

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * <input type="text" value="27"/>	SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 Form 19b-4	File No.* SR - <input type="text" value="2012"/> - * <input type="text" value="002"/> Amendment No. (req. for Amendments *) <input type="text"/>
Proposed Rule Change by NASDAQ Stock Market Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934		
Initial * <input checked="" type="checkbox"/>	Amendment * <input type="checkbox"/>	Withdrawal <input type="checkbox"/>
Section 19(b)(2) * <input checked="" type="checkbox"/>		
Section 19(b)(3)(A) * <input type="checkbox"/>		
Section 19(b)(3)(B) * <input type="checkbox"/>		
Rule		
<input type="checkbox"/> 19b-4(f)(1) <input type="checkbox"/> 19b-4(f)(4) <input type="checkbox"/> 19b-4(f)(2) <input type="checkbox"/> 19b-4(f)(5) <input type="checkbox"/> 19b-4(f)(3) <input type="checkbox"/> 19b-4(f)(6)		
Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>
Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>	
Description		
Provide a brief description of the proposed rule change (limit 250 characters, required when Initial is checked *).		
<input type="text" value="A proposed rule change to adopt an alternative to the four dollar initial listing bid price requirement for the Nasdaq Capital Market."/>		
Contact Information		
Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.		
First Name *	<input type="text" value="Arnold"/>	Last Name * <input type="text" value="Golub"/>
Title *	<input type="text" value="Vice President and Associate General Counsel"/>	
E-mail *	<input type="text" value="arnold.golub@nasdaqomx.com"/>	
Telephone *	<input type="text" value="(301) 978-8075"/>	Fax <input type="text" value="(301) 978-8472"/>
Signature		
Pursuant to the requirements of the Securities Exchange Act of 1934,		
has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized officer.		
Date	<input type="text" value="01/03/2012"/>	
By	<input type="text" value="Edward S. Knight"/>	<input type="text" value="Executive Vice President and General Counsel"/>
	(Name *)	(Title *)
NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.		
<input type="button" value="Edward S Knight"/>		

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

Form 19b-4 Information (required)

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change (required)

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

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Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit 3 - Form, Report, or Questionnaire

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit 4 - Marked Copies

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of Proposed Rule Change

Pursuant to the provisions of Section 19(b)(1) under the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² The NASDAQ Stock Market LLC (“Nasdaq”) is filing with the Securities and Exchange Commission (“Commission”) a proposed rule change to adopt an alternative to the \$4 initial listing bid price requirement for the Nasdaq Capital Market.

(a) The text of the proposed rule change is attached in Exhibit 5.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The Board of Directors of Nasdaq approved the proposed rule change on November 23, 2011, which authorized the filing of the rule change with the Commission. No other action by Nasdaq is necessary for the filing of the rule change.

Nasdaq will implement the proposed rule upon approval.

Questions regarding this rule filing may be directed to Arnold Golub, Vice President and Associate General Counsel, Nasdaq, at (301) 978-8075 (telephone) or (301) 978-8472 (fax).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

a. Purpose

Nasdaq proposes to adopt an alternative to the minimum \$4 price requirement for companies seeking to list on the Capital Market which meet the express exclusion from the definition of a "penny stock" contained in Exchange Act Rule 3a51-1(g).³

Nasdaq is seeking to make this change to enhance the competition among exchanges for companies with securities priced between \$2 and \$4. While Section 11A of the Act⁴ reflects a Congressional finding that it "is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure... fair competition ...among exchange markets," currently the only exchange listing alternative available to these companies is NYSE Amex, which has listing standards permitting the listing of companies at either \$2 or \$3.⁵ Nasdaq is unable to adopt an identical requirement for the Capital Market because of changes the Commission made to the Penny Stock Rules in 2005,⁶ which would treat securities listed on the Capital Market as "penny stocks" if Nasdaq adopted the identical requirement.

A number of companies have indicated a preference to initially list on the Capital Market instead of NYSE Amex and have expressed frustration at their inability to do so without reverse splitting their stock.⁷ Nasdaq has previously requested that the

³ 17 CFR 240.3a51-1(g).

⁴ 15 U.S.C. 78k-1.

⁵ Section 102(b) of the NYSE Amex Company Guide.

⁶ Securities Exchange Act Release No. 51983 (July 7, 2005) 70 FR 40614 (July 13, 2005).

