

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-94450; File No. SR-NASDAQ-2021-099)

March 17, 2022

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Approving Proposed Rule Change to Amend Nasdaq Rule 5815(d)(4) Regarding the Use of a Hearings Panel Monitor Following a Compliance Determination by a Nasdaq Listings Qualification Hearings Panel

I. Introduction

On December 10, 2021, 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(d)(4) regarding the use of a Hearings Panel Monitor following a compliance determination by a Nasdaq Listings Qualification Hearings Panel. The proposed rule change was published for comment in the Federal Register on December 21, 2021.³ On February 3, 2022, the Commission extended the time period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.⁴ The Commission received no comments on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposal

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 93789 (December 15, 2021), 86 FR 72293 (“Notice”).

⁴ See Securities Exchange Act Release No. 94145, 87 FR 7521 (February 9, 2022) (extending the time period to March 21, 2022).

The Nasdaq Rule 5300, 5400, and 5500 series set forth the initial listing requirements for a Company⁵ seeking to list, as well as continued listing requirements that apply to a Company once listed on, the Nasdaq Global Select Market, Nasdaq Global Market and Nasdaq Capital Market, respectively. The Nasdaq Rule 5800 series contains the rules and procedures applicable to a Company that does not meet the listing standards outlined in the Nasdaq Rule 5000 series and thus is “deficient” with respect to a listing standard.⁶ In this circumstance, staff from the Listings Qualifications Department⁷ (“Staff”) will issue a notification informing the Company of the deficiency. According to Nasdaq, 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.⁸ Companies that do not regain compliance within any time frame permitted by Staff under a plan of compliance,⁹ that do not regain compliance within the specified cure or compliance period,¹⁰ or that has a deficiency type that unless appealed subjects the Company to

⁵ The term “Company” means the issuer of a security listed or applying to list on Nasdaq. See Nasdaq Rule 5005(a)(6).

⁶ For purposes of this filing, Nasdaq’s rules identify deficiencies for which an already listed Company may submit a plan of compliance (Nasdaq Rule 5815(c)(2)); and deficiencies for which the Nasdaq Rules provide a specified cure or compliance period (Nasdaq Rule 5815(c)(3)). While the Rule 5800 rule series also addresses denials of listing for not meeting listing standards, the rule proposal considered herein concerns Companies that are already listed and fail to meet the continued listing standards.

⁷ The term “Staff” refers to the employees of the Listing Qualifications Department. See Nasdaq Rule 5805(g). The “Listing Qualifications Department” is the department of Nasdaq responsible for Company compliance with quantitative and qualitative listing standards and determining eligibility for initial and continued listing of a Company’s securities. See Nasdaq Rule 5805(f).

⁸ See Notice, supra note 3, at 72293.

⁹ See Rule 5810(c)(2)(E).

¹⁰ See Rule 5810(c)(3).

immediate suspension and delisting¹¹ will be issued a Staff Delisting Determination¹² and may request that a Hearings Panel¹³ (“Hearings Panel”) review such determination. If it deems appropriate, the Hearings Panel may grant an exception (“exception”) to the continued listing standard with respect to the deficiency.¹⁴ However, where a Company has previously been deficient with a listing standard but has regained compliance pursuant to an exception granted by the Hearings Panel, under certain circumstances, Nasdaq states that its rules do not allow a Company the opportunity to submit a plan to regain compliance or provide for a cure or compliance period in the event that the Company incurs another deficiency within one year of the prior deficiency. In these circumstances, Nasdaq Rules 5815(d)(4)(A) or (B) would apply.¹⁵

According to the Exchange, both Nasdaq Rules 5815(d)(4)(A) and (B) set forth the process by which Staff will issue a Staff Delisting Determination for a Company that fails to maintain compliance with one or more listing standards within one year of having regained compliance pursuant to an exception granted by a Hearings Panel.¹⁶ Currently, Nasdaq Rule 5815(d)(4)(A), entitled “Hearings Panel Monitor,” provides, in part, that a Hearings Panel has

¹¹ See Rule 5810(c)(1).

¹² A "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. See Nasdaq Rule 5805(h).

¹³ 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).

¹⁴ Pursuant to Nasdaq Rule 5815(c)(1)(A), when the Hearings Panel review is of a deficiency related to continued listing standards, the Hearings Panel may, where it deems appropriate 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. See Nasdaq Rule 5815(c)(1)(A).

¹⁵ See Notice, supra note 3, at 72293.

