

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-90201; File No. SR- NASDAQ-2020-002)

October 15, 2020

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Approving a Proposed Rule Change to Amend the Procedures Governing the Introduction of Legal Arguments and Material Information by Companies in a Proceeding Before a Hearings Panel

I. Introduction

On July 2, 2020, 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 thereunder,² a proposed rule change to amend the procedures governing proceedings before a Hearings Panel, including the introduction of legal arguments and material information by companies during such proceedings. The proposed rule change was published for comment in the Federal Register on July 20, 2020.³ On September 2, 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 This order approves the proposed rule change.

¹ 15 U.S.C.78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 89309 (Jul. 14, 2020), 85 FR 43900 (“Notice”). Comments on the proposed rule change can be found at: <https://www.sec.gov/comments/sr-nasdaq-2020-002/srnasdaq2020002.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 89745, 85 FR 55728 (Sep. 9, 2020). The Commission designated October 18, 2020, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

II. Description of the Proposal

Under Nasdaq’s current rules, a Company⁶ may, within seven calendar days of the date of a Staff Delisting Determination⁷ notification, Public Reprimand Letter,⁸ or written denial of a listing application, request a written or oral hearing before a Hearings Panel⁹ to review the Staff Delisting Determination, Public Reprimand Letter, or written denial of a listing application.¹⁰ The Hearings Department¹¹ will schedule hearings to take place, to the extent practicable, within 45 days of the request for a hearing.¹² The Hearings Department will send written

⁶ Nasdaq Rule 5005(a)(6) defines “Company” as the issuer of a security listed or applying to list on Nasdaq.

⁷ Nasdaq Rule 5805(h) defines a “Staff Delisting Determination” as a written determination by the Listing Qualifications Department to delist a listed Company’s securities for failure to meet a continued listing standard. Nasdaq Rule 5805(f) defines the “Listing Qualifications Department” as the department of Nasdaq responsible for evaluating Company compliance with quantitative and qualitative listing standards and determining eligibility for initial and continued listing of a Company’s securities.

⁸ Nasdaq Rule 5805(j) defines a “Public Reprimand Letter” as a letter issued by Staff or a Decision of an Adjudicatory Body in cases where the Company has violated a Nasdaq corporate governance or notification listing standard (other than one required by Rule 10A-3 of the Act) and Staff or the Adjudicatory Body determines that delisting is an inappropriate sanction. Rule 5805(g) defines “Staff” as employees of the Listing Qualifications Department; Rule 5805(i) defines “Decision” as a written decision of an Adjudicatory Body; and Rule 5805(a) defines “Adjudicatory Body” as the Hearings Panel, the Listing Council, or the Nasdaq Board, or a member thereof.

⁹ Nasdaq Rule 5805(d) defines “Hearings Panel” as an independent panel made up of at least two persons who are not employees or otherwise affiliated with Nasdaq or its affiliates, and who have been authorized by the Nasdaq Board of Directors.

¹⁰ See Nasdaq Rule 5815(a)(1)(A). If a Company fails to request in writing a hearing within seven calendar days, it waives its right to request review of a Staff Delisting Determination, Public Reprimand Letter, or written denial of an initial listing application and the Hearings Department will take action to suspend trading of the securities and follow procedures to delist the securities. See Nasdaq Rule 5815(a)(2).

¹¹ Nasdaq Rule 5805(c) defines “Hearings Department” as the Hearings Department of the Nasdaq Office of General Counsel.

¹² See Nasdaq Rule 5815(a)(4).

acknowledgment of the Company's hearing request and inform the Company of the date, time, and location of the hearing, and deadlines for written submissions to the Hearings Panel.¹³ The Company will be provided at least ten calendar days' notice of the hearing unless the Company waives such notice.¹⁴

Under the current hearings process, set forth in Nasdaq Rule 5815(a)(5), the Company may, but is not required to, submit to the Hearings Department a written plan of compliance and request that the Hearings Panel grant an exception to the listing standards for a limited time period, as permitted by Nasdaq Rule 5815(c)(1)(A), or may set forth specific grounds for the Company's contention that the issuance of a Staff Delisting Determination, Public Reprimand Letter, or denial of a listing application was in error, and may also submit public documents or other written material in support of its position, including any information not available at the time of the staff determination. The Hearings Panel will review the written record before the hearing.¹⁵ Pursuant to Nasdaq Rule 5815(a)(6), at an oral hearing, the Company may make such presentation as it deems appropriate, including the appearance by its officers, directors, accountants, counsel, investment bankers, or other persons, and the Hearings Panel may question any representative appearing at the hearing.¹⁶ A Company may waive its right to an oral hearing and seek a decision by the Hearings Panel based solely on its written submissions.¹⁷

¹³ See id.

