

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-68053; File No. SR-NASDAQ-2012-118)

October 15, 2012

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change to Modify Certain Disclosure Requirements to Require Listed Companies to Publicly Describe the Specific Basis and Concern Identified by Nasdaq When a Company Does not Meet a Listing Standard and Give Nasdaq the Authority to Make Such Public Announcement When a Listed Company Fails to do so

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 October 3, 2012, The NASDAQ Stock Market LLC (“Nasdaq”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. 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 the Substance of the Proposed Rule Change

Nasdaq proposes to modify certain disclosure requirements surrounding a company’s non-compliance with the listing rules. Nasdaq will implement the proposed rule upon approval.

The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets.<sup>3</sup>

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

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

<sup>3</sup> Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at <http://nasdaqomx.cchwallstreet.com>.

## **5250. Obligations for Companies Listed on The Nasdaq Stock Market**

(a) No change.

### **(b) Obligation to Make Public Disclosure**

(1) No change.

#### **(2) Disclosure of Notification of Deficiency**

As set forth in Rule 5810(b) and IM-5810-1, a Company that receives a notification of deficiency from Nasdaq is required to make a public announcement by filing a Form 8-K, where required by SEC rules, or by issuing a press release disclosing receipt of the notification and the Rule(s) upon which the deficiency is based, and describing each specific basis and concern identified by Nasdaq in reaching its determination that the Company does not meet the listing standard. However, note that in the case of a deficiency related to the requirement to file a periodic report contained in Rule 5250(c)(1) or (2), the Company is required to make the public announcement by issuing a press release. As described in Rule 5250(b)(1) and IM-5250-1, the Company must notify Nasdaq's MarketWatch Department about the announcement through the electronic disclosure submission system available at [www.nasdaq.net](http://www.nasdaq.net), except in emergency situations when notification may instead be provided by telephone or facsimile. If the public announcement is made during Nasdaq market hours, the Company must notify MarketWatch at least ten minutes prior to the announcement. If the public announcement is made outside of Nasdaq market hours, the Company must notify MarketWatch of the announcement prior to 6:50 a.m. ET.

(c) – (f) No change.

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## **5810. Notification of Deficiency by the Listing Qualifications Department**

When the Listing Qualifications Department determines that a Company does not meet a listing standard set forth in the Rule 5000 Series, it will immediately notify the Company of the deficiency. As explained in more detail below, deficiency notifications are of four types:

- (1) Staff Delisting Determinations, which are notifications of deficiencies that, unless appealed, subject the Company to immediate suspension and delisting;
- (2) Notifications of deficiencies for which a Company may submit a plan of compliance for staff review;
- (3) Notifications of deficiencies for which a Company is entitled to an automatic cure or compliance period; and
- (4) Public Reprimand Letters.

Notifications of deficiencies that allow for submission of a compliance plan or an automatic cure or compliance period may result, after review of the compliance plan or expiration of the cure or compliance period, in issuance of a Staff Delisting Determination or a Public Reprimand Letter.

**(a)** No change.

### **(b) Company Disclosure Obligations**

A Company that receives a notification of deficiency, Staff Delisting Determination, or Public Reprimand Letter is required to make a public announcement disclosing receipt of the notification and the Rule(s) upon which the deficiency is based, and describing each specific basis and concern identified by Nasdaq in reaching its determination that the Company does not meet the listing standard. [A Company that receives a notification of] If the deficiency or Staff Delisting Determination [related] relates to the requirement to file a periodic report contained in

Rule 5250(c)(1) or (2), the Company is required to make the public announcement by issuing a press release[ disclosing receipt of the notification and the Rule(s) upon which the deficiency is based], in addition to filing any Form 8-K required by SEC rules. In all other cases, the Company may make the public announcement either by filing a Form 8-K, where required by SEC rules, or by issuing a press release. Additional information about this disclosure obligation is provided in IM-5810-1.

