

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-102245; File No. SR-NASDAQ-2024-045)

January 17, 2025

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Granting Approval of 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 On November 20, 2024, the Commission initiated proceedings under

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) (“Notice of Extension”).

Section 19(b)(2)(B) of the Exchange Act⁶ to determine whether to approve or disapprove the proposed rule change.⁷

This order approves the proposed rule change.

II. Description of the Proposed Rule Change⁸

A. *Background*

Nasdaq Rules require a company's equity securities listed on the Nasdaq Global Select Market, Nasdaq Global Market, and Nasdaq Capital Market to maintain a minimum bid price of at least one dollar per share (the "Bid Price Requirement").⁹ 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.¹⁰ Subject to certain requirements,¹¹ including notifying Nasdaq of the company's intent to cure this

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See Securities Exchange Act Release No. 101662, 89 FR 93369 (Nov. 26, 2024) ("Order Instituting Proceedings").

⁸ All capitalized terms not otherwise defined in this order shall have the meanings set forth in the Nasdaq Listing Rules.

⁹ 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).

¹⁰ 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.

¹¹ 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

deficiency, a company listed on, or that transfers to, the Nasdaq Capital Market may be provided with a second 180-day compliance period.¹² If a company is not eligible for the second compliance period, or the 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”).¹³ A timely request for a hearing ordinarily stays the suspension of the security from trading pending the issuance of a written Hearings Panel decision.¹⁴ 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.¹⁵ 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.¹⁶

The Nasdaq Rules set forth the circumstances that can curtail or alter 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 during any bid price compliance period, Nasdaq must issue a Delisting Determination with respect to that security. Second, Nasdaq Rule 5810(c)(3)(A)(iv) provides that if a company’s security fails to meet the

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.

¹² See id.

¹³ See Nasdaq Rule 5815 (Review of Staff Determinations by Hearings Panel).

¹⁴ See Nasdaq Rule 5815(a)(1)(B).

¹⁵ See Nasdaq Rule 5815(c)(1)(A).

¹⁶ See Notice, supra note 3, at 68229.

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. Finally, Nasdaq Rule 5810(c)(3)(A) provides that if a company takes a corporate action (e.g., a reverse stock split) to regain compliance with the Bid Price Requirement and that action results in the company's security falling below the numeric threshold for another Exchange listing requirement, the company will not be granted any compliance period otherwise available for the other listing requirement. In such case, the company will continue to be considered non-compliant with the Bid Price Requirement until the deficiency pertaining to the other listing requirement is cured and thereafter the company meets the Bid Price Requirement. If the company does not regain compliance with both Exchange listing requirements during the compliance period applicable to the initial Bid Price Requirement deficiency, Nasdaq must issue a Delisting Determination and no additional compliance periods will be available.

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. ("Appeal Process Proposal") 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 Hearings 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.¹⁷ 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.¹⁸

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, unless Staff exercises its discretion to extend this 10-day period as set forth in Nasdaq Rule 5810(c)(3)(H).¹⁹

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.²⁰ 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

¹⁷ 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.

¹⁸ 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.

¹⁹ See proposed Nasdaq Rule 5815(a)(1)(B)(ii)d.

²⁰ 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.

180-day compliance period.²¹ 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.²²

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 ("Prior Reverse Split Proposal").²³ The Exchange states that this proposed change will 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.²⁴

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.²⁵ The Exchange states that it 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

²¹ See id. at 68229.

²² 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.

²³ See id. at 68229.

²⁴ See id. at 68229 n.10.

²⁵ See id. at 68229.

described above.²⁶ 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 5810.²⁷

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.²⁸ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,²⁹ which requires, among other things, that the rules of an 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, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and with Section 6(b)(7) of the Exchange Act,³⁰ which requires, among other things, that the rules of a national securities exchange provide a fair procedure for the prohibition or limitation by the exchange of any person with respect to access to services offered by the exchange.

²⁶ 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.

