

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-96500; File No. SR-NASDAQ-2022-075)

December 14, 2022

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Listing Rules 5605 and 5606

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 December 12, 2022, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“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 simplify implementation and compliance tracking of Listing Rules 5605 and 5606, as described further below.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

On December 1, 2020, the Exchange filed with the Commission a proposed rule change to adopt listing rules to advance board diversity and enhance transparency of diversity statistics (“Board Diversity Proposal”).³ On August 6, 2021 (“Approval Date”), the Commission approved the proposal, as amended (“Board Diversity Rules”).⁴

At the time of filing of the Board Diversity Proposal, Nasdaq and listed companies could not know when the proposal would be approved. Since directors typically are elected in connection with the annual shareholder meeting, Nasdaq wanted to assure that listed companies had at least one year from the approval of the rules, or until their next annual meeting, to take necessary actions to satisfy the requirements of the Board Diversity Rules. Therefore, Nasdaq tied the initial compliance deadlines in the Board Diversity Proposal to one year after the approval date.⁵ Specifically, on August 8, 2022 (one year after the Approval Date),⁶ Nasdaq-listed companies became subject to the first compliance condition: disclosing their Board

³ See Securities Exchange Act Release No. 90574 (December 4, 2020), 85 FR 80472 (SR–NASDAQ-2020–081).

⁴ Securities Exchange Act Release No. 92590 (August 6, 2021), 86 FR 44424 (August 12, 2021) (Approval order). Nasdaq filed an amendment to the proposal on February 26, 2021. See Amendment No. 1, available on the Commission’s website at: <https://www.sec.gov/comments/srnasdaq-2020-081/srnasdaq2020081-8425992-229601.pdf>. Pursuant to Rule 5605(f)(1), “Approval Date” means the date that the Commission issued an order granting the approval of this proposed Rule 5605(f).

⁵ See Rule 5605(f)(1); see also Rule 5605(f)(7) and 5606(e).

⁶ The Approval Date became August 8, 2022 because August 6, 2022 was a Saturday.

Diversity Matrix (“Matrix”).⁷ Subsequent compliance conditions were similarly scheduled to take effect starting two or more years from the Approval Date.⁸

Nasdaq has found that this formulation of the compliance deadlines is confusing and unnecessarily complicated. Therefore, Nasdaq now proposes to make technical changes to Rule 5605(f)(3) (Alternative Public Disclosure) and Rule 5605(f)(7) (Effective Dates/Transition) to simplify the implementation of the Board Diversity Rules by eliminating references to the Approval Date and the alternative deadline related to the filing of materials for the company’s annual meeting, and instead requiring compliance by December 31st of the applicable year. Nasdaq is also proposing to amend Rule 5605(f)(3) to provide additional flexibility in how a company can notify Nasdaq about the alternative public disclosure permissible under that rule. Additionally, Nasdaq is proposing a technical amendment to Rule 5605(f)(3) to change an erroneous reference to a non-existent Rule 5606(f)(2)(D).

Effective Dates

Pursuant to Rule 5605(f)(7)(A), Nasdaq currently requires each company listed on The Nasdaq Global Select Market, The Nasdaq Global Market and The Nasdaq Capital Market (including a Company with a smaller board under Rule 5606(f)(2)(D)) to have, or explain why it does not have, at least one Diverse⁹ director by the later of: (i) two calendar years after the Approval Date, which is August 7, 2023 or (ii) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for

⁷ See Rule 5606.

⁸ See Rule 5605(f)(7).

⁹ Pursuant to Rule 5605(f)(1), “Diverse” means an individual who self-identifies in one or more of the following categories: Female, Underrepresented Minority, or LGBTQ+. “Female” means an individual who self-identifies her gender as a woman, without regard to the individual’s designated sex at birth.

the Company's annual shareholders meeting during the calendar year of the First Effective Date¹⁰, which can be no later than December 31, 2023. The Exchange is proposing to replace this deadline with December 31, 2023, which is the deadline under the current rule for a company with a December 31st fiscal year-end to hold its annual shareholder meeting during the calendar year of the First Effective Date.

