

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98285; File No. SR-NASDAQ-2023-031)

September 5, 2023

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify Requirements Relating to The Waiver of The Code of Conduct in Listing Rule 5610 and IM-5610

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on August 21, 2023, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. 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 modify the requirements related to the waiver of the code of conduct in Listing Rules 5610 and IM-5610.

The text of the proposed rule change is set forth below. Proposed new language is underlined; deleted text is in brackets.

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The Nasdaq Stock Market Rules

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5610. Code of Conduct

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Each Company shall adopt a code of conduct applicable to all directors, officers and employees, which shall be publicly available. A code of conduct satisfying this rule must comply with the definition of a "code of ethics" set out in Section 406(c) of the Sarbanes-Oxley Act of 2002 ("the Sarbanes-Oxley Act") and any regulations promulgated thereunder by the Commission. [See 17 C.F.R. 228.406 and 17 C.F.R. 229.406.] In addition, the code must provide for an enforcement mechanism. Any waivers of the code for directors or Executive Officers must be approved by the [B]board or a board committee. Companies, other than Foreign Private Issuers, shall disclose such waivers within four business days by filing a current report on Form 8-K with the Commission or, in cases where a Form 8-K is not required, by distributing a press release. Foreign Private Issuers shall disclose such waivers within four business days either by distributing a press release or including disclosure in a Form 6-K[or in the next Form 20-F or 40-F]. Alternatively, within four business days, a Company, including a Foreign Private Issuer, may disclose waivers on the Company's website in a manner that satisfies the requirements of Item 5.05(c) of Form 8-K.

IM-5610. Code of Conduct

Ethical behavior is required and expected of every corporate director, officer and employee whether or not a formal code of conduct exists. The requirement of a publicly available code of conduct applicable to all directors, officers and employees of a Company is intended to demonstrate to investors that the board and management of Nasdaq Companies have carefully considered the requirement of ethical dealing and have put in place a system to ensure that they become aware of and take prompt action against any questionable behavior. For Company

personnel, a code of conduct with enforcement provisions provides assurance that reporting of questionable behavior is protected and encouraged, and fosters an atmosphere of self-awareness and prudent conduct.

Rule 5610 requires Companies to adopt a code of conduct complying with the definition of a "code of ethics" under Section 406(c) of the Sarbanes-Oxley Act of 2002 ("the Sarbanes-Oxley Act") and any regulations promulgated thereunder by the Commission. [See 17 C.F.R. 228.406 and 17 C.F.R. 229.406.] Thus, the code must include such standards as are reasonably necessary to promote the ethical handling of conflicts of interest, full and fair disclosure, and compliance with laws, rules and regulations, as specified by the Sarbanes-Oxley Act. However, the code of conduct required by Rule 5610 must apply to all directors, officers, and employees. Companies can satisfy this obligation by adopting one or more codes of conduct, such that all directors, officers and employees are subject to a code that satisfies the definition of a "code of ethics."

As the Sarbanes-Oxley Act recognizes, investors are harmed when the real or perceived private interest of a director, officer or employee is in conflict with the interests of the Company, as when the individual receives improper personal benefits as a result of his or her position with the Company, or when the individual has other duties, responsibilities or obligations that run counter to his or her duty to the Company. Also, the disclosures a Company makes to the Commission are the essential source of information about the Company for regulators and investors — there can be no question about the duty to make them fairly, accurately and timely. Finally, illegal action must be dealt with swiftly and the violators reported to the appropriate authorities. Each code of conduct must require that any waiver of the code for Executive Officers or directors may

be made only by the board or a board committee and must be disclosed to Shareholders, along with the reasons for the waiver. All Companies, other than Foreign Private Issuers, must disclose such waivers within four business days by filing a current report on Form 8-K with the Commission, providing website disclosure that satisfies the requirements of Item 5.05(c) of Form 8-K, or, in cases where a Form 8-K is not required, by distributing a press release. Foreign Private Issuers must disclose such waivers within four business days either by providing website disclosure that satisfies the requirements of Item 5.05(c) of Form 8-K, by including disclosure in a Form 6-K[or in the next Form 20-F or 40-F] or by distributing a press release. This disclosure requirement provides investors the comfort that waivers are not granted except where they are truly necessary and warranted, and that they are limited and qualified so as to protect the Company and its Shareholders to the greatest extent possible.

