

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-87716; File No. SR-NASDAQ-2019-089)

December 11, 2019

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Amend Rule 5815 to Preclude Stay During Hearing Panel Review of Staff Delisting Determinations in Certain Circumstances

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 27, 2019, The Nasdaq Stock Market LLC (“Nasdaq” or the “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Exchange Rule 5815 regarding review of Nasdaq Staff (“Staff”) Delisting Determinations by Hearings Panels. The proposed change would preclude the stay of a Staff Delisting Determination during the review period in three specified circumstances outlined below.

The text of the proposed rule change is available on the Exchange’s Website at <http://nasdaq.cchwallstreet.com>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq administers a series of rules that govern the initial and continued listing qualifications required of companies listed on the Exchange.<sup>3</sup> Newly listing companies must demonstrate compliance with all initial listing requirements before they are listed. Once listed, Nasdaq staff (“Staff”) monitors each company to ensure continued compliance with the Listing Rules. In the event that a company fails to maintain compliance with the Listing Rules, Staff will issue a notification informing the company of the deficiency. Where allowed by Nasdaq’s rules, Staff’s notification may provide for a cure or compliance period, allow the company to submit a plan of compliance for Staff to review, or state the Staff’s determination that the company should be delisted from the Exchange (a “Delisting Determination”).<sup>4</sup> In instances

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<sup>3</sup> See Nasdaq Rules 5300, 5400, and 5500 Series, outlining requirements for companies seeking to conduct an initial listing on Nasdaq Global Select Market, Nasdaq Global Market and Nasdaq Capital Market, respectively, as well as requirements for continued listing once an initial listing has been completed.

<sup>4</sup> See Nasdaq Rule 5810, listing the categories of deficiency notifications, information contained in deficiency notifications and Delisting Determinations, company disclosure obligations upon being informed of a deficiency or delisting, and types of deficiencies and notifications.

where the company is allowed a cure or compliance period, Staff will send a Delisting Determination at the end of the cure or compliance period if the company has not regained compliance; in instances where the company is allowed to submit a plan of compliance, Staff will send a Delisting Determination if Staff does not accept the company's plan of compliance or if the company does not timely complete its plan and regain compliance. The Delisting Determination will inform the company of the factual basis for the Staff's determination, provide instructions regarding obligations to disclose the Delisting Determination to the public, and inform the company of its right for review of the Delisting Determination by a Hearings Panel.

Nasdaq Rule 5815(a) allows a company to request a written or oral hearing before a Hearings Panel to review a Delisting Determination, public reprimand letter or denial of a listing application. Under the existing rules, this request for a hearing generally will stay the suspension and delisting action pending the issuance of a written decision from the Hearings Panel.<sup>5</sup>

The Exchange proposes to amend Rule 5815 to remove the stay provision in certain situations so that a company's securities will be suspended from trading on Nasdaq during the pendency of the Hearings Panel's review. Specifically, removal of the stay provision will apply to companies that have received a Delisting Determination: in the case of proposed 5815 (a)(1)(B)(ii)(a), following the completion of a business combination with an operating company that fails to satisfy the requirements of Nasdaq Rule IM-5101-2; in the case of proposed 5815 (a)(1)(B)(ii)(b), following a business combination with a non-Nasdaq entity that results in a change of control under Rule 5110(a) where the initial listing application has yet to be approved;

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<sup>5</sup> See Nasdaq Rule 5815(a)(1). In the case of a Delisting Determination related to the requirements to timely file periodic reports with the Commission, the delisting action is only stayed for 15 calendar days unless the company specifically requests and the Hearings Panel grants a further stay.

and in the case of proposed 5815 (a)(1)(B)(ii)(c), in connection with a company that has declared bankruptcy or announced liquidation pursuant to rule 5110(b). After considering the record in the matter, including an oral hearing if elected by the company, the Hearings Panel can reinstate the company and allow trading to continue on Nasdaq.<sup>6</sup>

Companies Whose Business Plan is to Complete One or More Acquisitions and Business Combinations with non-Nasdaq Entities Resulting in a Change of Control

Under Listing Rule IM-5101-02, Nasdaq will permit the listing of a company whose business plan is to complete an initial public offering and engage in a merger or acquisition with one or more unidentified companies within a specific period of time. Such a company is required to keep the proceeds of its initial public offering in an escrow account and, until the company has completed one or more business combinations having an aggregate fair market value of at least 80% of the value of the escrow account, must meet the requirements for initial listing following each business combination.<sup>7</sup> Nasdaq Staff may, after having reviewed such a company, determine that the combined company does not meet the initial listing requirements and, in such a case, will issue a Delisting Determination.