¹⁴ See id.

¹⁵ See Nasdaq Rule 5815(a)(5).

¹⁶ Hearings are generally scheduled to last one hour, but the Hearings Panel may extend the time. The Hearings Department will arrange for and keep on file a transcript of oral hearings. See Nasdaq Rule 5815(a)(6).

¹⁷ See Notice, supra note 3, 85 FR at 43901.

The Exchange now proposes to revise Nasdaq Rules 5815(a)(5) and (6) to amend the procedures governing the introduction of legal arguments and material information by Companies in a written or oral hearing before a Hearings Panel as well as require Companies to provide a written submission in such proceedings. The Exchange is also proposing some other changes to the Hearings Panel proceedings as discussed in more detail below. The Exchange stated that the proposed amendments are designed to improve the efficient and effective functioning of the hearings process in connection with the Company's appeal of a Staff Delisting Determination, Public Reprimand Letter, or denial of a listing application.¹⁸

Specifically, the Exchange is proposing to amend Nasdaq Rule 5815(a)(5) to require a Company to provide a written submission to the Hearings Department, to which Staff may respond in writing, stating with specificity the grounds on which the Company is seeking review of the Staff Delisting Determination notification, Public Reprimand Letter, or written denial of a listing application ("Written Submission").¹⁹ The Company would be required to include in the Written Submission all legal arguments on which it intends to rely.²⁰ In addition, the Exchange

¹⁸ See id.

¹⁹ The Hearings Department generally calendars a hearing within 45 days of the request for a hearing and will establish deadlines for written submissions to the Hearings Panel. See Nasdaq Rule 5815(a)(4). As determined by the Hearings Department, both oral and written hearing matters are generally considered on Thursdays, and the Company's written submission is typically due on the third Friday before the hearing. The Hearings Department will generally establish the Thursday before the hearing as the deadline for Nasdaq Staff to respond in writing. See Notice, supra note 3, 85 FR at 43901, n.6.

²⁰ The proposal would amend the current rule to allow the Company's Written Submission, as appropriate, to include a written plan of compliance and request that the Hearings Panel grant an exception to the listing standards for a limited time period, as permitted by Nasdaq Rule 5815(c)(1)(A), or may set forth specific grounds for the Company's contention that the issuance of a Staff Delisting Determination, Public Reprimand Letter, or denial of a listing application was in error, and may also submit public documents or other written material in support of its position, including any information not available at the time of the staff determination. See proposed Nasdaq Rule 5815(a)(5).

proposes to specify that the Company may supplement the Written Submission by providing a written update to the Hearings Department (“Written Update”) no later than two business days in advance of the hearing. The Written Update may not include any legal argument not raised by the Company with specificity in the Written Submission.²¹

The Exchange is proposing to amend Nasdaq Rule 5815(a)(6) to provide that during an oral hearing, a Company would be prohibited from introducing any legal argument not raised by the Company with specificity in the Written Submission. The Exchange also proposes to amend Nasdaq Rule 5815(a)(6) to provide that during an oral hearing, a Company would be prohibited from introducing any material information that was not raised by the Company with specificity in the Written Submission or Written Update, unless such information was solicited by the Hearings Panel or the Company shows either that the material information did not exist at the time the Company was permitted to submit a Written Update²² or that exceptional or unusual circumstances exist that warrant consideration of the newly raised material information. The proposal provides that exceptional or unusual circumstances would include, but are not necessarily limited to, material information that was not earlier discoverable by the Company

²¹ See proposed Nasdaq Rule 5815(a)(5). The Hearings Panel will determine that a company has raised a legal argument with specificity if the legal argument includes sufficient detail to be useful in the Hearings Panel’s review of the record before the hearing. See Notice, supra note 3, 85 FR at 43901.

