

*It is therefore ordered* pursuant to Section 19(b)(2) of the Act<sup>15</sup> that the proposed rule change (SR-ICC-2021-022), be, and hereby is, approved.<sup>16</sup>

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93789; File No. SR-NASDAQ-2021-099]

### Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change To Amend Nasdaq Rule 5815 Regarding the Use of a Panel Monitor Following a Compliance Determination by a Nasdaq Listings Qualification Hearings Panel

December 15, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that, on December 10, 2021, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. 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 Exchange proposes to amend Rule 5815 regarding the use of a Panel Monitor following a compliance determination by a Nasdaq Listings Qualification Hearings Panel.

The text of the proposed rule change is available on the Exchange’s website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

<sup>15</sup> 15 U.S.C. 78s(b)(2).

<sup>16</sup> In approving the proposed rule change, the Commission considered the proposal’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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

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

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

#### 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 and discussed any comments it received on 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

Nasdaq administers a series of rules that govern the initial and continued listing qualifications required of companies listed on the Exchange.<sup>3</sup> In the event that a company fails to maintain compliance with the Listing Rules, Nasdaq Listings Qualifications Staff (“Staff”) will issue a notification informing the company of the deficiency. Where allowed by Nasdaq’s rules, Staff’s notification may provide for a cure or compliance period or allow the company to submit a plan of compliance for Staff to review.

However, where a company has previously been deficient with a listing requirement and regained compliance pursuant to an exception (“exception”)<sup>4</sup> from a continued listing standard granted by an industry Hearings Panel (“Hearings Panel”) pursuant to Rule 5815(c)(1)(A), under certain circumstances, Nasdaq rules do not allow that company a cure or compliance period or the opportunity to submit a plan to regain compliance in the event it incurs another deficiency within one year of regaining compliance with a previous deficiency. Instead, Exchange Rules 5815(d)(4)(A) or (B) apply. Both rules set out a process by which Staff will issue a Delisting

<sup>3</sup> See Nasdaq Rules 5300, 5400, and 5500 Series, outlining requirements for companies seeking to conduct an initial listing on Nasdaq Global Select Market, Nasdaq Global Market and Nasdaq Capital Market, respectively, as well as requirements for continued listing once an initial listing has been completed.

<sup>4</sup> See Rule 5815(c)(1): When the Hearings Panel review is of a deficiency related to continued listing standards, the Hearings Panel may, where it deems appropriate: (A) Grant an exception to the continued listing standards for a period not to exceed 180 days from the date of the Staff Delisting Determination with respect to the deficiency for which the exception is granted.

Determination<sup>5</sup> for a company that fails to maintain compliance with one or more listing requirements within one year of having regained compliance with one or more listing requirements pursuant to an exception granted by a Hearings Panel. Once a Delisting Determination letter has been issued to a company pursuant to Rules 5815(d)(4)(A) or 5815(d)(4)(B), the company may then request a hearing before a Hearings Panel to argue in favor of maintaining its Exchange listing. Unless specifically outlined in proposed Rule 5815(d)(4)(C), the process for conducting a review of a Staff Delisting Determination will continue to be governed by Rule 5815.

Rule 5815(d)(4)(A), entitled “Hearings Panel Monitor,” provides a Hearings Panel with discretion to monitor a company for a period of up to one year after the date a company regains compliance with a listing standard if it concludes that there is a likelihood that a company will fail to maintain compliance with one or more listing standards during that period (including requirements with which the company was not previously deficient). During this one-year monitoring period, Staff will monitor the company, to confirm compliance with all listing requirements. While Staff monitors all listed companies for compliance with the Exchange’s listing standards, if Staff identifies a deficiency with any listing requirement for companies that are being monitored under Rule 5815(d)(4)(A), staff may not provide the company with a cure or compliance period, nor the opportunity to submit a plan to regain compliance with the deficiency. Instead, Staff will issue a Delisting Determination for these companies.

Rule 5815(d)(4)(B) provides that a company that received an exception from a Hearings Panel with respect to the stockholder’s equity requirement, periodic filing requirement or a bid price requirement where the company was ineligible for a bid price compliance period under Listing Rule 5810(c)(3)(A)(iii) or (iv), and subsequently regained compliance with the listing requirement that was the subject of the exception, will not be allowed a cure or compliance period or the opportunity to submit a plan of compliance for Staff to review as allowed under Listing Rule 5810(c)(2) if, within one year of regaining compliance, the company subsequently

<sup>5</sup> See Rule 5805(h): “Staff Delisting Determination” or “Delisting Determination” is a written determination by the Listing Qualifications Department to delist a listed Company’s securities for failure to meet a continued listing standard.

