I. Introduction

On December 1, 2020, 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”) and Rule 19b–4 thereunder, a proposed rule change to adopt listing rules related to board diversity (“Board Diversity Proposal”). The proposed rule change was published for comment in the Federal Register on December 11, 2020. On January 19, 2021, pursuant to Section 19(b)(2) of the Act, the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change. On February 26, 2021, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change as originally filed.1

SECURITIES AND EXCHANGE COMMISSION


Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendments No. 1 and Order Instituting Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Changes, as Modified by Amendments No. 1, To Adopt Listing Rules Related To Board Diversity and To Offer Certain Listed Companies Access to a Complimentary Board Recruiting Solution To Help Advance Diversity on Company Boards

March 10, 2021.

J. Matthew DeLesDernier, Assistant Secretary.

[FR Doc. 2021–05342 Filed 3–15–21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–222, OMB Control No. 3235–0233]

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension:

Form 2–E, Report pursuant to rule 609 of Regulation E

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), the Securities and Exchange Commission (the “Commission”) has submitted to the Office of Management and Budget (“OMB”) a request for extension of the previously approved collection of information discussed below.

Rule 609 (17 CFR 230.609) under the Securities Act of 1933 (15 U.S.C. 77a et seq.) requires small business investment companies and business development companies that have engaged in offerings of securities that are exempt from registration pursuant to Regulation E under the Securities Act of 1933 (17 CFR 230.601 to 610a) to report semi-annually on Form 2–E (17 CFR 239.201) the progress of the offering. The form solicits information such as the dates an offering commenced and was completed (if completed), the number of shares sold and still being offered, amounts received in the offering, and expenses and underwriting discounts incurred in the offering. The information provided on Form 2–E assists the staff in monitoring the progress of the offering and in determining whether the offering has stayed within the limits set for an offering exempt under Regulation E.

The Commission estimates that, on average, approximately one respondent submits a Form 2–E filing each year. The Commission further estimates that this information collection imposes an annual burden of four hours and imposes an annual external cost burden of zero.

The collection of information under Form 2–E is mandatory. The information provided by the form will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The public may view the background documentation for this information collection at the following website, www.reginfo.gov. Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: Lindsay.M.Abate@omb.eop.gov; and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street NE, Washington, DC 20549 or send an email to: PRA_Mailbox@sec.gov. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

Dated: March 11, 2021.

J. Matthew DeLesDernier, Assistant Secretary.

[FR Doc. 2021–05377 Filed 3–15–21; 8:45 am]

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5 See Securities Exchange Act Release No. 90951, 86 FR 7135 (January 26, 2021). The Commission designated March 11, 2021 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.
6 In Amendment No. 1, the Exchange amended the Board Diversity Proposal to: (1) Add a defined term for “Two or More Races or Ethnicities” to proposed Rule 5605(f)(1); (2) modify the application of proposed Rule 5605(f) to foreign issuers and clarify the scope of exempt companies; (3) provide a lower diversity objective for a company with five or fewer members on its board; (4) modify the...
The Commission is publishing this notice and order to solicit comments on the proposed rule changes, as modified by Amendments No. 1, from interested persons and to institute proceedings pursuant to Section 19(b)(2)(B) of the Act to determine whether to approve or disapprove the proposed rule changes, as modified by Amendments No. 1.

II. Description of the Proposed Rule Changes, as Modified by Amendments No. 1

A. The Board Diversity Proposal

1. Proposed Rule 5605(f)

The Exchange proposes to adopt new Rule 5605(f)(2), which would require each Nasdaq-listed company (other than a Foreign Issuer, Smaller Reporting Company, or Company with a Smaller Board, as discussed below) to have, or explain why it does not have, at least two members of its board of directors who are Diverse,\(^\text{14}\) including at least one Diverse director who self-identifies as Female and at least one Diverse director who self-identifies as an Underrepresented Minority or LGBTQ+.\(^\text{15}\) Pursuant to proposed Rule 5605(f)(1), “Diverse” would be defined to mean an individual who self-identifies in one or more of the following categories: (i) Female, (ii) Underrepresented Minority, or (iii) LGBTQ+. Also pursuant to proposed Rule 5605(f)(1), “Female” would be defined to mean an individual who self-identifies her gender as a woman, without regard to the individual’s designated sex at birth; “Underrepresented Minority” would be defined to mean an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities; and “LGBTQ+” would be defined to mean an individual who self-identifies as any of the following: Lesbian, gay, bisexual, transgender, or as a member of the queer community.\(^\text{17}\)