Similarly, a Nasdaq-listed company must apply for initial listing on the Exchange in connection with a transaction whereby the company combines with a non-Nasdaq entity, resulting in a change of control of the company and potentially allowing the non-Nasdaq entity

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<sup>6</sup> The proposed rule change would suspend the security from trading under proposed Rule 5815(a)(1)(B)(ii), rather than halt trading in the security pursuant to Nasdaq's authority under Rule 4120(a)(5).

<sup>7</sup> See Nasdaq Rule IM-5101-2.

to obtain a Nasdaq listing.<sup>8</sup> If the company's application for initial listing has not been approved prior to consummation of the transaction, Nasdaq will issue a Delisting Determination.<sup>9</sup>

In each case, under existing Nasdaq rules, if a company requests review by a Hearings Panel, the Delisting Determination is stayed during the pendency of such review and the company's shares will continue to trade on the Exchange. The proposed rule change will modify the rules so that suspension of the company's shares is not stayed in connection with a Delisting Determination for the following reasons.

For both categories of companies outlined above, the Exchange believes immediate suspension is appropriate and necessary in order to prevent a company from listing shares on the Exchange despite it having never established compliance with the Exchange's initial listing requirements. In each case, the company that must satisfy the initial listing requirements is effectively a new business entity and, as a result, is required by Nasdaq's rules to demonstrate compliance with the Exchange's initial listing standards. To allow such companies to trade on the Exchange without first demonstrating compliance with the initial listing standards misleads the investing public by giving the appearance that the company has met the standards imposed

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<sup>8</sup> See Nasdaq Rule 5110(a).

<sup>9</sup> Nasdaq Staff provides written notice to a company if it determines that a transaction, as then proposed, will result in a change of control pursuant to Listing Rule 5110(a). In this notification, Nasdaq Staff advises the company that the combined entity will be required to submit an initial listing application and listing agreement prior to consummating the transaction, satisfy all initial inclusion criteria immediately upon consummation of the transaction and pay all required fees. Upon receipt of this notification, the company may appeal Staff's determination that Listing Rule 5110(a) is applicable to the transaction. As such, a company would only be subject to suspension under the proposed rule if it does not contest the applicability of Rule 5110(a), or if the Panel has already concluded that the rule is applicable, and if the company does not satisfy the initial inclusion requirements upon consummation of the transaction. See Nasdaq FAQ 413, available at [https://listingcenter.nasdaq.com/Material\\_Search.aspx?materials=413&mc d=LQ&criteria=2](https://listingcenter.nasdaq.com/Material_Search.aspx?materials=413&mc d=LQ&criteria=2).

by Nasdaq. Moreover, the company could then use the benefits of its Nasdaq listing and trading to achieve compliance with the initial listing requirements it does not satisfy.<sup>10</sup>

Nasdaq believes that adopting this rule change will align the process for listing a company following a business combination (with an acquisition company or following a business combination resulting in a change of control) with the process for other companies that must meet the initial listing requirements before they are allowed to list and trade on Nasdaq.

### Bankruptcy

Under Nasdaq Rule 5110(b), Staff may use its discretionary authority to delist a company's listing in the event it has filed for protection under the federal bankruptcy laws, or comparable foreign laws, or has announced that liquidation has been authorized by its board of directors, even if the company's securities otherwise meet all requirements for continued listing on the Exchange.<sup>11</sup> The proposed rule change will modify the rules so that suspension in trading in the company's shares is not stayed when a company has requested an appeal after received a Delisting Determination for these reasons.

Nasdaq believes that it is appropriate to eliminate the stay during the pendency of the Hearings Panel's review where Nasdaq Staff has determined to delist a company in bankruptcy

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<sup>10</sup> In 2011, the Securities and Exchange Commission noted that "...the listing standards provide the means for an exchange to screen issuers that seek to become listed, and to provide listed status only to those that are bona fide companies with sufficient public float, investor base, and trading interest likely to generate depth and liquidity sufficient to promote fair and orderly markets. Meaningful listing standards also are important given investor expectations regarding the nature of securities that have achieved an exchange listing, and the role of an exchange in overseeing its market and assuring compliance with its listing standards." Securities Exchange Act Release No. 65708 (November 8, 2011), 76 FR 70799 at 70802 (November 15, 2011) (approving SR-NASDAQ-2011-073).

