

**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 or disapprove the 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. In particular, the Commission seeks comment on the following:

1. NYSE Arca, Inc. recently proposed to allow the listing and trading of a "mini" option product.<sup>6</sup> The Exchange's proposal would allow the listing and trading of Mini Options contracts with contract specifications that differ from the similar product proposed by NYSE Arca. Due to the differences in contract specifications, these two similar products, even if on the same underlying security, would not necessarily be fungible. The Commission requests comment on whether the listing and trading of two distinct and non-fungible "mini" options products, particularly if on the same underlying security, would create investor confusion or raise any other issues or concerns for market participants.

2. As discussed above, the Exchange's proposal would provide for contract specifications for Mini Options that include: (i) The strike prices would be set at the same level for Mini Options as for corresponding standard contracts; (ii) the premium multiplier would be 10 for Mini Options (rather than 100 as for the standard contract) and the premium would be expressed in terms of dollars per 1/10th part of the total value of the contract; and (iii) the Exchange would designate Mini Options with different trading symbols than the standard contract. The Commission requests comment regarding the Exchange's proposed contract methodology.<sup>7</sup>

Comments may be submitted by any of the following methods:

<sup>6</sup> See Securities Exchange Act Release No. 66725 (April 3, 2012), 77 FR 21120 (April 9, 2012) (SR-NYSEArca-2012-26).

<sup>7</sup> For a description of the proposed contract methodology for the mini option product proposed by NYSE Arca, see *id.*

#### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-ISE-2012-26 on the subject line.

#### Paper Comments

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

All submissions should refer to File Number SR-ISE-2012-26. This file number should be included on the subject line if email 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. 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-ISE-2012-26 and should be submitted on or before May 15, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>8</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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<sup>8</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-66830; File No. SR-NASDAQ-2012-002]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval to Proposed Rule Change, as Modified by Amendment No. 1, To Adopt an Alternative to the \$4 Per Share Initial Listing Bid Price Requirement for the Nasdaq Capital Market of Either \$2 Closing Price Per Share or \$3 Closing Price Per Share, if Certain Other Listing Requirements are Met

April 18, 2012.

#### I. Introduction

On January 3, 2012, The NASDAQ Stock Market LLC ("Exchange" or "Nasdaq") filed with the Securities and Exchange Commission ("Commission"), 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> a proposal to adopt an alternative to the \$4 minimum bid price initial listing requirement for the Nasdaq Capital Market of either \$2 or \$3, if certain other listing requirements are met. The proposed rule change was published for comment in the **Federal Register** on January 20, 2012.<sup>3</sup> The Commission received one comment on the proposal.<sup>4</sup> On March 1, 2012, the Commission extended to April 19, 2012 the time period in which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved.<sup>5</sup> Nasdaq filed Amendment No. 1 to the proposed rule change on April 16, 2012.<sup>6</sup> The Commission is

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

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 66159 (January 13, 2012), 77 FR 3021 (January 20, 2012) ("Notice").

<sup>4</sup> See letter from David A. Donohoe, Jr., Donohoe Advisory Associates LLC, to Elizabeth M. Murphy, Secretary, Commission, dated February 10, 2012 ("Donohoe Letter").

<sup>5</sup> See Securities Exchange Act Release No. 66499 (March 1, 2012), 77 FR 13680 (March 7, 2012).

<sup>6</sup> In Amendment No. 1, Nasdaq modified the proposal by, among other things: (1) Changing the alternative minimum price requirement from a bid price to a closing price that must be maintained for at least five consecutive business days; (2) stating that in the event a security listed under the alternative standard reaches a \$4 closing price, in determining whether the security qualifies for listing under the existing Nasdaq Capital Market listing requirement Nasdaq would review the security to ensure that it meets both the quantitative and qualitative listing standards and would require that the security maintain the closing price for five

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publishing this notice to solicit comments on Amendment No. 1 from interested persons and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

