

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-88716; File No. SR-NASDAQ-2020-001)

April 21, 2020

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; 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

I. Introduction

On January 2, 2020, The Nasdaq Stock Market LLC (“Exchange” or “Nasdaq”) 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 thereunder,² a proposed rule change to modify the delisting process for securities with a bid price at or below \$0.10 in certain circumstances as described below 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. The proposed rule change was published for comment in the Federal Register on January 22, 2020.³ On March 5, 2020, pursuant to Section 19(b)(2) of the 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 The

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 87982 (January 15, 2020), 85 FR 3736.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 88325, 85 FR 14264 (March 11, 2020). The Commission designated April 21, 2020 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposal

The Exchange has proposed to modify its delisting process for securities with a closing bid price at or below \$0.10 for ten consecutive trading days during any bid price compliance period 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 (i.e., in cases where following such reverse stock split(s) an investor would hold one share for every 250 shares or more owned at the start of the two-year period).

Nasdaq's current rules require that primary equity securities, preferred stocks, and secondary classes of common stock maintain a minimum bid price of at least \$1.00 per share for continued listing.⁶ Under Rule 5810(c)(3)(A), a security is considered deficient with this bid price requirement if its bid price closes below \$1.00 for a period of 30 consecutive business days. Under Nasdaq Rule 5810(c)(3)(A), a company with a bid price deficiency has 180 calendar days from notification of the deficiency to regain compliance. A company generally can regain compliance with the bid price requirement by maintaining a \$1.00 closing bid price for a minimum of ten consecutive business days during the 180-day compliance period.⁷ Under Rule 5810(c)(3)(A)(ii), a company that lists its security on the Nasdaq Capital Market, or transfers its listing to that market, may be eligible for a second 180 calendar day period to regain compliance, provided that on the last day of the first compliance period the company meets the market value

⁶ See Rules 5450(a)(1), 5460(a)(3), 5550(a)(2), and 5555(a)(1).

⁷ Under Rule 5810(c)(3)(G), Nasdaq staff could extend this ten-day period to a maximum of 20 days.

of publicly held shares requirement for continued listing as well as all other applicable standards for initial listing (except for the bid price requirement) on the Nasdaq Capital Market and notifies the Exchange of its intent to cure the bid price deficiency.⁸ If a company is able to avail itself of this second 180-day bid price compliance period when listed on, or transferring to, Nasdaq's Capital Market, the total compliance period to cure a bid price deficiency would be up to 360 calendar days.⁹

According to the Exchange, it believes that there are certain situations where a company may be facing more serious issues for which a compliance period of up to 360 days may not be appropriate.¹⁰ The Exchange stated that these situations involve securities with very low prices (as proposed, at or below \$0.10) and securities where the company has completed one or more reverse stock splits over the prior two-year period that, when considered cumulatively, result in a ratio of 250 shares or more to one and then fails to satisfy the bid price requirement. According to the Exchange, the challenges facing the company in these situations are generally not temporary and may be so severe that the company is not likely to regain compliance within the prescribed compliance period.¹¹ The Exchange also stated that these companies often become subject to delisting for other reasons during the compliance periods.¹² Accordingly, the

⁸ If it does not appear to Nasdaq that it is possible for the company to cure the deficiency with the bid price requirement, it will not be eligible for this second 180-day period to achieve compliance. See Rule 5810(c)(3)(A)(ii). See also Rule 5810(c)(3)(A)(i), which describes the conditions for a company transferring from the Nasdaq Global Market to the Nasdaq Capital Market to avail itself of the additional 180-day compliance period set forth in Rule 5810(c)(3)(A)(ii).

⁹ See Notice, supra note 3, 85 FR at 3737. See also Rule 5810(c)(3)(A).

¹⁰ See Notice, supra note 3, 85 FR at 3737.

¹¹ See id.

¹² See id.

Exchange has proposed to modify its listing rules so that companies that fit into the categories specified above are subject to shortened compliance periods, which, in the Exchange's view, could lead to earlier delisting and enhanced review procedures.

With respect to securities with very low prices, the Exchange has proposed to modify its listing rules to provide that a company in any bid price compliance period under Rule 5810(c)(3)(A) as described above (i.e., the company's security has already traded below \$1.00 for thirty consecutive business days) will immediately receive a Staff Delisting Determination if the security has a closing bid price of \$0.10 or less for a period of ten consecutive trading days, which would end any otherwise applicable compliance period.¹³ The Exchange also has proposed to amend its rules to not permit a company to avail itself of any bid price compliance periods under Rule 5810(c)(3)(A), and instead require the issuance of a Staff Delisting Determination, if a company falls out of compliance with the \$1.00 minimum bid price after completing one or more reverse stock splits resulting in a cumulative ratio of 250 shares or more to one over the two-year period immediately prior to such non-compliance.¹⁴ According to the Exchange, it believes it would be inappropriate to permit such securities to remain listed while

¹³ The Exchange noted that such a company could request review of the Staff Delisting Determination by a Hearings Panel, and the Hearings Panel could grant the company additional time to complete a reverse stock split or otherwise regain compliance. See id. See also infra note 16 and accompanying text, noting that the Hearings Panel can grant up to an additional 180 days.