The Exchange proposes to define a Foreign Issuer under proposed Rule 5605(f)(1) as: (a) A Foreign Private Issuer (as defined in Rule 5085(a)(19));\(^\text{18}\) or (b) a company that (i) is considered a “foreign issuer” under Rule 3b–4(b) under the Act and (ii) does not satisfy proposed Rule 5605(f); (iii) modifies the phase-in periods for companies subject to proposed Rules 5605(f) and 5606; (iv) provides a grace period for a company that no longer satisfies the Board diversity objectives of proposed Rule 5605(f)(2) due to a vacancy on its board and clarifies the cure period for a company that does not satisfy proposed Rule 5605(f); (v) modifies the effective dates and transition periods applicable to proposed Rules 5605(f) and 5606; (vi) make conforming and clarifying changes throughout the description of the proposed rule change and the proposed rule text; and (vii) provide additional justifications and support for the proposed rule change. The full text of Amendment No. 1 to the Board Diversity Proposal is available on the Commission’s website at: https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8425992-225901.pdf.

\(^{14}\) See Amendments No. 1 to the Board Diversity Proposal at 64. The Exchange also states that it does not intend for the Board Diversity Proposal to preclude companies from considering additional diverse attributes, such as nationality, disability, or veteran status, in selecting board members; however, the company would still have to provide the required disclosure under proposed Rule 5605(f)(3) if the company does not meet the diversity objectives of proposed Rule 5605(f)(1).

\(^{15}\) For purposes of Amendment No. 1, the terms “LGBTQ+” and “Diverse” include all of the following: Lesbian, gay, bisexual, transgender, and gender-non-binary individuals. See id. for a more complete definition of “LGBTQ+.”

\(^{16}\) See Amendments No. 1 to the Board Diversity Proposal at 66 n.173.

\(^{17}\) The Exchange proposes to define “Native Hawaiian or Pacific Islander” to mean an individual who self-identifies as one of the following: Hawaiian, Guamanian, or other Pacific Islands.

\(^{18}\) See Amendments No. 1 to the Board Diversity Proposal at 66 n.173.
The Exchange proposes to define a Smaller Reporting Company as set forth in Rule 12b–2 under the Act.24 Proposed Rule 5605(f)(2)(C) would require each Smaller Reporting Company (other than a Company with a Smaller Board, as discussed below) to have, or explain why it does not have, at least two members of its board of directors who are Diverse, including at least one Diverse director who self-identifies as Female. As proposed, the second Diverse director may include an individual who self-identifies as one or more of the following: Female, LGBTQ+, or an Underrepresented Individual.25

Proposed Rule 5605(f)(2)(D) would require each company with a board of directors of five or fewer members (“Company with a Smaller Board”) to have, or explain why it does not have, at least one member of its board of directors who is Diverse.26 As proposed, if a company had five members on its board of directors before becoming subject to proposed Rule 5605(f), it would not become subject to the objectives of proposed Rule 5605(f)(2)(A), (B), or (C) to have at least two Diverse directors if it then added one director to its board in order to satisfy proposed Rule 5605(f)(2)(D), thereby becoming a six-member board.27 However, a Company with a Smaller Board would become subject to proposed Rule 5605(f)(2)(A), (B), or (C) if it subsequently expands its board.28 If a company elects to satisfy the requirements of proposed Rule 5605(f)(2) by disclosing why it does not meet the applicable diversity objectives of proposed Rule 5605(f)(2), proposed Rule 5605(f)(3) would require the company to: (i) Specify the requirements of proposed Rule 5605(f)(2) that are applicable (e.g., the applicable subparagraph and the applicable diversity objectives); and (ii) explain the reasons why it does not have two Diverse directors (or one Diverse director for a Company with a Smaller Board).29 The disclosure must be provided in advance of the company’s next annual meeting of shareholders: (a) In any proxy statement or any information statement (or, if a company does not file a proxy, at its Form 10–K or 20–F); or (b) on the company’s website.30 If the company provides the disclosure on its website, the company must submit such disclosure concurrently with the filing made pursuant to (a) above and submit a URL link to the disclosure through the Nasdaq Listing Center, within one business day after such posting.31

Proposed Rule 5605(f)(5) would specify the phase-in period for any

27 See proposed Rule 5605(f)(2)(D). The Exchange proposes this exception to avoid complexity for Companies with a Smaller Board that attempt to satisfy the diversity objectives by adding a Diverse director to their board, and to prevent such companies from thereby being subject to a higher threshold (i.e., that of proposed Rule 5605(f)(2)(A), (B), or (C)) as a result. See Amendment No. 1 to the Board Diversity Proposal at 84–85.

