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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-88389; File No. SR-NASDAQ-2019-089]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to Amend Rule 5815 to Preclude Stay During Hearing Panel Review of Staff Delisting Determinations in Certain Circumstances

March 16, 2020

I. Introduction

On November 27, 2019, 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”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend Nasdaq Rule 5815 regarding review of Nasdaq Staff Delisting Determinations by Hearings Panels to preclude the stay of trading of a Company’s securities during the review period in specified circumstances. The proposed rule change was published for comment in the Federal Register on December 17, 2019.³ On January 30, 2020, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ On March 13, 2020, the Exchange filed Amendment No. 1 to the proposed rule change, which superseded and replaced the proposed rule change in its

¹ 15 U.S.C.78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 87716 (Dec. 11, 2019), 84 FR 69007 (“Notice”).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 88090, 85 FR 6655 (Feb. 5, 2020). The Commission designated March 16, 2020, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

entirety.⁶ The Commission has received no comment letters on the proposed rule change. The Commission is publishing notice of the filing of Amendment No. 1 to solicit comment from interested persons, and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description of the Proposal, as Modified by Amendment No. 1

Pursuant to Nasdaq Rule 5815, when a Company⁷ receives a Staff Delisting Determination⁸ it may request in writing that the Hearings Panel⁹ review the matter in a written or an oral hearing. Under existing rules, a timely request for a hearing ordinarily will stay the suspension and delisting action pending the issuance of a written decision from the Hearings Panel (“Panel Decision”).¹⁰

The Exchange proposes to amend Nasdaq Rule 5815 to preclude the stay of a Staff Delisting Determination during the Hearings Panel review period in two specified circumstances.

⁶ In Amendment No. 1, the Exchange removed a change proposed in the original filing to remove a stay where a special purpose acquisition company, or “SPAC,” does not satisfy the requirements described in IM-5101-2 that the company must meet initial listing requirements following the completion of a business combination with an operating company. Nasdaq stated in Amendment No. 1 that it was removing this portion of the proposed rule change while it re-assesses the treatment of SPACs. Amendment No. 1 is available at: <https://www.sec.gov/comments/sr-nasdaq-2019-089/srnasdaq2019089-6951085-212268.pdf>.

⁷ The term “Company” means the issuer of a security listed or applying to list on Nasdaq. See Nasdaq Rule 5005(a)(6).

⁸ A “Staff 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. See Nasdaq Rule 5805(h).

⁹ The “Hearings Panel” is an independent panel made up of at least two persons who are not employees or otherwise affiliated with Nasdaq or its affiliates, and who have been authorized by the Nasdaq Board of Directors. See Nasdaq Rule 5805(d).

¹⁰ See Nasdaq Rule 5815(a)(1). In the case of a Staff Delisting Determination related to the requirements to timely file periodic reports with the Commission, the delisting action is only stayed for 15 calendar days unless the Company specifically requests and the Hearings Panel grants a further stay. See Nasdaq Rule 5815(a)(1)(B).

Under the proposal, a timely request for a hearing will not stay the suspension of the securities from trading pending the issuance of a written Panel Decision when the Staff Delisting Determination is related to one of the following deficiencies: (i) a Company whose application for initial listing has not been approved prior to consummation of a transaction whereby the Company combines with a non-Nasdaq entity, resulting in a change of control of the Company and potentially allowing the non-Nasdaq entity to obtain a Nasdaq listing, as described in Nasdaq Rule 5110(a) (such a Company is referred to herein as a “Change of Control Company”);¹¹ or (ii) a Company that has filed for protection under any provision of the federal bankruptcy laws, or comparable foreign laws, or that has announced that liquidation has been authorized by its board of directors and that it is committed to proceed, as described in Nasdaq Rule 5110(b).¹² In both of these situations, under the proposal, the Company’s securities will be suspended from trading on the Exchange during the pendency of the Hearings Panel review and will remain suspended

¹¹ Under Nasdaq Rule 5110(a) (Business Combinations with Non-Nasdaq Entities Resulting in a Change of Control), a Company must apply for initial listing in connection with a transaction whereby the Company combines with a non-Nasdaq entity, resulting in a change of control of the Company and potentially allowing the non-Nasdaq entity to obtain a Nasdaq listing. If the Company’s application for initial listing has not been approved prior to consummation of the transaction, Nasdaq will issue a Staff Delisting Determination. See Nasdaq Rule 5110(a). See also Notice, supra note 3, 84 FR at 69008. Nasdaq stated that a Company would only be subject to suspension under the proposal if it does not contest the applicability of Rule 5110(a), or if the Hearings Panel has already concluded that the rule is applicable, and if the Company does not satisfy the initial inclusion requirements upon consummation of the transaction. See Notice, supra note 3, 84 FR at 69008, n.9 (referencing Nasdaq FAQ 413, available at https://listingcenter.nasdaq.com/Material_Search.aspx?materials=413&mcd=LQ&criteria=2.)

