

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * <input type="text" value="32"/>	SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 Form 19b-4	File No.* SR - <input type="text" value="2020"/> - * <input type="text" value="002"/> Amendment No. (req. for Amendments *) <input type="text"/>
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Filing by The Nasdaq Stock Market LLC
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input checked="" type="checkbox"/>	Amendment * <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input checked="" type="checkbox"/>	Section 19(b)(3)(A) * <input type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
Pilot <input type="checkbox"/>			Rule		
Extension of Time Period for Commission Action * <input type="checkbox"/>		Date Expires * <input type="text"/>	<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	
			<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)	

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010	Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934
Section 806(e)(1) * <input type="checkbox"/>	Section 806(e)(2) * <input type="checkbox"/>
	Section 3C(b)(2) * <input type="checkbox"/>

Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>
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Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked *).

Proposal to amend the procedures governing the introduction of legal arguments and material information by companies in a proceeding before a Hearings Panel

Contact Information

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name * Last Name *

Title *

E-mail *

Telephone * Fax

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

(Title *)

Date

By

(Name *)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFF website.

Form 19b-4 Information *

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change *

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies *

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

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Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit 3 - Form, Report, or Questionnaire

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit 4 - Marked Copies

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

(a) The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal to amend the procedures governing the introduction of legal arguments and material information by companies in a proceeding before a Hearings Panel.

A notice of the proposed rule change for publication in the Federal Register is attached as Exhibit 1. The text of the proposed rule change is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by the Board of Directors of the Exchange on November 7, 2019. No other action is necessary for the filing of the rule change.

Questions and comments on the proposed rule change may be directed to:

Joanne Pedone
Assistant General Counsel
Nasdaq, Inc.
301-978-8196

or

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Arnold Golub
Deputy General Counsel
Nasdaq, Inc.
301-978-8075

3. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

a. Purpose

A company may, within seven calendar days of the date of a staff delisting determination notification, public reprimand letter, or written denial of a listing application, request a written or oral hearing before a Hearings Panel to review the staff delisting determination, public reprimand letter, or written denial of a listing application.³ The Hearings Department will then schedule a hearing to take place before a Hearings Panel, generally within 45 days of the request for a hearing.⁴ The Hearings Department will send written acknowledgment of the company's hearing request and inform the company of the date, time, and location of the hearing, and the deadlines for written submissions to the Hearings Panel.⁵ A company may waive its right to an oral hearing and instead seek a decision by the Hearings Panel based solely on its written submissions. To improve the hearings process, the Exchange is proposing to revise the procedures governing the introduction of legal arguments and material information by companies in a written or oral hearing before a Hearings Panel.

³ See Listing Rule 5815(a)(1)(A).

⁴ See Listing Rule 5815(a)(4). Under that rule, the company will be provided at least ten calendar days' notice of the hearing unless the company waives such notice.

⁵ Id.

Specifically, the Exchange is proposing to revise, as discussed below, Listing Rule 5815(a)(5), which currently provides that a company may submit to the Hearings Department a written plan of compliance and request that the Hearings Panel grant an exception to the listing standards for a limited time period, or may set forth specific grounds for the company's contention that the issuance of a staff delisting determination, public reprimand letter, or denial of a listing application, was in error, and may also submit public documents or other written material in support of its position, including any information not available at the time of the staff determination. The Exchange is also proposing to revise Listing Rule 5815(a)(6), which currently provides that at an oral hearing, the company may make such presentation as it deems appropriate, and the Hearings Panel may question any representative appearing at the hearing. To improve the efficient and effective functioning of the hearings process, the Exchange proposes amending Listing Rule 5815(a)(5) and (a)(6) to: (1) establish a requirement, and set forth the process, for a company to provide a written submission and written update in connection with either a written or oral hearing; (2) prohibit a company from introducing in a written update or during an oral hearing before a Hearings Panel any legal arguments that were not previously raised; and (3) prohibit a company from introducing in a written update or during an oral hearing before a Hearings Panel any material information regarding the company's appeal of a delisting determination, public reprimand letter, or denial of a listing application unless the material information was previously raised by the company in writing, or the company can show that the material information did not earlier exist or exceptional or unusual circumstances are present.

The proposed revisions to Listing Rule 5815 would contain an express requirement that for both oral and written hearings a company must state in writing with specificity the grounds upon which it is seeking review in advance of a hearing (the “Written Submission”).⁶ This requirement will ensure that a company makes a Written Submission. In addition, the requirement that a company state “with specificity” the grounds on which it is seeking review will ensure that the Written Submission includes sufficient detail to be useful in the Hearings Panel’s review of the record before the hearing.