¹⁶ See Notice, supra note 3, at 72293.

discretion to monitor a Company (i.e., subject the Company to a “Hearings Panel Monitor”) for a period of up to one year after the date the Company regains compliance with a listing standard if it concludes that there is a likelihood that such 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 period in which the Company is under a Hearings Panel Monitor, Staff will monitor the Company to confirm compliance with all listing standards. If Staff identifies a deficiency with any listing standard for a Company being monitored under Nasdaq Rule 5815(d)(4)(A), Nasdaq states that 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 Staff Delisting Determination for the Company.

Nasdaq Rule 5815(d)(4)(B) currently states “[i]f a Hearings Panel has not opted to monitor a Company that has regained compliance with the listing standards requiring the Company to maintain certain levels of stockholders' equity, to timely file periodic reports, or with the bid price requirement where the Company was ineligible for a compliance period under Rule 5810(c)(3)(A)(iii) or (iv) and within one-year of the date the Company regained compliance with such listing standard, the Listing Qualifications Department finds the Company again out of compliance with the requirement that was the subject of the exception, then, notwithstanding Rule 5810(c)(2), the Listing Qualifications Department will not allow the Company to provide it with a plan of compliance or grant additional time for the Company to regain compliance. Rather, the Listing Qualifications Department will promptly issue a Staff Delisting Determination, and the Company may request review by a Hearings Panel. The Hearings Panel

will consider the Company's compliance history when rendering its Decision.”¹⁷ According to the Exchange, while entitled “No Hearings Panel Monitor”, paragraph (B) of Nasdaq Rule 5815(d)(4) amounts to what is in effect a mandatory Hearings Panel Monitor.¹⁸

The Exchange has proposed to clarify Nasdaq Rule 5815(d)(4) in several ways. First, the Exchange proposes to clarify that the use of a Hearings Panel Monitor is discretionary if a Company qualifies for monitoring under Nasdaq Rule 5815(d)(4)(A), but the use of a Hearings Panel Monitor is mandatory if a Company qualifies for monitoring under Nasdaq Rule 5815(d)(4)(B). Specifically, the Exchange proposes to modify Nasdaq Rule 5815(d)(4)(A) by adding the word “Discretionary” to the heading of Nasdaq Rule 5815(d)(4)(A) to make clear that the Hearings Panel Monitor under that provision is discretionary, and to retitle Nasdaq Rule 5815(d)(4)(B) to “Mandatory Hearings Panel” to make clear that a Hearings Panel Monitor under that provision is mandatory. In addition, the Exchange proposes to further modify Nasdaq Rule 5815(d)(4)(B) to make explicit the mandatory nature of appointing a Hearings Panel Monitor by stating in the rule that after having been granted an exception to the requirement to maintain certain levels of stockholders' equity, to timely file periodic reports, or with the bid price requirement where the Company was ineligible for a compliance period under Nasdaq Rule 5810(c)(3)(A)(iii) or (iv), a “Hearings Panel will impose a Hearings Panel Monitor for a period of one year from the date the company regains compliance” with those three specific listing requirements in Rule 5815(d)(4)(B).

¹⁷ Nasdaq states that this provision limits the grounds for an immediate Delisting Determination to a recurrence of the initial deficiency in the three enumerated areas in the rule that gave rise to the previous hearing before the Hearings Panel. See Notice, supra note 3, at 72293-4.

¹⁸ See Id. at 72294. The Exchange added that it is not aware of the reason for the original language in Nasdaq Rule 5815(d)(4)(B) stating the rule would not call for a Panel Monitor. Id. at n. 6.

The Exchange proposes to further clarify Nasdaq Rules 5815(d)(4)(A) and (B) by amending those rules to clearly state that under both paragraphs (A) and (B) of the rule, if a Company falls out of compliance with the listing standard deficiency that was the subject of the exception granted by the Listing Qualifications Department during the one-year monitoring period, the Company will not be afforded an applicable cure or compliance period pursuant to Nasdaq Rule 5810(c)(3), nor as currently provided by the rule be permitted to provide the Listing Qualifications Department with a plan of compliance under Nasdaq Rule 5810(c)(2). The Exchange represented that while the original language in both Nasdaq Rule 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 Nasdaq Rule 5810(c)(3) itself.¹⁹ The Exchange believes that adding a specific reference to Nasdaq Rule 5810(c)(3) will remove any potential confusion regarding this point.²⁰

The Exchange also proposes to add a new paragraph (C) to Nasdaq Rule 5815(d)(4), which will set out the procedures for a Hearings Panel Monitor that is appointed under either paragraphs (A) or (B) of Nasdaq Rule 5815(d)(4), in the event the Company receives a Staff Delisting Determination during the one-year monitoring period. Pursuant to proposed Nasdaq Rule 5815(d)(4)(C), if a Company receives a Staff Delisting Determination during the one-year period under paragraph (d)(4)(A) or (B) of Nasdaq Rule 5815(d)(4), the Company may request review by a Hearings Panel. Unless subparagraph (C) indicates otherwise, the hearing will be conducted in accordance with the procedures outlined in Nasdaq Rule 5815. Upon a request for

¹⁹ See Notice, supra note 3, at 72294.