Similarly, pursuant to Rule 5605(f)(7)(B), Nasdaq currently requires all companies listed on The Nasdaq Global Select Market or The Nasdaq Global Market to have, or explain why it does not have, at least two Diverse directors by the later of: (i) four calendar years after the Approval Date ("Second NGS/NGM Effective Date"), which is August 6, 2025 or (ii) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for the Company's annual shareholders meeting during the calendar year of the Second NGS/NGM Effective Date, which can be no later than December 31, 2025. The Exchange is proposing to replace this deadline with December 31, 2025, which is the deadline under the current rule for a company with a December 31st fiscal year-end to hold its annual shareholder meeting during the calendar year of the Second NGS/NGM Effective Date.

Lastly, Rule 5605(f)(7)(C) currently requires each Company listed on The Nasdaq Capital Market to have, or explain why it does not have, at least two Diverse directors by the later of: (i) five calendar years after the Approval Date ("Second NCM Effective Date"), which is August 6, 2026 or (ii) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for the Company's annual shareholders meeting during the calendar year of the Second NCM Effective Date, which

¹⁰ The "First Effective Date" is defined as two calendar years after the Approval Date. See Rule 5605(f)(7)(A).

is no later than December 31, 2026. The Exchange is proposing to replace this deadline with December 31, 2026, which is the deadline under the current rule for a company with a December 31st fiscal year-end to hold its annual shareholder meeting during the calendar year of the Second NCM Effective Date.

Nasdaq is also proposing to align the proposed December 31st deadlines for Rule 5605(f)(7) with the Rule 5606(f)(3) deadline for companies to explain why they do not meet the diversity objectives of Rule 5606(f)(2). Therefore, Nasdaq is proposing to amend Rule 5606(f)(3) to allow for companies to provide such disclosure on or before December 31st.

Additionally, Rule 5606(e) provides a deadline for a company's initial Matrix disclosure and requires a company to annually disclose the Matrix thereafter, but the current rule does not provide a specific deadline for subsequent disclosures, other than that such disclosure must be made in the same manner as, and concurrently with, the disclosure required in Rule 5605(f)(3) for those companies that are subject to that provision. Therefore, Nasdaq is proposing to modify Rule 5606(b) to specify the method of disclosure, which is the same as outlined in Rule 5605(f)(3), and the December 31st annual deadline for the required Matrix disclosure.

Nasdaq believes that using December 31st as the applicable deadline for various elements of the diversity objectives of Rule 5605(f) and Matrix disclosure of Rule 5606 aligns these deadlines with the end of the fiscal year for most companies,¹¹ which is also the deadline for those companies to hold their annual meeting under Nasdaq's rules.¹² As such, Nasdaq believes

¹¹ Approximately 80% of Nasdaq-listed companies subject to the rule have a December 31st fiscal year-end.

¹² See Rule 5620 (requiring most listed companies to hold an annual meeting of shareholders no later than one year after the end of the Company's fiscal year-end). Under Rules 5605(f)(3) and 5606(b), companies can include disclosure about why they do not meet the applicable diversity objectives of Rule 5605(f)(2) and the Matrix in the proxy or information statement for their annual meeting.

that aligning the deadline for these disclosures with the December 31st deadline for most companies to hold the annual meeting will simplify both compliance and compliance monitoring with these rules.¹³ In that regard, Nasdaq notes that while companies tend to hold their annual meetings at a similar time each year, they are not required to do so, and do not necessarily file their proxies or information statements at the same time each year. Moreover, neither Nasdaq nor investors know ahead of time when a company will file their proxy statements or information statements. Establishing a single deadline for all companies will therefore simplify Nasdaq's ability to review for instances of non-compliance and give investors a final date to expect a company's disclosure.

Notice to Nasdaq

Currently, if a Nasdaq-listed company posts its Matrix disclosure or its explanation for why the company does not satisfy the diverse director objective on its website, then the company must also submit a URL link to the disclosure through the Nasdaq Listing Center within one business day after posting on the company's website.¹⁴ To provide additional flexibility to companies, Nasdaq is proposing to also allow companies to submit the URL link via e-mail to "drivingdiversity@nasdaq.com". Nasdaq notes that providing the additional alternative may simplify compliance for companies and will not affect Nasdaq's ability to review for instances of non-compliance.

