

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-56339; File No. SR-NASDAQ-2007-042)

August 30, 2007

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, to Modify the Entry and Annual Fees Paid by a Company that Lists on Nasdaq upon Emerging from Bankruptcy

I. Introduction

On April 13, 2007, 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” or “Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposal to modify the entry and annual fees paid by a company that lists on Nasdaq upon emerging from bankruptcy. The Exchange filed Amendment No. 1 to the proposed rule change on June 28, 2007. The proposal was published for comment in the Federal Register on July 25, 2007.³ The Commission received no comments on the proposal. This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposal

The Exchange proposes to modify the fees charged to companies that list upon emerging from bankruptcy. Specifically, Nasdaq proposes to waive the entry fee (including the application fee)⁴ that such companies would otherwise be required to pay. In addition, for companies listing on the NASDAQ Global Market (including the NASDAQ Global Select Market), Nasdaq proposes to charge the company the minimum annual listing fee applicable to companies on that

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 56092 (June 18, 2007), 72 FR 40915.

⁴ Nasdaq’s entry fee includes a \$5000 non-refundable application fee. The proposed waiver would also waive this part of the fee.

market (currently \$30,000) for the first (prorated) year that such a company is listed⁵ and for each of the subsequent two full calendar years.⁶ Finally, Nasdaq proposes that a company that emerges from bankruptcy and relists during the same year that it has previously paid an annual fee will not be required to pay a second annual fee for that year.

The Exchange believes that the proposed fee waivers are justified by the unique circumstances faced by companies emerging from bankruptcy. According to the Exchange, these companies typically are not raising any new capital at the time of listing, so the payment of entry and listing fees is more burdensome than for companies that are listing upon an initial public offering. Also, because of the desire in bankruptcy proceedings to ensure that creditors are paid as much as possible, the Exchange believes these companies are much more sensitive to both the initial and continued costs associated with listing. As such, the Exchange believes the proposed fees are reasonable and equitably allocated.

The Exchange has represented that the proposed rule change would not affect its commitment of resources to its regulatory oversight of the listing process or its other regulatory programs. Nasdaq reports that historically it has not listed a large number of companies emerging from bankruptcy in any given year.⁷ Moreover, Nasdaq stated that it would still conduct a complete review of these companies for compliance with Nasdaq listing standards in the same manner as any other company applying for listing on Nasdaq. The company must successfully complete that review process and demonstrate compliance with the initial listing requirements prior to being approved for listing.

⁵ Nasdaq prorates the annual fee for the year a company lists, based on the month in which the company lists.

⁶ All domestic companies on the NASDAQ Capital Market pay the same annual fee.

⁷ Nasdaq listed four companies upon their emergence from bankruptcy from January 1, 2006, through March 31, 2007.

III. Discussion

After careful consideration, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.⁸ In particular, the Commission finds that the proposal is consistent with Section 6(b)(4) of the Act,⁹ which requires that an exchange have rules that provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Commission also finds that the proposal is consistent with Section 6(b)(5) of the Act,¹⁰ which requires, *inter alia*, that the rules of a national securities exchange be designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, and not designed to permit unfair discrimination between issuers. The Commission has not received any comments on the proposal. This order approves the proposed rule change, as modified by Amendment No 1.

The Commission notes that a company who re-lists upon emerging from bankruptcy has usually paid either an entry fee to the Exchange or a similar initial listing fee to another national securities exchange at the time of its initial listing. In addition, with respect to the application of the minimum annual listing fee to a company which lists upon emergence from bankruptcy and the waiver of the annual fee for a company that emerges from bankruptcy and relists during the same year that it has previously paid an annual fee, the Commission notes that this fee reduction or waiver is a temporary one, designed to enable recently bankrupt companies to manage the costs associated with listing, consistent with the desire in bankruptcy proceeding to ensure that

⁸ 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).

⁹ 15 U.S.C. 78f(b)(4).

¹⁰ 15 U.S.C. 78f(b)(5).

creditors are paid as much as possible. For these reasons, the Exchange believes that reduction or waiver of the Exchange's fees in these cases is equitable.

The Commission also notes that the Exchange has represented that the waiver of entry fees and the reduction or waiver of annual listing fees in these limited circumstances should not affect its commitment of resources to its regulatory oversight of the listing process or its other regulatory programs.

Further, the proposed fee changes would not have any impact on whether a company is actually eligible to list on the Exchange. The Commission expects, and the Exchange has represented, that a full and independent review of compliance with Nasdaq listing standards will be conducted for any company seeking to take advantage of the proposed fee changes, in the same manner as for any company that applies for listing on the Exchange.

In light of these arguments, the Commission agrees that the proposed waiver and fee cap, which are retroactively effective to April 13, 2007, the date of the filing of the proposed rule change, do not constitute an inequitable allocation of reasonable dues, fees, and other charges, do not permit unfair discrimination between issuers, and are generally consistent with the Act.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹¹ that the proposed rule change (File No. SR-NASDAQ-2007-042), as modified by Amendment No. 1, be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

Florence E. Harmon
Deputy Secretary

¹¹ Id.

¹² 17 CFR 200.30-3(a)(12).