²⁰ Id. The rule provisions stating that the Listing Qualification Department cannot grant additional time for the Company to regain compliance will remain in Rule 5815 (d) (A) and (B).

a hearing by the Company, the Hearings Department will promptly schedule a new hearing with the initial Hearings Panel or a newly convened Hearings Panel if the initial Hearings Panel is unavailable. The hearing may be oral or written, at the Company's election and the Hearings Panel will consider the Company's compliance history when rendering its decision. If the Company does not request review of the Staff Delisting Determination, then proposed Nasdaq Rule 5815(d)(4)(C) provides that the Company's securities will be suspended. The Exchange stated that as revised, Nasdaq Rule 5815(d)(4)(C) also will correct the erroneous inclusion of language in the current rule which could allow the Hearings Department to promptly schedule a hearing without first receiving a request for appeal from the Company .²¹

III. Discussion and Commission Findings

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.²² In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,²³ 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

²¹ Id. The Exchange also represents that 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. According to the Exchange, a new hearing would not be scheduled until the Company in question had requested an appeal from the Delisting Determination. The Exchange states that the proposed rule change will simply codify the existing practice of the Hearings Department. Id. at n. 7. In addition, the Exchange described other existing inconsistencies between paragraphs (A) and (B) of Rule 5815(d)(4), but states that each of the provisions will apply to both 5815(c)(4)(A) and (B) through the implementation of proposed Rule 5815(d)(4)(C). See Id. at n. 8.

²² In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²³ 15 U.S.C. 78f(b)(5).

and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, 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. In addition, the Commission finds that the proposed rule change is consistent with Section 6(b)(7) of the Act, 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.

The Exchange proposes to clarify when a Hearings Panel Monitor is discretionary or mandatory under paragraphs (A) and (B) of Nasdaq Rule 5815(d)(4) by adding the specific terms “Discretionary” and “Mandatory” to the title of Nasdaq Rule 5815(d)(4)(A) and (B), respectively. The Commission notes that Nasdaq Rule 5815(d)(4)(B) is currently titled “No Hearings Panel Monitor”; despite this current title, and the current rule language, the Exchange represented that “the rule itself actually outlines a process of a mandatory Hearings Panel Monitor.”²⁴ In this regard, the Commission believes that the proposed rule change will provide necessary clarity to the rule by correcting the inaccurate title to the rule, given that Nasdaq has stated that in effect paragraph (B) sets forth a mandatory Hearings Panel Monitor process. The Exchange has also proposed to make clear when a Hearings Panel will be mandatory by stating explicitly in Nasdaq Rule 5815(d)(4)(B) – but not in Nasdaq Rule 5815(d)(4)(A), which is a discretionary process– that a Hearings Panel will impose a Hearings Panel Monitor for a period of one year from the date the Company regains compliance with the listing standards relating to maintaining certain levels of stockholders' equity, to timely file periodic reports, or with the bid

²⁴ See Notice, supra note 3, at 72294.

price requirement where the Company was ineligible for a compliance period under Nasdaq Rule 5810(c)(3)(A)(iii) or (iv), following an exception that was granted by a Hearings Panel. The Commission believes that these changes to Nasdaq Rule 5815(d)(4)(A) and (B) will help remove impediments to and perfect the mechanism of a free and open market and a national market system and protect investors and the public interest by removing any confusion or ambiguity about when a Hearings Panel Monitor will be discretionary or mandatory.

The Exchange also proposes to clarify that if a Company falls out of compliance with the listing standard deficiency that was the subject of the exception granted by the Listing Qualifications Department during the one-year monitoring period under either Nasdaq Rule 5815(d)(4)(A) or (B), the Company will not be afforded an applicable cure or compliance period pursuant to Nasdaq Rule 5810(c)(3). The current rule language states that the Company will not be permitted to provide the Listing Qualifications Department with a plan of compliance notwithstanding Nasdaq Rule 5810(c)(2) and that the Company cannot be granted any additional time to regain compliance. While the current rule does prohibit any extension of time, the Exchange stated that specifically referencing Rule 5810(c)(3) will avoid any potential confusion.²⁵ The Commission believes that the proposed change should help to avoid any potential confusion by making clear that a Company cannot receive any extension of time, including by being afforded an applicable cure or compliance period pursuant to Nasdaq Rule 5810(c)(3), and as the rule currently states, by submitting a plan of compliance under Nasdaq 5810(c)(2). Additionally, because the current text of the rules prohibit any additional time to regain compliance, the Commission believes that adding an explicit reference to Nasdaq Rule 5810(c)(3) in Nasdaq Rule 5815(d)(4)(A) and (B) is consistent with the Act because it will

²⁵ Id.

clarify and provide transparency on the specific provisions in Rule 5810 that are not available to a Company when a deficiency occurs during the one year monitoring period.

