SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-89309; File No. SR-NASDAQ-2020-002)

July 14, 2020

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Amend the Procedures Governing the Introduction of Legal Arguments and Material Information by Companies in a Proceeding Before a Hearings Panel

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1], and Rule 19b-4 thereunder,[2] notice is hereby given that on July 2, 2020, The Nasdaq Stock Market LLC ("Nasdaq" or "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 the procedures governing the introduction of legal arguments and material information by companies in a proceeding before a Hearings Panel.

The text of the proposed rule change is available on the Exchange's Website at https://listingcenter.nasdaq.com/rulebook/nasdaq/rules, at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

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

A company may, within seven calendar days of the date of a staff delisting determination notification, public reprimand letter, or written denial of a listing application, request a written or oral hearing before a Hearings Panel to review the staff delisting determination, public reprimand letter, or written denial of a listing application.[3] The Hearings Department will then schedule a hearing to take place before a Hearings Panel, generally within 45 days of the request for a hearing.[4] The Hearings Department will send written acknowledgment of the company's hearing request and inform the company of the date, time, and location of the hearing, and the deadlines for written submissions to the Hearings Panel.[5] A company may waive its right to an oral hearing and instead seek a decision by the Hearings Panel based solely on its written submissions. To improve the hearings process, the Exchange is proposing to revise the procedures governing the introduction of legal arguments and material information by companies in a written or oral hearing before a Hearings Panel.

Specifically, the Exchange is proposing to revise, as discussed below, Listing Rule 5815(a)(5), which currently provides that a company may submit to the Hearings Department a written plan of compliance and request that the Hearings Panel grant an exception to the listing

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3 See Listing Rule 5815(a)(1)(A).

4 See Listing Rule 5815(a)(4). Under that rule, the company will be provided at least ten calendar days' notice of the hearing unless the company waives such notice.

5 Id.

standards for a limited time period, or may set forth specific grounds for the company's contention that the issuance of a staff delisting determination, public reprimand letter, or denial of a listing application, was in error, and may also submit public documents or other written material in support of its position, including any information not available at the time of the staff determination. The Exchange is also proposing to revise Listing Rule 5815(a)(6), which currently provides that at an oral hearing, the company may make such presentation as it deems appropriate, and the Hearings Panel may question any representative appearing at the hearing. To improve the efficient and effective functioning of the hearings process in connection with the company's appeal of a delisting determination, public reprimand letter, or denial of a listing application, the Exchange proposes amending Listing Rule 5815(a)(5) and (a)(6) to: (1) establish a requirement, and set forth the process, for a company to provide a written submission and written update in connection with either a written or oral hearing; (2) prohibit a company from introducing in a written update or during an oral hearing before a Hearings Panel any legal arguments that were not previously raised; and (3) prohibit a company from introducing during an oral hearing before a Hearings Panel any material information unless the material information was previously raised by the company in writing or was solicited by the Hearings Panel, or the company can show that the material information did not earlier exist or exceptional or unusual circumstances are present.

The proposed revisions to Listing Rule 5815 would contain an express requirement that for both oral and written hearings a company must state in writing with specificity the grounds upon which it is seeking review in advance of a hearing (the "Written Submission").[6] This

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[6] As noted above, the Hearings Department generally calendars a hearing within 45 days of the request for a hearing and will establish deadlines for written submissions to the Hearings Panel. See Listing Rule 5815(a)(4). As determined by the Hearings

requirement will ensure that a company makes a Written Submission. In addition, the requirement that a company state "with specificity" the grounds on which is it seeking review will ensure that the Written Submission includes sufficient detail to be useful in the Hearings Panel's review of the record before the hearing.

The proposed revisions to Listing Rule 5815 will clarify the ability of Nasdaq staff to respond in writing to a company's Written Submission. The proposed revisions to Listing Rule 5815 would also provide a company with the option to supplement the company's Written Submission by providing a written update to the Hearings Department no later than two business days in advance of the hearing, briefing the Hearings Panel on any new material information that has transpired since its Written Submission (the "Written Update").[7] The Exchange believes that allowing for a Written Update will improve the hearings process by allowing a company to provide updated information about fast-moving transactions, thereby enabling the Hearings Panel to prepare for the hearing with the most current data available on the company's steps toward achieving or maintaining compliance.

