

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-100816; File No. SR-NASDAQ-2024-019)

August 26, 2024

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Granting Approval of a Proposed Rule Change, to Rules 5605, 5615 and 5810 to Amend Phase-In Schedules for Certain Corporate Governance Requirements and Applicability of Certain Cure Periods

I. Introduction

On May 8, 2024, 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 amend Exchange Rules 5605, 5615, and 5810 regarding the phase-in schedules for certain corporate governance requirements and the applicability of certain cure periods. The proposed rule change was published for comment in the Federal Register on May 29, 2024.³ On July 12, 2024, the Commission designated a longer period for Commission action on the proposed rule change.⁴ The Commission has received no comment letters on the proposal. As discussed further below, the Commission is approving the proposed rule change.

II. Description of the Proposal

The Exchange proposes to amend the phase-in schedules for compliance with the independent board director and committee requirements for certain companies and codify its practices regarding the applicability of certain cure periods. As discussed below, the changes to the phase-in provisions are similar to those previously approved for another national securities

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 100208 (May 22, 2024), 89 FR 46528 (“Notice”).

⁴ See Securities Exchange Act Release No. 100523 (July 12, 2024), 89 FR 58450 (July 18, 2024) (designating August 27, 2024 as the date by which the Commission shall either approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change).

exchange. The Exchange also proposes to renumber several rules and make non-substantive clarifications.

A. Modifications to Phase-In Schedules

Initial Public Offerings

Currently, Exchange Rule 5615(b)(1) references that a company listing in connection with an IPO is permitted to phase in its independent audit committee requirements in accordance with Rule 10A-3(b)(1)(iv)(A) under the Act⁵ but does not restate the provisions of this rule. Nasdaq proposes to amend Rule 5615(b)(1) by specifically restating the phase-in provisions in the text of the rule.⁶

Further, Rule 5615(b)(1) currently allows companies listing in connection with an IPO to phase in the requirements for their independent nominations and compensation committees but requires one member to satisfy the requirements at the time of listing. The Exchange states that some companies expressed a concern that this requirement interferes with a common practice to hold a meeting of a board of directors in order to appoint additional independent directors shortly after the Listing Date, but prior to the date IPO closes.⁷ Therefore, to accommodate this practice, Nasdaq has proposed to amend Rule 5615(b)(1) to allow companies to comply with the requirement to have one independent director on the compensation and nominations committees by appointing an independent director to such a committee no later than the earlier of the date the

⁵ 17 CFR 240.10A-3(b)(1)(iv)(A).

⁶ See 17 CFR 240.10A-3(b)(1)(iv)(A). Accordingly, a company shall be permitted to phase in its compliance with the audit committee requirements set forth in Rule 5605(c)(2) as follows: (1) one member must satisfy the requirements by the date the company's securities first trade on Nasdaq (the "Listing Date"); (2) a majority of members must satisfy the requirements within 90 days of the effective date of its registration statement; and (3) all members must satisfy the requirements within one year of the effective date of its registration statement.

⁷ See Notice, supra note 3, at 46528. See also, e.g., New York Stock Exchange ("NYSE") IPO Guide, at 41, available at https://www.nyse.com/publicdocs/nyse/listing/nyse_ipo_guide.pdf.

initial public offering closes or five business days from the Listing Date.⁸ The Exchange is also proposing, as to the requirement for a company to have at least two members on the compensation committee, that the company have at least one member by the Listing Date and at least two members within one year of the Listing Date.

Rule 5605(c)(2)(A) requires a company to have a minimum of three members on the audit committee. Nasdaq proposes to amend Rule 5615(b)(1) to provide that companies listing in conjunction with an IPO may also phase in compliance with the three-person minimum on the following schedule: at least one member by the Listing Date, at least two members within 90 days of the Listing Date and at least three members within one year of the Listing Date.

Companies Emerging from Bankruptcy

Currently, Rule 5615(b)(2) allows a company that is emerging from bankruptcy to phase in independent nominations and compensation committees and majority independent boards requirements. Nasdaq proposes to amend Rule 5615(b)(2) to specifically state that a company emerging from bankruptcy must comply with the audit committee requirements set forth in Rule 5605(c)(2)⁹ by the Listing Date unless an exemption is available pursuant to Rule 10A-3 under the Act.¹⁰ Nasdaq also states that it proposes to make additional clarifications to improve the

⁸ See Notice, supra note 3, at 46528.

