

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-76731; File No. SR-NASDAQ-2015-144)

December 22, 2015

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of a Proposed Rule Change to Amend Rules 5810(4), 5810(c), 5815(c) and 5820(d) to Provide Staff with Limited Discretion to Grant a Listed Company that Failed to Hold its Annual Meeting of Shareholders an Extension of Time to Comply with the Requirement

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 December 9, 2015, 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 the Exchange. 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

NASDAQ proposes to amend Rule 5810(c) to provide NASDAQ staff with limited discretion to grant a listed company additional time to solicit proxies and hold an annual meeting of shareholders. The text of the proposed rule change is available from NASDAQ’s website at <http://nasdaq.cchwallstreet.com/Filings/>, at NASDAQ’s principal office, and at the Commission’s Public Reference Room.

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

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

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

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

Each company listing common stock or voting preferred stock, and their equivalents, must hold an annual meeting of shareholders no later than one year after the end of the company's fiscal year and solicit proxies for that meeting.<sup>3</sup> An annual meeting allows the equity owners of the company the opportunity to elect directors and meet with management to discuss company affairs. Currently, should a company fail to hold its annual meeting as required by Rule 5620, staff of the Listing Qualifications Department ("Staff") has no discretion to allow additional time for the company to regain compliance. Rather, Staff is required by Rule 5810(c)(1) to issue a delisting determination, subjecting the company to immediate suspension and delisting unless the company appeals to a Hearings Panel.<sup>4</sup> NASDAQ proposes to amend Rule 5810(4), 5810(c), 5815(c) and 5820(d) to provide Staff with limited discretion to grant a

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<sup>3</sup> See Rules 5620(a) and (b), respectively. Rule 5615(a)(4)(D) also requires a limited partnership to hold an annual meeting of limited partners if required by statute or regulation in the state in which the limited partnership is formed or doing business or by the terms of the partnership's limited partnership agreement. Rule 5615(a)(4)(F) requires the limited partnership to distribute information statements or proxies when a meeting of limited partners is required. The proposed process described herein would apply in the identical manner to limited partnerships required to hold a meeting as it does to other companies. See also Rules 5615(a)(4)(E) and (F) (partner meetings and proxy solicitation of limited partnerships).

<sup>4</sup> A listed company may request review of a Staff Delisting Determination by a Hearings Panel. A timely request for a hearing will stay the suspension and delisting pending the issuance of a written Panel Decision. See Rule 5815.

listed company that failed to hold its annual meeting of shareholders an extension of time to comply with the requirement.<sup>5</sup>

NASDAQ notes that the only other rule where a company is subject to immediate suspension and delisting, besides when it fails to solicit proxies and hold an annual meeting, is when Staff makes a determination pursuant to the Rule 5100 Series that the company's continued listing raises a public interest concern. This determination generally is made only following discussion and review of the facts and circumstances with the company. For all other deficiencies under the Rule 5000 Series, a listed company is provided with either a fixed compliance period within which to regain compliance,<sup>6</sup> or given the opportunity to submit a plan to regain compliance, which Staff reviews to determine whether to grant the company a limited time to implement.<sup>7</sup> Generally, a company is allowed 45 days to submit the plan of compliance<sup>8</sup> and, upon review of the plan, Staff may grant the company up to 180 days from the date of Staff's initial notification of the company's non-compliance to regain compliance. If upon review of the company's plan Staff determines that an extension is not warranted, Staff will issue a Delisting Determination, which triggers the company's right to request review by a Hearings Panel.

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<sup>5</sup> The Exchange notes that companies and certain limited partnerships are also required to solicit proxies and provide proxy statements for all meetings of shareholders or partners. See Rules 5620(b) and 5615(a)(4)(F), respectively. A company or limited partnership that has not timely held an annual meeting has not violated the proxy solicitation rule because no meeting has been held.

<sup>6</sup> See Rule 5810(c)(3).

<sup>7</sup> See Rule 5810(c)(2).

<sup>8</sup> Companies deficient with the filing requirement for periodic reports are provided up to 60 days to submit a plan of compliance. See Rule 5810(c)(2)(F). Staff can shorten these deadlines where deemed appropriate.

