

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-101662; File No. SR-NASDAQ-2024-045)

November 20, 2024

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Modify the Application of the Minimum Bid Price Compliance Periods and the Delisting Appeals Process for Bid Price Non-Compliance in Listing Rules 5810 and 5815 Under Certain Circumstances

I. Introduction

On August 6, 2024, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to modify the application of the minimum bid price compliance periods and the delisting appeals process for bid price non-compliance in Nasdaq Rules 5810 and 5815 under certain circumstances. The proposed rule change was published for comment in the Federal Register on August 23, 2024.³ On October 3, 2024, pursuant to Section 19(b)(2) of the Exchange Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ This order institutes proceedings under Section 19(b)(2)(B) of the Exchange Act⁶ to determine whether to approve or disapprove the proposed rule change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 100767 (Aug. 19, 2024), 89 FR 68228 (“Notice”). Comments received on the Notice are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nasdaq-2024-045/srnasdaq2024045.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 101238, 89 FR 81956 (Oct. 9, 2024) (designating November 21, 2024, as the date by which the Commission shall either approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change).

⁶ 15 U.S.C. 78s(b)(2)(B).

II. Description of the Proposed Rule Change⁷

A. *Background*

Nasdaq Rules require a company's equity securities listed on the Nasdaq Global Select, Global, and Capital Markets to maintain a minimum bid price of at least one dollar per share (the "Bid Price Requirement").⁸ Upon failure of a company's security to satisfy the Bid Price Requirement, Nasdaq Rule 5810(c)(3)(A) provides for an automatic compliance period of 180 calendar days from the date Nasdaq notifies the company of the deficiency for the company to achieve compliance with the Bid Price Requirement.⁹ Subject to certain requirements,¹⁰ including notifying Nasdaq of the company's intent to cure this deficiency, a company listed on, or that transfers to, the Nasdaq Capital Market may be provided with a second 180-day compliance period.¹¹ If a company is not eligible for the second compliance period, or the

⁷ All capitalized terms not otherwise defined in this order shall have the meanings set forth in the Nasdaq Listing Rules.

⁸ See Nasdaq Rules 5550(a)(2) (Primary Equity Security listed on the Nasdaq Capital Market), 5555(a)(1) (Preferred Stock and Secondary Classes of Common Stock listed on the Nasdaq Capital Market), 5450(a)(1) (Primary Equity Security listed on the Nasdaq Global or Global Select Markets), and 5460(a)(3) (Preferred Stock and Secondary Classes of Common Stock listed on the Nasdaq Global or Global Select Markets).

⁹ A failure to meet the Bid Price Requirement occurs when a company's security has a closing bid price below \$1.00 for a period of 30 consecutive business days. See Nasdaq Rule 5810(c)(3)(A). Compliance can be achieved by meeting the Bid Price Requirement for a minimum of 10 consecutive business days during the applicable compliance period, unless Staff exercises its discretion to extend this 10-day period as discussed in Nasdaq Rule 5810(c)(3)(H). See id.

¹⁰ If a company listed on the Nasdaq Capital Market is not deemed in compliance before the expiration of the 180-day compliance period, it will be afforded an additional 180-day compliance period, provided that on the 180th day of the first compliance period it meets the applicable market value of publicly held shares requirement for continued listing and all other applicable standards for initial listing on the Nasdaq Capital Market (except the bid price requirement) based on the company's most recent public filings and market information and notifies Nasdaq of its intent to cure this deficiency. See Nasdaq Rule 5810(c)(3)(A)(ii). If a company does not indicate its intent to cure the deficiency, or if it does not appear to Nasdaq that it is possible for the company to cure the deficiency, the company will not be eligible for the second compliance period. See id. If the company has publicly announced information (e.g., in an earnings release) indicating that it no longer satisfies the applicable listing criteria, it will not be eligible for the additional compliance period under this rule. See id.

¹¹ See id.

company is eligible but does not resolve the bid price deficiency during the second 180-day compliance period, the company is issued a Delisting Determination under Nasdaq Rule 5810 with respect to that security, which can be appealed to a Nasdaq Listing Qualifications Hearings Panel (“Hearings Panel”).¹² A timely request for a hearing ordinarily stays the suspension of the security from trading pending the issuance of a written Hearings Panel decision.¹³ The Hearings Panel may, where it deems appropriate, grant an exception to the Bid Price Requirement and allow a company up to an additional 180 days from the date of the Delisting Determination to regain compliance.¹⁴ As a result, a company may be continuously deficient with the Bid Price Requirement and continue trading on Nasdaq for more than 360 days (but not more than 540 days).¹⁵

The Nasdaq Rules set forth two circumstances that can curtail the bid price compliance periods. First, Nasdaq Rule 5810(c)(3)(A)(iii) provides that if a company’s security has a closing bid price of \$0.10 or less for 10 consecutive trading days, Nasdaq must issue a Delisting Determination with respect to that security, notwithstanding any otherwise available compliance period. Second, Nasdaq Rule 5810(c)(3)(A)(iv) provides that if a company’s security fails to meet the Bid Price Requirement and the company has effected one or more reverse stock splits over the prior two-year period with a cumulative ratio of 250 shares or more to one, then the company is not eligible for any compliance periods and Nasdaq must issue a Delisting Determination with respect to that security.