Finally, the Exchange proposed to create a new paragraph (C) to Nasdaq Rule 5815(d)(4) which will outline how a Company may seek an appeal of a Staff Delisting Determination. Pursuant to the Rule, if a Company receives a Staff Delisting Determination during a one-year Hearings Panel Monitor under Nasdaq Rule 5815 (d)(4)(A) or (B), the Company may request review by a Hearings Panel. The Hearings Department will schedule a hearing with the original Hearings Panel or a new Hearings Panel if the original Hearings Panel is unavailable, the hearing may be written or oral, and the Hearings Panel will consider the Company's compliance history when rendering its decision. Nasdaq Rule 5815(d)(4)(C) also provides that unless specifically addressed in the Rule, the procedures for requesting and preparing for a review by a Hearings Panel will continue to be governed by Nasdaq Rule 5815. The Commission believes that it is consistent with the Act to combine the procedures that a Company must follow to request a hearing after receiving a Staff Delisting Determination into one paragraph of Nasdaq Rule 5815(d)(4). Currently, the procedures for requesting a hearing following a Staff Delisting Determination are set forth in either or both paragraphs (A) and (B) of Rule 5815(d)(4). While both paragraphs address such hearings, the differences in the description of and procedures for requesting and conducting such hearings between paragraphs (A) and (B).could lead to confusion. Therefore, the Commission believes that providing the same procedures for requesting and conducting a hearing under Rules 5815(d)(4)(A) and (B) and consolidating these procedures into proposed paragraph (C) provides transparency and clarity to such hearings, and thus may help ensure that the Exchange's rules do not permit unfair discrimination between

issuers, and provides a fair procedure for review of a Staff Delisting Determination, consistent with the Act.

As the Commission has previously noted, the development and enforcement of meaningful listing standards²⁶ 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.²⁷ 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.²⁸ Therefore it is

²⁶ The Commission notes that this is referring to both initial and continued listing standards.

²⁷ 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 to ensure that it continues to meet the exchange's standards for market depth and liquidity so that fair and orderly markets can be maintained. See, e.g., Securities Exchange Act Release Nos. 82627 (Feb. 2, 2018), 3 FR 5650, 5653, n.53 (Feb. 8, 2018) (SR-NYSE-2017-30); 81856 (Oct. 11, 2017), 82 FR 48296, 48298 (Oct. 17, 2017) (SR-NYSE-2017-31); 81079 (July 5, 2017), 82 FR 32022, 32023 (July 11, 2017) (SR-NYSE-2017-11). The Commission has stated that adequate listing standards, by promoting fair and orderly markets, are consistent with Section 6(b)(5) of the Act, in that they are, among other things, designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and protect investors and the public interest. See, e.g., Securities Exchange Act Release Nos. 82627 (Feb. 2, 2018), 3 FR 5650, 5653, n.53 (Feb. 8, 2018) (SR-NYSE-2017-30); 87648 (Dec. 3, 2019), 84 FR 67308, 67314, n.42 (Dec. 9, 2019) (SR-NASDAQ-2019-059); 88716 (Apr. 21, 2020), 85 FR 23393, 23395, n.22 (Apr. 27, 2020) (SR-NASDAQ-2020-001).

²⁸ 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

important for exchanges to prevent companies that are deficient in their listing standards or that do not meet initial listing standards from remaining or becoming listed on an exchange.

Clarifying the rules and procedures for appeal where a listed Company has recurrent deficiencies so is under a Hearings Panel Monitor and cannot avail itself of additional time to demonstrate compliance, should further investor protection under Section 6(b)(5) of the Act by helping to eliminate potential confusion about the application of Rule 5815(d)(4), while at the same time ensuring such Companies have a fair procedure for review consistent with Section 6(b)(7) of the Act.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁹ that the proposed rule change (SR-NASDAQ-2021-099) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁰

J. Matthew DeLesDernier
Assistant Secretary

continued listing standards to list securities of special purpose acquisition companies).

²⁹ 15 U.S.C. 78s(b)(2).

³⁰ 17 CFR 200.30-3(a)(12).