

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-70535; File No. SR-NASDAQ-2013-128)

September 27, 2013

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the NASDAQ Listing Standards Related to Compliance Determinations for Market Value of Listed Securities and Market Value of Publicly-Held Shares Deficiencies

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> notice is hereby given that on September 26, 2013, 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, II, and III, 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 amend the NASDAQ listing standards related to compliance determinations for Market Value of Listed Securities and Market Value of Publicly-Held Shares deficiencies. The text of the proposed rule change is below. Proposed new language is *italicized*; proposed deletions are in brackets.

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**5810. Notification of Deficiency by the Listing Qualifications Department**

When the Listing Qualifications Department determines that a Company does not meet a listing standard set forth in the Rule 5000 Series, it will immediately notify the Company of the deficiency. As explained in more detail below, deficiency notifications are of four types:

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

- (1) Staff Delisting Determinations, which are notifications of deficiencies that, unless appealed, subject the Company to immediate suspension and delisting;
- (2) notifications of deficiencies for which a Company may submit a plan of compliance for staff review;
- (3) notifications of deficiencies for which a Company is entitled to an automatic cure or compliance period; and
- (4) Public Reprimand Letters.

Notifications of deficiencies that allow for submission of a compliance plan or an automatic cure or compliance period may result, after review of the compliance plan or expiration of the cure or compliance period, in issuance of a Staff Delisting Determination or a Public Reprimand Letter.

(a) – (b) No change.

**(c) Types of Deficiencies and Notifications**

The type of deficiency at issue determines whether the Company will be immediately suspended and delisted, or whether it may submit a compliance plan for review or is entitled to an automatic cure or compliance period before a Staff Delisting Determination is issued.

In the case of a deficiency not specified below, Staff will issue the Company a Staff Delisting Determination or a Public Reprimand Letter.

(1) – (2) No change.

**(3) Deficiencies for which the Rules Provide a Specified Cure or Compliance Period**

With respect to deficiencies related to the standards listed in (A) - (E) below, Staff's notification will inform the Company of the applicable cure or compliance period provided by these Rules and discussed below. If the Company does not regain

compliance within the specified cure or compliance period, the Listing Qualifications Department will immediately issue a Staff Delisting Determination letter.

(A)– (B) No change.

**(C) Market Value of Listed Securities**

A failure to meet the continued listing requirements for Market Value of Listed Securities shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the Company shall be notified promptly and shall have a period of 180 calendar days from such notification to achieve compliance. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 180 day compliance period, unless Staff exercises its discretion to extend this 10 day period as discussed in Rule 5810(c)(3)(F).

**(D) Market Value of Publicly Held Shares**

A failure to meet the continued listing requirement for Market Value of Publicly Held Shares shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the Company shall be notified promptly and shall have a period of 180 calendar days from such notification to achieve compliance. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 180 day compliance period, unless Staff exercises its discretion to extend this 10 day period as discussed in Rule 5810(c)(3)(F).

(E) No change.

**(F) Staff Discretion Relating to the [Bid] Price-based Requirements**

If a Company fails to meet the Market Value of Listed Securities, Market Value of Publicly Held Shares, or Bid Price requirements, each of which is related to the Company's security price and collectively called the "Price-based Requirements," compliance is generally achieved by meeting the requirement for a minimum of ten consecutive business days. However, Staff may, in its discretion, require a Company to [maintain a bid price of at least \$1.00 per share] satisfy the applicable Price-based Requirement for a period in excess of ten consecutive business days, but generally no more than 20 consecutive business days, before determining that the Company has demonstrated an ability to maintain long-term compliance. In determining whether to require a Company to meet the [minimum \$1.00 bid price standard] applicable Price-based-requirement beyond ten business days, Staff [will] may consider all relevant facts and circumstances, including without limitation[the following four factors]:

- (i) the margin of compliance (the amount by which a Company exceeds the [bid price is above the \$1.00 minimum standard] applicable Price-based Requirement);
- (ii) the trading volume (a lack of trading volume may indicate a lack of bona fide market interest in the security at the posted bid price);
- (iii) the Market Maker montage (the number of Market Makers quoting at or above \$1.00 or the minimum price necessary to satisfy another Price-based Requirement; and the size of their quotes); and
- (iv) the trend of the stock price (is it up or down).

