

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58432; File No. SR-NASDAQ-2008-062)

August 27, 2008

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

I. Introduction

On July 10, 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 clarify the application of certain Nasdaq listing rules when a Nasdaq-listed company combines with a non-Nasdaq entity. The proposed rule change was published for comment in the Federal Register on July 23, 2008.³ The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

Nasdaq Rule 4340(a) requires that 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. The current Rule refers to such a transaction as a “Reverse Merger” and provides a non-exclusive list of factors that Nasdaq will consider to determine if a transaction should be considered a Reverse Merger for purposes of the Rule.⁴

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 42848 (July 17, 2008), 73 FR 42848.

⁴ Specifically, the rule provides that, in determining whether a Reverse Merger has occurred, Nasdaq will consider all relevant factors including, but not limited to, changes

Nasdaq notes that Rule 4340(a) 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.⁵ In these combinations, a non-Nasdaq entity would purchase a Nasdaq issuer in a transaction that would result 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.

While this Rule was originally adopted to deal with companies seeking a “backdoor listing” by acquiring a listed shell company, its language is not limited in that regard. Accordingly, Nasdaq states that it 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. For example, Nasdaq has applied the rule to mergers involving operating companies in substantially similar businesses and, in appropriate cases, to mergers of “equals,” where the companies are approximately the same size.⁶ This allows Nasdaq staff to review the post-transaction entity,

in the management, board of directors, voting power, ownership, and financial structure of the issuer, as well as the nature of the businesses and relative size of the Nasdaq issuer and non-Nasdaq entity. Securities Exchange Act Release No. 44067 (March 13, 2001), 66 FR 15515 (March 19, 2001) (SR-NASD-01-01).

⁵ Securities Exchange Act Release No. 32264 (May 4, 1993), 58 FR 27760 (May 11, 1993) (SR-NAS-93-07).

⁶ 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>.

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.

However, given the use of the term “Reverse Merger” within Rule 4340(a), and the existence of a footnote in IM-4350-1 referring to “backdoor listings,”⁷ Nasdaq states that companies have expressed confusion as to the scope of the Rule. Nasdaq therefore proposes to remove these references from Rule 4340(a) and IM-4350-1 and instead refer simply to business combinations with non-Nasdaq entities resulting in a change of control.

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,⁸ 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.⁹

The Commission believes that the proposed rule change will provide clarity to, and eliminate any ambiguity over, the scope of application of Nasdaq Rule 4340. In particular, the revised rule language will make clear that an issuer must satisfy the initial listing requirements whenever it enters into any transaction with a non-Nasdaq entity, resulting in a change of control

⁷ See Nasdaq IM-4350-1, footnote 4.

⁸ 15 U.S.C. 78f(b)(5).

of the listed company and potentially allowing the non-Nasdaq entity to obtain a Nasdaq listing. The Commission notes that the Rule will continue to apply to “backdoor listings” or “reverse mergers,” but that the proposed rule change will clarify that the Rule also applies to a broader category of business combinations that result in a change of control of the issuer. The Commission believes that, in the case of any transaction resulting in such a change of control, which includes a backdoor listing, it is important for Nasdaq to ensure that the company meets all initial listing criteria and is subject to the scrutiny normally applied to issuers seeking initial listing. Accordingly, the Commission finds that the proposed rule change is consistent with the Act.

⁹ 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).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁰ that the proposed rule change (SR-NASDAQ-2008-062) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹

Florence E. Harmon
Acting Secretary

¹⁰ 15 U.S.C. 78s(b)(2).

¹¹ 17 CFR 200.30-3(a)(12).