⁹ Rule 5605(c)(2) requires a company to have an audit committee of at least three members, which must meet certain independence, professional competence and other requirements as specified in the rule.

¹⁰ This is a non-substantive change and simply codifies how the current rule works for companies emerging from bankruptcy because there is currently no phase-in provision from the audit committee requirements of Rule 5605(c)(2) for such companies under the Exchange rules. Additionally, Rule 5605(c)(2)(A)(ii) requires a listed company to meet the criteria for independence in Rule 10A-3(b)(1) under the Act subject to the exemptions provided in Rule 10A-3(c) under the Act. See 17 CFR 240.10A-3.

readability of the rule without changing its substance, including to provide that the applicable phase-in periods will be computed beginning on the Listing Date.¹¹

Companies Transferring from National Securities Exchanges Registered under Section 12(b) of the Act and Companies Listing Securities Previously Registered under Section 12(g) of the Act

Currently, Rule 5615(b)(3) provides that companies transferring from other markets with a substantially similar requirement shall be afforded the balance of any grace period afforded by the other market. Rule 5615(b)(3) further provides that companies transferring from other listed markets that do not have a substantially similar requirement shall be afforded one year from the date of listing on Nasdaq. The current rule also states that this transition period is not intended to supplant any applicable requirements of Rule 10A-3 under the Act.¹²

Nasdaq proposes to state that the phase-in period currently contained in Rule 5615(b)(3) is applicable only to companies that transfer securities registered pursuant to Section 12(b) of the Act¹³ from another national securities exchange to Nasdaq. The other provisions in the rule on any applicable phase-in periods and the application of Rule 10A-3 under the Act¹⁴ will remain the same as in the current rule as to companies transferring to the Exchange from another national securities exchange.

¹¹ See Notice, *supra* note 3, at 46529. The proposal makes clear that for companies emerging from bankruptcy all the phase in periods commence at the beginning of the Listing Date. This is in contrast to companies listing in connection with an IPO that are permitted to compute the compensation and nominating committee phase-in periods by the earlier of the date the IPO closes or five business days from the Listing Date.

¹² See 17 CFR 240.10A-3.

¹³ 15 U.S.C. 781(b).

¹⁴ 17 CFR 240.10A-3.

The Exchange is also proposing to specify requirements applicable to a company listing securities registered pursuant to Section 12(g) of the Act immediately prior to listing.¹⁵ Nasdaq proposes to modify Rule 5615(b)(3) to provide that a company with securities registered pursuant to Section 12(g) of the Act¹⁶ that lists those securities on Nasdaq must satisfy the audit committee requirements set forth in the Rule 5605(c) except for the requirement to have at least three members on the audit committee, as described below, by the Listing Date, unless an exemption is available pursuant to Rule 10A-3 under the Act.¹⁷

Nasdaq proposes to modify Rule 5615(b)(3) to also provide that a company with securities registered pursuant to Section 12(g) of the Act that lists those securities on Nasdaq will be provided a similar phase-in period as available to companies listing in connection with an IPO, other than with respect to the audit committee requirements. The Exchange states that, like a company conducting an IPO, these companies would not have been subject to another exchange's corporate governance standards at the time of their listing.¹⁸ Therefore, Nasdaq proposes to allow these companies a similar phase-in period as currently provided to an IPO, other than for the audit committee requirements, and require, on the nominations and compensation committee, one independent director upon listing, a majority of independent directors within 90 days of Listing Date, and a fully independent committee within one year of Listing Date.¹⁹ The company also would have twelve months from its Listing Date to comply with the majority independent board requirement set forth in Rule 5605(b).

¹⁵ 15 U.S.C. 781(g).

¹⁶ 15 U.S.C. 781(g).

¹⁷ See 17 CFR 240.10A-3.

¹⁸ See Notice, supra note 3, at 46529.

¹⁹ The independent directors serving on the compensation committee would also be required to satisfy the requirements of Rule 10C-1 under the Act. See 17 CFR 240.10(C)-1.