⁷ Some companies have indicated that they would not consider a reverse stock split unless there was an underlying business rationale to support it. Other companies

Commission modify its rules to eliminate this arbitrary regulatory disparity. In fact, as early as 2004, Nasdaq noted that the then proposed changes to the penny stock rules – which created a “grandfather” for Amex stocks and which were ultimately adopted by the Commission – would memorialize an unfair competitive advantage for Amex that is not available to other exchanges.⁸ The Commission rejected Nasdaq’s call for a uniform approach to all exchanges.⁹

In a petition filed in May 2010, Nasdaq again requested that the Commission act to eliminate the competitive advantage provided NYSE Amex by the grandfather provision, including, if it felt appropriate, by abrogating the NYSE Amex rule and requiring NYSE Amex to adopt the same minimum \$4 initial listing price currently applicable to Nasdaq.¹⁰ The Commission has not acted on this request and has not provided any rationale for its delay.

The proposed rule change fits within another express exclusion to the Commission’s penny stock definition and would allow a company that currently meets

are unable to reverse split their stock and maintain qualification with the public float requirement for listing.

⁸ See Comment of Edward S. Knight, Nasdaq (March 18, 2004) regarding Proposed Amendments to the Penny Stock Rules, Securities Exchange Act Release No. 49037 (January 8, 2004), 69 FR 2531 (January 16, 2004) (available at <http://www.sec.gov/rules/proposed/s70204/s70704-5.pdf>).

⁹ Securities Exchange Act Release No. 51983, *supra*. In rejecting Nasdaq’s comment, the Commission stated its belief that the rule would maintain the status quo. This conclusion was incorrect, however, as the status quo would have permitted Nasdaq to maintain its penny stock exclusion if it modified its listing standards to adopt the same requirements as NYSE Amex, whereas the new Commission rule did not.

¹⁰ See Request for Rulemaking to Allow the Nasdaq Capital Market to Adopt Initial Listing Price Requirements Identical to NYSE Amex, File No. 4-604 (May 25, 2010), available at <http://www.sec.gov/rules/petitions/2010/petn4-604.pdf> (the “2010 Petition”).

NYSE Amex's price requirement to instead list on the Capital Market at the same initial listing price requirement.¹¹ However, companies listing on the Capital Market under the proposed \$2 or \$3 price requirement would also have to satisfy the proposed net tangible assets or revenue test,¹² which is not a requirement of the NYSE Amex rules, but which satisfies the requirements of Rule 3a51-1(g).¹³ Specifically, as revised, a company would be eligible to list on the Capital Market if it satisfies all existing listing standards except for the \$4 price requirement. Such a company must instead have a minimum \$3 price if it qualifies under the \$5 million equity or \$750,000 net income alternatives¹⁴ or a minimum \$2 price if it qualifies under the \$50 million market value of listed securities alternative¹⁵. In addition, a company qualifying under the proposed standard must have either: (a) net tangible assets in excess of \$2 million, if the issuer has been in continuous operation for at least three years; or (b) net tangible assets in excess of \$5 million, if the issuer has been in continuous operation for less than three years; or (c) average revenue of at least \$6 million for the last three years. For this purpose, net tangible assets or revenue must be demonstrated on the Company's most recently filed audited financial statements,

¹¹ All other requirements for listing on the Capital Market are the same or higher than those of NYSE Amex. Nasdaq included a table comparing its listing standards with NYSE Amex's as an attachment to the 2010 Petition. In addition, the Commission previously concluded that the initial listing standards for common stock on the Capital Market were substantially similar to those of NYSE Amex, allowing it to designate Capital Market securities as "covered securities" under Section 18 of the 1933 Act, 15 U.S.C. 77r(b). Securities Act Release No. 8791 (April 18, 2007), 72 FR 20410 (April 24, 2007).

¹² The net tangible asset or revenue requirements would not apply to a company whose securities satisfy the existing \$4 price requirement.

¹³ 17 CFR 240.3a51-1(g).

¹⁴ Rules 5505(b)(1) or (b)(3).

¹⁵ Rule 5505(b)(2).

satisfying the requirements of the Commission, and which are dated less than 15 months prior to the date of listing.¹⁶

Unlike the relief Nasdaq requested in 2004 and 2010, the proposed rule change will require companies to meet an additional net tangible assets or revenue test, which NYSE Amex does not require, thus assuring that securities listed under the proposed rule change would not be considered “penny stocks” under the Act at the time of their listing. In that regard, Rule 3a51-1¹⁷ provides that “penny stock” means any equity security other than securities that meet certain exclusions. Rule 3a51-1(g) provides an exclusion for a security if its issuer has either “[n]et tangible assets (i.e., total assets less intangible assets and liabilities) in excess of \$2,000,000, if the issuer has been in continuous operation for at least three years, or \$5,000,000, if the issuer has been in continuous operation for less than three years” or “[a]verage revenue of at least \$6,000,000 for the last three years.” When the Commission made changes to Rule 3a51-1 concerning exchange-listed securities, it specifically noted that it did not intend to foreclose reliance on the other exclusions available in Rule 3a51-1, including the exclusion available in Rule 3a51-1(g).¹⁸ Proposed Rule 5505(a)(1)(B) would only permit a company to list with a \$2 or \$3

