

SEC Approves Modified Compliance Periods and Procedures for Certain Continued Listing Requirements of NASDAQ-Listed Companies

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On January 29, 2010, the U.S. Securities and Exchange Commission (SEC) approved proposed rule changes to modify the length of certain compliance periods in NASDAQ's continued listing requirements and to modify the time available for a company to provide a plan to regain compliance with certain continued listing requirements.¹

Specifically, the amended rules:

- extend the period of time, from 10 to 30 consecutive trading days, that triggers a company's non-compliance with the minimum market value of listed securities continued listing requirement;
- extend the period of time, from 90 to 180 calendar days, a company has to regain compliance with the continued listing requirement regarding the minimum market value of its publicly held shares;
- extend the period of time, from 90 to 180 calendar days, a company has to regain compliance with the continued listing requirement regarding the minimum market value of its listed securities;
- increase the number of calendar days, from 15 to 45, that a company has to present its plan to regain compliance with applicable continued listing requirements; and
- increase the length of time NASDAQ staff can grant to a company to regain compliance with applicable continued listing requirements, from 105 to 180 calendar days.

THE AMENDED RULES ALSO MODIFY THE TIME PERIODS APPLICABLE IN CASES IN WHICH THE COMPANY IS PERMITTED TO PROVIDE NASDAQ STAFF WITH A PLAN TO REGAIN COMPLIANCE WITH CERTAIN CONTINUED LISTING STANDARDS, AND MODIFY THE TIME PERIOD IN WHICH NASDAQ STAFF CAN GRANT AN EXTENSION OF TIME TO REGAIN COMPLIANCE FROM ITS INITIAL NOTIFICATION OF NON-COMPLIANCE TO THE COMPANY.

PRICE-RELATED CRITERIA

All companies listed on NASDAQ are required to maintain a minimum market value of their publicly held shares. Companies listed on the Global and Global Select Markets must maintain either a \$5 million or \$15 million market value of publicly held shares, and companies listed on the Capital Market must maintain a \$1 million market value of publicly held shares.²

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In addition to the requirement of maintaining a minimum market value of publicly held shares, companies listed on NASDAQ that qualify for continued listing based on the “Market Value of Listed Securities Standard” are required to maintain a minimum market value of listed securities of \$50 million in the case of companies listed on the Global or Global Select Markets, or \$35 million in the case of companies listed on the Capital Market.³

Before the adoption of the new rules, a listed company was considered to be non-compliant with continued listing standards if the market value of the company’s publicly held shares fell below the applicable standard for 30 consecutive trading days. Upon such failure, the company was provided with 90 calendar days to regain compliance. Further, a company that qualified for continued listing based on the Market Value of Listed Securities Standard was considered to be non-compliant after falling below the applicable minimum market value of listed securities standard for 10 consecutive trading days, following which the company was provided 90 calendar days to regain compliance with the applicable standard.

In its proposed rule, NASDAQ noted that under its minimum bid price continued listing standard, if a company’s security has a closing bid price below \$1 for 30 consecutive trading days, then it no longer meets the bid price requirements and is automatically provided 180 calendar days to regain compliance. NASDAQ asserted that because compliance with (i) the minimum bid price, (ii) the minimum market value of publicly held shares, and (iii) minimum market value of listed securities are all directly related to the price of an issuer’s security, the length of time to trigger non-compliance and the amount of time afforded to regain compliance should be consistent.

The amended rules now make consistent the time periods that trigger companies’ non-compliance in these three areas (minimum bid price, the minimum market value of publicly held shares, and minimum market value of listed securities) and make consistent the amount of time afforded companies to regain their compliance, by extending the length of time to trigger non-compliance with the minimum market value of listed securities requirement from 10 to 30 consecutive trading days, and extending the amount of time afforded to regain compliance with each of the minimum market value of publicly held shares and the minimum market value of listed securities from 90 to 180 calendar days.⁴

MODIFIED TIME PERIODS TO SUBMIT PLAN TO REGAIN COMPLIANCE

The amended rules also modify the time periods applicable in cases in which the company is permitted to provide NASDAQ staff with a plan to regain compliance with certain continued listing standards, and modify the time period in which NASDAQ staff can grant an extension of time to regain compliance from its initial notification of non-compliance to the company.