¹² See proposed Nasdaq Rule 5815(a)(1)(B)(ii). Under Nasdaq Rule 5110(b) (Bankruptcy and Liquidation), Nasdaq staff may use its discretionary authority under the Rule 5100 Series to suspend or terminate the listing of a Company that has filed for protection under any provision of the federal bankruptcy laws or comparable foreign laws, or has announced that liquidation has been authorized by its board of directors and that it is committed to proceed, even though the Company’s securities otherwise meet all enumerated criteria for continued listing on Nasdaq. See Nasdaq Rule 5110(b). See also Notice, supra note 3, 84 FR at 69009.

unless the written Panel Decision issued after the hearing determines to reinstate the trading of the securities.¹³ As noted above, this would be in contrast to the application of the current rules that ordinarily stays the suspension of securities during the pendency of an appeal of a delisting determination to the Hearings Panel.¹⁴

The Exchange stated, among other things, in support of its proposal to eliminate the stay upon appeal for change of control situations that it believes because the Company is a new business entity that must meet initial listing standards it should not be traded during appeal since the new Company never established compliance with listing standards and that such trading could then mislead the investing public.¹⁵ As to Companies in bankruptcy or liquidation, the Exchange noted, among other things, that it believed continued trading during a delisting review by the Hearings Panel could expose shareholders to increased risks due to the limited information during bankruptcy proceedings and the uncertainty of outcomes.¹⁶

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁷ In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section

¹³ See proposed Nasdaq Rule 5815(a)(1)(B)(ii). The Exchange also proposes to make non-substantive conforming changes to Nasdaq Rule 5815(a)(1)(A) and (B). See proposed Nasdaq Rule 5815(a)(1)(A) and (B).

¹⁴ See supra note 10 and accompanying text.

¹⁵ See Notice, supra note 3, 84 FR at 69008.

¹⁶ See id.

¹⁷ 15 U.S.C. 78f(b). In approving this proposed rule change, as modified by Amendment No. 1, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

6(b)(5) of the Act,¹⁸ 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. In addition, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(7) of the Act,¹⁹ which requires, among other things, that the rules of a national securities exchange provide a fair procedure for the prohibition or limitation by the exchange of any person with respect to access to services offered by the exchange.

Nasdaq has proposed to eliminate the stay of suspension from trading of a Company's securities, upon appeal of a Staff Delisting Determination, during the pendency of the Hearings Panel's review where the Staff Delisting Determination is related to the following deficiencies: (i) a Change of Control Company whose application for initial listing was not approved prior to consummation of the change-of-control transaction; or (ii) a Company undergoing bankruptcy or liquidation. As a result, even if appealed, Companies issued Staff Delisting Determinations related to such deficiencies will have their securities immediately suspended from trading unless and until the Hearings Panel issues a decision that reinstates the securities.

With respect to the proposed removal of the stay during the pendency of the Hearings Panel's review upon appeal of a Nasdaq staff determination to delist a Change of Control Company that did not have its initial listing approved prior to consummation of the relevant transaction, the Commission believes immediate suspension of trading in such circumstances is appropriate and consistent with the Act. A Change of Control Company following the change of

¹⁸ 15 U.S.C. 78f(b)(5).

¹⁹ 15 U.S.C. 78f(b)(7).

control transaction with a non-Nasdaq entity is a new business entity and, as a result, is required by Nasdaq's rules to demonstrate compliance with the Exchange's initial listing standards.²⁰ The Commission believes, as the Exchange has also stated, that permitting such companies to trade on the Exchange during the pendency of the Hearings Panel review without having demonstrated compliance with the Exchange's initial listing standards, as is the case under the current rule, may be misleading to investors, because it gives the appearance that the Company has met the standards imposed by Nasdaq.

