for initial [and continued] listing[,] there shall be at least 100 round lot holders of the security and for continued listing there shall be at least 100 public holders of the security, provided in each case that the issuer's common stock or common stock equivalent equity security must be listed on Nasdaq or be a covered security. In the event the issuer's common stock or common stock equivalent security either is not listed on Nasdaq or is not a covered security, the preferred stock and/or secondary class of common stock may be listed on Nasdaq so long as the security satisfies the listing criteria for common stock.

(C) No change.

(7) – (30) No change.

(d) No change.

4320. Listing Requirements for Non-Canadian Foreign Securities and American Depositary Receipts

To qualify for listing on Nasdaq, a security of a non-Canadian foreign issuer, an American Depositary Receipt (ADR) or similar security issued in respect of a security of a foreign issuer shall satisfy the requirements of paragraphs (a), (b), and (e) of this Rule. Issuers that meet these requirements, but that are not listed on the Nasdaq Global Market, are listed on the Nasdaq Capital Market.

(a) – (d) No change.

(e) In addition to the requirements contained in paragraphs (a) and (b), the security shall satisfy the criteria set out in this subsection for listing on Nasdaq. In the case of ADRs, the underlying security will be considered when determining the ADR's qualification for initial or continued listing on Nasdaq.

(1) – (3) No change.

(4)(A) In the case of common stock, for initial [and continued] listing[,] there shall be at least 300 round lot holders of the security and for continued listing there shall be at least 300 public holders of the security.

(B) In the case of preferred stock and secondary classes of common stock, for initial [and continued] listing[,] there shall be at least 100 round lot holders of the security and for continued listing there shall be at least 100 public holders of the security, provided in each case that the issuer's common stock or common

stock equivalent equity security must be listed on Nasdaq or be a covered security. In the event the issuer's common stock or common stock equivalent security either is not listed on Nasdaq or is not a covered security, the preferred stock and/or secondary class of common stock may be listed on Nasdaq so long as the security satisfies the listing criteria for common stock.

(C) No change.

(5) – (26) No change.

(f) No change.

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4426. Nasdaq Global Select Market Listing Requirements

(a) No change.

(b) Liquidity Requirements

(1) The security must demonstrate either:

(A) (i) a minimum of 550 [beneficial] total shareholders, and (ii) an average monthly trading volume over the prior 12 months of at least 1,100,000 shares per month; or

(B) a minimum of 2,200 [beneficial] total shareholders; or

(C) a minimum of 450 [beneficial] round lot shareholders

(2) – (3) No change.

(c) – (f) No change.

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4450. Quantitative Maintenance Criteria

After listing as a Nasdaq Global Market security, a security must substantially meet the criteria set forth in paragraphs (a) or (b), and (c), (d), (e) (f), (g), (h) or (i) below to continue to remain listed on the Nasdaq Global Market. A security maintaining its listing under paragraph (b) need not also be in compliance with the quantitative maintenance criteria in the Rule 4300 series.

(a) **Maintenance Standard 1** — First Class of Common Stock, Shares or Certificates of Beneficial Interest of Trusts, Limited Partnership Interests in Foreign or Domestic Issues and American Depositary Receipts

(1) – (3) No change.

(4) 400 total shareholders [of round lots]; and

(5) – (6) No change.

(b) **Maintenance Standard 2** — First Class of Common Stock, Shares or Certificates of Beneficial Interest of Trusts, Limited Partnership Interests in Foreign or Domestic Issues and American Depositary Receipts

(1) – (4) No change.

(5) 400 total shareholders [of round lots]; and

(6) No change.

(c) – (g) No change.

(h) **Quantitative Maintenance Criteria** — Preferred Stock and Secondary Classes of Common Stock

For continued listing, if the common stock or common stock equity equivalent security of the issuer is listed on Nasdaq or another national securities exchange, the issue shall have:

(1) – (3) No change.

(4) A minimum of 100 [round lot] public shareholders;

(5) No change.

Alternatively, in the event the issuer's common stock or common stock equivalent security is not listed on either Nasdaq or another national securities exchange, the preferred stock and/or secondary class of common stock may be listed on Nasdaq so long as the security satisfies the listing criteria for common stock.

(i) 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 rules require a company to maintain a certain minimum number of round lot holders for continued listing.⁴ However, for a variety reasons, it is often difficult for Nasdaq and the listed company to determine compliance with these requirements. First, the Commission only requires companies to annually disclose the number of record holders, not round lot holders, in their proxy. Companies often don't know how many round lot holders they have since that

⁴ The minimum requirement for continued listing of the first class of common stock or its equivalent on both the NASDAQ Global and Global Select Markets is 400 round lot shareholders and on the NASDAQ Capital Market is 300 round lot shareholders.

group includes “objecting beneficial holders” who wish their identity to remain confidential from the company.