Each code of conduct must also contain an enforcement mechanism that ensures prompt and consistent enforcement of the code, protection for persons reporting questionable behavior, clear and objective standards for compliance, and a fair process by which to determine violations.

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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.

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(b) Not applicable.

(c) Not applicable.

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

1. Purpose

Nasdaq is proposing to amend Listing Rules 5610 and IM-5610 to provide that waivers of the code of conduct for directors or executive officers may be approved by a board committee rather than exclusively by the board, as this rule currently requires and to require that Foreign Private Issuers must disclose such waivers within four business days.

Ethical behavior is required and expected of every corporate director, officer and employee whether or not a formal code of conduct exists. The requirement of a publicly available code of conduct applicable to all directors, officers and employees of a company is intended to demonstrate to investors that the board and management of Nasdaq companies have carefully considered the requirement of ethical dealing and have put in place a system to ensure that they become aware of and take prompt action against any questionable behavior. For company personnel, a code of conduct with enforcement provisions provides assurance that reporting of questionable behavior is protected and encouraged, and fosters an atmosphere of self-awareness and prudent conduct.

Listing Rules 5610 and IM-5610 require companies to adopt a code of conduct applicable to directors, officers, and employees, which shall be publicly available. A code of conduct satisfying this rule must comply with the definition of a "code of ethics" set out in Section 406(c) of the Sarbanes-Oxley Act of 2002 and any regulations promulgated thereunder by the

Commission.³ In addition, the code must provide for an enforcement mechanism. Any waivers of the code for directors or executive officers must be approved by the board and publicly disclosed to shareholders, along with the reasons for the waiver. Companies, other than foreign private issuers, must disclose such waivers within four business days by filing a current report on Form 8-K with the Commission or, in cases where a Form 8-K is not required, by distributing a press release. Foreign private issuers must disclose such waivers either by distributing a press release or including disclosure in a Form 6-K or in the next Form 20-F or 40-F.⁴ Nasdaq believes this disclosure requirement provides investors the comfort that waivers are not granted except where they are truly necessary and warranted, and that they are limited and qualified so as to protect the company and its shareholders to the greatest extent possible.

By expressly setting out the inherent obligation of ethical conduct in this manner, Nasdaq provides assurance to investors, regulators and itself that each of its issuers has in place a system to focus attention throughout the company on the obligation of ethical conduct, encourage reporting of potential violations, and deal fairly and promptly with questionable behavior.

Nasdaq is proposing to allow waivers of the code to be approved either by the board of directors or a committee of the board. This would give listed companies flexibility to place the oversight of a company's code of conduct within the jurisdiction of a particular committee if that structure is more effective and appropriate, while following the obligations of ethical conduct required by Listing Rules 5610 and IM-5610. The approach of delegating oversight authority to a board committee is also consistent with the provisions of Listing Rule 5630 that requires

³ See 17 C.F.R. 229.406.

⁴ See Listing Rule 5610. Alternatively, a company, including a foreign private issuer, may disclose waivers on the company's website in a manner that satisfies the requirements of Item 5.05(c) of Form 8-K. If a company elects to disclose the information through its website, such information must remain available on the website for at least a 12-month period. Following the 12-month period, the company must retain the information for a period of not less than five years. See also instructions to Item 16B of Form 20-F.

approval of related party transactions by the company's audit committee or another independent body of the board of directors.⁵ In addition, Nasdaq believes that the proposed change would align the requirements of this rule with the requirements of Rule 303A.10 of the Listed Company Manual of the New York Stock Exchange (“NYSE”).⁶