²⁷ 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.

²⁸ In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²⁹ 15 U.S.C. 78f(b)(5).

³⁰ 15 U.S.C. 78f(b)(7).

The development and enforcement of meaningful listing standards³¹ for 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.³²

As discussed above, currently, if a company whose security has failed to meet the Bid Price Requirement for one or two compliance periods timely appeals its Delisting Determination to the Hearings Panel, the trading suspension of that security is stayed during the pendency of the Hearings Panel review.³³ 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

³¹ The Commission notes that this reference to “listing standards” is referring to both initial and continued listing standards.

³² See, e.g., Securities Exchange Act Release Nos. 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); 88716 (Apr. 21, 2020), 85 FR 23393 (Apr. 27, 2020) (SR-NASDAQ-2020-001) (Order Approving a Proposed Rule Change To Modify the Delisting Process for Securities With a Bid Price at or Below \$0.10 and for Securities That Have Had One or More Reverse Stock Splits With a Cumulative Ratio of 250 Shares or More to One Over the Prior Two-Year Period); 88389 (Mar. 16, 2020), 85 FR 16163 (Mar. 20, 2020) (SR-NASDAQ-2019-089) (Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Amend Rule 5815 To Preclude Stay During Hearing Panel Review of Staff Delisting Determinations in Certain Circumstances). See also Securities Exchange Act Release No. 81856 (Oct. 11, 2017), 82 FR 48296, 48298 (Oct. 17, 2017) (SR-NYSE-2017-31) (Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Amend the Listed Company Manual To Adopt Initial and Continued Listing Standards for Subscription Receipts) (stating that “[a]dequate standards are especially important given the expectations of investors regarding exchange trading and the imprimatur of listing on a particular market” and that “[o]nce a security has been approved for initial listing, maintenance criteria allow an exchange to monitor the status and trading characteristics of that issue ... so that fair and orderly markets can be maintained.”).

³³ See supra note 14.

not receive a stay of suspension upon appeal.³⁴ In addition, the Exchange 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.³⁵ This latter proposal could lead to the earlier delisting of companies that fail to comply with the Bid Price Requirement.

Some comments received on the proposal were generally supportive of the goals behind Nasdaq's proposal.³⁶ One of the commenters 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."³⁷ Some other of these commenters supported the proposal as a "step in the right direction," though they stated 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.³⁸ Another commenter, while generally supporting the proposal, expressed concern that the Prior Reverse Split Proposal would not take into consideration the

³⁴ See proposed Nasdaq Rule 5815(a)(1)(B)(ii)d.

³⁵ See proposed Nasdaq Rule 5810(c)(3)(A)(iv).

³⁶ See Letters from Jennifer Becker, dated Aug. 28, 2024 ("Becker Letter"); 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 ("Joint Industry Letter"); American Consumer & Investor Institute, dated Sept. 13, 2024 ("ACII Letter"); Daniel Zinn, General Counsel, and Flavia Vehbiu, Deputy General Counsel, OTC Markets Group Inc., dated Sept. 17, 2024 ("OTC Letter"); Anonymous, dated Sept. 10, 2024 ("Anonymous Letter"); 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 ("SIFMA Letter"); Aleksei Nikolaev, dated Nov. 26, 2024.

³⁷ Becker Letter.

³⁸ See Joint Industry Letter; ACII Letter; OTC Letter; SIFMA Letter. Some of these commenters recommended further changes to Nasdaq's rules as well as supporting recommendations made in the Petition for Rulemaking on Exchange Listings of Penny Stocks filed with the Commission by Virtu Financial, Inc., dated July 15, 2024. These additional recommendations are not before the Commission in the Nasdaq proposal being considered herein. In approving this proposal, the Commission is finding the proposal before us is consistent with the Exchange Act.

ratio of the prior reverse stock split or whether the security was in compliance with the Bid Price Requirement at the time of the reverse split.³⁹