To ensure that companies provide the requisite information in a Written Submission or a Written Update, the Exchange proposes including certain evidentiary standards in proposed Listing Rule 5815. Under the proposed revisions to Listing Rule 5815, legal arguments are only permitted in the Written Submission, and the company must include in the Written Submission all legal arguments on which it intends to rely. A company that does not raise with specificity a

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Department, both oral and written hearing matters are generally considered on Thursdays, and the company's written submission is typically due on the third Friday before the hearing. The Hearings Department will generally establish the Thursday before the Hearing as the deadline for Nasdaq staff to respond in writing.

[7] Because one of the purposes of the Written Update is to allow a company to supplement its Written Submission, a company would be permitted to submit a Written Update even if Nasdaq staff does not respond in writing to the company's Written Submission.

legal argument in its Written Submission will be prohibited from introducing a new legal argument in the Written Update or during the hearing before the Hearings Panel.[8] The Hearings Panel will determine that a company has raised a legal argument with specificity if the legal argument includes sufficient detail to be useful in the Hearings Panel's review of the record before the hearing.

Otherwise, when a company raises a legal argument during a hearing or right before the hearing that was not contained in its Written Submission, it deprives Nasdaq staff of the opportunity to provide a thorough response to the legal argument and it deprives the Hearings Panel the benefit of Nasdaq staff's views and perspective. As a result, the Hearings Panel would not be able to properly adjudicate the legal issue. While new legal arguments are not permitted in the Written Update, the Exchange does not believe that any prejudice will result to a company from this requirement because the Exchange believes a company would have developed its legal arguments early in the hearings process as part of formulating its Written Submission. The Written Update is solely intended to give a company the additional opportunity to provide an

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[8] There is precedent for the requirement that an appellant include all legal arguments in an opening brief, such as the Written Submission, in the SEC Rules of Practice and by the Federal Rules of Appellate Procedure. See, e.g., SEC Rules of Practice 420, 17 C.F.R. § 201.420(c) (governing appeals to the Commission of determinations by Self-Regulatory Organizations, which requires that an application for review "set forth in summary form a brief statement of alleged errors in the determination and supporting reasons therefor" and that any exception to a determination "not supported in an opening brief" may "be deemed to have been waived"). See also SEC Rules of Practice Rule 222, 17 C.F.R. § 201.222(a) (governing prehearing submissions, which allows a hearing officer, on his or her own motion, or at the request of a party or other participant, to order any party to furnish information including "an outline or narrative summary of its case or defense" and "the legal theories upon which it will rely"). See, e.g., Barna v. Bd. of Sch. Dirs. of the Panther Valley Sch. Dist., 877 F.3d 136, 145-46 (3d Cir. 2017) (noting that Fed. R. App. P. 28 requires an appellant's opening brief to set forth and address each argument the appellant wishes to pursue in an appeal and that the court will not "reach arguments raised for the first time in a reply brief or at oral argument").

update on any new material information that has transpired since its Written Submission and to reply to Nasdaq staff's response.[9]

In addition, under the proposed revisions to Listing Rule 5815, a company that fails to raise with specificity any material information relating to its appeal of a delisting determination, public reprimand letter, or denial of a listing application in either its Written Submission or Written Update ("New Material Information"), with certain exceptions, will be prohibited from introducing such information during the oral hearing before the Hearings Panel. Information would not be considered New Material Information if, in the Hearings Panel's opinion, the company had previously included information with sufficient detail to be useful in the Hearings Panel's review of the record before the hearing. This revision is intended to improve the Hearings Panel's timely access to material information, and the proposed Listing Rule 5815 includes certain safeguards to ensure such access.

New Material Information would be permitted in three situations. First, the prohibition on introducing New Material Information during the hearing only applies absent solicitation from the Hearings Panel. This is to ensure that the Hearings Panel is not restricted or limited in its ability to ask questions of a company and has the latitude needed to receive answers to its inquiries during the oral hearing.