Under the revised rule, for a company with securities registered pursuant to Section 12(g) of the Act that lists those securities on Nasdaq, only directors who are independent, as defined in Rule 5605(a)(2), and meet the criteria for independence set forth in Rule 10A-3(b)(1) under the Act²⁰ would be permitted on the audit committee during the transition period (unless an exemption is available under Rule 10A-3 under the Act²¹).²² However, a phase-in period would be permitted with respect to the committee size requirement: at least one independent director member is required as of the date of listing, two independent director members within ninety days of the Listing Date, and three independent director members within one year of the Listing Date.²³ The revised rule would also specify that a company's compensation committee must have at least one member at the time of listing and at least two members within one year of listing.²⁴

Companies Listing in Connection with a Carve-out or Spin-off Transaction

Nasdaq proposes to provide that a company listing in connection with a carve-out or spin-off transaction will have a similar phase-in period as currently available to companies listing in connection with an IPO. The Exchange states that, like a company conducting an IPO, these companies would not have been subject to another exchange's corporate governance standards at

²⁰ 17 CFR 240.10A-3(b)(1).

²¹ 17 CFR 240.10A-3.

²² Each member of the audit committee must also: (1) not have participated in the preparation of the financial statements of the company or any current subsidiary of the company at any time during the past three years; and (2) be able to read and understand fundamental financial statements, including a company's balance sheet, income statement, and cash flow statement. See Rule 5605(c)(2)(A). See also infra note 23.

²³ During the phase-in period a company must comply with the requirement in Rule 5605(c)(2)(A) that every listed company's audit committee – without distinction as to the committee's size – have at least one member who has past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background which results in the individual's financial sophistication.

²⁴ See Securities Exchange Act Release No. 68013 (Oct. 9, 2012), 77 FR 62563, 62569, n.67 (Oct. 15, 2012) (Notice of Filing for SR-NASDAQ-2012-109). See also Securities Exchange Act Release No. 68640 (Jan. 11, 2013), 78 FR 4554 (Jan. 22, 2013) (approving SR-NASDAQ-2012-109).

the time of their listing. Therefore, Nasdaq proposes to adopt Rule 5615(b)(4)²⁵ specifying the phase-in provisions and stating that a company shall be permitted to phase in its compliance with the audit committee requirements set forth in Rule 5605(c)(2) as follows: (1) one member must satisfy the requirements by the Listing Date; (2) a majority of members must satisfy the requirements within 90 days of the effective date of its registration statement; and (3) all members must satisfy the requirements within one year of the effective date of its registration statement.

Nasdaq also proposes to allow these companies a similar phase-in period as an IPO and require that a company listing in connection with a carve-out or spin-off transaction shall have twelve months from its Listing Date to comply with the majority independent board requirement set forth in Rule 5605(b), and, on the nominations and compensation committee, one independent director by the date the transaction closes, a majority of independent directors within 90 days of the Listing Date, and a fully independent committee within one year of the Listing Date.²⁶ Nasdaq also proposes to provide that, regarding the requirement to have at least two members on the compensation committee, a company's compensation committee must have at least one member by the date the transaction closes and at least two members within one year of the Listing Date.²⁷

²⁵ Nasdaq proposes to renumber current Rule 5615(b)(4) regarding phase-in schedule for a company ceasing to be a Smaller Reporting Company to Rule 5615(b)(5).

²⁶ The independent directors serving on the compensation committee would also be required to satisfy the requirements of Rule 10C-1 under the Act. See 17 CFR 240.10(C)-1.

²⁷ See Securities Exchange Act Release No. 68013 (Oct. 9, 2012), 77 FR 62563 (Oct. 15, 2012) (Notice of Filing for SR-NASDAQ-2012-109) at footnote 67. See also Securities Exchange Act Release No. 34-68640 (Jan. 11, 2013), 78 FR 4554 (Jan. 22, 2013) (approving SR-NASDAQ-2012-109).

