



8011-01

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-87982; File No. SR-NASDAQ-2020-001]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Modify the Delisting Process for Securities with a Bid Price Below \$0.10 and for Securities that Have Had One or More Reverse Stock Splits with a Cumulative Ratio of 250 or More to One over the Prior Two Year Period

January 15, 2020

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 2, 2020, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. 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 modify the delisting process for securities with a bid price below \$0.10 and for securities that have had one or more reverse stock splits with a cumulative ratio of 250 shares or more to one over the prior two year period.

The text of the proposed rule change is available on the Exchange’s Website at <http://nasdaq.cchwallstreet.com>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 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 proposes to modify the delisting process for securities with a bid price below \$0.10 for ten consecutive trading days and for securities that have had one or more reverse stock splits with a cumulative ratio of 250 shares or more to one over the prior two year period (meaning that an investor would hold one share for every 250 shares or more owned at the start of the period).

Currently, Nasdaq rules require that primary equity securities, preferred stocks and secondary classes of common stock maintain a minimum \$1.00 bid price for continued listing.³ Under Listing Rule 5810(c)(3)(A), a security is considered deficient with this requirement if its bid price closes below \$1.00 for a period of 30 consecutive business days. A company with a bid price deficiency has 180 calendar days from notification of the deficiency to regain compliance. A company generally can regain compliance with the bid price requirement by maintaining a \$1.00 closing bid price for a minimum of ten consecutive business days during the compliance

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

period.⁴ Under Listing Rule 5810(c)(3)(A)(ii), a company that lists a security on the Nasdaq Capital Market, or transfers its listing to that market, may be eligible for a second 180 calendar day period to regain compliance, provided that on the last day of the first compliance period the company meets the market value of publicly held shares requirement for continued listing as well as all other applicable standards for initial listing on the Capital Market and notifies Nasdaq of its intent to cure the bid deficiency.

This process is designed to allow adequate time for a company facing temporary business issues, a temporary decrease in the market value of its securities, or temporary market conditions to come back into compliance with a bid price deficiency. Nasdaq has observed certain situations where, in Nasdaq's view, a company may be facing more serious issues and a compliance period of up to 360 days⁵ therefore may not be appropriate. Specifically, these situations involve: (i) securities with very low security prices (below \$0.10); and (ii) securities where the company has completed one or more reverse stock splits over the prior two year period that, when considered cumulatively, result in a ratio of 250 shares or more to one (meaning that an investor would receive one share for every 250 shares or more owned at the start of the period), and then fails to satisfy the bid price requirement.

In these situations, Nasdaq has observed that the challenges facing the company generally are not temporary and may be so severe that the company is not likely to regain compliance within the prescribed compliance period. Moreover, the bid price issues can be a leading

⁴ Under Listing Rule 5810(c)(3)(G), Nasdaq Staff could extend this ten-day period to a maximum of 20 days.

⁵ As noted above, under Listing Rule 5810(c)(3)(A) all companies are eligible for an initial compliance period of 180 calendar days from the notification of non-compliance with the bid price requirement and a company that lists its security on the Nasdaq Capital Market, or transfers its listing to that market, may be eligible for a second 180 calendar day period to regain compliance, for a total compliance period of up to 360 calendar days.

indicator of other listing compliance concerns. As a result, these companies often become subject to delisting for other reasons during the compliance periods. Finally, these companies frequently need to raise additional capital to fund their business operations and often do so by engaging in extremely dilutive transactions. Accordingly, in order to enhance investor protection, Nasdaq proposes to modify the listing rules so that these companies are subject to shortened compliance periods, which could lead to earlier delisting, and enhanced review procedures.

With respect to securities with very low prices, Nasdaq proposes to modify the Listing Rules to provide that a company in a bid price compliance period (i.e., the company's security has already traded below \$1.00 for thirty consecutive days) will immediately receive a Staff Delisting Determination if the security trades below \$0.10 for a period of ten consecutive trading days, ending any otherwise applicable compliance period. Such a company could request review of the Delisting Determination by a Hearings Panel, and the Panel could grant the company additional time to complete a reverse stock split or otherwise regain compliance.⁶ Nasdaq believes that placing such companies immediately under the scrutiny of a Hearings Panel will serve to better protect investors.

Nasdaq also proposes to change the Listing Rules to require the issuance of a Staff Delisting Determination if a company falls out of compliance with the \$1.00 minimum bid price (i.e., it has had a closing bid price below \$1.00 for 30 consecutive business days) after completing one or more reverse stock splits resulting in a cumulative ratio 250 shares or more to

⁶ Under Listing Rule 5815(c)(1)(A), a Hearings Panel can grant an exception to the continued listing standards for a period not to exceed 180 days from the date of the Staff Delisting Determination.

one over the two year period before such non-compliance.⁷ In these cases, Nasdaq believes it is inappropriate for a security to remain listed while relying on very large reverse stock splits to maintain compliance with the \$1.00 minimum bid price.