28 See proposed Rule 5605(f)(2)(D).

29 As proposed, a company would not need to provide any public disclosures pursuant to proposed Rule 5605(f) if the company demonstrates under proposed Rule 5606 (as discussed in Section II.A.2 below) that it meets the applicable diversity objectives of proposed Rule 5605(f)(2); however, if a company does not meet its applicable diversity objectives, it would be required to provide the additional public disclosure explaining why it does not meet the applicable objectives. See Amendment No. 1 to the Board Diversity Proposal at 73.

30 See proposed Rule 5605(f)(5). 

31 See id. The Exchange states that it would not evaluate the substance or merits of a company’s explanation provided pursuant to proposed Rule 5605(f)(5), but would verify that the company has provided one at the time it files its proxy statement or information statement (or, if the company does not file a proxy, at its Form 10–K or 20–F). See Amendment No. 1 to the Board Diversity Proposal at 74. If the company does not meet the applicable diversity objectives and has provided any explanation, or has provided an explanation that does not satisfy proposed Rule 5605(f)(5)(i) and (ii), the company will be considered deficient with the requirements of proposed Rule 5605(f)(3). See id. at 74–75.
company newly listing on the Exchange that was not previously subject to a substantially similar requirement of another national securities exchange (including through an initial public offering, direct listing, transfer from another exchange or the over-the-counter market, in connection with a spin-off or carve-out from a company listed on the Exchange or another exchange, or through a merger with an acquisition company listed under IM–5101–2 ("acquisition company")) and any company that ceases to be a Foreign Issuer, Smaller Reporting Company, or Exempt Company and (ii) the date the company files its proxy statement or information statement (or, if the company does not file a proxy, its Form 10–K or 20–F) for the company’s first annual meeting of shareholders subsequent to such event.

Proposed Rule 5605(f)(6)(A) would provide that if a company does not meet the applicable diversity objectives under proposed Rule 5605(f)(2) and fails to hold an annual meeting of shareholders during the applicable periods in proposed Rule 5605(f)(3) or (7) and therefore fails to meet, or explain why it does not meet, the diversity objectives of proposed Rule 5605(f)(2), the Exchange’s Listing Qualifications Department would promptly notify the company and inform it that it has until the later of its next annual shareholders meeting or 180 days from the event that caused the deficiency to cure the deficiency. If a company does not regain compliance within the applicable cure period, the Listings Qualifications Department would issue a Staff Delisting Determination Letter.

Moreover, proposed Rule 5605(f)(6)(B) would provide that a company that has satisfied the diversity objectives of proposed Rule 5605(f)(2) within the timeframes set forth in proposed Rule 5605(f)(7), but later ceases to meet the diversity objectives of proposed Rule 5605(f)(2) due to a vacancy on its board of directors, would have until the later of (i) one year from the date of vacancy and (ii) the date the company files its proxy statement or its information statement, to explain why it does not file a proxy, its Form 10–K or 20–F in the calendar year following the year of the date of vacancy, to satisfy proposed Rule 5605(f)(2) or (3). As proposed, in lieu of providing the disclosure required by proposed Rule 5605(f)(3), a company relying on this rule may publicly disclose that it is relying on the grace period provided by proposed Rule 5605(f)(6)(B). This disclosure must be provided in advance of the company’s next annual meeting of shareholders: (a) In any proxy statement or any information statement (or, if the company does not file a proxy, in its Form 10–K or 20–F); or (b) on the company’s website. If the company provides such disclosure on its website, then the company must submit such disclosure concurrently with the filing made pursuant to (a) and submit a URL link to the disclosure through the Nasdaq Listing Center, within one business day after such posting.

Proposed Rule 5605(f)(7) would specify the transition period for the implementation of the requirements of proposed Rule 5605(f). As proposed, each company listed on the Exchange (including a Company Board) would be required to have, or explain why it does not have, at least one Diverse director by the later of: (i) Two calendar years after the approval date of the proposal (“First Effective Date”); or (ii) the date the company files its proxy statement or information statement (or, if the company does not file a proxy, its Form 10–K or 20–F) for the company’s annual shareholders meeting during the calendar year of the First Effective Date.

In addition, each company listed on NGS or NGM must have, or explain why it does not have, at least two Diverse directors by the later of: (i) Four calendar years after the approval date of the proposal ("Second NGS/NGM Effective Date"); or (ii) the date the company files its proxy statement or information statement (or, if the company does not file a proxy, its Form 10–K or 20–F) for the company’s annual shareholders meeting during the calendar year of the Second NGS/NGM Effective Date.

