

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-68343; File No. SR-NASDAQ-2012-118)

December 3, 2012

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change to Modify Certain Disclosure Requirements to Require Issuers to Publicly Describe the Specific Basis and Concern Identified by Nasdaq When a Listed Issuer Does Not Meet a Listing Standard and Give Nasdaq the Authority to Make a Public Announcement When a Listed Issuer Fails to Make a Public Announcement

I. Introduction

On October 3, 2012, 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 (“Act”)¹ and Rule 19b-4 thereunder², a proposed rule change to modify certain disclosure requirements surrounding a listed issuer’s non-compliance with the Exchange’s listing rules and give the Exchange the authority to issue a public announcement when a listed issuer fails to do so. The proposed rule change was published in the Federal Register on October 19, 2012.³ The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

Before an issuer lists its securities on the Exchange for trading, the issuer and the securities must meet the Exchange’s initial listing standards.⁴ These standards include, among other things, minimum financial standards such as total market value, stock price, the number of publicly traded shares, and corporate governance standards to ensure transparency and accountability to the issuer’s stakeholders. Once the securities are listed for trading, the issuer

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 34-68053 (October 15, 2012), 77 FR 64369.

⁴ See Nasdaq Rule 5000 series.

and the securities would need to meet the Exchange’s continued listing standards to remain listed on the Exchange.⁵

In addition to the quantitative and corporate governance listing standards, Nasdaq Rule 5101 also gives the Exchange discretion to deny listing or continued listing based on any event or condition that makes such listing or continued listing inadvisable or unwarranted, even though the securities meet all enumerated standards.⁶ Nasdaq rules discuss in more detail the use of such discretion and state that the Exchange may deny initial or continued listing because it has concluded that “...a public interest concern is so serious that no remedial measure would be sufficient to alleviate it.”⁷

Nasdaq rules provide that when a listed issuer does not meet the Exchange’s continued listing standards, Nasdaq would immediately notify the issuer of the deficiency.⁸ The Exchange notification consists of: (1) staff delisting determination which subjects the issuer and its securities to immediate suspension and delisting, unless appealed; (2) notification of deficiency for which the issuer may submit a plan of compliance; (3) notification of deficiency for which the issuer is entitled to automatic cure or compliance period; or (4) public reprimand letters (collectively “Nasdaq Staff Determinations”). After a listed issuer receives a Nasdaq Staff Determination, Nasdaq rules require the issuer to make a public announcement disclosing receipt of the notification and the Exchange rules upon which the Nasdaq Staff Determination is based.⁹

⁵ See id.

⁶ See Nasdaq Rule 5101.

⁷ See Nasdaq Rule IM-5101-1.

⁸ See Nasdaq Rule 5810.

⁹ See Nasdaq Rule 5815(b). Nasdaq rules also provide for review and/or appeals. See Nasdaq Rule 5800 series. The Exchange’s listing qualification department would notify the issuer of the deficiency. See Nasdaq Rule 5810. Thereafter, the Exchange’s hearing panel, if requested by the issuer on a timely basis, would review the delisting

Currently, the Exchange's rules require the listed issuer, after receiving a Nasdaq Staff Determination, to make a public announcement by filing a Form 8-K when required by Commission rules or by issuing a press release disclosing receipt of the Nasdaq Staff Determination and the Exchange rules upon which the deficiency is based.¹⁰

In its proposal, the Exchange stated that some issuers comply with this requirement by merely disclosing the Exchange rule number and a description of such rule, but do not provide additional disclosure to allow the public to understand the deficiency or the underlying basis for it. The Exchange stated, for example, that in situations where the deficiency is not related to the quantitative continued listing standards, such as when the Exchange initiates delisting proceedings due to public interest concerns under Nasdaq Rule 5101, such issuer disclosure would not be adequate for the public if the listed issuer's public announcement only cites to Exchange Rule 5101 and does not provide any details on the nature of the deficiency.

The Exchange proposes to change its rules in several ways to address this issue. First, the Exchange would require issuers to disclose each specific basis and concern cited by Nasdaq in the Nasdaq Staff Determination.¹¹ The Exchange proposal would also indicate that issuers can

determination at a hearing. See Nasdaq Rule 5815. The Exchange's listing and hearings review council could review the decision of the Exchange's hearing panel, either on its own or through the appeal of the issuer. See Nasdaq Rule 5820. Lastly, the Exchange's board of directors could review the decision of the Exchange's review council. See Nasdaq Rule 5825.

