

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-96042; File No. SR-NASDAQ-2022-055)

October 12, 2022

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Extend Nasdaq’s Program Providing Eligible Companies with Complimentary Board Recruiting Services

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 October 4, 2022, 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 extend Nasdaq’s program providing Eligible Companies with complimentary board recruiting services.

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

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

Nasdaq is proposing to extend its program, described in IM-5900-9, providing Eligible Companies³ with complimentary board recruiting services. The rule currently requires Eligible Companies to request services by December 1, 2022; as revised that deadline would be extended to December 1, 2023. Nasdaq also proposes to make clarifying changes to reflect the approval of Rule 5605(f).

³ Under Nasdaq Rule IM-5900-9, an Eligible Company is:

(a) any listed Company, except as described below, that represents to Nasdaq that it does not have (i) at least one director who self-identifies as female; and (ii) at least one director who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities, or who self-identifies as lesbian, gay, bisexual, transgender or as a member of the queer community;

(b) a listed Company that (i) is a Foreign Private Issuer (as defined in Rule 5005(a)(19), or (ii) is considered a foreign issuer under Rule 3b-4(b) under the Act and has its principal executive offices located outside of the United States, if it represents to Nasdaq that it does not have (i) at least one director who self-identifies as female; and (ii) at least one director who self-identifies as one or more of the following: female, an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the company’s principal executive offices, or lesbian, gay, bisexual, transgender or as a member of the queer community; or

(c) a listed Company that is a Smaller Reporting Company (as defined in Rule 12b-2 under the Act), if it represents to Nasdaq that it does not have (i) at least one director who self-identifies as female, and (ii) at least one director who self-identifies as one or more of the following: female, Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities, or who self-identifies as lesbian, gay, bisexual, transgender or as a member of the queer community.

Under IM-5900-9,⁴ Nasdaq provides Eligible Companies with one year of complimentary access for two users to a board recruiting service, which provides access to a network of board-ready diverse candidates for companies to identify and evaluate. Nasdaq believes that offering this board recruiting solution assists and encourages listed companies to increase diverse representation on their boards, which can result in improved corporate governance, thus strengthening the integrity of the market and building investor confidence.

Currently, Eligible Companies may request the board recruiting complimentary service on or before December 1, 2022. After evaluating the service and progress made in enhancing diversity, Nasdaq proposes to extend the program until December 1, 2023. Under Nasdaq Rule 5605(f)(7), the earliest that a Nasdaq listed company will need to explain why it does not have at least one Diverse⁵ director, is August 6, 2023; and the earliest it will have to explain why it does not have at least two Diverse directors is August 6, 2025.⁶ As such, Nasdaq believes it continues to be appropriate to offer the complimentary board recruiting service to Eligible Companies.

In addition, Nasdaq proposes to update the reference in Nasdaq Rule IM-5900-9 to Nasdaq's proposed rule contained in SR-Nasdaq-2020-081, as it pertains to the Diverse Board Representation, to instead reference the approved Nasdaq Rule 5605(f). This change is non-substantive, and clarifies the rules.

⁴ Securities Exchange Act Release No. 92590 (August 6, 2021), 86 FR 44424 (August 12, 2021) (SR-NASDAQ-2020-082).

⁵ Nasdaq Rule 5605(f)(1) provides the definition of "Diverse". "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.

⁶ Nasdaq Rule 5065(f)(7)(A).

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁷ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁸ 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 also consistent with this provision because it is not designed to permit unfair discrimination between issuers. Nasdaq also believes that the proposed rule change is consistent with the provisions of Sections 6(b)(4)⁹ and 6(b)(8)¹⁰, in that the proposal is designed, among other things, to provide for the equitable allocation of reasonable dues, fees, and other charges among Exchange members and issuers and other persons using its facilities and that the rules of the Exchange do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Nasdaq believes that research surrounding the value of diversity on a company's board and investor interest in more diverse boards¹¹ supports the fact that the proposal to offer access to a board recruiting solution promotes just and equitable principles of trade and protects investors and the public interest. Nasdaq believes that by making this service available for a longer duration, more companies will seek to enhance the diversity of their boards to achieve these

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(5).