Some commenters opposed the Prior Reverse Split Proposal but also stated that they did not object to the Appeal Process Proposal.⁴⁰ These commenters stated that the Prior Reverse Split Proposal could negatively impact access to capital for a segment of Nasdaq-listed small companies, particularly biotechnology companies, and incentivize trading strategies by short sellers, including “naked” short sellers, to manipulate downward such company’s stock price.⁴¹ One of these commenters stated that other factors beyond “deep financial or operational distress” contribute to the need for reverse stock splits by these issuers, stating that certain biotechnology companies often depend on “frequent capital raises” and “are subject to volatile stock prices” that have a “negative impact on an issuer’s trading price not often reflective of the issuer’s value or suitability as an investment.”⁴² This commenter also stated that the Prior Reverse Split Proposal could have a detrimental effect on how companies administer and plan for reverse stock

³⁹ See Anonymous Letter.

⁴⁰ See Letters from Seth Lederman, Tonix Pharmaceuticals Holding Corp., dated Nov. 14, 2024 (“Tonix Letter”); Faith L. Charles, Thompson Hine, dated Nov. 20, 2024 (“Thompson Hine Letter”). One of the commenters stated that the Commission should consider providing the market additional time to “absorb the effects” of recent Nasdaq proposals to enhance transparency and compliance with Exchange listing requirements in connection with reverse stock splits before approving another related rule. See Tonix Letter at 6 (citing to Securities Exchange Act Release Nos. 88716 (Apr. 21, 2020), 85 FR 23393 (Apr. 27, 2020) (SR-NASDAQ-2020-001) (Order Approving a Proposed Rule Change To Modify the Delisting Process for Securities With a Bid Price at or Below \$0.10 and for Securities That Have Had One or More Reverse Stock Splits With a Cumulative Ratio of 250 Shares or More to One Over the Prior Two-Year Period); 98843 (Nov. 1, 2023), 88 FR 76867 (Nov. 7, 2023) (SR-NASDAQ-2023-025) (Order Approving a Proposed Rule Change Related to Notification and Disclosure of Reverse Stock Splits); 101271 (Oct. 7, 2024), 89 FR 82652 (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)). The Commission has provided the public with multiple opportunities to comment on the current proposed rule change through a Notice of Extension and an Order Instituting Proceedings and for the reasons discussed herein finds the proposal consistent with the Exchange Act.

⁴¹ See Tonix Letter; Thompson Hine Letter.

⁴² Thompson Hine Letter at 1. See also Tonix Letter at 5 (stating that “further study is required to determine whether” factors like “deep financial or operational distress” is the reason behind “all or even most reverse splits”).

splits, particularly as a company's stock price approaches noncompliance with the Bid Price Requirement.⁴³

Finally, some commenters opposed the proposed rule change based on an incorrect understanding of the proposed rule change.⁴⁴ In particular, these commenters raised concerns that the “certainty” of delisting brought about by the proposed rule change would incentivize manipulative short-selling activities, undermine the interest of Exchange-listed companies, and encourage issuer misconduct to avoid delisting.⁴⁵ To the contrary, the proposal would not affect companies' right to appeal a Delisting Determination to the Hearings Panel and therefore whether companies' securities would ultimately be delisted is not a certainty.⁴⁶

The Exchange's proposal is reasonably designed to enhance its continued listing standards, thereby protecting investors and the public interest. The Appeal Process Proposal prohibits continued trading of a company's securities on the Exchange during the pendency of a

⁴³ See Thompson Hine Letter at 2-3 (stating that the Prior Reverse Split Proposal could cause affected companies to “select large reverse split ratios that may cause issues to their capitalization” and “continually approve reverse stock split ratios at annual shareholder meetings” to preemptively avoid a Delisting Determination due to noncompliance with the Bid Price Requirement). This commenter also proposed that the Exchange adopt a single 180-day compliance period to companies that violate the Bid Price Requirement within a year of a reverse stock split. See *id.* at 3. While this commenter suggests an alternative that is different from Nasdaq's proposal, for the reasons discussed herein, the Commission finds that Nasdaq's proposal is consistent with these Exchange Act standards and, therefore, should be approved.

