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NASDAQ Listing Requirements

The following is written by Laura Anthony, Esq., a going public attorney focused on OTC listing requirements, direct public offerings, going public transactions, reverse mergers, Form 10 and Form S-1 registration statements, SEC compliance and OTC Market reporting requirements.

This blog is the first in a two-part series explaining the listing requirements for the two small-cap national exchanges, NASDAQ and the NYSE MKT, beginning with NASDAQ. In addition to often being asked about the listing requirements on NASDAQ and the NYSE MKT, I am asked about the benefits of trading on such an exchange. Accordingly, at the end of this blog I have included a discussion on such benefits.

The NASDAQ Stock Market

The NASDAQ Stock Market currently has three tiers of listed companies: (1) The NASDAQ Global Select Market, (2) The NASDAQ Global Market and (3) The NASDAQ Capital Market. Each tier has increasingly higher listing standards, with the NASDAQ Global Select Market having the highest initial listing standards and the NASDAQ Capital Markets being the entry-level tier for most micro- and small-cap issuers. Keeping in line with the focus of my blogs and practice, this blog is focused on the NASDAQ Capital Market tier.

A company seeking to list securities on NASDAQ must meet minimum listing requirements, including specified financial, liquidity and corporate governance criteria. NASDAQ has broad discretion over the listing process and may deny an application, even if the technical requirements are met, if it believes such denial is necessary to protect investors and the public interest.

Once listed, a company must meet continued listing standards. In order to apply for listing on NASDAQ, a company must complete and submit to NASDAQ a listing application including specified documents and information.

The application process generally takes four to six weeks. Upon submittal of the application, a NASDAQ analyst will be assigned to the file as a lead interface with the company. The company will receive an initial comment letter within two to three weeks, and the comment and review process will continue until the application is either approved or denied. Like a filing with the SEC, a well prepared NASDAQ application will result in fewer comments and a smoother, quicker process. Generally, a company's securities counsel takes the lead and is the point person in preparing the application and communicating with NASDAQ.

Also similar to an SEC review process, NASDAQ will review publicly available information about a company, including but not limited to SEC filings, a company's website, management communications and speeches, and press releases. For the most part, the back-and-forth process does not require a formal protocol, and communications will include e-mail correspondence and phone calls.

Listing Criteria for NASDAQ

To list its securities on NASDAQ, a company is required to meet: (a) certain initial quantitative and qualitative requirements and (b) certain continuing quantitative and qualitative requirements. The quantitative listing thresholds for initial listing are generally higher than for continued listing, thus helping to ensure that companies have reached a sufficient level of maturity prior to listing. NASDAQ also requires listed companies to meet stringent corporate governance standards.

Prior to submitting a full listing application, a company can seek a preliminary listing eligibility review. The Listing Qualifications staff will review the company's public filings to determine if it satisfies the numerical listing requirements. The staff will also consider compliance with the corporate governance requirements of Marketplace Rules ("Rules").

Once the preliminary review is completed, the Listing Qualifications staff will determine whether the company satisfies the numerical listing criteria and whether any corporate governance or regulatory issues raised by the company would preclude listing approval. Any final approval, however, will require the company to submit a formal listing application, which application will undergo an extensive review by NASDAQ Listing Qualifications staff. Moreover, any final approval will require satisfactory compliance with certain other qualitative reviews, including a review of the regulatory history of the company's officers, directors and significant shareholders.

The following information sets forth the requirements to list on the NASDAQ Capital Market, the lowest of the three NASDAQ market tiers, as well as the Corporate Governance Requirements required for such tiers.

Financial and Liquidity Requirements

Companies must meet all of the criteria under at least one of the three standards below to qualify for the NASDAQ Capital Market.

The Seasoning Rules

The seasoning rules, which were adopted in late 2011, prohibit a company that has completed a reverse merger with a public shell from applying to list until the combined entity had traded in the U.S. over-the-counter market, on another national securities exchange, or on a regulated foreign exchange, for at least one year following the filing of all required information about the reverse merger transaction, including audited financial statements. In addition, the rules require that the new reverse merger company has filed all of its required reports for the one-year period, including at least one annual report.

In addition, the seasoning rule requires that the reverse merger company "maintain a closing stock price equal to the stock price requirement applicable to the initial listing standard under which the reverse merger company is qualifying to list for a sustained period of time, but in no event for less than 30 of the most recent 60 trading days prior to the filing of the initial listing application."

