

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-96094; File No. SR-NASDAQ-2022-015)

October 17, 2022

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 2, to Exempt Non-Convertible Bonds Listed under Rule 5702 from Certain Corporate Governance Requirements

I. Introduction

On February 4, 2022, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to exempt non-convertible bonds listed under Rule 5702 from certain corporate governance requirements. The proposed rule change was published for comment in the Federal Register on February 23, 2022.³ On March 18, 2022, the Commission extended the time period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.⁴ On May 18, 2022, the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule change.⁵ On June 13, 2022, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change as

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 94265 (February 16, 2022), 87 FR 10265 (“Initial Proposal”).

⁴ See Securities Exchange Act Release No. 94471, 87 FR 16778 (March 24, 2022) (extending the time period to May 24, 2022).

⁵ See Securities Exchange Act Release No. 94941, 87 FR 31594 (May 24, 2022).

originally filed.⁶ On August 5, 2022, the Commission designated a longer period for Commission action on proceedings to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.⁷ On August 31, 2022, the Exchange filed Amendment No. 2 to the proposed rule change, which superseded the original filing, as modified by Amendment No. 1, in its entirety.⁸ The Commission received no comments on the proposed rule change. The Commission is publishing this notice to solicit comments on Amendment No. 2 from interested persons and is approving the proposed rule change, as modified by Amendment No. 2, on an accelerated basis.

II. The Exchange's Description of the Proposed Rule Change, as Modified by Amendment No. 2

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.

⁶ In Amendment No. 1, the Exchange revised the proposal to: (i) clarify the purpose and rationale of the proposed rule change; and (ii) make minor technical changes to improve the structure, clarity, and readability of the proposed rules. Amendment No. 1 to the proposed rule change is available at: <https://www.sec.gov/comments/sr-nasdaq-2022-015/srnasdaq2022015-20131121-301311.pdf>.

⁷ See Securities Exchange Act Release No. 95434, 87 FR 49631 (August 11, 2022) (extending the time period to October 21, 2022).

⁸ In Amendment No. 2, the Exchange deleted a proposed exemption from Nasdaq Rule 5630, Review of Related Party Transactions, for issuers whose only securities listed on Nasdaq are non-convertible bonds, as well as clarified the purpose of the proposed rule change. Amendment No. 2 to the proposed rule change is available at: <https://www.sec.gov/comments/sr-nasdaq-2022-015/srnasdaq2022015-20137931-308238.pdf>.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

This Amendment No. 2 supersedes and replaces the Initial Proposal, as modified by Amendment No. 1, in its entirety.

In November 2018, the Commission approved amendments to the Exchange’s rules that permit the Exchange to list and trade non-convertible corporate debt securities (referred to herein as “bonds” or “non-convertible bonds”) on the Nasdaq Bond Exchange.⁹ Under the Exchange’s listing rules then adopted, a non-convertible bond was eligible for initial listing on the Exchange only if it had a principal amount outstanding or market value of at least \$5 million and its issuer had at least one class of an equity security listed on Nasdaq, the New York Stock Exchange (“NYSE”), or NYSE American (collectively, a “listed company”).¹⁰ In February 2020, Nasdaq amended Rule 5702 to allow the listing of non-convertible bonds issued by certain companies not listed on Nasdaq, NYSE American or NYSE (the “2020 Filing”).¹¹

⁹ See Securities Exchange Act Release No. 84575 (November 13, 2018), 83 FR 58309 (November 19, 2018) (approving SR-NASDAQ-2018-070, as modified by Amendment Nos. 1-3) (“Approval Order”).

¹⁰ Rule 5702(a).

¹¹ Specifically, the 2020 Filing expanded the categories of non-convertible bonds eligible to be listed under Rule 5702 to include non-convertible bonds of affiliates of a listed company where: a listed company directly or indirectly owns a majority interest in, or is under common control with, the issuer of the non-convertible bond; or a listed company has guaranteed the non-convertible bond. In addition, for un-affiliated companies, the 2020 Filing allowed listing of non-convertible bonds where a nationally recognized securities rating organization (an “NRSRO”) has assigned a current rating to the non-convertible bond that is no lower than an S&P Corporation “B” rating or equivalent rating by another NRSRO; or if no NRSRO has assigned a rating to the issue, an NRSRO has currently assigned (i) an investment grade rating to an immediately senior issue of the same company, or (ii) a rating that is no lower than an S&P Corporation “B” rating, or an equivalent rating by another NRSRO, to a pari passu or junior issue of the same company. Securities and Exchange Act Release No. 88304 (February 28, 2020), 85 FR

Nasdaq now proposes to exempt issuers whose only securities listed on Nasdaq are non-convertible bonds listed under Rule 5702¹² from the requirements relating Shareholder Approval (Rule 5635) and Voting Rights (Rule 5640)(collectively, the “Rules”).¹³

Rule 5640 states that voting rights of existing shareholders of publicly traded common stock registered under Section 12 of the Securities Exchange Act of 1934 cannot be disparately reduced or restricted through any corporate action or issuance. As such, by its terms, the rule does not apply to bondholders because they are not shareholders of publicly traded common stock registered under Section 12 of the Act.

Rule 5635 sets forth the circumstances under which shareholder approval is required prior to an issuance of securities in connection with: (i) the acquisition of the stock or assets of another company; (ii) equity-based compensation of officers, directors, employees or consultants; (iii) a change of control; and (iv) transactions other than public offerings. Each of these rules predicates the need for shareholder approval on an issuance of securities by the

12953 (March 5, 2020)(SR-Nasdaq 2020-008).