Moreover, each company listed on NCM must have, or explain why it does not have, at least two Diverse directors by the later of: (i) Five calendar years after the approval date of the proposal ("Second NCS/NMG Effective Date"); or (ii) the date the company files its proxy statement or information statement (or, if the company does not file a proxy, its Form 10–K or 20–F) for the company’s annual shareholders meeting during the calendar year of the Second NCS/NMG Effective Date.
shareholders meeting during the calendar year of the Second NCM Effective Date. As proposed, a company would not be required to comply with the requirements of proposed Rule 5605(f) prior to the end of the phase-in periods set forth under proposed Rule 5605(f)(5), if applicable. Furthermore, a company listed on NCM that transfers to NGS or NGM after the approval date but prior to the end of the transition periods set forth in proposed Rule 5605(f)(7) would be required to satisfy the requirements of proposed Rule 5605(f)(7) by the later of: (i) The periods set forth in proposed Rule 5605(f)(7)(C); or (ii) one year from the date of transfer.

Proposed Rule 5605(f)(4) would exempt the following types of companies from the requirements of proposed Rule 5605(f) ("Exempt Companies"): (1) Acquisition companies; (2) asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); (3) cooperatives (as set forth in Rule 5615(a)(2)); (4) limited partnerships (as set forth in Rule 5615(a)(4)); (5) management investment companies (as set forth in Rule 5615(a)(5)); (6) issuers of non-voting preferred securities, debt securities, and derivative securities (as set forth in Rule 5615(a)(6)) that do not have equity securities listed on the Exchange; and (7) issuers of securities listed under the Rule 5700 series.

The Exchange states that it has published FAQs on its Listing Center to provide guidance to companies on the application of the proposed rules in the Board Diversity Proposal, and represents that it will establish a dedicated mailbox for companies and their counsel to email additional questions to the Exchange regarding the application of such proposed rules.

2. Proposed Rule 5606

The Exchange proposes to adopt new Rule 5606, which would require each Nasdaq-listed company (other than Exempt Companies) to (i) publish its updated Board Diversity Matrix on its website, the disclosure must remain accessible on the company’s website for at least once per year. If, within the same year, a company changes its board composition after it publishes the matrix, the company may, but is not required to, publish its updated information. In addition, any publication of the information in the Board Diversity Matrix must be included in a searchable format and, if a company uses a graphic or image format (i.e., .tif, .jpg, .gif, or .png), the company must also include the same information as searchable text or in a searchable table.

In the proposed Board Diversity Matrix, a company would be required to provide the total number of directors on its board and the company (other than a Foreign Issuer) would include the following information in accordance with the instructions accompanying the Board Diversity Matrix: (1) The number of directors based on gender identity (female, male, or non-binary) and the number of directors who did not disclose gender; (2) the number of directors based on race and ethnicity (African American or Black, Alaskan Native or Native American, Asian, Hispanic or Latinx, Native Hawaiian or Pacific Islander, White, or Two or More Races or Ethnicities); (3) the number of directors who self-identify as LGBTQ+; and (4) the number of directors who did not disclose a demographic background under item (2) or (3) above.

In the proposed Board Diversity Matrix, any director who chooses not to disclose a gender would be included in the "Did Not Disclose Gender" category and any director who chooses not to identify as any race or ethnicity or not to identify as LGBTQ+ would be included in the

