

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-90883; File No. SR-NASDAQ-2020-100)

January 11, 2021

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Modify the Quorum Requirement for Non-U.S. Companies Under Certain Limited Circumstances

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 31, 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 a proposal to modify the quorum requirement applicable to a non-U.S. company where such company’s home country law is in direct conflict with Nasdaq’s quorum requirement.

The text of the proposed rule change is detailed below: proposed new language is underlined and proposed deletions are in brackets.

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The Nasdaq Stock Market Rules

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5615. Exemptions from Certain Corporate Governance Requirements

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

This rule provides the exemptions from the corporate governance rules afforded to certain types of Companies, and sets forth the phase-in schedules for initial public offerings, Companies emerging from bankruptcy, Companies transferring from other markets and Companies ceasing to be Smaller Reporting Companies. This rule also describes the applicability of the corporate governance rules to Controlled Companies and sets forth the phase-in schedule afforded to Companies ceasing to be Controlled Companies.

(a) Exemptions to the Corporate Governance Requirements

(1) - (3) No change.

(4) Limited Partnerships

A limited partnership is not subject to the requirements of the Rule 5600 Series, except as provided in this Rule 5615(a)(4). A limited partnership may request a written interpretation pursuant to Rule 5602.

(A) - (D) No change.

(E) Quorum

(i) In the event that a meeting of limited partners is required pursuant to paragraph (D), the quorum for such meeting shall be not less than 33-1/3 percent of the limited partnership interests outstanding.

(ii) Notwithstanding the quorum requirements in paragraph (i) above, Nasdaq may accept any quorum requirement for a non-U.S. Company if the Company's home country law mandates such quorum for the shareholders' meeting and prohibits the Company from establishing a higher quorum required by paragraph (i) above. A Company relying on this provision shall submit to Nasdaq a written statement from an independent counsel in such Company's home country

describing the home country law that conflicts with Nasdaq's quorum requirement and certifying that, as the result, the Company is prohibited from complying with the quorum requirements in paragraph (i) above.

(F) - (J) No change

(5) - (6) No change.

(b) - (c) No change.

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5620. Meetings of Shareholders

(a) No change.

IM-5620. Meetings of Shareholders or Partners - No change.

(b) No change.

(c) Quorum

(i) Each Company that is not a limited partnership shall provide for a quorum as specified in its by-laws for any meeting of the holders of common stock; provided, however, that in no case shall such quorum be less than 33 1/3 % of the outstanding shares of the Company's common voting stock. Limited partnerships that are required to hold an annual meeting of partners are subject to the requirements of Rule 5615(a)(4)(E).

(ii) Notwithstanding the quorum requirements in paragraph (i) above, Nasdaq may accept any quorum requirement for a non-U.S. Company if the Company's home country law mandates such quorum for the shareholders' meeting and prohibits the Company from establishing a higher quorum required by paragraph (i) above. A Company relying on this provision shall submit to Nasdaq a written statement from an independent counsel in such Company's home country describing the home country law that conflicts with Nasdaq's quorum requirement and certifying

that, as the result, the Company is prohibited from complying with the quorum requirements in paragraph (i) above.

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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

Nasdaq is proposing to modify Listing Rules 5620(c) and 5615(a)(4)(E) (the "Quorum Rules") to allow Nasdaq to accept a quorum less than 33-1/3% of the outstanding shares of a company's common voting stock where the company is incorporated outside of the U.S. and such company's home country law prohibits the company from establishing a quorum that satisfies the Quorum Rules.

Listing Rule 5620(c) establishes quorum requirements for an annual meeting of shareholders for Nasdaq companies listing common stock or voting preferred stock, and their equivalents.³ Under this rule, each company that is not a limited partnership must provide for a quorum as specified in its by-laws for any meeting of the holders of common stock; provided, however, that in no case shall such quorum be less than 33 1/3% of the outstanding shares of the

³ Listing Rule 5620(a).

company's common voting stock (the "Nasdaq Quorum Requirement"). Nasdaq notes that domestic listed companies are subject to quorum requirements under the laws of their states of incorporation.⁴

Nasdaq recently discovered that the laws of certain foreign jurisdictions are in direct conflict with the Nasdaq Quorum Requirement. In particular, Nasdaq was approached by a French company that took advantage of the foreign private issuer exception and relied on home country practices in lieu of the Nasdaq Quorum Requirement, but lost its foreign private issuer status and cannot comply with the Nasdaq Quorum Requirement due to certain French law requirements.⁵ In that regard, Article L. 225-98 of the French Commercial code⁶ provides that upon first notice, the ordinary shareholders' meeting shall have a quorum requirement of one-fifth (20%) of the shares entitled to vote. The Article further provides that by-laws of a French company whose shares are listed on a regulated market (which includes Euronext Paris) cannot provide for a higher quorum for shareholders' meetings than that set forth above. As this rule constitutes a public order under French law, it is required to be followed and compliance is enforced by the French courts and by the French stock exchange authority, the Autorité des

⁴ For example, Delaware allows companies to establish their own quorum requirements in their certificates of incorporation or bylaws, provided that the quorum must be at least one-third of the shares entitled to vote on the matter. In the absence of a quorum provision in the company's certificate of incorporation or bylaws, Delaware requires a quorum of 50% of the shares entitled to vote on the matter. See Del. Code Sec. 216.

