

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-97687; File No. SR-NASDAQ-2023-005)

June 9, 2023

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to Establish Listing Standards Related to Recovery of Erroneously Awarded Executive Compensation

I. Introduction

On February 22, 2023, 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 adopt Nasdaq Rule 5608 to establish listing standards related to recovery of erroneously awarded executive compensation as required by Rule 10D-1 under the Act (“Rule 10D-1”). The proposed rule change was published for comment in the Federal Register on March 13, 2023.³ On April 24, 2023, 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 June 6, 2023, the Exchange filed partial Amendment No. 1 to the proposed rule change.⁵ The Commission is

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 97060 (March 7, 2023), 88 FR 15500 (“Notice”). Comments received on the proposed rule change are available at: <https://www.sec.gov/comments/sr-nasdaq-2023-005/srnasdaq2023005.htm>.

⁴ See Securities Exchange Act Release No. 97353, 88 FR 26369 (April 28, 2023).

⁵ Amendment No. 1 is available on the Commission’s website at <https://www.sec.gov/comments/sr-nasdaq-2023-005/srnasdaq2023005-200459-401302.pdf>. In Amendment No. 1, the Exchange proposes to amend Rule 5608(e) to (i) provide that the effective date of Rule 5608 would be October 2, 2023; and (ii) clarify, consistent with the requirements of Rule 10D-1 and the rule language as originally

publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Background and Description of the Proposal, as Modified by Amendment No. 1

On October 26, 2022, the Commission adopted final Rule 10D-1⁶ to implement Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”), which added Section 10D to the Act. Section 10D of the Act requires the Commission to adopt rules directing the national securities exchanges to prohibit the listing of any security of an issuer that is not in compliance with the requirements of Section 10D of the Act. Rule 10D-1 requires national securities exchanges that list securities to establish listing standards that require each issuer to adopt and comply with a written executive compensation recovery policy and to provide the disclosures required by Rule 10D-1 and in the applicable Commission filings.⁷ Under Rule 10D-1, listed companies must recover from current and former executive officers

proposed, that each company is required to comply with its recovery policy for all incentive-based compensation received (as such term is defined in proposed Rule 5608(d)) by executive officers on or after October 2, 2023.

⁶ 17 CFR 240.10D-1.

⁷ See Securities Exchange Act Release No. 96159, 87 FR 73076 (November 28, 2022) (“Adopting Release”). Rule 10D-1 requires such exchange listing rules to be effective no later than one year after November 28, 2022. Rule 10D-1 further requires that each listed issuer: (i) adopt the required recovery policy no later than 60 days following the effective date of the listing standard; (ii) comply with the recovery policy for all incentive-based compensation received by executive officers on or after the effective date of the applicable listing standard; and (iii) provide the required disclosures on or after the effective date of the listing standard.

incentive-based compensation received during the three completed fiscal years preceding the date on which the issuer is required to prepare an accounting restatement.

As required by Rule 10D-1, Nasdaq proposed to adopt Nasdaq Rule 5608 entitled “Recovery of Erroneously Awarded Compensation.” Proposed Nasdaq Rule 5608 (the “Rule”) mirrors the text of Rule 10D-1. Specifically, proposed Nasdaq Rule 5608(a) would require companies⁸ to adopt a compensation recovery policy, comply with that policy, and provide the compensation recovery policy disclosures required by the Rule and in the applicable Commission filings.

Proposed Nasdaq Rule 5608(b)(1) would require that each company adopt and comply with a written policy providing that the company will recover reasonably promptly the amount of erroneously awarded incentive-based compensation in the event that the company is required to prepare an accounting restatement due to the material noncompliance of the company with any financial reporting requirement under the securities laws, including any required accounting restatement to correct an error in previously issued financial statements that is material to the previously issued financial statements, or that would result in a material misstatement if the error were corrected in the current period or left uncorrected in the current period.

The company’s recovery policy must apply to all incentive-based compensation received by a person: (A) after beginning service as an executive officer; (B) who served as an executive officer at any time during the performance period for that incentive-based compensation; (C) while the company has a class of securities listed on a national securities exchange or a national securities association; and (D) during the three completed fiscal years immediately preceding the

⁸ For purposes of this order, “companies” or “company” refers to the issuer of a security listed or an issuer who is applying to list on Nasdaq. See, e.g., Nasdaq Rule 5005(a)(6).

date that the company is required to prepare an accounting restatement as described in paragraph (b)(1) of the Rule.⁹ A company's obligation to recover erroneously awarded compensation is not dependent on if or when the restated financial statements are filed.

