

The NASDAQ Stock Market Listing Qualifications Updates

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NASDAQ OMXSM

Overview

- The New NASDAQ Listing Rulebook
- Update on Late Filing Rules
- Efforts to Address the Financial Crisis
- Upcoming Rule Changes
- Shareholder Approval Issues in Today's Economy

The New NASDAQ Listing Rulebook

- NASDAQ's goal was to reorganize and rewrite the rules in a more logical structure, without making substantive changes.
 - SEC Notice of Filing: <http://www.sec.gov/rules/sro/nasdaq/2009/34-59663.pdf>
 - The New Listing Rules: http://www.nasdaq.com/about/Listing_Rules_041309.pdf
- As the old Listing Rules evolved over the last thirty years they became less intuitive and more difficult to navigate.
- NASDAQ has placed all rules applicable to the initial listing, continued listing and delisting of securities on the NASDAQ Stock Market under the Rule 5000 Series.
- The new Rules will be implemented on April 13, 2009.

The New NASDAQ Listing Rulebook

Notable Changes

- The new rules are organized so that:
 - The 5000 Series contains definitions that are used throughout the Listing Rules.
 - The 5100 Series sets forth the scope and use of NASDAQ's discretionary authority.
 - The 5200 Series houses NASDAQ's general listing requirements.
 - The 5300, 5400 and 5500 Series are dedicated sections that outline the initial and continued listing requirements of the Global Select, Global and Capital Market Tiers.
 - The 5600 Series is dedicated solely to NASDAQ's Corporate Governance rules.
 - The 5700 Series provides the rules relating to structured products and other non-traditional securities.
 - The 5800 Series contains expanded and clarified rules concerning companies that fail to meet a listing standard and the rules applicable to the appellate process.
 - The 5900 Series sets forth the fees applicable to applicants and listed companies.

The New NASDAQ Listing Rulebook

Notable Changes

- Examples:
 - Rules relating to a particular market tier are in individual sections.
 - Rules relating to initial and continued listing standards are separate.
 - Added descriptive language to rule citations, where possible.
 - New defined terms have been created.
 - Certain rules were not changed either:
 - Based on discussions with the SEC.
 - To maintain uniformity across multiple markets.

Late Filing Rule Change

- NASDAQ and NYSE rules related to late filers have differed over the years.
- In late October, NASDAQ significantly modified its rules related to late filers to allow listed companies a more reasonable process to regain compliance.
 - Previously, companies received a delisting letter as soon as a filing was late. They could appeal that delisting to a Hearings Panel, which could grant extensions up to 180 days from staff delist letter.
- As revised, companies are provided with 60 days to provide a plan to regain compliance to NASDAQ staff. Staff can grant an extension of up to 180 days from the filing due date for the company to regain compliance.
 - If the company has not regained compliance by the end of the staff extension, staff would issue a delisting letter, which can be appealed to a Hearings Panel.
 - The maximum time available through all appeals is one year from the due date of the first delinquent report.

Late Filing Rule Change

- Biggest current difference between NASDAQ and NYSE is enforcement of quarterly filing deadlines.
- The SEC has recognized this disparity and is working to establish a uniform rule, given that we each enforce the same SEC requirement. This uniform rule will likely result in other changes to the process as well.

Efforts to Address the Financial Crisis

Bid Price and Market Value of Publicly Held Shares Suspension

- In October 2008, in light of the extensive turmoil in the market, Nasdaq suspended the application of the \$1 bid price and the market value of publicly held shares (MVPHS) requirements.
- As a result, all existing bid price and MVPHS compliance concerns were frozen at their state on October 16th, and no new concerns will be created during the suspension.
- This suspension was extended twice, and the rules are now scheduled to be reinstated on July 20, 2009.
- We are monitoring the state of the markets and, if conditions remain unchanged, we will seek to again extend the suspension.

Efforts to Address the Financial Crisis

Compliance Process

- In light of current economic conditions, it is more difficult for companies to regain compliance with market-based listing standards and to develop and effect plans to regain compliance with other listing standards.
- As a result, NASDAQ recently extended the compliance period for companies to regain compliance with the market value of listed securities requirement from 30 days to 90 days.
- NASDAQ also conducted a review of all of our compliance periods and processes and determined to propose additional changes to conform many of the periods. These changes fall into two categories:
 - Rules that provide a compliance period.
 - Rules that allow the company to submit a plan to regain compliance.

Efforts to Address the Financial Crisis

Compliance Grace Periods

- Currently, the market value of publicly held shares, market value of listed securities, and bid price requirements all provide different periods before a company is considered non-compliant, and then allow a company different compliance periods to regain compliance, even though compliance with each requirement is tied, in part, to the price of the security.
- In order to eliminate these inconsistencies, and in recognition of the fact that the current economic crisis has highlighted that several of the rules may not provide sufficient time for a company to regain compliance, NASDAQ will be proposing changes to conform the periods.

