

Nasdaq and NYSE Provide Temporary Relief From Certain Price-Based Listing Requirements

I. Overview

On April 16, 2020¹ and April 20, 2020², The Nasdaq Stock Market LLC (“Nasdaq”) and the New York Stock Exchange (the “NYSE”), respectively, filed with the Securities and Exchange Commission (the “SEC”) proposals to provide listed companies with temporary relief from their continued listing bid price and market value requirements (the “Price-Based Listing Requirements”). Specifically, by tolling compliance periods through June 30, 2020, the proposals provide additional time for companies that are not compliant with the current Price-Based Listing Requirements to regain compliance. The proposals are intended to address the increase in the number of companies becoming non-compliant with the Price-Based Listing Requirements, given the uncertainty and turbulence in the markets due to the COVID-19 pandemic. The proposed rules became effective immediately upon filing with the SEC and will remain in effect through June 30, 2020 – although the SEC may suspend the rule changes within 60 days from their respective filing dates if it determines that it is in the public interest or necessary for the protection of investors.

II. Current Rules

A. Nasdaq Rules

Under the Nasdaq Stock Market Rules (“Nasdaq Rules”), “Primary Equity Securities”³ of issuers listed on the Nasdaq Global Market must maintain (1) a minimum of \$1 bid price per share and (2) a market value of publicly-held shares of at least \$5 million or \$15 million, depending on the applicable standard set forth in Nasdaq Rule 5450(b), and at least \$1 million in the case of preferred stock or secondary class of common stock of such issuers (“Nasdaq Global Price-Based Listing Requirements”).⁴ Primary Equity Securities, preferred stock, and secondary classes of common stock of issuers listed on the Nasdaq Capital Market must maintain, in each case, (a) a minimum of \$1 bid price per share and (b) a market value of publicly held shares of at least \$1 million (together, with Nasdaq

¹ For full text of the proposal and the related SEC release, see Securities and Exchange Commission, Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Permit a Longer Period of Time for Companies to Regain Compliance with the Bid Price and Market Value of Publicly Held Shares Continued Listing Requirements by Tolling the Compliance Periods Through and Including June 30, 2020, SEC Release No. 34-88685; File No. SR-NASDAQ-2020-021, available at <https://www.sec.gov/rules/sro/nasdaq/2020/34-88685.pdf> (April 17, 2020) [hereinafter, the “Nasdaq Release”].

² For full text of the proposal and the related SEC release, see Securities and Exchange Commission, Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Provide a Longer Period for Listed Companies to Regain Compliance with Its \$50 Million Market Capitalization/Stockholders’ Equity and \$1.00 Price Continued Listing Requirements, SEC Release No. 34-88717; File No. SR-NYSE-2020-36, available at <https://www.sec.gov/rules/sro/nyse/2020/34-88717.pdf> (April 21, 2020) [hereinafter, the “NYSE Release”]. Unless otherwise specified, quoted statements in this memorandum are taken from the Nasdaq Release or the NYSE Release, as the context suggests.

³ Under Section 5005(33) of the Nasdaq Rules, “Primary Equity Securities” means a company’s first class of common stock, ordinary shares, shares or certificates of beneficial interest of trust, limited partnership interests or American Depositary Receipts (ADR) or Shares (ADS).

⁴ See Sections 5450 and 5460 of the Nasdaq Rules.

Global Price-Based Listing Requirements, the “Nasdaq Price-Based Listing Requirements”).⁵ Upon a company’s failure to meet the Nasdaq Price-Based Listing Requirements for 30 consecutive business days, the Nasdaq Listing Qualifications Department will immediately notify the company of the deficiency, and the company will be given 180 calendar days from such notification to regain compliance by meeting the applicable standard for a minimum of 10 consecutive business days (or for such extended period of time as the Nasdaq Listings Qualifications Department may require in its discretion).⁶

B. NYSE Rules

Under the NYSE Listed Company Manual (“NYSE Rules”), a NYSE-listed company must maintain (1) stockholders’ equity and an average global market capitalization over a consecutive 30 trading-day period of \$50 million⁷ and (2) an average closing price of a security of at least \$1 over a consecutive 30 trading-day period, as reported on the NYSE’s consolidated tape⁸ (collectively, the “NYSE Price-Based Listing Requirements”). Once the NYSE identifies a company’s failure to meet the NYSE Price-Based Listing Requirements, it will notify the company by letter within 10 business days.⁹ Upon receipt of such a notice regarding failure to meet the \$50 million market capitalization requirement, the company will be provided an opportunity to submit a plan to bring itself back into compliance within 18 months.¹⁰ With respect to the \$1 average closing price requirement, the company must respond to the NYSE’s notice within 10 business days regarding its intent to cure the deficiency and bring itself into compliance within 6 months following the receipt of notice.¹¹