Nasdaq states that its current policy is to treat companies listing in connection with a carve-out or spin-off transaction as IPOs for purposes of phase-in periods.²⁸ Thus, Nasdaq allows such companies to phase in the requirements for their independent nominations and compensation committees but require one member to satisfy the requirements at the time of listing.²⁹ The Exchange states that some companies expressed a concern that this requirement interferes with a common practice to hold a meeting of a board of directors in order to appoint additional independent directors shortly after the Listing Date, but prior to the date a carve-out or spin-off transaction closes.³⁰ To accommodate this practice, Nasdaq proposes to allow the companies to comply with the requirement to have one independent director on the compensation and nominations committees by appointing an independent director to such a committee no later than the date such carve-out or spin-off transaction closes.³¹

Currently, Rule 5605(c)(2)(A) requires a company to have a minimum of three members on the audit committee. Nasdaq proposes to provide that companies listing in connection with a carve-out or spin-off transaction may also phase in compliance with the three-person minimum on the following schedule: at least one member by the Listing Date, at least two members within 90 days of the Listing Date and at least three members within one year of the Listing Date.³²

²⁸ See Notice, supra note 3, at 46530.

²⁹ See id.

³⁰ See id.

³¹ See id.

³² See supra notes 22 and 23. As discussed below, as with an IPO, if a company has only one member on the audit committee by the Listing Date as permitted by the phase-in periods, that audit committee member, in addition to meeting the independence requirements in Rule 5605(c)(2), must also meet the requirements to have accounting or finance experience and financial sophistication in accordance with Rule 5605(c)(2)(iv) as well meet the other requirements set forth in 5605(c)(2).

Companies Ceasing to Qualify as a Foreign Private Issuer

Currently, Rule 5615(a)(3) provides that a “Foreign Private Issuer,” as defined pursuant to Rule 3b-4 under the Act,³³ may follow its home country practice in lieu of the requirements of the Rule 5600 Series, provided, however, that such a Company must comply with, among other requirements,³⁴ the requirement to have an audit committee that satisfies Rule 5605(c)(3), and ensure that such audit committee’s members meet the independence requirement in Rule 5605(c)(2)(A)(ii). A Foreign Private Issuer that ceases to qualify as such under Commission rules becomes subject to all relevant corporate governance requirements of Rule 5605.

Pursuant to Rule 3b-4 under the Act,³⁵ a company must test its status as a Foreign Private Issuer on an annual basis at the end of its most recently completed second fiscal quarter (for purposes of this subsection, the “Foreign Private Issuer Determination Date”). Nasdaq proposes to modify its rules to take into consideration Rule 3b-4 under the Act.³⁶ Under Rule 3b-4 under the Act³⁷ a company’s determination that it fails to qualify as a Foreign Private Issuer governs its eligibility to use the forms and rules designated for Foreign Private Issuers beginning on the first day of the fiscal year following the determination date, effectively providing the company with a six-month grace period. Similarly, Nasdaq proposes to require a company that ceases to be a

³³ 17 CFR 240.3b-4.

³⁴ See Nasdaq Rule 5615(a)(3) and IM-5615-3 for the other requirements under the Exchange’s rules a Foreign Private Issuer must comply with and cannot follow home country practice.

³⁵ See id.

³⁶ See id.

³⁷ See id.

Foreign Private Issuer to be in compliance with the domestic company requirements within the same timeframe of six months, except for the requirement set forth in Rule 5605(c)(2)(A)(ii).

Specifically, the company shall have six months from the Foreign Private Issuer Determination Date to comply with the majority independent board and executive sessions requirements set forth in Rule 5605(b); the independent compensation and nominations committee requirements set forth in Rules 5605(d)(2) and (e)(1)(B); and audit committee requirements set forth in Rule 5605(c)(2), including the three-person audit committee requirement, with the exception of Rule 5605(c)(2)(A)(ii) that, as noted below, must continually be complied with by a Foreign Private Issuer. During the phase-in period, a company shall have an audit committee that satisfies Rule 5605(c)(3) and members of such audit committee shall meet the criteria for independence referenced in Rule 5605(c)(2)(A)(ii) (the criteria set forth in Rule 10A-3(b)(1) under the Act,³⁸ subject to the exemptions provided in Rule 10A-3(c) under the Act³⁹).

