SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-94265; File No. SR-NASDAQ-2022-015)

February 16, 2022

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Exempt Non-Convertible Bonds Listed Under Rule 5702 from Certain Corporate Governance Requirements

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on February 4, 2022, The Nasdaq Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to exempt non-convertible bonds listed under Rule 5702 from certain corporate governance requirements. The text of the proposed rule change is available on the Exchange's Website at https://listingcenter.nasdaq.com/rulebook/nasdaq/rules, at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in

1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

In November 2018, the Commission approved amendments to the Exchange's rules that permit the Exchange to list and trade non-convertible corporate debt securities (referred to herein as "bonds" or "non-convertible bonds") on the Nasdaq Bond Exchange.[3] Under the Exchange's listing rules then adopted, a non-convertible bond was eligible for initial listing on the Exchange only if it had a principal amount outstanding or market value of at least $5 million and its issuer had at least one class of an equity security listed on Nasdaq, the New York Stock Exchange ("NYSE"), or NYSE American.[4] In February 2020, Nasdaq amended Listing Rule 5702 to allow the listing of non-convertible bonds issued by certain companies not listed on Nasdaq, NYSE American or NYSE (the "2020 Filing").[5]

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3 See Securities Exchange Act Release No. 84575 (November 13, 2018), 83 FR 58309 (November 19, 2018) (approving SR-NASDAQ-2018-070, as modified by Amendment Nos. 1-3) ("Approval Order").

4 Rule 5702(a).

5 Specifically, the 2020 Filing expanded the categories of non-convertible bonds eligible to be listed under Rule 5702 to include non-convertible bonds of affiliates of a listed company where: a listed company directly or indirectly owns a majority interest in, or is under common control with, the issuer of the non- convertible bond; or a listed company has guaranteed the non-convertible bond. In addition, for un-affiliated companies, the 2020 Filing allowed listing of non-convertible bonds where a nationally recognized securities rating organization (an "NRSRO") has assigned a current rating to the non-convertible bond that is no lower than an S&P Corporation "B" rating or equivalent rating by another NRSRO; or if no NRSRO has assigned a rating to the issue, an NRSRO has currently assigned (i) an investment grade rating to an immediately senior issue of the same company, or (ii) a rating that is no lower than an S&P Corporation "B" rating, or an equivalent rating by another NRSRO, to a pari passu or junior issue of the same company.

In 2018, Nasdaq stated its plan to seek exemptions to certain requirements of the Nasdaq Rule 5600 Series, including requirements relating to Review of Related Party Transactions (Rule 5630), Shareholder Approval (Rule 5635), and Voting Rights (Rule 5640),[6] but later indicated that it would not pursue those exemptions because, at the time, the equity of the issuers listing non-convertible bonds under Rule 5702 was required to be listed on Nasdaq, NYSE American or NYSE and therefore were subject to those Rules or substantially similar rules of NYSE American or the NYSE.[7]

Given the change made in the 2020 Filing to allow the listing of non-convertible bonds by issuers that are not otherwise listed on a national securities exchange, Nasdaq now proposes to exempt non-convertible bonds from the requirements relating to Review of Related Party Transactions (Rule 5630), Shareholder Approval (Rule 5635), and Voting Rights (Rule 5640).[8]

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6 See Securities Exchange Act Release No. 84001 (August 30, 2018), 83 83 FR 45289 (September 6, 2018).

7 See Securities and Exchange Act Release No. 86072 (June 10, 2019), 84 FR 27816 (June 14, 2020).

8 To increase the clarity of the rule, Nasdaq proposes to include in the proposed Listing Rule 5702(d) other exemptions applicable to an issuer of a non-convertible bond, as provided by Listing Rule 5615(a)(6)(A), which states, in the relevant parts, that issuers "whose only securities listed on Nasdaq are … debt securities … are exempt 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), and Meetings of Shareholders (as set forth in Rule 5620(a)). In addition, these issuers are exempt from the requirements relating to Audit Committees (as set forth in Rule 5605(c)), except for the applicable requirements of SEC Rule 10A-3. Notwithstanding, if the issuer also lists its common stock or voting preferred stock, or their equivalent on Nasdaq it will be subject to all the requirements of the Nasdaq 5600 Rule Series." Nasdaq also proposes to include in the proposed Listing Rule 5702(d) exemptions from the requirements relating to Diverse Board Representation (as set forth in Rule 5605(f)) and Board Diversity Disclosure (as set forth in Rule 5606) applicable to an issuer of a non-convertible bond, as provided by Listing Rules 5605(f)(4) and 5606(c), respectively.

