2011–29 and should be submitted by October 7, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–23774 Filed 9–15–11; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65319; File No. SR–NASDAQ–2011–073]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Instituting Proceedings To Determine Whether to Disapprove Proposed Rule Change To Adopt Additional Listing Requirements for Reverse Mergers

September 12, 2011.

I. Introduction

On May 26, 2011, 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'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt additional listing requirements for a company that has become public through a combination with a public shell, whether through a reverse merger, exchange offer, or otherwise (a ''Reverse Merger''). The proposed rule change was published for comment in the **Federal Register** on June 14, 2011.[3] On July 25, 2011, the Commission extended the time period in which to either approve the proposed rule change, disapprove the proposed rule change, or to institute proceedings to determine whether to disapprove the proposed rule change, to September 12, 2011.[4] The Commission received two comment letters on the proposal.[5] This order institutes proceedings under Section 19(b)(2)(B) of the Act to determine whether to disapprove the proposed rule change.

II. Description of the Proposal

The Exchange proposes to adopt additional listing standards for companies that become public through a Reverse Merger,[6] to address significant regulatory concerns, including accounting fraud allegations that have recently arisen with respect to Reverse Merger companies. In its filing, Nasdaq noted, among other things, that there have been widespread allegations of fraudulent behavior by certain Reverse Merger companies, leading to concerns that their financial statements cannot be relied upon.[7] Nasdaq also stated that it was aware of situations where it appeared that promoters and others intended to manipulate prices of Reverse Merger companies' securities higher to help meet Nasdaq's initial listing bid price requirement, and where companies have gifted stock to artificially satisfy Nasdaq's public holder listing requirement.[8] As a result of these concerns, Nasdaq believes certain ''seasoning'' requirements in connection with the listing of Reverse Merger companies are appropriate.

Specifically, Nasdaq proposes to prohibit a Reverse Merger company from applying to list until the combined entity has traded in the U.S. over-the-counter market, on another national securities exchange, or on a foreign exchange for at least six months following the filing of all required information about the Reverse Merger transaction, including audited financial statements, to the Commission.[9] Further, Nasdaq proposes to require that the Reverse Merger company maintain a minimum of a $4 bid price on at least 30 of the 60 trading days immediately prior to submitting the listing application. Finally, under the proposed rule, Nasdaq would not approve any Reverse Merger company for listing unless the company has timely filed its two most recent financial reports with the Commission if it is a domestic issuer or comparable information if it is a foreign private issuer.

III. Comment Letters

The Commission received two comment letters on the proposal.[10] One commenter[11] objects broadly to the proposed ''seasoning'' requirement,[12] while the other supports the objectives of the proposed rule change, but believes it should include a particular exception.[13]

One commenter expressed the view that the proposal could have a ''chilling effect of discouraging exciting growth companies from pursuing all available techniques to obtain the benefits of a public listed stock and greater access to capital.''[14] The commenter further noted, in response to Nasdaq's justifications for the proposed rule change, that virtually all of the suggestions of wrongdoing involve Chinese companies that completed reverse mergers, but that a number of other Chinese companies that completed full traditional initial public offerings face the very same allegations, so that focusing on the manner in which these companies went public may not be appropriate. Rather than imposing a seasoning requirement, the commenter suggests Nasdaq review regulatory histories and financial arrangements with promoters, and refrain from listing companies where the issues are great. In any event, he recommends an exemption from the seasoning requirement for a company coming to the exchange with a firm commitment underwritten public offering. In addition, the commenter expressed concern that the requirement to maintain a $4 trading price for 30 days prior to the listing application is unfair, and unrealistic to expect companies to achieve in the over-the-counter markets, and suggests it be eliminated.

Another commenter expressed support for the proposed rule change's objective to protect investors from potential accounting fraud, manipulative trading, abusive practices

[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 64633 (June 8, 2011), 76 FR 34781 (''Nasdaq Notice'').

[4] *See* Securities Exchange Act Release No. 64956 (July 25, 2011), 76 FR 45636 (July 29, 2011).

[5] *See* Letter from David Feldman dated August 30, 2011 (''Feldman Letter'') and letter from Richard Rappaport, Chief Executive Officer, WestPark Capital, Inc. to Elizabeth M. Murphy, Secretary, Commission dated September 2, 2011 (WestPark Letter'').