For purposes of determining the relevant recovery period, the date that a company is required to prepare an accounting restatement as described in paragraph (b)(1) of the Rule is the earlier to occur of: (A) the date the company's board of directors, a committee of the board of directors, or the officer or officers of the company authorized to take such action if board action is not required, concludes, or reasonably should have concluded, that the company is required to prepare an accounting restatement as described in paragraph (b)(1) of this Rule; or (B) the date a court, regulator, or other legally authorized body directs the company to prepare an accounting restatement as described in paragraph (b)(1) of the Rule.¹⁰

The amount of incentive-based compensation that must be subject to the company's recovery policy ("erroneously awarded compensation") is the amount of incentive-based compensation received that exceeds the amount of incentive-based compensation that otherwise would have been received had it been determined based on the restated amounts, and must be computed without regard to any taxes paid. For incentive-based compensation based on stock price or total shareholder return, where the amount of erroneously awarded compensation is not subject to mathematical recalculation directly from the information in an accounting restatement,

⁹ See proposed Rule 5608(b)(1)(i). In addition to these last three completed fiscal years, the recovery policy must apply to any transition period (that results from a change in the company's fiscal year) within or immediately following those three completed fiscal years. However, a transition period between the last day of the company's previous fiscal year end and the first day of its new fiscal year that comprises a period of nine to 12 months would be deemed a completed fiscal year.

¹⁰ See proposed Rule 5608(b)(1)(ii).

the amount must be based on a reasonable estimate of the effect of the accounting restatement on the stock price or total shareholder return upon which the incentive-based compensation was received, and the company must maintain documentation of the determination of that reasonable estimate and provide such documentation to Nasdaq.¹¹

The company must recover erroneously awarded compensation in compliance with its recovery policy except to the extent that one of the conditions set forth below is met, and the company's Compensation Committee, or in the absence of such a committee, a majority of the independent directors serving on the board, has made a determination that recovery would be impracticable.

- The direct expense paid to a third party to assist in enforcing the policy would exceed the amount to be recovered. Before concluding that it would be impracticable to recover any amount of erroneously awarded compensation based on expense of enforcement, the company must make a reasonable attempt to recover such erroneously awarded compensation, document such reasonable attempt(s) to recover, and provide that documentation to Nasdaq.
- Recovery would violate home country law where that law was adopted prior to November 28, 2022. Before concluding that it would be impracticable to recover any amount of erroneously awarded compensation based on violation of home country law, the company must obtain an opinion of home country counsel, acceptable to Nasdaq, that recovery would result in such a violation, and must provide such opinion to Nasdaq.

¹¹ See proposed Rule 5608(b)(1)(iii).

- Recovery would likely cause an otherwise tax-qualified retirement plan, under which benefits are broadly available to employees of the registrant, to fail to meet the requirements of 26 U.S.C. 401(a)(13) or 26 U.S.C. 411(a) and regulations thereunder.¹²

The company is prohibited from indemnifying any executive officer or former executive officer against the loss of erroneously awarded compensation.¹³

Proposed Nasdaq Rule 5608(b)(2) would require that each company file all disclosures with respect to such recovery policy in accordance with the requirements of the federal securities laws, including the disclosure required by the applicable Commission filings.

Proposed Nasdaq Rule 5608(c) would provide that the requirements of the Rule do not apply to the listing of: (1) any security issued by a unit investment trust, as defined in 15 U.S.C. 80a-4(2); and (2) any security issued by a management company, as defined in 15 U.S.C. 80a-4(3), that is registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8), if such management company has not awarded incentive-based compensation to any executive officer of the company in any of the last three fiscal years, or in the case of a company that has been listed for less than three fiscal years, since the listing of the company.

Proposed Nasdaq Rule 5608(d) would provide that, unless the context otherwise requires, the following definitions apply for purposes of the Rule (and only for purposes of Rule 5608):

- *Executive Officer.* An executive officer is the company's president, principal financial officer, principal accounting officer (or if there is no such accounting officer, the controller), any vice-president of the company in charge of a principal

¹² See proposed Rule 5608(b)(1)(iv).