⁹ 15 U.S.C. 78f(4).

¹⁰ 15 U.S.C. 78f(8).

¹¹ Securities Exchange Act Release No. 92590 (August 6, 2021), 86 FR 44424 (August 12, 2021)(SR-NASDAQ-2020-082)

benefits. However, no company is required to use this service. Nasdaq believes it is reasonable, and not unfairly discriminatory, to offer the board recruiting solution only to Eligible Companies because these companies have the greatest need to identify diverse board candidates. They will need to identify diverse board candidates if they wish to satisfy that requirement instead of explaining why they do not satisfy it. Further, Nasdaq believes that companies that already have two Diverse directors will already be familiar with the benefits of board diversity and have demonstrated that they do not need Nasdaq's assistance in identifying diverse candidates.

Under Nasdaq Rule 5605(f), companies will have until August 6, 2023 to have, or explain why they do not have, at least one Diverse director and until August 6, 2025 to have, or explain why they do not have, at least two Diverse directors. Some Eligible Companies have already requested the service, other Eligible Companies may first use an alternate approach to identify a Diverse director. Therefore, to provide Eligible Companies with adequate time to determine whether to utilize the complimentary service before they first need to comply with Nasdaq Rule 5605(f), Nasdaq believes it is reasonable to extend the expiration date until December 1, 2023 to begin using the service.

Nasdaq faces competition in the market for listing services,¹² and competes, in part, by offering valuable services to companies. Nasdaq believes that it is reasonable to continue to offer this complimentary service as a tool to attract and retain listings as part of this competition. In particular, Nasdaq believes some companies will view the proposed board recruiting solution as a valuable tool to help achieve diversity, to the potential benefit of the company and its

¹² The Justice Department has noted the intense competitive environment for exchange listings. See "NASDAQ OMX Group Inc. and Intercontinental Exchange Inc. Abandon Their Proposed Acquisition Of NYSE Euronext After Justice Department Threatens Lawsuit" (May 16, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/271214.htm.

investors. Nasdaq also believes that offering this complimentary service will help it compete to attract and retain listings in light of the additional requirements contained in Rule 5065(f).

For these reasons, Nasdaq believes it is not an inequitable allocation of fees, unfairly discriminatory, nor an unnecessary or inappropriate burden on competition to continue to extend the offer of board recruiting solution only to Eligible Companies until December 1, 2023.

Nasdaq represents that individual listed companies are not given specially negotiated packages of products or services to list, or remain listed, which the Commission has previously stated would raise unfair discrimination issues under the Exchange Act.¹³

In addition, the proposal to reflect the approval of SR-Nasdaq-2020-081, and to directly reference the now-approved Nasdaq Rule 5605(f), is non-substantive, and simply clarifies the rules. The Exchange believes that this 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

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. As noted above, Nasdaq faces competition in the market for listing services, and competes, in part, by offering valuable services to companies. The proposed rule change reflects competition, but does not impose any burden on the competition with other exchanges. Rather, Nasdaq believes that some companies will find the proposed board recruiting solution an attractive offering and

¹³ See Exchange Act Release No. 79366, 81 FR 85663 at 85665 (citing Securities Exchange Act Release No. 65127 (August 12, 2011), 76 FR 51449, 51452 (August 18, 2011) (approving NYSE-2011-20)).

¹⁴ Ibid 9.

¹⁵ Ibid 10.

therefore make listing or remaining listed on Nasdaq more attractive, which will enhance competition for listings.

Other exchanges can also offer similar services to companies, thereby increasing competition to the benefit of those companies and their shareholders. Accordingly, Nasdaq does not believe the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

In addition, the proposal to reflect the approval of Nasdaq Rule 5605(f), is non-substantive, and simply aligns the rules in a clear and consistent manner. Nasdaq does not believe this change will 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

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 Act¹⁶ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹⁷

¹⁶ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁷ 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.

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 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-2022-055 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-2022-055. 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-2022-055 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.¹⁸

J. Matthew DeLesDernier,
Deputy Secretary.

¹⁸ 17 CFR 200.30-3(a)(12).