

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-89794; File No. SR-NASDAQ-2020-026)

September 9, 2020

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment No. 1 and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, to Adopt a New Requirement Related to the Qualification of Management for Companies From Restrictive Markets

I. Introduction

On May 29, 2020, 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 a new requirement related to the qualification of management for companies whose business is principally administered in a jurisdiction that has secrecy laws, blocking statutes, national security laws, or other laws or regulations restricting access to information by regulators of U.S.-listed companies. The proposed rule change was published for comment in the Federal Register on June 12, 2020.³ On July 20, 2020, 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 On August 21, 2020, the Exchange filed Amendment No. 1 to the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 89028 (June 8, 2020), 85 FR 35967 (“Notice”). Comments on the proposed rule change can be found at: <https://www.sec.gov/comments/sr-nasdaq-2020-026/srnasdaq2020026.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 89342, 85 FR 44951 (July 24, 2020). The Commission designated September 10, 2020 as the date by which the Commission shall

proposed rule change, which replaced and superseded the proposed rule change as originally filed.⁶ The Commission is publishing this notice and order to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons and to institute proceedings pursuant to Section 19(b)(2)(B) of the Act⁷ to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.

II. Exchange's Description of the Proposed Rule Change, as Modified by Amendment No. 1

The Exchange states that it has observed instances where it appears that a company's management lacked familiarity with the requirements to be a Nasdaq-listed public company in the U.S. or was otherwise unprepared for the rigors of operating as a public company.⁸ The Exchange further states that the risks arising from these situations are heightened when a company's business is principally administered in a jurisdiction that restricts access to information by regulators of U.S.-listed companies. As a result, the Exchange is now proposing

approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

⁶ Amendment No. 1 is available at <https://www.sec.gov/comments/sr-nasdaq-2020-026/srnasdaq2020026.htm>.

⁷ 15 U.S.C. 78s(b)(2)(B).

⁸ The Exchange states that, under federal securities laws, a company's management is responsible for preparing financial statements and for establishing and maintaining disclosure controls and procedures and internal control over financial reporting. See Amendment 1, *supra* note 6, at 4-5 (citing Sections 404(b), 302, and 906 of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002)). In addition, the Exchange states that its listing requirements include quantitative criteria based on the company's financial statements and market information, impose disclosure obligations, and establish minimum corporate governance requirements, and that a listed company's management is responsible for ensuring compliance with these listing requirements on an ongoing basis. See *id.* (citing Nasdaq Listing Rule 5625 (Notification of Noncompliance)).

new requirements that it believes will heighten compliance by such companies and enhance investor protection.⁹

First, the Exchange is proposing to adopt a new initial listing standard in Nasdaq Listing Rule 5210(c) to require any Company¹⁰ that principally administers its business in a jurisdiction that Nasdaq determines to have secrecy laws, blocking statutes, national security laws, or other laws or regulations restricting access to information by regulators of U.S.-listed companies in such jurisdiction (a “Restrictive Market”) to have, and certify that it will continue to have until the third anniversary of its listing date, at least one member of senior management or a director who has relevant past employment experience at a U.S.-listed public company or other experience, training, or background that results in the individual’s general familiarity with the regulatory and reporting requirements applicable to a U.S.-listed public company under Nasdaq rules and federal securities laws.¹¹ In the absence of such an individual, the proposal would require a Company that principally administers its business in a Restrictive Market (“Restrictive Market Company”) to retain on an ongoing basis an advisor or advisors, acceptable to Nasdaq, that will provide such guidance to the Company.¹² In determining whether a Company’s business is principally administered in a Restrictive Market, the proposed rule provides that Nasdaq may consider the geographic locations of the Company’s: (a) principal business segments, operations, or assets; (b) board and shareholders’ meetings; (c) headquarters or

⁹ See id. at 6.

¹⁰ Nasdaq Listing Rule 5005(a)(6) defines “Company” as the issuer of a security listed or applying to list on Nasdaq.

¹¹ The Exchange also proposes to renumber the remaining provisions of Nasdaq Listing Rule 5210.

¹² See proposed Rule 5210(c).

principal executive offices; (d) senior management and employees; and (e) books and records.¹³

The Exchange states that this definition would capture both foreign private issuers based in Restrictive Markets and companies based in the U.S. or another jurisdiction that principally administer their businesses in Restrictive Markets.¹⁴

In addition, the Exchange is proposing to adopt new Nasdaq Listing Rule 5250(g) to require any Company that was subject to proposed Rule 5210(c) upon initial listing and that continues to be a Restrictive Market Company to have, until the third anniversary of its listing date,¹⁵ at least one member of senior management or a director who has relevant past employment experience at a U.S.-listed public company or other experience, training, or background that results in the individual's general familiarity with the regulatory and reporting requirements applicable to a U.S.-listed public company under Nasdaq rules and federal securities laws or, in the absence of such an individual, to retain on an ongoing basis an advisor or advisors, acceptable to Nasdaq, that will provide such guidance to the Company. The Exchange is also proposing changes to Nasdaq Listing Rule 5810 (Notification of Deficiency by

¹³ See id.

¹⁴ See Amendment No. 1, supra note 6 at 7, n.8. The Exchange further provides the following example: a company's headquarters could be located in Country A, while the majority of its senior management, employees, assets, operations, and books and records are located in Country B, which is a Restrictive Market. In this case, Nasdaq would consider the company's business to be principally administered in Country B, which is a Restrictive Market, and Nasdaq would require the company to meet the criteria set forth in proposed Rule 5210(c). See id. at 7.