## II. Description of the Amended Proposal

Currently, issuers seeking to list their securities on the Nasdaq Capital Market must meet, among other things, the initial listing standards of the Nasdaq Capital Market. The initial listing standards include quantitative and qualitative requirements. To qualify for listing on the Nasdaq Capital Market, an issuer's security must, among other things, have a minimum bid price of at least \$4 per share.<sup>7</sup>

Nasdaq proposes to add an alternative to the \$4 minimum bid price per share requirement. Under the proposed alternative, a security would qualify for listing on the Nasdaq Capital Market if, for at least five consecutive business days prior to approval, the security has a minimum closing price of at least \$3 per share, if the issuer meets the Equity or Net Income standards,<sup>8</sup> or at least \$2 per share, if the issuer meets the Market Value of Listed Securities standard.<sup>9</sup>

consecutive business days unless Nasdaq extends this five-day period to a longer period based on the facts and circumstances (Nasdaq would notify the issuer of any such qualification); (3) specifying that in determining whether a \$4 closing price has been maintained for at least five consecutive business days in order to qualify for listing under the existing Nasdaq Capital Market listing requirement Nasdaq would use the Nasdaq Official Closing Price, if available, or the consolidated closing price; and (4) specifying that Nasdaq will update on a daily basis the list that it has proposed to publish on its Web site of securities that subsequently become penny stocks.

<sup>7</sup> See Nasdaq Rule 5505(a)(1). The term "bid price" refers to the closing bid price. See Nasdaq Rule 5005(a)(3).

<sup>8</sup> See Nasdaq Rule 5505(b)(1) and Nasdaq Rule 5505(b)(3). Under the Equity Standard, an issuer would need to meet, among other things: (A) stockholders' equity of at least \$5 million; (B) market value of publicly held shares of at least \$15 million; and (C) two year operating history. Under the Net Income Standard, an issuer would have to meet, among other things: (A) Net income from continuing operations of \$750,000 in the most recently completed fiscal year or in two of the three most recently completed fiscal years; (B) stockholders' equity of at least \$4 million; and (C) market value of publicly held shares of at least \$5 million.

<sup>9</sup> See Nasdaq Rule 5505(b)(2). Under the Market Value of Listed Securities Standard, an issuer would need to meet, among other things: (A) Market value of listed securities of at least \$50 million (current publicly traded issuers must meet this requirement and the price requirement for 90 consecutive trading days prior to applying for listing if qualifying to list only under the market value of listed securities standard); (B) stockholders' equity of at least \$4 million; and (C) market value of publicly held shares of at least \$15 million. Nasdaq proposes to revise Nasdaq Rule 5505(b)(2) in order to make it consistent with the

Further, for issuers to qualify their securities under this alternative price requirement, the issuer must demonstrate that it has net tangible assets in excess of \$2 million if the issuer has been in continuous operation for at least three years. If the issuer has been in continuous operation for less than three years, then the issuer must demonstrate net tangible assets in excess of \$5 million. The issuer could also be listed under the alternative, lower \$2 or \$3 price requirement if the issuer has average revenue of at least \$6 million for the last three years.<sup>10</sup>

Nasdaq is proposing to add new interpretative material in connection with this alternative price requirement. Proposed IM-5505 states that an issuer that qualifies its securities for initial listing under the alternative price requirement could become a "penny stock" if the issuer fails the net tangible assets and revenue tests after listing and does not satisfy any of the other exclusions from being a penny stock contained in Rule 3a51-1 under the Act.<sup>11</sup> Nasdaq would monitor issuers whose securities are listed under the alternative price requirement, and publish on its Web site on a daily basis a list of those companies that no longer satisfy the net tangible assets or revenue tests, nor any other exclusions from being a penny stock under Rule 3a51-1. Moreover, the proposed IM-5505, as amended, would provide that if an issuer initially lists its securities under the proposed alternative price requirement and the securities subsequently achieve a \$4 closing price over at least five consecutive business

proposal. In particular, Nasdaq Rule 5505(b)(2)(A) would be revised to delete the specific reference to \$4 bid price requirement, since an issuer seeking to initially list its securities under the Market Value of Listed Securities Standard using the proposed alternative price requirement would have to maintain a closing price of at least \$2 per share for 90 consecutive trading days. See email from Arnold Golub, Vice President, Office of the General Counsel, Nasdaq, to Sharon Lawson, Senior Special Counsel, Division of Trading and Markets, Commission, on April 18, 2012.