¹³ See proposed Rule 5608(b)(1)(v).

business unit, division, or function (such as sales, administration, or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the company. Executive officers of the company's parent(s) or subsidiaries are deemed executive officers of the company if they perform such policy making functions for the company. In addition, when the company is a limited partnership, officers or employees of the general partner(s) who perform policy-making functions for the limited partnership are deemed officers of the limited partnership. When the company is a trust, officers, or employees of the trustee(s) who perform policy-making functions for the trust are deemed officers of the trust. Policy-making function is not intended to include policy-making functions that are not significant.

Identification of an executive officer for purposes of the Rule would include at a minimum executive officers identified pursuant to 17 CFR 229.401(b).

- *Financial Reporting Measures.* Financial reporting measures are measures that are determined and presented in accordance with the accounting principles used in preparing the company's financial statements, and any measures that are derived wholly or in part from such measures. Stock price and total shareholder return are also financial reporting measures. A financial reporting measure need not be presented within the financial statements or included in a filing with the Commission.
- *Incentive-Based Compensation.* Incentive-based compensation is any compensation that is granted, earned, or vested based wholly or in part upon the attainment of a financial reporting measure.

- *Received.* Incentive-based compensation is deemed received in the company’s fiscal period during which the financial reporting measure specified in the incentive-based compensation award is attained, even if the payment or grant of the incentive-based compensation occurs after the end of that period.

Proposed Nasdaq Rule 5608(e) would provide that the effective date of the Rule (“effective date”) is October 2, 2023, and that each company is required to (i) adopt a policy governing the recovery of erroneously awarded compensation as required by the Rule no later than 60 days following October 2, 2023; (ii) comply with its recovery policy for all incentive-based compensation received (as such term is defined in Rule 5608(d)) by executive officers on or after October 2, 2023; and (iii) provide the disclosures required by the Rule and in the applicable Commission filings on or after October 2, 2023.¹⁴ Proposed Nasdaq Rule 5605(e) also states that notwithstanding the look-back requirement in proposed Rule 5608(b)(1)(i)(D), a company is only required to apply the recovery policy to incentive-based compensation received on or after October 2, 2023.¹⁵

¹⁴ See Amendment No. 1, supra note 5. In support of proposing an effective date of October 2, 2023, the Exchange states it believes this is consistent with Section 10D “and the goal of implementing the proposed rule promptly while also being consistent with the expectations of listed issuer that the proposed rules would take effect a year after the adoption of SEC Rule 10D-1 based on the issuers’ understanding of a statement made . . . in the Listing Standards Release.” See id.

¹⁵ As described above, a Nasdaq listed company would have to comply with its recovery policy for all incentive-based compensation received by executive officers on or after the effective date of the applicable listing standard (i.e. Nasdaq Rule 5608). Incentive-based compensation that is the subject of a compensation contract or arrangement that existed prior to the effective date of Rule 10D-1 would still be subject to recovery under the Exchange’s rule if such compensation was received on or after the effective date of Rule 5608, as required by Rule 10D-1. See Adopting Release, supra note 6, and also definitions of “incentive based compensation” and “received” in proposed Nasdaq Rule 5608(d).

Nasdaq also proposes additional clarifying changes to Nasdaq Rule 5210 (Prerequisites for Applying to List on the Nasdaq Stock Market), Nasdaq Rule 5701 (Preamble to the Listing Requirements to Other Securities) and Nasdaq Rule 5702 governing listing requirements for debt securities to make clear the application of proposed Nasdaq Rule 5608 under these provisions.¹⁶

Nasdaq states that the new requirements described above will help facilitate effective oversight of executive compensation and promote accountability to investors by not allowing executive officers to retain compensation that they were awarded erroneously.¹⁷

As described above, Rule 10D-1 requires national securities exchanges to prohibit the initial or continued listing of any security of an issuer not in compliance with its rules adopted to comply with Rule 10D-1. Nasdaq proposes therefore to require that a company will be subject to delisting if it does not adopt a compensation recovery policy that complies with the applicable listing standard, disclose the policy in accordance with Commission rules or comply with its recovery policy. Nasdaq states that the administrative process for a company that fails to comply with proposed Nasdaq Rule 5608 will follow the established pattern used for similar corporate governance deficiencies.¹⁸ Specifically, Nasdaq proposes to amend Nasdaq Rule 5810(c)(2)(A)(iii) to provide that a company that fails to comply with proposed Nasdaq Rule 5608 may submit to Nasdaq Staff¹⁹ a plan to regain compliance and, consistent with its process

¹⁶ Nasdaq states that the change to Nasdaq Rule 5210 will clarify that any company newly listing on Nasdaq must comply with these requirements. The proposed amendments to Nasdaq Rules 5701 and 5702 make clear that proposed Nasdaq Rule 5608 would apply, except to the extent exempted as set forth above. See supra discussion of proposed Rule 5608(c).