Nasdaq believes that it is appropriate to exempt non-convertible bonds satisfying the requirements of Listing Rule 5702, which are the same as the requirements for listing debt on NYSE American,[9] from the requirements relating to Review of Related Party Transactions (Rule 5630), Shareholder Approval (Rule 5635), and Voting Rights (Rule 5640). Nasdaq believes that listing requirements for non-convertible bonds are designed so that only companies capable of meeting their financial obligations are eligible to have their non-convertible bonds listed on Nasdaq. To issue a bond, the issuer hires a third-party trustee, typically a bank or trust company, to represent buyers of the bond. The agreement entered into by the issuer and the trustee is referred to as the trust indenture, which is a binding contract that is created to protect the interests of bondholders. Accordingly, holders of non-convertible bonds do not expect to have governance rights the way that equity investors may. The issuance of equity and assignment of voting rights does not affect these creditors because their interests are protected contractually, as indicated above. Accordingly, bondholders are focused on the ability of the issuer to meet their financial obligations and the listing rules already have standards in that regard. For this reason, non-convertible bonds are already exempt from many of the governance requirements.[10]

Nasdaq believes that it does not need to impose the requirements of the Rules in connection with listing of non-convertible bonds on issuers that have a class of equity listed on Nasdaq, NYSE or NYSE American because these issuers either have equity securities listed on Nasdaq, which makes them subject to the requirements of the Rules, or NYSE or NYSE

9 See Section 104 of the NYSE American Company Guide. In addition, NYSE has similar listing conditions, although the NYSE rule does not permit listing of debt securities where the issuer has equity securities listed on Nasdaq or NYSE American, is directly or indirectly owned by, or is under common control with, an issuer listed on Nasdaq or NYSE American, or where an issuer listed on Nasdaq or NYSE American has guaranteed the debt security. See Section 102.03 of the NYSE Listed Company Manual.

10 See Listing Rule 5615(a)(6)(A) and footnote 8 above.

American, which makes them subject to substantially similar requirements of such exchanges. In cases where listed issuers raise debt through entities they directly or indirectly own a majority interest in, or entities with which they are under common control, Nasdaq believes it is appropriate to exempt these issuers from the requirements of the Rules and rely on the company's listing on Nasdaq, NYSE American or NYSE as evidence that the issuer of the non-convertible bond is capable of meeting its financial obligations because the issuer is a subsidiary or affiliate of the listed company.

Similarly, in other cases, where the issuer of the non-convertible bond is not a subsidiary or affiliate of a listed company, a listed company may nonetheless guarantee the debt and in these cases the guarantee by the listed company serves to ensure that if the company cannot, then its guarantor is capable of meeting the financial obligations of the non-convertible bond, particularly, because that debt is a senior security to the listed equity.

Nasdaq also believes that there are other indications that the issuer of a non-convertible bond is capable of meeting its financial obligations, besides the ties to a listed company described above. Specifically, in the case of these un-affiliated issuers, Nasdaq believes that it is appropriate to exempt from the requirements of the Rules issuers of listed bonds with a current rating from an NRSRO that is no lower than an S&P Corporation "B" rating or equivalent rating by another NRSRO because this is another third-party evaluation of the issuers ability to make interest payments and repay the loan upon maturity. Similarly, if a more junior issue of the same company, or an issue of the same company at the same priority in liquidation (a "pari passu issue") has a rating no lower than an S&P Corporation "B" rating or an equivalent rating by another NRSRO, than it is appropriate to presume that the company will also be capable of meeting its obligations on the non-convertible bonds to be exempt from the requirements of the

Rules because those bonds would be repaid in the same priority (if a pari passu issue) or sooner (if the other issue is more junior) as the "B" rated issue. Finally, if no NRSRO has assigned a rating to the issue to be listed, Nasdaq believes it is appropriate to consider the rating assigned to the next most senior issue of the same company. If that rating is an investment grade rating, which is higher than the "B" rating standard just described, then that also provides assurance that the company will be capable of meeting its financial obligations on the non-convertible bond.[11] In assigning ratings, an NRSRO considers the ability of the issuer to make timely payments of interest and ultimate payment of principal to the related securities.[12]

Nasdaq notes that it performs real-time surveillance of the bonds for the purpose of maintaining a fair and orderly market at all times.[13] An issuer listing non-convertible bonds will continue to be subject to the existing continued listing requirement of Listing Rule 5702(b)(2) that it must be able to meet its obligations on the listed non-convertible bonds. These issuers are also subject to the requirement in Listing Rule 5702(c) to make prompt public disclosure of material information that would reasonably be expected to affect the value of its listed bonds or influence investors' decisions regarding such bonds, which will allow Nasdaq to timely review for events that may cause the issuer to be unable to meet its obligations on the listed non-convertible bonds. Thus, for example, an issuer would have to disclose if a non-convertible bond

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11 See S&P Global "Understanding Ratings" available at https://www.spglobal.com/ratings/en/about/understanding-ratings, which identifies ratings of "BBB" or higher as investment grade, at least two levels higher than "B" ratings.

12 See, e.g., Exhibit 2, Principles of Credit Ratings, to S&P Global Form NRSRO, available at https://www.standardandpoors.com/en_US/delegate/getPDF?articleId=2193671&type=COMMENTS&subType=REGULATORY.

13 See Approval Order at 58313.

that was previously guaranteed is no longer guaranteed, or if the issuer or guarantor declares bankruptcy. An issuer would also have to disclose if its common stock is delisted, and Nasdaq would consider whether it is appropriate to continue the listing of the non-convertible bond of an issuer that was majority-owned, under common control, or guaranteed by a listed company, which has since been delisted. Nasdaq also would consider any changes in the rating assigned to the bond or other issues of the same company that were used to qualify the listed bond.