Second, if the Hearings Panel determines that the company has shown that the New Material Information did not exist at the time the company was permitted to submit a Written

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[9] Nasdaq has observed that companies are primarily seeking to introduce material information such as a new equity offering or merger, as opposed to legal arguments, at the hearing; thus, the Written Update will provide companies with an opportunity to update the Hearings Panel with material information closer in time to the hearing, but far enough in advance that the Hearings Panel has adequate time to consider such information.

Update, i.e. the information is truly new, then the company will be permitted to introduce such evidence at the hearing. For example, where a key component of a company's compliance plan is a merger, and the company obtains a fully executed version of the merger agreement the day before the hearing, the executed merger agreement would constitute information that did not exist at the time the company was permitted to submit a Written Update. However, the fact that the company was pursuing a merger, the potential merger parties, and the material terms of the contemplated merger, should have been previously disclosed by the company, as some or all of such information likely existed at the time the company was permitted to submit a Written Update.

Third, if the Hearings Panel determines that the company has shown that "exceptional or unusual circumstances" exist that warrant consideration of the New Material Information, then the company will be permitted to introduce such evidence at the oral hearing. As stated in the proposed revisions to Listing Rule 5815, "exceptional or unusual circumstances" would include, but are not necessarily limited to, material information that was not earlier discoverable by the listed company despite all reasonable measures having been taken.[10] This is intended to provide a prudent safety valve for companies that have otherwise exercised due diligence in providing timely information to the Hearings Panel, yet it is circumscribed to the degree necessary to avoid becoming an exception that swallows the general standard.

Where a Hearings Panel permits a company to introduce New Material Information, the proposed revisions to Listing Rule 5815 also provides Nasdaq staff an opportunity to respond in

[10] Cf. SEC Rules of Practice 452, 17 C.F.R. § 201.452 (a party may file a motion for leave to adduce additional evidence prior to the issuance of a decision by the Commission upon a "show[ing] with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously").

writing to the New Material Information within up to three business days, or such shorter time as the Hearings Panel requests, following the oral hearing. Because the company had the opportunity to present its view on the New Material Information at the oral hearing, the company may respond to the staff's submission only if the Hearings Panel requests it do so. This approach balances the company's need to introduce new information during a hearing; the Nasdaq staff's ability to provide a fulsome review of such information to benefit the Hearings Panel's ultimate consideration of an issue; and the interest in timely resolving a matter after a hearing.

The proposed changes to Listing Rule 5815 will be operative for any company that requests a hearing to review a staff delisting determination, public reprimand letter, or written denial of a listing application after the date of an SEC approval of the proposed rule change.[11]

The Exchange believes that the above-mentioned revisions to Listing Rule 5815 will enhance the hearings process by providing the Hearings Panel with the most developed record in as timely a manner as possible. The Exchange further believes that the proposed revisions will avoid situations that Nasdaq staff has observed where, in advance of a hearing, companies provide little information about their plan to achieve or regain compliance or regarding their appeal of a public reprimand letter or denial of an initial listing application, and instead present such information for the first time during the hearing. When companies belatedly provide information to the Hearings Panel, Nasdaq staff has observed that it does not provide the Hearings Panel with adequate time to prepare for and consider the information in advance of the

[11] Companies that have requested a written or oral hearing before a Hearings Panel to review the staff delisting determination, public reprimand letter, or written denial of a listing application prior to the date of SEC approval of the proposed rule change will be subject to the rule text in Listing Rule 5815(a)(5)-(6) that was effective prior to the date of such SEC approval. For such companies, the online rulebook will contain a hyperlink to the older version of the rule.

hearing. Similarly, where companies belatedly provide legal arguments to the Hearings Panel, Nasdaq staff is unable to adequately brief the Hearings Panel concerning its response to the legal argument and, as a result, the Hearings Panel does not have adequate time to prepare for and consider the legal argument in advance of the hearing and thus cannot properly adjudicate the issue.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[12] in general, and furthers the objectives of Sections 6(b)(5) and 6(b)(7) of the Act,[13] 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 from engaging in gamesmanship in the hearings process while affording companies a fair process and reasonable opportunity to present material arguments and evidence to the Hearings Panel at an appropriate time in the hearings process.