¹⁷ See Notice, supra note 3, 88 FR at 15502.

¹⁸ See id. See also Nasdaq Rule 5805(c)(2)(B).

¹⁹ Nasdaq Rule 5805(g) defines the term “Staff” as employees of the Listing Qualifications Department (the department of Nasdaq responsible for evaluating company compliance

for similar corporate governance deficiencies, Nasdaq Staff may provide the issuer up to 180 days to cure the deficiency.²⁰ Nasdaq Rule 5810(c)(2)(B) further provides that notifications of deficiencies that allow for submission of a compliance plan may also result, after review of the compliance plan, in issuance of a Staff Delisting Determination or a Public Reprimand Letter. However, Nasdaq proposes to amend Nasdaq Rules 5810(c)(4), 5815(c)(1)(D), 5820(d)(1) and 5825(d) to provide that a Public Reprimand Letter may not be issued for violations of a listing standard required by Rule 10D-1 or upon appeal of such violations.²¹ If Nasdaq Staff provides the issuer with a period to cure the deficiency, and if the company does not regain compliance within the time period provided, Nasdaq Staff would be required to issue a Staff Delisting Determination,²² which the issuer could appeal to the Hearings Panel, as provided in Nasdaq Rule 5815. The Hearings Panel could allow the issuer up to an additional 180 days to cure the deficiency.²³

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations

with quantitative and qualitative listing standards and determining eligibility for initial and continued listing of a company's securities). See also Nasdaq Rule 5805(h).

²⁰ See Notice, supra note 3, 88 FR at 15502. See also Nasdaq Rule 5805(c)(2)(B).

²¹ Nasdaq also proposes to amend the definition of “Public Reprimand Letter” in Rule 5805(j) to provide that a Public Reprimand Letter may not be issued for violations of a listing standard required by Rule 10D-1. Under the existing definition in Rule 5805(j), Public Reprimand Letters can be issued for violations of Nasdaq corporate governance or notification listing standards except for violations of a listing standard required by Rule 10A-3 of the Act.

²² See Nasdaq Rule 5805(c)(2)(E).

²³ See Nasdaq Rule 5815(c).

thereunder applicable to a national securities exchange.²⁴ In particular, the Commission finds that the proposed rule change is consistent with the requirements of Section 6(b) of the Act.²⁵ Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,²⁶ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, 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, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. In addition, the Commission finds that the proposed rule change is consistent with Section 6(b)(7) of the Act,²⁷ which requires, among other things, that the rules of a national securities exchange provide a fair procedure for the prohibition or limitation by the exchange of any person with respect to access to services offered by the exchange. The proposed rule change, as modified by Amendment No. 1, is also consistent with Section 10D of the Act²⁸ and Rule 10D-1 thereunder, as further described below.²⁹

The development and enforcement of meaningful listing standards for a national securities exchange is of substantial importance to financial markets and the investing public. Meaningful listing standards are especially important given investor expectations regarding the

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

²⁵ 15 U.S.C. 78f(b).

²⁶ 15 U.S.C. 78f(b)(5).

²⁷ 15 U.S.C. 78(b)(7).

²⁸ 15 U.S.C. 78j-4.

²⁹ 17 CFR 240.10D-1.

nature of companies that have achieved an exchange listing for their securities, and the role of an exchange in overseeing its market and assuring compliance with its listing standards.³⁰ The corporate governance standards embodied in the listing rules of national securities exchanges, in particular, play an important role in assuring that companies listed for trading on the exchanges' markets observe good governance practices, including a fair approach and greater accountability for the recovery of erroneously awarded compensation.³¹

In enacting Section 10D of the Act,³² Congress resolved to require national securities exchanges to establish listing standards to require listed issuers to develop and comply with a policy to recover incentive-based compensation erroneously awarded on the basis of financial information that requires an accounting restatement.³³ In October 2022, as required by this

³⁰ See, e.g., Securities Exchange Release Nos. 65708 (November 8, 2011), 76 FR 70799 70802 (November 15, 2011) (SR-NASDAQ-2011-073); 63607 (December 23, 2010), 75 FR 82420, 82422 (December 30, 2010) (SR-NASDAQ-2010-137); 57785 (May 6, 2008), 73 FR 27597, 27599 (May 13, 2008) (SR-NYSE-2008-17); and 93256 (October 4, 2021), 86 FR 56338 (October 8, 2021) (SR-NASDAQ-2021-007).

