

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-91904; File No. SR-NASDAQ-2021-007)

May 17, 2021

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Adopt Additional Initial Listing Criteria for Companies Primarily Operating in Jurisdictions That Do Not Provide the PCAOB with the Ability to Inspect Public Accounting Firms

I. Introduction

On February 1, 2021, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to adopt additional initial listing criteria for companies primarily operating in jurisdictions that do not provide the Public Company Accounting Oversight Board (“PCAOB”) with the ability to inspect public accounting firms. The proposed rule change was published for comment in the Federal Register on February 16, 2021.³ On March 26, 2021, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ This order institutes proceedings

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 91089 (February 9, 2021), 86 FR 9549 (“Notice”). Comments on the proposed rule change can be found at: <https://www.sec.gov/comments/sr-nasdaq-2021-007/srnasdaq2021007.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 91413, 86 FR 17263 (April 1, 2021). The Commission designated May 17, 2021 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

pursuant to Section 19(b)(2)(B) of the Act⁶ to determine whether to approve or disapprove the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange states that the Exchange's rules, in addition to federal securities laws, require that a company's financial statements included in its initial registration statement or annual report be audited by an independent public accountant that is registered with the PCAOB.⁷ According to the Exchange, the Exchange and investors rely on the work of auditors to provide reasonable assurances that the financial statements provided by a company are free of material misstatements, and on the PCAOB's critical role in overseeing the quality of the auditor's work.⁸ The Exchange states its belief that accurate financial statement disclosure is critical for investors to make informed investment decisions.⁹

The Exchange states that the former Chairman and former Chief Accountant of the Commission and the Chairman of the PCAOB have raised concerns that national barriers on access to information can impede effective regulatory oversight of U.S.-listed companies with operations in certain countries, including the PCAOB's inability to inspect the audit work and practices of auditors in those countries.¹⁰ The Exchange states that similar concerns have been

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See Notice, supra note 3, at 9549. See also Nasdaq Rules 5210(b) and 5250(c)(3) (requiring for initial and continued listing on Nasdaq that companies must be audited by an independent public accountant that is registered as a public accounting firm with the PCAOB); 15 U.S.C. 7212(a) (Registration with the PCAOB); 17 CFR 210.2-01 (Qualifications of Accountants).

⁸ See Notice, supra note 3, at 9550.

⁹ See id.

¹⁰ See id. (citing to various statements by former Commission Chairman Jay Clayton, former Commission Chief Accountant Wes Bricker, and PCAOB Chairman William D. Duhnke III, available at <https://www.sec.gov/news/public-statement/statement-vital-role->

expressed by members of Congress, the State Department, and the President’s Working Group on Financial Markets.¹¹ The Exchange states that it shares these concerns and believes the lack of transparency from certain markets raises concerns about the accuracy of disclosures, accountability, and access to information, particularly when a company is based in a jurisdiction that does not provide the PCAOB with access to conduct inspections of public accounting firms that audit Nasdaq-listed companies (“Restrictive Market”).¹²

The Exchange further states that such concerns can be compounded when a company from a Restrictive Market lists on the Exchange through an initial public offering (“IPO”) or a business combination with a small offering size or a low public float percentage because such companies may not attract market attention and develop sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly trading.¹³

audit-quality-and-regulatory-access-audit-and-other; <https://www.sec.gov/news/public-statement/emerging-market-investments-disclosure-reporting>; and <https://www.sec.gov/news/public-statement/clayton-emerging-markets-roundtable-2020-07-09>). See *id.* at 9550, n.8.

