

# Public Company Guide

A Publication of the Honigman LLP Public Company Group

## Nasdaq Compliance Plans for Stockholders' Equity Deficiencies

November 25, 2024

- More companies are receiving notices of noncompliance regarding Nasdaq's minimum stockholders' equity requirement
- This article outlines guidance for companies navigating the stockholders' equity requirement and tips for preparing and submitting a compliance plan with Nasdaq
- This article focuses on companies listed on the Nasdaq Capital Market

In our prior [article](#)<sup>1</sup>, we discussed the various considerations regarding compliance with Nasdaq's minimum bid price requirement under Nasdaq Listing Rule 5810(c)(3). While the minimum bid price requirement is a significant point of compliance for Nasdaq listed companies, it is important to remember that it is not the only continued listing requirement that public companies face. As conditions in the U.S. capital markets continue to present challenges for many public companies, an increasing number of companies are at risk of being delisted from Nasdaq for failing to meet the continued listing requirement related to stockholders' equity pursuant to Nasdaq Listing Rule 5550(b)(1). As of the publication of this article, Nasdaq has reported that 51 companies listed on the Nasdaq Capital Market are deficient under the equity standard<sup>2</sup>.

This article (i) provides a brief overview of Nasdaq's continued listing standards, with a focus on the equity standard of the Nasdaq Capital Market, (ii) discusses the circumstances under which a company would cease to be compliant with the equity standard of the Nasdaq Capital Market, and (iii) provides important considerations for submitting compliance plans to Nasdaq to help companies meet Nasdaq's standards and to avoid delisting. A sample timeline for a company to submit a compliance plan to Nasdaq to remedy a failure to comply with the continued listing requirement's equity standard is attached here as well.

This publication provides general information only and does not constitute legal advice for any situation. Advertising Material.

For additional information,  
please contact:

**Phil Torrence**  
(269) 337-7702  
[ptorrence@honigman.com](mailto:ptorrence@honigman.com)

**Emily Johns**  
(616) 649-1908  
[ejohns@honigman.com](mailto:ejohns@honigman.com)

**Josh Damm**  
(313) 465-7714  
[jdamm@honigman.com](mailto:jdamm@honigman.com)

**N. Danny Shulman**  
(202) 889-4137  
[nshulman@honigman.com](mailto:nshulman@honigman.com)

**Samuel Katz**  
(313) 465-8137  
[skatz@honigman.com](mailto:skatz@honigman.com)

**Garrett Packer**  
(313) 429-8090  
[gpacker@honigman.com](mailto:gpacker@honigman.com)

<sup>1</sup> Anatomy of a Reverse Stock Split for Nasdaq-Listed Companies, March 27, 2024.

<sup>2</sup> <https://listingcenter.nasdaq.com/noncompliantcompanylist.aspx>

## Overview of Nasdaq Continued Listing Standards and the Stockholders' Equity Requirement

Nasdaq is divided into three tiers: the Nasdaq Capital Market, the Nasdaq Global Market, and the Nasdaq Global Select Market, and each of the tiers has its own set of listing requirements. Once a company is listed on Nasdaq, a company must continually meet the relevant qualitative and quantitative criteria of the applicable tier<sup>3</sup>.

In order for companies to remain listed on the Nasdaq Capital Market and to avoid a deficiency with respect to the Listing Rules, each of the requirements of Nasdaq Listing Rule 5550(a) must be continually met, as well as one of the following financial standards outlined in Nasdaq Listing Rule 5550(b):

- (i) the "equity standard," which requires companies to maintain stockholders' equity of at least \$2.5 million<sup>4</sup>;
- (ii) the "market value standard," which requires companies to maintain a market value of listed securities at least \$35.0<sup>5</sup> million, or;
- (iii) the "net income standard," which requires companies to maintain net income from continuing operations of at least \$500,000 in the most recently completed fiscal year or in two of the three most recently completed fiscal years<sup>6</sup>.

