

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-97060; File No. SR-NASDAQ-2023-005)

March 7, 2023

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Establish Listing Standards Related to Recovery of Erroneously Awarded Executive Compensation

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 22, 2023, 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 self-regulatory organization. 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 establish listing standards related to recovery of erroneously awarded executive compensation as required by SEC Rule 10D-1.

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

The Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”) added Section 10D to the Securities Exchange Act of 1934.³ In October 2022, the SEC adopted final Rule 10D-1⁴ instructing national securities exchanges to establish specific listing standards that require each issuer to adopt and comply with a written executive compensation recovery policy.⁵ Under Rule 10D-1, listed companies must recover from current and former executive officers incentive-based compensation received during the three fiscal years preceding the date on which the issuer is required to prepare an accounting restatement to correct a material error. As required by Rule 10D-1 and the Listing Standards Release, Nasdaq proposes to adopt Listing Rule 5608 (the “Rule”), titled, recovery of erroneously awarded compensation.

Proposed Listing Rule 5608(a) would introduce the requirements of the Rule in accordance with the Listing Standards Release. Nasdaq also proposes to adopt Listing Rule 5608(b), which sets forth the substantive requirements of Rule 10D-1(b), and Listing Rule 5608(d), which sets forth the defined terms applicable to the Rule. As provided in Rule 10D-1, Nasdaq proposes to define the term “executive officer” to include the issuer’s president, principal financial officer, principal accounting officer, any vice-president in charge of a principal

³ 15 U.S.C. 78j-4.

⁴ 17 CFR 240.10D-1.

⁵ Securities Exchange Act Release No. 96159 (October 26, 2022), 87 FR 73076 (November 28, 2022)(“Listing Standards Release”).

business unit, division or function and any other person (including executive officers of a parent or subsidiary) who performs similar policy-making functions for the issuer. The term “policy-making function” is not intended to include policy-making functions that are not significant.

The recovery of erroneously awarded compensation is required on a “no fault” basis, without regard to whether any misconduct occurred or an executive officer’s responsibility for the erroneous financial statements. A restatement due to material non-compliance with any financial reporting requirement under the securities laws triggers application of the recovery policy. As explained in the Listing Standards Release, the determination regarding materiality of an error should be based on facts and circumstances and existing judicial and administrative interpretations. The proposed Rule requires recovery for restatements that correct errors that are material to previously issued financial statements (commonly referred to as “Big R” restatements), as well as for restatements that correct errors that are not material to previously issued financial statements but would result in a material misstatement if the errors were left uncorrected in the current report or the error correction was recognized in the current period (commonly referred to as “little r” restatement).

Under the proposed Rule, listed companies will be required to recover the amount of incentive-based compensation received by an executive officer that exceeds the amount the executive officer would have received had the incentive-based compensation been determined based on the accounting restatement. Incentive-based compensation is deemed received⁶ in the fiscal period during which the financial reporting measure specified in the incentive-based compensation award is attained, even if the grant or payment of the incentive-based compensation occurs after the end of that period. For incentive-based compensation based on

⁶ Nasdaq proposes to define the term “received” as provided in Rule 10D-1.

stock price or total shareholder return, companies can use a reasonable estimate of the effect of the restatement on the applicable measure to determine the amount to be recovered.

As provided in Rule 10D-1, Nasdaq proposes to define the term “Incentive-based compensation” to mean any compensation that is granted, earned or vested based wholly or in part upon the attainment of any financial reporting measure. The term “financial reporting measures” is defined as measures that are determined and presented in accordance with the accounting principles used in an issuer’s financial statements, and any measures that are derived wholly or in part from such measures, as well as an issuer’s stock price and total shareholder return. Equity awards that vest exclusively upon completion of a specified employment period, without any performance condition, and bonus awards that are discretionary or based on subjective goals or goals unrelated to financial reporting measures, do not constitute incentive-based compensation.⁷ Incentive-based compensation received by an executive officer before the issuer had a class of securities listed on a national securities exchange or a national securities association would not be subject to the compensation recovery policy.

