

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-100544; File No. SR-NASDAQ-2024-037)

July 17, 2024

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Amend Rule 5820 to Codify the Standards of Review that Govern Appeals before the Nasdaq Listing and Hearing Review Council and Calls for Review by the Nasdaq Listing and Hearing Review Council

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 July 3, 2024, 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 Rule 5820 to codify the standards of review that govern appeals before the Nasdaq Listing and Hearing Review Council and calls for review by the Nasdaq Listing and Hearing Review Council.

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.

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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’s Listing Qualifications Department (the “Listing Qualifications Department”) evaluates Company compliance with quantitative and qualitative listing standards and determines eligibility for initial and continued listing of a company’s securities under Nasdaq’s Listing Rules (the “Listing Rules”). When the Listing Qualifications Department determines that a company does not meet the requirements to remain listed, the Listing Qualifications Department will issue a Staff Delisting Determination.<sup>3</sup> Upon receipt of a Staff Delisting Determination or a Public Reprimand Letter, or when its application for initial listing is denied, a company may request that a Hearings Panel review the matter.<sup>4</sup> After reviewing the written record and holding an oral hearing, if one is requested, a Hearings Panel will issue a decision, which is reviewed by the Nasdaq Listing and Hearing Review Council (the “Listing Council”), either on appeal or on its own initiative.<sup>5</sup> The use of Hearings Panels and the Listing Council, along with the limited

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<sup>3</sup> See Listing Rule 5810. The Listing Department may also issue a Public Reprimand Letter in certain circumstances.

<sup>4</sup> See Listing Rule 5815.

<sup>5</sup> See Listing Rule 5820. Pursuant to the Nasdaq Stock Market LLC By-Laws, the Listing Council is composed of non-Nasdaq-affiliated members, from both industry and non-industry backgrounds, who are nominated by Nasdaq management and approved by a Nominating Committee of its Board of Directors.

discretion given to the Listing Qualifications Department, helps address the perception of conflicts that may otherwise exist given Nasdaq’s status as both a self-regulatory organization and a for-profit entity.<sup>6</sup>

Nasdaq’s Listing Rules currently do not specify a standard of review that applies when the Listing Council reviews Hearings Panel decisions. In fact, the Listing Rules are ambiguous on this issue. On the one hand, Listing Rule 5820 charges the Listing Council with conducting a “review” and hearing an “appeal” of a Hearings Panel decision – language which suggests that the responsibility of the Listing Council is to determine whether the Hearings Panel’s decisions were correct. On the other hand, Listing Rule 5820(d) gives the Listing Council broad discretion to “consider . . . failures previously not considered by the Hearings Panel” and Listing Rule 5820(e) states that the Listing Council may request additional evidence and hold additional hearings. This language suggests that the Listing Council’s mandate is broader and that it may render decisions based upon facts and circumstances that were not before the Hearings Panels or that arose subsequent to the Hearings Panels’ decisions.

The Exchange believes that it is important to address the absence of a clear standard of review in Listing Council matters. Doing so would provide clarity to all participants in the appeals process as to the appropriate role of the Listing Council vis-à-vis the Hearings Panels. It would help the Listing Council to understand whether and under what circumstances to consider companies’ efforts to comply with applicable Listing Rules after the Hearings Panel has rendered its decision. Likewise, it would inform companies as to whether appeals to the Listing Council are likely to be viable or futile. Finally, the establishment of a standard of review would promote

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See Bylaws of the Nasdaq Stock Market LLC, Article V.

<sup>6</sup> The Exchange notes that the Listing Rules also provide an opportunity for the Board of Directors to review Listing Council decisions on its own initiative. See Listing Rule 5825.

consistency in the Listing Council’s decisions, which in turn is important to ensuring that the Listing Council is regarded as a fair and reasonable appellate body and that its decisions garner respect. For these reasons, the Exchange now proposes to amend Listing Rule 5820 to adopt a standard of review for appeals of Hearings Panel decisions before the Listing Council and a separate standard of review for Hearings Panel decision called for review by the Listing Council.