<sup>11</sup> Nasdaq Rule 5110(b) also requires a company emerging from bankruptcy protection to demonstrate compliance with the Exchange's initial listing standards in order to be listed on the Exchange.

proceedings. In these cases, the company has acknowledged its serious financial straits and, in Nasdaq's experience, there is generally no residual equity for the current stockholders.

Continued trading of the company's shares during the duration of the Hearings Panel's review is inadvisable in light of these facts and could create investor confusion about the company's ability to satisfy Nasdaq's listing requirements.<sup>12</sup> Instead, Nasdaq believes it would better enhance investor protection if the company's shares were suspended during the review process.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>13</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>14</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by preventing companies that have not demonstrated compliance with the Exchange's initial listing standards, and companies that have sought bankruptcy protection, from trading on the Exchange during the pendency of the Hearings Panel's review of a Delisting Determination. Nasdaq believes that allowing such companies to continue trading on the Exchange is confusing to investors and raises investor protection concerns.

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<sup>12</sup> Rule 5110(b) requires a company emerging from bankruptcy protection to demonstrate compliance with the Exchange's initial listing standards in order to continue to be listed on the Exchange. Of 37 Delisting Determinations related to bankruptcy between 2016 and 2018, only one company remained listed and demonstrated compliance with the initial listing requirements upon emerging from bankruptcy.

<sup>13</sup> 15 U.S.C. 78f(b).

<sup>14</sup> 15 U.S.C. 78f(b)(5).

In the case of companies whose business plan is to complete one or more acquisitions and companies that complete a business combinations with a non-Nasdaq entity resulting in a change in control, allowing continued trading on the Exchange would permit companies that are effectively new entities to be listed without having completed the standard vetting process conducted by the Exchange of all new listed companies and demonstrating compliance with all initial listing requirements. Likewise, due to the uncertainty of the outcome, and the limited information provided during bankruptcy proceedings, continued listing of a company's shares on the Exchange during such proceedings exposes investors to increased risk. The proposed rule will protect investors by preventing continued trading in such company's securities until an independent Hearings Panel reviews the Delisting Determination and determines that continued trading on Nasdaq is appropriate.

The proposed rule change is also consistent with Section 6(b)(7) of the Act in that it provides a fair procedure for the prohibition or limitation by the Exchange of any person with respect to access to services offered. Under the proposed rule change, companies whose business plan is to complete one or more acquisitions or a business combination with a non-Nasdaq entity resulting in a change of control would be treated the same as any other company that is applying for listing on The Nasdaq Stock Market. No company may trade on The Nasdaq Stock Market until it demonstrates compliance with the listings qualifications rules of the Exchange. This standard is applied to new companies and companies that previously traded on the Exchange but have now undergone a change in business status that requires demonstration of compliance with the Exchange's listing rules.

In the case of a company undergoing bankruptcy, the proposed rule change is fair because the company's shares will be suspended only for the duration of an independent Hearing



Panel's consideration of the company's appeal. The proposed rule would not immediately delist a company's shares. A company subject to a Delisting Determination pursuant to bankruptcy would be given an opportunity to present its case to an impartial Hearings Panel. Once the Hearings Panel has issued a written decision, the company's shares may then resume trading if the Hearings Panel deems it appropriate. Fairness requirements do not mandate continued trading, only the ability to have an impartial Hearings Panel review the Staff's Delisting Determination. Limitations on trading during the pendency of the Hearings Panel's review is appropriate in light of the need to protect prospective investors.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule would be applied equally to all listed companies whose business plan is to complete one or more acquisitions, that complete a business combinations with a non-Nasdaq entity resulting in a change in control, or that seek bankruptcy protection. In addition, the proposed rule change will align the process for listing a new company following a business combination with an acquisition company or following a business combination resulting in a change of control with the process for other newly listing companies, which must meet the initial listing requirements prior to being listed.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer

period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2019-089 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2019-089. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be

available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2019-089, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>15</sup> 17 CFR 200.30-3(a)(12).