²² The Exchange provides the following example. Where a key component of a Company’s compliance plan is a merger, and the Company obtains a fully executed version of the merger agreement the day before the hearing, the executed merger agreement would constitute information that did not exist at the time the Company was permitted to submit a Written Update. However, the fact that the Company was pursuing a merger, the potential merger parties, and the material terms of the contemplated merger should have been previously disclosed by the Company, as some or all of such information likely existed at the time the Company was permitted to submit a Written Update. See Notice, supra note 3, 85 FR at 43902.

despite all reasonable measures having been taken.²³ If the Hearings Panel determines either that the Company has shown that the material information did not exist at the time the Company was permitted to submit a Written Update or that the Company has shown exceptional or unusual circumstances exist that warrant consideration of the newly raised material information, then the Company would be permitted to introduce such information at the oral hearing.²⁴ Nasdaq Staff would have up to three business days, or such shorter time as the Hearings Panel requests, following the oral hearing to respond in writing to the Company's newly raised material information, and the Company would be permitted to respond to the Staff's submission only upon request by the Hearings Panel.²⁵

The Exchange stated that Companies that have requested a written or oral hearing before a Hearings Panel to review a Staff Delisting Determination, Public Reprimand Letter, or written denial of a listing application prior to the date of Commission approval of the proposed rule change will be subject to the rule text in Nasdaq Rule 5815(a)(5) and (6) that was effective prior to the date of such Commission approval.²⁶

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.²⁷ In particular, the Commission finds that the proposed rule change is

²³ See proposed Nasdaq Rule 5815(a)(6).

²⁴ See id.

²⁵ See id.

²⁶ See Notice, supra note 3, 85 FR at 43902, n.11.

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

consistent with Section 6(b)(5) of the Act,²⁸ 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. In addition, the Commission finds that the proposed rule change is consistent with Section 6(b)(7) of the Act,²⁹ which requires, among other things, that the rules of a national securities exchange provide a fair procedure for the prohibition or limitation by the exchange of any person with respect to access to services offered by the exchange.

Nasdaq proposes to amend the procedures that govern a written or oral hearing before a Hearings Panel to review a Staff Delisting Determination, Public Reprimand Letter, or written denial of a listing application. Specifically, where a company has requested either a written or an oral hearing, Nasdaq proposes to require the company to provide a Written Submission in advance of the hearing, in which the company must state in writing with specificity the grounds upon which it is seeking review and all legal arguments on which it intends to rely. In addition, Nasdaq proposes to clarify that Nasdaq Staff may respond in writing to a company's Written Submission. Nasdaq also proposes that a company may supplement its Written Submission by providing a Written Update to the Hearings Department no later than two business days in advance of the hearing, thereby briefing the Hearings Panel on any new material information that has transpired since its Written Submission. Nasdaq proposes to allow a company only to introduce legal arguments in the Written Submission, and to not allow a company to introduce

²⁸ 15 U.S.C. 78f(b)(5).

²⁹ 15 U.S.C. 78f(b)(7).

any legal arguments in the Written Update or during the oral hearing that were not raised with specificity in the Written Submission. Finally, Nasdaq proposes to set forth limited circumstances in which the Hearings Panel will permit a company to introduce material information at the oral hearing.³⁰ The Exchange stated that the proposed amendments will enhance the hearings process by providing the Hearings Panel with the most developed record in as timely a manner as possible.³¹

As the Commission has previously noted, the development and enforcement of meaningful listing standards³² 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 companies that have or will have sufficient public float, investor base, and trading interest likely to generate depth and liquidity sufficient to promote fair and orderly markets.³³ Meaningful listing standards also are important given investor expectations regarding

³⁰ See supra notes 22–24 and accompanying text.

³¹ See Notice, supra note 3, 85 FR at 43902.

³² The Commission notes that this is referring to both initial and continued listing standards.

³³ 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. 82627 (Feb. 2, 2018), 3 FR 5650, 5653, n.53 (Feb. 8, 2018) (SR-NYSE-2017-30); 81856 (Oct. 11, 2017), 82 FR 48296, 48298 (Oct. 17, 2017) (SR-NYSE-2017-31); 81079 (July 5, 2017), 82 FR 32022, 32023 (July 11, 2017) (SR-NYSE-2017-11). The Commission has stated that 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 Nos. 82627 (Feb. 2, 2018), 3 FR 5650, 5653, n.53 (Feb. 8, 2018) (SR-NYSE-2017-30); 87648 (Dec. 3, 2019), 84 FR 67308, 67314, n.42 (Dec. 9, 2019) (SR-NASDAQ-2019-059); 88716 (Apr. 21, 2020), 85 FR 23393, 23395, n.22 (Apr. 27, 2020) (SR-NASDAQ-2020-001).

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.³⁴ Therefore it is important for exchanges to prevent companies that are deficient in their listing standards or that do not meet initial listing standards from remaining or becoming listed on an exchange.

