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SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-74279; File No. SR-NASDAQ-2014-102)

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of Proposed Rule Change to Require That a Company Publicly Disclose the Denial of a Listing Application

February 13, 2015

I. Introduction

On December 11, 2014, 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”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to require companies to disclose the denial of an initial listing application. The proposed rule change was published for comment in the Federal Register on December 30, 2014.<sup>3</sup> The Commission received no comments on the proposed rule change. This order approves the proposed rule change.

II. Description of Proposed Rule Change

In its filing, Nasdaq stated that it processes between 200 and 300 applications each year from companies seeking to list securities on Nasdaq. According to the Exchange, while most applicants meet the listing requirements (or are prepared to take action to meet those requirements before listing) in some cases a company does not meet the requirements and is not willing, or able, to comply. Nasdaq may also deny a listing application based on public interest

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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> See Securities Exchange Act Release No. 73912 (December 22, 2014), 79 FR 78540 (December 30, 2014) (“Notice”).

concerns even though the company meets all quantitative listing requirements.<sup>4</sup> In either case, Nasdaq will inform the company of the outcome, and the company may withdraw its application before the application is formally denied. If the company does not withdraw its application, then the Nasdaq Listing Qualifications Department will issue a written denial to the company.<sup>5</sup> A company denied listing on Nasdaq may appeal the denial to a Listing Qualifications Hearings Panel (“Hearings Panel”).<sup>6</sup>

According to Nasdaq, investors view a company’s decision to seek initial listing on the Exchange as a positive development, and companies often publicize their intention to apply for listing.<sup>7</sup> Nasdaq believes that the public is therefore interested in the outcome of an application for initial listing. Nasdaq proposes to require that a company that receives a written determination denying its application for listing must, within four business days, make a public announcement in a press release or other Regulation FD compliant manner about the receipt of the determination and the Nasdaq Rule(s) upon which the determination is based. The company must describe each specific basis and concern identified by Nasdaq in reaching the determination. If the public announcement is not made by the company within the time allotted or does not include all of the required information, Nasdaq will make a public announcement with the required information and, if the company appeals the determination as set forth in Nasdaq Rule 5815, the Hearings Panel will consider the company's failure to make the public announcement in considering whether to list the company. Nasdaq also proposes to clarify in Rule 5205 that a company may withdraw its application for initial listing at any time.

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<sup>4</sup> See Nasdaq Rule 5101 and 5101-1.

<sup>5</sup> See Nasdaq Rule 5810.

<sup>6</sup> See Nasdaq Rule 5815.

<sup>7</sup> See Notice, supra note 3.

### 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.<sup>8</sup> In particular, the Commission find that the proposed rule change is consistent with section 6(b)(5) of the Act,<sup>9</sup> which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission notes that full and fair disclosure of information by companies is of critical importance to financial markets and the investing public. According to the Exchange, investors view a company's decision to seek initial listing on the Exchange as a positive development, and companies often publicize their intention to apply for listing. The listing of a company on a national securities exchange such as Nasdaq provides benefits including, among others, potential for increased stock liquidity and capital raising benefits.<sup>10</sup> However, there appears to be no Exchange requirement for the company to publicize when its listing application has been denied and therefore that the company will not be receiving the benefits of an exchange listing.

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<sup>8</sup> In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>9</sup> 15 U.S.C. 78f(b)(5).

<sup>10</sup> Section 18 of the Securities Act of 1933 ("Securities Act") provides federal preemption of state blue sky laws for securities listed on certain national securities exchanges. 15 U.S.C. 77r. See also 17 CFR 230.146.

The Commission believes that the public, including potential future investors, would find a denial of a company's listing application, just as important as the decision to seek an exchange listing which, as noted by Nasdaq, is often publicized. The significance of a denial of listing is also underscored by the existence of both the right to appeal the denial on Nasdaq and the right to obtain Commission review of such appeals. Nasdaq rules provide, as noted above, for due process to appeal a denial of listing.<sup>11</sup> Denial of listings have also been subject to Commission review under section 19(d) of the Exchange Act.<sup>12</sup>

The Commission therefore believes that the proposed rule change will help provide transparency to future, as well as existing, investors about the status of a company's listing application. The Commission also believes that Nasdaq's proposal to require that such disclosure be made by press release, or other Regulation FD compliant manner, will permit companies to disseminate this important information to the public in a broad and inclusive manner and should help to ensure for broad public access to the denial of listing determination and the reasons for the denial.

As described above, the proposal will also clarify in Nasdaq's rules that a company may withdraw its application for initial listing at any time during the review process.<sup>13</sup> The decision to seek listing and submit a listing application is generally a voluntary decision by a company. Consistent with this, it is our understanding that companies seeking listing on Nasdaq are allowed to withdraw their voluntary application at any time during the process. The clarification

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<sup>11</sup> These appeal provisions have been adopted in accordance with section 6(b)(7) of the Act. 15 U.S.C. 78f(b)(7).

<sup>12</sup> Section 19(d) of the Act provides, among other things, for Commission review of any action self-regulatory organization that, among other things, prohibits or limits any person in respect to access to service offered by such organization. See U.S.C. 78s(d).

<sup>13</sup> See Notice, supra note 3.

in Nasdaq's proposal codifies this concept in Nasdaq's rules. The Commission also believes that for, the same reasons noted above, companies should consider any applicable disclosure requirements under the federal securities laws if a company withdraws its listing application with Nasdaq for any reason.

IV. Conclusion

IT IS THEREFORE ORDERED pursuant to section 19(b)(2) of the Act,<sup>14</sup> that the proposed rule change (SR-NASDAQ-2014-102) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

Jill M. Peterson,  
Assistant Secretary.

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<sup>14</sup> 15 U.S.C. 78s(b)(2).

<sup>15</sup> 17 CFR 200.30-3(a)(12).