¹¹ See *id.* at 9550 (citing to “Congress Passes Legislation to De-List Chinese Companies Unless U.S. Has Access to Audit Workpapers” (December 2, 2020), available at <https://sherman.house.gov/media-center/press-releases/congress-passes-legislation-to-de-list-chinese-companies-unless-us-has>; Former Commission Chairman Jay Clayton, “Statement after the Enactment of the Holding Foreign Companies Accountable Act” (December 18, 2020), available at https://www.sec.gov/news/public-statement/clayton-hfcaa-2020-12#_ftn5; Press Statement of Michael R. Pompeo, Secretary of State, New Nasdaq Restrictions Affecting Listing of Chinese Companies (June 4, 2020), available at <https://2017-2021-translations.state.gov/2020/06/04/new-nasdaq-restrictions-affecting-listing-of-chinese-companies/index.html>; President’s Working Group on Financial Markets: Report on Protecting United States Investors from Significant Risks from Chinese Companies (July 24, 2020), available at <https://home.treasury.gov/system/files/136/PWG-Report-on-Protecting-United-States-Investors-from-Significant-Risks-from-Chinese-Companies.pdf>). See *id.* at 9550, nn.9-11.

¹² See *id.* at 9550.

¹³ See *id.*

According to the Exchange, such securities may trade infrequently, in a more volatile manner and with a wider bid-ask spread, all of which may result in trading at a price that may not reflect their true market value.¹⁴ Furthermore, the Exchange states that less liquid securities may be more susceptible to price manipulation and that, in particular, the risk of price manipulation due to insider trading is more acute with respect to a company that principally administers its business in a Restrictive Market (“Restrictive Market Company”), particularly if a company’s financial statements contain undetected material misstatements due to error or fraud and the PCAOB is unable to inspect the company’s auditor to determine if it complied with PCAOB and Commission rules and professional standards in connection with its performance of audits.¹⁵ The Exchange states that risk to investors in such cases may be compounded because regulatory investigations into price manipulation, insider trading, and compliance concerns may be impeded and investor protections and remedies may be limited in such cases due to obstacles encountered by U.S. authorities in bringing or enforcing actions against the companies and insiders.¹⁶

Nasdaq states that it believes the U.S. capital markets can provide Restrictive Market Companies with access to additional capital to fund ground-breaking research and technological advancements and that such companies provide U.S. investors with opportunities to diversify their portfolio by providing exposure to Restrictive Markets.¹⁷ However, Nasdaq further states that it believes that Restrictive Market Companies present unique potential risks to U.S. investors

¹⁴ See id. The Exchange also states that foreign issuers are more likely to issue a portion of an offering to investors in their home country, which raises concerns that such investors will not contribute to the liquidity of the security in the U.S. secondary market. See id.

¹⁵ See id.

¹⁶ See id.

¹⁷ See id. at 9553-54. See also Letter from Jeffrey S. Davis, Senior Vice President, General Counsel, Nasdaq, Inc. (April 30, 2021) (“Nasdaq Response Letter”), at 2.

due to restrictions on the PCAOB’s ability to inspect the audit work and practices of auditors in those countries, which create concerns about the accuracy of disclosures, accountability, and access to information.¹⁸ Nasdaq states that it believes its proposal will reduce trading volatility and price manipulation and help to ensure that Restrictive Market Companies have sufficient investor base and public float to support fair and orderly trading on the Exchange.¹⁹

Specifically, the Exchange proposes to adopt a definition of “Restrictive Market”²⁰ and to apply additional initial listing requirements to a Restrictive Market Company listing on the Exchange in connection with an IPO or a business combination.²¹ The Exchange also proposes to prohibit a Restrictive Market Company from listing on the Nasdaq Capital Market in connection with a Direct Listing,²² but to allow a Restrictive Market Company to list on the

¹⁸ See Notice, *supra* note 3, at 9554.

¹⁹ See *id.* See also Nasdaq Response Letter, *supra* note 17, at 3.

²⁰ See *infra* note 24 and accompanying text.