Nasdaq also noted in its proposal that the Change of Control Company could use the benefits of its Nasdaq listing and continued trading during the review process to achieve compliance with the initial listing requirements it does not satisfy.²¹ The Commission also believes that investor protection issues are raised if such a Company can use the continued listing and trading of its securities on the Exchange during the pendency of the hearing review process to try to achieve compliance with initial listing requirements that it has not met, even though the new Company never qualified initially for trading in the first instance like any new listing applicant is required to do.²² While Nasdaq stated in its proposal that newly listing Companies must demonstrate compliance with all initial listing requirements before they are listed,²³ Nasdaq further noted that the Change of Control Companies covered by the proposed rule change are effectively new entities but have not completed the standard vetting process conducted by the

²⁰ See supra note 11.

²¹ See Notice, supra note 3, 84 FR at 69008.

²² See Securities Exchange Act Release No. 82478 (Jan. 9, 2018) 83 FR 2278 (Jan. 16, 2018) (Nasdaq-2018-087) (Order Instituting Proceedings Relating to Special Purpose Acquisition Companies Listing Standards) ("The Commission notes that initial listing standards, absent an explicit exception, apply upon initial listing.").

²³ See Notice, supra note 3, 84 FR at 69008–09.

Exchange of all new listed companies and demonstrated compliance with initial listing requirements.²⁴

The Commission further believes that the Exchange's proposal to remove the stay during the pendency of a Hearings Panel's review and immediately suspend trading where Nasdaq Staff has determined to delist a Company in bankruptcy or liquidation and the Company has appealed that determination is consistent with the Act. In such situations, the Company has acknowledged it is having insurmountable financial difficulties and the Commission believes there are investor protection concerns with allowing such securities to continue to trade during the appeal process. For example, the Exchange stated that continued listing of a Company's securities on the Exchange during the pendency of bankruptcy proceedings exposes investors to increased risk due to the uncertainty of the outcome and the limited information provided during bankruptcy proceedings.²⁵ In addition, the Exchange stated that, in its experience with respect to bankrupt or liquidating Companies, there is generally no residual equity for the current stockholders.²⁶ Furthermore, the Commission believes that continued trading of the Company's shares during the duration of the Hearings Panel's review could be misleading to investors and, as Nasdaq stated, can create confusion about the Company's ability to satisfy Nasdaq's initial listing requirements upon emerging from bankruptcy as required under Nasdaq Rule 5110(b). While a

²⁴ See id. at 69009 (“No company may trade on The Nasdaq Stock Market until it demonstrates compliance with the listings qualifications rules of the Exchange.”). The Commission notes that the fair procedure requirements under Section 6(b)(7) of the Act are consistent with, among other things, not automatically allowing a Company that invokes the appeal process to continue to trade during the appeal and gain the benefit of continued listing and trading during the pendency of that process and, in effect, gain additional time to achieve compliance with initial listing standards that the Company has not (and has never) met. See also discussion, infra, on Section 6(b)(7) under the Act.

²⁵ See Notice, supra note 3, 84 FR at 69009.

²⁶ See id.

Company emerging from bankruptcy protection may continue to be listed and traded on the Exchange if the Company demonstrates compliance with the Exchange’s initial listing standards, Nasdaq represented that of 37 Staff Delisting Determinations related to bankruptcy between 2016 and 2018, only one Company remained listed and demonstrated compliance with the initial listing requirements upon emerging from bankruptcy.²⁷

As the Commission has previously noted, the development and enforcement of meaningful listing standards²⁸ for an exchange is of substantial importance to financial markets and the investing public. 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 that have or will have sufficient public float, investor base, and trading interest likely to generate depth and liquidity sufficient to promote fair and orderly markets. Meaningful 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.²⁹ Allowing essentially new Companies that have not demonstrated compliance with the Exchange’s initial listing

²⁷ See id. at 69009, n.12.

²⁸ The Commission notes that this reference to “listing standards” is referring to both initial and continued listing standards.