<sup>10</sup> Nasdaq would define net tangible assets or average revenues based on the issuer's most recently filed audited financial statements that satisfy the requirements of the Commission or Other Regulatory Authority, so long as such financial statements are dated less than 15 months prior to the date of listing. Nasdaq Rule 5005(a)(31) defines "Other Regulatory Authority" as "(i) in the case of a bank or savings authority identified in Section 12(i) of the Act, the agency vested with authority to enforce the provisions of Section 12 of the Act; or (ii) in the case of an insurance company that is subject to an exemption issued by the Commission that permits the listing of the security, notwithstanding its failure to be registered pursuant to section 12(b), the Commissioner of Insurance (or other officer or agency performing a similar function) of its domiciliary state."

<sup>11</sup> See 17 CFR 240.3a51-1.

days<sup>12</sup> and satisfy all other initial listing criteria, the securities would no longer be considered as having listed under the alternative price requirement, and would no longer be monitored for compliance with that requirement.<sup>13</sup> In Amendment No. 1, Nasdaq amended the proposal to state that the \$4 closing price would be the Nasdaq Official Closing Price,<sup>14</sup> or if such price is not available, the consolidated closing price distributed under the applicable National Market System Plan. In Amendment No. 1, Nasdaq also stated that it would notify a company that initially lists its securities under the alternative standard of its subsequent qualification for listing under the \$4 price requirement of Rule 5505(a)(1)(A).

Nasdaq's stated purpose for its proposal is to compete with NYSE Amex for initial listings of companies with securities priced between \$2 and \$4.<sup>15</sup> Currently, NYSE Amex is able to list companies priced between \$2 and \$4 without their securities being considered "penny stocks," because NYSE Amex benefits from the "grandfather" exclusion set forth in Rule 3a51-1(a)(1) under the Act,<sup>16</sup> which does not apply to Nasdaq.<sup>17</sup> As

<sup>12</sup> See Amendment No. 1, note 6, *supra*. As provided in proposed Amendment No. 1 to IM-5505, Nasdaq may extend this five-day period based on any fact or circumstance, including the margin of compliance, the trading volume, the Market Maker montage, the trend of the security's price, or information or concerns raised by other regulators concerning the trading of the security.

<sup>13</sup> In Amendment No. 1 Nasdaq also clarified that, for purposes of satisfying the Market Value of Listed Securities Standard to be no longer treated as listed under the alternative standard, a company would be required to maintain for 90 consecutive trading days the market value of their listed securities at \$50 million and a \$4 bid price, although this 90-day period may overlap with the five-consecutive-business-day period during which the company must maintain a \$4 closing price. The company would, of course, also have to meet the other remaining quantitative and qualitative listing standards to no longer be considered listed under the alternative standard and therefore no longer subject to the penny stock rules. See Nasdaq Rule 5505(b)(2)(A).

<sup>14</sup> See Nasdaq Rule 4754(b)(4) and Amendment No. 1, *supra* note 6. In Amendment No. 1, Nasdaq stated that the Nasdaq Official Closing Price is set by the Nasdaq Closing Cross process, using an algorithm to find a price to match all eligible buy and sell orders at the close. Nasdaq stated that a closing cross occurs for every security listed on Nasdaq. If no trades occur as a result of the closing cross, then the Nasdaq Official Closing Price is the last matched trade that occurred that day on Nasdaq.

<sup>15</sup> See Notice, *supra* at Note 3.

<sup>16</sup> 17 CFR 240.3a51-1(a)(1).

