

November 20, 2024

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090

Dear Ms. Countryman:

Re: Notice of Filing of Proposed Rule Change to Modify the Application of the Minimum Bid Price Compliance Periods and the Delisting Appeals Process for Bid Price Non-Compliance (Release No. 34-100767; File No. SR-NASDAQ-2024-045)

We are a law firm that works with companies that may be affected by the proposal by The Nasdaq Stock Market LLC (“*Nasdaq*”) to amend its minimum bid price rules contained in Listing Rules 5810 and 5815 (the “*Proposal*”). After discussion with these companies, we are writing to share certain concerns regarding certain aspects of the rule change and support others. We understand the Proposal is intended to better protect investors¹, and we are supportive of certain aspects of the Proposal we believe accomplish this goal while balancing the interests of companies that rely on the opportunities to raise capital afforded to them by the Nasdaq.

The Proposal will in effect result in two changes to the Nasdaq’s Listing Rules. First, after 360 days of non-compliance with the minimum bid rule and receipt of a delisting determination (“*Delisting Determination*”), no longer will an issuer’s suspension and delisting action from the Nasdaq be stayed during the appeal process, which can result in an additional 180-day compliance period (the “*Appeal Process Stay Removal*”). Second, the Proposal will require the Nasdaq to immediately issue a Delisting Determination to any issuer that fails to meet the continued listing standard for minimum bid price, i.e. has closing bid price of less than \$1.00 for ten consecutive trading days, and has effected one or more reverse stock splits during the prior one-year period (the “*Automatic Delisting Determination*”). We object to the Automatic Delisting Determination, and do not object to the Appeal Process Stay Removal.

I. The Automatic Delisting Determination Will Harm Healthy Micro- and Small-Cap Companies.

Micro- and small-cap companies, particularly those operating in certain sectors such as bio-tech and pharmaceuticals, often require frequent capital raises and are subject to volatile stock prices, and to certain actions by traders that, although legal, have a negative impact causing large fluctuations in an issuer’s trading price not often reflective of the issuer’s value or suitability as an investment. Capital raises can depress stock prices resulting in the need for issuers to effect reverse stock splits to regain compliance with the Nasdaq’s minimum bid rules. The Nasdaq “believes that such behavior is often indicative of deep financial or operational distress within such companies rendering them inappropriate

¹ See Securities Exchange Act Release No. 100767 (August 19, 2024), p. 4.

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for trading on Nasdaq for investor protection reasons.”² However, other factors contribute to the need for reverse stock splits by these issuers.

Advancing drugs and medical devices through the FDA approval process may require years, or even decades to achieve. Prior to obtaining such approvals, companies do not generate revenue. Small companies without a proven track record will need to continually raise capital throughout the FDA approval process, which causes a depressed stock price. This cycle is not indicative of an unhealthy company, rather the nature of certain capital intensive industries.

Equity issuances attract talented employees and directors and align interests in a company’s success and display a confidence in companies from those individuals accepting equity compensation. Equity issuances often have a large dilutive effect on the capitalization of micro- and small-cap companies, causing a company’s stock price to be depressed. This is not indicative of a distressed company, but rather a normal cycle faced by micro- and small-cap companies, especially those in the early stage bio-tech and pharmaceuticals industry.

II. The Automatic Delisting Determination Will Force Companies to Select High Reverse-Stock-Split Ratios, Which is Detrimental to Companies.

The Automatic Delisting Determination creates a “one bite at the apple” problem for issuers. Knowing that they will only have a single chance to effect a reverse stock split to regain compliance with the minimum bid price rules every year, companies will select large reverse split ratios that may cause issues to their capitalization. For example, large reverse stock split ratio will greatly reduce a company’s public float and lessen a stock’s liquidity. The Automatic Delisting Determination will turn the complex analysis done by companies to select a reverse stock split ratio that best fits a company’s needs into a decision driven by a single factor – determining a large enough ratio that would likely give the company the best chance of not falling out of compliance with the Nasdaq bid price requirements during the subsequent one-year period.

III. The Automatic Delisting Determination Will Encourage Short-Sellers to Depress Stock Prices.

The Automatic Delisting Determination will in essence create a clear ledge over which short-sellers will seek to push stock prices. Once a company has conducted a reverse stock split, short-sellers will be encouraged to cause a company to fall out of compliance with the Nasdaq bid price requirements. Once a non-compliance occurs, a Company will likely lose its ability to remain listed on the Nasdaq, causing its stock price to drop dramatically and allowing the short-sellers to profit greatly. The certainty of a delisting gives a clear indicator to these short sellers that a delisting will occur, as opposed to now, when a company can plead its case to Nasdaq and Nasdaq can still make a facts and circumstance determination as to the timing of a company’s potential delisting. Investors can then decide what it wants to do with its investment as the company continues to announce its listing status, whereas short sellers would not be

² Securities Exchange Act Release No. 100767 (August 19, 2024), p. 6.

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able to identify with any certainty exactly when a delisting would or would not occur unless and until a company announces such a delisting. We believe the Automatic Delisting Determination creates a scenario of rewarding bad behavior by short sellers and creating an inequitable situation for the capital markets as a whole and for the affected small companies in particular.

IV. The Automatic Delisting Determination Will Encourage Companies to Regularly have Shareholders Approve Reverse Stock Splits In Order to Have Split Ratios Available to Effect a Split Prior to an Automatic Delisting Determination.

The Nasdaq has indicated that the Automatic Delisting Determination will not apply to companies that were in compliance with the bid price requirement at the time of a reverse stock split. This will encourage companies to continually approve reverse stock split ratios at annual shareholder meetings so that if the company's stock drops close to the minimum price, the Company will be able to preemptively initiate a reverse stock split to avoid an Automatic Delisting Determination. Moreover, it will also encourage companies to effect a reverse stock split when their stock price starts to trade below \$1.00, but before it reaches the 10-day trading period which would otherwise cause noncompliance with the bid price rule. By effectively removing the 10-trading day cure period, the Nasdaq Delisting Determination could cause companies to unnecessarily and prematurely effect a reverse stock split since it won't be able to effect another reverse stock split if it has previously done so within the last year, which essentially undermines the purpose of the proposed rule.

V. The Nasdaq Can Achieve its Aims Without the Automatic Delisting Determination.

We propose that instead of implementing the Automatic Delisting Determination for companies that violate the minimum bid price requirements within a year of a reverse stock split, the Nasdaq grant a single 180-day compliance period to companies that violate the minimum bid requirements within a year of a reverse stock split. This will avoid many of the shortcomings of the proposed rule discussed above. Furthermore, it will still provide additional protection to investors in conjunction with the Appeal Stay Removal Proposal.

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Very truly yours,

A handwritten signature in black ink that reads "Faith L. Charles". The signature is written in a cursive, flowing style.

Faith L. Charles