The rule includes an exception for companies that complete a firm commitment offering resulting in net proceeds of at least \$40 million.

In addition to the specific additional listing requirements contained in the new rule, the Exchange may “in its discretion impose more stringent requirements than those set forth above if the Exchange believes it is warranted in the case of a particular reverse merger company based on, among other things, an inactive trading market in the reverse merger company’s securities, the existence of a low number of publicly held shares that are not subject to transfer restrictions, if the reverse merger company has not had a Securities Act registration statement or other filing subjected to a comprehensive review by the SEC, or if the reverse merger company has disclosed that it has material weaknesses in its internal controls which have been identified by management and/or the reverse merger company’s independent auditor and has not yet implemented an appropriate corrective action plan.”

Corporate Governance Requirements

All three tiers of the NASDAQ Stock Market regarding corporate governance requirements are generally the same.

The categories of corporate governance include: (1) Distribution of Annual or Interim Reports, (2) Independent Directors, (3) Audit Committee, (4) Compensation Committee, (5) Nomination of Directors, (6) Code of Conduct, (7) Annual Meetings, (8) Solicitation of Proxies, (9) Quorum, (10) Conflict of Interest, (11) Shareholder Approval and (12) Voting Rights. Companies must meet the following corporate governance standards:

Corporate Governance Requirement

Description

Distribution of Annual or Interim Reports The company must make its annual and interim reports available to shareholders, either by mail or electronically through the company’s website.

Independent Directors

The company's board of directors is required to have a majority of independent directors.

Audit Committee

The company is required to have an audit committee consisting solely of independent directors who also satisfy the requirements of SEC Rule 10A-3 and who can read and understand fundamental financial statements. The audit committee must have at least three members. One member of the audit committee must have experience that results in the individual's financial sophistication.

Compensation of Executive Officers

The company is required to have a compensation committee consisting solely of independent directors and having at least two members. In addition, Rule 5605(d)(2)(A) includes an additional independence test for compensation committee members. The compensation committee must determine, or recommend to the full board for determination, the compensation of the chief executive officer and all other executive officers.

Nomination of Directors

Independent directors must select or recommend nominees for directors.

Code of Conduct

The company must adopt a code of conduct applicable to all directors, officers and employees.

Annual Meetings

The company is required to hold an annual meeting of shareholders no later than one year after the end of its fiscal year.

Solicitation of Proxies

The company is required to solicit proxies for all shareholder meetings.

Quorum

The company must provide for a quorum of not less than 33 1/3% of the outstanding shares of its voting stock for any meeting of the holders of its common stock.

Conflict of Interest

The company must conduct appropriate review and oversight of all related party transactions for potential conflict of interest situations.

Shareholder Approval

The company is required to obtain shareholder approval of certain issuances of securities, including:

- Acquisitions where the issuance equals 20% or more of the pre-transaction outstanding shares, or 5% or more of the pre-transaction outstanding shares when a related party has a 5% or greater interest in the acquisition target
- Issuances resulting in a change of control
- Equity compensation
- Private placements where the issuance equals 20% or more of the pre-transaction outstanding shares at a price less than the greater of book or market value

Voting Rights

Corporate actions or issuances cannot disparately reduce or restrict the voting rights of existing shareholders.

The Application and Documents

The NASDAQ application package includes: (i) a symbol reservation form; (ii) the listing application (which requires supplemental documents); (iii) the listing agreement; (iv) the corporate governance certification; (v) the initial application fee, payable via check or wire transfer; and (vi) a logo submission form. All the application forms are completed online at the NASDAQ website listing center. The online platform allows for uploading supplemental and supporting documents. All of the forms should be reviewed in advance and the requisite information readily available before submitting the application.

Symbol Reservation Form

The symbol reservation form is a one-page fill-in electronic form. NASDAQ symbols must be 1-5 characters and are governed by the Intermarket Symbols Reservation Authority (ISRA), which is designed to help organize symbols, prevent duplication and reduce programming and operational complexities. Although beyond this blog, the national market systems have developed a NMS Symbology Plan which is utilized by the ISRA and NASDAQ. The symbol reservation form requests three symbol choices in order of preference. Although NASDAQ will likely give the first choice if available, it has full authority to assign, rescind, or reassign a trading symbol at any time. In addition to the symbol choice, this form includes additional basic information regarding the issuer and planned public offering, including, for example, the name of attorney, lead underwriter if applicable, names of CEO and CFO, yearly revenues, company website and company sector.