The Commission believes that the proposed revisions to the hearings process are appropriate and consistent with Section 6(b)(5) of the Act in that the proposed rules are designed to protect investors and the public interest. The Commission further believes the proposed rule change is consistent with Section 6(b)(7) of the Act in that it provides a fair procedure for the prohibition or limitation by the Exchange of any person with respect to access to services offered. The Commission believes that the proposed procedures will require companies that have received a Staff Delisting Determination, Public Reprimand Letter, or have been denied initial listing to provide all relevant legal arguments and material information to the Hearings Panel in a timely manner within reasonable deadlines, so that the Hearings Panel may make an informed decision regarding the company's initial or continued listing on the Exchange. The proposed procedures should prevent companies that have received a Staff Delisting Determination, Public Reprimand Letter, or have been denied initial listing from withholding material information or legal arguments in an effort to extend the time before the Hearings Panel makes a decision or otherwise unduly lengthen the hearings process. The Commission notes that this is particularly important given that under Nasdaq rules a timely request for a hearing will

³⁴ See, e.g., Securities Exchange Act Release Nos. 65708 (Nov. 8, 2011), 76 FR 70799 (Nov. 15, 2011) (SR-NASDAQ-2011-073) (order approving a proposal to adopt additional listing requirements for companies applying to list after consummation of a "reverse merger" with a shell company), and 57785 (May 6, 2008), 73 FR 27597 (May 13, 2008) (SR-NYSE-2018-17) (order approving a proposal to adopt new initial and continued listing standards to list securities of special purpose acquisition companies).

ordinarily stay the suspension and delisting action until the issuance of a written panel decision. Therefore, as discussed in more detail below, most companies will have their stock continue to trade during the appeal of a Staff Delisting Determination or Public Reprimand Letter.³⁵ The Commission believes that the proposed procedures are reasonable and appropriate to allow companies to present all relevant legal arguments and material information before the Hearings Panel, and for Nasdaq Staff to have a reasonable opportunity to respond in advance of the hearing. The Commission further believes that the proposed procedures are also reasonable to allow the Hearings Panel time and opportunity to review all relevant material information and legal arguments and should strengthen the integrity, efficiency, and transparency of the hearings process while also providing for a fair procedure for companies to present their case before the Hearings Panel.³⁶

The Commission believes the proposed amendments governing the submission of a Written Submission and Written Update are appropriate and consistent with the Act. The Exchange has stated that Nasdaq Staff has observed instances where, in advance of a hearing, companies provide little information about their plan to achieve or regain compliance or regarding their appeal of a Public Reprimand Letter or denial of an initial listing application, and instead present such information for the first time during the hearing.³⁷ Under current rules, as noted above, companies are not required to make a written submission upon an appeal to the Hearings Panel, but rather companies have the option to submit a written submission. The new procedures will require all companies to submit a Written Submission upon an appeal to the

³⁵ See infra notes 65–67 and accompanying text.

³⁶ See below at notes 43–60 and accompanying text for discussion of comments received.

³⁷ See Notice, supra note 3, 85 FR at 43902.

Hearings Panel. The Exchange has stated in support of the new requirements that when companies belatedly provide information to the Hearings Panel, it does not provide the Hearings Panel with adequate time to consider the information or to adequately prepare or formulate questions in advance of the hearing.³⁸ The Exchange stated that in such circumstances, the Hearings Panel may need more time or information to fully consider the matter following the hearing, and that a company that withholds information is effectively rewarded by extending the time it remains listed pending a Hearings Panel decision.³⁹ The Exchange also stated that the Written Update will provide the company an additional opportunity to update any new material information since the submission of its Written Submission as well as provide an opportunity to reply to any Nasdaq written Staff response.⁴⁰ The Commission believes that requiring a company to provide a Written Submission early on in the hearings process and allowing a company to supplement this information up to two business days prior to the hearing should enable the Hearings Panel to prepare for the hearing with the most up-to-date information regarding the company and its ability to achieve or maintain compliance with listing standards when appealing a Staff Delisting Determination, Public Reprimand Letter, or a denial of initial listing.

³⁸ See id.

³⁹ See Notice, supra note 3, 85 FR at 43903. Pursuant to Nasdaq Rule 5815(a)(1)(B), a timely request for a hearing generally stays the suspension and delisting action pending the issuance of a written panel decision.

⁴⁰ The Commission notes that the information the company may provide in the Written Update may not include any legal argument not raised by the company with specificity in the Written Submission but is otherwise not limited. The proposed language will specifically state that the Nasdaq Staff may respond in writing to the Written Submission. Nasdaq stated this is a clarification of current procedures. See Notice, supra note 3, 85 FR at 43901.