Companies Ceasing to be a Controlled Company

Nasdaq proposes to amend Rule 5615(c)(3) to state that the applicable phase-in periods for companies ceasing to be a Controlled Company for purposes of the independent

³⁸ 17 CFR 240.10A-3(b)(1).

³⁹ 17 CFR 240.10A-3(c).

compensation and nominations committees and majority of independent boards will be computed beginning on the date the company ceases to be a Controlled Company.⁴⁰

Noncompliance During the Phase-In Period

Nasdaq also proposes to codify its current policy that a company that demonstrates compliance with a requirement during a phase-in period but subsequently falls out of compliance with that requirement before the end of the phase-in period, would not be considered deficient with the requirement until the end of the phase-in period. The Exchange states that this treatment is consistent with treatment of a company that relied on a phase-in period throughout its duration although, as discussed below, there are differences in the availability of a cure period at the end of the phase-in period.

B. Unavailability of Cure Periods Following the Expiration of Phase-in Periods

Nasdaq proposes to amend Rules 5605(b)(1), 5605(c)(4), 5605(d)(4), and 5810(c)(3)(E) to codify its current position that a company relying on any phase-in period in Rule 5615(b) is not eligible for a cure period provided by Rule 5810(c)(3)(E), immediately following the expiration of the phase-in period, unless the company complied with the audit committee composition requirement in Rule 5605(c)(2)(A), the compensation committee composition requirement in Rule 5605(d)(2)(A), or the majority independent board requirement in Rule 5605(b)(1), as applicable, during such phase-in period but fell out of compliance with such requirement after having complied with the requirement before the end of the phase-in period. Nasdaq also proposes to codify its current policy that, if a company demonstrated compliance

⁴⁰ Under current Rule 5615(c)(2), Controlled Companies are exempt from the requirements of Rules 5605(b) (Independent Directors), 5605(d) (Compensation Committee Requirements) and 5605(e) (Independent Director Oversight of Director Nominations), except for the requirements of subsection (b)(2) which pertains to executive sessions of independent directors. Under the proposal, this provision is being moved unchanged to new Rule 5615(a)(1) (Exemptions Afforded to a Controlled Company).

with the applicable requirement during the phase-in period, but subsequently fell out of compliance before the end of the phase-in period, for purposes of computing the applicable cure period, the event that caused the failure to comply is the event causing the company to fall out of compliance after having complied with the requirement, and not the end of the phase-in period. In these circumstances, as described above, the company would not be considered deficient with the requirement until the end of the phase-in period.

In a situation where a company lists on Nasdaq or becomes subject to the requirements after it lists, relies on the phase-in period for one of the independent committees or the independent board requirements, and allows the phase-in period to run out without demonstrating compliance with the rule, the Exchange states that it is not appropriate for the company to rely on the grace period immediately thereafter because it would effectively extend the phase-in period.⁴¹ In such a case, Nasdaq states that it will issue a Staff Delisting Determination letter to delist the Company's securities.⁴²

Nasdaq also proposes to amend Rule 5810(c)(3)(E) to provide that if a company fails to meet the compensation committee composition requirement under Rule 5605(d)(2)(A) due to one vacancy, or one compensation committee member ceases to be independent due to circumstances beyond the member's reasonable control, the Listing Qualifications Department will promptly notify the company and inform it has until the earlier of its next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply with this requirement to cure the deficiency. However, if the company's next annual

⁴¹ See Notice, supra note 3, at 46531.

⁴² See id.

shareholders' meeting is held sooner than 180 days after the event that caused the deficiency, then the company has 180 days from the event that caused the deficiency to cure it.

C. Renumbering of Certain Rules and Non-Substantive Clarifications

Nasdaq proposes to renumber Rules 5615(c)(1), 5615(c)(2), and 5615(c)(3) as 5615(a)(7)(A), 5615(a)(7)(B), and 5615(b)(7), respectively. Nasdaq also proposes to amend the title of the proposed Rule 5615(b)(7) to improve the readability of the rule without changing its substance and update cross references to account for renumbering of the rules.

Additionally, Nasdaq proposes to amend the title of Rule 5615(b)(4), concerning companies that cease to be a Smaller Reporting Company, and renumber it to Rule 5615(b)(5) and add an introductory sentence to improve the readability of the rule without changing its substance.