The proposed revisions to Listing Rule 5815 will clarify the ability of Nasdaq staff to respond in writing to a company’s Written Submission. The proposed revisions to Listing Rule 5815 would also provide a company with the option to supplement the company’s Written Submission by providing a written update to the Hearings Department no later than two business days in advance of the hearing, briefing the Hearings Panel on any new material information that has transpired since its Written Submission (the “Written Update”).⁷ The Exchange believes that allowing for a Written Update will improve the hearings process by allowing a company to provide updated

⁶ As noted above, the Hearings Department generally calendars a hearing within 45 days of the request for a hearing and will establish deadlines for written submissions to the Hearings Panel. See Listing Rule 5815(a)(4). As determined by the Hearings Department, both oral and written hearing matters are generally considered on Thursdays, and the company’s written submission is typically due on the third Friday before the hearing. The Hearings Department will generally establish the Thursday before the Hearing as the deadline for Nasdaq staff to respond in writing.

⁷ Because one of the purposes of the Written Update is to allow a company to supplement its Written Submission, a company would be permitted to submit a Written Update even if Nasdaq staff does not respond in writing to the company’s Written Submission.

information about fast-moving transactions, thereby enabling the Hearings Panel to prepare for the hearing with the most current data available on the company's steps toward achieving or maintaining compliance.

To ensure that companies provide the requisite information in a Written Submission or a Written Update, the Exchange proposes including certain evidentiary standards in proposed Listing Rule 5815. Under the proposed revisions to Listing Rule 5815, legal arguments are only permitted in the Written Submission, and the company must include in the Written Submission all legal arguments on which it intends to rely. A company that does not raise with specificity a legal argument in its Written Submission will be prohibited from introducing a new legal argument in the Written Update or during the hearing before the Hearings Panel.⁸ The Hearings Panel will determine that a company has raised a legal argument with specificity if the legal argument includes sufficient detail to be useful in the Hearings Panel's review of the record before the hearing.

⁸ There is precedent for the requirement that an appellant include all legal arguments in an opening brief, such as the Written Submission in the SEC Rules of Practice and by the Federal Rules of Appellate Procedure. See, e.g., SEC Rules of Practice 420, 17 C.F.R. § 201.420(c) (governing appeals to the Commission of determinations by Self-Regulatory Organizations, which requires that an application for review “set forth in summary form a brief statement of alleged errors in the determination and supporting reasons therefor” and that any exception to a determination “not supported in an opening brief” may “be deemed to have been waived”). See also SEC Rules of Practice Rule 222, 17 C.F.R. § 201.222(a) (governing prehearing submissions, which allows a hearing officer, on his or her own motion, or at the request of a party or other participant, to order any party to furnish information including “an outline or narrative summary of its case or defense” and “the legal theories upon which it will rely”). See, e.g., *Barna v. Bd. of Sch. Dirs. of the Panther Valley Sch. Dist.*, 877 F.3d 136, 145-46 (3d Cir. 2017) (noting that Fed. R. App. P. 28 requires an appellant's opening brief to set forth and address each argument the appellant wishes to pursue in an appeal and that the court will not “reach arguments raised for the first time in a reply brief or at oral argument”).

Otherwise, when a company raises a legal argument during a hearing or right before the hearing that was not contained in its Written Submission, it deprives Nasdaq staff of the opportunity to provide a thorough response to the legal argument and it deprives the Hearings Panel the benefit of Nasdaq staff's views and perspective. As a result, the Hearings Panel would not be able to properly adjudicate the legal issue. While new legal arguments are not permitted in the Written Update, the Exchange does not believe that any prejudice will result to a company from this requirement because the Exchange believes a company would have developed its legal arguments early in the hearings process as part of formulating its Written Submission. The Written Update is solely intended to give a company the additional opportunity to provide an update on any new material information that has transpired since its Written Submission and to reply to Nasdaq staff's response.⁹

In addition, under the proposed revisions to Listing Rule 5815, a company that fails to raise with specificity any material information relating to its appeal of a delisting determination, public reprimand letter, or denial of a listing application in either its Written Submission or Written Update ("New Material Information"), with certain exceptions, will be prohibited from introducing such information during the oral hearing before the Hearings Panel. Information would not be considered New Material Information if, in the Hearings Panel's opinion, the company had previously included information with sufficient detail to be useful in the Hearings Panel's review of the

⁹ Nasdaq has observed that companies are primarily seeking to introduce material information such as a new equity offering or merger, as opposed to legal arguments, at the hearing; thus, the Written Update will provide companies with an opportunity to update the Hearings Panel with material information closer in time to the hearing, but far enough in advance that the Hearings Panel has adequate time to consider such information.

record before the hearing. This revision is intended to improve the Hearings Panel's timely access to material information, and the proposed Listing Rule 5815 includes certain safeguards to ensure such access.