In addition, the Commission believes that the proposed restrictions on a company's ability to present material information during the oral hearing are appropriate and consistent with the Act. As discussed above, such restrictions should improve the Hearings Panel's access to relevant information in a timely manner and allow the Hearings Panel to prepare for the hearings process in order to make an informed decision. Under the proposal, a company would be permitted to introduce new material information that is solicited by the Hearings Panel to ensure the Hearings Panel is not unnecessarily restricted and that the company can appropriately respond to any such inquiry by the Hearings Panel at the oral hearing. Further, a company would be permitted to introduce new material information if the company shows that such information did not exist at the time the company was permitted to submit a Written Update or that exceptional or unusual circumstances exist that warrant consideration of the new material information. Such exceptions are fair to allow a company to raise new information if the Hearings Panel finds that the company has shown that it was truly unable to present such information prior to the oral hearing or exceptional circumstances existed. The Commission also has previously found a similar provision of a national securities exchange that limited a company's ability to introduce new material information that was not identified in its initial request for review of a delisting as consistent with Sections 6(b)(5) and 6(b)(7) of the Act, stating, among other things, that the new procedures may contribute to a more efficient appeals process and reduce unnecessary delays.⁴¹

⁴¹ See Securities Exchange Act Release No. 47161 (Jan. 10, 2003), 68 FR 2603, 2604 (Jan. 17, 2003) (SR-NYSE-2001-46) (approving proposed rule change to modify, among other things, the exchange's procedures for issuer appeals of delisting determinations) ("NYSE 2003 Order").

Further, the Commission believes that the proposed requirement for a company to present all legal arguments on which it intends to rely in its Written Submission, and the related restrictions on presenting any legal arguments later in the Written Update or oral hearings process, are also appropriate and consistent with the Act. The Exchange has stated that where companies belatedly provide legal arguments to the Hearings Panel, Nasdaq Staff may be unable to fully develop legal arguments or advise the Hearings Panel effectively regarding a company's request for relief. As a result, the Hearings Panel may not have all the relevant information before it and may not be able to properly adjudicate the issue during the hearing.⁴² Requiring a company to raise legal arguments in the Written Submission should allow Nasdaq Staff the opportunity to provide a thorough response to the legal argument and provide the Hearings Panel the benefit of Nasdaq Staff's views and perspective, thus improving the integrity and transparency of the hearings process while at the same time providing a fair procedure for the company to set forth its legal arguments in the hearings process.

One commenter opposed Nasdaq's proposed revisions to the hearings process, stating its belief that the proposal is highly prejudicial to issuers and will impede the Hearings Panel's ability to make fully informed listing decisions.⁴³ This commenter stated that issuers are often still in the process of assembling their legal team for the hearing in the days leading up to the deadline for making the prehearing submission, which "limits the issuer's ability to provide any and all comprehensive legal arguments or other detailed information regarding its compliance plan."⁴⁴ The commenter stated that requiring "the issuer to submit the totality of its compliance

⁴² See Notice, supra note 3, 85 FR at 43903.

⁴³ See Letter from David A. Donohoe, Jr., Donohoe Advisory Associates LLC, to Secretary, Commission, dated August 10, 2020 ("Donohoe Letter"), at 3.

⁴⁴ Id. at 2.

plan and any legal arguments in connection therewith several weeks ahead of the hearing would place the issuer at a significant disadvantage before the Panel” and that the proposal “fails to take into consideration the fact that companies that are subject to delisting . . . are typically dealing with a very fluid set of circumstances in their efforts to regain compliance with the applicable listing criteria; circumstances that are rapidly evolving, sometimes right up to the time of the hearing.”⁴⁵ The commenter stated that the Nasdaq’s current procedures, which require the hearing to be held within 45 days of the hearing request and do not require the Hearings Panel to issue its decision within any particular time period following the hearing,⁴⁶ allow for sufficient time for the Hearings Panel to seek a response from Nasdaq Staff on any new information provided at the hearing.⁴⁷ The commenter stated that it is “not uncommon for the Panel to afford the Staff an opportunity to make a responsive submission post-hearing and then to give the company the opportunity to respond to such post-hearing submission” and that “[s]uch an exchange can easily be completed within two weeks, allowing the Panel to make a decision within 30 days.”⁴⁸ The commenter argued that the current hearings process has served Nasdaq, investors, and issuers well for many years and provides the Hearings Panel with the necessary tools to ensure that Nasdaq Staff has an adequate opportunity to respond to an issuer’s compliance plan and any legal arguments in connection therewith without arbitrarily limiting the issuer’s ability to present information it deems relevant to the Hearings Panel’s decision.⁴⁹

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Id.