⁴⁴ See Letter from Taft Stettinius & Hollister LLP, dated Dec. 31, 2024 (“Taft Letter”); Thompson Hine Letter at 2. These commenters also incorrectly stated that a company fails to meet the continued listing standard for the Bid Price Requirement if “the stock has closed at less than \$1.00 for ten consecutive trading days.” Taft Letter at 1; Thompson Hine Letter at 1. Pursuant to Nasdaq Rule 5810(c)(3)(A), 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 *supra* note 10. See also Nasdaq Rule 5810(c)(3)(A)(iii) (stating that if during any compliance period specified in Nasdaq Rule 5810(c)(3)(A) a company's security has a closing bid price of \$0.10 or less for 10 consecutive trading days, the Listings Qualifications Department will issue a Delisting Determination with respect to that security).

⁴⁵ See Taft Letter at 3-6; Thompson Hine Letter at 2 (stating that “[o]nce a company has conducted a reverse stock split, short-sellers will be encouraged to cause a company to fall out of compliance with the Nasdaq bid price requirements” and “[t]he certainty of a delisting gives a clear indicator to these short sellers that a delisting will occur, as opposed to now, when a company can plead its case to Nasdaq and Nasdaq can still make a facts and circumstance determination as to the timing of a company's potential delisting.”).

⁴⁶ See Nasdaq Rule 5815. See also *infra* notes 70-71 and accompanying text (describing Commission and the Financial Industry Regulatory Authority, Inc. (“FINRA”) rules to regulate short selling).

delisting appeal when a company has not maintained the Exchange's Bid Price Requirement for 360 days. It applies only to companies that have notified the Exchange of their intent to cure the bid price deficiency during the second 180-day compliance period and that therefore receive a second compliance period (for a total of 360 days) and yet still fail to meet the Bid Price Requirement.⁴⁷ In such cases, it is consistent with investor protection to prohibit such companies from continuing to trade on the Exchange during any appeal of delisting when they have already failed to cure a bid price deficiency for 360 days.⁴⁸ Commenters generally did not express opposition to this aspect of the proposal. One commenter opposed the Appeal Process Proposal stating the proposal "eliminates the ability for registrants to appeal delisting decisions while still operating on the exchange" and that "many of these registrants may only need a brief period to regain compliance with the Minimum Bid Price Requirement."⁴⁹ However, as stated above, the Appeal Process Proposal only applies to companies that have failed to cure a bid price deficiency after the first two 180-day compliance periods, totaling 360 days provided to a company to comply. In addition, affected companies, while their securities will not trade on the Exchange during the pendency of an appeal, will still be able to seek review of their Delisting Determinations from the Hearings Panel in accordance with Nasdaq Rule 5815.⁵⁰

The Prior Reverse Split Proposal is reasonably designed to curtail the use of reverse stock splits to inappropriately delay delisting when a security fails to meet the Bid Price Requirement. A commenter expressed concern that the Prior Reverse Split Proposal does not take into

⁴⁷ See supra note 22.

⁴⁸ 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.").

⁴⁹ Taft Letter at 5.

⁵⁰ See supra note 22. See also Nasdaq Rule 5815.

consideration the ratio of the prior reverse stock split.⁵¹ However, as the Exchange discussed in the Notice and in a response to the commenter,⁵² the Exchange already has a rule that takes into account the cumulative ratio of prior reverse stock splits.⁵³ 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.⁵⁴

The commenter also expressed concern that the Prior Reverse Split Proposal does not take into consideration whether a security was in compliance with the Bid Price Requirement at the time of the reverse split.⁵⁵ In response, Nasdaq 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.⁵⁶ Where the company does not choose a sufficiently high ratio, and therefore becomes non-compliant within one year, Nasdaq stated that the resulting pattern of repeated reverse splits is

⁵¹ See Anonymous Letter.