New Material Information would be permitted in three situations. First, the prohibition on introducing New Material Information during the hearing only applies absent solicitation from the Hearings Panel. This is to ensure that the Hearings Panel is not restricted or limited in its ability to ask questions of a company and has the latitude needed to receive answers to its inquiries during the oral hearing.

Second, if the Hearings Panel determines that the company has shown that the New Material Information did not exist at the time the company was permitted to submit a Written Update, i.e. the information is truly new, then the company will be permitted to introduce such evidence at the hearing. For example, where a key component of a company's compliance plan is a merger, and the company obtains a fully executed version of the merger agreement the day before the hearing, the executed merger agreement would constitute information that did not exist at the time the company was permitted to submit a Written Update. However, the fact that the company was pursuing a merger, the potential merger parties, and the material terms of the contemplated merger, should have been previously disclosed by the company, as some or all of such information likely existed at the time the company was permitted to submit a Written Update.

Third, if the Hearings Panel determines that the company has shown that "exceptional or unusual circumstances" exist that warrant consideration of the New Material Information, then the company will be permitted to introduce such evidence at

the oral hearing. As stated in the proposed revisions to Listing Rule 5815, “exceptional or unusual circumstances” would include, but are not necessarily limited to, material information that was not earlier discoverable by the listed company despite all reasonable measures having been taken.¹⁰ This is intended to provide a prudent safety valve for companies that have otherwise exercised due diligence in providing timely information to the Hearings Panel, yet it is circumscribed to the degree necessary to avoid becoming an exception that swallows the general standard.

Where a Hearings Panel permits a company to introduce New Material Information, the proposed revisions to Listing Rule 5815 also provides Nasdaq staff an opportunity to respond in writing to the New Material Information within up to three business days, or such shorter time as the Hearings Panel requests, following the oral hearing. Because the company had the opportunity to present its view on the New Material Information at the oral hearing, the company may respond to the staff’s submission only if the Hearings Panel requests it do so. This approach balances the company’s need to introduce new information during a hearing; the Nasdaq staff’s ability to provide a fulsome review of such information to benefit the Hearings Panel’s ultimate consideration of an issue; and the interest in timely resolving a matter after a hearing.

The proposed changes to Listing Rule 5815 will be operative for any company that requests a hearing to review a staff delisting determination, public reprimand letter,

¹⁰ Cf. SEC Rules of Practice 452, 17 C.F.R. § 201.452 (a party may file a motion for leave to adduce additional evidence prior to the issuance of a decision by the Commission upon a “show[ing] with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously”).

or written denial of a listing application after the date of an SEC approval of the proposed rule change.¹¹

The Exchange believes that the above-mentioned revisions to Listing Rule 5815 will enhance the hearings process by providing the Hearings Panel with the most developed record in as timely a manner as possible. The Exchange further believes that the proposed revisions will avoid situations that Nasdaq staff has observed where, in advance of a hearing, companies provide little information about their plan to achieve or regain compliance or regarding their appeal of a public reprimand letter or denial of an initial listing application, and instead present such information for the first time during the hearing. When companies belatedly provide information to the Hearings Panel, Nasdaq staff has observed that it does not provide the Hearings Panel with adequate time to prepare for and consider the information in advance of the hearing. Similarly, where companies belatedly provide legal arguments to the Hearings Panel, Nasdaq staff is unable to adequately brief the Hearings Panel concerning its response to the legal argument and, as a result, the Hearings Panel does not have adequate time to prepare for and consider the legal argument in advance of the hearing and thus cannot properly adjudicate the issue.

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹² in general, and furthers the objectives of Sections 6(b)(5) and 6(b)(7) of the Act,¹³

¹¹ Companies that have requested a written or oral hearing before a Hearings Panel to review the staff delisting determination, public reprimand letter, or written denial of a listing application prior to the date of SEC approval of the proposed rule change will be subject to the rule text in Listing Rule 5815(a)(5)-(6) that was effective prior to the date of such SEC approval. For such companies, the online rulebook will contain a hyperlink to the older version of the rule.

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, by preventing companies from engaging in gamesmanship in the hearings process while affording companies a fair process and reasonable opportunity to present material arguments and evidence to the Hearings Panel at an appropriate time in the hearings process.