<sup>17</sup> See Notice, *supra* at Note 3; NYSE Amex Company Guide Section 102(b). Nasdaq filed a petition seeking an exemption from Rule 3a51-1(a)(2)(i)(C) to allow Nasdaq to adopt initial listing standards identical to NYSE Amex's or, in the alternative, elimination of the grandfather provision. See Notice, *supra* at Note 3; see also Request for Rulemaking to Allow the Nasdaq

a result, in order to compete with NYSE Amex for listing securities priced between \$2 and \$4, and avoid their being considered “penny stocks,” Nasdaq’s proposed Rule 5505(a)(1)(B) incorporates the net tangible assets and average revenue tests contained in the alternative penny stock exclusion set forth in Rule 3a51–1(g) under the Act<sup>18</sup> so that Nasdaq can initially list companies priced between \$2 and \$4 on the Nasdaq Capital Market that are not considered “penny stocks.”<sup>19</sup> As noted above, however, ongoing monitoring of listed companies relying on this alternative penny stock exclusion is required in order to assure they continue to meet the net tangible assets and average revenue tests set forth in that exclusion.

### III. Comment Summary

The Commission received one comment letter on the proposal, in which the commenter recommended that the Commission initiate a process to amend Rule 3a51–1 under the Act<sup>20</sup> and then approve Nasdaq’s proposal.<sup>21</sup> The commenter noted that NYSE Amex’s initial listing price requirements—\$3 per share under three of NYSE Amex’s listing standards and \$2 per share under a fourth listing standard—are lower than Nasdaq’s current \$4 per share initial listing price requirement.<sup>22</sup> The commenter stated his belief that this disparity is the main reason securities of companies trading between \$2 and \$4 per share list on NYSE Amex instead of the Nasdaq Capital Market.<sup>23</sup> The commenter also expressed his belief that the Commission should “level the playing field” between NYSE Amex and Nasdaq.<sup>24</sup> The commenter urged the Commission to focus on what changes to the penny stock rules must be made in order to eliminate the purported regulatory inequality between the two exchanges and carry out its mandate to ensure fair competition among the exchanges.<sup>25</sup>

Further, the commenter stated that the list of issuers published on Nasdaq’s Web site would be “unwieldy and certain to be less than fully transparent.”<sup>26</sup> The commenter

suggested that this aspect of Nasdaq’s proposal would “allow the NYSE Amex to maintain a competitive advantage over Nasdaq” because issuers listing on Nasdaq would risk being deemed a “penny stock” in the future whereas issuers listing on NYSE Amex incur no such risk.<sup>27</sup> Again, the commenter suggested that the solution to this purported regulatory inequality is to amend the penny stock rules.<sup>28</sup>

### IV. Discussion and Commission’s 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.<sup>29</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>30</sup> 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 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; and not be designed to permit unfair discrimination between customers, issuers, brokers or dealers.

The development and enforcement of meaningful listing standards for an exchange is of substantial importance to financial markets and the investing public. Among other things, listing standards provide the means for an exchange to screen issuers that seek to become listed and to provide listed status only to those that are bona fide companies with sufficient public float, investor base, and trading interest likely to generate depth and liquidity sufficient to promote fair and orderly markets. Meaningful listing standards also are important given investor expectations regarding the nature of securities that have achieved an exchange listing, and the role of an exchange in overseeing its market, assuring compliance with its listing

standards and detecting and deterring manipulative trading activity.

Rule 3a51–1 under the Act<sup>31</sup> defines “penny stock” as any equity security that does not satisfy one of the exceptions enumerated in subparagraphs (a) through (g) under the Rule. If a security is a penny stock, Rules 15g-1 through 15g-9 under the Act<sup>32</sup> impose certain additional disclosure and other requirements on brokers and dealers when effecting transactions in such securities. Currently, Nasdaq-listed securities are not considered penny stocks because they comply with the requirements in Rule 3a51–1(a)(2) under the Act,<sup>33</sup> which excepts from the definition of penny stock securities registered on a national securities exchange that have initial listing standards that meet certain requirements, including a \$4 bid price at the time of listing. Nasdaq listing standards currently include all the requirements to qualify for the penny stock exception under Rule 3a51–1(a)(2) so that today, once a security is initially listed on Nasdaq, the security will not be considered a penny stock for so long as it is listed on Nasdaq.

