

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-77481 ; File No. SR-NASDAQ-2016-013)

March 30, 2016

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Require Listed Companies to Publicly Disclose Compensation or Other Payments by Third Parties to Board of Director's Members or Nominees

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 March 15, 2016, The Nasdaq Stock Market LLC ("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 require listed companies to publicly disclose compensation or other payments by third parties to any nominee for director or sitting director in connection with their candidacy for or service on the companies' Board of Directors.

The text of the proposed rule change is available on the Exchange's Website at <http://nasdaq.cchwallstreet.com>, 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 Rules require listed companies to make public disclosure in several areas. For example, a listed company is required to publicly disclose material information that would reasonably be expected to affect the value of its securities or influence investors' decisions as well as when non-independent directors serve on a committee that generally requires only independent directors, such as for a controlled company or under exceptional and limited circumstances.³ A listed company is also required to file required periodic reports with the Commission.⁴ A principal purpose of these disclosure requirements is to protect investors and ensure these investors have necessary information to make informed investment and voting decisions.

In recent years, Nasdaq has observed one area where investors may not have complete information. This is when third parties compensate directors in connection with their candidacy for and/or service on company Boards of Directors. This third-party compensation, which may not be publicly disclosed, arises when a shareholder privately offers to compensate nominee directors in connection with those nominees' candidacy or service as directors. These

³ See Rules 5250(b)(1), 5615(c)(2), 5605(c)(2)(B), 5605(d)(2)(B) and 5605(e)(3).

⁴ See Rule 5250(c).

arrangements vary but may include compensating directors based on achieving benchmarks such as an increase in share price over a fixed term.⁵

Nasdaq believes these undisclosed compensation arrangements potentially raise several concerns, including that they may lead to conflicts of interest among directors and call into question the directors' ability to satisfy their fiduciary duties. These arrangements may also tend to promote a focus on short-term results at the expense of long-term value creation. Nasdaq believes that enhancing transparency around third-party board compensation would help address these concerns and would benefit investors by making available information potentially relevant to investment and voting decisions. Nasdaq further believes that the proposed disclosure would not create meaningful burdens on directors or those making these payments nor on the companies required to make the disclosure.

Accordingly, Nasdaq is proposing to adopt Rule 5250(c) to require listed companies⁶ to publicly disclose on or through the companies' website or proxy statement for the next annual meeting at which directors are elected (or, if they do not file proxy statements, in Form 10-K or Form 20-F),⁷ all agreements and arrangements between any director or nominee and any person

⁵ The Commission notes that various provisions of the federal securities laws already require the disclosure of compensation arrangements between third parties and directors or director nominees. See, e.g., Items 401(a) and 402(a)(2) of Regulation S-K; Item 5(b) of Schedule 14A; and Item 5.02(d) of Form 8-K.

⁶ Pursuant to Listing Rule 5615(a)(3), a foreign private issuer may follow home country practice in lieu of the requirements of the proposed rule.

⁷ This disclosure method is consistent with the method under Listing Rule 5605(d)(2)(B) for disclosure of the appointment of a non-independent compensation committee member under exceptional and limited circumstances. A Company that provides disclosure under Commission rules – including the requirement in Item 5.02(d)(2) of Form 8-K to provide “a brief description of any arrangement or understanding between the new director and any other persons, naming such persons, pursuant to which such director was selected as a director” – would not have to make separate disclosure under the proposed rule if the

or entity (other than the company) that provide for compensation or other payment in connection with that person's candidacy or service as a director.⁸

A listed company's obligation under the proposed rule to publicly disclose such arrangements is continuous and will terminate at the earlier of the resignation of the director subject to the arrangement or one year following the termination of the arrangement. The proposed rule is intended to be construed broadly and apply to both compensation and other forms of payment such as health insurance premiums that are made in connection with a person's candidacy or service as a director. Further, at a minimum, the disclosure should identify the parties to and the material terms of the agreement or arrangement. To allow listed companies affected by the proposed rule a transition period, the rule will be effective on June 30, 2016.⁹

In recognition of circumstances that do not raise the concerns noted above or where such disclosure may be duplicative, the proposed rule would not apply to agreements and arrangements that existed before the nominee's candidacy and have been otherwise publicly disclosed, for example, pursuant to Items 402(a)(2) or 402(k) of Regulation S-K or in a director's biographical summary included in periodic reports filed with the Commission. An example of an agreement or arrangement falling under this exception is a director or a nominee for director being employed by a private equity fund where employees are expected to and routinely serve on

disclosure identifies the material terms of the agreement or arrangement and the Commission disclosure document (i.e., Form 8-K) is posted on the company's website. However, such an agreement or arrangement is subject to the continuous disclosure requirements of the proposed rule on an annual basis.

