

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-68676; File No. SR-NASDAQ-2013-004)

January 16, 2013

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Modify Fees For Review of Delisting Determinations and Appeal of Panel Decisions

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 January 2, 2013. The NASDAQ Stock Market LLC (“NASDAQ” or “Exchange”) 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 Substance of the Proposed Rule Change

The NASDAQ Stock Market LLC proposes to modify the fees applicable to companies seeking review of a denial of initial listing or a delisting or reprimand determination.

While changes pursuant to this proposal are effective upon filing, the Exchange will implement the proposed rule by imposing the new fee for hearings on companies who receive a Staff Delisting Determination on or after January 2, 2013. NASDAQ will implement the new fee for appeals on companies who receive a Panel Decision on or after January 2, 2013.

The text of the proposed rule change is below. Proposed new language is underlined; proposed deletions are in brackets.

\* \* \* \* \*

---

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

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

### **5815. Review of Staff Determinations by Hearings Panel**

When a Company receives a Staff Delisting Determination or a Public Reprimand Letter issued by the Listing Qualifications Department, or when its application for initial listing is denied, it may request in writing that the Hearings Panel review the matter in a written or an oral hearing. This section sets forth the procedures for requesting a hearing before a Hearings Panel, describes the Hearings Panel and the possible outcomes of a hearing, and sets forth Hearings Panel procedures.

#### **(a) Procedures for Requesting and Preparing for a Hearing**

(1) - (2) No changes.

#### **(3) Fees**

Within 15 calendar days of the date of the Staff Delisting Determination, the Company must submit a hearing fee of \$10,000. However, if the hearing request relates to a Staff Delisting Determination dated before January 2, 2013, the Company must submit a hearing fee [to The Nasdaq Stock Market, LLC, to cover the cost of the hearing,] as follows:

(A) when the Company has requested a written hearing, \$4,000; or

(B) when the Company has requested an oral hearing, whether in person or by telephone, \$5,000.

(4) – (6) No changes.

(b) – (d) No changes.

### **5820. Appeal to the Nasdaq Listing and Hearing Review Council**

A Company may appeal a Panel Decision to the Listing Council. The Listing Council may also call for review a Panel Decision on its own initiative. This Rule 5820 describes the procedures applicable to appeals and calls for review.

#### **(a) Procedure for Requesting Appeal**

A Company may appeal any Panel Decision to the Listing Council by submitting a written request for appeal and a fee of [\$4,000] \$10,000 to the Nasdaq Office of Appeals and Review within 15 calendar days of the date of the Panel Decision. However, if the appeal relates to a Panel Decision dated before January 2, 2013, the applicable fee is \$4,000. An appeal will not operate as a stay of the Panel Decision. Upon receipt of the appeal request and the applicable fee, the Nasdaq Office of Appeals and Review will acknowledge the Company's request and provide deadlines for the Company to provide written submissions.

(b) – (e) No changes.

\* \* \* \* \*

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

Pursuant to the NASDAQ Listing Rule Series 5800, companies may seek review of a determination by NASDAQ Staff to deny initial listing or delist a company's securities or to issue a Public Reprimand Letter, by requesting an oral or written hearing before an independent Hearings Panel. Listing Rule 5815(a)(3) provides that to request a hearing, the Company must, within 15 calendar days of the date of the Staff Delisting Determination, submit a hearing fee in the amount of \$4000 for a written hearing or \$5,000 for an oral hearing. Companies may also appeal a Panel decision to the NASDAQ Listing and Hearing Review Council (the "NLHRC"). Listing Rule 5820(a) requires a company seeking an appeal to submit a written request and a fee of \$4,000 within 15 days of the date of the Panel Decision.

NASDAQ last changed these fees in 2001.<sup>3</sup> NASDAQ proposes to increase these fees to \$10,000. NASDAQ also proposes to eliminate the distinction in fees between a written and an oral hearing.

---

<sup>3</sup> Securities Exchange Act Release No. 44374 (April 5, 2001) 66 FR 18837 (April 11, 2001) (approving SR-NASD-2001-17).

