



Listing Qualifications Transparency Report

Nasdaq Listing Rule 5101 provides discretion to Nasdaq to impose additional and more stringent criteria in order to protect investors and the public interest. To provide transparency to our application of this rule, Nasdaq intends to prepare and publish a report each year describing instances where Nasdaq Staff and Hearings Panels relied upon that authority as the basis for a delisting decision. In addition, this report will describe instances where Nasdaq shortened time frames within which a company could submit a compliance plan. Finally, the report will describe certain instances where companies made significant changes to transactions based on comments received during Nasdaq Staff's review of Listing of Additional Shares notification forms. Nasdaq believes that these summaries will help companies understand the application of these rules and remain compliant with the listing requirements. These reports will be available in the Nasdaq Reference Library.

This January 2018 report describes events that happened during 2016. Nasdaq delays publication of these events to allow any appeal and call for review procedures permissible under the Listing Rules to expire and for any transactions involved to be finalized and publicly announced.

This report is intended to enhance transparency around the facts and circumstances that may prompt the Nasdaq Listing Qualifications department to apply additional and more stringent criteria as permitted under the Listing Rules. Please note that this report is provided for informational and illustrative purposes only and actions described are not precedential and do not bind Nasdaq Staff, Hearings Panels or the Listing and Hearing Review Council. Listing matters are determined based on the unique facts and circumstances in each case.

Exercise of Discretionary Authority under Listing Rule 5101

Delist Determinations

Case 1: Listing Qualifications determined to delist a company while the company was in a compliance period to regain compliance with the \$1 bid price requirement. The Company previously issued warrants with a cashless exercise provision, such that the number of shares issuable under the warrants would increase exponentially as the price of the company's common stock decreased, resulting in a potentially infinite number of shares being issued. While the company attempted to conduct an exchange offer to eliminate these warrants, it was unable to successfully do so. As a result, given the dilution that would occur as a result of the large number of shares issuable under the warrants, Nasdaq Staff had significant doubts about the company's ability to regain compliance and issued a Delist Determination to the company before the end of the bid price compliance period.

Case 2: Listing Qualifications determined to delist a company following the criminal indictment and arrest of the company's controlling shareholder, chairman and chief executive officer (the "CEO") and its outside counsel for, among other things, securities fraud based on allegations that he engaged in a Ponzi-type scheme. The SEC also brought civil charges based on the same allegations. Shortly before these actions were taken the CEO had replaced the officers and directors of the company with individuals who had past ties to the CEO. Listing Qualifications determined to delist the company based on the CEO's influence and control over the company by virtue of his positions and share ownership, given the nature of the criminal and civil charges brought against him. The company requested a review of the delisting determination before a Hearings Panel but withdrew its request prior to a hearing.

Panel Delisting Decisions

Case 3: Listing Qualifications determined to delist a company based on public interest concerns primarily raised by repeated security issuances that resulted in substantial dilution for stockholders. While these transactions complied with Nasdaq's shareholder approval rules, they were structured to convert into common stock at a discount to the future price of that stock. As a result, the company had not been able to maintain compliance with the minimum \$1 bid price requirement, having been notified of noncompliance on five separate occasions in five years. In an effort to maintain a \$1 bid price, the company completed multiple reverse stock splits over the course of six years, the result of which was that a shareholder who held over 5.5 million shares would hold only one share following the reverse stock splits. Given the potential for continued excessive dilution and harm to investors, Listing Qualifications determined that the remainder of the bid price compliance period was no longer warranted and instead issued a Delist Determination.

The company requested a review before a Hearings Panel, which subsequently determined to delist the company, finding that the degree of dilution resulting from the company's share issuances was extreme and that the multiple reverse stock splits and their ratios were excessive, even for a distressed company. The Panel also found that the company's prospects for regaining compliance appeared unlikely.

Case 4: Listing Qualifications determined to delist a company for public interest concerns arising from (i) the company's failure to promptly initiate and conduct an independent investigation into revenue recognition and other concerns, as requested by two prior auditing firms, and (ii) the company's inability to produce minutes evidencing any meetings of its board of directors or board committees for over a year. Additionally, the company failed to timely file its periodic reports, and had made misleading statements and omitted material facts in its communications with Listing Qualifications, both of which served as additional bases for delisting the company.

The company's independent auditor had requested that the company conduct an independent investigation into concerns regarding revenue recognition and share issuances. However, after a fight for control of the company resulted in the removal of the board of directors, the company did not initiate an independent investigation, and terminated its auditor. After the new auditor also requested that the company conduct such an investigation, the company subsequently terminated this firm's engagement too. The company ultimately decided to retain a law firm to conduct an independent investigation when it was advised that its failure to do so would be a basis for Nasdaq to delist it. However, the company's newly engaged audit firm did not plan to take into account the findings of the investigation before rendering its opinion on the financial statements.

