

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-88304; File No. SR-NASDAQ-2020-008)

February 28, 2020

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rule 5702

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 14, 2020, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “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 amend Rule 5702 to allow the listing of non-convertible bonds issued by certain companies not listed on Nasdaq, NYSE American or NYSE and to remove language that is no longer applicable.

The text of the proposed rule change is set forth below. Proposed new language is italicized; deleted text is in brackets.

5702. Debt Securities (Other than Convertible Debt)

(a) For initial listing of a non-convertible bond, the following conditions must be satisfied:

- (1) the principal amount outstanding or market value must be at least \$5 million; and
- (2) the security must be characterized by one of the following conditions:

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

(A) the issuer of the non-convertible bond must have one class of equity security that is listed on Nasdaq, NYSE American or the New York Stock Exchange (“NYSE”)[.];

(B) an issuer of equity securities listed on Nasdaq, NYSE American or NYSE directly or indirectly owns a majority interest in, or is under common control with, the issuer of the non-convertible bond;

(C) an issuer of equity securities listed on Nasdaq, NYSE American or NYSE has guaranteed the non-convertible bond;

(D) 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

(E) 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; 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.

[The Exchange anticipates that it will not be ready, prior to the Second Quarter of 2019, to list the non-convertible bonds of issuers whose equity securities are listed on NYSE American or NYSE. The Exchange will post a notification via a Trader Alert at least seven days prior to accepting applications from issuers to list such non-convertible bonds.]

(b) – (c) No change.

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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 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, a non-convertible bond is eligible for initial listing on the Exchange only if it has a principal amount outstanding or market value of at least \$5 million and its issuer concurrently lists at least one class of an equity security on Nasdaq, the New York Stock Exchange (“NYSE”), or NYSE American.⁴ In order to remain listed, a non-convertible bond must maintain a market value or principal amount outstanding of at least \$400,000 and the issuer must continue to be able to meet its obligations on the listed non-convertible bonds.⁵ A company that has non-convertible bonds listed on the Nasdaq Bond Exchange also must 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.⁶

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 Rule 5702(b).

⁶ Rule 5702(c). Companies must provide notice of such disclosure to Nasdaq's MarketWatch Department. This obligation to disclose material information includes material information about the company's equity securities to the extent the information would reasonably be expected to affect the value of, or influence investors' decisions to invest in, the listed bonds, even if those equity securities are listed on another national securities exchange.

While Rule 5702(a)(2) allows Nasdaq to list the non-convertible bonds of an issuer that concurrently lists at least one class of an equity security on Nasdaq, NYSE or NYSE American, the Exchange noted in its proposal for the Nasdaq Bond Exchange that upon the effective date of its proposal the Exchange would be capable of listing and trading non-convertible bonds only of issuers that list equity securities on Nasdaq.⁷ The Exchange stated that it expected to be ready to list and trade bonds of issuers with equity securities listed on NYSE or NYSE American by the second quarter of 2019.⁸

On May 13, 2019, Nasdaq announced that it was prepared to list and trade bonds of issuers with equity securities listed on NYSE or NYSE American⁹ and Nasdaq began accepting applications to list those bonds on May 20, 2019. Given that issuers whose equity securities are listed on NYSE American and NYSE can now list non-convertible bonds on the Nasdaq Bond Exchange, Nasdaq proposes to remove language in the rule describing how it intended to announce the launch of that capability.

In addition, Nasdaq also proposes to modify Rule 5702(a) to expand the types of non-convertible bonds eligible to be listed on the Nasdaq Bond Exchange. At present, only an issuer with a class of equity security that is listed on Nasdaq, NYSE American or NYSE (collectively referred to herein as a “listed company”) can list non-convertible bonds on the Nasdaq Bond Exchange. Nasdaq proposes to expand the categories of debt that can be listed to also allow listing of non-convertible bonds of affiliates of a listed company where: a listed company

⁷ See Approval Order at footnote 11

⁸ See id.

⁹ See Nasdaq Data News #2019-3, available at <http://www.nasdaqtrader.com/TraderNews.aspx?id=dn2019-3>.