¹⁶ Nasdaq notes that under Rule 5210(a)(1), any newly listing company, including a foreign private issuer, must be registered under Section 12(b) of the Act, which requires filing audited financial statements. Nasdaq believes that in all cases those financial statements must be more recent than 15 months old. See Rule 3-01 and 3-12, 17 CFR 210.3-01 and 210.3-12, with respect to domestic companies, and Item 8.A(4) of Form 20-F, with respect to foreign private issuers. However, the proposed rule adopts the 15 month requirement to assure consistency with the timing requirements contained in Rule 3a51-1(g).

¹⁷ 17 CFR 240.3a51-1.

¹⁸ Release No. 49037, 69 FR at 2535 (text at footnote 41) (“In addition, we note that any security that satisfies one of the other exclusions in Rule 3a51-1 will not be a penny stock even if it fails to satisfy any of the proposed conditions for reported securities or for other exchange registered securities discussed above.”).

price if it satisfies the net tangible assets or revenue test of Rule 3a51-1(g) and, as such, securities listing under the proposed rule would not be penny stocks at the time of their listing.¹⁹

A company that qualifies for initial listing only under the proposed requirement could become a “penny stock” if it fails the net tangible assets and revenue tests after listing and does not satisfy any of the other exclusions from being a penny stock. In order to assist brokers’ and dealers’ compliance with the requirements of the Penny Stock Rules, Nasdaq will monitor companies listed under the proposed alternative and publish a list of any company that initially listed under that requirement, which does not then meet the requirements of Rule 3a51-1(g), described above, or any of the other exclusions from being a penny stock contained in Rule 3a51-1.²⁰

Nasdaq notes that the adoption of the proposed rule change should not alter the Commission’s prior designation of securities listed on the Capital Market as “covered securities” under Section 18 of the Securities Act of 1933.²¹ In 2007, the Commission concluded that Capital Market securities were covered securities, exempt from State law

¹⁹ Furthermore, the Commission has already concluded that companies that satisfy the NYSE Amex listing standards, including price, are not penny stocks. There is no reason to draw a different conclusion about these same companies if they were to list instead on the Nasdaq Capital Market under the proposed standard. See *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996) (“An agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so.”).

²⁰ Nasdaq believes that the other exclusion most likely to be implicated would be Rule 3a51-1(d), 17 CFR 240.3a51-1(d), which provides an exclusion from the definition of a penny stock for a security with a minimum bid price of \$5. Note, however, that if a company obtains a \$4 minimum bid price at a time when it meets all other initial listing requirements, Nasdaq would no longer consider the company as having listed under the proposed alternative standard.

²¹ 15 U.S.C. 77r.

registration requirements, because the Capital Market has listing standards that are substantially similar to the listing standards of the Nasdaq Global Market, New York Stock Exchange, or NYSE Amex (the “Named Markets”).²² The Commission has held that an exchange’s listing requirements will be considered substantially similar if the listing standards are “at least as comprehensive as those of the Named Markets” and that if “listing standards are higher than the Named Markets, then the Commission still determined that the petitioner’s listing standards are substantially similar to the Named Markets.”²³ As described above, following approval of the proposed rule change, the Capital Market listing requirements for common stock will continue to be the same as, or higher than, those of NYSE Amex, which permit the listing of companies at \$2 and \$3 without the proposed additional net tangible asset or revenue test. Indeed, all other requirements for listing on the Capital Market meet or exceed the requirements for listing on NYSE Amex. The proposed rule change, therefore, should not disturb the Commission’s designation of Capital Market securities as covered securities.

b. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,²⁴ in general and with Sections 6(b)(5) and (8) of the Act,²⁵ in particular. Section 6(b)(5) requires, among other things, that a national securities exchange’s rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect

²² Securities Act Release No. 8791, supra.

²³ Id., 72 FR at 20411.

²⁴ 15 U.S.C. 78f.