The Application

NASDAQ has several listing applications depending on the circumstances of the listing sought. There are twelve different listing applications varying from an application where there has been a change of control, to switching from another exchange or other U.S. market such as the OTC Markets, to spin-offs and of course an IPO. Each listing application is approximately 7 pages in length and requests detailed basic information about the company such as address, contact and billing information, securities attorney and auditor information, transfer agent and officers and directors. In addition, the application form requests information on the specific securities including type, par value and cusip number.

A NASDAQ application also requires disclosure of certain inquiries, investigations, lawsuits, litigation, arbitrations, hearings and other legal and administrative proceedings involving the company, its officers or directors or ten percent (10%) or greater shareholders. Related to the company, the application requires disclosure of any proceedings within the ten years preceding the application date (i) that were initiated by any regulatory civil or criminal agency; (ii) which are material to the company and were asserted under state or federal securities, banking, insurance, tax or bankruptcy laws; or (iii) which are material to the company and allege fraud, deceit or misrepresentation. Backup and final disposition documents must be provided.

Related to officers, directors or ten percent (10%) or greater shareholders, the application the application requires disclosure of any proceedings within the ten years preceding the application date (i) that were initiated by any regulatory civil or criminal agency; or (ii) which allege fraud, deceit or misrepresentation and requested damages in excess of \$100,000. Again, backup and final disposition documents must be provided.

Disclosure is required as to any and all matters that fall within the category requested, including all inquiries, even where the inquiring party would not have jurisdiction to pursue a claim. Accordingly, inquiries by FINRA's Office of Fraud Detection and Market related to the trading activity and press releases, although usually benign, must be disclosed.

The application includes additional questions related to the background of the company, including questions designed to ensure compliance with the seasoning rules.

Moreover, all private offerings, including bridge financings, shelf registrations, and Regulation S offerings, that "are contemplated or have been consummated within the prior six months," must be disclosed. A planned incomplete or busted offering may result in additional questions and accordingly, care should be given in launching private offerings prior to a planned listing or uplisting.

Although NASDAQ has the right to request any supporting documents it deems relevant, certain supporting documents must be included with the application. The types of supporting documents vary depending on application type.

An application for an uplisting from an existing U.S. market, such as the OTC Markets, must include (i) letters from 3 market makers confirming their agreement to make a market in the subject securities upon acceptance of a NASDAQ listing; (ii) a listing agreement; (iii) a logo submission form; (iv) a corporate governance certification form; (v) regulatory correspondence over the past 12 months; and (vi) shareholder confirmation documents. Moreover, in an uplisting application, NASDAQ frequently requests a written confirmation from the company's transfer agent that the security is DRS (direct registration program) eligible. For more information on DRS, see my blog [HERE](#).

Other common follow-up questions from NASDAQ when reviewing an uplisting application include: (i) a request for a Broadridge share range analysis and NOBO list; (ii) a request for a certified shareholder list; (iii) questions related to the mitigation of any going concern opinions; (iv) a request for income statement and/or balance sheet projections for the next 12 months; (v) confirmation that all Sarbanes Oxley Section 302 and 906 certifications have been made; and (vi) confirmation that the auditors have reviewed all quarterly filings in accordance with SAS 100.

The Listing Agreement

The Listing Agreement is a simple 2-page agreement affirming the company's agreement to comply with all rules and regulations of the NASDAQ Stock Market and indemnifying and holding NASDAQ harmless from liability. In particular, a listed company holds NASDAQ harmless and agrees to indemnify the exchange from any liability resulting from third-party trademark infringement claims related to the company's symbol and logo and NASDAQ's use of same. In addition, the listing agreement contains a disclaimer of warranty and liability against NASDAQ for trading issues other than those resulting from gross negligence or willful misconduct.

Corporate Governance Certification Form

The corporate governance certification form certifies compliance with the governance requirements related to an audit committee, director nomination process, compensation committee, board composition, executive sessions, quorum and codes of conduct. Where an exemption applies, the form requires specification of the exemption terms. The form specifies the different rules and exceptions in a check-the-box format.

Logo Submission Form

The logo submission form contains the guidelines for the logo and affirms NASDAQ's rights to use same. NASDAQ uses company logos in its own marketing materials, on the MarketSite Video Wall and Tower and on websites.

