

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-94941; File No. SR-NASDAQ-2022-015)

May 18, 2022

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Exempt Non-Convertible Bonds Listed Under Rule 5702 from Certain Corporate Governance Requirements

I. Introduction

On February 4, 2022, 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 exempt non-convertible bonds listed under Rule 5702 from certain corporate governance requirements.³ The proposed rule change was published for comment in the Federal Register on February 23, 2022.⁴ On March 18, 2022, pursuant to Section 19(b)(2) of the Act,⁵ 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.⁶ The Commission received no comment letters regarding the proposed

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 94265 (February 16, 2022), 87 FR 10265 (February 23, 2022) (“Notice”).

⁴ Id.

⁵ 15 U.S.C. 78s(b)(2).

⁶ See Securities Exchange Act Release No. 94471 (March 18, 2022), 87 FR 16778 (March 24, 2022). The Commission designated May 24, 2022, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

rule change. This order institutes proceedings under Section 19(b)(2)(B) of the Act to determine whether to approve or disapprove the proposed rule change.

II. Description of the Proposed Rule Change

Generally, Nasdaq proposes to exempt issuers listing non-convertible bonds under Rule 5702 from certain corporate governance requirements.⁷ Specifically, Nasdaq proposes to amend Nasdaq Rule 5702⁸ to exempt these issuers from the requirements relating to Review of Related Party Transactions (Nasdaq Rule 5630),⁹ Shareholder Approval (Nasdaq Rule 5635),¹⁰ and Voting Rights (Nasdaq Rule 5640).¹¹ According to Nasdaq, it is appropriate to exempt these issuers from governance requirements because the interests of bond holders are protected contractually through the trust indenture, and therefore, “holders of non-convertible bonds do not expect to have governance rights the way equity investors may.”¹²

⁷ Under proposed Rule 5702(d), if an issuer also lists its common stock, voting preferred stock, or their equivalent on Nasdaq, the corporate governance requirements under the Nasdaq 5600 Rule Series would apply. See Notice, supra note 3, n. 8.

⁸ Rule 5702 contains the initial and continued listing standards for non-convertible bonds, as well as disclosure requirements for companies that list non-convertible bonds.

⁹ Rule 5630 requires certain companies to conduct an appropriate review and oversight of all related party transactions for potential conflict of interest situations on an ongoing basis.

¹⁰ Rule 5635 sets forth the circumstances under which shareholder approval is required prior to an issuance of securities in connection with: (i) the acquisition of the stock or assets of another company; (ii) equity-based compensation of officers, directors, employees, or consultants; (iii) a change of control; and (iv) transactions other than public offerings.

¹¹ Rule 5640 states that voting rights of existing shareholders of publicly traded common stock registered under Section 12 of the Act cannot be disparately reduced or restricted through any corporate action or issuance.

¹² See Notice, supra note 3, at 10266.

In addition, Nasdaq proposes to consolidate under Nasdaq Rule 5702 other exemptions currently applicable to such issuers pursuant to Nasdaq Rules 5605(f)(4), 5606(c), and 5616(a)(6)(A).¹³

III. Proceedings to Determine Whether to Approve or Disapprove SR-NASDAQ-2022-015 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act¹⁴ 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 proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as stated below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,¹⁵ the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the consistency of

¹³ Rule 5615(a)(6)(A) exempts certain non-convertible bond issuers from the requirements relating to Independent Directors (as set forth in Rule 5605(b)), Compensation Committees (as set forth in Rule 5605(d)), Director Nominations (as set forth in Rule 5605(e)), Codes of Conduct (as set forth in Rule 5610), Meetings of Shareholders (as set forth in Rule 5620(a)), and Audit Committees (as set forth in Rule 5605(c), except for the applicable requirements Commission Rule 10A-3). Rules 5605(f)(4) and Rule 5606(c) exempts certain non-convertible bond issuers from the requirements related to Diverse Board Representation (as set forth in Rule 5605(f)) and Board Diversity Disclosure (as set forth in Rule 5606), respectively.

¹⁴ 15 U.S.C. 78s(b)(2)(B).

¹⁵ 15 U.S.C. 78s(b)(2)(B).

the proposal 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, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.¹⁶ Specifically, the Commission solicits comments on the sufficiency of the Exchange’s justification for exempting non-convertible bonds listed under Rule 5702 from certain corporate governance requirements enumerated above. As stated above, the Exchange justifies the proposed rule change on the assertion that “holders of non-convertible bonds do not expect to have governance rights the way equity investors may.” Do commenters agree that holders of non-convertible bonds do not expect that Nasdaq Rules pertaining to Review of Related Party Transactions, Shareholder Approval, and Voting Rights to apply to their bond holdings? And even if there is no such expectations, would non-convertible bond holders benefit from any of these provisions?

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 issued thereunder . . . is on the self-regulatory organization that proposed the rule change.”¹⁷ 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

¹⁶ 15 U.S.C. 78f(b)(5).

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

Commission finding,¹⁸ and any failure of a self-regulatory organization to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.¹⁹

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposal is consistent with the Act.

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 proposal is consistent with Sections 6(b)(5), 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 under the Act,²⁰ any request for an opportunity to make an oral presentation.²¹

¹⁸ See id.

¹⁹ See id.

²⁰ 17 CFR 240.19b-4.

²¹ 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).

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal 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]. 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-2022-015 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-2022-015. 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-2022-015, 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 the date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²²

J. Matthew DeLesDernier
Assistant Secretary

²² 17 CFR 200.30-3(a)(57).