²⁵ 15 U.S.C. 78f(b)(5) and (8).

investors and the public interest. The proposed rule change would adopt a \$2 and \$3 initial listing price alternative for the NASDAQ Capital Market that is substantially similar to the requirements of NYSE Amex, which the Commission has already determined is consistent with these requirements.²⁶ However, the proposed rule change would require companies to also satisfy an additional net tangible asset or revenue test, which is not a requirement of the NYSE Amex listing requirements and which is consistent with the requirements for a security to avoid being a “penny stock” set forth in Rule 3a51-1(g).²⁷ Nasdaq believes that the proposed price requirement is sufficient to protect investors and would exercise its discretionary authority to deny initial listing if Nasdaq was concerned about the ability of the company to maintain compliance with the continued listing price or believed there were public interest concerns leading to the company’s low stock price.²⁸ Moreover, given that these companies have an exchange-listing available to them, prohibiting listing on Nasdaq does not serve to protect investors and Nasdaq believes that investors would be at least as well protected by having these companies instead listed on the Capital Market, where they would be subject to oversight by Nasdaq’s regulatory staff.

²⁶ Securities Exchange Act Release No. 53050 (January 3, 2006), 71 FR 1580 (January 10, 2006) (approving the NYSE Amex \$2 price requirement).

²⁷ 17 CFR 240.3a51-1(g).

²⁸ Nasdaq notes that NYSE Amex does not have a continued listing price requirement, although NYSE Amex will “consider suspending dealings” in a “common stock selling for a substantial period of time at a low price per share.” NYSE Amex Company Guide Section 1003(f)(v). As such, companies listing at \$2 or \$3 on NYSE Amex could quickly fall to a very low price and nonetheless remain listed indefinitely. On the other hand, Nasdaq requires a \$1 price for continued listing. Nasdaq Listing Rule 5550(a)(2). See also Exchange Act Release No. 53050 (January 3, 2006), 71 FR 1580 at 1581 (note 11) (January 10, 2006) (encouraging NYSE Amex to adopt a minimum price requirement for continued listing while approving SR-AMEX-2005-114).

Section 6(b)(8) of the Act requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In addition, Section 11A of the Act²⁹ requires that there be fair competition among exchange markets to further the public interest and protection of investors. The Department of Justice recently noted the importance of a competitive environment for exchange listings.³⁰ Nasdaq believes that the existing situation, whereby NYSE Amex is permitted to list companies that no other market can, is an unfair burden on competition in violation of Sections 6(b)(8) and 11A. Since 2008, NYSE Amex listed approximately 50 companies for which no other market could compete. The proposed rule change would enhance the competition between exchanges, and benefit companies and their investors, by providing companies that today are forced to list on NYSE Amex an alternative exchange listing venue. As such, the proposed rule change is consistent with Sections 6(b)(8) and 11A.

Finally, as noted above, the proposed rule change would adopt the identical initial listing price requirement contained in the NYSE Amex Company Guide. As such, Nasdaq believes that its listing requirements would remain substantially similar to those of NYSE Amex, as required for covered securities under Section 18 of the Securities Act.³¹ In addition, as noted, the proposed rule change would require that any company qualifying under this new price alternative also meet the requirements of Rule 3a51-

²⁹ 15 U.S.C. 78k-1.

³⁰ See “NASDAQ OMX Group Inc. and IntercontinentalExchange Inc. Abandon Their Proposed Acquisition Of NYSE Euronext After Justice Department Threatens Lawsuit” (May 16, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/271214.htm.

³¹ 15 U.S.C. 77r.

1(g)³² and that these securities therefore would not be considered “penny stocks” under the Act at the time of their listing. To the extent that a company no longer qualified for the exclusion under Rule 3a51-1(g), or any of the other exclusions in Rule 3a51-1, Nasdaq would notify the public by including the company in a list published on Nasdaq’s website.

4. Self-Regulatory Organization’s Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Instead, the proposed rule change would enhance the competition between exchanges, and benefit companies and their investors, by allowing companies that today are forced to list on NYSE Amex an alternative listing venue.

5. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

6. Extension of Time Period for Commission Action

Nasdaq does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

³² 17 CFR 240.3a51-1(g).

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

The proposed rule change is based upon the Exchange Act Rule 3a51-1(g),³³ which exempts from the definition of a penny stock the securities of issuers with: (1) net tangible assets in excess of \$2,000,000, if the issuer has been in continuous operation for at least three years; (2) net tangible assets in excess of \$5,000,000, if the issuer has been in continuous operation for less than three years; or (3) average revenue of at least \$6,000,000 for the last three years. The proposed rule change is also substantially similar to the requirements of Section 102(b) of the NYSE Amex Company Guide, which the Commission has already determined is consistent with the requirements of the Act.³⁴

9. Exhibits

1. Completed notice of proposed rule change for publication in the Federal Register.
5. Text of proposed rule change.

³³ 17 CFR 240.3a51-1(g).

³⁴ Securities Exchange Act Release No. 53050 (January 3, 2006), 71 FR 1580 (January 10, 2006) (approving the \$2 price requirement).