Specifically, this proposal will prevent companies from providing substantive information for the first time during a hearing, after having provided the Hearings Panel either no written compliance plan before the hearing or little detail regarding their compliance plan or appeal of a public reprimand letter or denial of an initial listing application before the hearing. In such circumstances, a Hearings Panel has little or no opportunity to review material information regarding a company's compliance plan or a company's appellate position, or to formulate questions to ask the company, in advance of the hearing. As a result, the Hearings Panel may need more time or information to fully consider the matter following the hearing. In the Exchange's view, these current practices effectively reward a company that withholds information by extending the time it remains listed pending a Hearings Panel decision.¹⁴

Likewise, when companies withhold legal arguments from their Written Submissions regarding a compliance plan or their appellate position, Nasdaq staff may be

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(5) and (7).

¹⁴ Generally, a timely request for a hearing stays the suspension and delisting action pending the issuance of a written Panel Decision. Listing Rule 5815(a)(1)(B).

unable to fully develop legal arguments or advise the Hearings Panel effectively regarding a company's request for relief. As a result, the Hearings Panel would not be able to properly adjudicate the legal issue during the hearing. While legal arguments are not permitted in the Written Update, the Exchange does not believe that any prejudice will result to a company because the Exchange believes a company would have developed its legal arguments early in the hearings process as part of formulating its Written Submission.

The Exchange believes that this proposal is in keeping with the principles described in Sections 6(b)(5) and 6(b)(7) because it will ensure that the hearings process operates effectively and efficiently, allowing companies the opportunity to present information and legal arguments about their appellate position or ability to achieve and maintain compliance, while also affording the Hearings Panel an opportunity to review that information or legal argument and benefit from Nasdaq staff's views about the information presented. As such, the Exchange believes that this proposal will strengthen the integrity and transparency of the hearings process. Furthermore, the Exchange believes that the proposed changes to the hearings process appropriately balance the potential harm of a delisting decision or a denial of initial listing to the company and its current investors with the expectations of prospective investors, who are entitled to believe that a company listed on Nasdaq satisfies all of Nasdaq's listing requirements.¹⁵

Likewise, the Exchange believes that the proposed changes to the hearings process

¹⁵ 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.”).

appropriately balance the potential harm to companies issued a public reprimand letter with an improved opportunity to adequately develop the record in advance of the oral hearing.

The Exchange believes that the proposed process is fair because companies retain the ability to introduce all relevant information before a Hearings Panel, and the proposed changes require that they do so in a more efficient way that helps to minimize the length of time a Hearings Panel needs to make a decision. The Exchange further believes that the proposed process limiting legal arguments to the Written Submission is fair because the Exchange believes a company would have developed its legal arguments early in the hearings process as part of formulating its Written Submission. In addition, building in time for Nasdaq staff to provide a thorough response to the legal argument in advance of the hearing allows the Hearings Panel to properly adjudicate a legal issue with the benefit of having fully considered the company's and Nasdaq staff's views in advance of the hearing.

4. 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 seeking review of a delisting determination, public reprimand letter, or denial of an initial listing application before a Hearings Panel would be affected in the same manner by this change. Moreover, as described above, Nasdaq believes that the proposed rule change is necessary to enhance investor protection from companies that withhold material information or legal arguments from the Hearings Panel until the day of the hearing. This conduct may result in the Hearings Panel's need for additional time

to review the information and, thus, potentially unqualified companies remaining listed longer pending a Hearings Panel decision.

5. 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.

6. Extension of Time Period for Commission Action

The Exchange does not consent to an extension of the time period for Commission action.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

1. Notice of Proposed Rule Change for publication in the Federal Register.

5. Text of the proposed rule change.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. _____ ; File No. SR-NASDAQ-2020-002)

June __, 2020

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Amend the Procedures Governing the Introduction of Legal Arguments and Material Information by Companies in a Proceeding Before a Hearings Panel

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 June 23, 2020, 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 procedures governing the introduction of legal arguments and material information by companies in a proceeding before a Hearings Panel.

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

A company may, within seven calendar days of the date of a staff delisting determination notification, public reprimand letter, or written denial of a listing application, request a written or oral hearing before a Hearings Panel to review the staff delisting determination, public reprimand letter, or written denial of a listing application.³ The Hearings Department will then schedule a hearing to take place before a Hearings Panel, generally within 45 days of the request for a hearing.⁴ The Hearings Department will send written acknowledgment of the company's hearing request and inform the company of the date, time, and location of the hearing, and the deadlines for written submissions to the Hearings Panel.⁵ A company may waive its right to an oral hearing and instead seek a decision by the Hearings Panel based solely on its written submissions.