NASDAQ is increasing the fees because the costs incurred in preparing for and conducting appeals have increased since the fees were last changed. The costs of the delisting process include significant Staff time and resources to prepare for and conduct hearings and appeals. Staff prepares written submissions in support of a delisting determination; attends hearings; provides legal counsel and support to independent Panelists and the NLHRC; drafts final decisions; manages and coordinates the appeals dockets; and monitors post-hearing compliance efforts. NASDAQ also incurs the costs of transcription of the proceedings and expenses for the Panelists and members of the NLHRC. In addition, the Exchange incurs costs to upgrade electronic systems for tracking companies and maintaining a clear record. It also maintains lists on its website, updated every business day, that reflect the status of all companies in the deficiency process.<sup>4</sup> Finally, NASDAQ expends regulatory resources to ensure transparent communication of appeal rules and procedures to listed companies by continually improving our electronic interface with them.<sup>5</sup>

All of these expenses have increased in the eleven years since the fees were set in 2001. In addition, appeals have become more complicated and contentious than when fees were last modified. As a result, NASDAQ devotes more Staff time and resources now to a typical appeal than was historically the case. In response to increasing complexities, NASDAQ has made new hires in its investigatory group and on several occasions engaged an outside law firm or an investigative firm to assist in connection with matters under review.

---

<sup>4</sup> See <https://listingcenter.nasdaqomx.com/assets/DelDefOpenReport.pdf> and <https://listingcenter.nasdaqomx.com/assets/IssuesPendingDelisting.pdf>.

<sup>5</sup> NASDAQ has developed a user-friendly electronic NASDAQ Listing Center and Reference Library, the maintenance of which requires resources on an on-going basis. See <https://listingcenter.nasdaqomx.com/MaterialHome.aspx?mcd=LQ>. Users can view [more than 30 Frequently Asked Questions about the hearings and appeals processes and summaries of almost 100 NLHRC decisions](#). See also [https://listingcenter.nasdaqomx.com/assets/Get\\_Started\\_Guide.pdf](https://listingcenter.nasdaqomx.com/assets/Get_Started_Guide.pdf).

Accordingly, NASDAQ proposes to increase fees to \$10,000 for a Panel hearing, whether the company elects a written or an oral hearing; and \$10,000 for an appeal to the NLRHC. NASDAQ recognizes that in the past, fees for a written hearing have been lower than fees for an oral one. The Exchange believes that the basis for this historical distinction is unclear, and upon review, found to be unwarranted. The cost to a company that elects a written hearing may be lower because the company's related expenses, such as travel and legal representation, may be avoided. However, the costs to the Exchange associated with a written hearing are virtually identical to those associated with an oral hearing, differing only by the cost of transcribing a hearing. NASDAQ believes that the fees should reflect that Staff and Panels expend the same resources, time, and effort in ensuring a full and fair hearing for all hearing participants, and both processes afford the same benefit to the issuer. Therefore, while the proposed amendment preserves the availability of a written hearing to any company that requests one, NASDAQ proposes to charge the same fee for a written hearing as for an oral one.

The revised fees for a hearing will be applicable to issuers that are sent a Staff Delisting Determination on or after January 2, 2013. The revised fees for an appeal of a Panel Decision will be applicable to issuers that receive a Panel Decision on or after January 2, 2013. The current fees will remain in effect for any company that receives a Staff Determination or a Panel Decision before that date.<sup>6</sup>

The revised fees will allow NASDAQ to recoup a portion of the expenses it incurs in the delisting process that will more closely approximate the actual costs associated with the appeal process. The Exchange has reviewed all costs associated with delisting appeals and does not

---

<sup>6</sup> Companies are notified of the fees associated with a request for a hearing in the Staff Delist Determination letter. They are notified of the fees associated with an appeal in the Panel Decision, which includes a notice of the right to appeal.

expect or intend that the fees will exceed the costs.<sup>7</sup> Moreover, the Exchange believes that the proposed fees for a Panel or NLHRC review of a delisting determination are comparable to the appeal fees of other national securities exchanges. For example, NYSE MKT LLC has recently increased its fees for appeal of a Staff delisting determination to \$8,000 for a written and \$10,000 for an oral hearing, and \$10,000 for an appeal of a Panel decision to the Exchange Committee on Securities.<sup>8</sup> NYSE rules provide that a listed company must pay a \$20,000 fee in connection with a delisting appeal.<sup>9</sup>

## 2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>10</sup> in general and with Sections 6(b)(4) and (5) of the Act,<sup>11</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities, and does not unfairly discriminate between customers, issuers, brokers or dealers.