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42 See proposed Rule 5605(f)(7)(C).
43 See proposed Rule 5605(f)(7)(D). A company listing after the approval date, but prior to the end of the periods set forth in proposed Rule 5605(f)(7) would be required to fully satisfy the requirements of proposed Rule 5605(f) by the later of the periods under proposed Rule 5605(f)(7) or the two year phase-in periods under proposed Rule 5605(f)(5). See proposed Rule 5605(f)(7)(E). According to the Exchange, the proposed transition and phase-in periods are intended to provide newly-listed public companies with additional time to meet the diversity objectives of proposed Rule 5605(f)(2), as newly-listed public companies may have unique governance structures, such as staggered boards or director seats held by venture capital firms, that require additional timing considerations when adjusting the board’s composition. See Amendment No. 1 to the Board Diversity Proposal at 79. The Exchange further states that the proposed transition and phase-in periods are intended to provide additional flexibility to companies listed on NCM, as such companies are typically smaller and may face additional challenges and resource constraints when identifying additional director nominees who self-identify as Diverse. See id. The Exchange also states that its proposed phase-in periods are consistent with the phase-in periods it provides to companies for other board composition requirements. See id. at 81. See also, e.g., Rules 5615(b)(1), 5615(b)(3), and 5620.
44 See proposed Rule 5605(f)(7)(F).
45 The Exchange states that these companies do not have boards, do not list equity securities, or are not operating companies. See Amendment No. 1 to the Board Diversity Proposal at 90. The Exchange also states that these companies are already exempt from certain corporate governance standards related
46 The Exchange states that its proposed phase-in periods are consistent with the phase-in periods it provides to companies for other board composition requirements. See id. at 81. See also, e.g., Rules 5615(b)(1), 5615(b)(3), and 5620.
47 The Exchange states that these companies do not have boards, do not list equity securities, or are not operating companies. See Amendment No. 1 to the Board Diversity Proposal at 90. The Exchange also states that these companies are already exempt from certain corporate governance standards related
48 The Exchange states that its proposed phase-in periods are consistent with the phase-in periods it provides to companies for other board composition requirements. See id. at 81. See also, e.g., Rules 5615(b)(1), 5615(b)(3), and 5620.
49 See proposed Rule 5606(c).
50 The Exchange states that its proposed phase-in periods are consistent with the phase-in periods it provides to companies for other board composition requirements. See id. at 81. See also, e.g., Rules 5615(b)(1), 5615(b)(3), and 5620.
51 As proposed, a company may not substantially alter the Board Diversity Matrix. However, a company may supplement its disclosure by providing additional information related to its directors (e.g., a company may choose to provide the information on a director-by-director basis or may choose to include any skills, experience, and attributes (including those that are relevant to the company). Supplemental information may be included below the information required by the Board Diversity Matrix or in a separate table. See id. at 326–27.
52 See Amendment No. 1 to the Board Diversity Proposal at 326.
53 See id. In addition, the Board Diversity Matrix must include the date the information was collected as the “as of date.” See id.
54 The searchable information could be included, for example, together with the related graphic or in an appendix. See id.
55 “Non-binary” refers to genders that are not solely male or female; someone who is non-binary may have more than one gender, have no gender, or their gender may not be in relation to the gender binary. See id. at 327.
56 A director self-identifies in the “Two or More Races or Ethnicities” category, the director must also self-identify in each individual category, as appropriate. See id. at 66 n.174.
57 The Exchange states that defined terms for the race and ethnicity categories in the instructions to the Board Diversity Matrix are substantially similar to the terms and definitions used in the EEO–1 report, as described above. See supra note 17. Also, in the instructions to the Board Diversity Matrix, "LGBTQ+" is defined similarly to proposed Rule 5605(f)(1) as a person who identifies as any of the following: lesbian, gay, bisexual, transgender, or a member of the queer community.
“Did Not Disclose Demographic Background” category.

A company that qualifies as a Foreign Issuer under proposed Rule 5605(f)(1) may elect to use an alternative Board Diversity Matrix format.58 Similar to other companies, a Foreign Issuer would be required to provide the total number of directors on its board. The Foreign Issuer would also be required to provide the following in its Board Diversity Matrix: (1) Its country of principal executive offices; (2) whether it is a Foreign Private Issuer; (3) whether disclosed Board Diversity Matrix is prohibited under home country law; (4) the number of directors based on gender identity (female, male, or non-binary) and the number of directors who did not disclose gender; (5) the number of directors who self-identify as Underrepresented Individuals in home country jurisdiction; (6) the number of directors who self-identify as LGBTQ+; and (7) the number of directors who did not disclose the demographic background under item (5) or (6) above.59 In the proposed Board Diversity Matrix, any director who chooses not to disclose a gender would be included in the “Did Not Disclose Gender” category and any director who chooses not to identify as an Underrepresented Individual or not to identify as LGBTQ+ would be included in the “Did Not Disclose Demographic Background” category.

Proposed Rule 5606(b) would require each company to provide the disclosure required under proposed Rule 5606 in the same manner as, and concurrently with, the disclosure required by proposed Rule 5605(f).60 Proposed Rule 5606(d) would permit a company newly listing on the Exchange that was not previously subject to a substantially similar requirement of another national securities exchange (including through an initial public offering, direct listing, transfer from another exchange or the over-the-counter market, in connection with a spin-off or carve-out from a company listed on the Exchange or another exchange, or through a merger with an acquisition company) to satisfy the requirement of proposed Rule 5606 within one year of listing on the Exchange.

Pursuant to Rule 5606(e), proposed Rule 5606 would become operative one year after a Commission approval of the proposal. A company would be required to be in compliance with proposed Rule 5606 by the later of: (i) One calendar year from the approval date (“Effective Date”); or (ii) the date the company files its proxy statement or its information statement for its annual meeting of shareholders (or, if the company does not file a proxy or information statement, the date it files its Form 10-K or 20-F) during the calendar year of the Effective Date.

