

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 23	SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 Form 19b-4		File No.* SR - 2013 - * 004	Amendment No. (req. for Amendments *)
Filing by NASDAQ Stock Market Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934				
Initial * <input checked="" type="checkbox"/>	Amendment * <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input type="checkbox"/>	Section 19(b)(3)(A) * <input checked="" type="checkbox"/>
			Section 19(b)(3)(B) * <input type="checkbox"/>	
			Rule	
Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>	<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)
			<input checked="" type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)
			<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)
Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010			Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934	
Section 806(e)(1) <input type="checkbox"/>		Section 806(e)(2) <input type="checkbox"/>	Section 3C(b)(2) <input type="checkbox"/>	
Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>			
<b>Description</b>				
Provide a brief description of the action (limit 250 characters, required when Initial is checked *).				
<input type="text" value="A proposed rule change to modify the fees applicable to companies seeking review of a delisting determination."/>				
<b>Contact Information</b>				
Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.				
First Name *	<input type="text" value="Amy"/>	Last Name *	<input type="text" value="Horton"/>	
Title *	<input type="text" value="Associate General Counsel"/>			
E-mail *	<input type="text" value="amy.horton@nasdaqomx.com"/>			
Telephone *	<input type="text" value="(301) 978-8077"/>	Fax	<input type="text" value="(301) 978-8472"/>	
<b>Signature</b>				
Pursuant to the requirements of the Securities Exchange Act of 1934,				
has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.				
(Title *)				
Date	<input type="text" value="01/02/2013"/>	<input type="text" value="Executive Vice President and General Counsel"/>		
By	<input type="text" value="Edward S. Knight"/>	<input type="text" value="Edward S Knight,"/>		
(Name *)				
NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.				

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFF website.

**Form 19b-4 Information \***

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change \***

Add Remove View

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies**

Add Remove View

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**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

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Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

Add Remove View

Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

Add Remove View

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

Add Remove View

If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of Proposed Rule Change

Pursuant to the provisions of Section 19(b)(1) under the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> The NASDAQ Stock Market LLC (“NASDAQ” or “the Exchange”) is filing with the Securities and Exchange Commission (“Commission”) a proposed rule change to modify the fees applicable to companies seeking review of a delisting determination.

The text of the proposed rule change is below. Proposed new language is underlined; proposed deletions are in brackets.<sup>3</sup>

\* \* \* \* \*

**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

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

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

<sup>3</sup> Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at <http://nasdaq.cchwallstreet.com>.

(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.

\* \* \* \* \*

(b) Not applicable.

(c) Not applicable.

#### **2. Procedures of the Self-Regulatory Organization**

The proposed rule change was approved by senior management of NASDAQ pursuant to authority delegated by the Board of Directors of NASDAQ on July 10, 2012. NASDAQ staff will advise the Board of Directors of NASDAQ of any action taken pursuant to delegated authority. No other action by NASDAQ is necessary for the filing of the rule change. NASDAQ will implement the proposed rule by imposing the new fee for a hearing on companies that receive a Staff Delisting Determination on or after January 2, 2013 and request a hearing. NASDAQ will implement the new fee for appeals

on companies that receive a Panel Decision on or after January 2, 2013 and request an appeal.

Questions regarding this rule filing may be directed to Amy Horton, Associate General Counsel, NASDAQ, at (301) 978-8077 or Arnold Golub, Vice President, NASDAQ, at (301) 978-8475.

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

a. 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>4</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.

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<sup>4</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>5</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>6</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

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<sup>5</sup> See <https://listingcenter.nasdaqomx.com/assets/DelDefOpenReport.pdf> and <https://listingcenter.nasdaqomx.com/assets/IssuesPendingDelisting.pdf>.

<sup>6</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).

occasions engaged an outside law firm or an investigative firm to assist in connection with matters under review.

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>7</sup>

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<sup>7</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.

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 expect or intend that the fees will exceed the costs.<sup>8</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>9</sup> NYSE rules provide that a listed company must pay a \$20,000 fee in connection with a delisting appeal.<sup>10</sup>

b. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>11</sup> in general and with Sections 6(b)(4) and (5) of the Act,<sup>12</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees, and

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<sup>8</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>9</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>10</sup> Section 804.00 of the NYSE Listed Company Manual.

<sup>11</sup> 15 U.S.C. 78f.

<sup>12</sup> 15 U.S.C. 78f(b)(4) and (5).



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 appeal since 2001,<sup>13</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>14</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.

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<sup>13</sup> Securities Exchange Act Release No. 44374, supra.

<sup>14</sup> 15 U.S.C. 78f(b)(5).

NASDAQ also believes that the proposed changes are consistent with Section 6(b)(7) of the Act,<sup>15</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 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>16</sup>

4. 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

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

<sup>16</sup> See footnotes 9 and 10, supra, and accompanying text.

proposed rule change, NASDAQ does not believe that the proposed rule change will result in any burden on competition for listings.

5. 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.

6. Extension of Time Period for Commission Action

NASDAQ does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>17</sup> NASDAQ has designated this proposal as establishing or changing a due, fee, or other charge imposed by the self-regulatory 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.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

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<sup>17</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advanced Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

1. Completed notice of proposed rule change for publication in the Federal Register.

**EXHIBIT 1**

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

January \_\_ 2013

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Modify Fees For Review of Delisting Determinations

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup>, and Rule 19b-4<sup>2</sup> thereunder, notice is hereby given that on January 2, 2013. The NASDAQ Stock Market LLC ("NASDAQ" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "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.

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

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

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

\* \* \* \* \*

### **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.

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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.

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>

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

<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).



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.

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 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>

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<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.

<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.

## 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 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

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

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

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

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

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 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

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

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

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 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:

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

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 Web site (<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 the 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

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