⁵² See Letter from Arnold Golub, Vice President, Deputy General Counsel, Nasdaq, dated Oct. 5, 2024 (“Nasdaq Response Letter”).

⁵³ 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.

⁵⁴ See Notice, supra note 3, at 68229; Nasdaq Response Letter at 2-3.

⁵⁵ See Anonymous Letter.

⁵⁶ See Nasdaq Response Letter at 3. In some cases, the share reduction caused by the reverse stock split results in a proportional reduction in the number of Publicly Held Shares and, depending on how fractional shares are treated, may also reduce the number of holders of the company’s securities. As such, a reverse stock split used to regain compliance with the Bid Price Requirement may result in the company’s non-compliance with other Exchange listing rules that require a certain number of holders and Publicly Held Shares. See Securities Exchange Act Release No. 101271 (Oct. 7, 2024), 89 FR 82652, 82652 (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).

often indicative of deep financial or operational distress that renders the company inappropriate for trading on Nasdaq for investor protection reasons.⁵⁷ 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 Prior Reverse Split Proposal remains the same regardless of whether the company was in compliance with the Bid Price Requirement at the time of the reverse split.⁵⁸

The Commission finds that it is reasonable that the Prior Reverse Split Proposal is not based on the security's compliance with the Bid Price Requirement at the time of the reverse split. The Exchange can reasonably conclude from its experience that a company's inability to maintain compliance with the Bid Price Requirement for at least one year post-reverse split—regardless of its security's compliance at the time of the reverse split—is indicative of serious difficulties within such company that are likely to put continued downward pressure on the stock price, such that the company is less likely to regain compliance within any compliance periods. In this respect, the Prior Reverse Split Proposal is appropriately targeted to those securities that are more likely to have serious recurrent issues in regaining and maintaining compliance with the Bid Price Requirement.⁵⁹ Moreover, as with the Appeal Process Proposal, any affected companies would be able to seek review of their Delisting Determinations from the Hearings Panel.⁶⁰

⁵⁷ See Nasdaq Response Letter at 3.

⁵⁸ See *id.*

⁵⁹ Nasdaq stated that companies may also reverse split their stock for reasons such as “to attract institutional investors and lower transaction costs for investors, however these companies are less likely to conduct multiple reverse stock splits such that they would be impacted by the [p]roposal.” Nasdaq Response Letter at 3, n.8.

⁶⁰ See *supra* note 15 and accompanying text. With respect to the Reverse Stock Split Proposal, if a company's security fails to meet the Bid Price Requirement and the company has conducted a reverse stock split over the prior one-year period, a timely request for a hearing will ordinarily stay the suspension of trading and

The Exchange’s proposal is reasonably designed to further investor protection by limiting the ability of listed companies to engage in a pattern of repeated reverse stock splits to remain qualified for listing. The Exchange states that it is appropriate to subject such securities to heightened scrutiny because, as the Exchange stated in its proposal,⁶¹ such securities may have similar characteristics to penny stocks and yet, because they are listed on the Exchange, are exempt from the Penny Stock Rules, which provide enhanced investor protections, among other things, to prevent fraud and safeguard against potential market manipulation.⁶² In addition, the Exchange states that it has observed that the challenges facing such companies generally are not temporary and may be so severe that the companies are not likely to regain compliance within the prescribed compliance period.⁶³ The Exchange also states that the price concerns with such companies can be a leading indicator of other listing compliance concerns, and that these companies often become subject to delisting for other reasons during the compliance periods.⁶⁴ Further, the continued listing of low-priced securities raises concerns that these securities may not have sufficient public float, investor base, and trading interest to promote fair and orderly markets and relatedly may have heightened susceptibility to manipulation. Given these concerns, the Exchange’s proposal to commence delisting proceedings for those companies that have

the Hearings Panel may, where it deems appropriate, grant an additional compliance period. See Nasdaq Rule 5815(a)(1)(B) and (c)(1)(A).