III. Temporary Changes to the Rules

A. Nasdaq Temporary Rule

For Nasdaq-listed companies out of compliance with the Nasdaq Price-Based Listing Requirements, the 180-day periods for regaining compliance will be tolled through and including June 30, 2020. On July 1, 2020, companies will be granted the remaining number of days of the compliance periods in effect at the beginning of the tolling period. If a company receives a temporary exception from Nasdaq’s Hearings Panel before the tolling begins, the company will receive the remaining number of days of the exception period on July 1, 2020. If a company was undergoing a hearings process before the tolling began, the company will return to the same stage of the process on July 1, 2020, unless the company already had an oral or written hearing before a Hearings Panel which determined that a delisting is appropriate.

Nasdaq will continue to monitor and notify companies of their non-compliance during the tolling period, and companies that are newly-found to be non-compliant during this period will be given 180 days to regain compliance beginning July 1, 2020. Upon receipt of such a notice, a company would continue to be required to make a public announcement disclosing the receipt of the notification by filing a Current Report on Form 8-K,

⁵ See Sections 5550 and 5555 of the Nasdaq Rules.

⁶ See Section 5810 of the Nasdaq Rules.

⁷ See Section 802.01B of the NYSE Rules.

⁸ See Section 802.01C of the NYSE Rules.

⁹ See Section 802.02 of the NYSE Rules.

¹⁰ *Id.*

¹¹ See Section 802.01C of the NYSE Rules.

where required by SEC rules, or by issuing a press release. Nasdaq will also continue to monitor companies that become compliant with the Nasdaq Price-Based Listing Requirements during the tolling period.

B. NYSE Temporary Rule

Similarly, for NYSE-listed companies out of compliance with the NYSE Price-Based Listing Requirements, the 18-month and 6-month compliance periods will be tolled through and including June 30, 2020. As a result, until June 30, 2020, any time period for which a company is not in compliance with the NYSE Price-Based Listing Requirements during the tolling period will not be counted against the compliance periods of 18 months, with respect to the \$50 million market capitalization requirement, or 6 months, with respect to the \$1 average closing price requirement, as applicable. As with Nasdaq's temporary rule, on July 1, 2020, companies will be granted the remaining number of days of the compliance periods in effect at the beginning of the tolling period.

Non-compliant companies will continue to be required to submit their compliance plans within the applicable time frames set forth in Sections 802.02 and 802.03 of the NYSE Rules, and the NYSE may continue to commence delisting proceedings before the end of a compliance period for a company's failure to meet the material aspects of its compliance plan or any of the quarterly milestones in that plan. Although the compliance periods for the NYSE Price-Based Listing Requirements will be tolled, the NYSE will continue to identify non-compliant companies during the tolling period. Upon receipt of a notice of noncompliance, companies will continue to be required to comply with the press release requirements set forth in Sections 802.02, 802.03 and 802.01C of the NYSE Rules and file a Current Report on Form 8-K where required by SEC rules. Further, the NYSE will continue to attach a .BC indicator to the ticker symbols of non-compliant companies and identify them as such on the NYSE's website.

IV. Conclusion

In proposing these rule changes, Nasdaq expressed that "it could be harmful to existing shareholders for a company to sell securities at an artificially low price, solely to regain compliance." The NYSE expressed that "it is undesirable to impose on companies in the midst of this crisis the additional burden of attempting to return to compliance...while the crisis is ongoing, which may be unrealistic for many companies in the immediate term whereas their prospects may be better once the current extraordinary conditions have passed." Both Nasdaq and the NYSE acknowledged the temporary nature of the current crisis and that the tolling of compliance periods is consistent with the protection of investors and the public interest.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email authors Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; Bradley J. Bondi at 202.862.8910 or bbondi@cahill.com; or Joseph E. Cho at 212.701.3589 or jcho@cahill.com; or email publications@cahill.com.