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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

The purpose of this proposed rule change is to increase transparency of the fact that NASDAQ Staff (“Staff”) may consider periods longer than ten days when evaluating whether a company has regained compliance with the minimum Market Value of Listed Securities (“MVLS”) and Market Value of Publicly-Held Shares (“MVPHS”) requirements, while also generally limiting such review to twenty days. Currently, NASDAQ Rules provide that compliance with the MVLS and MVPHS requirements “can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days.” (emphasis added). As such, while a company cannot regain compliance in a period less than ten days, the rule does not require Staff to limit its review for compliance with the MVLS and MVPHS requirements to exactly ten days. Further, Staff’s broad discretionary authority under Rule 5101 supports Staff’s consideration of a longer period when necessary.<sup>3</sup>

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<sup>3</sup> Rule 5101 provides NASDAQ with broad discretionary authority over the initial and continued listing of securities, and allows the application of additional or more stringent criteria for the continued listing of particular securities based on any event, condition, or circumstance that exists or occurs, even though the securities meet all enumerated criteria for initial or continued listing on NASDAQ.

By contrast, Rule 5810(c)(3)(F) explicitly describes Staff's discretion to extend the compliance period for a bid price deficiency beyond ten days (but generally not more than 20 days) and identifies factors for Staff to consider in making a decision to do so.<sup>4</sup> In the ten years since adopting these factors,<sup>5</sup> Staff has found them useful in determining whether to extend the bid price compliance period beyond ten days and thus typically uses these same factors, and, generally, the 20 day limit, when evaluating compliance with the MVLS and MVPHS requirements. The proposed change to Rule 5810(c)(3)(F) would describe this practice and thereby provide transparency to the manner in which Staff applies its existing discretion.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>6</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>7</sup> 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 rule change will add greater transparency to the rule administration process by permitting issuers to better understand how NASDAQ evaluates compliance with the MVLS and MVPHS listing rules. At the same time, it describes NASDAQ Staff discretion to apply a higher standard in determining which companies are suitable for continued listing on the exchange, thus protecting investors.

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<sup>4</sup> These factors are: (i) the margin of compliance; (ii) the trading volume; (iii) the market maker montage; and (iv) the trend of the stock price.

<sup>5</sup> Current Rule 5810(c)(3)(F) was originally adopted in 2003 as Rule 4310(c)(8)(E). Exchange Act Release No. 47181 (January 14, 2003), 68 FR 3074 (January 22, 2003).

<sup>6</sup> 15 U.S.C. 78f(b).

<sup>7</sup> 15 U.S.C. 78f(b)(5).

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. In this regard, NASDAQ notes that the competition among exchanges for listings is robust and vigorous, and the proposed rule change is not intended, nor is it expected, to reduce or diminish such competition. The rule brings added transparency to NASDAQ's vigilant enforcement of the Listing Rules, which already allow NASDAQ Staff to use discretion to apply more stringent listing standards. However, it does not allow the Staff any discretion to apply diminished listing standards in order to attract or retain listing business. The proposed rule change offers NASDAQ no advantages over its competitors beyond those created by enhancing the Exchange's regulatory effectiveness.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>8</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>9</sup> The proposed rule change will add

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<sup>8</sup> 15 U.S.C. 78s(b)(3)(a)(ii).

<sup>9</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

greater transparency by clarifying how NASDAQ applies its existing authority to evaluate compliance with the MVLS and MVPHS listing rules for periods longer than ten consecutive business days. As such, given that the proposed change merely describes, and does not modify, NASDAQ's authority to determine compliance with the MVLS and MVPHS requirements, it does not significantly affect the protection of investors or the public interest and does not impose any significant burden on competition.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2013-128 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.



All submissions should refer to File Number SR-NASDAQ-2013-128. 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 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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer

to File Number SR-NASDAQ-2013-128 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.<sup>10</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>10</sup> 17 CFR 200.30-3(a)(12).