As noted above, the penny stock rules also exclude from the definition of penny stock, under a “grandfather” provision, securities registered on a national securities exchange that has been continually registered as such since April 20, 1992, and has maintained quantitative listing standards that are substantially similar to or stricter than those listing standards that were in place on the exchange on January 8, 2004.<sup>34</sup> NYSE Amex meets this standard, but Nasdaq, which was more recently registered as a national securities exchange, does not. Accordingly, NYSE Amex’s initial listing price requirements of either \$2 or \$3 are grandfathered under this provision. Nasdaq has proposed its alternative price listing requirement in order to compete with NYSE Amex for listings of securities priced between \$2 and \$4.

The Commission has carefully considered Nasdaq’s proposal under the Exchange Act requirements. Under Nasdaq’s proposed alternative price standard, companies that maintain a \$2 or \$3 closing price for at least five consecutive business days would qualify for listing if, among other things, they meet the net tangible assets or average revenue tests of the alternative penny stock exclusion set forth in Rule

Capital Market to Adopt Initial Listing Price Requirements Identical to NYSE Amex, File No. 4–604 (May 25, 2010).

<sup>18</sup> 17 CFR 240.3a51–1(g).

<sup>19</sup> See Notice, *supra* at Note 3.

<sup>20</sup> 17 CFR 240.3a51–1(g).

<sup>21</sup> See Donohoe Letter.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> In approving this proposed rule change, as modified by Amendment No. 1, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>30</sup> 15 U.S.C. 78f(b)(5).

<sup>31</sup> 17 CFR 240.3a51–1.

<sup>32</sup> 17 CFR 240.15g–1 *et seq.*

<sup>33</sup> 17 CFR 240.3a51–1(a)(2).

<sup>34</sup> See 17 CFR 240.3a51–1(a)(1).

3a51-1(g).<sup>35</sup> This presents novel issues since it is the first time that an exchange-listed security could become subject to the penny stock rules following initial listing if it no longer meets the net tangible assets or average revenue tests of the alternative exclusion, and does not qualify for another exclusion under the penny stock rules.<sup>36</sup> Further, unlike securities listed under Nasdaq's existing standards, which have a blanket exclusion from the penny stock rules, broker-dealers that effect recommended transactions in securities that originally qualified for listing under Nasdaq's alternative price standard would, among other things, under Rule 3a51-1(g), need to review current financial statements of the issuer to verify that it meets the applicable net tangible assets or average revenue test, have a reasonable basis for believing they remain accurate, and preserve copies of those financial statements as part of its records.

To facilitate compliance by broker-dealers, Nasdaq has committed to monitor the companies listed under the alternative price standard and to publish on its Web site, and update daily, a list of any such company that no longer meets the net tangible assets or average revenue tests of the penny stock exclusion, and which does not satisfy any other penny stock exclusion. Nasdaq also specifically reminds broker-dealers of their obligations under the penny stock rules. The Commission believes that, although the listing of securities that do not have a blanket exclusion from the penny stock rules and require ongoing monitoring may increase compliance burdens on broker-dealers, the additional steps proposed by Nasdaq to facilitate compliance should reduce those burdens and that, on balance, Nasdaq's proposal is consistent with the requirement of Section 6(b)(5) of the Act that the rules of an exchange, among other things, be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of

<sup>35</sup> See 17 CFR 240.3a51-1(g). As set forth in note 9, *supra*, a company seeking to qualify under only the Market Value of Listed Securities Standard would, among other things, also be required to maintain for 90 consecutive trading days the market value of their listed securities at \$50 million and the \$2 price requirement prior to applying to list under the alternative standard.