[6] For purposes of the Nasdaq proposal, Nasdaq would treat as a Reverse Merger any transaction whereby an operating company becomes public by combining with a public shell, whether through a reverse merger, exchange offer, or otherwise. However, a Reverse Merger would not include the acquisition of an operating company by a listed company satisfying the requirements of IM–5101–2 (relating to companies whose business plan is to complete one or more acquisitions) or a business combination described in Rule 5110(a) (relating to a listed company that combines with a non-Nasdaq entity, resulting in a change of control of the company and potentially allowing the non-Nasdaq entity to obtain a Nasdaq listing, sometimes called a ''back-door listing''). A reverse merger would also not include a Substitution Listing Event, as defined in Rule 5005(a)(39) (proposed to be renumbered as Rule 5005(a)(40)), such as the formation of a holding company to replace the listed company or a merger to facilitate a re-incorporation, because in these cases the operating company is already a listed entity.

[7] *See* Nasdaq Notice.

[8] *Id.*

[9] According to the Nasdaq proposal, the six month period would not begin to run until the filing of a Form 8–K. A company must file a Form 8–K within four days of completing a reverse merger. The Form 8–K must contain audited financial statements and information comparable to the information provided in a Form 10 for the registration of securities. *See* Form 8–K Items 2.01, 5.06, and 9.01(c).

[10] *See,* note 5, *supra.*

[11] *See* Feldman Letter.

[12] *Id.*

[13] *See* WestPark Letter.

[14] *See* Feldman Letter.

or other inappropriate behavior on the part of companies, promoters and others.[15] The commenter, however, recommended that, in order to avoid unnecessary burdens on smaller capitalization issuers, the proposed rule change be modified to exclude Form 10 share exchange transactions from the reverse merger definition, or provide an exception for a reverse merger company listing in connection with a firm commitment underwritten public offering. This commenter also recommended that Nasdaq consider requiring companies listing on the exchange to engage a recognized independent diligence firm to conduct a forensic audit and issue a forensic diligence report prior to approval of the listing application.

IV. NYSE and NYSE Amex Proposals

On July 22, 2011, the New York Stock Exchange LLC (''NYSE'') [16] and the NYSE Amex LLC (''NYSE Amex'') [17] each filed a proposed rule change to adopt additional listing requirements for a company that has become public through a Reverse Merger. NYSE and NYSE Amex filed these proposed rule changes for similar reasons as Nasdaq—to address significant regulatory concerns, including accounting fraud allegations, that have recently arisen with respect to Reverse Merger companies. The NYSE and NYSE Amex proposals, while similar to the Nasdaq proposal in many respects, contain certain provisions that materially differ from the Nasdaq proposal. For example, the NYSE and NYSE Amex proposals would prohibit a Reverse Merger company from applying to list until it has traded in another market for one year after the combined entity submits all required information about the transaction, including audited financial statements, to the Commission. The NYSE and NYSE Amex proposals also would require the maintenance of the minimum stock price for listing on an ''absolute and an average basis for a sustained period'' of time immediately preceding the filing of the initial listing application and through listing. In addition, NYSE and NYSE Amex would not approve any Reverse Merger company for listing unless the company has timely filed with the Commission all required reports since the consummation of the Reverse Merger, including at least one annual report containing audited financial statements for a full fiscal year commencing on a date after the date of filing of a Form 8–K, or Form 20–F, relating to the Reverse Merger. Finally, the NYSE and NYSE Amex proposals include an exemption from the proposed listing requirements for Reverse Merger companies when the listing is in connection with an initial firm commitment underwritten public offering where the proceeds will be at least $40 million and the offering is occurring subsequent to or concurrently with the Reverse Merger. The comment period for each of the NYSE and NYSE Amex proposals expired on August 31, 2011, and the Commission currently is reviewing the comments received.

V. Proceedings To Determine Whether To Disapprove SR–NASDAQ–2011–073 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act to determine whether the proposed rule change should be disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposal that are discussed below. Institution of disapproval proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described in greater detail below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change.

Pursuant to Section 19(b)(2)(B), the Commission is providing notice of the grounds for disapproval under consideration. In particular, Section 6(b)(5) of the Act [18] requires that the rules of an exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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.

Nasdaq's proposal would require Reverse Merger companies to meet certain ''seasoning'' requirements prior to listing, and is designed to address significant regulatory concerns, including accounting fraud allegations, that have recently arisen with respect to Reverse Merger companies. As noted above, NYSE and NYSE Amex subsequently filed proposed rule changes designed to address the same concerns as the Nasdaq proposal. Although similar to the Nasdaq proposal in many respects, certain provisions of the NYSE and NYSE Amex proposals materially differ from the Nasdaq proposal, including a one-year instead of a six-month seasoning period, and a more general requirement to maintain the minimum listing price for a ''sustained period,'' rather than on at least 30 of the 60 trading days prior to filing the listing application. Unlike the Nasdaq proposal, the NYSE and NYSE Amex proposals also include an exemption for Reverse Merger companies that list in connection with certain underwritten public offerings.