*Appeals of Hearings Panel Decisions Before the Listing Council*

Specifically, the proposed standard for appeals would first state a general principle that the Listing Council ordinarily shall not substitute its judgment for that of the Hearings Panel when reviewing Hearings Panels’ decisions.<sup>7</sup> The Exchange believes that deference to Hearings Panels is appropriate insofar as the Hearings Panels’ decisions are based upon fulsome examinations of the law, rules, and facts applicable to matters, including through written briefs submitted by both parties as well as oral hearings at which Hearings Panels scrutinize the parties’ assertions. By contrast, the Listing Council does not conduct its own independent factual examinations. Although the Listing Council has access to the full record of prior Hearings Panel proceedings and prior Listing Qualifications Department actions, as well as the appellate briefs submitted by both parties, the Listing Council typically focuses on discrete questions of law, rule, or fact raised in the appellate briefs and does not ordinarily hold oral hearings.<sup>8</sup> Given the limited role that the Listing Council plays in the process relative to the Hearings Panels, the

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<sup>7</sup> In light of the proposed changes described herein, which circumscribe the authority of the Listing Council, the Exchange proposes to modify the first sentence of Listing Rule 5820(d)(1), which presently states that the Listing Council may “where it deems appropriate” affirm, modify, or reverse a Hearings Panel decision. The Exchange proposes to remove the phrase “where it deems appropriate” insofar as the proposal sets forth elsewhere the circumstances in which such actions would be appropriate for the Listing Council.

<sup>8</sup> See Listing Rule 5820(e)(1), providing that the review generally will be on the written record, although the Listing Council has the ability, at its discretion, to hold additional hearings.

Exchange believes that the Listing Council should defer to the Hearings Panels' judgment in most instances.

The proposed rule also provides that the Listing Council shall affirm a Panel Decision unless it determines that: (i) the specific grounds on which the Panel Decision is based did not exist, as a matter of fact; (ii) the Panel Decision is inconsistent with law or Nasdaq Rules; or (iii) there exist extraordinary circumstances that warrant reversal, modification or remand, consistent with the public interest and protection of investors.<sup>9</sup> By proposing such standard, the Exchange seeks to limit frivolous and baseless appeals. Based on Nasdaq's experience, such appeals often consist of companies simply pleading to the Listing Council to grant them additional time beyond that which the Hearings Panel or Listing Qualifications Department had granted them to comply with the Listing Rules. Going forward, absent a showing of extraordinary circumstances (as described below), the Listing Council would not entertain such appeals, and that standard would be transparent to companies.

Likewise, by limiting the Listing Council's appellate authority to the consideration of circumstances that existed as of the time when the Hearings Panel rendered its decision, the Exchange would provide transparency to the effect of a company gaining compliance with applicable Listing Rules after the Hearings Panel has issued its decision. The pendency of a

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<sup>9</sup> The Exchange notes that the proposed standard is similar to the standard of review with respect to the Commission's review of self-regulatory organization decisions, which states that, "In any proceeding to review ... the prohibition or limitation by a self-regulatory organization of any person with respect to access to services offered by the self-regulatory organization or any member thereof, if the appropriate regulatory agency for such applicant or person, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to dismiss the proceeding or set aside the action of the self-regulatory organization) *finds that the specific grounds on which such denial, bar, or prohibition or limitation is based exist in fact, that such denial, bar, or prohibition or limitation is in accordance with the rules of the self-regulatory organization, and that such rules are, and were applied in a manner, consistent with the purposes of this chapter, such appropriate regulatory agency, by order, shall dismiss the proceeding.*" See 15 U.S.C. 78s(f).

Listing Council appeal is not intended to be, and should not serve as, a de facto additional extension period during which a company may demonstrate compliance with applicable listing requirements. Instead, a company should satisfy the initial listing requirements and follow the application process if it wishes to be listed after it was properly removed by a Hearings Panel for non-compliance with a listing requirement. The Exchange's proposal will adopt this construct by stating that the Listing Council shall affirm a Panel Decision unless it determines that the specific grounds on which the Panel Decision is based did not exist, as a matter of fact, except as described below.

Notwithstanding the above, the Exchange recognizes that there may be certain circumstances that – as a matter of fundamental fairness or to protect investors and the market – warrant the Listing Council reversing, modifying, or remanding a Hearings Panel decision, even when the Hearings Panel decision was based on specific grounds that existed, as a matter of fact, and was consistent with law or Nasdaq Rules at the time it was rendered. The Exchange believes that such circumstances should be limited to those that are extraordinary, lest the exceptions will swallow the general rule that limits the scope of the Listing Council's review authority.

The Exchange proposes to define these “extraordinary circumstances,” for purposes of proposed Listing Rule 5820(d)(1)(A), as those that are “unusual and infrequent” – so opposed to routine and common occurrences that a company should be expected to anticipate and address them within the normal course of their business.

Specifically, under proposed Listing Rule 5820(d)(1)(A), extraordinary circumstances mean unusual and infrequent circumstances that are either: (i) outside of the reasonable control of a company or anyone acting on its behalf (such as where non-compliance with a Listing Rule is caused by a natural disaster or another force majeure event); or (ii) indicative of widespread

difficulties among similarly situated companies in complying with the relevant Listing Rules, where delisting those companies' securities would pose an unnecessary burden on investors and the market.