¹² See Nasdaq Rule 5815 (Review of Staff Determinations by Hearings Panel).

¹³ See Nasdaq Rule 5815(a)(1)(B).

¹⁴ See Nasdaq Rule 5815(c) (Scope of the Hearings Panel’s Discretion).

¹⁵ See Notice, supra note 3, at 68229.

Based on the Exchange's experience administering the rules described above, it is proposing two modifications to the delisting process in Nasdaq Rules 5810 and 5815. These proposed changes are described in more detail below.

B. Suspension After Second Compliance Period

First, the Exchange proposes to adopt Nasdaq Rule 5815(a)(1)(B)(ii)d. to provide that notwithstanding the general rule that a timely request for a hearing shall ordinarily stay the suspension and delisting action pending the issuance of a written panel decision, a request for a hearing shall not stay the suspension of the securities from trading where the matter relates to a request made by a company that was afforded the second 180-day compliance period described in Nasdaq Rule 5810(c)(3)(A)(ii) and that failed to regain compliance with the Bid Price Requirement during that period.¹⁶ The Exchange states that pursuant to Nasdaq Rule 5815(c)(1)(A), the Hearings Panel will continue to have discretion, where it deems appropriate, to provide an exception for up to 180 days from the Delisting Determination date for the company to regain compliance with the Bid Price Requirement.¹⁷

The Exchange also proposes to clarify in proposed Nasdaq Rule 5815(a)(1)(B)(ii)d. that, pursuant to Nasdaq Rule 5810(c)(3)(A), a company achieves compliance with the Bid Price Requirement by meeting the applicable standard for a minimum of 10 consecutive business days,

¹⁶ See proposed Nasdaq Rule 5815(a)(1)(B)(ii)d. The Exchange states that a company that is suspended under the proposed rule could appeal the Delisting Determination to a Hearings Panel, but its securities would trade in the over-the-counter ("OTC") market while that appeal is pending. See Notice, supra note 3, at 68229.

¹⁷ See Notice, supra note 3, at 68229. The Exchange also states that, pursuant to Nasdaq Rule 5815(c)(1)(E), the Hearings Panel will continue to have the authority to find the company in compliance with all applicable listing standards and reinstate the trading of the company's securities on Nasdaq (e.g., if the company effects a reverse stock split and maintains a \$1.00 closing bid price for at least 10 consecutive days while trading in the OTC market). See id.

unless Staff exercises its discretion to extend this 10-day period as set forth in Nasdaq Rule 5810(c)(3)(H).¹⁸

The Exchange states in its proposal that it believes that two consecutive compliance periods for a total of 360 days is a sufficient period of time for a company to regain compliance with the Bid Price Requirement.¹⁹ Nasdaq states that it provides a company with a second bid price compliance period only if the company reviewed its circumstances and notified Nasdaq that it intends to cure the bid price deficiency by effecting a reverse stock split within the second 180-day compliance period.²⁰ As such, the Exchange states that it believes it is not appropriate for a company in these circumstances to continue trading on Nasdaq during the pendency of the Hearings Panel review process.²¹

C. Delisting Determination If Failure to Meet Bid Price Requirement Occurs Within One Year After Reverse Stock Split

Second, the Exchange proposes to amend Nasdaq Rule 5810(c)(3)(A)(iv) to provide that if a company's security fails to meet the Bid Price Requirement and the company has effected a reverse stock split over the prior one-year period, then the company shall not be eligible for any compliance period specified in Nasdaq Rule 5810(c)(3)(A) and the Listing Qualifications Department shall issue a Delisting Determination under Rule 5810 with respect to that security.²²

¹⁸ See proposed Nasdaq Rule 5815(a)(1)(B)(ii)d.