²¹ The Exchange states that, currently, it may rely upon its discretionary authority under Nasdaq Rule 5101 to deny initial listing or apply additional or more stringent criteria when it is concerned that a small offering size for an IPO may not reflect the company’s initial valuation or may not ensure sufficient liquidity to support trading in the secondary market. Pursuant to Nasdaq Rule 5101, Nasdaq has broad discretionary authority over the initial and continued listing of securities in Nasdaq in order to maintain the quality of and public confidence in its market, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest. Nasdaq may use such discretion to deny initial listing, apply additional or more stringent criteria for the initial or continued listing of particular securities, or suspend or delist particular securities based on any event, condition, or circumstance that exists or occurs that makes initial or continued listing of the securities on Nasdaq inadvisable or unwarranted in the opinion of Nasdaq, even though the securities meet all enumerated criteria for initial or continued listing on Nasdaq. See Nasdaq Rule 5101.

²² Nasdaq defines “Direct Listing” as the listing of “companies that have sold common equity securities in private placements, which have not been listed on a national securities exchange or traded in the over-the-counter market pursuant to FINRA Form 211 immediately prior to the initial pricing.” See Nasdaq Rule IM-5315-1.

Nasdaq Global Select Market or Nasdaq Global Market in connection with a Direct Listing, provided that such company meets all applicable initial listing requirements for such market.

A. Definition of Restrictive Market

The Exchange proposes to adopt a new definition of Restrictive Market in Nasdaq Rule 5005(a)(37).²³ As proposed, a Restrictive Market will be defined as a jurisdiction that does not provide the PCAOB with access to conduct inspections of public accounting firms that audit Nasdaq-listed companies.²⁴ Under the proposed rule, Nasdaq will consider a company's business to be principally administered in a Restrictive Market if: (i) the company's books and records are located in that jurisdiction; (ii) at least 50% of the company's assets are located in such jurisdiction; or (iii) at least 50% of the company's revenues are derived from such jurisdiction.²⁵

²³ The Exchange proposes to renumber current paragraphs (a)(37) through (a)(46) of Nasdaq Rule 5005 in connection with the addition of the definition of Restrictive Market. See Notice, supra note 3, at 9551.

²⁴ See proposed Nasdaq Rule 5005(a)(37). The Exchange states that the PCAOB maintains a map of where it can and cannot conduct oversight activities on its website and publishes a list identifying the public companies for which a PCAOB-registered public accounting firm signed and issued an audit report and is located in a jurisdiction where obstacles to PCAOB inspections exist. See Notice, supra note 3, at 9551.

²⁵ See proposed Nasdaq Rule 5005(a)(37). The term "Company" means the issuer of a security listed or applying to list on Nasdaq. See Nasdaq Rule 5005(a)(6). The Exchange provides the following examples. Company X's books and records are located in Country Y, which is not a Restrictive Market, while 90% of its revenues are driven from operations in Country Z, which is a Restrictive Market. Nasdaq would consider Company X's business to be principally administered in Country Z, so Company X would be considered a Restrictive Market Company. Alternatively, Company A's books and records are located in Country B, which is a Restrictive Market, but 90% of its revenues are derived from Country C, which is not a Restrictive Market. Nasdaq would consider Company A's business to be principally administered in Country B, so Company A would be considered a Restrictive Market Company. See Notice, supra note 3, at 9551.

B. Minimum Offering Size or Public Float Percentage Requirement for an IPO

The Exchange proposes to adopt new Nasdaq Rule 5210(k)(i) to require a Restrictive Market Company listing its Primary Equity Security²⁶ on Nasdaq in connection with its IPO to offer a minimum amount of securities in a Firm Commitment Offering²⁷ in the U.S. to Public Holders²⁸ that (i) will result in gross proceeds to the Company of at least \$25 million or (ii) will represent at least 25% of the Company's post-offering Market Value of Listed Securities,²⁹ whichever is lower. A Restrictive Market Company listing on the Exchange in connection with an IPO that is subject to the proposed rule would also need to comply with all other applicable listing requirements.³⁰ The Exchange states that it believes this proposed listing requirement for

²⁶ Nasdaq Rule 5005(a)(33) defines "Primary Equity Security" as "a Company's first class of Common Stock, Ordinary Shares, Shares or Certificates of Beneficial Interest of Trust, Limited Partnership Interests or American Depositary Receipts (ADR) or Shares (ADS)."