A circumstance that is beyond the reasonable control of a company or someone acting on its behalf (such as an auditor, accountant, attorney, consultant, vendor, employee, officer, or director) might include, by way of illustration only, a storm, fire, war, terrorist act, or other force majeure event that, despite reasonable protective measures, destroys, damages, delays, or otherwise impedes the ability of a company to meet its obligations under the Listing Rules. By contrast, a circumstance that likely would not be beyond the control of a company would be an error by a company employee. Even if the company's management did not know about or specifically authorize the employee's action, a company is ordinarily responsible for supervising its employees. Likewise, unauthorized malfeasance by a company employee might be considered within the company's control if the misconduct occurred due to a lack of oversight.

An example of a widespread difficulty among similarly situated companies in complying with the Listing Rules might include a good faith misunderstanding or misinterpretation of a new or complex accounting standard that impacts a large number of public companies and requires them all to restate their financial statements. In such a circumstance, the Listing Council may determine that delisting all of the impacted companies for the same reason could unduly disrupt the market and result in greater harm than good for investors. The Exchange notes, however, that if a company knowingly or willfully misapplied the accounting standard in the above example, or did not act diligently to restate its financial statements, then the Listing Council could determine that the company was not "similarly situated" with other listed companies and that it therefore is ineligible for additional time to regain compliance with the Listing Rules.

The Exchange notes that the question of what particular circumstances will qualify as “extraordinary” is a fact-specific inquiry that cannot be reduced to a comprehensive list. Accordingly, the question will be determined by the Listing Council on a case-by-case basis. In determining this question, the Listing Council will consider any recommendation made by the Hearings Panel or Listing Qualifications Department as to whether or not the circumstances surrounding the appeal are indeed extraordinary.

The Exchange notes that it proposes to grant the Listing Council authority to act in extraordinary circumstances only where the Listing Council otherwise has discretion under Listing Rule 5820(d) to provide the requested relief. That is, if a company asks the Listing Council for additional time to file a delinquent periodic report, but the company’s report is already more than 360 days late, then the Listing Council would be limited by Listing Rule 5820(d)(4) and would not have discretion to grant the company’s request, pursuant to proposed Listing Rule 5820(d)(1)(A), even if the Listing Council might otherwise agree that the company’s lateness was the result of extraordinary circumstances.

*Calls for Review of Hearings Panel Decisions by the Listing Council*

The Exchange proposes to adopt a separate standard of review in the event the Listing Council calls a matter for review. Specifically, proposed Listing Rule 5820(d)(1)(B) provides that if the Listing Council calls a matter for review, the Listing Council shall conduct a de novo review of the matter and may consider circumstances that did not exist when the Hearings Panel rendered its decision. Should the Listing Council call a matter for review, the Exchange believes that it is appropriate to adopt a de novo review where the Council can consider facts and circumstances that did not exist at the time when the Panel rendered its decision. Moreover, the de novo standard will allow the Listing Council to draw different conclusions based on the facts

than the Hearings Panel did, which the Exchange believes will best enable the Listing Council to perform its oversight responsibilities through the call for review function.<sup>10</sup> Finally, the Exchange notes that calls for review are rare and are solely in the control of the Council.<sup>11</sup> Therefore, unlike the appeal process, there is nearly no risk of companies exploiting the review process to belatedly regain compliance.

#### *Clarifying Changes*

Lastly, and in addition to the above, the Exchange proposes to reorganize and clarify the existing text of Listing Rule 5820(d) so that it is easier to comprehend. Specifically, the Exchange proposes to relocate the second sentence of subparagraph (d)(1) – which sets forth the general authority of the Listing Council to grant an exception to the Listing Rules – to subparagraph (d)(4). As part of this reorganization, the Exchange also proposes to insert the existing text of subparagraph (d)(4) as subparagraph (d)(4)(A) and the existing text of subparagraph (d)(5) as subparagraph (d)(4)(B). Existing subparagraph (d)(4) prescribes a maximum time period for Listing Council exceptions for companies to regain compliance with periodic filing requirement, while existing subparagraph (d)(5) does the same with respect to exceptions for companies that fail to hold annual meetings. The proposed reorganization of these three provisions will clarify that the Listing Council’s general authority to grant an exemption under (d)(4) will apply except where non-compliance involves delinquencies in filing periodic reports or failures to hold annual meetings, in which cases subparagraphs (d)(4)(A) or

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<sup>10</sup> For example, the Listing Council could observe in its call for review process that a company was granted an exception to remain listed based on a plan of compliance where other companies with similar plans of compliance were not granted exceptions by different Hearings Panels. The ability to review the matter de novo will allow the Listing Council to call that matter for review and reverse the Hearings Panel’s decision even though the Hearings Panel did not make a factual error in its decision and Nasdaq’s Rules would allow the Hearings Panel to grant such an exception.