Before the adoption of the new rules, if a company had certain deficiencies from the continued listing standards, such as quantitative deficiencies from standards that do not provide for a compliance period (e.g., the minimum requirements for stockholders’ equity, total assets and total revenue, net income from continuing operations, the number of publicly held shares or the number of shareholders), the company had 15 calendar days to submit a plan to regain compliance.⁵ Following a review of the compliance plan, NASDAQ staff could grant the company a period of up to 105 calendar days from the initial notification of non-compliance for the company to regain compliance.

The amended rules increase the number of calendar days a company has to present its compliance plan from 15 to 45 (and also permits NASDAQ staff to grant an extension of this period of up to five days, if good cause is shown) and increase the length of time that the NASDAQ staff can grant to a company to regain compliance from its initial notification of non-compliance, from 105 to 180 calendar days. In amending the rules, NASDAQ noted that 15 days is often insufficient for a company to prepare a meaningful compliance plan, especially in light of current market and economic conditions, and that allowing companies additional time from its initial notification of non-compliance will better allow companies to implement their plan to regain compliance.⁶

IMPLEMENTATION

The amended rules have the following transition implications:

- any company that was not notified that it was non-compliant with the market value of listed securities continued listing requirement upon the SEC’s approval of the amended rules, will not be notified until they have fallen below the requirement for 30 consecutive trading days from the initial date of non-compliance

- any company that was notified prior to the approval of the amended rules that it was non-compliant with either the market value of listed securities or the market value of publicly held shares continued listing requirement and that is still within the 90-calendar day compliance period for such failure will have their compliance period extended until 180 days from the date they were originally notified of the deficiency
- with respect to the compliance plan process, if a company has not submitted its plan of compliance when the amended rules were approved, the deadline to submit that plan will be extended until 45 days from the date of the NASDAQ staff's notification of the deficiency
- if a company had already submitted its plan of compliance when the amended rules were approved, but NASDAQ staff has not yet determined whether or not to grant additional time, the staff will be permitted to grant the company up to 180 days from the date of the NASDAQ staff's notification of the deficiency, and
- if a company had already received an extension of time to regain compliance when the amended rules were approved, at the end of that extension the staff could, based on a review of the company at the time, grant additional time for the company to regain compliance, up to 180 days from the staff's original notification of the deficiency.

ENDNOTES

- ¹ For continued listing, NASDAQ requires listed companies to meet specific quantitative requirements and stringent corporate governance standards. A listed company may satisfy the continued listing requirements of the NASDAQ Global Select Market, the NASDAQ Global Market or the NASDAQ Capital Market, as the case may be, by satisfying the criteria under at least one of three standards applicable to each market. These standards, known as the "Equity Standard," "Market Value of Listed Securities Standard" and the "Net Income Standard," can be found at http://www.nasdaq.com/about/nasdaq_listing_req_fees.pdf.
- ² "Publicly held shares" means the total shares outstanding, less any shares held directly or indirectly by officers, directors or any person who is the beneficial owner of more than 10 percent of the total shares outstanding of the company.
- ³ "Listed securities" means securities listed on NASDAQ or another national securities exchange.
- ⁴ As amended, the maximum amount of time that could be afforded to a company that failed to meet the market value of listed securities or market value of publicly held shares requirement would be 18 months. A company would only receive an extension up to this 18-month maximum length if (i) it failed to comply during the automatic 180-day compliance period, (ii) the company appealed to a NASDAQ Hearings Panel, and (iii) the NASDAQ Listing and Hearings Review Council determined to call the matter for review, to stay the company's delisting, and, after reviewing the company's compliance plan, to provide the company with the maximum 360-day period from the date of the Staff Delisting Determination to regain compliance.
- ⁵ See NASDAQ Rule 5810(c)(2) for a more comprehensive list of deficiencies for which a company may submit a plan of compliance to NASDAQ staff.
- ⁶ The maximum amount of time that could be afforded to a company that failed to meet a listing requirement that allows the submission of a plan to regain compliance would be 18 months. See endnote 4.