³¹ See, e.g., Securities Exchange Release No. 68639 (January 11, 2013), 78 FR 4570, 4579 (January 22, 2013) (SR-NYSE-2012-49) (stating, in connection with the modification of exchange rules for compensation committees of listed issuers to comply with Rule 10C-1 of the Act, that corporate governance listing standards “play an important role in assuring that companies listed for trading on the exchanges’ markets observe good governance practices, including a reasoned, fair, and impartial approach for determining the compensation of corporate executives” and stating that the proposal would foster “greater transparency, accountability and objectivity” in oversight of compensation practices).

³² Pub. L. No. 111-203, § 954, 124 Stat. 1376, 1904 (2010) (codified at 15 U.S.C. 78j-4).

³³ As a part of the Dodd-Frank Act legislative process, in a 2010 report, the Senate Committee on Banking, Housing and Urban Affairs stated that it is “unfair to shareholders for corporations to allow executive officers to retain compensation that they were awarded erroneously.” See Report of the Senate Committee on Banking, Housing, and Urban Affairs, S.3217, Report No. 111-176 at 135- 36 (Apr. 30, 2010) (“Senate Report”) at 135. See also Adopting Release, supra note 7, 87 FR at 73077 (citing to the Senate Report) (“The language and legislative history of the Dodd-Frank Act make clear that Section 10D is premised on the notion that an executive officer should not retain incentive-based compensation that, had the issuer’s accounting been correct in the first

legislation, the Commission adopted Rule 10D-1 under the Act, which directs the national securities exchanges to establish listing standards that require issuers to: (i) develop and comply with written policies for recovery of incentive-based compensation based on financial information required to be reported under the securities laws, applicable to the issuers' executive officers, during the three completed fiscal years immediately preceding the date that the issuer is required to prepare an accounting restatement; and (ii) disclose those compensation recovery policies in accordance with Commission rules. In response, the Exchange has filed the proposed rule change, which includes rules intended to comply with the requirements of Rule 10D-1.

The Exchange's proposed Rule 5608 incorporates the requirements of Rule 10D-1. The Commission believes that the Exchange's proposal will foster greater fairness, accountability, and transparency to shareholders of listed issuers by advancing the recovery of incentive-based compensation that was erroneously awarded on the basis of financial information that requires an accounting restatement, consistent with Section 10D of the Act³⁴ and Rule 10D-1 thereunder,³⁵ and will therefore further the protection of investors consistent with Section 6(b)(5) of the Act.³⁶ In addition, as the Commission stated in the Adopting Release, the recovery requirements may provide executive officers with an increased incentive to take steps to reduce the likelihood of inadvertent misreporting and will reduce the financial benefits to executive officers who choose

instance, would not have been received by the executive officer, regardless of any fault of the executive officer for the accounting errors. The Senate Report also indicates that shareholders should not 'have to embark on costly legal expenses to recoup their losses' and that 'executives must return monies that should belong to the shareholders.'").

³⁴ 15 U.S.C. 78j-4.

³⁵ 17 CFR 240.10D-1.

³⁶ 15 U.S.C. 78f(b)(5).

to pursue impermissible accounting methods, which can further discourage such behavior.³⁷ The Commission believes that these benefits of the Exchange’s new rules on the recovery of erroneously awarded compensation will protect investors and the public interest as required under Section 6(b)(5) of the Act.