<sup>11</sup> From January 1, 2022 until June 30, 2024, only one matter was called for review by the Listing Council. That call for review was later withdrawn.

(d)(4)(B) will instead apply, respectively. This clarification will help to dispel confusion as to whether the Listing Council’s authority to grant an exception in cases of filing delinquencies and annual meeting deficiencies is in addition to or in lieu of the Listing Council’s general authority to grant exceptions. Finally, the Exchange proposes to relocate the last two sentences of existing subparagraph (d)(1) – which concern the issuance by the Listing Council of a public reprimand letter – to subparagraph (d)(5). This change is also intended to improve clarity.

### *Implementation*

Following approval of this proposal, the Exchange proposes to apply the new standards of review to all matters that thereafter enter the Listing Council review process. The Exchange will apply the current rules to any matter that is pending Listing Council review at the time when the proposal becomes effective.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>12</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>13</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.

As discussed above, the Listing Rules presently lack a clear standard of review to govern Listing Council reviews of Hearings Panel decisions. The absence of a standard of review can lead to inconsistent interpretations of the Listing Council’s authority over time and has led to confusion by companies as to whether actions they take to comply with applicable Listing Rules

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<sup>12</sup> 15 U.S.C. 78f(b).

<sup>13</sup> 15 U.S.C. 78f(b)(5).

after a Hearings Panel decision can allow them to be approved for initial listing or avoid delisting.

The Exchange's proposal will address these problems, to the benefit of the markets, investors, and the public, by adopting a transparent standard of review for Listing Council reviews of Hearings Panel decisions, which is consistent with the standard of review imposed on the Commission's review of Nasdaq listing decisions in Section 19 of the Act.<sup>14</sup> The adoption of specified standards of review will help promote consistency and prevent unfair discrimination in the Listing Council's decisions, improve the clarity of the appellate process and the respective roles of the Hearings Panels and the Listing Council, and also improve the fairness of the process.

The proposal will also promote the equitable treatment of applicant and listed companies, and protect the market and investors, by preserving the Listing Council's discretionary authority (to the extent it otherwise exists) to grant relief in the appeals process to companies when extraordinary circumstances exist. When non-compliance with the Listing Rules is the result of unusual and infrequent occurrences that were beyond the reasonable control of a company, a decision to not approve for initial listing or delist a company's securities may be unduly harsh and unnecessarily harm the company's investors. Likewise, when a large group of similarly situated companies experience a common difficulty that occasions their non-compliance with the Listing Rules, delisting the securities of all those companies may result in undue disruption to the markets and harm to investors. The proposal grants the Listing Council discretion to avoid such unfair and imprudent results, albeit in a manner that is itself carefully calibrated to avoid granting discretion that is either too broad or too narrow.

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<sup>14</sup> 15 U.S.C. 78s(f). See footnote 9, supra.

In addition, the Exchange believes that its proposal to adopt a de novo standard of review in instances where the Listing Council calls a matter for review on its own accord will serve to protect the market and investors. As described above, calls for review are rare and solely under the control of the Council. Therefore, unlike the appeal process, there is nearly no risk of companies exploiting the review process to belatedly regain compliance.

Finally, the Exchange believes that it is consistent with the Act to amend Listing Rule 5820 to improve its overall clarity and organization. In particular, the Exchange believes that its proposal to reorganize language pertaining to the Listing Council's authorities to grant exceptions to the Listing Rules will help to dispel confusion as to the intended relationships between these authorities and thereby 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.

**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 proposal will merely establish standards of review for Listing Council appeals and calls for review that will apply equally to all companies listed on the Exchange and all applicants for listing thereupon. If any listed company or applicant for listing finds the proposal or the review procedures to be unfair or to be otherwise unfavorable, such companies or applicants may freely apply to list their securities on other exchanges. In addition, this rule proposal does not burden competition with other venues, which are similarly free to align their appellate processes.<sup>15</sup>

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<sup>15</sup> The Exchange notes that it offers an additional level of review via the Listing Council, an appellate layer that is not offered by certain competitors of the Exchange.

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 self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR-NASDAQ-2024-037 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-2024-037. This file number should be included on the subject line if email 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 (<https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright

protection. All submissions should refer to file number SR-NASDAQ-2024-037 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

**J. Matthew DeLesDernier,**

*Deputy Secretary.*

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<sup>16</sup> 17 CFR 200.30-3(a)(12).