³ See Listing Rule 5815(a)(1)(A).

⁴ See Listing Rule 5815(a)(4). Under that rule, the company will be provided at least ten calendar days' notice of the hearing unless the company waives such notice.

⁵ Id.

To improve the hearings process, the Exchange is proposing to revise the procedures governing the introduction of legal arguments and material information by companies in a written or oral hearing before a Hearings Panel.

Specifically, the Exchange is proposing to revise, as discussed below, Listing Rule 5815(a)(5), which currently provides that a company may submit to the Hearings Department a written plan of compliance and request that the Hearings Panel grant an exception to the listing standards for a limited time period, or may set forth specific grounds for the company's contention that the issuance of a staff delisting determination, public reprimand letter, or denial of a listing application, was in error, and may also submit public documents or other written material in support of its position, including any information not available at the time of the staff determination. The Exchange is also proposing to revise Listing Rule 5815(a)(6), which currently provides that at an oral hearing, the company may make such presentation as it deems appropriate, and the Hearings Panel may question any representative appearing at the hearing. To improve the efficient and effective functioning of the hearings process, the Exchange proposes amending Listing Rule 5815(a)(5) and (a)(6) to: (1) establish a requirement, and set forth the process, for a company to provide a written submission and written update in connection with either a written or oral hearing; (2) prohibit a company from introducing in a written update or during an oral hearing before a Hearings Panel any legal arguments that were not previously raised; and (3) prohibit a company from introducing in a written update or during an oral hearing before a Hearings Panel any material information regarding the company's appeal of a delisting determination, public reprimand letter, or denial of a listing application unless the material information was previously raised by

the company in writing, or the company can show that the material information did not earlier exist or exceptional or unusual circumstances are present.

The proposed revisions to Listing Rule 5815 would contain an express requirement that for both oral and written hearings a company must state in writing with specificity the grounds upon which it is seeking review in advance of a hearing (the “Written Submission”).⁶ This requirement will ensure that a company makes a Written Submission. In addition, the requirement that a company state “with specificity” the grounds on which it is seeking review will ensure that the Written Submission includes sufficient detail to be useful in the Hearings Panel’s review of the record before the hearing.

The proposed revisions to Listing Rule 5815 will clarify the ability of Nasdaq staff to respond in writing to a company’s Written Submission. The proposed revisions to Listing Rule 5815 would also provide a company with the option to supplement the company’s Written Submission by providing a written update to the Hearings Department no later than two business days in advance of the hearing, briefing the Hearings Panel on any new material information that has transpired since its Written Submission (the “Written Update”).⁷ The Exchange believes that allowing for a Written

⁶ As noted above, the Hearings Department generally calendars a hearing within 45 days of the request for a hearing and will establish deadlines for written submissions to the Hearings Panel. See Listing Rule 5815(a)(4). As determined by the Hearings Department, both oral and written hearing matters are generally considered on Thursdays, and the company’s written submission is typically due on the third Friday before the hearing. The Hearings Department will generally establish the Thursday before the Hearing as the deadline for Nasdaq staff to respond in writing.

⁷ Because one of the purposes of the Written Update is to allow a company to supplement its Written Submission, a company would be permitted to submit a

Update will improve the hearings process by allowing a company to provide updated information about fast-moving transactions, thereby enabling the Hearings Panel to prepare for the hearing with the most current data available on the company's steps toward achieving or maintaining compliance.

To ensure that companies provide the requisite information in a Written Submission or a Written Update, the Exchange proposes including certain evidentiary standards in proposed Listing Rule 5815. Under the proposed revisions to Listing Rule 5815, legal arguments are only permitted in the Written Submission, and the company must include in the Written Submission all legal arguments on which it intends to rely. A company that does not raise with specificity a legal argument in its Written Submission will be prohibited from introducing a new legal argument in the Written Update or during the hearing before the Hearings Panel.⁸ The Hearings Panel will determine that a

Written Update even if Nasdaq staff does not respond in writing to the company's Written Submission.