becomes deficient in the same requirement that was the subject of the exception. While limiting the grounds for an immediate Delisting Determination to a recurrence of the initial deficiency in one or more of the three enumerated areas in the rule that gave rise to the previous hearing before the Hearings Panel (*i.e.*, the stockholder's equity requirement, periodic filing requirement or a bid price requirement where the company was ineligible for a bid price compliance period under Listing Rule 5810(c)(3)(A)(iii) or (iv)), Rule 5815(d)(4)(B) also requires Staff to issue a Delisting Determination to the company without providing an opportunity for a cure or compliance period or the opportunity to submit a plan of compliance for Staff to review. While entitled "No Hearings Panel Monitor," the rule amounts to what is in effect a mandatory Hearings Panel Monitor.

The Exchange proposes to amend Rule 5815(d)(4) to clarify the instances under which a Hearings Panel may impose a Panel Monitor and when the implementation of a Panel Monitor is mandatory. In particular, the Exchange proposes to modify, among other changes, the headings to Rules 5815(d)(4)(A) and (B) to "Discretionary" and "Mandatory," respectively, to accurately describe the scope of the Panel's authority to implement the Panel Monitor.<sup>6</sup> The Exchange also proposes adding a reference to Rule 5810(c)(3) to clarify that Listings Qualifications Staff will not be permitted to provide a company under a Hearings Panel Monitor with a cure or compliance period after it has received a Delisting Determination. While the original language in both 5815(d)(4)(A) and (B) included language regarding Staff's inability to afford a company under a Hearings Panel Monitor a cure or compliance period, the current rules do not specifically include a reference to Rule 5810(c)(3) itself. The addition of a specific reference to Rule 5810(c)(3) will remove any potential confusion regarding this point.

Rules 5815(d)(4)(A) and (B) each describe the specific procedures for use of a Panel Monitor. Rule 5815(d)(4)(A) states that in the event a company under a Panel Monitor fails to maintain compliance with a listing requirement, the Hearings Department will schedule a new hearing, with the original Hearings Panel or a new panel if the original panel is unavailable. The rule

text also notes that the hearing may be oral or written, at the company's election. The text finally notes that the Hearings Panel will consider the company's compliance history when rendering a decision. The Exchange proposes to amend Rule 5815(d)(4)(A) to remove each of these provisions and add them in proposed Rule 5815(d)(4)(C) which will apply to both 5815(d)(4)(A) and (B).

Under the proposed language, in the event a company under a Panel Monitor fails to maintain compliance with any listing standard, Staff will issue a Delisting Determination. The company must then determine if it wishes to seek an appeal from this determination. The proposed rule change will correct the erroneous inclusion of language in the rule requiring the Hearings Department to promptly schedule a hearing without first receiving a request for appeal from the company.<sup>7</sup> The Exchange proposes removing the language regarding whether the hearing will be oral or written and the language noting that the Hearings Panel may consider the company's compliance history when rendering a decision in order to add that language to proposed Rule 5815(d)(4)(C), a new sub-paragraph that will outline procedures applicable to both instances in which a Panel Monitor has been employed. The Exchange also proposes adding a reference to Rule 5810(c)(3) to remove any confusion that may be created by the current Rule 5815(d)(4)(A) and (B) which both reference the Listings Qualifications Department's inability to grant additional time for the Company to regain compliance despite the specified cure or compliance period allowed for under Rule 5810(c)(3).

The Exchange proposes amending Rule 5815(d)(4)(B) to change the heading from "No Hearings Panel Monitor" to "Mandatory Hearings Panel Monitor." Despite the fact that the title is "No Hearings Panel Monitor", the rule itself actually outlines a process that calls for the mandatory use of a Hearings Panel Monitor. The proposed new title will remove any confusion brought about by this language. The proposed rule changes also include adding language to the body of the rule specifically calling for the Hearings Panel to impose a Hearings Panel

Monitor for a period of one year from the date the company regained compliance with the stockholders' equity, periodic filing or certain bid price listing standards. The Exchange also proposes adding language that will align the language in both Rules 5815(d)(4)(A) and (B) regarding the inability of Staff to grant the company a cure or compliance period or submit a plan to regain compliance. Again, the Exchange proposes adding a specific reference to Rule 5810(c)(3) to clarify that Listings Qualifications Staff will not have the ability to provide a Company under a Hearings Panel Monitor subject to a Delisting Determination additional time to regain compliance with respect to any deficiency. While the current rule prohibits such an extension of time, the Exchange thought it prudent to specifically reference Rule 5810(c)(3) to avoid any possible confusion.