There are a variety of reasons a company may fail to timely hold an annual meeting. In many of these cases, the circumstances that precipitated the delay may arise just before a planned meeting. For example, NASDAQ has observed cases where a company has attempted to hold an annual meeting before the deadline, but was required to adjourn and reschedule the meeting to allow its shareholders more time to review proxy materials in connection with a shareholder proxy contest. NASDAQ has also encountered companies that could not hold an annual meeting because they were delinquent in filing periodic reports and therefore could not include required financial information in a proxy statement. In that case, under the current rules, the company could receive an extension of the time to regain compliance with the filing requirement. However, if during any such compliance period the company subsequently fails to hold an annual meeting of shareholders for any reason, Staff would issue a delist determination at that time for both the filing delinquency and the annual meeting deficiency, notwithstanding that the compliance period for the filing delinquency has not expired.<sup>9</sup> [sic] Under these circumstances, as required by the Listing Rules, Staff will notify the company in writing of the annual meeting deficiency<sup>10</sup> and the company must publicly disclose such notification.<sup>11</sup> The deficiency will then be considered at the same time and together with the filing delinquency in any subsequent delisting proceeding.<sup>12</sup>

For these reasons, NASDAQ is proposing to amend Rules 5810(c), 5815(c) and 5820(d) to afford those companies and limited partnerships that fail to hold an annual meeting in accordance with the listing rules an opportunity to submit a plan of compliance for Staff's

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<sup>9</sup> See Rule 5810(c)(2)(A).

<sup>10</sup> See Rule 5810(a).

<sup>11</sup> See Rule 5810(b).

<sup>12</sup> See Rule 5810(d).

review.<sup>13</sup> Accordingly, we are also proposing to modify Rule 5810(4) to make clear that a Public Reprimand Letter is not an available notification type for unresolved deficiencies from the standards of Rules 5250(c) (obligation to file periodic financial reports), 5615(a)(4)(D) (partner meetings of limited partnerships), and 5620(a) (meetings of shareholders). Under proposed Rule 5810(c)(2)(G), Staff's written deficiency notice shall provide the Company with 45 calendar days to submit a plan to regain compliance. A non-compliant company will have to publicly disclose, under both Commission and NASDAQ rules, that it has received notification of non-compliance with the annual meeting rule.<sup>14</sup> In addition, we are proposing to modify Rule 5810(c)(2)(B) to make clear that annual meeting deficiencies are governed by proposed Rule 5810(c)(2)(G).

In determining whether to grant the Company an extension to comply with the annual meeting requirement, Staff will consider the likelihood that the Company would be able to hold an annual meeting within the exception period, the Company's past compliance history, the reasons for the failure to timely hold an annual meeting, corporate events that may occur within the exception period, the Company's general financial status, and the Company's disclosures to the market. This review will be based on information provided by a variety of sources, which may include the Company, its audit committee, its outside auditors, the staff of the SEC and any other regulatory body. The proposed rule change will limit the length of an extension granted by Staff, upon review of the plan, to no more than 180 calendar days from the deadline to hold the

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<sup>13</sup> As noted above, the company or limited partnership generally would have 45 days to submit a plan to regain compliance, although Staff could shorten that period where it believes appropriate.

<sup>14</sup> See Rule 5810(b) and IM-5810-1. See also Item 3.01 of SEC Form 8-K.

annual meeting (i.e., one year after the end of the Company's fiscal year).<sup>15</sup> The proposed rule change will also limit the maximum length of an extension that a NASDAQ Hearings Panel or the NASDAQ Listing and Hearing Review Council<sup>16</sup> may grant for such a deficiency to no more than 360 calendar days from the date of non-compliance with the rule. In doing so, the total time that a company may be granted to regain compliance with the annual meeting requirement is unchanged from the existing rule.<sup>17</sup> The proposed rule change merely vests Staff with the limited discretion to grant an extension to regain compliance for a prescribed portion of this time. NASDAQ believes that the proposed rule change provides consistency with the administration of other continued listing standards where companies are provided a cure period or opportunity to submit a plan to regain compliance after they become deficient, without undermining the requirement that NASDAQ-listed companies hold annual meetings.

Lastly, in accordance with Rule 5810(c)(2) a company or limited partnership not subject to the all-inclusive annual fee program that submits such a plan is subject to the \$5,000 compliance plan review fee. Effective January 2018, all companies will be subject to the all-inclusive annual fee program and this fee will no longer be applicable to any company. Further, all companies, regardless of whether they participate in the all-inclusive annual fee program or

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<sup>15</sup> NASDAQ has observed that a substantial majority of companies that received delisting notices for failing to solicit proxies and hold their annual meetings regain compliance within a six month period.

<sup>16</sup> The Hearings Panel reviews staff delisting determinations and the Listing and Hearing Review Council reviews Panel Decisions.