²⁷ Nasdaq Rule 5005(a)(17) defines "Firm Commitment Offering" as "an offering of securities by participants in a selling syndicate under an agreement that imposes a financial commitment on participants in such syndicate to purchase such securities."

²⁸ Nasdaq Rule 5005(a)(36) defines "Public Holders" as "holders of a security that includes both beneficial holders and holders of record, but does not include any holder who is, either directly or indirectly, an Executive Officer, director, or the beneficial holder of more than 10% of the total shares outstanding."

²⁹ "Market Value" means the consolidated closing bid price multiplied by the measure to be valued. See Nasdaq Rule 5000(a)(23). "Listed Securities" means securities listed on Nasdaq or another national securities exchange. See Nasdaq Rule 5000(a)(22).

³⁰ The Exchange provides the following examples to illustrate the proposed rule. First, Company X, which principally administers its business in a Restrictive Market, is applying to list on Nasdaq Global Market and has an expected post-offering Market Value of Listed Securities of \$75,000,000. Since 25% of \$75,000,000 is \$18,750,000, which is lower than \$25,000,000, pursuant to the requirements of the proposed rule, Company X would be eligible to list based on a Firm Commitment Offering in the U.S. to Public Holders of at least \$18,750,000. Company X would also need to comply with the other applicable listing requirements of the Nasdaq Global Market, including a Market Value of Unrestricted Publicly Held Shares of at least \$8 million. See Notice, supra note 3, at 9551; Nasdaq Rule 5405(b)(1)(C). See also Nasdaq Rules 5005(a)(45) (definition of "Unrestricted Publicly Held Shares"), 5005(a)(46) (definition of "Unrestricted Securities"), and 5005(a)(37) (definition of "Restricted Securities"). As another example,

Restrictive Market Companies conducting an IPO will provide greater support for the company's price, as determined through the offering, and will help assure there will be sufficient liquidity, U.S. investor interest, and distribution to support price discovery once the security is listed.³¹ In addition, the Exchange states that the proposal will help ensure that Restrictive Market Companies seeking to list on the Exchange have sufficient investor base and public float to support fair and orderly trading on the Exchange.³²

The Exchange further states that it has observed that Restrictive Market Companies listing on Nasdaq in connection with an IPO with an offering size below \$25 million or public float ratio below 25% have a high rate of compliance concerns.³³ The Exchange states that it

Company Y, which also principally administers its business in a Restrictive Market, is applying to list on the Nasdaq Global Select Market and its post-offering Market Value of Listed Securities is expected to be \$200,000,000. Since 25% of \$200,000,000 is \$50,000,000, which is higher than \$25,000,000, pursuant to the requirements of the proposed rule, Company Y would be eligible to list based on a Firm Commitment Offering in the U.S. to Public Holders that will result in gross proceeds of at least \$25,000,000. Company Y would also need to comply with the other applicable listing requirements of the Nasdaq Global Select Market, including a Market Value of Unrestricted Publicly Held Shares of at least \$45 million. See Notice, supra note 3, at 9551-52; Nasdaq Rule 5315(f)(2)(C).

³¹ See Notice, supra note 3, at 9552.

³² See id.