Nasdaq is also proposing to correct a misleading rule reference in Rule 5615(b)(1), which makes references to the nominations committee's responsibilities under Rule 5605(b). The responsibilities of the nominations committee are found in Rule 5605(e), not Rule 5605(b). Accordingly, new Rule 5615(b)(1)(C) allows a majority of the Independent Directors to discharge responsibilities of the nominations committee outlined in Rule 5605(e).

Further, Nasdaq proposes to eliminate the reference to Rule 5625 in Rule 5615(b)(1), which states that: "For purposes of ... Rule 5625, a Company shall be considered to be listing in conjunction with an initial public offering only if it meets the conditions in Rule 10A-3(b)(1)(iv)(A) under the Act, namely, that the Company was not, immediately prior to the effective date of a registration statement, required to file reports with the Commission pursuant to Section 13(a) or 15(d) of the Act." By its terms, Rule 5625 (Notification of Noncompliance) applies to any company listed on Nasdaq, including in conjunction with an IPO, and requires that

a “Company must provide Nasdaq with prompt notification after an Executive Officer of the Company becomes aware of any noncompliance by the Company with the requirements of this Rule 5600 Series.” Moreover, Rule 5615(b)(1) does not provide an exemption from Rule 5625 for any company. Accordingly, Nasdaq states it is proposing to eliminate the references to Rule 5625 in Rule 5615(b)(1) to eliminate potential confusion without any substantive impact.

Finally, Nasdaq proposes to add an introductory paragraph to the phase-in rules in Rule 5615(b). The Exchange believes the change will improve the readability of the rules without changing its substance.⁴³

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.⁴⁴ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,⁴⁵ 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 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 and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

⁴³ See id.

⁴⁴ 15 U.S.C. 78f(b). In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁴⁵ 15 U.S.C. 78f(b)(5).

The development and enforcement of meaningful listing standards for a national securities exchange is of critical importance to financial markets and the investing public.⁴⁶ Meaningful listing standards are especially important given investor expectations regarding the nature of companies that have achieved an exchange listing for their securities, and the role of an exchange in overseeing its market and ensuring compliance with its listing standards.⁴⁷ The corporate governance standards embodied in the listing rules of national securities exchanges, in particular, play an important role in assuring that companies listed for trading on the exchanges' markets observe good governance practices,⁴⁸ including the maintenance of fair and impartial boards and on key committees such as the audit, compensation, and nominating committees. The Commission believes that Nasdaq's proposal will foster greater transparency, accountability, and objectivity in the oversight of listed companies.

As described above, the Exchange proposes to amend, or adopt new, phase-in schedules for certain listed companies to comply with corporate governance requirements relating to audit, compensation and nominating committees and majority independent boards. Specifically, the proposal would clarify and amend existing phase-in schedules for companies listing in

⁴⁶ See, e.g., Securities Exchange Act Release Nos. 99238 (Dec. 26, 2023), 89 FR 113, 116 (Jan. 2, 2024) (SR-NYSE-2023-34) and 81856, (Oct. 11, 2017), 82 FR 48296, 48298 (Oct. 17, 2017) (SR-NYSE-2017-31). Among other things, the Commission has stated that listing standards provide the means for an exchange to screen issuers that seek to become listed, and to provide listed status only to those that are bona fide companies and that have or will have sufficient public float, investor base, and trading interest likely to generate depth and liquidity sufficient to promote fair and orderly markets. See e.g., Securities Exchange Act Release No. 93256 (Oct. 4, 2021), 86 FR 56338, 56342 (Oct. 8, 2021) ("SR-NASDAQ-2021-007 Approval Order").

⁴⁷ See SR-NASDAQ-2021-007 Approval Order, *supra* note 46, at 56342. The Commission has also stated that adequate listing standards, by promoting fair and orderly markets, are consistent with Section 6(b)(5) of the Act, in that they are, among other things, designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and protect investors and the public interest. See *id.* at 56342, n.59.