Rule 10D-1 and proposed Rule 5608 require that a listed issuer recover the amount of erroneously awarded incentive-based compensation “reasonably promptly.” One commenter requested Nasdaq include guidance in its proposed listing standards regarding what the exchange will consider in evaluating whether an issuer is pursuing recovery “reasonably promptly” under its policy and provided a non-exclusive list of factors the Exchange could consider and set forth in its rules.³⁸ As discussed above, Nasdaq’s proposed rule mirrors the language in Rule 10D-1 and such guidance is not included in the rule text of Rule 10D-1. The Adopting Release stated that whether an issuer is acting reasonably promptly “will depend on the particular facts and circumstances applicable to that issuer” and “the final rules do not restrict exchanges from adopting more prescriptive approaches to the timing and method of recovery under their rules in compliance with Section 19(b) of the Exchange Act ...”³⁹ Rule 10D-1 also does not compel the exchanges to adopt a more prescriptive approach to the timing and method of recovery. In its Notice, Nasdaq stated that “the issuer’s obligation to recover erroneously awarded incentive-

³⁷ See Adopting Release, *supra* note 7, 87 FR at 73077. See also Notice, *supra* note 3, 88 FR at 15502, agreeing with the Commission’s statement on the benefits of the recovery policy.

³⁸ See Letter to Vanessa Countryman, Secretary, Commission, from Wilson Sonsini Goodrich & Rosati, dated April 4, 2024 [sic] (“Wilson Sonsini Letter”), at 4.

³⁹ See Adopting Release, *supra* note 7, 87 FR at 73104. For example, the Commission stated that after the exchanges have observed issuer performance they can use any resulting data to assess the need for further guidelines to ensure prompt and effective recovery. See *id.*

based compensation reasonably promptly will be assessed on a holistic basis with respect to each such accounting restatement prepared by the issuer” and that “[i]n evaluating whether an issuer is recovering erroneously awarded incentive-based compensation reasonably promptly, the Exchange will consider whether the issuer is pursuing an appropriate balance of cost and speed in determining the appropriate means to seek recovery, and whether the issuer is securing recovery through means that are appropriate based on the particular facts and circumstances of each executive officer that owes a recoverable amount.”⁴⁰ The Commission believes this guidance provided by the Exchange is consistent with the Commission’s statements regarding when an issuer is acting “reasonably promptly” as expressed in the Adopting Release, with Rule 10D-1 and with the Act.⁴¹

Rule 10D-1 requires issuers subject to the listing standards to adopt a recovery policy no later than 60 days following the date on which the applicable listing standards become effective and to comply with their recovery policy, and provide the required disclosures, on or after the effective date. The Commission received comment letters requesting the Commission not approve the proposal before November 28, 2023, citing burdens to issuers, including with respect to assessing the impact of the new listing standards on their existing executive compensation programs, developing and implementing compliant policies, and obtaining board (and in some cases shareholder) approval.⁴² Commenters stated that listed issuers anticipated an effective date

⁴⁰ See Notice, supra note 3, 88 FR at 15502.

⁴¹ See Adopting Release, supra note 7, 87 FR 73104.

⁴² See, e.g., Wilson Sonsini Letter at 5; Letter to Vanessa Countryman, Secretary, Commission, from Davis Polk Wardwell LLP et al., submitted on behalf of 39 law firms, dated April 3, 2023 (“Davis Polk Letter”); Letter to Vanessa Countryman, Secretary, Commission, from C. Edward Allen, Vice President, Policy & Advocacy, and Christina Maguire, President & CEO, Society for Corporate Governance, dated April 3, 2023 (“Society Letter”); Letter to Vanessa Countryman, Secretary, Commission, from

of November 28, 2023 based on the language in Rule 10D-1 requiring that the new listing standards become effective by no later than one year following the publication of the final rules in the Federal Register.⁴³ One commenter stated that the Adopting Release stated that “issuers will have more than a year from the date the final rules are published in the Federal Register to prepare and adopt compliant recovery policies.”⁴⁴ The Commission also received comment letters from individual investors that requested the Commission quickly implement the proposal.⁴⁵ The Exchange, in Amendment No. 1, is proposing that the effective date of Rule 5608 be October 2, 2023.⁴⁶ The Exchange believes that setting this date as the effective date will ensure that issuers have more than a year from the date Rule 10D-1 was published in the Federal Register to adopt recovery policies.⁴⁷ This is consistent with language in Rule 10D-1 and the Adopting Release, while also ensuring prompt implementation of this proposed rule.

American Securities Association, Business Roundtable, Center On Executive Compensation, National Association of Manufacturers, and U.S. Chamber of Commerce, dated April 3, 2023 (“ASA Letter”).