⁶¹ See Notice, supra note 3, at 68230.

⁶² See 17 CFR 240.3a51-1(a)(1); 17 CFR 240.15g-1 to -9. In particular, the Penny Stock Rules provide protections to investors in low-priced stocks requiring, among other things, that broker-dealers provide a disclosure document to their customers describing the risk of investing in penny stocks and approve customer accounts for transactions in penny stocks.

⁶³ See Notice, supra note 3, at 68230. Nasdaq also stated that FINRA has alerted investors that “low-priced stocks may be more susceptible to fraud, including in cases where the company has no involvement in that fraud.” Letter from Arnold Golub, Vice President, Deputy General Counsel, Nasdaq, dated Jan. 8, 2025 (“Nasdaq Response Letter II”), at 5 (citing to FINRA Investor Insights, “Low-Priced Stocks Can Spell Big Problems,” dated Jan. 19, 2024, available at <https://www.finra.org/investors/insights/low-priced-stocks-big-problems>).

⁶⁴ See id.

conducted a prior reverse split within a year of being in violation of the Bid Price Requirement is appropriate and consistent with Section 6(b)(5) of the Exchange Act.

Some commenters raised concerns relating to the impact of the Prior Reverse Split Proposal on access to capital for a segment of Nasdaq-listed small companies, particularly biotechnology companies, and stated that other factors beyond financial distress also contribute to the need for reverse stock splits by these issuers.⁶⁵ As discussed above, the Prior Reverse Split Proposal is reasonably designed to address the investor protection and market manipulation concerns that the Exchange has observed in circumstances involving companies that have utilized reverse stock splits. Importantly, the proposal does not single out any specific type of Exchange-listed company based on whether a company is small or on a sector of the market. The proposal reasonably addresses a gap in the Exchange's current continued listing standards that potentially allows an issuer to inappropriately delay delisting, thereby protecting investors and the public interest. While the Commission recognizes that the Exchange delisting process is in part designed to allow companies experiencing temporary financial and/or business issues to regain compliance with continued listing standards, the proposal reasonably balances the intent of the delisting process with the need to prevent companies from taking advantage of the delisting process for an extended period of time despite indications of serious difficulties within such companies that are likely to put continued downward pressure on the stock price, contrary to the goal of protecting investors and the public interest under the Exchange Act.⁶⁶

⁶⁵ See supra notes 41 and 42.

⁶⁶ In response to the commenters, Nasdaq stated that “the Prior Reverse Split Proposal appropriately balances the goals of capital formation and investor protection by discouraging listed companies from engaging in a pattern of repeated reverse stock splits” and that “any incidental burden on affected companies is necessary to better protect prospective investors, in furtherance of a central purpose of the Exchange Act.” Nasdaq Response Letter II at 4.

The commenters' concern that the Prior Reverse Split Proposal will encourage short-selling activities due to non-compliance with continued listing standards is not unique to the Exchange's proposal and, indeed, exists today.⁶⁷ Short selling provides the market with important benefits, such as providing market liquidity and pricing efficiency.⁶⁸ While short selling can serve useful market purposes, such as facilitating price discovery, there are concerns that it could be used to drive down the price of a security, to accelerate a declining market in a security, or to manipulate stock prices.⁶⁹ The Commission and FINRA have established rules to regulate short selling in order to maintain market integrity and protect investors from abusive short selling practices.⁷⁰ Further, market manipulation activity conducted through short selling is illegal under the general anti-fraud and anti-manipulation provisions of the federal securities laws.⁷¹ In response to the commenters, Nasdaq stated that, "to the extent that companies effect larger reverse stock splits such that they may maintain compliance and thereby avoid the delisting process for a longer period of time, the Prior Reverse Split Proposal may, in fact, reduce the attractiveness of a legitimate short position."⁷²

⁶⁷ See supra note 41.