The company also was unable to provide board or committee meeting minutes for any meetings during most of the relevant time frame. Further, statements made in the company's public filings about the dismissal of its auditors contradicted earlier statements the company made to Nasdaq about the status and timing of the company's audit. These facts served as the basis for Listing Qualification's determination to delist the company.

The company requested a review of the delisting determination by a Hearings Panel. The Panel affirmed Listing Qualifications' exercise of discretionary authority to delist the company, noting, among other things, that the CEO demonstrated a lack of knowledge and respect for basic corporate governance standards; despite identifying a number of material weaknesses in internal controls, the company appeared to be prioritizing meeting deadlines over quality in terms of utilizing outside professional assistance; and that the Panel did not have confidence that the management team was equipped to ensure acceptable standards of corporate governance going forward.

Exercise of Discretionary Authority to Shorten the Time Period for Company Compliance Plan Submissions

The Listing Rules prescribe the timelines within which plans to regain compliance are due. For example, a plan to regain compliance with the minimum stockholders' equity requirement is due within 45 calendar days from notification and a plan to regain compliance with the periodic filing requirement is due within 60 calendar days. In certain circumstances, Listing Qualifications will utilize its discretionary authority to shorten these timelines in light of exigent circumstances, such as a company presenting a significant degree of non-compliance, evidence indicating that a company is unlikely to regain compliance within the time period Listing Qualifications is permitted to grant, or multiple concurrent rule violations.

During 2016, Listing Qualifications shortened the timelines for submission of plans to regain compliance on four occasions under these circumstances:

- when a company terminated its independent auditor just prior to the deadline to file its periodic report;
- when the former CEO of a company delinquent in filing a periodic report gained voting control of that company through voting agreements with multiple shareholders, ousted the board of directors, and reinstated himself as CEO;
- when a company violated the shareholder approval requirements during the period it was working with Listing Qualifications to resolve a previous shareholder approval violation; and
- when all independent directors of a company, delinquent in filing a required periodic report, resigned at the same time, causing that company to fail to meet the audit committee composition requirement.

Summary of Transaction Modifications Identified through Review of Listing of Additional Shares Notification Forms

Following Nasdaq Listing Qualifications' review of, and dialog with listed companies regarding, Listing of Additional Shares ("LAS") notification forms, companies significantly modified 63 transactions. In addition to these 63 transactions, following review of LAS forms, Listing Qualifications identified five shareholder approval violations. Three of these companies achieved compliance by amending the transactions and two companies received delist determinations. The companies that received delist determinations did not appeal and were delisted.

Of the 63 modified transactions, 23 transactions included issuances of "Future Priced" securities where the number of shares that could potentially be issued by the company would increase as the share price of the listed common stock decreased. Of these 23, Listing Qualifications requested 18 transactions be modified to include a minimum conversion or exercise price ("floor price") in the adjustment provision to protect investors by mitigating the dilution caused by the potential for an excessively large issuance of shares. These 18 transactions otherwise complied with the shareholder approval rules, but Nasdaq believed the potential for substantial future dilution, and related potential non-compliance with the price-based listing requirements, warranted the application of additional and more stringent criteria. Additionally, in five other transactions, Listing Qualifications requested not only a floor price but also a limitation ("share cap") on the number of shares potentially issuable to ensure compliance with the shareholder approval rules.

In another 27 transactions, following dialog with Listing Qualifications, companies revised the proposed terms prior to issuing securities to comply with the shareholder approval rules. Of these:

- twelve transactions were amended to either change or add a share cap to limit the maximum number of shares that could be issued to an amount below the 20% threshold that would require shareholder approval;
- six reduced the number of shares issuable to comply with the 20% threshold for shares issued in an acquisition;
- three were revised to comply with the equity compensation requirements, including to increase to market price the amount paid by an officer or director in a transaction so that the discount would not be treated as equity compensation;
- three were withdrawn after Staff advised the companies that the transaction at issue would be aggregated with previously completed transactions and require shareholder approval;
- two were reduced in size to below the 20% threshold that would require shareholder approval after Staff advised the companies that the transactions were not public offerings and would otherwise require shareholder approval; and

- one transaction was an acquisition where insiders had ownership in the target and the number of shares to be issued was greater than 5%, necessitating shareholder approval. Following dialog with Staff regarding this requirement, the Company scheduled a shareholder meeting and received approval for the transaction.

In addition, another 13 transactions reviewed by Staff were amended to comply with Nasdaq's voting rights rule, including to eliminate provisions in the Certificates of Designation that would allow preferred stock to vote at a heavier rate than the existing class of common stock. This most frequently arises when the preferred stock converts at a discount to the market price and votes accordingly. These potential violations were addressed by limiting the voting power, such that the preferred shares would vote as if converted at market value on the date of issuance. In another nine cases, companies revised board designation rights to assure they were proportional to share ownership of the investors holding such rights.