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SEC Approves Nasdaq Proposal for Alternative Minimum Bid Price Listing Requirement

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On April 18, 2012, the U.S. Securities and Exchange Commission (SEC) granted accelerated approval of a final rule adopting a more relaxed alternative to the current $4.00 per share minimum bid price initial listing requirement for the NASDAQ Capital Market (Nasdaq). The stated purpose of the Nasdaq proposal was to level the competitive playing field between Nasdaq and the New York Stock Exchange (NYSE) Amex so as to allow Nasdaq to compete more effectively with NYSE Amex for initial listings of companies. In addition to increasing competition, this change is also anticipated to benefit smallcap companies by allowing greater access to capital markets and facilitating capital formation and flow.

Currently, a company seeking to list its securities on Nasdaq must comply with a host of quantitative and qualitative initial listing requirements, including, among others, the $4.00 per share minimum bid price requirement. Under the approved rule, however, a company that does not meet the $4.00 per share minimum bid price requirement may still list its securities on Nasdaq if it meets all other initial listing requirements and:

- evidences the $3.00 minimum bid price and qualifies under the Equity[1] or Net Income[2] initial listing standards, or
- evidences the $2.00 minimum bid price and qualifies under the Market Value of Listed Securities[3] initial listing standard.

[1] Under the Equity Standard, a company must show, among others, stockholders' equity of at least $5 million, market value of publicly held shares of at least $15 million and two-year operating history.

[2] Under Net Income Standard, a company must show, among others, net income from continuing operations of $750,000 in the most recently completed fiscal year or in two of the three most recently completed fiscal years, stockholders' equity of at least $4 million and market value of publicly held shares of at least $5 million.

[3] Under the Market Value of Listed Securities Standard, a company show, among others, market value of listed securities of at least $50 million (current publicly traded companies must meet this requirement and the 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), stockholders' equity of at lea st $4 million and market value of publicly held shares of at least $15 million.

Further, to avail itself of this alternative minimum initial bid price listing standard, the company must demonstrate that it has net tangible assets in excess of $2 million if the company has been in continuous operation for at least three years, or of $5 million if it has been in continuous operation less than three years. The company could also be listed under the alternative if it has at least $6 million in net tangible assets for the last three years (as determined based upon the applicant's most recently filed audited financial statements).

Finally, under new IM-5505 (Interpretative Material), a company that qualifies its securities for initial listing under the alternative price requirement would be monitored and could become a "penny stock" if the company fails the net tangible assets and revenue tests after listing and does not satisfy any of the other exclusions from being a penny stock. Nasdaq will publish and update on its website a list of these "non-compliant" companies, i.e., the companies that initially listed under the alternative price requirement, but subsequently fell out of compliance with the penny stock exclusion. However, any security that subsequently achieves a $4.00 per share closing price over at least a five-consecutive-trading-day period (and remains in compliance with all other requirements), will cease being deemed to have listed under this alternative listing requirement and, as a result, will not be subject to the Nasdaq ongoing monitoring for penny stock compliance. Following our communications with the staff on this matter, it is our understanding that the alternative listing requirement will also be available to OTC Bulletin Board trading companies that became "public" through the reverse merger process. A copy of the SEC release is available here.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact:
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