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SEC Approves Amendments to Nasdaq's Eligibility Rule for Securities of Issuers Quoted on the OTC Bulletin Board That May Result in "Delisting" for a Period of One Year For Repeat Late Filers or Non-Filers of Required Periodic Reports

June 8, 2006

Overview

The SEC has approved important amendments to the OTC Bulletin Board's (OTCBB) Eligibility Rule that will affect issuers whose securities are quoted on the OTCBB and may result in an issuer being "delisted" from the OTCBB for a period of one year if either (1) the OTCBB issuer submits a required periodic filing late or in an incomplete form three times in a rolling two year period (including any extension permitted under Rule 12b-25) (Rule 6530(e)(1)), or (2) the OTCBB issuer fails to file a required report twice in a rolling two year period (Rule 6530(e)(2)).

Once the securities of an OTCBB issuer become ineligible for quotation, the securities do not become eligible for re-inclusion on the OTCBB until the issuer has timely filed in complete form all required annual and quarterly reports for a period of one year (i.e., until a domestic issuer has filed one Form 10-K and three Forms 10-Q).

The amended rule may have significant consequences for the market and liquidity of the stock of an issuer that is delisted from the OTCBB.

Summary of Amendments

Under current NASD Rule 6530 (Eligibility Rule), for an issuer's securities to be eligible for and remain eligible for quotation on the OTCBB by an NASD member, the issuer must be current in its periodic filings with the SEC under the Securities Exchange Act of 1934, as amended. When a security becomes ineligible for quotation on the OTCBB due to the late filing of a periodic report (including any extension permitted under Rule 12b-25), Nasdaq appends an "E" to the security's symbol. If the issuer does not file the required report within the applicable grace period provided by the Eligibility Rule (normally 30 days), the Eligibility Rule prohibits NASD members from quoting the issuer's securities on the OTCBB.

As discussed in the proposing release, Nasdaq proposed the amendment to the Eligibility Rule because of the high level of non-compliance with the Eligibility Rule by OTCBB issuers.

Under the amendments:

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- First, securities of those OTCBB issuers that are delinquent in a required filing three times in a two year period become ineligible for quotation on the OTCBB for a period of one year. A filing is not considered delinquent if made within any applicable extension period permitted under Rule 12b-25. The securities of an OTCBB issuer will be removed from the OTCBB the third time in the prior two year period that the issuer does not file a required periodic report by the due date (including any applicable extension permitted under Rule 12b-25) without the benefit of any grace period for the third delinquency.
- Second, securities of those OTCBB issuers whose securities are removed from the OTCBB for failure to file two times in a two year become period ineligible for quotation for a period of one year. This new rule applies to issuers who were unable to regain compliance even within the applicable grace period during which Nasdaq appends an "E" to the issuer's trading symbol. In applying the two-year look back, Nasdaq considers the date the security was removed, without regard to when the delinquent reports were actually due.

Under the rule changes, only filings for which the grace period ends while the issuer is quoted on the OTCBB are considered. Following removal for violating Rule 6530(e)(1) or (2), a security is only eligible for re-inclusion once the issuer has timely filed all required annual and quarterly reports for a period of one year. A late filing during the period of ineligibility has the effect of resetting the one-year ineligibility period. Also, Nasdaq does not consider late filings due prior to the date of re-inclusion.

The rule applies in connection with filings for periods ending on or after October 1, 2005. Filings for periods ending prior to October 1, 2005, are not considered in determining the number of times a company has made late filings. Thus, for example, a late filing with regard to the period or year ended September 30, 2005, (or any period ending prior thereto) will not be considered. Late filings for any period ending on or after October 1, 2005, such as for the year or period ended December 31, 2005 and later, will be considered.

Nasdaq provides an OTCBB issuer with written notification whenever Nasdaq determines that such issuer is late in a periodic filing, and will include an explanation of the effect of such late filing under the new rules.

Prior to removal, Nasdaq provides an OTCBB issuer with seven calendar days to request review of the determination by a hearings panel.

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For further information about Babirak, Vangellow & Carr, P.C., and its lawyers, you may visit our web site at www.bvcpc.com. If you have any question regarding any topic raised in this Corporate Advisor or regarding any corporate finance or related matter, please feel free to contact one of the following:

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