A company that is not eligible for a compliance period under these proposed rule changes would receive a Staff Delisting Determination, which it could appeal to a Hearings Panel, and the Panel could grant the company an exception to remain listed if it believes the company will be able to achieve and maintain compliance with the bid price requirement. However, Nasdaq also proposes to modify the Listing Rules so that following such a Panel exception the company would be subject to the procedures applicable to a company with recurring deficiencies as described in Rule 5815(d)(4)(B). As a result, if within one year of the date the company regains compliance the company again fails to maintain compliance with the price requirement, the company would not be eligible for a compliance period and instead the Listing Qualifications Department will issue a Staff Delisting Determination, which can be appealed to the Hearings Panel.

Nasdaq believes that it would be unfair to modify the rules impacting companies with securities that are already in a compliance period, and therefore proposes to implement these new rules for companies that first receive notification of non-compliance with the bid price requirement after the date of the Commission's approval of these changes. A company that has

⁷ For example, a company could effect a reverse stock split in a ratio of 25 shares to one followed within the two-year period by a second reverse stock split in a ratio of 10 shares to one, resulting in a cumulative ratio of 250 shares to one. Alternatively, a company could effect three reverse stock splits in the two year period, with ratios of 10 shares to one, five shares to one, and five shares to one, respectively, resulting in a cumulative ratio of 250 shares to one.

already received notification of non-compliance would be permitted to regain compliance under the existing rule, in the manner that the notification of non-compliance would have described.⁸

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁹ in general, and furthers the objectives of Section 6(b)(5) and 6(b)(7) of the Act,¹⁰ in particular. The proposed rule change furthers the objectives of Section 6(b)(5) 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 enhancing Nasdaq's listing requirements and limiting the time that a security can remain listed with a price below \$0.10 or following one or more reverse stock splits with a cumulative ratio of 250 to one or more over the prior two year period. In that regard, Nasdaq has observed that the challenges facing such companies generally are not temporary and may be so severe that the company is not likely to regain compliance within the prescribed compliance period. Moreover, the price concerns with these companies can be a leading indicator of other listing compliance concerns, and these companies often become subject to delisting for other reasons during the compliance periods. Finally, these companies often have a need to raise additional capital to fund their business operations at extremely low prices in dilutive

⁸ Nasdaq notes that under Listing Rule 5810(c)(3)(A)(ii), a company is not eligible for the second compliance period "if it does not appear to Nasdaq that it is possible for the Company to cure the deficiency." As is currently the case, Nasdaq may rely upon this language to deny the second compliance period to a company with a very low stock price or that has engaged in significant prior reverse stock splits, even though the company is not yet subject to the new rule.

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(5) and (7).

transactions. While listed, these securities are exempt from the “Penny Stock Rules,”¹¹ which provide enhanced investor protections to prevent fraud and safeguard against potential market manipulation. In particular, the Penny Stock Rules generally require that broker-dealers provide a disclosure document to their customers describing the risk of investing in Penny Stocks and approve customer accounts for transactions in Penny Stocks. Nasdaq believes that an exemption from these Penny Stock requirements may not be appropriate for abnormally low priced stocks and stocks that are trading below \$1 after completing one or more reverse stock splits with a cumulative ratio of 250 to one or more over the prior two year period because these securities may have similar characteristics to Penny Stocks. Nasdaq therefore believes it is appropriate to subject these securities to heightened scrutiny given the availability of the exemption to securities listed on Nasdaq.

The proposed rule change furthers the objectives of Section 6(b)(7) of the Act in that it continues to provide a fair procedure for companies subject to these enhanced listing requirements. These companies can seek review of a Staff Delisting Determination from a Hearings Panel, which can afford the company additional time to regain compliance, and can appeal the Hearings Panel decision to the Nasdaq Listing and Hearing Review Council.¹² As a result, Nasdaq believes that the proposed rule appropriately balances the need for appropriate listing standards with the statutory requirement to protect investors and the public interest.

Finally, Nasdaq believes that the ten consecutive trading day period that a company must trade below \$0.10 before the proposed rule would require issuance of a Staff Delisting Determination appropriately balances Nasdaq’s obligation and desire to protect investors under

¹¹ See Exchange Act Rules 3a51-1, 17 CFR 240.3a51-1, and 15g-1 to 15g-100, 17 CFR 240.5g-1 et seq.

¹² See Listing Rules 5815 and 5820, respectively.

Section 6(b)(5) with the need for a fair and equitable procedure under Section 6(b)(7). The ten consecutive trading day period is long enough that a temporary decline below \$0.10 will not trigger the proposed heightened requirements. Moreover, the ten-day period is designed to parallel the timeframe, already a part of Nasdaq's rules, that a company must trade above \$1.00 to demonstrate compliance with the bid price requirement.

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. While Nasdaq does not believe there will be any impact on competition from the proposed change, any impact on competition that does arise will be necessary to better protect investors, in furtherance of a central purpose of the Act.

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 e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2020-001 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-2020-001. 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 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-2020-001, 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.¹³

J. Matthew DeLesDernier,

Assistant Secretary.

¹³ 17 CFR 200.30-3(a)(12).