<sup>36</sup> The Commission has previously noted the potential for abuse with respect to penny stocks. See, e.g., Securities Exchange Act Release No. 49037 (January 16, 2004), 69 FR 2531 (January 8, 2004) ("Our original penny stock rules reflected Congress' view that many of the abuses occurring in the penny stock market were caused by the lack of publicly available information about the market in general and about the price and trading volume of particular penny stocks").

trade and, in general, to protect investors and the public interest.

Further, to address concerns about the potential manipulation of lower priced stocks to meet the initial listing requirements, Nasdaq has amended its proposal to require a company to maintain a \$2 or \$3 closing price for five consecutive business days prior to approval for listing, rather than on a single day, as proposed.<sup>37</sup> The Commission believes that requiring the minimum \$2 or \$3 closing price to be maintained for a longer period should reduce the risk that some might attempt to manipulate or otherwise artificially inflate the closing price in order to allow a security to qualify for listing. In addition, Nasdaq has noted that it would exercise its discretionary authority to deny initial listing if there were particular concerns about an issuer, such as its ability to maintain compliance with continued listing standards or if there were other public interest concerns. The Commission believes these additional measures, in conjunction with Nasdaq's surveillance procedures and pre-listing qualification review, should help reduce the potential for price manipulation to meet the new initial listing standards, and in this respect are designed to prevent fraudulent and manipulative acts and practices consistent with Section 6(b)(5) of the Act.

Additionally, under Nasdaq's proposal, if securities listed under the alternative price listing standard subsequently achieve a \$4 closing price over at least five consecutive business days, and the issuer and the securities satisfy all other relevant initial listing criteria, then such securities would no longer be considered as having listed under the alternative price requirement. As with the initial \$2 and \$3 closing price requirements, the Commission has considered whether this provision could provide an incentive for market participants to manipulate the price of the security in order to achieve the \$4 closing price and no longer be considered as having listed under the alternative price requirement. The Commission notes that Nasdaq has taken several steps to address these concerns. First, Nasdaq has represented that it would conduct a robust, wholesale review of the issuer's compliance with all applicable initial

<sup>37</sup> The Commission notes that Nasdaq's current rules only require a company to achieve a \$4 bid price on a single day to qualify for initial listing, except for reverse merger companies, which have to maintain a closing price of \$4 per share or higher for a sustained period of time, but in no event for less than 30 of the most recent 60 trading days. See Nasdaq Rule 5110(c)(1)(B) and (c)(2)(B).

listing criteria, including qualitative and quantitative standards, at the time the \$4 closing price is achieved, and would have a reasonable basis to believe that that price was legitimately, and not manipulatively, achieved. Secondly, Nasdaq has further represented that it is developing enhanced surveillance procedures to monitor securities listed under the alternative price requirement as they approach \$4 to identify anomalous trading that would be indicative of potential price manipulation. Finally, the amended proposal requires the \$4 closing price to be met over at least a five consecutive business day period in order to reduce the potential for price manipulation. The Commission believes that these measures should help reduce the potential for price manipulation to achieve the \$4 closing price, and in this respect are designed to prevent fraudulent and manipulative acts and practices consistent with Section 6(b)(5) of the Act.<sup>38</sup>

In sum, the Commission believes that the Nasdaq proposal, as amended, reasonably addresses the concerns discussed above. We also note that Nasdaq's proposal is more rigorous than existing NYSE Amex listing standards in that it additionally requires the net tangible assets or average revenue test set forth in Rule 3a51-1(g) to be met. For the reasons set forth above, the Commission finds that the proposed rule change is consistent with the Act, including the provisions of Section 6(b)(5) thereunder.

#### V. Solicitation of Comments of Amendment No. 1

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2012-002 on the subject line.

<sup>38</sup> We note that the commenter recommended that the Commission instead amend the penny stock rules to level the playing field between Nasdaq and NYSE Amex, and eliminate what he views as regulatory inequality between the two exchanges. The Commission, however, notes that the proposal before the Commission must be considered on its merits in accordance with the substantive and procedural requirements of Section 19(b) under the Act. 15 U.S.C. 78s(b).