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- ; File No. SR-NASDAQ-2012-002)

January __, 2012

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt an Alternative to the \$4 Initial Listing Bid Price Requirement for the Nasdaq Capital Market

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 3, 2012, The NASDAQ Stock Market LLC (“Nasdaq”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by Nasdaq. 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 the Substance of the Proposed Rule Change

Nasdaq proposes to adopt an alternative to the \$4 initial listing bid price requirement for the Nasdaq Capital Market. The text of the proposed rule change is available on the Nasdaq’s Website at <http://www.nasdaq.cchwallstreet.com>, at Nasdaq’s principal office, and at the Commission’s Public Reference Room. Nasdaq will implement the proposed rule change upon approval.

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

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

Nasdaq proposes to adopt an alternative to the minimum \$4 price requirement for companies seeking to list on the Capital Market which meet the express exclusion from the definition of a "penny stock" contained in Exchange Act Rule 3a51-1(g).³

Nasdaq is seeking to make this change to enhance the competition among exchanges for companies with securities priced between \$2 and \$4. While Section 11A of the Act⁴ reflects a Congressional finding that it "is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure... fair competition ...among exchange markets," currently the only exchange listing alternative available to these companies is NYSE Amex, which has listing standards permitting the listing of companies at either \$2 or \$3.⁵ Nasdaq is unable to adopt an identical requirement for the Capital Market because of changes the Commission made to the Penny Stock Rules in 2005,⁶ which would treat securities listed on the Capital Market as "penny stocks" if Nasdaq adopted the identical requirement.

³ 17 CFR 240.3a51-1(g).

⁴ 15 U.S.C. 78k-1.

⁵ Section 102(b) of the NYSE Amex Company Guide.

⁶ Securities Exchange Act Release No. 51983 (July 7, 2005) 70 FR 40614 (July 13, 2005).

A number of companies have indicated a preference to initially list on the Capital Market instead of NYSE Amex and have expressed frustration at their inability to do so without reverse splitting their stock.⁷ Nasdaq has previously requested that the Commission modify its rules to eliminate this arbitrary regulatory disparity. In fact, as early as 2004, Nasdaq noted that the then proposed changes to the penny stock rules – which created a “grandfather” for Amex stocks and which were ultimately adopted by the Commission – would memorialize an unfair competitive advantage for Amex that is not available to other exchanges.⁸ The Commission rejected Nasdaq’s call for a uniform approach to all exchanges.⁹

In a petition filed in May 2010, Nasdaq again requested that the Commission act to eliminate the competitive advantage provided NYSE Amex by the grandfather provision, including, if it felt appropriate, by abrogating the NYSE Amex rule and requiring NYSE Amex to adopt the same minimum \$4 initial listing price currently

⁷ Some companies have indicated that they would not consider a reverse stock split unless there was an underlying business rationale to support it. Other companies are unable to reverse split their stock and maintain qualification with the public float requirement for listing.

⁸ See Comment of Edward S. Knight, Nasdaq (March 18, 2004) regarding Proposed Amendments to the Penny Stock Rules, Securities Exchange Act Release No. 49037 (January 8, 2004), 69 FR 2531 (January 16, 2004) (available at <http://www.sec.gov/rules/proposed/s70204/s70704-5.pdf>).

⁹ Securities Exchange Act Release No. 51983, supra. In rejecting Nasdaq’s comment, the Commission stated its belief that the rule would maintain the status quo. This conclusion was incorrect, however, as the status quo would have permitted Nasdaq to maintain its penny stock exclusion if it modified its listing standards to adopt the same requirements as NYSE Amex, whereas the new Commission rule did not.

applicable to Nasdaq.¹⁰ The Commission has not acted on this request and has not provided any rationale for its delay.

The proposed rule change fits within another express exclusion to the Commission's penny stock definition and would allow a company that currently meets NYSE Amex's price requirement to instead list on the Capital Market at the same initial listing price requirement.¹¹ However, companies listing on the Capital Market under the proposed \$2 or \$3 price requirement would also have to satisfy the proposed net tangible assets or revenue test,¹² which is not a requirement of the NYSE Amex rules, but which satisfies the requirements of Rule 3a51-1(g).¹³ Specifically, as revised, a company would be eligible to list on the Capital Market if it satisfies all existing listing standards except for the \$4 price requirement. Such a company must instead have a minimum \$3 price if it qualifies under the \$5 million equity or \$750,000 net income alternatives¹⁴ or a minimum \$2 price if it qualifies under the \$50 million market value of listed securities alternative¹⁵.