Nasdaq is also proposing to clarify that Foreign Private Issuers are required to disclose any waivers of the code for directors or executive officers within four business days by providing website disclosure that satisfies the requirements of Item 5.05(c) of Form 8-K, by including disclosure in a Form 6-K or by distributing a press release. The disclosure of any code of conduct waivers provides investors the comfort that waivers are not granted except where they are truly necessary and warranted, and that they are limited and qualified so as to protect the company and its shareholders to the greatest extent possible. Accordingly, Nasdaq believes that Foreign Private Issuers, like other Nasdaq listed companies, should be required to make such disclosure within four business days by providing website disclosure that satisfies the requirements of Item 5.05(c) of Form 8-K, by including disclosure in a Form 6-K or by distributing a press release rather than providing such disclosure in the next Form 20-F or 40-F.⁷

⁵ See Listing Rule 5630.

⁶ In 2002, the NASD, through its subsidiary, The Nasdaq Stock Market, Inc., filed with the Commission a proposed rule change to amend NASD Rules to adopt the code of conduct requirements. See Securities Exchange Act Release No. 48125 (July 2, 2003), 68 FR 41194 (July 10, 2003) (SR-NASD-2002-139) (“Nasdaq Code of Conduct Proposal”). At about the same time, NYSE proposed similar changes to its listing standards. See Securities Exchange Act Release No. 47672 (April 11, 2003) 68 FR 19051 (April 17, 2003) (“NYSE Corporate Governance Proposal”). The Commission discussed and approved both the Nasdaq Code of Conduct Proposal and the NYSE Corporate Governance Proposal in one order (the “2003 Order”). See Securities Exchange Act Release No. 48745 (November 4, 2003), 68 FR 64154 (November 12, 2003).

⁷ Listing Rules 5610 and IM-5610 already specifically provide that companies, other than Foreign Private Issuers, must disclose code of conduct waivers within four business. Nasdaq is proposing to remove references in Listing Rules 5610 and IM-5610 to Forms 20-F and 40-F as an alternative disclosure venue for code of conduct waivers.

Finally, Nasdaq proposes to remove citation to 17 C.F.R. 228.406 and 17 C.F.R. 229.406 from the rule language, without changing the substance of Rules 5610 and IM-5610, to maintain consistency within the rulebook.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁸ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁹ 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 5610 and IM-5610 to provide that waivers of the code of conduct for directors or executive officers may be approved by a board committee and to require that Foreign Private Issuers must disclose such waivers within four business days are designed to protect investors and the public interest because there would continue to be other significant protections for shareholders with respect to the waivers of the code of conduct. Specifically, consistent with the provisions of Listing Rule 5630, waivers of the code of conduct for directors or executive officers would be approved by the board or a board committee and publicly disclosed, as described above. Nasdaq believes this disclosure requirement provides investors the comfort that waivers are not granted except where they are truly necessary and warranted, and that they are limited and qualified so as to protect the company and its shareholders to the greatest extent possible. The proposed amendment would make Nasdaq's requirements regarding the granting of the waivers by the board or a board

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(5).

committee of the code of conduct substantively similar to those of the NYSE.¹⁰ In the 2003 Order, the Commission determined that this approach is consistent with the requirements of the Exchange Act.

Finally, Nasdaq believes that removing citation from the rule language is consistent with the requirements of the Exchange Act because the removal does not change the substance of the rule.

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 make Nasdaq requirements with respect to the waivers of the code of conduct substantively similar to those of the NYSE. All listed companies would be affected in the same manner by these changes. 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

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

¹⁰ Nasdaq reviewed recent code of ethics disclosure of a sample of NYSE listed companies and observed that a number of companies provide for waivers to the code of conduct to be approved by the board or a board committee.

as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act¹¹ and Rule 19b-4(f)(6) thereunder.¹²

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.

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NASDAQ-2023-031 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.

¹¹ 15 U.S.C. 78s(b)(3)(A)(iii).

¹² 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires the Exchange to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of 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.

All submissions should refer to file number SR-NASDAQ-2023-031. 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-2023-031 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹³

Sherry R. Haywood,

Assistant Secretary.

¹³ 17 CFR 200.30-3(a)(12).