⁸ There is precedent for the requirement that an appellant include all legal arguments in an opening brief, such as the Written Submission in the SEC Rules of Practice and by the Federal Rules of Appellate Procedure. See, e.g., SEC Rules of Practice 420, 17 C.F.R. § 201.420(c) (governing appeals to the Commission of determinations by Self-Regulatory Organizations, which requires that an application for review “set forth in summary form a brief statement of alleged errors in the determination and supporting reasons therefor” and that any exception to a determination “not supported in an opening brief” may “be deemed to have been waived”). See also SEC Rules of Practice Rule 222, 17 C.F.R. § 201.222(a) (governing prehearing submissions, which allows a hearing officer, on his or her own motion, or at the request of a party or other participant, to order any party to furnish information including “an outline or narrative summary of its case or defense” and “the legal theories upon which it will rely”). See, e.g., *Barna v. Bd. of Sch. Dirs. of the Panther Valley Sch. Dist.*, 877 F.3d 136, 145-46 (3d Cir. 2017) (noting that Fed. R. App. P. 28 requires an appellant's opening brief to set forth and address each argument the appellant wishes to pursue in an appeal and that the court will not “reach arguments raised for the first time in a reply brief or at oral argument”).

company has raised a legal argument with specificity if the legal argument includes sufficient detail to be useful in the Hearings Panel's review of the record before the hearing.

Otherwise, when a company raises a legal argument during a hearing or right before the hearing that was not contained in its Written Submission, it deprives Nasdaq staff of the opportunity to provide a thorough response to the legal argument and it deprives the Hearings Panel the benefit of Nasdaq staff's views and perspective. As a result, the Hearings Panel would not be able to properly adjudicate the legal issue. While new legal arguments are not permitted in the Written Update, the Exchange does not believe that any prejudice will result to a company from this requirement because the Exchange believes a company would have developed its legal arguments early in the hearings process as part of formulating its Written Submission. The Written Update is solely intended to give a company the additional opportunity to provide an update on any new material information that has transpired since its Written Submission and to reply to Nasdaq staff's response.⁹

In addition, under the proposed revisions to Listing Rule 5815, a company that fails to raise with specificity any material information relating to its appeal of a delisting determination, public reprimand letter, or denial of a listing application in either its Written Submission or Written Update ("New Material Information"), with certain exceptions, will be prohibited from introducing such information during the oral hearing

⁹ Nasdaq has observed that companies are primarily seeking to introduce material information such as a new equity offering or merger, as opposed to legal arguments, at the hearing; thus, the Written Update will provide companies with an opportunity to update the Hearings Panel with material information closer in time to the hearing, but far enough in advance that the Hearings Panel has adequate time to consider such information.

before the Hearings Panel. Information would not be considered New Material Information if, in the Hearings Panel's opinion, the company had previously included information with sufficient detail to be useful in the Hearings Panel's review of the record before the hearing. This revision is intended to improve the Hearings Panel's timely access to material information, and the proposed Listing Rule 5815 includes certain safeguards to ensure such access.

New Material Information would be permitted in three situations. First, the prohibition on introducing New Material Information during the hearing only applies absent solicitation from the Hearings Panel. This is to ensure that the Hearings Panel is not restricted or limited in its ability to ask questions of a company and has the latitude needed to receive answers to its inquiries during the oral hearing.

Second, if the Hearings Panel determines that the company has shown that the New Material Information did not exist at the time the company was permitted to submit a Written Update, i.e. the information is truly new, then the company will be permitted to introduce such evidence at the hearing. For example, where a key component of a company's compliance plan is a merger, and the company obtains a fully executed version of the merger agreement the day before the hearing, the executed merger agreement would constitute information that did not exist at the time the company was permitted to submit a Written Update. However, the fact that the company was pursuing a merger, the potential merger parties, and the material terms of the contemplated merger, should have been previously disclosed by the company, as some or all of such information likely existed at the time the company was permitted to submit a Written Update.

Third, if the Hearings Panel determines that the company has shown that “exceptional or unusual circumstances” exist that warrant consideration of the New Material Information, then the company will be permitted to introduce such evidence at the oral hearing. As stated in the proposed revisions to Listing Rule 5815, “exceptional or unusual circumstances” would include, but are not necessarily limited to, material information that was not earlier discoverable by the listed company despite all reasonable measures having been taken.¹⁰ This is intended to provide a prudent safety valve for companies that have otherwise exercised due diligence in providing timely information to the Hearings Panel, yet it is circumscribed to the degree necessary to avoid becoming an exception that swallows the general standard.

Where a Hearings Panel permits a company to introduce New Material Information, the proposed revisions to Listing Rule 5815 also provides Nasdaq staff an opportunity to respond in writing to the New Material Information within up to three business days, or such shorter time as the Hearings Panel requests, following the oral hearing. Because the company had the opportunity to present its view on the New Material Information at the oral hearing, the company may respond to the staff’s submission only if the Hearings Panel requests it do so. This approach balances the company’s need to introduce new information during a hearing; the Nasdaq staff’s ability to provide a fulsome review of such information to benefit the Hearings Panel’s ultimate consideration of an issue; and the interest in timely resolving a matter after a hearing.