As also provided in Rule 10D-1, Nasdaq proposes to set forth the circumstances where listed companies would have limited discretion not to recover the excess incentive-based compensation. Specifically, Nasdaq proposes to provide that a company is required to recover compensation in compliance with its recovery policy, except to the extent that pursuit of recovery would be impracticable because: (1) the direct expense paid to a third party to assist in enforcing the policy would exceed the amount to be recovered, (2) recovery would violate home country law, where that law was adopted prior to November 28, 2022, based on an opinion of counsel acceptable to Nasdaq or (3) recovery would cause a broad-based retirement plan to fail

⁷ See the Listing Standards Release, at 73094.

to meet the tax-qualification requirements of 26 U.S.C. 401(a)(13) or 26 U.S.C. 411(a) and regulations thereunder. Before concluding that pursuit is impracticable, a company must first make a reasonable attempt to recover the incentive-based compensation and provide that documentation to Nasdaq. The listed company's board is required to apply on a "no fault" basis any recovery policy consistently to executive officers and a listed company is prohibited from indemnifying any current or former executive officer for recovered compensation.

As provided in Rule 10D-1, Nasdaq proposes to require each listed company to file all disclosures with respect to its erroneously awarded executive compensation recovery policy in accordance with the requirements of the Federal securities laws, including the disclosure required by the applicable Commission filings. As explained in the Listing Standards Release, each listed company is required to file its compensation recovery policy as an exhibit to its Exchange Act annual report. In addition, the Commission's rules require disclosure pursuant to Item 402 of Regulation S-K of the following items, among others, if, during the prior fiscal year, either a triggering restatement occurred or any balance of excess incentive-based compensation was outstanding:

- The date on which the listed issuer was required to prepare an accounting restatement and the aggregate dollar amount of erroneously awarded compensation attributable to such accounting restatement (including an analysis of how the recoverable amount was calculated) or, if the amount has not yet been determined, an explanation of the reasons and disclosure of the amount and related disclosures in the next filing that is subject to Item 402 of Regulation S-K;
- The aggregate dollar amount of erroneously awarded compensation that remains outstanding at the end of its last completed fiscal year;

- If the financial reporting measure related to a stock price or total shareholder return metric, the estimates used to determine the amount of erroneously awarded compensation attributable to such accounting restatement and an explanation of the methodology used for such estimates;
- If recovery would be impracticable pursuant to Rule 10D-1(b)(1)(iv), for each current and former named executive officer and for all other current and former executive officers as a group, disclose the amount of recovery forgone and a brief description of the reason the listed registrant decided in each case not to pursue recovery; and
- For each current and former named executive officer, disclose the amount of erroneously awarded compensation still owed that had been outstanding for 180 days or longer since the date the issuer determined the amount owed.

The additional disclosure requirements apply immediately following the effective date of the applicable listing standards.

Covered Companies

As provided in Rule 10D-1, Nasdaq proposes to apply the proposed listing standards related to recovery of erroneously awarded executive compensation to all listed companies (including but not limited to, foreign private issuers, emerging growth companies, smaller reporting companies, controlled companies and issuers of listed debt whose stock is not also listed) except for certain registered investment companies to the extent they do not provide incentive-based compensation to their employees. As provided in Rule 10D-1, Nasdaq proposes to adopt Listing Rule 5608(c) to provide certain exemptions from the requirements related to recovery of erroneously awarded executive compensation. Specifically Rule 5608(c) will exempt any security issued by a unit investment trust, as defined in 15 U.S.C. 80a-4(2); and any

security issued by a management company, as defined in 15 U.S.C. 80a-4(3), that is registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8), if such management company has not awarded incentive-based compensation to any executive officer of the company in any of the last three fiscal years, or in the case of a company that has been listed for less than three fiscal years, since the listing of the company.

For clarity, Nasdaq proposes to amend Listing Rule 5210 to indicate that any company newly listing on Nasdaq must comply with the requirements of proposed Listing Rule 5608 (Recovery of Erroneously Awarded Compensation). Nasdaq also proposes to similarly amend Listing Rule 5701 governing listing requirements for “other securities,” and Listing Rule 5702 governing listing requirements for “debt securities.”

Compliance with Compensation Recovery Policy

As described above, Nasdaq proposes to require that a company will be subject to delisting if it does not adopt a compensation recovery policy that complies with the applicable listing standard, disclose the policy in accordance with Commission rules or comply with the policy’s recovery provisions. Rule 10D-1 requires that a listed company recover the amount of erroneously awarded incentive-based compensation reasonably promptly,⁸ but does not specify the time by which the issuer must complete the recovery of excess incentive-based compensation; rather, Nasdaq would determine whether the steps an issuer is taking constitute compliance with its compensation recovery policy. The issuer’s obligation to recover