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The commenter noted, however, that Nasdaq advises all issuers in advance of the hearing that it is their intention to issue the panel decision within 30 calendar days of the hearing date. See id. at 3.

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See id.

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Id.

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See id.

In response to this commenter, Nasdaq stated that, rather than impeding the Hearings Panel’s ability to make fully informed listing decisions, the proposal will “increase the information available to the Hearings Panel in advance of a hearing, which will allow the Panelists adequate time to review the information and ask questions of the company during the hearing and, thereby, make a fully informed decision.”⁵⁰ Nasdaq stated that the proposal does not in any way limit the nature and amount of information, whether legal arguments or factual statements, that a company may submit to the Hearings Panel for consideration, but rather requires a company to submit the relevant legal arguments and material information by a reasonable deadline and prevents the belated submission of such information.⁵¹ In addition, Nasdaq stated that the proposed rules will provide a company with ample opportunity to present the material information necessary to allow for a full and complete consideration of the issues by the Hearings Panel.⁵²

Nasdaq further stated that, as recognized by the opposing commenter,⁵³ most hearings relate to deficiencies where the company receives a cure period or is allowed to submit to Nasdaq Staff a plan to regain compliance before receiving a delisting letter.⁵⁴ Therefore, the

⁵⁰ Letter from Arnold Golub, Vice President and Deputy General Counsel, Nasdaq, to Secretary, Commission, dated September 1, 2020 (“Response Letter”), at 1.

⁵¹ See id. at 2.

⁵² See id. at 3. Nasdaq stated, for example, that the proposal allows a company appealing a staff determination to submit additional information two business days prior to the hearing. Nasdaq also stated that the proposal permits the company an opportunity to present new material information under certain conditions at the oral hearing as discussed above. See Response Letter, at 2. See also supra notes 21–24 and accompanying text.

⁵³ See Donohoe Letter, at 2 (stating that “market-based deficiencies (e.g., bid price, market value of listed securities, and market value of publicly held shares) and stockholders’ equity deficiencies . . . represent the lion’s share of compliance issues resulting in hearings.”).

⁵⁴ Nasdaq stated that from January 1, 2020 through August 31, 2020, 28 of the 45 hearings held, or 62%, related only to bid price, market value of listed securities, market value of

company should be on notice long before the hearings process of both the nature of the deficiency and the timing of when the company will receive a delisting, and the company should have adequate time before receiving a delisting letter to assemble its legal team, consider its legal arguments, and develop its plan to regain compliance.⁵⁵ Nasdaq stated that, as noted by the commenter,⁵⁶ in most cases, the Hearings Panel does not render a decision regarding the legal merits of Nasdaq Staff's determination in the matter. Given that most matters do not require the Hearings Panel to consider legal arguments put forth by the company, Nasdaq stated that it is more important that such arguments be raised early in the process to allow Nasdaq Staff adequate time to consider the claims raised and respond in advance of the hearing.⁵⁷ Nasdaq

publicly held shares, and stockholders' equity deficiencies. See Response Letter, at 2, n.4. Deficiencies relating to all such listing standards allow a company to submit a plan of compliance. See Nasdaq Rule 5810(c)(2) and (c)(3) (setting forth deficiencies for which a company may submit a plan of compliance). Generally, deficiencies relating to bid price, market value of listed securities, and market value of publicly held shares allow for a cure period of 180 days. See Nasdaq Rule 5810(c)(3). In addition, under certain circumstances, companies that fail to meet the continued listing requirement for minimum bid price may be allowed a cure period of 360 days. See Nasdaq Rule 5810(c)(3)(A).

⁵⁵ See Response Letter, at 2–3. Pursuant to Nasdaq Rules, there are only a limited set of deficiencies for which Nasdaq's initial notice to the company is a delisting determination and the company's securities are immediately subject to suspension and delisting, including where a company fails to timely solicit proxies and where, under its discretionary authority in the Nasdaq Rule 5100 Series, Nasdaq Staff has determined that a company's continued listing raises a public interest concern. See Nasdaq Rule 5810(c)(1); Response Letter, at 2, n.6. Moreover, Nasdaq stated that it would be concerned if a company ignored its prior communications with Staff about the deficiency and only began to act upon receiving the delisting letter, as suggested by the commenter. See Response Letter, at 2–3.