³³ See id. Specifically, the Exchange states that 39 out of 113 Restrictive Market Companies that listed on Nasdaq through an IPO from January 1, 2015 to September 30, 2020 would not have qualified under the requirement in proposed Nasdaq Rule 5210(k)(i) because they had offering amounts of \$25 million or less. According to Nasdaq, two of these companies were considered to be Restrictive Market Companies because they had at least 50% of the company's assets located in a Restrictive Market, and 37 met the definition because they had at least 50% of the company's revenues derived from a Restrictive Market. Of those companies that would not have qualified under the requirement in proposed Nasdaq Rule 5210(k)(i), twenty, or 51%, were cited for a compliance issue, which Nasdaq states is a significantly higher rate than other Restrictive Market Companies (16%). The Exchange also states that, during the same period, 25 out of 84 (or 30%) of Restrictive Market Companies that had a ratio of offering size to Market Value of Listed Securities of 25% or less failed to comply with one or more

believes the proposed listing requirement for Restrictive Market Companies conducting an IPO will mitigate such compliance concerns.³⁴

C. Minimum Market Value of Unrestricted Publicly Held Shares Requirement for a Business Combination

The Exchange proposes to adopt new Nasdaq Rule 5210(k)(ii) to require a Company that is conducting a business combination, as described in Nasdaq Rule 5110(a)³⁵ or IM-5101-2,³⁶ with a Restrictive Market Company to have a minimum Market Value of Unrestricted Publicly Held Shares³⁷ following the business combination equal to the lesser of (i) \$25 million or (ii)

listing standards after listing, which, according to the Exchange, is a significantly higher non-compliance rate than for other foreign companies (11%) and other Restrictive Market Companies (21%) that had such listings. The Exchange also found that, during the same period, 35 Restrictive Market Companies would not have met either the \$25 million offering size requirement or the 25% of the company's post-offering Market Value of Listed Securities requirement, and 18 of those companies were cited for a compliance concern. See id.

³⁴ See id.

³⁵ Nasdaq Rule 5110(a) (Business Combinations with non-Nasdaq Entities Resulting in a Change of Control) sets forth requirements applicable to a Company that engages in a business combination with a non-Nasdaq entity, resulting in a change of control of the Company and potentially allowing the non-Nasdaq entity to obtain a Nasdaq Listing.

³⁶ Nasdaq Rule IM-5101-2 (Listing of Companies Whose Business Plan is to Complete One or More Acquisitions) sets forth requirements applicable to a Company whose business plan is to complete an IPO and engage in a merger or acquisition with one or more unidentified companies within a specific period of time.

³⁷ Nasdaq Rule 5005(a)(45) defines "Unrestricted Publicly Held Shares" as Publicly Held Shares that are Unrestricted Securities. "Publicly Held Shares" means shares not held directly or indirectly by an officer, director or any person who is the beneficial owner of more than 10 percent of the total shares outstanding. See Nasdaq Rule 5005(a)(35). "Unrestricted Securities" means securities that are not subject to resale restrictions for any reason, including, but not limited to, securities: (i) acquired directly or indirectly from the issuer or an affiliate of the issuer in unregistered offerings such as private placements or Regulation D offerings; (ii) acquired through an employee stock benefit plan or as compensation for professional services; (iii) acquired in reliance on Regulation S, which cannot be resold within the United States; (iv) subject to a lockup agreement or

25% of post-business combination entity's Market Value of Listed Securities. A Restrictive Market Company subject to the proposed rule would also need to comply with all other applicable listing requirements.³⁸

The Exchange states that it believes that a business combination as described in Nasdaq Rule 5110(a) or IM-5101-2 involving a Restrictive Market Company presents similar risks to U.S. investors as an IPO of a Restrictive Market Company, and therefore, Nasdaq believes it is appropriate to apply similar thresholds to post-business combination entities to ensure that a company listing through a business combination would have satisfied equivalent standards that

a similar contractual restriction; or (v) considered "restricted securities" under Rule 144. See Nasdaq Rules 5005(a)(46) and (37).

