

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-90390; File No. SR-NASDAQ-2020-076)

November 10, 2020

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Harmonize Exchange Rules 1015, 9261, 9524 and 9830 with recent changes by the Financial Industry Regulatory Authority, Inc.

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 November 5, 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, II, and III, 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 harmonize Exchange Rules 1015, 9261, 9524 and 9830 with recent changes by the Financial Industry Regulatory Authority, Inc. (“FINRA”). These amendments would temporarily grant the Exchange’s Office of Hearing Officers (“OHO”) and the Exchange Review Council (“ERC”) authority³ to conduct hearings in connection with appeals of Membership Application Program decisions, disciplinary

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ For OHO hearings under Exchange Rules 9261 and 9830, the proposed rule change temporarily grants authority to the Chief or Deputy Chief Hearing Officer to order that a hearing be conducted by video conference. For ERC hearings under Exchange Rules 1015 and 9524, this temporary authority is granted to the ERC or relevant Subcommittee.

actions, eligibility proceedings and temporary and permanent cease and desist orders by video conference, if warranted by the current COVID-19-related public health risks posed by an in-person hearing. As proposed, these temporary amendments would be in effect through December 31, 2020.⁴

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 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 Exchange proposes to harmonize Exchange Rules 1015, 9261, 9524 and 9830 with recent changes by FINRA to its Rules 1015, 9261, 9524 and 9830 in order to temporarily grant its OHO and the ERC authority to conduct hearings in connection with appeals of Membership Application Program decisions, disciplinary actions, eligibility

⁴ If the Exchange requires temporary relief from the rule requirements identified in this proposal beyond December 31, 2020, the Exchange may submit a separate rule filing to extend the expiration date of the temporary amendments under these rules. The amended Exchange rules will revert back to their current state at the conclusion of the temporary relief period and any extension thereof.

proceedings and temporary and permanent cease and desist orders by video conference, if warranted by the current COVID-19-related public health risks posed by an in-person hearing. As proposed, these temporary amendments would be in effect through December 31, 2020.

Background

The Exchange's rules regarding hearing and evidentiary processes as set forth in Rules 1015, 9261, 9524 and 9830 model FINRA rules. As adopted, the text of Exchange Rule 1015 is substantially the same as FINRA Rule 1015, excepting additional provisions for Ex Parte Communications, Recusal or Disqualification, and conforming and technical differences. Similarly, the text of Exchange Rules 9261, 9524 and 9830 are substantially the same as FINRA Rules 9261, 9524 and 9830, except for conforming and technical differences.

In view of the ongoing spread of COVID-19 and its effect on FINRA's adjudicatory functions nationwide, FINRA recently filed a temporary rule change to grant FINRA's OHO and the National Adjudicatory Council ("NAC") the authority to conduct certain hearings by video conference, if warranted by the current COVID-19-related public health risks posed by in-person hearings.⁵ Accordingly, the Exchange proposes to file this temporary rule change to align with FINRA.

A. OHO Hearings

FINRA represented in its filing that its protocol for conducting hearings by video conference would ensure that such hearings maintain fair process for the parties by, among other things, FINRA's use of a high quality, secure and user-friendly video

⁵ See Securities Exchange Act Release Nos. 89737 (September 2, 2020), 85 FR 55712 (September 9, 2020) (SR-FINRA-2020-027) ("FINRA Filing").

conferencing service and provide thorough instructions, training and technical support to all hearing participants.⁶ According to FINRA, the proposed changes were a reasonable interim solution to allow FINRA’s critical adjudicatory processes to continue to function while protecting the health and safety of hearing participants as FINRA works towards resuming in-person hearings in a manner that is compliant with the current guidance of public health authorities.⁷

Pursuant to a regulatory services agreement (“RSA”) between the Exchange and FINRA, FINRA’s OHO administers all aspects of adjudications, including assigning hearing officers to serve as Exchange hearing officers. A hearing officer from the OHO, among other things, presides over the disciplinary hearing, selects and chairs the hearing panel, and prepares and issues written decisions. The Chief or Deputy Hearing Officer for all Exchange disciplinary hearings are currently drawn from the OHO and are all FINRA employees. The Exchange believes that the OHO will utilize the same video conference protocol and processes for Exchange matters under the RSA as it proposes for FINRA matters.

Given that FINRA and its OHO administer disciplinary hearings on the Exchange’s behalf, and given that the public health concerns addressed by FINRA’s amendments apply equally to the Exchange’s disciplinary hearings, the Exchange proposes to temporarily amend its disciplinary rules to allow FINRA, pursuant to the RSA, to conduct virtual hearings on its behalf.

⁶ See id. at 55713.

⁷ See id.

B. ERC Hearings

Mirroring FINRA's NAC, the ERC is the Exchange's appellate body, which reviews initial decisions issued by its OHO and – through Subcommittees – holds evidentiary hearings for Membership Application Program decision appeals and eligibility proceedings under Exchange Rules 1015 or 9524. As with OHO hearings discussed above, this temporary proposed rule change will allow the ERC or relevant Subcommittee to make an assessment as to whether an in-person hearing would compromise the health and safety of the hearing participants such that the hearing should proceed by video conference.