It also can be difficult to obtain the number of shares held by beneficial owners from record holders, such as broker-dealers.

In order to determine compliance with the round lot requirement, Nasdaq reviews a number of factors, including whether the company has a number of record holders well in excess of the round lot holder requirement and shareholder data provided by the company’s transfer agent and Broadridge Financial Solutions, Inc. (formerly, Automatic Data Processing, Inc.). While this process is effective, it is very time-consuming for Nasdaq and can be frustrating to the company, which has to spend considerable time and may be charged a fee to obtain this information.

In contrast, the number of total holders is more easily determined. For example, the number of proxies that a company mails is a very good approximation of the number of its total holders. In fact, many companies disclose the number of beneficial holders in their public filings, either instead of, or in addition to, the number of record holders. Further, the number of public holders generally can be easily determined by subtracting from the total shareholders the number of executive officers, directors, and 10% shareholders that are disclosed in the company’s proxy statement.

When the round lot holder requirement was originally adopted it was difficult and costly to trade in increments of less than 100 shares. Thus odd lot holders (that is, holders of fewer than 100 shares) added little to the distribution and potential liquidity of a security. These impediments no longer exist, given the current state of online trading and competitive

commission structures. As such, Nasdaq believes that today all holders, not just holders of round lots, can potentially contribute to a security's liquidity.

In addition, in Nasdaq's experience, companies do not typically see a decrease in the number of round lot holders following their listing, absent a transaction such as a reverse stock split or major stock buy-back.

Given these difficulties and changed circumstances, Nasdaq proposes that the shareholder requirements for continued listing be changed so that it no longer considers only round lot holders. As revised, Nasdaq would generally require 300 public shareholders⁵ for continued listing on the Capital Market, and 400 total shareholders for continued listing on the Global and Global Select Markets.⁶ In the case of preferred stock and secondary classes of common stock, 100 public shareholders would be required for continued listing on the Capital, Global and Global Select Markets. As proposed, a public holder would exclude any holder who is, either directly or indirectly, an executive officer, director, or the beneficial holder of more than 10% of the total shares outstanding.

Under this definition, Nasdaq would consider immediate family members of an executive officer, director, or 10% holder to not be public holders to the extent the shares held by such

⁵ The definition of "public holders" would appear in proposed Rule 4200(a)(32) and replace the definition of "Reported Security" because that term is now defined in Regulation NMS and is not used within the Nasdaq rules.

⁶ Nasdaq proposes to require public shareholders, instead of total shareholders, on the Capital Market so that Nasdaq's rules remain substantially similar to the rules of the American Stock Exchange ("Amex"), which require 300 public shareholders. See Section 1003(b)(i)(B) of the Amex Company Guide. Nasdaq does not believe it necessary to limit the shareholders on the Global and Global Select Markets to public shareholders given the higher number of total holders required. In addition, Nasdaq notes that the New York Stock Exchange ("NYSE") requires 400 total shareholders for continued listing. See Section 802.01A of the NYSE Listed Company Manual.

individuals are considered beneficially owned by the executive officer, director or 10% holder under Rule 16a-1 under the Act.⁷

Nasdaq also proposes to modify the rules relating to the Nasdaq Global Select Market to use the newly defined term “total shareholders” in those rules; however, no substantive change is being made to the requirements for the Global Select Market. In addition, no change is proposed to the initial listing requirements because the majority of initial listings are initial public offerings, where the number of round lot shareholders can be easily determined by the underwriter when distributing the offering, and because SEC rules require that markets have a minimum of 300 round lot holders for initial listing to avoid having listed securities be subject to the penny stock rules.⁸ Nasdaq does propose, however, to clarify that the definition of round lot holders includes beneficial holders in addition to holders of record, consistent with current practice.

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 the proposal 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 securities, to remove impediments to and perfect the mechanism of a free and open market and

⁷ See 17 CFR 240.16a-1(a)(2). Nasdaq will determine “public holders” based on the information disclosed in public filings about the company, including ownership statements and proxy statements.

⁸ See 17 CFR 240.3a51-1(a)(2)(i)(D).

⁹ 15 U.S.C. 78f.

¹⁰ 15 U.S.C. 78f(b)(5).

a national market system, and, in general, to protect investors and the public interest. The proposed rule change is consistent with these requirements in that modifying the requirement will facilitate consistent application of the rules by Nasdaq and ease the burden of compliance on listed companies, without increasing the risk to investors.

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. Please include File Number SR-Nasdaq-2008-037 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-Nasdaq-2008-037. 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 am and 3:00 pm. 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 available publicly. All submissions should refer to File Number SR-Nasdaq-2008-037 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
Deputy Secretary

¹¹ 17 CFR 200.30-3(a)(12).