### 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-2012-002. This file number should be included on the subject line if email 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, 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 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-2012-002 and should be submitted on or before May 15, 2012.

### VI. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1

Amendment No. 1 revises the proposal to, among other things, change the minimum bid price requirement to a closing price, require that a security must have a \$4 closing price for at least five consecutive business days, rather than one day as originally proposed, before it will be reevaluated under both the qualitative and quantitative initial listing standards, and require daily publication of the list of securities that become subject to the penny stock rules. The Commission believes that the changes in Amendment No. 1 strengthen the proposal and, as discussed above, address concerns about the potential for manipulation. Accordingly, the Commission also finds good cause, pursuant to Section 19(b)(2)

of the Act,<sup>39</sup> for approving the proposed rule change, as modified by Amendment No. 1, prior to the 30th day after the date of publication of notice in the **Federal Register**.

### VII. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>40</sup> that the proposed rule change (SR-NASDAQ-2012-002), as modified by Amendment No. 1, is approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>41</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2012-9795 Filed 4-23-12; 8:45 am]

**BILLING CODE 8011-01-P**

### SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #13050 and #13051]

#### Kentucky Disaster Number KY-00045

**AGENCY:** Small Business Administration.

**ACTION:** Amendment 2.

**SUMMARY:** This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the Commonwealth of Kentucky (FEMA-4057-DR), dated 03/16/2012.

*Incident:* Severe Storms, Tornadoes, Straight-line Winds, and Flooding.

*Incident Period:* 02/29/2012 through 03/03/2012.

**DATES:** *Effective Date:* 04/12/2012.

*Physical Loan Application Deadline Date:* 05/15/2012.

*Economic Injury (EIDL) Loan Application Deadline Date:* 12/17/2012.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** The notice of the President's major disaster declaration for Private Non-Profit organizations in the Commonwealth of KENTUCKY, dated 03/16/2012, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties:

<sup>39</sup> 15 U.S.C. 78s(b)(2).

<sup>40</sup> 15 U.S.C. 78s(b)(2).

<sup>41</sup> 17 CFR 200.30-3(a)(12).

Adair, Bath.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**James E. Rivera,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. 2012-9757 Filed 4-23-12; 8:45 am]

**BILLING CODE 8025-01-P**

### SMALL BUSINESS ADMINISTRATION

#### Announcement of National Small Business Week Video Contest Under the America Competes Reauthorization Act of 2011

**AGENCY:** Small Business Administration (SBA).

**ACTION:** Notice.

**SUMMARY:** In celebration of National Small Business Week 2012, the U.S. Small Business Administration (SBA) announces a video contest (the "Contest") for small businesses to show how they have been assisted by an SBA program or service. This **Federal Register** notice is required under the Section 105 of the America COMPETES Reauthorization Act of 2011.

**DATES:** The submission period for entries begins 12 p.m. EDT, April 16, 2012, and ends 5 p.m. EDT, May 11, 2012. Winners will be announced during National Small Business Week 2012, unless the term of the Contest is extended by SBA.

**FOR FURTHER INFORMATION CONTACT:** Stephen Morris, Office of Communications & Public Liaison, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416; Telephone (202) 205-7422; [stephen.morris@sba.gov](mailto:stephen.morris@sba.gov).

#### SUPPLEMENTARY INFORMATION:

##### Competition Details

1. *Subject of the Competition:* In celebration of National Small Business Week 2012, the U.S. Small Business Administration is looking for creative videos from small businesses that show how they have been assisted by an SBA program or service, including, but not limited to, counseling, training, guaranteed loans, government contracts, and disaster recovery. The video contest will provide recognition to small businesses across the country that are utilizing SBA's programs and services to create jobs, serve as pillars in their communities, and to create the next big products that will help keep America competitive.