⁵ Ordinary shares of at least one Nasdaq listed company DBV Technologies S.A. (DBV), are listed on Euronext Paris which is a regulated market under French and EU regulations. Accordingly, as explained below, DBV cannot amend its bylaws to increase the quorum requirement to comply with the Nasdaq Quorum Requirement. Since its IPO in 2014, DBV qualified as a foreign private issuer and relied on home country practices in lieu of complying with the Nasdaq Quorum Requirement.

⁶ Available at <https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000038799445&cidTexte=LEGITEXT000005634379&dateTexte=20190721>

marchés financiers. According to article L. 225-121, any decision taken in violation of the aforementioned rules on quorum is deemed null and void. As such, a French company listed on a regulated market cannot comply with the Nasdaq Quorum Requirement.

Listing Rule 5615(a)(3) allows a foreign private issuer⁷ to follow its home country practice in lieu of the requirements of the Rule 5600 Series, including the Nasdaq Quorum Requirement, subject to certain disclosure requirements and the requirement that an independent counsel in such company's home country certify to Nasdaq that the company's practices are not prohibited by the home country's laws.⁸ Accordingly, a French foreign private issuer could rely on Listing Rule 5615(a)(3) to remain in compliance with the Nasdaq corporate governance requirements in the Rule 5600 Series.⁹

A non-U.S. company¹⁰ that is not a foreign private issuer currently is required to comply with the Nasdaq Quorum Requirement without regard to the requirements of such company's home country laws. As described above, for some companies, including DBV, the company's

⁷ A foreign company will qualify as a foreign private issuer if 50% or less of its outstanding voting securities are held by U.S. residents; or if more than 50% of its outstanding voting securities are held by U.S. residents and none of the following three circumstances applies: the majority of its executive officers or directors are U.S. citizens or residents; more than 50% of the issuer's assets are located in the United States; or the issuer's business is administered principally in the United States. These tests are found in Securities Act Rule 405 and Exchange Act Rule 3b-4.

⁸ See Listing Rule 5615(a)(3)(B) and Listing Rule IM-5615-3.

⁹ As of December 31, 2019, approximately 62% of DBV's outstanding ordinary shares were held by U.S. residents. See company's Form 20-F filed on March 20, 2020. As of June 30, 2020, according to the information provided to Nasdaq by the company, more than 50% of DBV's outstanding ordinary shares were held by U.S. residents and the majority of DBV's executive officers were U.S. citizens and residents and DBV's business was administered principally in the United States. Accordingly, DBV will no longer qualify as a foreign private issuer and will be required to comply with SEC rules for domestic issuers as of January 1, 2021.

¹⁰ The term non-US company refers to a company incorporated outside of U.S. See also Listing Rules 5630 and 5640 that use this term.

home country law prohibits the company from establishing a higher quorum required by the Nasdaq Quorum Requirement.

Accordingly, Nasdaq proposes to modify the Nasdaq Quorum Requirement to allow Nasdaq to accept any quorum requirement for a non-U.S. company if such company's home country law mandates such quorum for the shareholders' meeting and prohibits the company from establishing the higher quorum required the Nasdaq Quorum Requirement. This approach is consistent with the provisions of Listing Rule 5640 that allows Nasdaq to accept any action or issuance relating to the voting rights structure of a non-U.S. company that is not prohibited by the company's home country law.¹¹ Nasdaq proposes to require that a company relying on this provision shall submit to Nasdaq a written statement from an independent counsel in such company's home country describing the home country law that conflicts with Nasdaq's quorum requirement. Nasdaq also proposes to require such counsel to certify that, as the result of the conflict with the home country law, the company is prohibited from complying with the Nasdaq Quorum Requirement.

Nasdaq also proposes to modify Listing Rule 5615(a)(4)(E) governing the quorum requirements for limited partnerships listed on Nasdaq to also reflect this change to the Nasdaq Quorum Requirement.

¹¹ The proposed modified Nasdaq Quorum Requirement will apply only in circumstances where the company's home country law specifically prohibits the company from establishing a higher quorum required the Nasdaq Quorum Requirement, whereas Listing 5640 allows Nasdaq to accept any voting rights structure of a non-U.S. company that is not prohibited by the company's home country law.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹² in general, and furthers the objectives of Section 6(b)(5) of the Act,¹³ 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.

Nasdaq believes that the proposed amendments to Listing Rules 5620(c) and 5615(a)(4)(E) are designed to protect interests and the public interest because the proposal would eliminate a conflict forcing a company to choose between following Nasdaq's rules or the law in its home jurisdiction. Further, while the Nasdaq Quorum Requirement would not apply, there would continue to be other protections for shareholders provided by the company's home country laws. Nasdaq also believes that Nasdaq's long experience of listing foreign private issuers, including DBV, while allowing such companies to rely on home country practices in lieu of the Nasdaq Quorum Requirement provides evidence of an appropriate level of investor protection. In addition, this modification is consistent with the provisions of Listing Rule 5640 that allows Nasdaq to accept any action or issuance relating to the voting rights structure of a non-U.S. company that is not prohibited by the company's home country law.

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 will address conflicting requirements of jurisdictions affecting a small number of

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(5).

non-U.S. companies, as described above; and as such, these changes are neither intended to, nor expected to, impose any burden on competition.

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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date 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 shall: (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-2020-100 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-2020-100. 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-2020-100 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

J. Matthew DeLesDernier
Assistant Secretary

¹⁴ 17 CFR 200.30-3(a)(12).