



8011-01

SECURITIES AND EXCHANGE COMMISSION
[Release No. 34-87677; File No. SR-NASDAQ-2019-091]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt a New Rule Permitting Nasdaq to Halt Trading in a Security and Request Information from the Company Regarding the Number of Unrestricted Publicly Held Shares in Certain Circumstances and in Certain Circumstances Request a Plan to Increase the Number of Unrestricted Publicly Held Shares to an Amount That is Higher Than the Applicable Publicly Held Shares Requirement

December 6, 2019

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 November 22, 2019, 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 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 adopt a new rule permitting Nasdaq to halt trading in a security and request information from the company regarding the number of unrestricted publicly held shares when Nasdaq observes unusual trading characteristics in a security or a company announces an event that may cause a contraction in the number of unrestricted publicly held shares.

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's listing requirements include a number of criteria designed to ensure that a listed security has adequate liquidity and is thus suitable for listing and trading on a national securities exchange. These requirements are intended to ensure that there are sufficient shares available for trading to facilitate proper price discovery in the secondary market. On July 5, 2019, the Commission approved Nasdaq's proposed changes to enhance its initial listing standards related to liquidity (the "Approval Order").³ Under the revised standards, securities subject to resale restrictions for any reason ("restricted securities") are excluded from the calculation of publicly held shares for initial listing purposes.⁴ Nasdaq believes that, by excluding securities that are not freely transferrable or available for investors to purchase, the revised standards help the

³ See Securities Exchange Act Release No. 86314 (July 5, 2019), 84 FR 33102 (July 11, 2019) (approving SR-NASDAQ-2019-009).

⁴ Rule 5005(a)(37) defines "Restricted Securities" as "securities that are subject to resale restrictions for any reason, including, but not limited to, securities: (1) acquired directly or indirectly from the issuer or an affiliate of the issuer in unregistered offerings such as private placements or Regulation D offerings; (2) acquired through an employee stock benefit plan or as compensation for professional services; (3) acquired in reliance on Regulation S, which cannot be resold within the United States; (4) subject to a lockup agreement or a similar contractual restriction; or (5) considered "restricted securities" under Rule 144."

Exchange to ensure that companies seeking to list on Nasdaq have sufficient public float, investor base, and trading interest likely to generate depth and liquidity.

These changes apply only to a company's initial listing, and do not apply to Nasdaq's calculation of publicly held shares for continued listing purposes.⁵ Instead, for continued listing purposes, a company is required to maintain a minimum number of publicly held shares, which means shares not held directly or indirectly by an officer, a director or any person who is the beneficial owner of more than 10 percent of the total shares outstanding.⁶ Restricted securities are not excluded from the calculation of a listed company's publicly held shares.

Nasdaq believes that, as a result of the exclusion of restricted securities from the liquidity tests upon initial listing, securities listing on Nasdaq will be more likely to trade better after listing. However, while newly listing companies must satisfy the revised initial listing requirements, companies that were not required to meet those requirements upon initial listing may still have restricted securities that are not freely tradable. In addition, a listed company may conduct a transaction that decreases the number of unrestricted securities in its public float, such as a reverse stock split, tender offer, stock buyback, or entering into a contractual agreement such as a standstill or lockup. The Exchange believes that the new initial listing standards do not sufficiently address these concerns, which could potentially result in a security that is illiquid.

Illiquid securities may trade infrequently and in a more volatile manner and change hands at a price that may not reflect their true market value. Less liquid securities may also be more

⁵ See Approval Order at 33112 ("Nasdaq states that it is not proposing to change the requirements for continued listing at this time, and believes that the proposed heightened initial listing requirements will result in enhanced liquidity for the companies that satisfy them on an ongoing basis.").

⁶ Rule 5005(a)(35) defines "Publicly Held Shares" as "shares not held directly or indirectly by an officer, director or any person who is the beneficial owner of more than 10 percent of the total shares outstanding. Determinations of beneficial ownership in calculating publicly held shares shall be made in accordance with Rule 13d-3 under the Act."

susceptible to price manipulation as a relatively small amount of trading activity can have an inordinate effect on market prices. Nasdaq has observed problems with a small number of listed companies that have a large number of restricted securities in their public float. Such companies may not have sufficient liquidity to meet investor demand, particularly upon announcement of material news, which may result in unusual trading characteristics, such as extreme price movements and unusually large bid-ask spreads.

While Nasdaq's existing rules allow it to apply additional and more stringent criteria to a listed company that satisfies all of the continued listing requirements where there are indications that there is insufficient liquidity in the security to support fair and orderly trading,⁷ Nasdaq believes that it would enhance investor protection and the transparency of Nasdaq's regulatory process to adopt a rule specifying certain situations in which Nasdaq would act in this manner. Therefore, the Exchange is proposing to adopt a new Rule 5120, which would specifically permit Nasdaq to request information from a company regarding the number of unrestricted publicly held shares⁸ when Nasdaq observes unusual trading characteristics of a security or if a company announces an event that may cause a contraction in the number of unrestricted publicly held shares. Nasdaq may also halt trading in the security in connection with such a request pursuant

⁷ Rule 5101 provides, in part, that "Nasdaq may use [its broad discretionary authority] to ... apply additional or more stringent criteria for the initial or continued listing of particular securities, or suspend or delist particular securities based on any event, condition, or circumstance that exists or occurs that makes initial or continued listing of the securities on Nasdaq inadvisable or unwarranted in the opinion of Nasdaq, even though the securities meet all enumerated criteria for initial or continued listing on Nasdaq." See also Approval Order at 33103 (footnote 9).