⁴³ See, e.g., Society Letter at 1; ASA Letter at 2.

⁴⁴ See Davis Polk Letter at 1 n.1 (citing to Adopting Release, supra note 7, 87 FR at 73111).

⁴⁵ See, e.g., Letters from Clarissa McLaughlin, dated May 15, 2023; Deborah Temple, dated May 15, 2023; John Leonard, dated May 13, 2023.

⁴⁶ See Amendment No. 1, supra note 5, amending proposed Nasdaq Rule 5608(e).

⁴⁷ Listed issuers will need to have their recovery policy in place no later than 60 days following the effective date of October 2, 2023, which would be more than a year after publication of Rule 10D-1 in the Federal Register. Listed issuers will also have to comply with their recovery policy for all incentive-based compensation received by executive officers on or after the effective date of October 2, 2023, and provide the required disclosures in the applicable Commission filings on or after the effective date of October 2, 2023. See Adopting Release, supra note 6, and also definitions of “incentive based compensation” and “received” in proposed Nasdaq Rule 5608(d). See also supra note 15 and accompanying text.

With respect to a listed issuer that fails to comply with proposed Rule 5608, the Exchange has proposed to apply its current procedures applicable to companies with similar corporate governance deficiencies in addition to prohibiting the use of a Public Reprimand Letter for violations of a listing standard required by Rule 10D-1.⁴⁸ The Commission believes that these procedures for listed issuers out of compliance with proposed Nasdaq Rule 5608, which are consistent with the procedures for similar corporate governance deficiencies, adequately meet the mandate of Rule 10D-1 and are consistent with investor protection and the public interest, since they give a listed issuer a reasonable time period to cure non-compliance with these important requirements before the listed issuer will be delisted while helping to ensure that listed issuers that are non-compliant will not remain listed for an inappropriate amount of time.⁴⁹ Additionally, the proposed delisting process, including the cure period and the right to appeal a delisting determination to the Exchange's Hearing Panel, is consistent with Section 6(b)(7) of the Act in that it provides a fair procedure for the review of delisting determinations based on violations of the Exchange's rules for recovering erroneous compensation.

⁴⁸ See supra notes 18-23 and accompanying text.

⁴⁹ One commenter states its agreement that issuers should be given an opportunity to submit a plan of compliance and to cure noncompliance in good faith and states that Nasdaq's proposal "strikes the right balance" in deterring issuers from violating the proposed listing standards without unnecessarily harming shareholders. See Wilson Sonsini Letter, at 3. Another commenter that was generally supportive of Nasdaq's proposal states that Nasdaq's proposed delisting process involves the use of Listing Qualifications Panels and a Listing and Hearing Review Council with investor representatives. See Letter to Vanessa Countryman, Secretary, Commission, from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, dated April 3, 2023, at 4 n.13.

IV. Solicitation of Comments on Amendment No. 1 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning whether the proposed rule change, as modified by Amendment No. 1, is consistent with the Exchange Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NASDAQ-2023-005 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-2023-005. This file number should be included on the subject line if email 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 (<https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should

submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NASDAQ-2023-005, and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 1 in the Federal Register. In Amendment No. 1, the Exchange amended proposed Rule 5608(e) to (i) provide that the effective date of Rule 5608 would be October 2, 2023; and (ii) clarify, consistent with the requirements of Rule 10D-1 and the rule language as originally proposed, that each company is required to comply with its recovery policy for all incentive-based compensation received (as such term is defined in proposed Rule 5608(d)) by executive officers on or after October 2, 2023.⁵⁰ The changes in Amendment No. 1 provide greater clarity to the proposal. The change to the effective date of the listing standards is consistent with Rule 10D-1 and language in the Adopting Release and is responsive to comments stating that listed issuers anticipated an effective date of November 28, 2023. The additional clarification to Rule 5608(e) will ensure that the requirements of that Rule conform to the requirements of Rule 10D-1. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,⁵¹ to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

⁵⁰ See Amendment No. 1, supra note 5.

⁵¹ 15 U.S.C. 78s(b)(2).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁵² that the proposed rule change (SR-NASDAQ-2023-005), as modified by Amendment No. 1, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵³

Sherry R. Haywood,

Assistant Secretary

⁵² 15 U.S.C. 78s(b)(2).

⁵³ 17 CFR 200.30-3(a)(12).