¹⁰ Cf. SEC Rules of Practice 452, 17 C.F.R. § 201.452 (a party may file a motion for leave to adduce additional evidence prior to the issuance of a decision by the Commission upon a “show[ing] with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously”).

The proposed changes to Listing Rule 5815 will be operative for any company that requests a hearing to review a staff delisting determination, public reprimand letter, or written denial of a listing application after the date of an SEC approval of the proposed rule change.¹¹

The Exchange believes that the above-mentioned revisions to Listing Rule 5815 will enhance the hearings process by providing the Hearings Panel with the most developed record in as timely a manner as possible. The Exchange further believes that the proposed revisions will avoid situations that Nasdaq staff has observed where, in advance of a hearing, companies provide little information about their plan to achieve or regain compliance or regarding their appeal of a public reprimand letter or denial of an initial listing application, and instead present such information for the first time during the hearing. When companies belatedly provide information to the Hearings Panel, Nasdaq staff has observed that it does not provide the Hearings Panel with adequate time to prepare for and consider the information in advance of the hearing. Similarly, where companies belatedly provide legal arguments to the Hearings Panel, Nasdaq staff is unable to adequately brief the Hearings Panel concerning its response to the legal argument and, as a result, the Hearings Panel does not have adequate time to prepare for and consider the legal argument in advance of the hearing and thus cannot properly adjudicate the issue.

¹¹ Companies that have requested a written or oral hearing before a Hearings Panel to review the staff delisting determination, public reprimand letter, or written denial of a listing application prior to the date of SEC approval of the proposed rule change will be subject to the rule text in Listing Rule 5815(a)(5)-(6) that was effective prior to the date of such SEC approval. For such companies, the online rulebook will contain a hyperlink to the older version of the rule.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹² in general, and furthers the objectives of Sections 6(b)(5) and 6(b)(7) of the Act,¹³ 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, by preventing companies from engaging in gamesmanship in the hearings process while affording companies a fair process and reasonable opportunity to present material arguments and evidence to the Hearings Panel at an appropriate time in the hearings process.

Specifically, this proposal will prevent companies from providing substantive information for the first time during a hearing, after having provided the Hearings Panel either no written compliance plan before the hearing or little detail regarding their compliance plan or appeal of a public reprimand letter or denial of an initial listing application before the hearing. In such circumstances, a Hearings Panel has little or no opportunity to review material information regarding a company's compliance plan or a company's appellate position, or to formulate questions to ask the company, in advance of the hearing. As a result, the Hearings Panel may need more time or information to fully consider the matter following the hearing. In the Exchange's view, these current

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(5) and (7).

practices effectively reward a company that withholds information by extending the time it remains listed pending a Hearings Panel decision.¹⁴

Likewise, when companies withhold legal arguments from their Written Submissions regarding a compliance plan or their appellate position, Nasdaq staff may be unable to fully develop legal arguments or advise the Hearings Panel effectively regarding a company's request for relief. As a result, the Hearings Panel would not be able to properly adjudicate the legal issue during the hearing. While legal arguments are not permitted in the Written Update, the Exchange does not believe that any prejudice will result to a company because the Exchange believes a company would have developed its legal arguments early in the hearings process as part of formulating its Written Submission.

The Exchange believes that this proposal is in keeping with the principles described in Sections 6(b)(5) and 6(b)(7) because it will ensure that the hearings process operates effectively and efficiently, allowing companies the opportunity to present information and legal arguments about their appellate position or ability to achieve and maintain compliance, while also affording the Hearings Panel an opportunity to review that information or legal argument and benefit from Nasdaq staff's views about the information presented. As such, the Exchange believes that this proposal will strengthen the integrity and transparency of the hearings process. Furthermore, the Exchange believes that the proposed changes to the hearings process appropriately balance the potential harm of a delisting decision or a denial of initial listing to the company and its current investors with the expectations of prospective investors, who are entitled to

¹⁴ Generally, a timely request for a hearing stays the suspension and delisting action pending the issuance of a written Panel Decision. Listing Rule 5815(a)(1)(B).

believe that a company listed on Nasdaq satisfies all of Nasdaq's listing requirements.¹⁵ Likewise, the Exchange believes that the proposed changes to the hearings process appropriately balance the potential harm to companies issued a public reprimand letter with an improved opportunity to adequately develop the record in advance of the oral hearing.