Pre-revenue and newly commercialized life sciences companies often encounter challenges in meeting the net income standard, and many of these companies have historically relied on the market value standard to maintain their listing on the Nasdaq Capital Market. Whether due to precipitous decreases in stock prices or a reduction in the number of shares outstanding following a reverse split (or a combination of both), in recent years a number of companies have been forced to rely on the equity standard, rather than the market value standard, to maintain their listings on the Nasdaq Capital Market.

## Falling Out of Compliance with the Stockholders' Equity Requirement

Nasdaq evaluates companies' stockholders' equity for purposes of compliance with the equity standard on a quarterly basis by reviewing the balance sheet data included in a company's most recently filed Annual Report on Form 10-K or Quarterly Report on Form 10-Q. If the disclosed amount of stockholders' equity is less than \$2.5 million and the company also fails to meet the Nasdaq Listing Rule 5550(b)'s market value standard and net income standard, then Nasdaq will deliver a notice of deficiency to the company. Typically, such notice of deficiency is delivered within one business day to one calendar week following the company's most recent Form 10-K or Form 10-Q filing. After receiving the notice of deficiency, the company has four business days to file a Current Report on Form 8-K announcing the receipt of the notice (as required both by Nasdaq rules<sup>7</sup>, and Item 3.01 of Form 8-K). The Form 8-K deadline is based on the date that Nasdaq's notice is delivered, and not on the date of filing of the Form 10-K or Form 10-Q.

With respect to the deficiency itself, the company has 45 calendar days from the date the notice is delivered from Nasdaq to provide to Nasdaq a compliance plan

that sets forth the company's pathway to regaining (and maintaining) compliance with the \$2.5 million stockholders' equity threshold. Acceptance of the plan is at Nasdaq's discretion. If the company's plan is accepted, Nasdaq will grant the company an extension of up to 180 calendar days from the date the Company received the notice of deficiency. However, if the company does not regain compliance within the allotted timeframe, including any extensions that may be granted by Nasdaq, Nasdaq will provide notice that company's securities listed on Nasdaq will be subject to delisting. The company would then be entitled to request review of that determination by a Nasdaq hearings panel.

## Submitting a Compliance Plan to Nasdaq

While Nasdaq has provided guidance (primarily through FAQ)<sup>8</sup> on its considerations for reviewing compliance plans, the exchange has not issued a formal template for companies to reference. The successful compliance plans we have reviewed and prepared include the following elements:

1. *Introduction:* The letter should include a formal header, addressed to the company's Nasdaq listing analyst. The introduction should clearly state the date that the company received its notice of deficiency, and specifically request a 180-day extension to regain compliance.
2. *Company Information:* Typically, the first formal section of the compliance plan includes 2-3 paragraphs providing background of the company's business, including its operations, products, general strategy, and recent developments in the company. This section provides a summary similar to the "Business Overview" sections found in the company's SEC filings, with an added focus on keeping the description succinct.
3. *Compliance Plan:* In 2-3 paragraphs, the company should concisely set forth its plan to regain compliance. In Nasdaq FAQ #366, Nasdaq further elaborates that this plan must be stated in a definitive and concise way and must directly address a path to regaining and maintaining compliance. Companies often describe intended financing plans and/or strategic transactions that will result in increasing their stockholders' equity.

Securities Offerings: The most commonly accepted compliance plan involves securities offerings (either public offerings or private placements). Historically, companies often presented a compliance plan involving one large offering. With the increased challenges in capital markets, many companies now provide a compliance plan that includes multiple offerings; two smaller public offerings, and sales through an ATM, for example.

If available, companies should provide information regarding the bank(s) engaged to conduct the offering(s) during the compliance period. For private placements, a list of the participating investors (if known) must also be provided with the submission.

<sup>3</sup> Given the different continued listing standards, companies struggling to maintain compliance with the heightened listings standards on the Nasdaq Global Market or Nasdaq Global Select Market often look to move their listing to the Nasdaq Capital Market to increase their likelihood of remaining listed on Nasdaq.