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, Nasdaq proposes to allow 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.

Nasdaq believes that non-convertible bonds satisfying these conditions, which are the same as the requirements for listing debt on NYSE American¹⁰ and convertible debt securities on Nasdaq,¹¹ are appropriate for listing on the Nasdaq Bond Exchange. The current requirement that the issuer of a non-convertible bond security have a class of equity listed on Nasdaq, NYSE or NYSE American is designed so that “only companies capable of meeting their financial obligations are eligible to have their non-convertible bonds listed on Nasdaq.”¹² Nasdaq notes that listed companies raise debt capital through a variety of structures designed to satisfy tax or

¹⁰ 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.

¹¹ See Nasdaq Listing Rule 5515(b)(4). While convertible debt can be converted into common stock, the debt characteristics of convertible debt securities are the same as non-convertible bonds.

¹² Approval Order at 58313.

regulatory obligations, including by the issuance of non-convertible bonds through entities they directly or indirectly own a majority interest in, or entities with which they are under common control. In these cases, it is appropriate to rely on the relationship with the listed company 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 on the non-convertible bond. In each case, Nasdaq notes that debt is a senior security to the listed equity, so that it is appropriate to list that more senior security.

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 list 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 listed 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 to be listed.¹³ 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.¹⁴

Nasdaq will surveil non-convertible bonds listed under the new requirements in the same manner that it surveils other non-convertible bonds.¹⁵ An issuer listing non-convertible bonds under the proposed requirements will 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 that was previously guaranteed is no longer guaranteed, or if the issuer or

¹³ 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.

¹⁴ 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.

¹⁵ See Approval Order at 58313.

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.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁶ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁷ 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.

Specifically, the Exchange notes that the proposed change to eliminate language from the rule that no longer is applicable will enhance the transparency of Nasdaq's listing rules and reduce confusion.

In addition, the proposed rule change will allow the listing of non-convertible bonds issued by other companies capable of meeting their financial obligations on those bonds. The proposed new alternative conditions 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

¹⁶ 15 U.S.C. 78f(b).

¹⁷ 15 U.S.C. 78f(b)(5).

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, these are the same additional conditions as for listing bonds on NYSE American and for listing convertible debt on Nasdaq and are similar to the conditions for listing bonds on NYSE.¹⁸ As such, the Commission has previously considered these criteria and approved listing requirements that rely upon them to provide assurance that an issuer is capable of meeting its financial obligations. In addition, investors are already familiar with the availability of bonds with these characteristics on listing exchanges. Finally, once listed, Nasdaq will be able to surveil for changes to these conditions 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 allowing Nasdaq to list all of the same categories of debt securities as can currently be listed on NYSE American. 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 proposed 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.

¹⁸ 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.

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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act¹⁹ and Rule 19b-4(f)(6)²⁰ thereunder. Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act²¹ and Rule 19b-4(f)(6)²² thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)²³ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),²⁴ the Commission may designate a shorter time if such action is consistent with protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay. According to the Exchange, allowing these securities to list on Nasdaq immediately would benefit investors due to Nasdaq's real time surveillance of the non-convertible bonds and enhanced transparency. The Commission also notes that the proposed listing requirements are substantially the same as NYSE American and therefore, the Exchange's proposal does not raise any new or novel issues. Therefore, the Commission

¹⁹ 15 U.S.C. 78(b)(3)(A).

²⁰ 17 CFR 240.19b-4(f)(6).

²¹ 15 U.S.C. 78s(b)(3)(A).

²² 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

²³ 17 CFR 240.19b-4(f)(6).

²⁴ 17 CFR 240.19b-4(f)(6).

believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission designates the proposed rule change to be operative on upon filing.²⁵

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or 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-2020-008 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.

²⁵ For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

All submissions should refer to File Number SR-NASDAQ-2020-008. 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, D.C. 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-2020-008 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.²⁶

J. Matthew DeLesDernier
Assistant Secretary

²⁶ 17 CFR 200.30-3(a)(12).