

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-70627; File No. SR-NASDAQ-2013-130)

October 8, 2013

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Adopt New Regulatory Fees Payable by Certain Listed Companies and Applicants

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹, and Rule 19b-4² thereunder, notice is hereby given that on October 2, 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 NASDAQ. 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

NASDAQ is proposing to adopt new regulatory fees payable by certain listed companies and applicants.

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.

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. The text of these statements may be

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 adopt new regulatory fees applicable to certain listed companies and applicants. Specifically, NASDAQ proposes to require that an acquisition company that completes a business combination pay a \$15,000 substitution listing fee in connection with the acquisition transaction. In addition, NASDAQ proposes to require that an applicant that does not list within 12 months of submitting its application pay a \$5,000 additional application fee each subsequent 12 month period that the application remains pending. NASDAQ also proposes to impose a \$5,000 application fee on companies that transfer from the NASDAQ Global or Global Select Market to the NASDAQ Capital Market. Finally, NASDAQ proposes to impose a \$5,000 review fee on companies that submit a plan to regain compliance with certain listing requirements.

Acquisition Companies

NASDAQ Rule IM-5101-2 provides rules for the listing of a company whose business plan is to complete one or more acquisitions. These companies are required to maintain most of the proceeds of their initial public offering in a deposit account until the company completes one or more acquisitions representing at least 80% of the value of the deposit account. In connection with each acquisition made during this period, the acquisition company must notify NASDAQ about the acquisition and NASDAQ staff must determine whether the combined company will meet the requirements for initial listing. In conducting this review, NASDAQ staff considers the quantitative requirements for listing and also reviews for any public interest concerns the new

officers, directors and shareholders that will become associated with the listed company as a result of the transaction.

When NASDAQ initially adopted rules concerning the listing of acquisition companies it determined not to charge an entry fee when the company completes a business combination.³ As a result, because the application review fee is a component of the entry fee, NASDAQ also does not collect an application fee in connection with its review of whether the acquisition company satisfies the initial listing standards.⁴ However, while the acquisition company is already a listed company, there are significant changes in its business, management and ownership structure at the time of the acquisition, necessitating a review that is substantially similar to the review conducted for newly listing companies. NASDAQ staff spends considerable time on such reviews.

Accordingly, NASDAQ now proposes to include a business combination described in IM-5101-2 in the definition of “Substitution Listing Events,” and thus subject these transactions to the \$15,000 fee imposed on a Substitution [sic] Listing Event in Rules 5910(f) and 5920(e). NASDAQ believes that this is appropriate, as the business combination by an acquisition company is similar to other Substitution Listing Events for which a fee is charged, such as a technical change whereby the shareholders of the original company receive a share-for-share interest in a new company.

³ See Securities Exchange Act Release No. 57685 (April 18, 2008), 73 FR 22191 (April 24, 2008) (Notice of Filing for SR-NASDAQ-2008-013, proposing additional initial listing standards for Special Purpose Acquisition Vehicles) at footnote 9 (noting that companies would not be required to pay a new listing fee at the time of an acquisition transaction).

⁴ See Rules 5910(a) and 5920(a).

NASDAQ will implement this fee immediately. However, NASDAQ will not charge this fee in connection with its review of any transaction that was publicly announced in a press release or Form 8-K prior to October 15, 2013.

Additional Application Fee

NASDAQ Rules 5910(a) and 5920(a) impose application fees on companies listing on NASDAQ. These fees are designed to recoup a portion of the costs associated with NASDAQ's review of the company.

NASDAQ has observed that when a company lists a substantial period of time after it first submitted its applications, NASDAQ must complete additional reviews of the application prior to the listing. These additional reviews are substantially equivalent to the review for a newly applying company and include, for example, additional reviews of individuals associated with the company, staff monitoring of disclosures and public filings by the applicant while its application is pending, and often extensive discussions with the applicant. To offset the costs associated with the ongoing monitoring and additional reviews for companies whose application remains open for an extended period, NASDAQ proposes to require that an applicant that does not list within 12 months of submitting its application pay an additional \$5,000 application fee each subsequent 12 month period. NASDAQ believes that the proposed additional application fee may result in companies closing unrealistic applications rather than maintaining such applications indefinitely.

Like the current application fee, the proposed additional application fee would be credited towards the entry fee payable upon listing if the application remains open until such listing. Thus, for a company that ultimately lists on NASDAQ, there would be no change in the overall fee paid. If a company does not timely pay the additional application fee, its application

will be closed and it will be required to submit a new application, and pay a new application fee, if it subsequently reapplies.

NASDAQ will implement this fee immediately, but will not charge any company until October 15, 2014. This will assure that any company with an application pending at the time of this filing will have at least one year to list before they are charged the fee.

Capital Market Transfer Fee

NASDAQ does not impose an entry fee on a company that transfers from the NASDAQ Global Market to the NASDAQ Capital Market.⁵ As a result, because the application fee is a component of the entry fee, similar to the case noted above involving acquisition companies, NASDAQ also has not collected an application fee for companies that transfer from the Global to the Capital Market. However, the review of such applications is often complicated and companies transferring from the Global Market to the Capital Market are often experiencing business challenges.⁶ As a result, to help offset a portion of the costs associated with such reviews, NASDAQ now proposes to impose a \$5,000 application fee for a company that submits an application to transfer from the Global to the Capital Market.