Efforts to Address the Financial Crisis

Compliance Grace Periods

- Proposed changes:
 - In order to become non-compliant, the security would have to be below the requirement for 30 consecutive trading days.
 - Once non-compliant, companies would receive a 180-day compliance period to regain compliance.
 - NASDAQ is also proposing to modify the second compliance period available to companies that are non-compliant with the bid price requirement. Currently, the second compliance period is available only to companies that transfer to the Capital Market, if not already listed there. We are proposing to allow a company to remain on the Global or Global Select Market for the second 180-day compliance period if it meets all continued listing requirements for that tier, other than bid price.

Efforts to Address the Financial Crisis

Compliance Plans

- Currently, when a company is non-compliant with some rules (e.g., stockholders' equity), the company is notified of the deficiency and allowed 15 days to submit a plan to regain compliance, which is reviewed by staff. Staff can grant an extension for up to 105 days from the notification of the deficiency for the company to regain compliance.
- NASDAQ is proposing to change these rules to conform with our recently adopted process for filing deficiencies. As revised, companies would be allowed 60 days to submit a plan to regain compliance and staff would be permitted to grant an extension of up to 180 days from the notification of the deficiency for the company to regain compliance.

Upcoming Rule Changes

Form 20-F Disclosure

- A foreign private issuer can follow its home country practice in lieu of certain of NASDAQ's corporate governance requirements, provided the company discloses in its annual report or on its website when it does so.
- The SEC recently adopted changes to Form 20-F, which most foreign private issuers must file, that requires that they disclose non-conforming governance practices in the Form 20-F.
- We will be modifying our rules to align them with this SEC requirement, by mandating that Form 20-F filers disclose in their 20-F those NASDAQ corporate governance requirements that they do not follow.

Upcoming Rule Changes

Press Release Disclosure

- NASDAQ listed companies must publicly disclose material news.
- Companies can make this disclosure through any Regulation FD compliant manner.
- NASDAQ rules still require a press release in certain circumstances, including several where SEC rules require a Form 8-K or Form 6-K, such as to announce:
 - Receipt of a Delisting Determination or Public Reprimand Letter.
 - Interim results by non-US issuers.
- We will be filing a proposed rule change to eliminate the duplicate press release requirement and allow issuers to satisfy the NASDAQ requirement through the filing of Forms 8-K or 6-K, where required.

Other Upcoming Rule Changes

Nasdaq Official Closing Price

- Compliance with several of NASDAQ's continued listing requirements are currently calculated using the listed security's closing bid price:
 - Minimum price requirement.
 - Market value of public float requirement.
 - Market value of listed securities requirement.
- Closing bid price is not always transparent from the more commonly used free financial websites and is not typically available historically other than from NASDAQ.
 - This makes compliance determinations difficult for companies and investors.
- As a result, NASDAQ plans to propose changes to use the NASDAQ Official Closing Price (NOCP) to determine compliance with market-based listing requirements.

Other Upcoming Rule Changes

Nasdaq Official Closing Price (continued)

- The NOCP is set by NASDAQ's Closing Cross Process utilizing an algorithm to find the equilibrium price by matching all eligible buy and sell orders.
- The methodology behind the calculation of the NOCP ensures that the closing price is at, or within, the best bid and ask quotations. The NOCP calculation also minimizes the impact of any anomalies in a security's price that might occur at the end of the trading day.
- The NOCP is used by all leading index providers to calculate closing values for indexes and by mutual funds to calculate the closing Net Asset Values.

Shareholder Approval Issues in Today's Economy

Stock Option Repricing

- With stock prices down, approximately 50 companies amended their outstanding stock options during the first quarter of 2009 or announced plans to do so.
- During the first quarter of last year, only 7 companies repriced options.
- Shareholder approval is required for a repricing unless the option plan specifically authorizes it.

Shareholder Approval Issues in Today's Economy

Private Placements

- With stock prices down, companies need to sell a significantly higher number of shares of stock to raise a desired dollar amount of funds
- Shareholder approval is required where:
 - The issuance equals 20% or more of the pre-transaction outstanding shares; and
 - The transaction price per share is less than the *greater of book or market value* per share.
- Remember that book value may exceed market value.
- A company is required to provide to NASDAQ 15-day prior notice of a transaction that could increase its total shares outstanding by 10%. This includes TARP transactions if such an increase could result.

Shareholder Approval Issues in Today's Economy

Financial Distress Situations

- For a company needing to raise capital quickly, an exception to the shareholder approval requirement is available when the delay caused by securing shareholder approval would seriously jeopardize the company's financial viability.
 - The financial condition needs to be very serious, even approaching bankruptcy.
 - Prior application to NASDAQ is required.
 - Approval of the company's audit committee is required.
 - A company relying on the exception must provide 10-day prior notice to its shareholders.
- Examples of recently granted exceptions:
 - A company, due to an unexpected change in circumstances, would default on its debt and be forced into bankruptcy.
 - Due to unexpected adverse events, a company is unable to fund its operations and may have to cease operations.

NASDAQ Regulatory Resources

Legal and Compliance website:

<http://www.nasdaq.com/about/LegalCompliance.stm>

- 250+ Summary staff interpretations
- 350+ Frequently asked questions
- Issuer alerts
- 75+ summaries of Listing Council decisions

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