

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59219; File No. SR-NASDAQ-2008-099]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Temporary Suspension of the Continued Listing Requirements Related to Bid Price and Market Value of Publicly Held Shares for Listing on the Nasdaq Stock Market Through April 19, 2009

January 8, 2009.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on December 18, 2008, The NASDAQ Stock Market LLC ("Nasdaq") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II 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 extend the temporary suspension of the application of the continued inclusion bid price and market value of publicly held shares requirements for listing on the Nasdaq Stock Market through April 19, 2009.

#### 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

On October 16, 2008, Nasdaq filed a proposed rule change, which was immediately effective, to temporarily suspend the bid price<sup>4</sup> and market value of publicly held shares<sup>5</sup> continued listing requirements otherwise applicable to issuers of common stock, preferred stock, secondary classes of common stock, shares or certificates of beneficial interest of trusts, limited partnership interests, American Depositary Receipts, and their equivalents.<sup>6</sup> This suspension is currently scheduled to last until January 16, 2009, to provide temporary relief to companies from the application of these requirements during a period in which the financial markets face almost unprecedented turmoil, resulting in a crisis in investor confidence and concerns about the proper functioning of the securities markets.<sup>7</sup>

<sup>4</sup> Nasdaq's continued listing requirements relating to bid price are set forth in Rules 4310(c)(4), 4320(e)(2)(E)(ii), 4450(a)(5), 4450(b)(4), and 4450(h)(3) and the related compliance periods are set forth in Rules 4310(c)(8)(D), 4320(e)(2)(E)(ii), and 4450(e)(2). Under these rules, a security is considered deficient if it fails to achieve at least a \$1 closing bid price for a period of 30 consecutive business days. Once deficient, Capital Market issuers are provided one automatic 180-day period to regain compliance. Thereafter, these issuers can receive an additional 180-day compliance period if they comply with all Capital Market initial inclusion requirements except bid price. Global Market issuers are also provided one automatic 180-day period to regain compliance, after which they can transfer to the Capital Market, if they comply with all Capital Market initial inclusion requirements except bid price, to take advantage of the second 180-day compliance period. A company can regain compliance by achieving a \$1 closing bid price for a minimum of ten consecutive business days.

<sup>5</sup> Nasdaq's continued listing requirements relating to market value of publicly held shares are set forth in Rules 4310(c)(7), 4320(e)(5), 4450(a)(2), 4450(b)(3) and 4450(h)(2) and the related compliance periods are set forth in Rules 4310(c)(8)(B) and 4450(e)(1). Under these rules, a security is considered deficient if it fails to achieve the minimum market value of publicly held shares requirement for a period of 30 consecutive business days. Thereafter, companies have a compliance period of 90 calendar days to achieve compliance by meeting the applicable standard for a minimum of ten consecutive business days.

<sup>6</sup> Securities Exchange Act Release No. 58809 (October 17, 2008), 73 FR 63222 (October 23, 2008) (SR-NASDAQ-2008-082). One comment was submitted on this proposal by Alan F. Eisenberg, Executive Vice President, the Biotechnology Industry Organization. This comment supported the suspension and "any efforts by the Commission and NASDAQ to extend [the suspension], as necessary, beyond the termination date of January 16, 2009."

<sup>7</sup> See, e.g., Securities Exchange Act Release No. 58588 (September 18, 2008), 73 FR 55174

Market conditions have not improved since the suspension began and, in fact, both the number of securities trading below \$1 and the number of securities trading between \$1 and \$2 on Nasdaq has increased. Nasdaq continues to believe that there was no fundamental change in the underlying business model or prospects for many of these companies, and that a decline in general investor confidence has resulted in depressed pricing for companies that otherwise remain suitable for continued listing. These same conditions continue to make it difficult for companies to successfully implement a plan to regain compliance with the price or market value of publicly held shares tests.