¹⁹ See Notice, *supra* note 3, at 68229. The Exchange states that it has observed that some companies do not regain compliance during the second 180-day compliance period notwithstanding the company's notification to Nasdaq of its intent to do so. See *id.* at 68228. The Exchange states that in these circumstances, Nasdaq issues a Delisting Determination; however, as described above, the company could continue its listing by appealing that decision to a Hearings Panel, which has the discretion to provide up to 180 additional days from the date of the Delisting Determination. See *id.* at 68228-29.

²⁰ See *id.* at 68229.

²¹ The Exchange states that if a company was not afforded the second 180-day compliance period, the company would not be affected by this proposal and its security would not be suspended from trading on Nasdaq during an appeal to the Hearings Panel, if any. See *id.* at 68228 n.8.

²² See *id.* at 68229.

The Exchange states that this proposed change would apply to a company even if the company was in compliance with the Bid Price Requirement at the time of its prior reverse stock split.²³

The Exchange states that it has observed that some companies, typically those in financial distress or experiencing a prolonged operational downturn, engage in a pattern of repeated reverse stock splits to regain compliance with the Bid Price Requirement.²⁴ The Exchange believes that such actions are often indicative of serious difficulties within such companies and, generally, are not temporary such that the company is not likely to regain compliance in a manner consistent with the Bid Price Requirement within the prescribed compliance periods described above.²⁵ Accordingly, the Exchange states that it believes it is appropriate for investor protection reasons that such companies be immediately subject to the delisting process, rather than being provided a 180-day compliance period pursuant to Nasdaq Rule 5810.²⁶

III. Proceedings to Determine Whether to Approve or Disapprove SR-NASDAQ-2024-045 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act²⁷ to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved.

²³ See id. at 68229 n.10.

²⁴ See id. at 68229.

²⁵ See id. The Exchange further states that companies facing these challenges “will continue oscillating between compliance and non-compliance with the Bid Price Requirement.” Id.

²⁶ See id. The Exchange states that a company could appeal the Delisting Determination to the Hearings Panel, where it could receive up to 180 days to regain compliance, as described above. See id.

²⁷ 15 U.S.C. 78s(b)(2)(B).

Pursuant to Section 19(b)(2)(B) of the Exchange Act,²⁸ the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change’s consistency with the Exchange Act and, in particular, with Section 6(b)(5) of the Exchange Act,²⁹ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, 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.

The development and enforcement of meaningful listing standards³⁰ by an exchange is of critical importance to financial markets and the investing public. Among other things, such listing standards help ensure that exchange-listed companies will have sufficient public float, investor base, and trading interest to provide the depth and liquidity 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.³¹

The Exchange’s proposal could lead to the earlier delisting of companies that fail to comply with the Bid Price Requirement. As discussed above, currently, if a company whose security has failed to meet the Bid Price Requirement for one or two compliance periods timely

²⁸ Id.

²⁹ 15 U.S.C. 78f(b)(5).

³⁰ The Commission notes that this reference to “listing standards” is referring to both initial and continued listing standards.

³¹ See Securities Exchange Act Release No. 101271 (Oct. 7, 2024), 89 FR 82652, 82653 n.23 and accompanying text (Oct. 11, 2024) (SR-NASDAQ-2024-029) (Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 2, to Modify the Application of Bid Price Compliance Periods).

appeals its Delisting Determination to the Hearings Panel, the trading suspension of that security is stayed during the pendency of the Hearings Panel review. The Exchange now proposes that those securities that were afforded, and that failed to meet the Bid Price Requirement during, the second compliance period would not receive a stay of suspension upon appeal. In addition, the Exchange now proposes that a company whose security fails to meet the Bid Price Requirement and that has effected a reverse stock split of any ratio within the prior year will not be eligible for any compliance periods.

Comments received on the proposal were generally supportive; however, one commenter opposed the proposed amendment to Nasdaq Rule 5810.³² One commenter stated that the proposal is a “carefully crafted crucial step in safeguarding the interests of retail investors and maintaining the integrity of our capital markets.”³³ Other commenters supported the proposal as a “step in the right direction,” though they believe the proposal does not go far enough to address concerns with exchanges’ listing standards related to minimum bid price requirements and the process for enforcing such standards.³⁴

Another commenter, while generally supporting the proposal, expressed concern that the proposed amendment to Nasdaq Rule 5810 would not take into consideration the ratio of the prior reverse stock split or whether the security was in compliance with the Bid Price

³² See *infra* note 42.

³³ See Letter from Jennifer Becker, dated Aug. 28, 2024.