The Exchange proposes to amend Rule 5810(c)(2)(A)(iv) to include a deficiency from the standards of proposed Rule 5606 as a deficiency for which a company may submit a plan of compliance for Exchange staff review. Accordingly, if a company fails to adhere to proposed Rule 5606, the Exchange would notify the company that it is not in compliance with a listing standard and allow the company 45 calendar days to submit a plan to regain compliance and, upon review of such plan, the Exchange may provide the company with up to 180 days to regain compliance.61 If the company does not submit a plan or regain compliance within the applicable time periods, it would be issued a Staff Delisting Determination, which the company could appeal to a Hearings Panel pursuant to Rule 5815.62

B. The Board Recruiting Service Proposal

In order to help advance diversity on company boards and to help companies prepare for and, if approved, comply with proposed Rules 5605(f) and 5606, the Exchange proposes to provide certain Nasdaq-listed companies with one-year of complimentary access for two users to a board recruiting solution, which would provide access to a network of board-ready Diverse candidates, allowing companies to identify and evaluate Diverse board candidates.63 According to the Exchange, this service has an approximate retail value of $10,000 per year.64

The Exchange proposes to offer this service to any “Eligible Company,” which would be defined to mean a listed company (except as described below) that represents to the Exchange that it does not have: (i) At least one director who self-identifies as Female; and (ii) at least one director who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Island, or Two or More Races or Ethnicities, or who self-identifies as lesbian, gay, bisexual, transgender, or as a member of the queer community.65 A company that is that an Eligible Company if it does not have: (i) At least one director who self-identifies as Female; and (ii) at least one director who self-identifies as one or more of the following: Female, an underrepresented minority or LGBTQ+, or a member of the queer community.

As proposed, until December 1, 2022, any Eligible Company that requests access to this service through the Nasdaq Listing Center will receive complimentary access for one year from the initiation of the service.66 The Exchange states that it intends to evaluate the service and the progress made in enhancing diversity and may extend the program prior to its expiration through another proposed rule change filed with the

58 See proposed Rule 5605(a).
59 See id.
60 See supra notes 30–31 and accompanying text.
61 See Rule 5810(c)(2).
62 See id.
63 See proposed IM–5900–9(a). The Exchange states that, although proposed Rule 5605(f)(2)(D) would require a Company with a Smaller Board to have, or explain why it does not have, at least one Diverse director on its board, such a company would be considered an Eligible Company if it does not have at least one director who self-identifies as female and at least one director who self-identifies as an Underrepresented Minority or LGBTQ+, which the Exchange believes would help promote greater diversity on boards of all sizes. See Amendment No. 1 to the Board Recruiting Service Proposal at 11 n.20.
64 See proposed IM–5900–9(b).
65 See proposed IM–5900–9(c). The Exchange states that a company that is not an Eligible Company would be able to receive complimentary 90-day access to the board recruiting solution which is being offered by Nasdaq’s partner to all clients of Nasdaq, Inc., including non-listed companies. See Amendment No. 1 to the Board Recruiting Service Proposal at 12 n.21.
66 See proposed IM–5900–9.
III. The Exchange’s Arguments in the Proposals and the Comment and Response Letters Received on the Proposals

A. Summary of the Exchange’s Arguments in the Proposals

1. The Board Diversity Proposal

In support of the Board Diversity Proposal, the Exchange states that it has reviewed dozens of empirical studies and found that an extensive body of empirical research demonstrates that diverse boards are positively associated with improved corporate governance and company performance. While the Exchange acknowledges that some studies have reached conflicting results on this issue—for example, some studies have found that board gender and ethnic diversity has a non-significant relationship or no relationship with a company’s performance—the Exchange believes that, at a minimum, the academic and empirical studies support the conclusion that board diversity does not have adverse effects on company performance.

The Exchange also states that there is substantial evidence that board diversity promotes investor protection, including by enhancing the quality of a company’s financial reporting, internal controls, public disclosures, and management oversight. The Exchange states that more than a dozen studies have found a positive association between gender diversity and important investor protections, and some academics assert that such findings may extend to other forms of diversity, including racial and ethnic diversity. The Exchange also states that it has reviewed studies suggesting that board diversity could enhance a company’s ability to monitor management by reducing “groupthink” and improving decision-making.

The Exchange states that, while some companies have made progress in diversifying their boardrooms, the national market system and the public interest would be well-served by a “disclosure-based, business driven” framework for companies to embrace meaningful and multi-dimensional diversification of their boards. The Exchange states that its discussions with organizational leaders representing a broad spectrum of market participants and stakeholders (including business, investor, governance, legal, and civil rights communities) revealed strong support for disclosure requirements that would standardize the reporting of board diversity statistics.

The Exchange further states that such discussions reinforced the notion that if companies recruit by skill set and experience rather than title, they would find that there is more than enough diverse talent to satisfy demand. Moreover, the Exchange states that current reporting of board diversity data is not provided in a consistent manner or on a sufficiently widespread basis and, as such, investors are not able to readily compare board diversity statistics across companies. In pointing out the “broad latitude” afforded to companies by Commission rules relating to board diversity and proxy disclosure, the Exchange states that the absence of a specific definition of “diversity” for such disclosures has resulted in current reporting of board-level diversity statistics being significantly unreliable and unusable to investors.

