

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-89028; File No. SR-NASDAQ-2020-026)

June 8, 2020

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt a New Requirement Related to the Qualification of Management for Companies From Restrictive Markets

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 May 29, 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 adopt a new requirement related to the qualification of management for certain companies.

The text of the proposed rule change is available on the Exchange’s Website at <http://nasdaq.cchwallstreet.com>, 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

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.³ Nasdaq’s listing requirements include transparent quantitative criteria, which are based on the company’s financial statements and market information. They also impose disclosure obligations (along with applicable federal securities laws) and establish minimum corporate governance requirements, which are designed to protect investors and the public interest. A company’s management is also responsible for ensuring compliance with these listing requirements on an ongoing basis.⁴ For these reasons, Nasdaq

³ See, e.g., SEC Chairman Jay Clayton, PCAOB Chairman William D. Duhnke III, SEC Chief Accountant Sagar Teotia, SEC Division of Corporation Finance Director William Hinman, SEC Division of Investment Management Director Dalia Blass, Emerging Market Investments Entail Significant Disclosure, Financial Reporting and Other Risks: Remedies are Limited (April 21, 2020), available at <https://www.sec.gov/news/public-statement/emerging-market-investments-disclosure-reporting> (“Emerging Market Risks Statement”) (“Management is responsible for the preparation of the financial statements, including responsibility for establishing and maintaining disclosure controls and procedures (“DCP”) and internal control over financial reporting (“ICFR”), and for maintaining accountability for the company’s assets, among other things... Management ... must determine that the financial statements, and other financial information included in the report filed with the SEC, fairly present in all material respects the financial condition, results of operations and cash flows of the company.”) See also Section 404(b) of the Sarbanes Oxley Act, 15 U.S.C. 7262(b).

⁴ For example, Nasdaq Rules require prompt notification to Nasdaq after an executive officer of the company, or a person performing an equivalent role, becomes aware of any noncompliance with Nasdaq’s corporate governance requirements. Rule 5625. Similarly, SEC rules and the Sarbanes-Oxley Act impose a heightened obligation on the CEO and CFO of a public company, including the requirement to certify the company’s periodic financial statements. See, e.g., Section 302 of the Sarbanes Oxley Act, Pub. L.

believes that it is critically important for companies to have management that is familiar with these responsibilities, or an advisor to guide the company in fulfilling these obligations, in order to protect investors and the public interest.

Accordingly, Nasdaq has observed instances where it appears that 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. The risks arising from these situations are heightened when a company's 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 in such jurisdiction (a "Restrictive Market").⁵

Accordingly, Nasdaq proposes to adopt a new listing standard in Rule 5210(c) to require that listing applicants from Restrictive Market countries have, and certify to Nasdaq that they will continue to have, a member of senior management or a director with relevant past employment experience at a U.S.-listed public company or other experience, training or background which 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. Alternatively, in the absence of such an individual, the company could retain on an ongoing basis an advisor or advisors, acceptable to Nasdaq, that will provide such guidance to the company.

107-204, 116 Stat. 745 (2002), and Rules 13a-14 and 15d-14 under the Act, 17 CFR 240.13a-14 and 240.15d-14. See also Section 906 of the Sarbanes Oxley Act.

⁵ See Emerging Market Risks Statement ("As a result, in many emerging markets, including China, there is substantially greater risk that disclosures will be incomplete or misleading and, in the event of investor harm, substantially less access to recourse, in comparison to U.S. domestic companies.")

It is expected that the member of senior management, director or advisor would be a resource to the company on matters such as the Nasdaq corporate governance requirements, disclosure of material information, SEC reporting obligations including financial reporting obligations, internal controls over financial reporting, related party transactions, insider trading restrictions, whistleblower protections and investor communications. As such, Nasdaq expects this proposed requirement will heighten compliance by companies from Restrictive Markets and enhance investor protection. The proposed requirement is similar to the requirements of other global markets, which also include qualification requirements for management.⁶

In determining whether a company's business is principally administered in a Restrictive Market, 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 principal executive offices; (d) senior management and employees; and (e) books and records.⁷

⁶ For example, the Toronto Stock Exchange requires management to have "adequate public company experience which demonstrates that they are able to satisfy all of their reporting and public company obligations." See Section 311 of the TSX Company Manual. The Hong Kong Stock Exchange requires business experience and management continuity, which can achieve similar objectives to the proposed requirement. See Rule 8.05A of the Hong Kong Stock Exchange Main Board Listing Rules. Nasdaq's main markets in the Nordics require management to be familiar with the way the company has structured its internal reporting lines, the management pertaining to financial reporting, its investor relation management and its procedures for disclosing ad hoc and regular information to the stock market. See Section 2.15.2 of the Nordic Main Market Rulebook for Issuers of Shares.