¹⁰ See Request for Rulemaking to Allow the Nasdaq Capital Market to Adopt Initial Listing Price Requirements Identical to NYSE Amex, File No. 4-604 (May 25, 2010), available at <http://www.sec.gov/rules/petitions/2010/petn4-604.pdf> (the "2010 Petition").

¹¹ All other requirements for listing on the Capital Market are the same or higher than those of NYSE Amex. Nasdaq included a table comparing its listing standards with NYSE Amex's as an attachment to the 2010 Petition. In addition, the Commission previously concluded that the initial listing standards for common stock on the Capital Market were substantially similar to those of NYSE Amex, allowing it to designate Capital Market securities as "covered securities" under Section 18 of the 1933 Act, 15 U.S.C. 77r(b). Securities Act Release No. 8791 (April 18, 2007), 72 FR 20410 (April 24, 2007).

¹² The net tangible asset or revenue requirements would not apply to a company whose securities satisfy the existing \$4 price requirement.

¹³ 17 CFR 240.3a51-1(g).

¹⁴ Rules 5505(b)(1) or (b)(3).

¹⁵ Rule 5505(b)(2).

In addition, a company qualifying under the proposed standard must have either: (a) net tangible assets in excess of \$2 million, if the issuer has been in continuous operation for at least three years; or (b) net tangible assets in excess of \$5 million, if the issuer has been in continuous operation for less than three years; or (c) average revenue of at least \$6 million for the last three years. For this purpose, net tangible assets or revenue must be demonstrated on the Company's most recently filed audited financial statements, satisfying the requirements of the Commission, and which are dated less than 15 months prior to the date of listing.¹⁶

Unlike the relief Nasdaq requested in 2004 and 2010, the proposed rule change will require companies to meet an additional net tangible assets or revenue test, which NYSE Amex does not require, thus assuring that securities listed under the proposed rule change would not be considered "penny stocks" under the Act at the time of their listing. In that regard, Rule 3a51-1¹⁷ provides that "penny stock" means any equity security other than securities that meet certain exclusions. Rule 3a51-1(g) provides an exclusion for a security if its issuer has either "[n]et tangible assets (i.e., total assets less intangible assets and liabilities) in excess of \$2,000,000, if the issuer has been in continuous operation for at least three years, or \$5,000,000, if the issuer has been in continuous operation for less than three years" or "[a]verage revenue of at least \$6,000,000 for the last three years."

¹⁶ Nasdaq notes that under Rule 5210(a)(1), any newly listing company, including a foreign private issuer, must be registered under Section 12(b) of the Act, which requires filing audited financial statements. Nasdaq believes that in all cases those financial statements must be more recent than 15 months old. See Rule 3-01 and 3-12, 17 CFR 210.3-01 and 210.3-12, with respect to domestic companies, and Item 8.A(4) of Form 20-F, with respect to foreign private issuers. However, the proposed rule adopts the 15 month requirement to assure consistency with the timing requirements contained in Rule 3a51-1(g).

¹⁷ 17 CFR 240.3a51-1.

When the Commission made changes to Rule 3a51-1 concerning exchange-listed securities, it specifically noted that it did not intend to foreclose reliance on the other exclusions available in Rule 3a51-1, including the exclusion available in Rule 3a51-1(g).¹⁸ Proposed Rule 5505(a)(1)(B) would only permit a company to list with a \$2 or \$3 price if it satisfies the net tangible assets or revenue test of Rule 3a51-1(g) and, as such, securities listing under the proposed rule would not be penny stocks at the time of their listing.¹⁹

A company that qualifies for initial listing only under the proposed requirement could become a “penny stock” if it fails the net tangible assets and revenue tests after listing and does not satisfy any of the other exclusions from being a penny stock. In order to assist brokers’ and dealers’ compliance with the requirements of the Penny Stock Rules, Nasdaq will monitor companies listed under the proposed alternative and publish a list of any company that initially listed under that requirement, which does not then meet the requirements of Rule 3a51-1(g), described above, or any of the other exclusions from being a penny stock contained in Rule 3a51-1.²⁰

¹⁸ Release No. 49037, 69 FR at 2535 (text at footnote 41) (“In addition, we note that any security that satisfies one of the other exclusions in Rule 3a51-1 will not be a penny stock even if it fails to satisfy any of the proposed conditions for reported securities or for other exchange registered securities discussed above.”).

¹⁹ Furthermore, the Commission has already concluded that companies that satisfy the NYSE Amex listing standards, including price, are not penny stocks. There is no reason to draw a different conclusion about these same companies if they were to list instead on the Nasdaq Capital Market under the proposed standard. See *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996) (“An agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so.”).