¹⁰ See Nasdaq Rules 5250(b)(2), 5810(b) and IM-5810. The Commission notes that under Nasdaq Rule 5810, an issuer that is late in filing a periodic report must issue a press announcement by issuing a press release disclosing receipt of the Nasdaq Staff Determination and the Nasdaq rules upon which the deficiency is based, in addition to filing any Form 8-K as required by Commission rules.

¹¹ See proposed Nasdaq Rules 5250(b)(2), 5810(b) and IM-5810-1. This new requirement would be in addition to the current requirement for a listed issuer to disclose receipt of a Nasdaq Staff Determination and the rules upon which it is based.

provide their own analysis of the issues raised in the Exchange's delisting determination.¹²

Finally, the Exchange proposes to allow it to issue a public announcement if a listed issuer does not make the required announcement or at any level of a proceeding after an issuer receives a Nasdaq Staff Determination involving an issuer's listing or trading.¹³ For example, if the issuer does not make the public announcement within the allotted time, if the issuer's public announcement does not contain all of the required information, or if the issuer's public announcement contains inaccurate or misleading information, the Exchange stated that it may issue a public announcement with the required information.¹⁴

III. Discussion and Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁵ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,¹⁶ 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 foster cooperation and

¹² See proposed Nasdaq Rule IM-5810-1.

¹³ See proposed Nasdaq Rules IM-5810-1 and 5840(l).

¹⁴ See proposed Nasdaq Rules IM-5810-1. Currently, if the public announcement is not made by the listed issuer within the time allotted, the Exchange would halt trading of the securities. The Exchange proposes to halt trading if the issuer's public announcement does not include all of the required information and to allow the Exchange to make a public announcement with the required information. See proposed Nasdaq Rule IM-5810-1. The Exchange also proposes to resume trading if the Exchange makes the public announcement if the issuer's failure to make the announcement is the only basis for the trading halt. *Id.*

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

¹⁶ 15 U.S.C. 78f(b)(5).

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 development and enforcement of meaningful listing standards for an exchange is of substantial importance to financial markets and the investing public. Among other things, listing standards provide the means for an exchange to screen issuers that seek to become listed and to provide listed status only to those that are bona fide issuers with sufficient public float, investor base, and trading interest likely to generate depth and liquidity sufficient 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, assuring compliance with its listing standards and detecting and deterring manipulative trading activity.

The Commission finds that the proposed rule change is consistent with the requirements of the Act. The proposal would require an issuer, after receipt of a notification of deficiency of the Exchange's continued listing standards, to issue more detailed public announcements on the concerns identified in the Exchange's determination. Currently, issuers are required to disclose receipt of the notification and the Exchange rule(s) upon which the deficiency is based. As the Exchange noted, in certain instances such disclosure is inadequate. For example, some delisting notifications are based on the Exchange exercising its public interest authority pursuant to Exchange Rule 5101. Mere disclosure of the Exchange rule number would not provide investors with the necessary information as to the reasons behind the Exchange's deficiency determination.

The Commission believes that this proposal should provide investors with additional important information on the listed issuer in order to help investors make informed trading decisions.

As noted above, the Exchange's rules give listed issuers the right to appeal a delisting determination or public reprimand letter.¹⁷ This process at the first appeal level involving a hearing panel review can take up to six months. Without adequate disclosure of the specific basis and concerns identified by the Exchange during this appeal process, investors may not have full disclosure of the issues involving the listed issuer that gave rise to the deficiency and that may affect an investment decision. The Commission also notes that the proposal furthers the intent behind the original requirement that a listed issuer publicly announce in either its 8-K, if applicable, or a press release that it has received a Nasdaq Staff Determination for a deficiency and the rule on which it is based, which is to ensure adequate disclosure to the public and investors on the deficiency. The proposal will help to ensure that this purpose cannot be avoided by minimal disclosure. The Commission believes that the benefits of full disclosure on the specific basis for a Nasdaq Staff Determination should help to prevent fraudulent and manipulative acts and practices and further investor protection and the public interest, consistent with Section 6(b)(5) under the Act.