The Exchange states that the lack of transparency creates barriers to investment analysis, due diligence, and academic study, and is impacting investors who are increasingly basing public advocacy, voting, and direct shareholder-company engagement decisions on board diversity considerations.

69 See Amendment No. 1 to the Board Recruiting Service Proposal at 12.
70 See id.
71 See Amendment No. 1 to the Board Diversity Proposal at 13. The Exchange states that studies have identified positive relationships between board diversity and commonly used financial metrics, including higher returns on invested capital, returns on equity, earnings per share, earnings before interest and taxation margin, asset valuation multiples, and credit ratings. See id. at 13, Section 3.a.iii.A.
72 See id. at 25–27.
73 See id. at 28. The Exchange also states that this is not the first time it has considered whether, on balance, various studies finding mixed results related to board composition and company performance are a sufficient rationale to propose a listing rule. See id. The Exchange states that, for example, in 2003, notwithstanding the various findings of studies at the time regarding the relationship between company performance and board independence, it adopted listing rules requiring a majority independent board. See id.
74 See id. at 29.
75 See id. at 29–30.
76 See id. at 8–9.
77 See id. at 30. The Exchange also states that the majority of the organizations were in agreement that companies would benefit from a disclosure-based, business-driven framework to drive meaningful and systemic change in board diversity, and that a disclosure-based approach would be more feasible for the U.S. business community than a mandate. See id. at 46. According to the Exchange, some in the group pointed out that smaller companies and companies in certain industries may face challenges finding diverse board members. See id. in addition, the Exchange states that leaders from the legal community emphasized that any proposed rule change that imposed additional burdens beyond, or is inconsistent with, existing securities laws would present an additional burden and potentially more legal liability for listed companies. See id. at 46–47.
78 See id. at 19–20, 46. According to the Exchange, studies suggest that the traditional director candidate selection process may create barriers to considering qualified diverse candidates for board positions (e.g., directors looking within their own social networks for candidates with previous C-suite experience). See id. at 41–44, Section 3.b.ii.a.
79 See id. at 9. The Exchange also states that, while conducting research on the state of board diversity among its listed companies, it encountered multiple key challenges, such as: (1) Inconsistent disclosure and definitions of “diversity” across companies; (2) limited data on diverse characteristics outside of gender; (3) inconsistent or no disclosure of a director’s race, ethnicity, or other diversity attributes; (4) difficult-to-extract data because statistics are often embedded in graphics; and (5) aggregation of information, making it difficult to separate gender from other categories of diversity. See id. at 51. See also id. at 59, 107 (stating that the current lack of transparency and consistency makes it difficult for the Exchange and investors to determine the state of diversity among listed companies and each board’s philosophy regarding diversity; to the extent investors must obtain this information on their own through an imperfect process, this increases information asymmetries between larger and smaller stakeholders; and a broader definition of diversity may result in certain diverse candidates being overlooked and may hinder meaningful progress on improving diversity related to race, ethnicity, sexual orientation, and gender identity).
The Exchange states that it is well positioned to establish practices that would assist in carrying out its mandate to protect investors and remove impediments from the market through the Board Diversity Proposal. The Exchange believes that it is well within its delegated authority to propose listing rules designed to enhance transparency, provided that they do not conflict with existing federal securities laws.

The Exchange also states that the proposal is related to corporate governance standards for listed companies and is therefore designed to regulate by virtue of any authority conferred by the Act matters not related to the purposes of the Act or the administration of the Exchange. While the Exchange recognizes that U.S. states are currently engaged in the process of determining how they will address board diversity matters, the Exchange states that its current corporate governance listing rules relate to areas that are also regulated by states (e.g., quorums, shareholder approval of certain transactions). The Exchange also states that adopting Exchange rules relating to such matters (and the proposed rule changes described herein) would ensure uniformity of such rules among its listed companies.

The Exchange believes that the disclosure-based framework of proposed Rule 5605(f) may influence corporate conduct if a company chooses to meet the proposed diversity objectives, and could help increase opportunities for diverse candidates who otherwise may be overlooked due to the impediments of the traditional director recruitment process. The Exchange also believes that boards that choose to meet the proposed diversity objectives may experience benefits from diversity that perfect the mechanism of a free and open market and a national market system, and promote investor protection and the public interest. Moreover, the Exchange believes that, to the extent a company chooses not to meet the proposed diversity objectives, the disclosure under proposed Rule 5605(f)(3) would provide analysts and investors with a better understanding about a company’s reasons for not doing so and its philosophy regarding diversity. The Exchange believes that this disclosure would enable the investment community to conduct more informed analyses of, and have more informed conversations with, companies, and improve the quality of information available to investors who rely on this information to make informed investment and voting decisions.