As described in Rule 5250(b)(1) and IM-5250-1, the Company must notify Nasdaq's MarketWatch Department about the announcement through the electronic disclosure submission system available at [www.nasdaq.net](http://www.nasdaq.net), except in emergency situations when notification may instead be provided by telephone or facsimile. If the public announcement is made during Nasdaq market hours, the Company must notify MarketWatch at least ten minutes prior to the announcement. If the public announcement is made outside of Nasdaq market hours, the Company must notify MarketWatch of the announcement prior to 6:50 a.m. ET. The Company should make the public announcement as promptly as possible but not more than four business days following receipt of the notification.

#### **IM-5810-1. Disclosure of Written Notice of Staff Determination**

Rule 5810(b) requires that a Company make a public announcement by filing a Form 8-K, where required by SEC rules, or by issuing a press release disclosing the receipt of (i) a notice that the Company does not meet a listing standard set forth in the Rule 5000 Series, (ii) a Staff Delisting Determination to limit or prohibit continued listing of the Company's securities under Rule 5810 as a result of the Company's failure to comply with the continued listing requirements, or (iii) a Public Reprimand Letter; provided, however, that if the notification relates to a failure to meet the requirements of Rules 5250(c)(1) or (2), the Company must make the public

announcement by issuing a press release. Such public announcement shall be made as promptly as possible, but not more than four business days following the receipt of the notification, Staff Delisting Determination, or Public Reprimand Letter, as applicable. In addition to containing all disclosure required by Form 8-K, if applicable, the public announcement must describe each specific basis and concern identified by Nasdaq in its determination that the Company does not meet the listing standard and identify the Rules upon which the deficiency is based. For example, if the Listing Qualifications Department determines to delist a Company based on its discretionary authority under Rule 5101, the Company must include in its public announcement the specific concerns cited in the Staff Delisting Determination. In addition, a Company may provide its own analysis of the issues raised in the Staff Delisting Determination.

If the public announcement is not made by the Company within the time allotted or does not include all of the required information, trading of its securities shall be halted (if not already halted), even if the Company appeals the Staff Delisting Determination or Public Reprimand Letter as set forth in Rule 5815, and Nasdaq may make a public announcement with the required information. If the company's failure to make this public announcement is the only basis for a trading halt, Nasdaq would ordinarily resume trading if Nasdaq makes the public announcement. If the Company fails to make the public announcement by the time that the Hearings Panel issues its Decision, that Decision will also determine whether to delist the Company's securities for failure to make the public announcement.

Rule 5810(b) does not relieve a Company of its disclosure obligation under the federal securities laws, nor should it be construed as providing a safe harbor under the federal securities laws. It is suggested that the Company consult with corporate/securities counsel in assessing its disclosure obligations under the federal securities laws.

(c) No change.

**IM-5810-2.** No change.

(d) No change.

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**5840. Adjudicatory Process: General Information**

(a) – (k) No change.

**(l) Disclosure by Nasdaq**

In order to maintain the quality of and public confidence in its market and to protect investors and the public interest, Nasdaq may, at any level of a proceeding under this Rule 5800 Series, make a public announcement, including by press release, describing a notification, Public Reprimand Letter, Staff Delisting Determination, Adjudicatory Body Decision, or other event involving a Company’s listing or trading on Nasdaq.

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

In its filing with the Commission, Nasdaq 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. Nasdaq 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 rules require that a company that receives a Staff Delisting Determination, Public Reprimand Letter or a notice that the company does not meet a listing standard (collectively, a

“Staff Determination”) make a public announcement, either by filing a Form 8-K, where required by SEC rules, or by issuing a press release disclosing its receipt of the notification.<sup>4</sup> These rules also require that this disclosure identify “the Rule(s) upon which the deficiency is based.”

Nasdaq’s intent in adopting this requirement was to ensure that the public is provided with adequate information whenever a company is deficient under Nasdaq’s rules. However, Nasdaq has observed that some companies merely disclose the rule number and a description of the rule, without providing additional disclosure to enable the public to understand the deficiency or the underlying basis for it. While this may be sufficient in most cases where the deficiency is related to a quantitative requirement, such as a bid price deficiency, it is insufficient when qualitative issues are raised. For example, a company may disclose that Nasdaq has determined to delist it for “public interest concerns under Rule 5101” without describing the nature of Nasdaq’s concerns. Nasdaq believes that disclosure made without a description of the specific underlying concerns that gave rise to the delisting proceeding will prevent investors from making fully informed investment decisions. Furthermore, since the remedy for failing to make this disclosure is for Staff to halt trading in the company’s securities, Nasdaq is concerned that a company that has already been halted by Staff due to regulatory concerns may decline altogether to make the required disclosure.