In addition, as described above, Nasdaq's proposal also specifically states that in its public announcement, a listed issuer can provide its own analysis of the issues raised in a staff delisting determination. While the Commission notes that the appropriate forum for appealing a delisting determination is within the adjudicatory process provided in the Exchange's rules and this provision should not be used as a way to litigate the issues through the public announcement, the proposed rule simply reflects that issuers may currently make public announcements for a

¹⁷ See supra note 9.

variety of reasons. In the event that an issuer discloses inaccurate or misleading analysis, the Exchange represented that the Exchange could use the new authority in proposed Nasdaq Rule 5840(l), as discussed below, to issue an Exchange clarifying public announcement.¹⁸ The Commission believes that the proposal is reasonably balanced to allow issuers to express their analysis, while the proposed rules help to ensure that there will not be inaccurate, misleading or confusing public information through the Exchange's authority to issue its own public announcement in response to such issuer's announcement. The Commission expects the Exchange to actively monitor issuers' analysis and for the Exchange to promptly issue a public announcement if the Exchange detects misleading or inaccurate information.¹⁹ Based on the above, the Commission believes that, consistent with Section 6(b)(5) of the Act, that the proposal should prevent fraudulent and manipulative acts and practices and further investor protection.

The Commission also finds that the proposed changes that would allow the Exchange to make an issuer's required public announcement about a Nasdaq Staff Determination should the issuer fail to do so within the time allotted or if the announcement does not contain all the required information are consistent with the requirements of the Act. The Commission notes that, for the same reasons noted above, it is important that there is adequate notification of a Nasdaq Staff Determination to investors and the public. Therefore, if the issuer fails to make the required disclosure the Exchange will have the authority to do so. The Commission notes that the proposal is similar to the rules of another national securities exchange.²⁰ As described above, the Exchange's proposal will also clarify some of the rule language concerning a trading halt that

¹⁸ The Commission notes that this order only addresses issues raised by the Exchange's proposal and does not address any issues or liabilities that may arise under the Act.

¹⁹ The Commission expects Nasdaq to monitor the new requirements and propose to make changes if necessary.

²⁰ See New York Stock Exchange Listed Company Manual Section 802.02.

is imposed for an issuer's failure to make the public announcement, and update these requirements to reflect the other changes being adopted herein. The Commission believes these changes are appropriate and will ensure that a trading halt can be imposed for failure to adequately disclose information in the public announcement, and clarify that such trading halt would be lifted after the Exchange makes the public announcement assuming that is the only basis for the trading halt. Based on the above, the Commission believes that these aspects of the proposal are consistent with furthering investor protection and the public interest.

Finally, the Commission believes that the proposed new provision that gives the Exchange the authority to make a public announcement involving an issuer's listing or trading on Nasdaq at any level of a proceeding under its Rule 5800 Series in order to maintain the quality of and public confidence in its markets and to protect investors and the public interest is consistent with the Act. For example, the Exchange could use this authority to counter any inaccurate or misleading statements in an issuer's own public announcement with respect to the issuer's delisting. The Commission also believes that this authority could be useful in those situations, as noted by Nasdaq in its filing, where an issuer is trading in the over-the-counter market pending its delisting appeal and does not make its own announcement when the appeal is finally denied. In such a situation, Nasdaq could use its authority to make such an announcement. In both situations noted above, allowing the Exchange to make a public announcement if there is a lack of accurate public information concerning a Nasdaq Staff Determination would be important for investors and the public interest consistent with Section 6(b)(5) of the Act.²¹

²¹ The Commission does not believe giving the Exchange the authority to make such public announcements replaces any due process or rights to appeal a delisting notification or public reprimand letter under the Exchange's adjudicatory process, but rather is meant simply to provide a way for the public to get accurate information about an issuer that is

IV. Conclusion

It is therefore ordered that, pursuant to Section 19(b)(2) of the Act,²² that the proposed rule change (SR-NASDAQ-2012-118) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²³

Kevin O'Neill
Deputy Secretary

subject to a Staff Determination. The Commission expects the Exchange to monitor its use of this authority consistent with this purpose.

²² 15 U.S.C. 78s(b)(2).

²³ 17 CFR 200.30-3(a)(12).