¹² If an issuer has a class of equity securities listed on Nasdaq, the issuer is subject to the requirements of the Rules, except as otherwise provided in the Nasdaq 5600 Rule Series.

¹³ To increase the clarity of the rule, Nasdaq proposes to consolidate without substantively changing in the proposed Rule 5702(d) other exemptions applicable to an issuer of a non-convertible bond, as provided by Rule 5615(a)(6)(A), which states, in the relevant parts, that issuers “whose only securities listed on Nasdaq are ... debt securities ... are exempt from the requirements relating to Independent Directors (as set forth in Rule 5605(b)), Compensation Committees (as set forth in Rule 5605(d)), Director Nominations (as set forth in Rule 5605(e)), Codes of Conduct (as set forth in Rule 5610), and Meetings of Shareholders (as set forth in Rule 5620(a)). In addition, these issuers are exempt from the requirements relating to Audit Committees (as set forth in Rule 5605(c)), except for the applicable requirements of SEC Rule 10A-3. Nasdaq also proposes to include in the proposed Rule 5702(d) exemptions from the requirements relating to Diverse Board Representation (as set forth in Rule 5605(f) and Board Diversity Disclosure (as set forth in Rule 5606) applicable to an issuer of a non-convertible bond, as provided by Rules 5605(f)(4) and 5606(c), respectively.

company, but does not meaningfully protect bondholders because they do not have a right to vote in the event of an issuance of securities by the company that could trigger the approval requirements under Rule 5635.¹⁴

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)(5) of the Act,¹⁶ 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 exempting issuers whose only securities listed on Nasdaq are non-convertible bonds listed under Rules 5702 from the requirements of the Rules is designed to remove impediments to and perfect the mechanism of a free and open market because Rule 5640, by its terms, does not apply to bondholders as they are not shareholders of publicly traded common stock registered under Section 12 of the Act and bondholders do not have a right to vote in the event of an issuance of securities by the company that could trigger the approval requirements under Rule 5635. In addition Nasdaq believes that Rule 5702 adequately protects bondholders by setting forth the requirements to help ensure that the issuer of the non-convertible bond is capable of meeting its financial obligations.

¹⁴ See also general provisions relating to shareholder approval in Rule 5635(e) regarding determining the number of shares issuable in a transaction and the voting power outstanding.

¹⁵ 15 U.S.C. 78f(b).

¹⁶ 15 U.S.C. 78f(b)(5).

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. Nasdaq believes the proposed rule is not designed to limit the ability of the issuers of nonconvertible securities to list them on any other national securities exchange because it is designed to provide transparency to the applicability of the Rules to such issuers given that the Rules do not meaningfully protect bondholders. In addition, the proposed rule change may enhance competition among issuers by allowing more issuers to list their non-convertible bonds on Nasdaq, provided they meet the requirements of the rule.

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. Discussion and Commission Findings

The Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁷ In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with Section 6(b)(5) of the Act,¹⁸ which requires that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments and to perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

¹⁷ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁸ 15 U.S.C. 78f(b)(5).

As stated above, the Exchange proposes to exempt issuers whose only securities listed on Nasdaq are non-convertible bonds listed under Rule 5702 from the corporate governance requirements relating to Shareholder Approval (Nasdaq Rule 5635) and Voting Rights (Nasdaq Rule 5640). The Commission is approving the proposed rule change because, as described above, today, bondholders are not entitled to vote in the event of an issuance of securities under Nasdaq Rule 5635. Further, Nasdaq Rule 5640, by its terms, is not applicable to bondholders. Moreover, issuers that list non-convertible bonds pursuant to Nasdaq Rule 5702, if they also have a class of equity securities listed on Nasdaq, must continue to comply with the requirements of Nasdaq Rules 5635 and 5640 through their equity listing.¹⁹ The Exchange also proposes to consolidate in proposed Rule 5702(d), without substantive changes, other exemptions currently applicable to an issuer whose only security listed on Nasdaq is a non-convertible bond (i.e., requirements from rules pertaining to Independent Directors, Compensation Committees, Director Nominations, Diverse Board Representation, Board Diversity Disclosure, Codes of Conduct, Meetings of Shareholders, and Audit Committees, except for the applicable requirements of SEC Rule 10A-3).²⁰

Accordingly, the Commission believes that the proposed rule change, as modified by Amendment No. 2, is consistent with Section 6(b)(5) of the Act because it clarifies the application of Nasdaq Rules 5635 and 5640 to issuers that only list non-convertible bonds on Nasdaq and consolidates all relevant exemptions in one provision.

IV. Solicitation of Comments on Amendment No. 2 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning

¹⁹ See supra note 12 and accompanying text.

²⁰ See supra note 13.

the foregoing, including whether Amendment No. 2 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-2022-015 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-2022-015. 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, D.C. 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-2022-015 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 2

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 2, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 2 in the Federal Register. Amendment No. 2 merely amends the proposed rule to delete a proposed exemption for issuers whose only securities listed on Nasdaq are non-convertible bonds from Nasdaq Rule 5630, Review of Related Party Transactions, as well as provide greater clarity as to the purpose of the proposed rule change. Amendment No. 2 does not change the substance of the remaining proposed exemptions for issuers of non-convertible bonds from Nasdaq Rules 5635 and 5640, which were previously noticed.²¹ Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,²² to approve the proposed rule change, as modified by Amendment No. 2, on an accelerated basis.

²¹ See Initial Proposal, supra note 3.

²² 15 U.S.C. 78s(b)(2).

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²³ that the proposed rule change (SR-NASDAQ-2022-015), as modified by Amendment No. 2 thereto, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

J. Matthew DeLesDernier

Deputy Secretary

²³ Id.

²⁴ 17 CFR 200.30-3(a)(12).