³⁸ The Exchange provides the following examples to illustrate the proposed rule. First, Company A is currently listed on the Nasdaq Capital Market and plans to acquire a company that principally administers its business in a Restrictive Market, in accordance with IM-5101-2. Following the business combination, Company A intends to transfer to the Nasdaq Global Select Market. Company A expects the post-business combination entity to have a Market Value of Listed Securities of \$250,000,000. Since 25% of \$250,000,000 is \$62,500,000, which is higher than \$25,000,000, pursuant to the requirements of the proposed rule, to qualify for listing the post-business combination entity must have a minimum Market Value of Unrestricted Publicly Held Shares of at least \$25,000,000. The company would also need to comply with the other applicable listing requirements of the Nasdaq Global Select Market, including a Market Value of Unrestricted Publicly Held Shares of at least \$45,000,000. See Notice, supra note 3, at 9552; Nasdaq Rule 5315(f)(2)(C). As another example, Company B is currently listed on Nasdaq Capital Market and plans to combine with a non-Nasdaq entity that principally administers its business in a Restrictive Market, resulting in a change of control as defined in Nasdaq Rule 5110(a), whereby the non-Nasdaq entity will become the Nasdaq-listed company. Following the change of control, Company B expects the listed company to have a Market Value of Listed Securities of \$50,000,000. Since 25% of \$50,000,000 is \$12,500,000, which is lower than \$25,000,000, pursuant to the requirements of the proposed rule, the listed company must have a minimum Market Value of Unrestricted Publicly Held Shares following the change of control of at least \$12,500,000. The post-business combination company would also need to comply with all other applicable listing requirements of the Nasdaq Capital Market, including a Market Value of Unrestricted Publicly Held Shares of at least \$5 million. See Notice, supra note 3, at 9552; Nasdaq Rule 5505(b)(3)(C).

apply to an IPO.³⁹ The Exchange further states that it believes that the proposed listing requirement for post-business combination entities would help to provide an additional assurance that there are sufficient freely tradable shares and investor interest to support fair and orderly trading on the Exchange when the target company principally administers its business in a Restrictive Market.⁴⁰

D. Direct Listings of Restrictive Market Companies

The Exchange proposes to adopt new Nasdaq Rule 5210(k)(iii) to provide that a Restrictive Market Company that is listing its Primary Equity Security on Nasdaq in connection with a Direct Listing, as defined in Nasdaq Rule IM-5315-1,⁴¹ would be permitted to list on: (i) the Nasdaq Global Select Market, provided that the Company meets all applicable listing requirements for the Nasdaq Global Select Market and the additional requirements of Nasdaq Rule IM-5315-1, or (ii) the Nasdaq Global Market, provided that the Company meets all applicable listing requirements for the Nasdaq Global Market and the additional requirements of Nasdaq Rule IM-5405-1.⁴² On the other hand, proposed Nasdaq Rule 5210(k)(iii) would provide

³⁹ See Notice, supra note 3, at 9553. The Exchange states that it found that out of seven business combinations involving Restrictive Market Companies from 2015 through September 30, 2020, five would not have qualified under proposed Nasdaq Rule 5210(k)(ii) to have a minimum Market Value of Unrestricted Publicly Held Shares following the business combination of \$25 million or 25% of the post-business combination entity's Market Value of Listed Securities, whichever is lower. The Exchange states that all five of these companies have been cited for a deficiency after the completion of their business combination. On the other hand, Nasdaq states that only one out of the two business combinations involving Restrictive Market Companies that would have qualified under proposed Nasdaq Rule 5210(k)(ii) during such period was cited for a compliance concern. See id.

⁴⁰ See id.

⁴¹ See supra note 22.