⁵⁶ See Donohoe Letter, at 2 (stating that “in the majority of cases, the Panel is not rendering a determination as to whether the Staff erred in its determination to delist an issuer, but rather is seeking to determine whether, at the time of the Panel's decision, the issuer has adequately addressed the Staff's concerns and presented a definitive plan to regain compliance within a reasonable period of time and, certainly within the discretionary period available to the Panel under the Nasdaq Listing Rules.”).

⁵⁷ See Response Letter, at 3.

stated that requiring the Hearings Panel to solicit subsequent submissions, as proposed by the commenter,⁵⁸ would only serve to delay the adjudication of the matter, potentially to the detriment of prospective future investors.⁵⁹ One commenter also expressed unqualified support for the Nasdaq proposal and Nasdaq's efforts to improve the effectiveness of Hearings Panel proceedings.⁶⁰

As discussed above, the Commission believes, as noted by Nasdaq, that the proposed procedures will require companies to submit relevant legal arguments and material information by a reasonable deadline and prevent the belated submission of such information.⁶¹ The proposal permits the addition of any new information up to two business days prior to the hearing to be submitted in the Written Update, except for any legal argument not raised by the Company with specificity in the Written Submission. Thus, the company should be able to provide any new information that has evolved since the submission of the Written Submission, including updates on its compliance plan, in its Written Update. Further, the Hearings Panel can allow the admission of additional material information at an oral hearing if certain conditions are met.⁶²

⁵⁸ See supra note 48 and accompanying text.

⁵⁹ See Response Letter, at 3.

⁶⁰ See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, to Secretary, Commission, dated August 4, 2020 ("CII Letter").

⁶¹ The Commission notes that the one commenter agreed with Nasdaq that "when companies belatedly provide information to the Hearings Panel . . . it does not provide the Hearings Panel with adequate time to prepare for and consider the information in advance of the hearing" and that "where companies belatedly provide legal arguments to the Hearings Panel, Nasdaq staff is unable to adequately brief the Hearings Panel concerning its response to the legal argument and, as a result, the Hearings Panel does not have adequate time to prepare for and consider the legal argument in advance of the hearing and thus cannot properly adjudicate the issue." See CII Letter.

⁶² Indeed, in its filing, Nasdaq stated that it has observed that companies primarily seek to introduce material information, such as a new equity offering or merger, as opposed to legal arguments at the hearing. See Notice, supra note 3, 85 FR at 43902, n.9.

The Commission notes that the New York Stock Exchange (“NYSE”) provides for similar procedures regarding the submission of information where an issuer requests a review of a delisting determination by the Committee of the Board of Directors of the NYSE and the Commission found such procedures to be consistent with both Section 6(b)(5) and 6(b)(7) under the Exchange Act.⁶³ The Commission further notes that the requirement for all legal arguments upon which the company will rely to be presented in the company’s opening submission is not novel and is analogous to provisions in the Commission’s Rules of Practice and Federal Rules of Appellate Procedure, routinely enforced by the Commission and the federal courts of appeals.⁶⁴

⁶³ See Section 804.00 of the NYSE Listed Company Manual (“The Committee’s review and final decision will be based on oral argument (if any) and the written briefs and accompanying materials submitted by the parties. The company will not be permitted to argue grounds for reversing the staff’s decision that are not identified in its request for review, however, the company may ask the Committee for leave to adduce additional evidence or raise arguments not identified in its request for review, if it can demonstrate that the proposed additional evidence or new arguments are material to its request for review and that there was reasonable ground for not adducing such evidence or identifying such issues earlier. This section will not, however, (i) authorize a company to seek to file a reply brief in support of its request for review or (ii) be deemed to limit the staff’s response to a request for review to the issues raised in the request for review. Upon review of a properly supported request, the Committee may in its sole discretion permit new arguments or additional evidence to be raised before the Committee.”). See also supra note 41 and accompanying text.

⁶⁴ See 17 CFR 201.420(c) (stating, in reference to Commission review of a determination by a self-regulatory organization, that “[a]ny exception to a determination not supported in an opening brief . . . may, at the discretion of the Commission, be deemed to have been waived by the applicant”). See also 17 CFR 201.222(a) (providing that a hearing officer may require a party, in its prehearing submission, to include “[a]n outline or narrative summary of its case or defense” and “[t]he legal theories upon which it will rely”); Island Creek Coal Co. v. Wilkerson, 910 F.3d 254, 256 (6th Cir. 2018) (“Time, time, and time again, we have reminded litigants that we will treat an ‘argument’ as ‘forfeited when it was not raised in the opening brief.’ The obligation to identify the issues on appeal in the opening brief applies to arguments premised on the loftiest charter of government as well as the most down to earth ordinance.”); United States v. Van Smith, 530 F.3d 967, 973 (D.C. Cir. 2008) (“We require petitioners and appellants to raise all of their arguments in the opening brief, and have repeatedly held that an argument first made in a reply brief ordinarily comes too late for our consideration.”); Barna v. Bd. Of Sch. Dir. of the Panther Valley Sch. Dist., 877 F.3d 136, 145–46 (3d Cir. 2017) (“We have long