<sup>4</sup> [Nasdaq Listing Rule 5550\(b\)\(1\)](#)

<sup>5</sup> [Nasdaq Listing Rule 5550\(b\)\(2\)](#)

<sup>6</sup> [Nasdaq Listing Rule 5550\(b\)\(3\)](#)

<sup>7</sup> [Nasdaq Listing Rule 5810\(b\)](#)

<sup>8</sup> <https://listingcenter.nasdaq.com/MaterialHome.aspx?mcd=LQ>

Strategic Transactions: Some companies describe plans to pursue a strategic transaction to raise their stockholders' equity. Such a transaction may include an asset sale of a portion of the company's business, an acquisition or merger with another company, or a license agreement.

If the compliance plan relies on a transaction, Nasdaq requires that a pro forma balance sheet and income statement be included with the compliance plan submission based on historical financial information that is not older than 45 calendar days from the date of the compliance plan submission. In addition, copies of all available definitive or draft agreements or contractual arrangements should be included with the submission<sup>9</sup>.

Revenue Projections: Nasdaq typically doesn't accept compliance plans that rely on revenue projections or operational improvements in order to regain compliance, unless the company includes definitive contracts and evidence that revenue from those contracts will be received in the short term.

4. *Compliance Timeline:* The compliance plan must show a path of compliance that ends on a date within 180 calendar days from the date that the initial notice from Nasdaq was received by the company. For example, if a company receives a notice from Nasdaq on April 4, 2025, its compliance plan must show that stockholders' equity will be above \$2.5 million prior to October 1, 2025. It is helpful to include a timeline as an exhibit showing key upcoming milestones related to the company regaining compliance (such as filing dates and targeted pricing and closing timelines for any planned securities offerings).
5. *Pro Forma Financial Projections:* Nasdaq requires not only that a company's compliance plan evidence stockholders' equity above \$2.5 million, but that stockholders' equity will *remain* above \$2.5 million for the next 12 months<sup>10</sup>. A company should attach financial projections as an exhibit showing expected stockholders' equity in excess of \$2.5 million through the following four quarters. In our hypothetical example where a notice of deficiency is received on April 4, 2025, the financial projections should show a plan that raises stockholders' equity above \$2.5 million prior to October 1, 2025, and financial projections that show stockholders' equity remaining above \$2.5 million over the next four fiscal quarters. In calculating future projections, the company should use its historical burn rate.
6. *Compliance with Other Nasdaq Listing Rules:* It is important that any offering or transaction proposed in a compliance plan be conducted in accordance with all applicable Nasdaq listing rules, and the staff appreciate seeing a few sentences confirming that the company will comply with applicable Nasdaq rules. This section is typically a few sentences that reference any relevant rules that the company intends to comply with, including whether the company intends to seek stockholder approval if necessary. For example, if the company's compliance plan involves one or more securities offerings, the

company will need to comply with Nasdaq's 20% rule and if it is engaging in merger transaction, the company will need to comply with Nasdaq's business combination rules.

7. *Conclusion:* The compliance plan should be signed by an officer of the company and the company should request that the information included in the submission be kept confidential by the staff.

## Conclusion

With a well-prepared compliance plan and utilizing the steps discussed above, companies will be able to position themselves favorably to navigate the compliance process with Nasdaq.

<sup>9</sup> Documents previously filed with the SEC may be hyperlinked within the compliance plan rather than provided in full.

<sup>10</sup> Nasdaq FAQs state that the required period of compliance that needs to be demonstrated is 6 to 12 months; however, our experience is that Nasdaq typically requires projections for the full 12 months.

**SAMPLE**

**Timeline for Submitting a Compliance Plan to Address Stockholders' Equity Deficiency**

<b>Weeks</b>	<b>Activities</b>
<b>March 31, 2025</b>	File Form 10-K (last day to file for non-accelerated filers)
<b>April 4, 2025</b>	Receive notice of deficiency from Nasdaq (typically anytime within one week of the Form 10-K/Q filing)
<b>April 10, 2025</b>	File Item 3.01 Form 8-K (due within 4 business days of receiving the notice of non-compliance)
<b>May 19, 2025</b>	File plan for compliance with Nasdaq (due within 45 days of receiving the notice of deficiency)
<b>October 1, 2025</b>	If compliance plan accepted, outside date to regain compliance (180 days after receiving the notice of deficiency).