<sup>17</sup> Under the current rule, the 360 calendar day limit on extensions starts on the date of Staff's written notification to a company of the deficiency, which is typically the first business day of a calendar year for companies with calendar year fiscal years. Under the proposed rule, the 360 calendar day period would start on the deadline to hold the annual meeting, which is one year after the end of a company's fiscal year. Thus, while the proposal does not change the total length of an extension a company may be granted, the starting date for an extension period under the proposed rule would be a day or two earlier than under the current rule.

not, are subject to the \$10,000 fee for each of a Panel hearing and appeal to the Listing and Hearing Review Council set forth in Listing Rules 5815(a)(3) and 5820(a), respectively. Accordingly, under the proposed rule as compared to the current rule, companies and limited partnerships may be subject to these fees at different times, if at all, depending on whether and when they regain compliance. Notwithstanding, a company that elects not to participate in the all-inclusive annual fee program prior to January 2018 will incur the \$5,000 compliance plan review fee whereas a company that has opted-in to the all-inclusive fee will not. This fee would be in addition to any fees incurred in the appellate process.

## 2. Statutory Basis

NASDAQ believes that the proposed rule changes are consistent with the provisions of Section 6 of the Act,<sup>18</sup> in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,<sup>19</sup> in particular, in that they provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the Exchange operates or controls, and 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; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Specifically, the proposed changes are consistent with these requirements because they permit Staff to grant additional time to a company to comply with the annual meeting

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<sup>18</sup> 15 U.S.C. 78f.

<sup>19</sup> 15 U.S.C. 78f(b)(4) and (5).

requirement in limited situations after Staff review of a compliance plan. The proposed changes, however, do not change the total length of an extension a company may be granted – as is the case under the current rule, such maximum time period would remain 360 calendar days.

Furthermore, as is the case under the current rule, a company notified that it is deficient in the annual meeting requirement is required to publicly disclose such notice and the rules basis for it. NASDAQ also separately publicly discloses a list of noncompliant companies and the listing standards with which they do not comply. For these reasons, the proposed rule protects investors and the public interest.

As noted above, there are various reasons why a company may not be able to hold an annual meeting and for which immediate delisting is an inappropriate outcome under the circumstances. In lieu of the current requirement that Staff send an immediate Delisting Determination, the proposal vests Staff with discretion to determine whether the reason for the deficiency and the plan to regain compliance merit an extension. The Rules allow Staff such discretion for other deficiencies, and the only case where Staff sends an immediate Delisting Determination is where Staff has concluded, after review of the facts and circumstances, that continued listing is contrary to the public interest. NASDAQ believes that it is consistent with the Act to provide Staff with discretion to grant an extension for an annual meeting deficiency based on a plan of compliance, consistent with the process currently used for the majority of deficiencies under NASDAQ's rules. The Exchange is not extending the total time that a company may remain listed on NASDAQ while deficient; rather, the proposed rule change will allow Staff limited discretion to grant an extension to regain compliance with the listing standard for a prescribed portion of this time, which, to the extent exercised, will limit the length of time a Hearings Panel and Listing and Hearing Review Council may subsequently grant. Accordingly,

the Exchange believes that the proposal promotes the requirements of the Act by providing Staff with limited discretion to allow additional time where the circumstances do not support immediate delisting, while maintaining Staff's authority to delist a company when warranted.

The Exchange also believes that assessing the \$5,000 compliance plan review fee on companies that have not opted-in to the all-inclusive annual fee program prior to January 2018 is reasonable because NASDAQ is changing the process in an effort to make it more consistent with how other deficiencies are handled. The Exchange notes that companies that do not resolve their annual meeting deficiencies during an extension period provided by Staff under the proposed changes may subsequently be subject to the \$10,000 fee for each of a Panel Hearing and an appeal to the Listing and Hearing Review Council. However, because most companies resolve annual meeting deficiencies within six months, under the proposed rules, they would likely not incur these fees. Further, the Exchange believes that the proposed rule change is equitably allocated because the fees assessed to companies as a result of the changes will be allocated uniformly among similarly-situated companies. Moreover, the Exchange believes that assessing different fees between companies that opt-in to the all-inclusive annual fee program and those that do not is an equitable allocation because participation in the program is elective and available to all listed companies. As a consequence, companies are able to weigh the benefits of the program against the relative risk of incurring additional fees and choose whether opting-in to the program at this juncture is appropriate.

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

The Exchange 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. The proposed rule change will not burden competition as it provides discretion to

Staff to provide a limited time to regain compliance when immediate delisting is not warranted, thereby potentially reducing the time and costs associated with appealing a delisting determination. Moreover, the proposed rule change is intended to promote consistent and fair regulation, and is not being adopted for competitive purposes. To the extent a competitor marketplace believes that the proposed rule change places them at a competitive disadvantage, it may file with the Commission a proposed rule change to adopt the same or similar rule.

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 Exchange consents, the Commission shall: (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-2015-144 on the subject line.

Paper comments:

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2015-144. 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, D.C. 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-2015-144, 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>20</sup>

Brent J. Fields  
Secretary

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<sup>20</sup> 17 CFR 200.30-3(a)(12).