Finally, the Commission notes that when a company requests a Hearings Panel review, the suspension and delisting of the company's securities is generally stayed pending the issuance of the Hearing Panel's decision.⁶⁵ The Commission believes that where a company has received a delisting determination, it is important to have an efficient, fair, and effective process for reviewing such determination, given that the company's shares will likely continue to trade during the duration of the Hearings Panel's review.⁶⁶ If such company is not in compliance with listing standards and will not be able to regain compliance in accordance with Nasdaq rules, the continued trading of such securities could be misleading to investors. Allowing a company that will not be able to demonstrate compliance with the Exchange's listing standards to delay providing material information and legal arguments and thereby extend the delisting review process and thus the trading of the security on the Exchange during the pendency of the Hearings Panel's review would raise issues under the Exchange Act, including investor protection concerns.⁶⁷

recognized, consistent with Federal Rule of Appellate Procedure 28(a) . . . that an appellant's opening brief must set forth and address each argument the appellant wishes to pursue in an appeal." . . . and the court will not "reach arguments raised for the first time in a reply brief or at oral argument.").

⁶⁵ See Nasdaq Rule 5815(a)(1)(B). There are some exceptions to this rule for companies subject to late filing delinquencies, companies involved in a change of control as described in Nasdaq Rule 5110(a), or companies involved in a bankruptcy or liquidation as described in Nasdaq Rule 5110(b). See Nasdaq Rule 5815(a)(1)(B)(i) and (ii).

⁶⁶ See NYSE 2003 Order, *supra* note 41, 68 FR at 2604 (stating that ensuring appeals are considered in a timely manner and resolved promptly is particularly important because the NYSE may permit an issuer to continue to trade during the appeal process).

⁶⁷ See *In re Tassaway*, Securities Exchange Act Release No. 11291, 45 S.E.C. 706, 709, 1975 SEC LEXIS 2057, at *6 (Mar. 13, 1975) ("[P]rimary emphasis must be placed on the interests of prospective future investors . . . [who are] entitled to assume that the securities in [Nasdaq] meet [Nasdaq's] standards. Hence the presence in [Nasdaq] of non-complying securities could have a serious deceptive effect."). See also *In re Biorelease Corporation*, Securities Exchange Act Release No. 35575, 1995 SEC LEXIS 818, at *13 (Apr. 6, 1995) ("[T]hough exclusion from the system may hurt existing investors,

Based on the above, the Commission believes the proposed procedures provide companies with ample opportunity for a fair procedure and efficient process for reviewing appeals before the Hearings Panel. The Commission therefore believes that Nasdaq's proposal is consistent with Section 6(b)(7) of the Act in setting forth a fair procedure for the Hearings Panel's review of a Staff Delisting Determination, Public Reprimand Letter, or denial of a listing application. The Commission also believes that Nasdaq's proposal will further the purposes of Section 6(b)(5) of the Act by, among other things, protecting investors and the public interest by setting forth reasonable deadlines and a fair and efficient process for the Hearings Panel to review a delisting determination and make an informed determination regarding whether a company should remain listed on the Exchange. Where the Hearings Panel ultimately determines that the continued listing of a company on Nasdaq is not appropriate, the proposal would help to prevent such a company from unnecessarily delaying the review process and thereby extending the time period that the company's securities are traded on Nasdaq, while at the same time ensuring that companies have a fair procedure and reasonable process to provide relevant information to the Hearings Panel in a timely manner. The Commission believes the proposal furthers these goals consistent with Sections 6(b)(5) and 6(b)(7) of the Act.

primary emphasis must be placed on the interests of prospective future investors. Prospective investors are entitled to assume that the securities listed [on Nasdaq] meet the system's listing standards.”).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁶⁸ that the proposed rule change (SR-NASDAQ-2020-002), be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶⁹

J. Matthew DeLesDernier
Assistant Secretary

⁶⁸ 15 U.S.C. 78s(b)(2).

⁶⁹ 17 CFR 200.30-3(a)(12).