The Commission shares the concerns of Nasdaq, as well as NYSE and NYSE Amex, with respect to fraud and manipulation in connection with the formation of Reverse Merger companies and their listing on an exchange. The Commission also believes that meaningful enhancements to exchange listing standards, including more rigorous seasoning requirements that are appropriately targeted at Reverse Merger companies could help prevent fraud and manipulation in this area, and protect investors and the public interest. Because of the importance of this issue, however, the Commission believes the Nasdaq proposal should be considered together with the NYSE and NYSE Amex proposals, to assure that the exchanges develop and implement consistent and effective enhancements to their listing standards, to best address the serious concerns that have arisen with respect to the listing of Reverse Merger companies. Accordingly, in light of the material differences between the Nasdaq proposal and the NYSE and NYSE Amex proposals, and the concerns raised by commenters, the Commission believes that questions are raised as to whether Nasdaq's proposal is consistent with the requirements of Section 6(b)(5) of the Act, including whether the proposed listing requirements would prevent fraud and manipulation, promote just and equitable principles of trade, or protect investors and the public interest.

VI. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data and arguments with respect to the concerns identified above, as well as any others they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change is inconsistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulation thereunder.

[15] *See* WestPark Letter.

[16] *See* Securities Exchange Act Release No. 65034 (August 4, 2011), 76 FR 49513 (August 10, 2011) (SR–NYSE–2011–38).

[17] *See* Securities Exchange Act Release No. 65033 (August 4, 2011), 76 FR 49522 (August 10, 2011) (SR–NYSEAmex–2011–55).

[18] 15 U.S.C. 78f(b)(5).

Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[19]

Interested persons are invited to submit written data, views and arguments regarding whether the proposed rule change should be disapproved by October 17, 2011. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by October 26, 2011.

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 e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2011–073 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–2011–073. 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 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–NASDAQ–2011–073 and should be submitted on or before October 17, 2011. Rebuttal comments should be submitted by October 26, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Elizabeth M. Murphy,

Secretary.

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[19] Section 19(b) (2) of the Act, as amended by the Securities Act Amendments of 1975, Public Law 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[20] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65314; File No. SR–NYSEAmex–2011–69]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Its Options Fee Schedule To Add Clarifying Language With Respect to Marketing Charges Generally and Marketing Charges for Directed Orders, and To Add New and Clarifying Language With Respect to Marketing Charges for Electronic Complex Orders

September 12, 2011.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on September 6, 2011, NYSE Amex LLC (the ''Exchange'' or ''NYSE Amex'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. 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

The Exchange proposes to amend its Options Fee Schedule (the ''Schedule'') to add clarifying language with respect to marketing charges generally and marketing charges for Directed Orders, and to add new and clarifying language with respect to marketing charges for Electronic Complex Orders. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, on the Commission's Web site at *http://www.sec.gov,* and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization 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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The current Schedule in footnote 11 describes the distribution of the pool of monies for marketing charges for non-Directed Orders, but does not include any language addressing the marketing charges for Directed Orders or Electronic Complex Orders. Currently, the pool of monies resulting from collection of marketing charges on electronic Directed Orders is controlled by the NYSE Amex Options Market Maker to which the order was directed.[4] In addition, Electronic Complex Orders are treated in the same manner as non-Directed Orders, and consequently, the pool of monies resulting from collection of marketing charges on such orders is controlled by a Specialist or e-Specialist.[5]

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See, e.g.,* Securities Exchange Act Release No. 61849 (April 6, 2010), 75 FR 18556 (April 12, 2010) (SR–NYSEAmex–2010–30).

[5] The Exchange recently reinstituted the standard marketing charges for Electronic Complex Order executions that had been temporarily waived in July 2010. *See* Securities Exchange Act Release No. 64524 (May 19, 2011), 76 FR 30412 (May 25, 2011) (SR–NYSEAmex–2011–30). The Exchange had been informed by several Order Flow Providers that the absence of marketing charges for Customer executions in the complex order book was hindering their ability to route complex order flow to the Exchange, particularly since competing exchanges do allow for the collection of marketing charges on complex orders. Consequently, the Exchange recently resumed its prior practice of

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