Fees

Entry fees are based upon the aggregate number of shares to be listed at the time of initial listing, regardless of class, with a maximum cap of \$75,000. Fees are assessed on the date of entry in The NASDAQ Capital Market, except for \$5,000, which represents a non-refundable application fee. This fee must be submitted with the company's application.

NASDAQ does not charge application or entry fees for any securities that are transferred from a national securities exchange.

NASDAQ Capital Market Entry Fees

Shares	Entry Fees
Up to 15 million	\$50,000, including \$5,000 application fee
Over 15 million	\$75,000, including \$5,000 application fee

Annual Fees

Annual fees are based on the company's Total Shares Outstanding ("TSO") for all classes of stock listed on the Capital Market, as reported in the company's latest filing on record with NASDAQ. In the first year of listing, the company's annual fee will be prorated based on the date of listing.

For a company transferring to The NASDAQ Capital Market from The NASDAQ Global Select Market or Global Market, NASDAQ will apply a credit toward the balance of the company's new annual fee based on the annual fee already paid.

NASDAQ Capital Market Annual Fees

Total Shares Outstanding Annual Fees Annual Fees for ADRs

Up to 10 million \$32,000 \$32,000

Over 10 million \$40,000 \$40,000

Benefits of Trading on an Exchange

There are many benefits to trading on an exchange as opposed to the OTC Markets. The biggest benefits to an exchange are the ability to attract analyst coverage and institutional investors, and the corresponding increase in liquidity that comes with both. Stocks that trade on NASDAQ tend to have a lower bid/offer spread—again, encouraging trading volume and liquidity. Exchange traded securities are exempt from the penny stock definition, allowing for more market maker and broker-dealer participation. As further explained below, a broker-dealer cannot recommend a penny stock transaction to its retail clients, and therefore, no analysts, financial advisors, or institutional investors make recommendations for purchases of penny stocks.

As an aside, this is one of the reasons that OTC Markets created the OTCQX market tier, which does not list penny stocks. It is also the reason that the small- and micro-cap industry is pushing for a supported valid venture exchange (for further reading, see my blog [HERE](#)).

In today's world it is increasingly difficult to deposit stock and/or trade in non-exchange traded securities. Despite the congressional efforts and SEC rulemaking in support of small-cap capital formation (for example, the JOBS Act, including the emerging growth company regulations, new Regulation A+ and Title III Crowdfunding and new FAST Act), through enforcement and investigative proceedings, both the SEC and FINRA continue to apply pressure on broker-dealers, clearing firms and transfer agents to reduce the secondary trading and free flow of penny stocks. For more information on difficulties in depositing stocks, see my blog [HERE](#).

Further on Penny Stocks

NASDAQ and NYSE MKT traded securities are exempted from the definition of a “penny stock” as a result of the initial and ongoing listing standards. Penny stock rules focus on the activity of broker-dealers in effectuating trades in penny stocks. The Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (the “Penny Stock Act”) prohibits broker-dealers from effecting transactions in penny stocks unless they comply with the requirements of Section 15(h) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”) and the rules promulgated thereunder and, in particular, Exchange Act rules 15g-1 through 15g-100 (the “penny stock rules”).

Section 15(h) of the Exchange Act provides that no broker or dealer may effectuate the purchase or sale of any penny stock by a customer unless such broker or dealer (i) approves the customer for the specific penny stock transaction and receives from the customer a written agreement to the transaction; (ii) furnishes the customer a risk disclosure document describing the risks of investing in penny stocks; (iii) discloses to the customer the current market quotation, if any, for the penny stock, including the bid and ask prices and the number of shares that apply to such bid and ask prices; and (iv) discloses to the customer the amount of compensation the firm and its broker will receive for the trade. In addition, after executing the sale, a broker-dealer must send to its customer monthly account statements showing the market value of each penny stock held in the customer’s account.

Moreover, brokers and dealers that are subject to the penny stock rules are subject to additional disclosure requirements set forth in Rules 15g-2 through 15g-9. For my information on penny stocks and the rules affecting broker-dealer activity, see my blog [HERE](#).

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Securities Law Blog is written by Laura Anthony, Esq., a going public lawyer focused on OTC Listing Requirements, Direct Public Offerings, Going Public Transactions, Reverse Mergers, Form 10 Registration Statements, and Form S-1 Registration Statements. Securities Law Blog covers topics ranging from SEC Compliance, FINRA Compliance, DTC Chills, Going Public on the OTC, and OTCQX and OTCQB Reporting Requirements. Ms. Anthony is also the host of LawCast.com, the securities law network.

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