The Exchange also proposes removing language currently found in Rules 5815(d)(4)(A) and (B) which outlines the process that will apply to either situation in which a Panel Monitor has been implemented and add this language in Proposed Rule 5815(d)(4)(C).<sup>8</sup> Specifically, the proposed language will outline how a company may seek an appeal of a Staff Delisting Determination, that the Hearings Department will schedule a hearing with the original Hearings Panel or a new Hearings Panel if the original Hearings Panel is unavailable, that the hearing may be written or oral, and that the Hearings Panel will consider the company's compliance history when rendering its decision. Unless specifically addressed in proposed Rule 5815(d)(4)(C), the procedures for requesting and preparing for a review by a Hearings Panel will continue to be governed by Rule 5815.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>9</sup> in general, and furthers the

<sup>8</sup> Rule 5815(c)(4)(B) in its present form includes language regarding a company's ability to request a review by a Hearings Panel and the fact that a company's compliance history will be considered by the Hearings Panel when it renders a decision. Rule 5815(c)(4)(B) does not contain language found in 5815(c)(4)(A) regarding Staff issuing a Delisting Determination and the Hearings Department promptly scheduling a hearing upon a company's failure to maintain compliance with a relevant listing standard during the one-year monitoring period, nor the use of the original or new Hearings Panel nor the ability of the hearing to be in written or oral form, at the company's election. Each of the provisions just outlined will apply to both 5815(c)(4)(A) and (B) through the implementation of proposed Rule 5815(c)(4)(C).

<sup>9</sup> 15 U.S.C. 78f(b).

<sup>6</sup> Staff is not aware of the reason for the original language in Rule 5815(d)(4)(B) stating that that rule would not call for a Panel Monitor.

<sup>7</sup> Historically the Hearings Department has not immediately scheduled a new hearing for a company under a Panel Monitor that has received a Delisting Determination from Staff. A new hearing would not be scheduled until the company in question had requested an appeal from the Delisting Determination. The proposed rule change will simply codify the existing practice of the Hearings Department.

objectives of Section 6(b)(5) of the Act,<sup>10</sup> in particular, in that it is designed 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, by removing any ambiguity as to when a Hearings Panel has the discretion to implement a Hearings Panel Monitor and when the use of a Hearings Panel Monitor is mandatory. The proposed rule will not change the operation of the Hearings Panel Monitor, but will provide clarification as to when a Hearings Panel may impose a Hearings Panel Monitor and when the use of a Hearings Panel Monitor is mandatory under Rule 5815(d)(4)(A) or 5815(d)(4)(B), which are designed to protect investors and the public interest. Under the proposed change to Rule 5815(d)(4)(A), the ability of a Panel to continue to monitor a company's continued compliance for up to one year after the compliance date will remain unchanged during which time the company will not be permitted to provide the Listing Qualifications Department with a plan of compliance with respect to any deficiency that arises during the monitor period, and the Listing Qualifications Department will not be permitted to grant additional time for the Company to regain compliance with respect to any deficiency. Similarly, under the proposed change to Rule 5815(d)(4)(B), companies that regain compliance with the shareholder equity, periodic filing or certain bid price requirements will continue to be prohibited from submitting a plan of compliance or be afforded a compliance period to cure the deficiency under Listing Rule 5810(c)(2) or (3) within one year of regaining compliance with the listing requirement in question. The rule change will simply clarify that Rule 5815(d)(4)(B) calls for the mandatory use of a Hearings Panel Monitor.

Nasdaq believes that the proposed rule change's clarification of the mandatory nature of the Hearings Panel Monitor when a company has regained compliance with the shareholders' equity, periodic filing or certain bid price rules will promote fair and orderly markets by eliminating confusion. Nasdaq also believes that the alignment of language used in Rules 5815(d)(4)(A)

and (B), including creating a new Rule 5815(d)(4)(C), will also eliminate confusion that could arise due to previous differences in the wording between the similar sections and will ensure that all companies that are subject to a Hearings Panel Monitor, whether required by rule or imposed at the discretion of the Hearings Panel, will be treated in the same manner.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not expected to have any impact on competition among listed companies nor on competition between exchanges. The proposed rule change will apply equally to all companies that are subject to Panel Monitors.

#### *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**

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) By order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2021-099 on the subject line.

#### *Paper Comments*

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

All submissions should refer to File Number SR-NASDAQ-2021-099. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2021-099, and should be submitted on or before January 11, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

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<sup>10</sup> 15 U.S.C. 78f(b)(5).

<sup>11</sup> 17 CFR 200.30-3(a)(12).