Specifically, the proposed fee increase is reasonable because it will better reflect NASDAQ's costs related to the appeal process. NASDAQ has not increased the fees for an

---

<sup>7</sup> A precise cost-per-hearing analysis is not possible given the need to maintain an appeals infrastructure for which the Exchange incurs expenses irrespective of the number of hearings requested in a given year. Economies of scale may result in a lower cost-per-hearing in a year when NASDAQ receives more requests than when it receives fewer requests. Over the past 2 years, the number of hearings requests has been lower than in the previous 2 years, but the complexity of the appeal issues has demanded significantly greater Exchange resources.

<sup>8</sup> Securities and Exchange Act Release No. 67907 (September 21, 2012), 77 FR 59442 (September 27, 2012) (SR-NYSEMKT-2012-45). See also Sections 1203 and 1205 of the NYSE MKT Company Guide.

<sup>9</sup> Section 804.00 of the NYSE Listed Company Manual.

<sup>10</sup> 15 U.S.C. 78f.

<sup>11</sup> 15 U.S.C. 78f(b)(4) and (5).

appeal since 2001,<sup>12</sup> but has handled increasingly complex matters while providing issuers and investors with an increasingly efficient and transparent appeal process. The fees will help offset the costs of conducting appeals, which serve to ensure that NASDAQ's listing standards are properly enforced for the protection of investors. The proposed changes are equitable and not unfairly discriminatory because they would apply equally to all companies that choose to appeal a delisting determination. In addition, aligning the fees for hearings with the underlying costs of the delisting process will help minimize the extent that companies that are compliant with all listing standards may subsidize the costs of review for companies that are non-compliant.

NASDAQ also believes that the proposed fees are consistent with the investor protection objectives of Section 6(b)(5) of the Act<sup>13</sup> in that they are designed to promote just and equitable principles of trade, to remove impediments to a free and open market and national market systems, and in general to protect investors and the public interest. Specifically, the fees are designed to provide adequate resources for appropriate preparation to conduct Panel hearings and appeals of Panel Decisions, which help to assure that the Exchanges' listing standards are properly enforced and investors are protected. Finally, the proposed change maintains a fair procedure by which listed companies may avail themselves of an appeal.

NASDAQ also believes that the proposed changes are consistent with Section 6(b)(7) of the Act,<sup>14</sup> in that the proposed fees are consistent with the provision by the Exchange of a fair procedures for the prohibition or limitation by the Exchange of any person with respect to access to services offered by the Exchange. In particular, the Exchange believes that the proposed amended fees should not deter listed issuers from availing themselves of the right to appeal

---

<sup>12</sup> Securities Exchange Act Release No. 44374, supra.

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

<sup>14</sup> 15. U.S.C. 78f(b)(7).

because the fees will still be set at a level that will be affordable for listed companies. NASDAQ does not believe that the proposed fee is unduly burdensome or would discourage any company from seeking a hearing or appeal. Finally, NASDAQ notes that the proposed fees are comparable to the fees charged for similar appeal processes by other exchanges.<sup>15</sup>

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. As discussed above, this proposed fee is based on the increase in costs to the Exchange to provide a delisting review process, which is in turn necessary to ensure investor protection as well as a transparent process for issuers. Moreover, the market for listing services is extremely competitive and listed companies may freely choose alternative venues based on the aggregate fees assessed, and the value provided by each listing. This rule proposal does not burden competition with other listing venues, which are similarly free to align their fees on the costs incurred by the process they offer. For this reason, and the reasons discussed in connection with the statutory basis for the proposed rule change, NASDAQ does not believe that the proposed rule change will result in any burden on competition for listings.

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

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>16</sup> NASDAQ has designated this proposal as establishing or changing a due, fee, or other charge imposed by the self-regulatory

---

<sup>15</sup> See footnotes 8 and 9, supra, and accompanying text.

<sup>16</sup> 15 U.S.C. 78s(b)(3)(A)(ii).



organization on any person, whether or not the person is a member of the self-regulatory organization, which renders the proposed rule change effective upon filing.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

#### 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-2013-004 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-2013-004. 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-2013-004 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>17</sup>

Kevin M. O'Neill  
Deputy Secretary

---

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