¹⁵ The Exchange states that it believes three years will provide a sufficient transition period for Restrictive Market Companies because by the third anniversary of a company's listing date, the company will have filed at least two annual reports and gone through the accompanying reporting processes and procedures, and the company's staff will have been subject to federal securities laws and Nasdaq's regulatory and reporting requirements for a sufficient period of time to gain experience with the requirements and how to comply. See id. at 8.

the Listing Qualifications Department) to allow a Restrictive Market Company subject to, but not in compliance with, proposed Rule 5250(g) to submit a plan to regain compliance pursuant to Nasdaq Listing Rule 5810(c)(2)(iii).¹⁶

The proposed rule changes would apply to Restrictive Market Companies that apply to list on Nasdaq after the date of effectiveness of the proposed rules and would not apply to companies already listed on Nasdaq.¹⁷ Nasdaq states that it believes this is appropriate because currently-listed companies are already subject to Nasdaq's requirements and U.S. securities laws and have gained familiarity with the reporting processes and procedures and disclosure requirements by virtue of being subject to them.¹⁸

III. Summary of the Comment Letters Received

One commenter stated that it fully supports the proposed rule change inasmuch as it seems reasonably tailored to help ensure full, complete, and transparent financial and other disclosure from Restrictive Market Companies.¹⁹ Another commenter expressed its support for the proposed requirements relating to management qualifications for Restrictive Market Companies, but recommended that the proposal be revised to apply to all Restrictive Market

¹⁶ The Exchange states that a Restrictive Market Company would be required to disclose that it does not meet the requirement set forth in proposed Rule 5250(g) pursuant to Nasdaq Listing Rule 5810(b) and that, based on its review of the company's compliance plan, Nasdaq Staff generally would be able to allow the company up to 180 days to regain compliance under Nasdaq Listing Rule 5810(c)(2)(B). See id.

¹⁷ See id. at 9.

¹⁸ See id. at 10. Nasdaq further states that, to the extent there are future concerns about a currently-listed company that arise from an apparent unfamiliarity with the requirements to be a U.S.-listed public company, Nasdaq would exercise its regulatory authority and could consider that lack of familiarity when determining whether to allow the company to remain listed. See id.

¹⁹ See Letter from Annemarie Tierney, Founder and Principal, Liquid Advisors, Inc. (July 2, 2020), at 5.

Companies listed on Nasdaq, rather than just those companies that apply to list on Nasdaq after the date of the proposed rule change's effectiveness.²⁰ This commenter stated that Nasdaq provided no basis for this distinction between companies and suggested that such distinction may raise issues about whether the proposal unfairly discriminates among companies.²¹ In response, Nasdaq amended the proposal to apply the proposed requirements to Restrictive Market Companies only until the third anniversary of their listing date.²² Nasdaq stated that it believes it is appropriate to impose the proposed requirement only for three years from the date that a Restrictive Market Company lists and that after being subject to Nasdaq's requirements for that period of time, it would potentially be unfair to treat the company differently than other listed companies in the absence of a specific identified concern.²³

IV. Proceedings to Determine Whether to Approve or Disapprove SR-NASDAQ-2020-026, as Modified by Amendment No. 1, and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act²⁴ to determine whether the proposed rule change, as modified by Amendment No. 1, 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 described below, the Commission seeks and encourages interested persons

²⁰ See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (June 25, 2020), at 6-7.

²¹ See id. at 7.

²² See Amendment No. 1, supra note 6.

²³ See id. at 10, n.13.

²⁴ 15 U.S.C. 78s(b)(2)(B).

to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,²⁵ the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change'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, 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 to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.²⁶

The Exchange's proposed requirements: (1) only apply to Restrictive Market Companies that apply to list on Nasdaq after the date of effectiveness of the proposed rules; (2) only apply until the third anniversary of a Restrictive Market Company's listing date; and (3) do not apply to Restrictive Market Companies already listed on Nasdaq, even if such companies have been listed on Nasdaq for less than three years. Accordingly, the Commission believes there are questions as to whether the proposal is consistent with Section 6(b)(5) of the Act and its requirement, among other things, that the rules of a national securities exchange not be designed to permit unfair discrimination.

²⁵ Id.

²⁶ 15 U.S.C. 78f(b)(5).

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.”²⁷ 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,²⁸ and any failure of an SRO 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.²⁹

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposal, as modified by Amendment No. 1, is consistent with the Act.

V. 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, as modified by Amendment No. 1, is consistent with Section 6(b)(5)³⁰ 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

²⁷ 17 CFR 201.700(b)(3).

²⁸ See id.

²⁹ See id.

³⁰ 15 U.S.C. 78f(b)(5).

Commission will consider, pursuant to Rule 19b-4 under the Act,³¹ any request for an opportunity to make an oral presentation.³²

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change, as modified by Amendment No. 1, 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 Amendment No. 1,³³ 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-2020-026 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.

³¹ 17 CFR 240.19b-4.

³² 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).

³³ See supra note 6.

All submissions should refer to File Number SR-NASDAQ-2020-026. 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-2020-026 and should be submitted by [insert date 21 days from date of 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.³⁴

J. Matthew DeLesDernier
Assistant Secretary

³⁴ 17 CFR 200.30-3(a)(57).