²⁰ Nasdaq believes that the other exclusion most likely to be implicated would be Rule 3a51-1(d), 17 CFR 240.3a51-1(d), which provides an exclusion from the definition of a penny stock for a security with a minimum bid price of \$5. Note, however, that if a company obtains a \$4 minimum bid price at a time when it

Nasdaq notes that the adoption of the proposed rule change should not alter the Commission's prior designation of securities listed on the Capital Market as "covered securities" under Section 18 of the Securities Act of 1933.²¹ In 2007, the Commission concluded that Capital Market securities were covered securities, exempt from State law registration requirements, because the Capital Market has listing standards that are substantially similar to the listing standards of the Nasdaq Global Market, New York Stock Exchange, or NYSE Amex (the "Named Markets").²² The Commission has held that an exchange's listing requirements will be considered substantially similar if the listing standards are "at least as comprehensive as those of the Named Markets" and that if "listing standards are higher than the Named Markets, then the Commission still determined that the petitioner's listing standards are substantially similar to the Named Markets."²³ As described above, following approval of the proposed rule change, the Capital Market listing requirements for common stock will continue to be the same as, or higher than, those of NYSE Amex, which permit the listing of companies at \$2 and \$3 without the proposed additional net tangible asset or revenue test. Indeed, all other requirements for listing on the Capital Market meet or exceed the requirements for listing on NYSE Amex. The proposed rule change, therefore, should not disturb the Commission's designation of Capital Market securities as covered securities.

meets all other initial listing requirements, Nasdaq would no longer consider the company as having listed under the proposed alternative standard.

²¹ 15 U.S.C. 77r.

²² Securities Act Release No. 8791, supra.

²³ Id., 72 FR at 20411.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,²⁴ in general and with Sections 6(b)(5) and (8) of the Act,²⁵ in particular. Section 6(b)(5) requires, among other things, that a national securities exchange's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The proposed rule change would adopt a \$2 and \$3 initial listing price alternative for the NASDAQ Capital Market that is substantially similar to the requirements of NYSE Amex, which the Commission has already determined is consistent with these requirements.²⁶ However, the proposed rule change would require companies to also satisfy an additional net tangible asset or revenue test, which is not a requirement of the NYSE Amex listing requirements and which is consistent with the requirements for a security to avoid being a "penny stock" set forth in Rule 3a51-1(g).²⁷ Nasdaq believes that the proposed price requirement is sufficient to protect investors and would exercise its discretionary authority to deny initial listing if Nasdaq was concerned about the ability of the company to maintain compliance with the continued listing price or believed there were public interest concerns leading to the company's low stock price.²⁸ Moreover, given that these companies have an exchange-

²⁴ 15 U.S.C. 78f.

²⁵ 15 U.S.C. 78f(b)(5) and (8).

²⁶ Securities Exchange Act Release No. 53050 (January 3, 2006), 71 FR 1580 (January 10, 2006) (approving the NYSE Amex \$2 price requirement).

²⁷ 17 CFR 240.3a51-1(g).

²⁸ Nasdaq notes that NYSE Amex does not have a continued listing price requirement, although NYSE Amex will "consider suspending dealings" in a "common stock selling for a substantial period of time at a low price per share."

listing available to them, prohibiting listing on Nasdaq does not serve to protect investors and Nasdaq believes that investors would be at least as well protected by having these companies instead listed on the Capital Market, where they would be subject to oversight by Nasdaq's regulatory staff.

Section 6(b)(8) of the Act requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In addition, Section 11A of the Act²⁹ requires that there be fair competition among exchange markets to further the public interest and protection of investors. The Department of Justice recently noted the importance of a competitive environment for exchange listings.³⁰ Nasdaq believes that the existing situation, whereby NYSE Amex is permitted to list companies that no other market can, is an unfair burden on competition in violation of Sections 6(b)(8) and 11A. Since 2008, NYSE Amex listed approximately 50 companies for which no other market could compete. The proposed rule change would enhance the competition between exchanges, and benefit companies and their investors, by providing companies that today are forced to list on NYSE Amex an

NYSE Amex Company Guide Section 1003(f)(v). As such, companies listing at \$2 or \$3 on NYSE Amex could quickly fall to a very low price and nonetheless remain listed indefinitely. On the other hand, Nasdaq requires a \$1 price for continued listing. Nasdaq Listing Rule 5550(a)(2). See also Exchange Act Release No. 53050 (January 3, 2006), 71 FR 1580 at 1581 (note 11) (January 10, 2006) (encouraging NYSE Amex to adopt a minimum price requirement for continued listing while approving SR-AMEX-2005-114).

²⁹ 15 U.S.C. 78k-1.

