

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-57616; File No. SR-NASDAQ-2008-017)

April 3, 2008

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change to Clarify the Listing of Additional Shares Notification Process

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 March 6, 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 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 clarify the process concerning notifications of the listing of additional shares.<sup>3</sup> The text of the proposed rule change is below. Proposed new language is underlined; proposed deletions are in brackets.<sup>4</sup>

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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

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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> The Commission notes that 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 proposed rule changes herein.

<sup>4</sup> Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at [www.complinet.com/nasdaq](http://www.complinet.com/nasdaq).

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) – (16) No change.

(17) [The issuer shall be] A listed company is required to notify Nasdaq [on the appropriate form no later than] at least 15 calendar days prior to:

(A) (i) 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,

(ii) Nasdaq recognizes that when an issuer makes an equity grant to induce an individual to accept employment, as permitted by the exception contained in Rule 4350(i)(1)(A)(iv), it may not be practical to provide the advance notice otherwise required by this Rule. Therefore, when an issuer relies on that exception to make such an inducement grant without shareholder approval, it is sufficient to notify Nasdaq about the grant and the use of the exception no later than five calendar days after entering into the agreement to issue the securities; or

(B) – (C) No change.

(D) [entering into] issuing any common stock, or any security convertible into common stock in 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.

The notifications required by this paragraph must be made on the Notification Form:

Listing of Additional Shares and Nasdaq encourages companies to file this form as soon as practicable, even if all of the relevant terms are not yet known. Nasdaq reviews these forms to determine compliance with applicable Nasdaq rules, including the shareholder approval requirements. Therefore, if a company fails to file timely the form required by this paragraph, Nasdaq may issue a Staff Determination (pursuant to the Rule 4800 Series) that is either a public reprimand letter or a delisting determination.

(18) – (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) – (14) No change.

(15) The issuer of any class of securities listed on Nasdaq, except for American Depositary Receipts, [shall be] is required to notify Nasdaq [on the appropriate form no later than] at least 15 calendar days prior to:

(A) (i) 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.

(ii) Nasdaq recognizes that when an issuer makes an equity grant to induce an individual to accept employment, as permitted by the exception contained in Rule 4350(i)(1)(A)(iv), it may not be practical to provide the advance notice otherwise required by this Rule. Therefore, when an issuer relies on that exception to make such an inducement grant without shareholder approval, it is sufficient to notify Nasdaq about the grant and the use of the exception no later than five calendar days after entering into the agreement to issue the securities; or

(B) – (C) No change.

(D) [entering into] issuing any common stock, or any security convertible into common stock in 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.

The notifications required by this paragraph must be made on the Notification Form:

Listing of Additional Shares and Nasdaq encourages companies to file this form as soon as practicable, even if all of the relevant terms are not yet known. Nasdaq reviews these forms to determine compliance with applicable Nasdaq rules, including the shareholder approval requirements. Therefore, if a company fails to file timely the form required by this paragraph, Nasdaq may issue a Staff Determination (pursuant to the Rule 4800 Series) that is either a public reprimand letter or a delisting determination.

(16) – (26) No change.

(f) 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 4310(c)(17) and 4320(e)(15) require a company to provide 15 days notice prior to issuing securities in certain specified situations. These notifications allow Nasdaq to

make compliance determinations regarding stock issuances that are potentially subject to the shareholder approval rules.

Nasdaq proposes to clarify the timing requirement contained in Rules 4310(c)(17)(D) and 4320(e)(15)(D).<sup>5</sup> At present, the rules provide that notifications under these subparagraphs are required prior to “entering into” a described transaction. However, while Nasdaq has treated this requirement as being satisfied if the company files the required notification 15 days before issuing the securities, that interpretation is not transparent from the rule. As such, Nasdaq proposes to revise these provisions such that notice will instead be required prior to “issuing” the securities, consistent with the requirements in paragraphs (B) and (C) of those rules.<sup>6</sup>

In addition, Nasdaq proposes to modify the timing 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).<sup>7</sup> Because these grants can be made at the time the employment offer is accepted, companies may not be able to provide 15 days advance notice. Instead, the proposed rule would require notification no later than five calendar days after entering into the agreement to issue the securities.

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<sup>5</sup> See supra note 3.

<sup>6</sup> Nasdaq believes that this is also consistent with the requirements of other marketplaces. See, e.g., New York Stock Exchange LLC (“NYSE”) Listed Company Manual Section 703.01(B) (requiring subsequent listing applications to be filed at least two weeks before the company wishes the NYSE to take action upon the application) and American Stock Exchange LLC (“Amex”) Company Guide Sections 303(b) and 331 (requiring a company to submit an additional listing application at least one to two weeks in advance of the date on which Amex’s approval is needed).

<sup>7</sup> 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.”

Nasdaq also 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 and to provide transparency to the consequences of failing to timely file LAS notifications. Specifically, depending on the circumstances, Nasdaq may issue a Staff Determination (pursuant to the Rule 4800 Series) that is a public reprimand letter or a delisting determination. In determining whether to issue a Staff Determination, and whether such a Staff Determination 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.

Finally, in connection with this change, Nasdaq notes that it also intends to adopt a process whereby it will notify companies when the LAS review process has been completed. At present, Nasdaq does not routinely inform a company when it has completed its review.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>8</sup> in general, and with Section 6(b)(5) of the Act,<sup>9</sup> 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 a national market system, and, in general, to protect investors and the public interest. The

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<sup>8</sup> 15 U.S.C. 78f.

<sup>9</sup> 15 U.S.C. 78f(b)(5).

proposed rule change is designed to simplify and provide transparency to the operation of Nasdaq's notification requirements.

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.

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](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2008-017 on the subject line.



Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, 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 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].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>10</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>10</sup> 17 CFR 200.30-3(a)(12).