¹⁴ The Exchange stated, for example, that a company could effect a reverse stock split in a ratio of 25 shares to one, followed within the two-year period by a second reverse stock split in a ratio of ten shares to one, resulting in a cumulative ratio of 250 shares to one. See Notice, supra note 3, 85 FR at 3737 n.7. Alternatively, a company could effect three reverse stock splits in the two-year period, with ratios of ten shares to one, five shares to one, and five shares to one, respectively, resulting in a cumulative ratio of 250 shares to one. See id.

relying on very large reverse stock splits to maintain compliance with the \$1.00 minimum bid price.¹⁵

The Exchange stated that a company that is not eligible for a compliance period under the proposed rule change would receive a Staff Delisting Determination, which it could appeal to a Hearings Panel. The Hearings Panel could grant the company an exception to remain listed for a period not to exceed 180 days from the date of the Staff Delisting Determination if, according to the Exchange, it believes the company will be able to achieve and maintain compliance with the bid price requirement.¹⁶ However, the Exchange also proposed to modify its listing rules so that following such a Hearings Panel exception the company would be subject to the procedures applicable to a company with recurring deficiencies as described in Rule 5815(d)(4)(B). As a result, if within one year of the date a company regained compliance (i.e., in those cases where the company was not granted a compliance period under proposed Rule 5810(c)(3)(A)(iii) and (iv) but the Hearings Panel had granted an exception during which time the company came into compliance) the company again fails to maintain compliance with the bid price requirement, the company would not be eligible for a compliance period and instead the Listing Qualifications Department will issue a Staff Delisting Determination, which can be appealed to the Hearings Panel.

The Exchange has proposed to begin to implement the proposed rule change for companies that first receive notification of non-compliance with the bid price requirement after the date of this approval order. Accordingly, a company that has already received notification of

¹⁵ See id. at 3737. See also supra note 13 (noting that the Hearings Panel could grant the company up to an additional 180 days).

¹⁶ See Rule 5815(c)(1)(A).

such non-compliance would be permitted to regain compliance under the existing rule, in the manner that the notification of non-compliance would have described.¹⁷

III. Discussion and Commission 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.¹⁸ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,¹⁹ 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 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. In addition, the Commission finds that the proposed rule change is consistent with Section 6(b)(7) of the Act,²⁰ which requires, among other things, that the rules of a national securities exchange provide a fair procedure for the prohibition

¹⁷ See Notice, supra note 3, 85 FR at 3738. The Exchange noted in its proposal that under Rule 5810(c)(3)(A)(ii), a company is not eligible for the second compliance period “if it does not appear to Nasdaq that it is possible for the Company to cure the deficiency.” See id. at 3738 n.8. The Exchange stated that, as is currently the case, it may rely upon this language to deny the second compliance period to a company with a very low stock price or that has engaged in significant prior reverse stock splits, even though the company is not yet subject to the proposed rule change. See id. See also Rule 5810(c)(3)(A)(i), which states that following a transfer from Nasdaq Global Market to Capital Market a company will be afforded the remainder of the applicable compliance period in Rule 5810(c)(3)(A)(ii) “unless it does not appear to Nasdaq that it is possible for the Company to cure the deficiency.”

¹⁸ 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).

¹⁹ 15 U.S.C. 78f(b)(5).

²⁰ 15 U.S.C. 78f(b)(7).

or limitation by the exchange of any person with respect to access to services offered by the exchange.

The development and enforcement of meaningful listing standards²¹ 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.²² Meaningful listing standards are also 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.²³

The proposed amendments would shorten the compliance periods available to listed companies to cure a bid price deficiency in certain circumstances, which could lead to earlier delisting of the company. In particular, rather than being able to take advantage of the

²¹ The Commission notes that this reference to “listing standards” is referring to both initial and continued listing standards.

²² The Commission has consistently recognized the importance of exchange listing standards. 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 companies with sufficient public float, investor base, and trading interest likely to generate depth and liquidity sufficient to promote fair and orderly markets. In addition, once a security has been approved for initial listing, maintenance criteria allow an exchange to monitor the status and trading characteristics of that issue to ensure that it continues to meet the exchange’s standards for market depth and liquidity so that fair and orderly markets can be maintained. See, e.g., Securities Exchange Act Release Nos. 81856 (October 11, 2017), 82 FR 48296, 48298 (October 17, 2017) (SR-NYSE-2017-31); 81079 (July 5, 2017), 82 FR 32022, 32023 (July 11, 2017) (SR-NYSE-2017-11). The Commission notes that, in general, adequate listing standards, by promoting fair and orderly markets, are consistent with Section 6(b)(5) of the Act, in that they are, among other things, designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and protect investors and the public interest. See, e.g., Securities Exchange Act Release No. 80933 (June 15, 2017), 82 FR 28200 (June 20, 2017) (SR-NYSE-2017-30).