⁴⁸ See e.g., Securities Exchange Act Release No. 48745 (Nov. 4, 2003), 68 FR 64154, 64175 (Nov. 12, 2003) (relating to approval of corporate governance rule filings SR-NYSE-2002-33, SR-NASD-2002-77, SR-NASD-2002-80, SR-NASD-2002-138, SR-NASD-2002-139, and SR-NASD-2002-141).

connection with an IPO; companies emerging from bankruptcy,⁴⁹ and companies transferring from other national securities exchanges with or without substantially similar requirements. The Exchange is also proposing to adopt new rules that provide certain corporate governance phase-in schedules for companies (i) listing securities that were, immediately prior to listing, registered pursuant to Section 12(g) of the Act; (ii) listing in connection with a carve-out or spin-off transaction; or (iii) ceasing to qualify as a Foreign Private Issuer. The Exchange states in support of the changes to, or additions of, these phase-in periods that they are substantially similar to those available for similar companies listing under the NYSE.⁵⁰

Consistent with the Commission’s previous order approving NYSE’s analogous corporate governance requirements,⁵¹ the Commission believes phase-in periods for specified companies newly listing on the Exchange or newly becoming subject to certain corporate governance listing standards as a result of a change in status are reasonable. The proposal would permit a phase-in schedule similar to that allowed under the current rules for a company listing in conjunction with an IPO, and would extend such a phase-in schedule appropriately, to companies listing in connection with a carve-out or spin-off transaction.⁵² As the Commission has previously stated in reference to approving similar NYSE rule changes, the proposed rules offer an acceptable minimal tolerance for the special circumstances of each of these types of new listings with respect to the point in time that the standards would begin to apply.⁵³ The proposal

⁴⁹ See supra note 10.

⁵⁰ See Notice, supra note 3, at 46531. See also Section 303A.00 (Introduction) of the NYSE Listed Company Manual. See also Securities Exchange Act Release No. 61067 (Nov. 25, 2009), 74 FR 63808 (Dec. 4, 2009) (approving SR-NYSE-2009-89) (“NYSE 2009-89 Approval Order”).

⁵¹ NYSE 2009-89 Approval Order, supra note 50, at 63810-12.

⁵² Id.

⁵³ Id.

provides a listed company with a limited phase-in period to assure that the listed company's board of directors and key committees are comprised in a manner that is designed to provide an objective oversight role and are consistent with phase-in periods previously approved by the Commission.⁵⁴ Further, the Commission notes that the Exchange's proposal on the phase-in periods does not make any changes to the requirements for companies to comply with any of the provisions of Rule 10A-3 under the Act.⁵⁵

The proposal also would allow companies listing in conjunction with an IPO, a carve-out, or a spin-off, in addition to companies listing securities previously registered under Section 12(g) of the Act, a phase-in period with respect to the Exchange requirement that the audit committee have a minimum of three members. As the Commission previously stated in approving NYSE's similar phase-in provisions, permitting a company to have only one member on its audit committee by the listing date, at least two members within 90 days of the listing date and at least three members within a year of the listing date, affords a reasonable accommodation for such companies.⁵⁶

The Commission further states that the proposed rule change does not grant an exemption or phase-in period to any newly-listed company with respect to the provision set forth in Rule

⁵⁴ See NYSE 2009-89 Approval Order, supra note 50.

⁵⁵ See 17 CFR 240.10A-3. As the Exchange states, the proposal also makes no adjustments for compliance with Rule 10C-1 under the Act as well. See Notice, supra note 3, at 46532.

⁵⁶ Under existing Exchange Rule 5615(b)(1) companies listing in connection with an IPO are allowed to phase in the requirements for independent compensation and nomination committees and must have one independent director member at the time of listing. Consistent with NYSE rules, Nasdaq is also proposing to provide that companies listing in connection with an IPO can comply with the requirement to have one independent director on the compensation and nomination committee no later than the earlier of the date the IPO closes or five business days from the Listing Date and for purposes of the listing of carve-outs and spin-offs that such committees have an independent director by the date the transaction closes. The Commission believes this is reasonable and has previously approved similar NYSE rules as consistent with the Act. See Section 303A.00 (Introduction) of the NYSE Listed Company Manual; NYSE 2009-89. Approval Order, supra note 50.