⁸ In that regard, the Commission stated that it “recognize[s] that what is reasonable may depend on the additional cost incident to recovery efforts. [The Commission] expect[s] that issuers and their directors and officers, in the exercise of their fiduciary duty to safeguard the assets of the issuer (including the time value of any potentially recoverable compensation), will pursue the most appropriate balance of cost and speed in determining the appropriate means to seek recovery.” The Listing Standards Release, at 73104.

erroneously awarded incentive-based compensation reasonably promptly will be assessed on a holistic basis with respect to each such accounting restatement prepared by the issuer. In evaluating whether an issuer is recovering erroneously awarded incentive-based compensation reasonably promptly, the Exchange will consider whether the issuer is pursuing an appropriate balance of cost and speed in determining the appropriate means to seek recovery, and whether the issuer is securing recovery through means that are appropriate based on the particular facts and circumstances of each executive officer that owes a recoverable amount.

Nasdaq proposes to amend Listing Rule 5810(c)(2)(A)(iii) to provide that a company that failed to comply with proposed Listing Rule 5608 is required to submit to Nasdaq Staff a plan to regain compliance. The administrative process for such deficiencies will follow the established pattern used for similar corporate governance deficiencies, and would allow Nasdaq Staff to provide the issuer up to 180 days to cure the deficiency. Thereafter, Nasdaq Staff would be required to issue a delisting letter,⁹ which the issuer could appeal to the Hearings Panel, as provided in Listing Rule 5815. The Hearings Panel could allow the issuer up to an additional 180 days to cure the deficiency.

Implementation and Transition

As provided in Rule 10D-1, Nasdaq proposes to require that each Company is required to (i) adopt a policy governing the recovery of erroneously awarded compensation as required by this rule no later than 60 days following the effective date of this rule, and (ii) provide the

⁹ Listing Rule 5810 provides that notifications of deficiencies that allow for submission of a compliance plan may result, after review of the compliance plan, in issuance of a Staff Delisting Determination or a Public Reprimand Letter. However Nasdaq believes that issuance of a Public Reprimand Letter is inconsistent with the provisions of Rule 10D-1 and, therefore, proposes to amend Listing Rule 5805(j) to provide that a Public Reprimand Letter may not be issued for violations of a listing standard required by Rule 10D-1. Nasdaq also proposes to modify Listing Rules 5810-5825 accordingly.

disclosures required by this rule and in the applicable Commission filings on or after the effective date of this rule. Notwithstanding the look-back requirement in Rule 5608(b)(1)(i)(D), as provided in the Listing Standards Release, Nasdaq proposes to provide that a company is only required to apply the recovery policy to incentive-based compensation received on or after the effective date of this rule.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁰ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹¹ 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.

As required by the Dodd-Frank Act and Rule 10D-1, Nasdaq is proposing amendments to its listing rules relating to recovery of erroneously awarded executive compensation. These proposals are, generally, required by SEC Rule 10D-1. Nasdaq believes that these proposals protect investors and the public interest by requiring companies, with certain exemptions, that, in the event the company is required to prepare an accounting restatement, the company will recover reasonably promptly erroneously awarded incentive-based compensation paid to its current or former executive officers based on any misstated financial reporting measure. Nasdaq also believes that these new requirements will help facilitate effective oversight of executive compensation and promote accountability to investors by not allowing executive officers to retain compensation that they were awarded erroneously. Finally, Nasdaq agrees with the

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(5).

Commission that the recovery requirement may provide executive officers with an increased incentive to take steps to reduce the likelihood of inadvertent misreporting and will reduce the financial benefits to executive officers who choose to pursue impermissible accounting methods, which the Commission expects will further discourage such behavior.¹²

Nasdaq believes that the proposal to amend Listing Rule 5810(c)(2)(A)(iii) to provide that a company that failed to comply with proposed Listing Rule 5608 is required to submit to Nasdaq Staff a plan to regain compliance and be subject to the appeal process described above, is consistent with the investor protection objectives of Section 6(b)(5) of the Act¹³ because the administrative process for such deficiencies will follow the established pattern used for similar corporate governance deficiencies and Nasdaq has developed expertise administering this process.

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. The proposed amendments would not impose any burden on competition, not necessary or appropriate in furtherance of the purposes of the Act, because the proposed listing standards will apply to all listed companies, except in limited circumstances described above, as required by the Dodd-Frank Act and the SEC Rule 10D-1.

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.

¹² See the Listing Standards Release, at 73077.

¹³ 15 U.S.C. 78f(b)(5).

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-2023-005 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-2023-005. 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-2023-005, 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.¹⁴

Sherry R. Haywood

Assistant Secretary

¹⁴ 17 CFR 200.30-3(a)(12).