Finally, Nasdaq notes that in approving the bond listing standards of other exchanges,[14] the Commission considered the delisting criteria for the bonds and noted that it would have serious concerns about any proposal that does not provide for the delisting of convertible bonds where a company acts to disadvantage its shareholders. That concern was addressed by including in a requirement that the NYSE American would delist convertible bonds when the issuer's equity security is delisted due to a violation of the that exchange's corporate governance listing standards. However, in circumstances where the exchange lacked an equity listing relationship with the debt issuer the Commission concluded that:

> the revised standards should enable [NYSE American] to identify listed companies that may have insufficient resources to meet their financial obligations or whose debt securities may lack adequate trading depth and liquidity. This, in turn, will allow [NYSE American] to take appropriate action to protect bondholders.

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[14] See Section 104 of the NYSE American Company Guide; Securities Exchange Act Release No. 36594 (December 14, 1995), 60 FR 66330 (December 21, 1995) (approving SR-Amex-95-29). See also Securities Exchange Act Release No. 37878 (October 28, 1996), 61 FR 56726 (November 4, 1996) (Notice of filing and immediate effectiveness of proposed rule change by the Chicago Board Options Exchange, Inc., relating to listing and delisting standards for debt securities).

In terms of the delisting criteria, the Commission discussed the lack a minimum market value for debt securities, elimination of the distribution requirement for "unaffiliated"[15] issuers and set forth its expectation for the exchange to consider carefully the propriety of continued exchange trading of the securities of bankrupt or distressed companies, and indicated that it expected debt securities with minimal value to be delisted. However, the Commission did not discuss or set forth any expectations that an unaffiliated bond issuer should be subject to any corporate governance requirements applicable to an issuer of an equity security. Nasdaq believes this approach is consistent with the creditors' reliance on contractual protections of their interests rather than on governance rights, as described above. Accordingly, Nasdaq believes that it is appropriate to exempt non-convertible bonds satisfying the requirements of Listing Rule 5702 from the requirements of the Rules and that this approach is consistent with the delisting requirements of other exchanges.[16]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[17] in general, and furthers the objectives of Section 6(b)(5) of the Act,[18] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

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15 The Commission defined an unaffiliated issuer as an issuer that has no equity securities listed on the [NYSE American] or NYSE; is not, directly or indirectly, majority-owned by, nor under common control with, an issuer of [NYSE American] or NYSE-listed equity securities; and is not issuing a debt security guaranteed by an issuer of equity securities listed on the [NYSE American] or NYSE.

16 See footnote 14 above.

17 15 U.S.C. 78f(b).

18 15 U.S.C. 78f(b)(5).

Listing Rule 5702 allows the listing of non-convertible bonds issued by companies capable of meeting their financial obligations on those bonds. Nasdaq believes that the proposed rule change is designed to protect investors and the public interest because issuers that have equity securities listed on Nasdaq, are already subject to the requirements of the Rules, or such issuers are subject to the rules of NYSE or NYSE American, that impose substantially similar requirements.

Nasdaq also believes that exempting unaffiliated bond issuers is designed to remove impediments to and perfect the mechanism of a free and open market because issuers of such bonds are capable of meeting their financial obligations on those bonds and because Nasdaq lacks an equity listing relationship with the debt issuer or such relationship is attenuated. The existing alternative conditions for issuers that do not have equity securities listed on Nasdaq, NYSE American or NYSE are designed to protect investors and the public interest by ensuring that the bond is issued or guaranteed by an entity listed on Nasdaq, NYSE American or NYSE; is issued by an entity under direct, indirect or common control with an issuer listed on Nasdaq, NYSE American or NYSE; that the issue to be listed (or an issue that is at the same priority or junior to the issue to be listed) is assigned a minimum "B" rating or its equivalent by an NRSRO; or that the next most senior issue to the issue to be listed is assigned an investment grade rating. These conditions are appropriate indicia that the issuer, or a guarantor, can meet its obligations on the debt. Moreover, this approach is consistent with approach of NYSE American and other exchanges for listing debt.[19] As discussed above, Nasdaq believes that the Commission has previously considered this approach and approved listing standards that assure that an issuer is

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[19] See Section 104 of the NYSE American Company Guide, Nasdaq Listing Rule 5515(b)(4) and Section 102.03 of the NYSE Listed Company Manual.

capable of meeting its financial obligations. Finally, Nasdaq notes that it surveils for changes to the conditions of listed bonds that may implicate the ability of the issuer to meet its obligations on the listed non-convertible bonds.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Rather, the proposed rule change will enhance competition among exchanges by conforming Nasdaq's listing standards for non-convertible bonds to those of other exchanges, as described in details above. In addition, the proposed rule change may enhance competition among issuers by allowing more issuers to list their non-convertible bonds on Nasdaq, provided they meet the requirements of the rule.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-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].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

J. Matthew DeLesDernier
Assistant Secretary

[20] 17 CFR 200.30-3(a)(12).