Proposed Rule Change

Consistent with FINRA's temporary amendment to FINRA Rules 1015, 9261, 9524 and 9830, the Exchange proposes to temporarily grant its OHO and the ERC authority to conduct hearings in connection with appeals of Membership Application Program decisions, disciplinary actions, eligibility proceedings and temporary and permanent cease and desist orders by video conference, if warranted by the current COVID-19-related public health risks posed by an in-person hearing. The proposed change will permit the OHO and the ERC to make an assessment, based on critical COVID-19 data and criteria and the guidance of health and security consultants, whether an in-person hearing would compromise the health and safety of the hearing participants such that the hearing should proceed by video conference. As noted, FINRA has adopted a detailed and thorough protocol to ensure that hearings conducted by video conference

will maintain fair process for the parties.⁸ The Exchange believes that this is a reasonable procedure to follow in hearings under Rules 1015, 9261, 9524 and 9830.⁹

To effectuate these changes, the Exchange proposes to add the following sentence to Rule 1015(f):

Upon consideration of the current public health risks presented by an in-person hearing, the Exchange Review Council or Subcommittee may, on a temporary basis, determine that the hearing shall be conducted, in whole or in part, by video conference.

The proposed text is substantially the same as the language adopted by FINRA, excepting conforming and technical differences.¹⁰

Similarly, the Exchange proposes to add the following sentence to Rule 9261(b):

Upon consideration of the current public health risks presented by an in-person hearing, the Chief Hearing Officer or Deputy Chief Hearing Officer may, on a temporary basis, determine that the hearing shall be conducted, in whole or in part, by video conference.

The proposed text is identical to the language adopted by FINRA.¹¹

⁸ See id. at 55713.

⁹ The Exchange notes, as did FINRA, that SEC's Rules of Practice pertaining to temporary cease-and-desist orders provide that parties and witnesses may participate by telephone or, in the Commission's discretion, through the use of alternative technologies that allow remote access, such as a video link. See SEC Rule of Practice 511(d)(3); Comment (d); see also FINRA Filing, 85 FR at 55714, n. 21.

¹⁰ See FINRA Filing, 85 FR at 55712.

Similarly, the Exchange proposes to add the following sentence to Rule 9524(a):

Upon consideration of the current public health risks presented by an in-person hearing, the Exchange Review Council or Review Subcommittee may, on a temporary basis, determine that the hearing shall be conducted, in whole or in part, by video conference.

The proposed text is substantially the same as the language adopted by FINRA, excepting conforming and technical differences.¹²

Similarly, the Exchange proposes to add the following sentence to Rule 9830(a):

Upon consideration of the current public health risks presented by an in-person hearing, the Chief Hearing Officer or Deputy Chief Hearing Officer may, on a temporary basis, determine that the hearing shall be conducted, in whole or in part, by video conference.

The proposed text is identical to the language adopted by FINRA.¹³

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁴ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁵ in particular,

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(5).

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, by providing greater harmonization between the Exchange rules and FINRA rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance.

As previously noted, with certain exceptions, the text of Exchange Rules 1015, 9261, 9524 and 9830 are substantially the same as FINRA's rules. As such, the proposed rule change will foster cooperation and coordination with persons engaged in facilitating transactions in securities and will remove impediments to and perfect the mechanism of a free and open market and a national market system.

The Exchange believes that the proposed temporary rule change will permit the Exchange¹⁶ to effectively conduct hearings during the COVID-19 pandemic in situations where in-person hearings present likely public health risks. The ability to conduct hearings by video conference will thereby permit the adjudicatory functions of the Exchange's rules to continue unabated, thereby avoiding protracted delays. The Exchange believes that this is especially important in matters where temporary and permanent cease and desist orders are sought because the proposed rule change would enable those hearings to proceed without delay, thereby enabling the Exchange to take immediate action to stop significant, ongoing customer harm, to the benefit of the investing public.

Conducting hearings via video conference will give the parties and adjudicators simultaneous visual and oral communication without the risks inherent in physical

¹⁶ As noted herein, FINRA and its OHO administer disciplinary hearings on the Exchange's behalf.

proximity during a pandemic. Temporarily permitting hearings to proceed by video conference maintains fair process by providing respondents a timely opportunity to address and potentially resolve any allegations of misconduct.

As noted, FINRA will use a high quality, secure video conferencing technology with features that will allow the parties to reasonably approximate those tasks that are typically performed at an in-person hearing, such as sharing documents, marking documents, and utilizing breakout rooms. FINRA will also provide training for participants on how to use the video conferencing platform and detailed guidance on the procedures that will govern such hearings. Moreover, the Chief or Deputy Chief Hearing Officer may take into consideration, among other things, a hearing participant's access to connectivity and technology in scheduling a video conference hearing and can also, at their discretion, allow a party or witness to participate by telephone, if necessary, to address such access issues.

The Exchange believes that the temporary proposed rule change strikes an appropriate balance between providing fair process and enabling the Exchange to fulfill its statutory obligations to protect investors and maintain fair and orderly markets, while accounting for the significant health and safety risks of in-person hearings stemming from the outbreak of COVID-19.

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 rule change is not intended to address competitive issues but is rather intended solely to provide temporary relief given the impacts of the COVID-19 pandemic. In its filing, FINRA provides an abbreviated economic impact assessment

maintaining that the changes are necessary to temporarily rebalance the attendant benefits and costs of the obligations under FINRA Rules 1015, 9261, 9524 and 9830 in response to the impacts of the COVID-19 pandemic that is equally applicable to the changes the Exchange proposes.¹⁷ The Exchange accordingly incorporates FINRA's abbreviated economic impact assessment by reference.

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

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)(iii) of the Act¹⁸ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹⁹

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

¹⁷ See FINRA Filing, 85 FR at 55716.

¹⁸ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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.

protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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-2020-076 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-2020-076. 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 Web site (<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-2020-076 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).