³⁴ See, e.g., Letters from Christopher A. Iacovella, President and Chief Executive Officer, American Securities Association, Stephen Hall, Legal Director, Better Markets, Tyler Gellasch, President and CEO, Healthy Markets Association, John Ramsay, Chief Market Policy Officer, Investors Exchange LLC, and Joseph Saluzzi, Partner, Themis Trading LLC, dated Aug. 23, 2024; American Consumer & Investor Institute, dated Sept. 13, 2024; Daniel Zinn, General Counsel, and Flavia Vehbiu, Deputy General Counsel, OTC Markets Group Inc., dated Sept. 17, 2024. These commenters support the recommendations contained in the Petition for Rulemaking on Exchange Listings of Penny Stocks filed with the Commission by Virtu Financial, Inc., dated July 15, 2024. See also Letter from Ellen Greene, Managing Director, Equities & Options Market Structure, and Joseph Corcoran, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated Oct. 8, 2024.

Requirement at the time of the reverse split.³⁵ In the Notice and in response to this commenter,³⁶ the Exchange stated that it already has a rule that takes into account the cumulative ratio of prior reverse stock splits.³⁷ Yet since that rule’s adoption, the Exchange has continued to observe some companies engaging in a pattern of effecting consecutive reverse stock splits, which are often accompanied by dilutive issuances of securities and which potentially cause investor confusion and operational difficulties for market participants.³⁸ The Exchange further stated that, regardless of the reason for the reverse split, a company can control the ratio of the split and choose a sufficiently high ratio to remain in compliance with the Bid Price Requirement for at least one year post-reverse split.³⁹ Where the company does not choose a sufficiently high ratio, and therefore becomes non-compliant within one year, Nasdaq believes that the resulting pattern of repeated reverse splits is often indicative of deep financial or operational distress that renders the company inappropriate for trading on Nasdaq for investor protection reasons.⁴⁰ Nasdaq further stated that this pattern creates the same investor confusion and operational difficulties regardless of whether the company was previously non-compliant, and thus that the rationale for the proposed amendment to Nasdaq Rule 5810 remains the same regardless of whether the company was in compliance with the Bid Price Requirement at the time of the reverse split.⁴¹

³⁵ See Letter from Anonymous, dated Sept. 10, 2024 (“Anonymous Letter”).

³⁶ See Letter from Arnold Golub, Vice President, Deputy General Counsel, Nasdaq, dated Oct. 5, 2024 (“Nasdaq Response Letter”).

³⁷ See Notice, supra note 3, at 68228. As described above, Nasdaq Rule 5810(c)(3)(A)(iv) provides that if a company’s security fails to meet the Bid Price Requirement and the company has effected one or more reverse stock splits over the prior two-year period with a cumulative ratio of 250 shares or more to one, then the company is not eligible for any compliance periods and Nasdaq must issue a Delisting Determination with respect to that security.

³⁸ See Notice, supra note 3, at 68229; Nasdaq Response Letter at 2-3.

³⁹ See Nasdaq Response Letter at 3.

⁴⁰ See id.

⁴¹ See id. See also supra section II.C.

Finally, another commenter stated that it opposed the proposed amendment to Nasdaq Rule 5810 because it could, among other things, incentivize market manipulative trading strategies and negatively impact access to capital for a segment of Nasdaq-listed small companies, particularly biotechnology companies.⁴²

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change.”⁴³ The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,⁴⁴ and any failure of a self-regulatory organization to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations.⁴⁵

The Commission is instituting proceedings to allow for additional consideration and comment on the proposed rule change’s consistency with the Exchange Act. In particular, the Commission asks commenters to address whether the proposal includes sufficient data and analysis to support a conclusion that the proposal is consistent with the requirements of Section 6(b)(5) of the Exchange Act.⁴⁶

⁴² See Letter from Seth Lederman, Tonix Pharmaceuticals Holding Corp., dated Nov. 14, 2024. The commenter also stated that it did not object to the proposed change in Nasdaq Rule 5815. See *id.* at 2.

⁴³ 17 CFR 201.700(b)(3).

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ 15 U.S.C. 78f(b)(5).

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their data, views, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act⁴⁷ or any other provision of the Exchange Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of data, views, and arguments, the Commission will consider, pursuant to Rule 19b-4 under the Exchange Act,⁴⁸ any request for an opportunity to make an oral presentation.⁴⁹

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be approved or disapproved by [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change. Comments may be submitted by any of the following methods:

⁴⁷ 15 U.S.C. 78f(b)(5).

⁴⁸ 17 CFR 240.19b-4.

⁴⁹ Section 19(b)(2) of the Exchange Act, as amended by the Securities Acts Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants to the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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. Please include file number SR-NASDAQ-2024-045 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-2024-045. 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-2024-045 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁰

Sherry R. Haywood,

Assistant Secretary.

⁵⁰ 17 CFR 200.30-3(a)(57).