Specifically, this proposal will prevent companies from providing substantive information for the first time during a hearing, after having provided the Hearings Panel either no written compliance plan before the hearing or little detail regarding their compliance plan or appeal of a public reprimand letter or denial of an initial listing application before the hearing. In such circumstances, a Hearings Panel has little or no opportunity to review material information regarding a company's compliance plan or a company's appellate position, or to formulate questions to ask the company, in advance of the hearing. As a result, the Hearings Panel may

12 15 U.S.C. 78f(b).

13 15 U.S.C. 78f(b)(5) and (7).

need more time or information to fully consider the matter following the hearing. In the Exchange's view, these current practices effectively reward a company that withholds information by extending the time it remains listed pending a Hearings Panel decision.[14]

Likewise, when companies withhold legal arguments from their Written Submissions regarding a compliance plan or their appellate position, Nasdaq staff may be unable to fully develop legal arguments or advise the Hearings Panel effectively regarding a company's request for relief. As a result, the Hearings Panel would not be able to properly adjudicate the legal issue during the hearing. While legal arguments are not permitted in the Written Update, the Exchange does not believe that any prejudice will result to a company because the Exchange believes a company would have developed its legal arguments early in the hearings process as part of formulating its Written Submission.

The Exchange believes that this proposal is in keeping with the principles described in Sections 6(b)(5) and 6(b)(7) because it will ensure that the hearings process operates effectively and efficiently, allowing companies the opportunity to present information and legal arguments about their appellate position or ability to achieve and maintain compliance, while also affording the Hearings Panel an opportunity to review that information or legal argument and benefit from Nasdaq staff's views about the information presented. As such, the Exchange believes that this proposal will strengthen the integrity and transparency of the hearings process. Furthermore, the Exchange believes that the proposed changes to the hearings process appropriately balance the potential harm of a delisting decision or a denial of initial listing to the company and its current investors with the expectations of prospective investors, who are entitled to believe that a

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[14] Generally, a timely request for a hearing stays the suspension and delisting action pending the issuance of a written Panel Decision. Listing Rule 5815(a)(1)(B).

company listed on Nasdaq satisfies all of Nasdaq's listing requirements.[15] Likewise, the Exchange believes that the proposed changes to the hearings process appropriately balance the potential harm to companies issued a public reprimand letter with an improved opportunity to adequately develop the record in advance of the oral hearing.

The Exchange believes that the proposed process is fair because companies retain the ability to introduce all relevant information before a Hearings Panel, and the proposed changes require that they do so in a more efficient way that helps to minimize the length of time a Hearings Panel needs to make a decision. The Exchange further believes that the proposed process limiting legal arguments to the Written Submission is fair because the Exchange believes a company would have developed its legal arguments early in the hearings process as part of formulating its Written Submission. In addition, building in time for Nasdaq staff to provide a thorough response to the legal argument in advance of the hearing allows the Hearings Panel to properly adjudicate a legal issue with the benefit of having fully considered the company's and Nasdaq staff's views in advance of the hearing.

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. All companies seeking review of a delisting determination, public reprimand letter, or denial of an initial listing application before a Hearings Panel would be affected in the same manner by this change. Moreover, as described above, Nasdaq believes that the proposed rule change is

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15 See In re Tassaway, Securities Exchange Act Release No. 11291, 45 S.E.C. 706, 709, 1975 SEC LEXIS 2057, at *6 (Mar. 13, 1975) ("[P]rimary emphasis must be placed on the interests of prospective future investors . . . [who are] entitled to assume that the securities in [Nasdaq] meet [Nasdaq's] standards. Hence the presence in [Nasdaq] of non-complying securities could have a serious deceptive effect.").

necessary to enhance investor protection from companies that withhold material information or legal arguments from the Hearings Panel until the day of the hearing. This conduct may result in the Hearings Panel's need for additional time to review the information and, thus, potentially unqualified companies remaining listed longer pending a Hearings Panel decision.

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 will: (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. Please include File Number SR-NASDAQ-2020-002 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-2020-002. 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 the 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-2020-002 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.[16]

J. Matthew DeLesDernier
Assistant Secretary

[16] 17 CFR 200.30-3(a)(12).