²⁹ See, e.g., Securities Exchange Act Release Nos. 65708 (Nov. 8, 2011), 76 FR 70799 (Nov. 15, 2011) (SR-NASDAQ-2011-073) (order approving a proposal to adopt additional listing requirements for companies applying to list after consummation of a “reverse merger” with a shell company), and 57785 (May 6, 2008), 73 FR 27597 (May 13, 2008) (SR-NYSE-2018-17) (order approving a proposal to adopt new initial and continued listing standards to list securities of special purpose acquisition companies). See also Securities Exchange Act Release No. 81856 (October 11, 2017), 82 FR 48296, 48298 (Oct. 17, 2017) (SR-NYSE-2017-31) (stating that in addition, once a security has been approved for initial listing, maintenance criteria allow an exchange to monitor the status and trading characteristics of that issue so that fair and orderly markets can be maintained).

standards to continue trading on the Exchange during the pendency of the Hearings Panel's review of a Staff Delisting Determination may be confusing to investors and raises investor protection concerns.³⁰ Similar investor protection concerns are present with allowing Companies that have sought bankruptcy protection or that have announced a liquidation to continue trading on the Exchange during the pendency of the Hearings Panel's review.³¹ The Commission believes that Nasdaq's proposal will further the purposes of Section 6(b)(5) of the Act by, among other things, protecting investors and the public interest by preventing continued trading on the Exchange in such a Company's securities unless and until the Hearings Panel determines that continued trading on Nasdaq is appropriate.

The Commission further believes the proposed rule change is consistent with Section 6(b)(7) of the Act in that it provides a fair procedure for the prohibition or limitation by the Exchange of any person with respect to access to services offered. The Commission notes that pursuant to the proposal, a Company whose securities are suspended pending its appeal would be given the same opportunity it currently has to present its case to the Hearings Panel pursuant to current Nasdaq rules. Further, a Company's shares will be suspended unless and until the Hearings Panel issues a written decision determining that continued trading on Nasdaq is appropriate. If the Panel Decision determines to permit continued trading of the securities, the

³⁰ See In re Tassaway, Securities Exchange Act Release No. 11291, 45 S.E.C. 706, 709, 1975 SEC LEXIS 2057, at *6 (Mar. 13, 1975) (“[P]rimary emphasis must be placed on the interests of prospective future investors . . . [who are] entitled to assume that the securities in [Nasdaq] meet [Nasdaq’s] standards. Hence the presence in [Nasdaq] of non-complying securities could have a serious deceptive effect.”). See also In re Biorelease Corporation, Securities Exchange Act Release No. 35575, 1995 SEC LEXIS 818, at *13 (Apr. 6, 1995) (“[T]hough exclusion from the system may hurt existing investors, primary emphasis must be placed on the interests of prospective future investors. Prospective investors are entitled to assume that the securities listed [on Nasdaq] meet the system’s listing standards.”).

³¹ See supra note 27 and accompanying text.

Company's shares can then resume trading on the Exchange.³² The Commission believes that limitations on trading of a Company's securities during the pendency of the Hearings Panel's review is appropriate in the situations prescribed by the proposed rule in light of the need to protect investors and the public interest and that the Nasdaq's hearings review process will continue, as it currently does, to provide a fair procedure for the review of Staff Delisting Determinations in accordance with Section 6(b)(7) of the Act.³³

IV. Accelerated Approval of the Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 1 in the Federal Register. Amendment No. 1 removed a change proposed in the original filing to remove a stay where a special purpose acquisition company, or "SPAC," does not satisfy the requirements described in IM-5101-2 that the Company must meet initial listing requirements following the completion of a business combination with an operating company while Nasdaq reassesses the treatment of SPACs. The amendment did not modify the remaining two circumstances in which the Exchange has proposed to eliminate the stay of suspension from trading of a Company's securities following receipt of a Staff Delisting Determination during the pendency of the Hearings Panel's review—a Change of Control Company whose application for initial listing was not approved prior to consummation of the change-of-control transaction, or a Company undergoing bankruptcy or liquidation. The Commission also notes that these remaining aspects of the proposed rule change were noticed for comment in the Federal Register and no comments were received in response to that notice. The Commission has also found that

³² See Nasdaq Rule 5815. Should the Hearings Panel decide the Company's securities should be delisted, the Company would be afforded an appeal of the Panel Decision to the Listing Counsel as would any listed company or new applicant denied listing. Id.

³³ See also supra note 24.

the proposal, as modified by Amendment No. 1, is consistent with the Act for the reasons discussed herein. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,³⁴ to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

V. Solicitation of Comments on Amendment No. 1 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 1 is consistent with the Exchange 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-2019-089 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-2019-089. 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

³⁴ 15 U.S.C. 78s(b)(2).

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 such 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-2019-089, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,³⁵ that the proposed rule change (SR-NASDAQ-2019-089), as modified by Amendment No. 1, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁶

J. Matthew DeLesDernier
Assistant Secretary

³⁵ 15 U.S.C. 78s(b)(2).

³⁶ 17 CFR 200.30-3(a)(12).

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