Technical Changes

Nasdaq is proposing a technical amendment to Rule 5605(f)(3) to change an erroneous reference to a non-existent Rule 5606(f)(2)(D). The reference was intended to be 5605(f)(2)(D).

¹³ Of course, companies will continue to be able to comply earlier than the proposed December 31st deadline.

¹⁴ See Rule 5605(f)(3).

Nasdaq is also proposing to remove Rule 5606(e) since the rule became effective and operative over a year ago and Nasdaq believes the provision is no longer relevant.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁵ in general, and furthers the objectives of Section 6(b)(1) of the Act,¹⁶ in particular, in that the Exchange is organized and has the capacity to be able to carry out the purposes of the Act and to comply and enforce compliance by its members and persons associated with its member. The Exchange believe the proposal is also consistent with 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.

It is consistent with the Act to amend Rule 5605(f)(7) governing the effective dates of the Diverse director objective. When proposing changes to its rulebook, Nasdaq must ensure that the changes remain consistent with other provisions. Presently, companies that opt to publish the alternative public disclosure rather than satisfy the Diverse director objective must do so in the same manner, and concurrently with Rule 5606 – the Matrix disclosure.¹⁸ The proposed amendments to Rule 5605(f)(7) aligns the annual deadline for companies that opt to explain why they do not satisfy the Diverse director objective with the proposed annual deadline for the Matrix. Companies will continue to have the option of publishing the disclosure sooner than the proposed December 31st deadline.

¹⁵ 15 U.S.C. 78f(b).

¹⁶ 15 U.S.C. 78f(b)(1).

¹⁷ 15 U.S.C. 78f(b)(5).

¹⁸ See Rule 5605(f)(3) and Rule 5606(b).

Similarly, the Exchange’s proposal to amend its rule requiring Nasdaq-listed companies to publicly disclose board diversity statistics using the Matrix, or a substantially similar format, at Rule 5606(e), is consistent with the Act. Clarifying the date for subsequent Matrix disclosures ensures that all Nasdaq-listed companies will disclose a Matrix during each calendar year. Additionally, proposing December 31st as the deadline each year simplifies compliance and more closely aligns the deadline with the end of the fiscal year for most companies, which is also their deadline to hold an annual meeting. Moreover, this revised formulation provides all Nasdaq-listed companies with the same compliance deadline, which is the same as the latest calendar date for compliance under the current rule.¹⁹ As discussed above, Companies will continue to have the option of publishing the disclosure sooner than the proposed December 31st deadline. Nasdaq also believes that having the same annual deadline date for all companies will simplify Nasdaq’s ability to track non-compliant companies and give investors a final date to expect a company’s disclosure.

Additionally, it is consistent with the Act to amend Rule 5605(f)(3) to give companies an additional alternative for submitting the URL link to their disclosures. The additional option of submitting the URL via e-mail simplifies compliance and gives companies flexibility in meeting their requirements. Moreover, there will be no impact on Nasdaq’s ability to review for instances of non-compliance.

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

¹⁹ Currently, all Nasdaq-listed companies are required to file an annual proxy or information statement by the end of the company’s fiscal year. The end of the fiscal year for most Nasdaq-listed companies is December 31st. Therefore, Nasdaq is proposing to simplify the deadlines by aligning the Board Diversity Rule deadlines with the most company’s fiscal year end.

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. All companies would continue to be required to make the same disclosure of their board-level statistical information and will have the same deadline for that disclosure. Additionally, all companies would be given the same flexibility of alternatively submitting the URL link to their disclosure via e-mail. Similarly, all companies would be given the same maximum amount of time to publish their Matrix and to satisfy the Diverse director objective.

Moreover, none of the proposed changes will unduly burden intra-market competition among various Exchange participants. Participants will experience no competitive impact from the proposals, as these proposals are merely intended to assist companies in maintaining compliance with the Board Diversity Rules by providing additional flexibility, clarifying certain provisions, and maintaining consistency among the provisions.

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 Act²⁰ and subparagraph (f)(6) of Rule 19b-4 thereunder.²¹

²⁰ 15 U.S.C. 78s(b)(3)(A)(iii).

²¹ 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,

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: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) 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-2022-075.

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-2022-075. 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

or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

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-2022-075, 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.²²

Sherry R. Haywood
Assistant Secretary

²² 17 CFR 200.30-3(a)(12).