⁸ The proposal is intended to apply to agreements and arrangements whether or not the right to nominate a director legally belongs to the third party. See IM 5605-7 (Independent Director Oversight of Director Nominations).

⁹ The Commission notes that the proposed effective date of June 30, 2016 is contingent on Commission approval of the rule proposal under Section 19(b) of the Act by that date.

the boards of the fund's portfolio companies and their remuneration is not materially affected by such service. If such a director or a nominee's remuneration is materially increased in connection with such person's candidacy or service as a director of the company, only the difference between the new and the previous level of compensation needs to be disclosed under the proposed rule.

Additionally, the proposed rule would not apply to agreements and arrangements that relate only to reimbursement of expenses incurred in connection with candidacy as a director, whether or not such reimbursement arrangement has been publicly disclosed. Finally, Commission Rule 14a-12(c) subjects persons soliciting proxies in opposition to companies' proxy solicitation to certain disclosure requirements of Schedule 14A of the Act. The proposed rule relieves the company from the initial disclosure requirements of the proposed rule where an agreement or arrangement for a director or a nominee has been disclosed under Item 5(b) of Schedule 14A of the Act. However, such an agreement or arrangement is subject to the continuous disclosure requirements of the proposed rule on an annual basis.

Further, in recognition that a company, despite reasonable efforts, may not be able to identify all such agreements and arrangements, the proposed rule provides that a company shall not be deficient with the proposed requirement if it has undertaken reasonable efforts to identify all such agreements and arrangements, including by asking each director or nominee in a manner designed to allow timely disclosure, and upon discovery of a non-disclosed arrangement, promptly makes the required disclosure by filing a Form 8-K or 6-K, where required by Commission rules, or by issuing a press release.

In cases where a company is considered deficient, the company must provide a plan to regain compliance. Consistent with deficiencies from most other rules that allow a company to

submit a plan to regain compliance,¹⁰ Nasdaq proposes to allow companies deficient under the proposed rule 45 calendar days to submit a plan sufficient to satisfy Nasdaq staff that the company has adopted processes and procedures designed to identify and disclose relevant agreements and arrangements in the future. If the company does not do so, it would be issued a Staff Delisting Determination, which the company could appeal to a Hearings Panel pursuant to Rule 5815.¹¹

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

¹⁰ Pursuant to Rule 5810(c)(2)(A), a company is provided 45 days to submit a plan to regain compliance with Rules 5620(c) (Quorum), 5630 (Review of Related Party Transactions), 5635 (Shareholder Approval), 5250(c)(3) (Auditor Registration), 5255(a) (Direct Registration Program), 5610 (Code of Conduct), 5615(a)(4)(E) (Quorum of Limited Partnerships), 5615(a)(4)(G) (Related Party Transactions of Limited Partnerships), and 5640 (Voting Rights). A company is generally provided 60 days to submit a plan to regain compliance with the requirement to timely file periodic reports contained in Rule 5250(c)(1).

¹¹ Separate from this proposed rule change, Nasdaq is surveying interested parties as to whether Nasdaq should propose additional requirements surrounding directors and candidates that receive third party payments, including whether such directors should be prohibited from being considered independent under Nasdaq rules or prohibited from serving on the board altogether. Nasdaq has made no decision about whether to propose additional rules. If Nasdaq does determine to propose additional rules, any proposal would be subject to a separate rule filing. Listing Rule 5605(a)(2) excludes from the definition of Independent Director any “individual having a relationship which, in the opinion of the Company's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director.”

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(5).

investors and the public interest. The proposal accomplishes these objectives by enhancing transparency around third party compensation and payments made in connection with board service. The Exchange believes such disclosure has several benefits: it would provide information to investors to help them make meaningful investing and voting decisions. It would also address potential concerns that undisclosed third party compensation arrangements may lead to conflicts of interest among directors and call into question their ability to satisfy fiduciary duties.

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 amended. The proposed rule to require listed companies to disclose third party compensation and payments in connection with board service is intended to provide meaningful information to investors and to address potential concerns with undisclosed compensation schemes without creating unnecessary burdens on directors or those making the payments.

Further, the proposed rule change is intended to promote transparency and protect investors and is not being adopted for competitive purposes. To the extent a competitor marketplace believes that the proposed rule change places them at a competitive disadvantage, it may file with the Commission a proposed rule change to adopt the same or similar 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. 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-2016-013 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-2016-013. 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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2016-013 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

Robert W. Errett
Deputy Secretary

¹⁴ 17 CFR 200.30-3(a)(12).