⁷ This threshold 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. The factors that Nasdaq would consider when determining whether a business is principally administered in a Restrictive Market is supported by SEC guidance regarding foreign private issuer status, which suggests that a foreign company may consider certain factors including the locations of: the company's principal business segments or operations; its board and shareholders' meetings; its headquarters; and its most influential key executives (potentially a subset of all executives). See Division of Corporation Finance of the SEC, Accessing the U.S. Capital Markets — A Brief Overview for Foreign Private Issuers (February 13, 2013), available

For 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 Rule 5210(c).

Once listed, a company subject to proposed Rule 5210(c) will be subject to proposed Rule 5250(g). This rule will contain the continuing obligations for a Restricted Market Company listed on Nasdaq to have at least one member of senior management or director who has relevant past employment experience at a U.S.-listed public company or other experience, training or background which 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.

Nasdaq proposes changes to Rule 5810 to allow a company from a Restrictive Market that is subject to, but does not maintain compliance with, this requirement to provide Nasdaq Staff with a plan to regain compliance. Based on its review of the company's plan, Nasdaq Staff generally would be able to allow the company up to 180 days to regain compliance.⁸ Companies would be required under Rule 5810(b) to disclose that they do not meet this requirement, which would alert investors to the heightened risk during this time.

at <https://www.sec.gov/divisions/corpfin/internatl/foreign-private-issuers-overview.shtml#IIA2c>.

⁸ See Rule 5810(c)(2)(B). Staff cannot grant additional time if the company is currently under review by an Adjudicatory Body for a Staff Delisting Determination.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁹ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁰ in particular, in that it is 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. Further, the Exchange believes that this proposal is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Nasdaq believes that requiring applicants from Restrictive Market countries to satisfy the proposed requirement will help ensure that the company has at least one member of senior management or director or an advisor who serves as a resource for the company to assist in compliance with the company's reporting and public company obligations in the U.S. on an ongoing basis. This will better enable the company to satisfy the regulatory and reporting requirements applicable to a U.S.-listed public company under Nasdaq rules and federal securities laws, which will enhance investor protection and the public interest.

The proposed rule changes would apply to companies from Restrictive Market countries that apply to list on Nasdaq after the date of effectiveness, but would not apply to companies from other countries or to companies already listed on Nasdaq. Notwithstanding, the Exchange believes that the proposal does not unfairly discriminate among companies. With respect to the discrimination between companies from Restrictive Markets and other companies, Nasdaq believes that the distinction is fair because Nasdaq and the SEC have identified additional

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(5).

concerns around companies from Restrictive Markets,¹¹ which the proposed rule change is designed to address. With respect to the discrimination between newly listing companies from Restrictive Markets and companies from Restrictive Markets that are already listed before this rule is effective, Nasdaq believes that this is an appropriate distinction because this requirement was not in place when the later group of companies listed and these companies have structured alternative mechanisms to comply with the requirements to be a U.S.-listed public company. To the extent there are future concerns about such a listed company that arise from an apparent unfamiliarity with the requirements to be a U.S.-listed public company, however, Nasdaq would exercise its regulatory authority and could consider that lack of familiarity when determining whether to allow the company to remain listed.

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. While the proposed rule change will apply only to companies from Restrictive Markets, Nasdaq and the SEC have identified specific concerns with such companies that make the imposition of a heightened requirement on such companies appropriate to enhance investor protection, which is a central purpose of the Act. Any impact on competition, either among listed companies or between exchanges, is incidental to that purpose.

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.

¹¹ See Emerging Market Risks Statement, supra note 3.

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 Exchange consents, the Commission will: (a) by order approve or disapprove such 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-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.

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 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.¹²

J. Matthew DeLesDernier
Assistant Secretary

¹² 17 CFR 200.30-3(a)(12).