²³ See supra note 22.

compliance periods under the Exchange's rules of 180 calendar days or 360 calendar days for companies that so qualify, companies in a bid price compliance period that have a closing bid price at or below \$0.10 for ten consecutive trading days would have that compliance period end and be issued an immediate Staff Delisting Determination, which could then be appealed.

Similarly, companies that have had reverse stock splits with a cumulative ratio of 250 shares to one over the prior two-year period would not be able to take advantage of any of the compliance periods under Rule 5810(c)(3)(A) if they fail the bid price requirement and the company would receive an immediate Staff Delisting Determination, which could then be appealed.

The Exchange noted in its proposal that the compliance periods are designed to allow adequate time for a company that faces temporary business issues, temporary decreases in the market value of its securities, or temporary market conditions to come back into compliance with a bid price deficiency.²⁴ According to the Exchange, however, in those situations where securities have a very low security price (i.e., \$0.10 or below) or the company has undertaken large reverse stock splits over a two-year period but then fails the bid price requirement, a compliance period of up to 360 calendar days may not be appropriate. The Exchange has found that companies meeting such criteria often have problems so severe that they are not likely to regain compliance during either the 180 or 360 calendar day compliance periods. In Nasdaq's experience, such companies are not usually experiencing temporary problems, have other compliance issues, and frequently need to raise additional capital to fund their business operations and often do so by engaging in extremely dilutive transactions. The Commission believes that, in such circumstances, there are investor protection concerns with allowing the securities identified in the Exchange's proposal to have an extended period of time to regain

²⁴ See Notice, supra note 3, 85 FR at 3737.

compliance with the bid price requirement, as provided under Nasdaq's current rules, prior to commencing delisting proceedings. The Commission believes that shortening the available compliance periods in the described situations, and immediately commencing delisting proceedings, should therefore help to ensure that only those securities that are suitable for continued Exchange trading remain listed on the Exchange.

Further, the low-priced stocks identified in the criteria raise concerns about their susceptibility to manipulation and the prevention of fraudulent and manipulative acts and practices as well as the ability to promote fair and orderly markets on the Exchange in such securities. As Nasdaq stated in its proposal, securities 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.²⁵ The Exchange stated in support of its proposal that it believes such exemption may not be appropriate for abnormally low-priced securities and securities that are trading below \$1.00 after completing one or more reverse stock splits with a cumulative ratio of 250 shares to one or more over the prior two-year period because these securities, in the Exchange's view, may have similar characteristics to penny stocks.²⁶ Given the historical concerns regarding penny stocks, the Commission believes Nasdaq's proposal to commence delisting proceedings sooner in the process for those companies meeting the criteria identified in the proposed rule that fail to satisfy the bid price requirement is appropriate.

²⁵ 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.

²⁶ See Notice, supra note 3, 85 FR at 3738.

The Commission also notes that companies that have shortened compliance periods as a result of the proposed changes being approved herein will still be able to appeal the Staff Delisting Determination to the Hearings Panel.²⁷ The Hearings Panel, as noted above, can grant the company an additional 180 days to comply with the bid price requirement should the Hearings Panel determine that the facts warrant such additional time. The Commission believes that the shortening of the 180 or 360 calendar day period to regain compliance with a bid price deficiency in the situations described above is appropriate in light of the need to protect investors and the public interest and that the Hearings Panel review process should continue, as it currently does, to provide a fair procedure for the review of the Staff Delisting Determination in accordance with Section 6(b)(7) of the Act.

Finally, the Commission notes that, for the same reasons discussed above, it is appropriate and consistent with the protection of investors for Nasdaq to amend its recurring deficiency provisions to include companies that fall out of compliance with the bid price requirement within a year of regaining such compliance after being granted an exception from the Hearings Panel, in those cases where such companies were previously not eligible for a compliance period due to a low stock price or excessive reverse stock splits. The Commission believes it is reasonable for the Exchange to determine that such recurrent violators of the bid price requirement may not be able to regain compliance during the compliance periods and as such should be subject to an immediate Staff Delisting Determination, which can then be appealed to the Hearings Panel.²⁸

²⁷ A timely request for a hearing shall ordinarily stay the suspension and delisting action pending the issuance of a written Panel Decision. See Rule 5815(A)(1)(b).

²⁸ See Notice, supra note 3, 85 FR at 3738.

The Exchange's proposal identifies securities listed on its market that have had serious and recurrent issues in meeting and regaining compliance with the \$1.00 bid price continued listing requirement and proposes to prohibit such companies from utilizing the compliance periods and instead commence immediate delisting proceedings. This should help to protect investors and the public interest, while at the same time providing a fair procedure for companies to appeal the Staff Delisting Determination to the Hearings Panel. Based on the above, the Commission believes that the proposed rule change can help to ensure that the Exchange lists only securities with a sufficient market, with adequate depth and liquidity, and with sufficient investor interest to support an exchange listing.

Based on the foregoing, the Commission finds that the proposed rule change is consistent with the Act.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁹ that the proposed rule change (SR-NASDAQ-2020-001) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁰

J. Matthew DeLesDernier
Assistant Secretary

²⁹ 15 U.S.C. 78s(b)(2).

³⁰ 17 CFR 200.30-3(a)(12).