5605(c) that requires every listed company’s audit committee, and without distinction as to the committee’s size, to have at least one member who has past accounting or finance experience and other comparable experience or background which results in financial sophistication.⁵⁷ In addition, Rule 10A-3 under the Act⁵⁸ requires at least one member of a listed company’s audit committee to be independent as of the listing date, even when the company is allowed a phase-in period with respect to the independence of other audit committee members.⁵⁹ Thus, if a newly-listed company that is eligible for a phase-in period with respect to the size requirement chooses to have initially only one member on its audit committee, that member would need to be independent and also have to meet the Exchange’s financial sophistication requirement.

The Exchange is also proposing, as described above, to provide a phase-in to certain corporate governance requirements for companies that cease to be Foreign Private Issuers. As the Exchange explained in its proposal, Foreign Private Issuers can follow home country practice for certain corporate governance provisions.⁶⁰ The Exchange is proposing to allow a Foreign Private Issuer that ceases to qualify as such to comply with certain corporate governance requirements (e.g. the majority independent board requirement), six months after the date it was determined to no longer qualify as a Foreign Private Issuer.⁶¹ Foreign Private Issuers are not permitted to follow home country practice with respect to the independent audit committee requirements under Rule 5605(c)(2)(A)(ii) and the audit committee requirements in Rule 5605(c)(3)⁶² and the phase-in rule for Foreign Private Issuers makes clear that the company must continue to have an

⁵⁷ See Notice, supra note 3, at 46532.

⁵⁸ 17 CFR 240.10A-3.

⁵⁹ See 17 CFR 240.10A-3(b)(1)(iv).

⁶⁰ See Notice, supra note 3, at 46530.

⁶¹ See supra section II.A, “Companies Ceasing to Qualify as a Foreign Private Issuer.”

⁶² See Nasdaq IM-5615-3 (Foreign Private Issuers).

audit committee meeting these requirements during any phase in for other corporate governance requirements provided for in the new provision. The phase-in provisions for companies ceasing to be Foreign Private Issuers are consistent with NYSE rules and appear to be a reasonable accommodation.

The amended rules will also address the treatment of companies that wish to avail themselves of a cure period following the expiration of a phase-in period with respect to the independence requirements applicable to the board of directors, audit committee and compensation committee, the permissibility of which the rules are currently silent.⁶³ In prohibiting a cure period following the expiration of a phase-in period (unless the company demonstrated compliance with the applicable requirement during such phase-in period and then fell out of compliance before the expiration of the phase-in period), the Exchange states it seeks to limit the maximum time a company may remain listed without fully complying with independent committees or the independent board requirements. The Commission believes, given the importance of these requirements to assure adequate oversight, that it is reasonable not to provide a cure period under such circumstances because the company has already had a phase-in period and failed to comply throughout that period.⁶⁴ The greater clarity and uniformity of treatment afforded by the proposal can help to foster accountability of companies' corporate governance practices.

⁶³ The Exchange states it is codifying its current position. See Notice, *supra* note 3, at 46532. The Exchange proposal is also amending Rule 5810(c)(3)(E) to describe procedures for administering a cure period if one member of the compensation committee fails to comply with the compensation requirement in Rule 5605(d)(2)(A) in certain circumstances. See also Rule 5805(d)(4) (Cure Period for Compensation Committee).

⁶⁴ While the Exchange is proposing to allow a cure period if the company came into compliance and then fell out of compliance during the phase-in period, any cure period will be measured from the earlier period when the company fell out of compliance as opposed to end of the phase-in period.

In addition, the Commission believes that the renumbering of certain rules and other non-substantive changes, clarifications and corrections will add clarity to the Exchange's corporate governance listing rules, as well as remove any confusion regarding the application of phase-in periods.

Finally, as described above, many of the changes proposed by Nasdaq are similar to rules that were previously approved for the NYSE and found to be consistent with the Act.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act⁶⁵ that the proposed rule change (SR-NASDAQ-2024-019) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶⁶

Vanessa A. Countryman,
Secretary.

⁶⁵ 15 U.S.C. 78s(b)(2).

⁶⁶ 17 CFR 200.30-3(a)(12).