The Exchange believes that the proposed process is fair because companies retain the ability to introduce all relevant information before a Hearings Panel, and the proposed changes require that they do so in a more efficient way that helps to minimize the length of time a Hearings Panel needs to make a decision. The Exchange further believes that the proposed process limiting legal arguments to the Written Submission is fair because the Exchange believes a company would have developed its legal arguments early in the hearings process as part of formulating its Written Submission. In addition, building in time for Nasdaq staff to provide a thorough response to the legal argument in advance of the hearing allows the Hearings Panel to properly adjudicate a legal issue with the benefit of having fully considered the company's and Nasdaq staff's views in advance of the hearing.

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 seeking review of a delisting determination, public reprimand letter,

¹⁵ 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.”).

or denial of an initial listing application before a Hearings Panel would be affected in the same manner by this change. Moreover, as described above, Nasdaq believes that the proposed rule change is necessary to enhance investor protection from companies that withhold material information or legal arguments from the Hearings Panel until the day of the hearing. This conduct may result in the Hearings Panel's need for additional time to review the information and, thus, potentially unqualified companies remaining listed longer pending a Hearings Panel decision.

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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date 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-2020-002 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-2020-002. 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; 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-2020-002 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.¹⁶

J. Matthew DeLesDernier
Assistant Secretary

¹⁶ 17 CFR 200.30-3(a)(12).

EXHIBIT 5

Deleted text is [bracketed]. New text is underlined.

The Nasdaq Stock Market Rules

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5815. Review of Staff Determinations by Hearings Panel

When a Company receives a Staff Delisting Determination or a Public Reprimand Letter issued by the Listing Qualifications Department, or when its application for initial listing is denied, it may request in writing that the Hearings Panel review the matter in a written or an oral hearing. This section sets forth the procedures for requesting a hearing before a Hearings Panel, describes the Hearings Panel and the possible outcomes of a hearing, and sets forth Hearings Panel procedures.

(a) Procedures for Requesting and Preparing for a Hearing

(1) – (4) No change.

(5) Submissions from Company

The Company must provide a written submission to the Hearings Department, to which Staff may respond in writing, stating with specificity the grounds on which the Company is seeking review of the Staff Delisting Determination notification, Public Reprimand Letter, or written denial of a listing application in accordance with subsection (a)(1) of this Rule (“Written Submission”). The Company must include in the Written Submission all legal arguments on which it intends to rely. As appropriate, [T]the Company’s Written Submission may include[submit to the Hearings Department] a written plan of compliance and request that the Hearings Panel grant an exception to the listing standards for a limited time period, as permitted by Rule 5815(c)(1)(A) or may set forth specific grounds for the Company’s contention that the issuance of a Staff Delisting Determination, Public Reprimand Letter, or denial of a listing application, was in error, and may also submit public documents or other written material in support of its position, including any information not available at the time of the Staff Determination. The Company may supplement the Written Submission by providing a written update to the Hearings Department (“Written Update”) no later than two business days in advance of the hearing. The Written Update may not include any legal argument not raised by the Company with specificity in the Written Submission. The Hearings Panel will review the written record, as described in Rule 5840(a), before the hearing.

(6) Presentation at Hearing

At an oral hearing, the Company may make such presentation as it deems appropriate, including the appearance by its officers, directors, accountants, counsel, investment bankers, or other persons, and the Hearings Panel may question any representative appearing at the hearing. The Company will not be permitted to introduce any legal argument not raised by the Company with specificity in the Written Submission required by subsection (a)(5) of this Rule. Absent solicitation from the Hearings Panel, the Company will not be permitted to introduce any material information that was not raised by the Company with specificity in the Written Submission or Written Update provided for by subsection (a)(5) of this Rule, unless the Company shows either that the material information did not exist at the time the Company was permitted to submit a Written Update or the Company shows that exceptional or unusual circumstances exist that warrant consideration of the newly raised material information. Exceptional or unusual circumstances would include, but are not necessarily limited to, material information that was not earlier discoverable by the Company despite all reasonable measures having been taken. If the Hearings Panel determines either that the Company has shown that the material information did not exist at the time the Company was permitted to submit a Written Update or that the Company has shown exceptional or unusual circumstances exist that warrant consideration of the newly raised material information, then the Company will be permitted to introduce such information at the oral hearing. Staff shall have up to three business days, or such shorter time as the Hearings Panel requests, following the oral hearing to respond in writing to the Company's newly raised material information. The Company may respond to the Staff's submission only if the Hearings Panel requests it do so. Hearings are generally scheduled to last one hour, but the Hearings Panel may extend the time. The Hearings Department will arrange for and keep on file a transcript of oral hearings.

(b) – (d) No change.

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