⁴² See Notice, supra note 3, at 9553.

that a Restrictive Market Company would not be permitted to list on the Nasdaq Capital Market in connection with a Direct Listing, notwithstanding the fact that the Company may meet the applicable initial listing requirements for the Nasdaq Capital Market and the additional requirements in Nasdaq Rule IM-5505-1.⁴³

The Exchange's rules currently set forth initial listing requirements for companies listing on the Nasdaq Global Select Market, Nasdaq Global Market, and Nasdaq Capital Market,⁴⁴ and additional listing requirements for Companies conducting a Direct Listing on such markets.⁴⁵ The Exchange states that it believes it is appropriate to permit Restrictive Market Companies to list through a Direct Listing on the Nasdaq Global Select Market or Nasdaq Global Market because such companies would be subject to the additional listing requirements set forth in Nasdaq Rule IM-5315-1 or IM-5405-1, respectively.⁴⁶ On the other hand, the Exchange states that it does not believe that the additional requirements for Direct Listing on the Nasdaq Capital Market, set forth in Nasdaq Rule IM-5501-1, are sufficient to overcome concerns regarding sufficient liquidity and investor interest to support fair and orderly trading on the Exchange with respect to Restrictive Market Companies.⁴⁷

⁴³ See id.

⁴⁴ See Nasdaq Rules 5315, 5405, and 5505.

⁴⁵ See Nasdaq Rules IM-5315-1, IM-5405-1, and IM-5505-1.

⁴⁶ See Notice, supra note 3, at 9553.

⁴⁷ See id. As an example, the Exchange states that the Nasdaq Global Select Market and Nasdaq Global Market require a company to have at least 1,250,000 and 1.1 million Unrestricted Publicly Held Shares, respectively, and a Market Value of Unrestricted Publicly Held Shares of at least \$45 million and \$8 million, respectively. See Nasdaq Rules 5315(e)(2), 5315(f)(2)(C), 5405(a)(2), and 5405(b)(1)(C). In contrast, the Nasdaq Capital Market only requires a company to have at least 1 million Unrestricted Publicly Held Shares and a Market Value of Unrestricted Publicly Held Shares of at least \$5

III. Proceedings to Determine Whether to Approve or Disapprove SR-NASDAQ-2021-007 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act⁴⁸ to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposal. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change to inform the Commission’s analysis of whether to approve or disapprove the proposal.

Pursuant to Section 19(b)(2)(B) of the Act,⁴⁹ the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposal’s consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be “designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade,” and “to protect investors and the public interest.”⁵⁰

As discussed above, the Exchange is proposing to apply additional initial listing requirements to a Restrictive Market Company listing on the Exchange in connection with an IPO or a business combination and to prohibit a Restrictive Market Company from listing on the Nasdaq Capital Market in connection with a Direct Listing. The Commission has received one

million. See Nasdaq Rules 5505(a)(2) and 5505(b)(3)(C); Notice, supra note 3, at 9553, n.34.

⁴⁸ 15 U.S.C. 78s(b)(2)(B).

⁴⁹ Id.

⁵⁰ 15 U.S.C. 78f(b)(5).

comment letter regarding the proposed rule change⁵¹ and a response to comments from the Exchange.⁵² Given the comment letter received and the recently filed response from the Exchange, the Commission is seeking additional public comment on the proposed rule change in order to determine whether it is consistent with the requirements of Section 6(b)(5) of the Act.

The Commission notes that, under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the Act and the rules and regulations thereunder...is on the self-regulatory organization [‘SRO’] that proposed the rule change.”⁵³ The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,⁵⁴ and any failure of an SRO to provide this information may result in the Commission not having sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rule and regulations.⁵⁵

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change is consistent with

⁵¹ See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (February 18, 2021).

⁵² See Nasdaq Response Letter, supra note 17.

⁵³ Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

⁵⁴ See id.

⁵⁵ See id.

Section 6(b)(5) of the Act or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.⁵⁶

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register].

The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in the Notice,⁵⁷ in addition to any other comments they may wish to submit about the proposed rule change.

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-2021-007 on the subject line.

⁵⁶ Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding – either oral or notice and opportunity for written comments – is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

⁵⁷ See supra note 3.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, D.C. 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2021-007. 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to

make available publicly. All submissions should refer to File Number SR-NASDAQ-2021-007 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁸

J. Matthew DeLesDernier
Assistant Secretary

⁵⁸ 17 CFR 200.30-3(a)(57).