³⁰ See "NASDAQ OMX Group Inc. and IntercontinentalExchange Inc. Abandon Their Proposed Acquisition Of NYSE Euronext After Justice Department Threatens Lawsuit" (May 16, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/271214.htm.

alternative exchange listing venue. As such, the proposed rule change is consistent with Sections 6(b)(8) and 11A.

Finally, as noted above, the proposed rule change would adopt the identical initial listing price requirement contained in the NYSE Amex Company Guide. As such, Nasdaq believes that its listing requirements would remain substantially similar to those of NYSE Amex, as required for covered securities under Section 18 of the Securities Act.³¹ In addition, as noted, the proposed rule change would require that any company qualifying under this new price alternative also meet the requirements of Rule 3a51-1(g)³² and that these securities therefore would not be considered “penny stocks” under the Act at the time of their listing. To the extent that a company no longer qualified for the exclusion under Rule 3a51-1(g), or any of the other exclusions in Rule 3a51-1, Nasdaq would notify the public by including the company in a list published on Nasdaq’s website.

B. Self-Regulatory Organization’s Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Instead, the proposed rule change would enhance the competition between exchanges, and benefit companies and their investors, by allowing companies that today are forced to list on NYSE Amex an alternative listing venue.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

³¹ 15 U.S.C. 77r.

³² 17 CFR 240.3a51-1(g).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will: (a) by order approve such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. 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-2012-002 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-2012-002. 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 inspection and copying in the Commission's Public Reference Room on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of Nasdaq. 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-2012-002 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³³

Kevin M. O'Neill
Deputy Secretary

³³ 17 CFR 200.30-3(a)(12).

EXHIBIT 5Text of the Proposed Rule Change¹

New language is underlined; deletions are in [brackets].

5505. Initial Listing of Primary Equity Securities

A Company applying to list its Primary Equity Security on the Capital Market must meet all of the requirements set forth in Rule 5505(a) and at least one of the Standards in Rule 5505(b).

(a) Initial Listing Requirements for Primary Equity Securities:

- (1) (A) Minimum bid price of \$4 per share; or
(B) Minimum bid price of \$3 per share, if the Company meets the requirements of the Equity or Net Income Standards under Rules 5505(b)(1) or (b)(3), or of \$2 per share, if the Company meets the requirements of the Market Value of Listed Securities Standard under Rule 5505(b)(2), provided that in either case the Company must also demonstrate that it has net tangible assets (i.e., total assets less intangible assets and liabilities) in excess of \$2 million, if the issuer has been in continuous operation for at least three years; or net tangible assets in excess of \$5 million, if the issuer has been in continuous operation for less than three years; or average revenue of at least \$6 million for the last three years.

For purposes of this paragraph (B), net tangible assets or average revenues must be demonstrated on the Company's most recently filed audited financial statements filed with, and satisfying the requirements of, the Commission or Other Regulatory Authority, and which are dated less than 15 months prior to the date of listing.

- (2) – (5) No change.

(b) Initial Listing Standards for Primary Equity Securities:

- (1) No change.

(2) Market Value of Listed Securities Standard

¹ Changes are marked to the rule text that appears in the electronic Nasdaq Manual found at <http://nasdaq.cchwallstreet.com>.

(A) Market Value of Listed Securities of at least \$50 million (current publicly traded Companies must meet this requirement and the [\$4] bid price requirement for 90 consecutive trading days prior to applying for listing if qualifying to list only under the Market Value of Listed Securities Standard);

(B) – (C) No change.

(3) No change.

IM-5505. Initial Listing for Securities below \$4

Rule 5505(a)(1)(B) provides an alternative initial listing requirement for certain companies with a minimum bid price below \$4. A company that qualifies for initial listing only under this alternative could become a “penny stock” if it later fails the net tangible assets and revenue tests after listing and does not satisfy any of the other exclusions from being a penny stock contained in Rule 3a51-1 under the Act. In order to assist brokers’ and dealers’ compliance with the requirements of the Penny Stock Rules, Nasdaq will monitor companies listed under the alternative requirement and publish on its website a list of any company that initially listed under the alternative requirement, which no longer satisfies the net tangible assets or revenue test contained in Rule 5505(a)(1)(B), and which does not satisfy any of the other exclusions from being a penny stock contained in Rule 3a51-1 under the Act. If a company initially lists under the alternative requirement at a price below \$4, but subsequently achieves a \$4 price and, at the same time, satisfies all other initial listing criteria, it will no longer be considered as having listed under the alternative requirement.

Brokers and dealers are reminded that the list published by Nasdaq is only an aid and that the Penny Stock Rules impose specific obligations on brokers and dealers with respect to transactions in penny stocks.

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