NASDAQ will implement this fee for transfer applications submitted after October 15, 2013. This period before implementation will allow companies with an application in progress to finalize and submit that application before the new fee is applicable.

NASDAQ will implement this fee for transfer applications submitted after October 15, 2013. This period before implementation will allow companies with an application in progress to finalize and submit that application before the new fee is applicable. [sic]

⁵ Rule 5920(a)(7)(i). The NASDAQ Global Market also includes the Global Select tier.

⁶ In fact, many companies making such transfers do so in connection with their failure to meet a Global Market continued listing standard. Such companies would not also be subject to the proposed compliance plan review fee discussed below.

Compliance Plan Review Fee

NASDAQ proposes to impose a \$5,000 review fee on non-compliant companies that submit a plan to regain compliance with certain of the listing requirements. Rule 5810(c)(2) allows a listed company to submit a plan to regain compliance when it fails to meet certain listing requirements. NASDAQ dedicates considerable staff resources to reviewing these plans of compliance. At present, the cost of that time is allocated across all companies as part of the listing fee. In order to allocate this cost more equitably to the individual companies who directly benefit, NASDAQ proposes to adopt a \$5,000 review fee for the review of certain compliance plans.

NASDAQ believes that the proposed compliance plan review fee is appropriate because companies often have the ability to foresee non-compliance with these listing requirements and take appropriate action before becoming non-compliant. In addition, companies have a period of time, generally either 45 or 60 days, before they must submit a plan to regain compliance⁷ and, if a company achieves compliance during this time, it would not be required to submit a plan or pay the proposed compliance plan review fee. When a company does become non-compliant and cannot cure the deficiency before the plan is due, NASDAQ's experience is that the company's plan often requires detailed analysis by staff to determine whether the plan can enable the company to regain compliance in the near term.⁸ Depending on the underlying listing requirement, NASDAQ staff may also need to expend time discussing the viability of the plan with the company's outside auditor and advisors and/or reviewing transactional documents.

⁷ Rule 5810(c)(2)(A).

⁸ A company's plan with respect to a quantitative deficiency may be for it to transfer from the Global Market to the Capital Market, which has lower quantitative listing requirements. In this case, the company must submit the application transfer fee in proposed Rule 5920(a)(11), described above, but would not also pay a compliance plan review fee.

NASDAQ does not propose to impose the compliance plan review fee on plans to regain compliance with deficiencies from board of director and board committee requirements where the company is not eligible for a cure period, as described in Rule 5810(c)(2)(A)(iii) [sic]. NASDAQ's experience is that these types of deficiencies often arise unexpectedly from events outside the control of the company, such as the death or resignation of a director. Further, NASDAQ has observed that the plans to regain compliance with these deficiencies are typically straight forward and do not require significant staff analysis. For example, a typical plan might describe the hiring of a director search firm or providing the resume of a director candidate who is concluding his or her own due diligence on the company before agreeing to join the board. As such, NASDAQ does not believe it is necessary to impose a plan review fee in these situations.

NASDAQ will implement this fee for plans submitted in response to deficiency notifications sent after October 15, 2013.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁹ in general and with Sections 6(b)(4) and (5) of the Act,¹⁰ in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities, and does not unfairly discriminate between customers, issuers, brokers or dealers.

NASDAQ believes that the proposed fees are reasonable because they will better reflect NASDAQ's costs in reviewing applications and compliance plans and help ensure adequate resources for NASDAQ's listing compliance program. In addition, NASDAQ believes that such fees are reasonable and that none of the proposed fees are unduly burdensome or would

⁹ 15 U.S.C. 78f.

¹⁰ 15 U.S.C. 78f(b)(4) and (5).

discourage any company from pursuing an application or submitting a plan of compliance, as applicable.

The proposed changes are equitable and not unfairly discriminatory because they would apply equally to all similarly situated companies. In addition, aligning NASDAQ's fees with the costs incurred for specific actions will help minimize the extent that companies that do not utilize the application process, or which are compliant with all listing standards, may subsidize the costs of review for other companies. NASDAQ believes that excluding companies that submit a plan for a board or committee deficiency from the compliance plan review fee is not unfairly discriminatory because these plans are generally simpler and require fewer resources and less time to review.

NASDAQ also believes that the proposed fees are consistent with the investor protection objectives of Section 6(b)(5) of the Act¹¹ in that they are designed to promote just and equitable principles of trade, to remove impediments to a free and open market and national market systems, and in general to protect investors and the public interest. Specifically, the fees are designed to ensure that there are adequate resources for NASDAQ's listing compliance program, which helps to assure that listing standards are properly enforced and investors are protected.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The market for listing services is extremely competitive and listed companies may freely choose alternative venues based on the aggregate fees assessed, and the value provided by each listing. This rule proposal does not burden competition with other listing venues, which are

¹¹ 15 U.S.C. 78f(b)(5).

similarly free to align their fees on the costs incurred by the process they offer. For these reasons, NASDAQ does not believe that the proposed rule change will result in any burden on competition for listings.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹² and paragraph (f) of Rule 19b-4 thereunder.¹³ 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 necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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-2013-130 on the subject line.

¹² 15 U.S.C. 78s(b)(3)(A).

¹³ 17 CFR 240.19b-4(f).

Paper comments:

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

All submissions should refer to File Number SR-NASDAQ-2013-130. 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; 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-2013-130 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.¹⁴

Kevin M. O'Neill
Deputy Secretary

¹⁴ 17 CFR 200.30-3(a)(12).