Given these extraordinary market conditions, Nasdaq has determined that it is appropriate to continue the temporary suspension of the bid price and market value of publicly held shares requirements for an additional three months, until April 19, 2009. Under this proposal, companies would not be cited for new bid price or market value of publicly held shares deficiencies during the suspension period, and the time allowed to companies already in a compliance period or in the hearings process for bid price or market value of publicly held shares deficiencies would remain suspended with respect to those requirements.<sup>8</sup> Following the temporary suspension, any new deficiencies with the bid price or market value of publicly held shares requirements would be determined using data starting on April 20, 2009.<sup>9</sup> When the suspension expires, companies that were in a compliance period as of October 16, 2008, when the suspension first began, would receive the balance of any pending compliance

(September 24, 2008) ("The Commission is aware of the continued potential of sudden and excessive fluctuations of securities prices and disruption in the functioning of the securities markets that could threaten fair and orderly markets. Given the importance of confidence in our financial markets as a whole, we have also become concerned about sudden and unexplained declines in the prices of securities. Such price declines can give rise to questions about the underlying financial condition of an issuer, which in turn can create a crisis of confidence without a fundamental underlying basis. This crisis of confidence can impair the liquidity and ultimate viability of an issuer, with potentially broad market consequences.")

<sup>8</sup> Nasdaq would continue to identify on its Web site and in its daily data feed to vendors those companies in a compliance period or in the hearings process as not satisfying the continued listing standards, unless the company regains compliance during the suspension. A company would continue to be subject to delisting for failure to comply with other listing requirements.

<sup>9</sup> Nasdaq would not consider the bid price or market value of publicly held shares for the period before or during the suspension with respect to a company that was not yet non-compliant with those requirements at the start of the suspension.

<sup>13</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

periods in effect at the time of the initial suspension.<sup>10</sup> Similarly, companies that were in the Hearings process prior to October 16, 2008, would resume in that process at the same stage they were in when the suspension first went into effect. Nasdaq will continue to monitor securities to determine if they regain compliance during the temporary suspension.

Nasdaq believes that extending the temporary suspension will permit companies to continue focusing on running their businesses, rather than satisfying market-based requirements that are largely beyond their control in the current environment. Moreover, this extension will allow investors to buy shares of some of these lower-priced securities without fear that the company will receive a delisting notification or be delisted in the very near term.<sup>11</sup> Nasdaq will continue to monitor market conditions and consider whether it is appropriate to further extend the suspension.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>12</sup> in general and with Sections [sic] 6(b)(5) of the Act,<sup>13</sup> 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 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 is designed to remove uncertainty regarding the ability of companies to remain listed on Nasdaq during this especially turbulent market environment, thereby protecting investors, facilitating transactions in securities, and removing an impediment to a free and open market.

<sup>10</sup> For example, if a company was 120 days into its first 180-day compliance period for a bid price deficiency when the suspension first started and the company does not regain compliance during the suspension, the company would have sixty days remaining, starting on April 20, 2009, to regain compliance. The company may be eligible for the second 180-day compliance period if it satisfies the conditions for the second compliance period at the conclusion of the first compliance period.

<sup>11</sup> As noted above, following the suspension, companies presently in the compliance process will remain at that same stage of the process.

<sup>12</sup> 15 U.S.C. 78f.

<sup>13</sup> 15 U.S.C. 78f(b)(5).

## 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

While written comments were not solicited about the proposed extension, there was one comment submitted by the Biotechnology Industry Organization on the original suspension of the bid price and market value of publicly held shares requirements, which supported the extension. That comment is described in footnote 6, above.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>14</sup> and Rule 19b-4(f)(6) thereunder.<sup>15</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

## 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:

<sup>14</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>15</sup> 17 CFR 240.19b-4(f)(6). Pursuant to Rule 19b-4(f)(6)(iii) under the Act, the Exchange is required to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has requested that the Commission waive the 5-day pre-filing notice requirement. The Commission has determined to waive this requirement.

## 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-2008-099 on the subject line.

## Paper Comments

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

All submissions should refer to File Number SR-NASDAQ-2008-099. 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 a.m. and 3 p.m. Copies of the 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-2008-099 and should be submitted on or before February 5, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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<sup>16</sup> 17 CFR 200.30-3(a)(12).