⁸ Rule 5005(a)(45) defines "Unrestricted Publicly Held Shares" as "the Publicly Held Shares that are Unrestricted Securities." Rule 5005(a)(46) defines "Unrestricted Securities" as "securities that are not Restricted Securities."

to Nasdaq’s authority under Rule 4120(a)(5).⁹ If information provided by the company, or otherwise obtained by Nasdaq, indicates that the number of unrestricted publicly held shares is below the applicable publicly held shares requirement for continued listing of the security, Nasdaq generally will use its authority under Rule 5101 to apply more stringent criteria and request a plan to increase the number of unrestricted publicly held shares to an amount that is higher than the applicable publicly held shares requirement, as provided in the Rule 5800 Series.¹⁰

Under proposed Rule 5120, in considering whether there are unusual trading characteristics, Nasdaq may review volume, price movements, spread and the presence or absence of any news. Events that may cause a contraction in the number of unrestricted publicly held shares include reverse stock splits, tender offers, stock buybacks, or entering into contractual agreements such as standstills or lockups. Nasdaq is also proposing to revise Rule 5810(c)(2)(A) to correct punctuation within the rule and add a new subsection (vii) to provide that when Nasdaq requests a plan to increase the number of publicly held shares [sic], such plan must generally be provided to Nasdaq within 45 calendar days of the date of the request.

The proposed rule would not impose any burden on companies, which may not otherwise regularly track or report the number of their unrestricted publicly held shares, to determine these amounts unless Nasdaq observed unusual trading characteristics or a change in the company’s total shares outstanding. As such, Nasdaq believes that the proposed rule change is finely

⁹ Rule 4120(a)(5) provides that Nasdaq “may halt trading in a security listed on Nasdaq when Nasdaq requests from the issuer information relating to: (A) material news; (B) the issuer’s ability to meet Nasdaq listing qualification requirements, as set forth in the Listing Rule 5000 Series; or (C) any other information which is necessary to protect investors and the public interest.”

¹⁰ The Rule 5800 Series sets forth procedures for the independent review, suspension, and delisting of companies that fail to satisfy one or more standards for initial or continued listing, and thus are “deficient” with respect to the listing standards.

tailored to address the Exchange’s concerns, without imposing an unnecessary burden on companies.

Finally, Nasdaq is proposing to revise the phrase “market value of publicly held shares” to “Market Value of Publicly Held Shares” in Rules 5810(c)(3)(A)(i) and 5810(c)(3)(A)(ii) to correct an inadvertent error and clarify that these references are to the term as defined in Rule 5005(a).

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹¹ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹² 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. The proposed change will enhance transparency and ensure that securities listed on Nasdaq are liquid and have sufficient freely tradable shares to meet investor demand, which will reduce trading volatility and price manipulation, thereby protecting investors and the public interest and supporting fair and orderly trading. Illiquid securities may trade infrequently, in a more volatile manner and with a wider bid-ask spread, all of which may result in trading at a price that may not reflect their true market value. Less liquid securities also may be more susceptible to price manipulation, as a relatively small amount of trading activity can have an inordinate effect on market prices.

Nasdaq believes that it will protect investors and the public interest to halt trading in a security that exhibits unusual trading characteristics and request information from the company regarding its number of unrestricted publicly held shares in order to determine whether such

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(5).

unusual trading characteristics were caused by a large number of restricted securities. Nasdaq believes that it also will protect investors and the public interest to halt trading in a security and request information from the company regarding its number of unrestricted publicly held shares if the company has announced a liquidity-reducing event in order to determine whether a company has a sufficient number of unrestricted publicly held shares following such liquidity-reducing event. The Exchange believes that these changes will help Nasdaq to ensure that the security has enough liquidity to meet investor demand after the liquidity-reducing event, which will support fair and orderly trading.

Nasdaq currently monitors securities for unusual trading characteristics and receives notifications from companies regarding material news and changes in total shares outstanding. Therefore, the proposed rule would not require companies to report unrestricted publicly held shares to Nasdaq on an ongoing basis. As such, Nasdaq believes that the proposed rule change is finely tailored to address the Exchange's concerns, without imposing an unnecessary burden on companies.

The Commission has previously opined on the importance of meaningful listing standards for the protection of investors and the public interest.¹³ In particular, the Commission stated:

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 with sufficient public float, investor base, and trading interest likely to generate depth and liquidity sufficient to promote fair and orderly markets. Meaningful

¹³ Securities Exchange Act Release No. 65708 (November 8, 2011), 76 FR 70799 (November 15, 2011) (approving SR-Nasdaq-2011-073 adopting additional listing requirements for companies applying to list after consummation of a "reverse merger" with a shell company).

listing standards also are important given investor expectations regarding 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.¹⁴

Further, the Exchange believes that this proposal is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. While the proposed changes will only apply to securities exhibiting unusual trading characteristics and companies which announce an event that may cause a contraction in the number of unrestricted publicly held shares of a listed security, they will apply equally to all such securities listed on Nasdaq and the Exchange believes that evidence of unusual trading characteristics is a non-discriminatory reason to apply additional criteria to these securities.

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. All companies and securities listed on Nasdaq will be affected in the same manner by these changes, across all market tiers. To the extent that companies prefer listing on a market with these proposed listing standards, other exchanges can choose to adopt similar enhancements to their requirements. As such, these changes are neither intended to, nor expected to, impose any burden on competition between exchanges.

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.

¹⁴ Id. at 70802.

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 Exchange consents, the Commission shall: (a) by order approve or disapprove such 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-2019-091 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-2019-091. 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. 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-2019-091 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

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

Jill M. Peterson,
Assistant Secretary.

¹⁵ 17 CFR 200.30-3(a)(12).