Accordingly, Nasdaq proposes to modify IM-5810-1 to specifically require that the company’s public announcement of receipt of a Staff Determination describe each of the bases and specific concerns underlying Nasdaq’s determination. The IM would also provide that the

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<sup>4</sup> See Nasdaq Listing Rules 5250(b)(2) and 5810(b).

company may include its own analysis of the issues raised.<sup>5</sup> The IM would also be modified to specify that Nasdaq may itself make a public announcement, such as by issuing a press release, in the circumstance that the company makes insufficient disclosure or refuses to make the required disclosure altogether. If the company's failure to make this required disclosure is the only basis for a trading halt, Nasdaq would ordinarily resume trading after issuing its disclosure. If, on the other hand, the company's securities were already subject to a trading halt for another reason, such as the failure to respond to a request for information to Nasdaq, the halt would remain in effect notwithstanding the disclosure made by Nasdaq.

Similarly, Nasdaq also proposes to provide that it may make a public announcement, including by press release, describing an action involving a company's listing or trading on Nasdaq. This authority could be used, for example, where a company that is late in filing its periodic reports is not granted an extended stay of delisting by the Hearings Panel pursuant to Rule 5815(a)(1)(B), and is therefore trading in the over-the-counter market pending a final decision by a hearings Panel. If the Panel ultimately determines to delist this company, its securities would continue to trade in the over-the-counter market and, unless the company chose to issue its own public announcement, investors would not know that the Panel had determined to delist the Company until Nasdaq filed a Form 25 with the Commission to formally delist the

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<sup>5</sup> For example, the company could choose to describe its plan to regain compliance, or describe why it believes the concerns identified by Nasdaq should not result in delisting. However, if the company's analysis or description is inaccurate or misleading, Nasdaq could use the authority in proposed Rule 5840(l) to issue a clarifying public announcement. In this event, the Hearings Panel would also consider the inaccurate or misleading disclosure when determining whether it is appropriate to continue the company's listing. Nasdaq could also halt trading under Rule 4120(a)(5) based on the inaccurate or misleading disclosure.

Company some months later.<sup>6</sup> If the company does not make this disclosure, proposed Rule 5840(l) would allow Nasdaq to make a public announcement to provide transparency to the Panel's decision and the change in the status of the company's Nasdaq listing.<sup>7</sup>

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>8</sup> in general and with Sections 6(b)(5) of the Act,<sup>9</sup> in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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 proposed rule change will require disclosure to the public of the specific bases for Staff's determination to delist or reprimand the company, thereby helping assure adequate information for investors and potential investors. In addition, it will allow Nasdaq to provide information to the public about a company's listing status. As such, it is designed to protect investors and the public interest.

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<sup>6</sup> Rule 5815(d)(2) provides that when a Hearings Panel issues a decision to delist a company's securities, Nasdaq will File a Form 25 after the Nasdaq Listing and Hearing Council has determined not to call the decision [sic] review. The Listing Council has 45 days to call the decision for review pursuant to Rule 5820(b). In addition, if the Company appeals the Panel's decision to the Listing Council, the Form 25 would not be filed until after the Listing Council issues its decision and the Nasdaq Board of Directors has had an opportunity to call that decision for review. Rule 5820(e)(6).

<sup>7</sup> See, also, footnote 5, supra, for another example where Nasdaq may use the authority in proposed Rule 5840(l).

<sup>8</sup> 15 U.S.C. 78f.

<sup>9</sup> 15 U.S.C. 78f(b)(5).

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

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

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

Written comments were neither solicited nor 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 (i) as the Commission may designate up to 90 days of such date 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 such proposed rule change, or
- B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

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

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2012-118 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NASDAQ-2012-118. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer

to File Number SR-NASDAQ-2012-118 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>10</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>10</sup> 17 CFR 200.30-3(a)(12).