⁶⁸ See Securities Exchange Act Release No. 98738 (Oct. 23, 2023), 88 FR 75100, 75101 (Nov. 1, 2023) (Final Rule: Short Position and Short Activity Reporting by Institutional Investment Managers).

⁶⁹ See id. Nasdaq also stated that "[l]egitimate short selling contributes to efficient price formation, enhances liquidity, and facilitates risk management, and short sellers may benefit the market and investors in other important ways, including by identifying and ferreting out instances of fraud and other misconduct at public companies." Nasdaq Response Letter II at 2.

⁷⁰ See, e.g., Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (Aug. 6, 2004) (Final Rule: Short Sales); FINRA Rules 4210 (Margin Requirements), 4320 (Short Sale Delivery Requirements), and 4560 (Short-Interest Reporting). See also, e.g., Nasdaq Rules, Equity 9, Section 9 (Short-Interest Reporting).

⁷¹ See, e.g., Securities Exchange Act Release No. 58774 (Oct. 14, 2008), 73 FR 61666, 61667 (Oct. 17, 2008) (Final Rule: "Naked" Short Selling Antifraud Rule) ("Although abusive 'naked' short selling as part of a manipulative scheme is always illegal under the general antifraud provisions of the federal securities laws, including Rule 10b-5 of the Exchange Act, [*] Rule 10b-21 will further evidence the liability of persons that deceive others about their intention or ability to deliver securities in time for settlement, including persons that deceive their broker-dealer about their locate source or ownership of shares.").

⁷² Nasdaq Response Letter II at 4.

One commenter raised concerns regarding the Prior Reverse Split Proposal’s potential impact on how companies administer reverse stock splits and its potential to cause issues for companies’ capitalization; however, the commenter did not specify any harm that would result from this specific proposal, particularly to a company’s capitalization.⁷³ Today, companies often conduct reverse stock splits as their stock price approaches noncompliance with the Bid Price Requirement and, as discussed above, the continued listing of the low-priced securities of companies that engage in a pattern of repeated reverse stock splits raises concerns.⁷⁴ In response to the commenter, Nasdaq stated that a reverse stock split, “by design, has no impact on the company’s capitalization” because such action has “the effect of increasing a company’s stock price by consolidating the outstanding shares.”⁷⁵ Nasdaq further stated that it “believes that a company facing temporary business issues, a temporary decrease in the market value of its securities, or temporary market conditions, generally, can choose the ratio of a reverse stock split that is high enough to help ensure that subsequent price fluctuations will not cause the company’s securities to fall below the \$1.00 minimum bid price requirement within the following year.”⁷⁶

In sum, the Exchange’s proposal appropriately identifies securities listed on its market that are more likely to have serious recurrent issues in regaining and maintaining compliance with the Bid Price Requirement and proposes reasonable changes to shorten the time that such non-compliant securities can remain trading on the Exchange, thereby protecting investors and

⁷³ See supra note 43.

⁷⁴ See supra note 63 and accompanying text.

⁷⁵ Nasdaq Response Letter II at 5.

⁷⁶ Id. See also supra note 56.

the public interest in accordance with Section 6(b)(5) of the Exchange Act,⁷⁷ while at the same time maintaining a fair procedure for affected companies to appeal their Delisting Determinations to the Hearings Panel in accordance with Section 6(b)(7) of the Exchange Act.⁷⁸ For these reasons, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,⁷⁹ that the proposed rule change (SR-NASDAQ-2024-045) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁸⁰

Sherry R. Haywood,

Assistant Secretary.

⁷⁷ 15 U.S.C. 78f(b)(5).

⁷⁸ 15 U.S.C. 78f(b)(7).

⁷⁹ 15 U.S.C. 78s(b)(2).

⁸⁰ 17 CFR 200.30-3(a)(12).