In addition, the Exchange believes that the proposed disclosure framework and phase-in and transition periods under Rule 5605(f) recognize the differences (e.g., in demographics or resources) among different types of companies and would not unfairly discriminate among companies.

The Exchange believes that the disclosures required by proposed Rule 5606 and the accompanying format requirements would protect investors by eliminating data collection inaccuracies, decreasing investors’ costs, and enhancing investors’ ability to utilize the information disclosed. The Exchange also believes that proposed Rule 5606 would protect investors that view information related to board diversity as material to their investment and voting decisions, and enhance investor confidence by assisting investors in making informed decisions. Moreover, the Exchange believes that the proposed annual disclosures would provide consistent information to the public and would enable investors to continually review the board composition of a company to track trends, as well as simplify or eliminate the need for a company to respond to multiple investor requests for board diversity information.

The Exchange also believes that the proposed timing for the board composition disclosures would align with other governance-related disclosures (e.g., those provided in the proxy) and would make it easier for investors to know where a company has provided the disclosures and give shareholders access to the information burden on competition among issuers that is not necessary or appropriate in furtherance of the purposes of the Act and would not impose any burden on competition among listing exchanges.

The Exchange additionally believes that it would be in the public interest to utilize the Board Diversity Matrix format because it would remove impediments in aggregating and analyzing data across all companies. The Exchange also believes that its proposed definition of “Diverse” would be familiar to most companies and that the proposed Board Diversity Matrix would provide for standardized disclosures. The Exchange also states that its proposed annual disclosures would provide a means for the Exchange to assess whether companies meet the diversity objectives under proposed Rule 5606, which would protect investors and the public interest.

The Exchange also states that the disclosures under proposed Rule 5606 would provide a means for the Exchange to assess whether companies meet the diversity objectives under proposed Rule 5606, which would protect investors and the public interest.
prior to a company’s annual shareholders meeting. Finally, the Exchange believes that proposed Rule 5606 would provide appropriate flexibility for Foreign Issuers and appropriate exceptions for certain types of Nasdaq-listed companies, and would provide reasonable compliance periods because it would impose only a de minimis burden on companies.

2. The Board Recruiting Service Proposal
In support of the Board Recruiting Service Proposal, the Exchange argues that offering a board recruiting solution would assist and encourage listed companies to increase diverse representation on their boards, which the Exchange believes could result in improved corporate governance, strengthening of market integrity, and improved investor confidence. The Exchange further states that offering this service would help companies to achieve compliance with the Board Diversity Proposal, if it were approved. The Exchange also states that utilization of the complimentary board recruiting solution would be optional, and no company would be required to use the service.

The Exchange further argues that it is reasonable and not unfairly discriminatory to offer the board recruiting solution only to Eligible Companies because the Exchange believes these companies have the greatest need to identify Diverse board candidates, particularly if these companies elect to meet the diversity objectives in the Board Diversity Proposal, if approved, rather than disclosing why they have not met the objectives. Additionally, the Exchange believes that companies that already have two Diverse directors have demonstrated by their current board composition that they do not need additional assistance provided by the Exchange to identify Diverse candidates for their boards. The Exchange also believes that offering this complimentary service would help it compete to attract and retain listings, particularly in light of the additional requirements in the Board Diversity Proposal that would apply to Exchange-listed companies, if it were approved. The Exchange further represents that individual listed companies would not be given specially negotiated packages of products or services to list, or remain listed.

B. The Comment and Response Letters Received on the Proposals
The Commission has received comment letters that support the proposals, comment letters that suggest changes to the proposals, and comment letters that oppose the proposals. The Commission has also received two response letters from the Exchange.

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act to determine whether the proposed rule changes, as modified by Amendments No. 1, should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the issues raised by the proposed rule changes. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described above, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule changes, as modified by Amendments No. 1.

Pursuant to Section 19(b)(2)(B) of the Act, the Commission is providing notice of the grounds for disapproval under consideration. As described above, the Exchange proposes in the Board Diversity Proposal to require each of its listed companies, subject to certain exceptions, to: (i) Provide statistical information regarding the diversity characteristics among the members of the company’s board of directors; and (ii) if the company does not meet the applicable board diversity objectives, to disclose an explanation as to why. Also as described above, the Exchange proposes in the Board Recruiting Service Proposal to provide certain Nasdaq-listed companies with one-year of complimentary access to a diverse board candidate recruiting solution. In addition, as stated above, the Commission has received comment letters that support the proposals, comment letters that suggest changes to the proposals, and comment letters that oppose the proposals, as well as two response letters from the Exchange.

Moreover, on February 26, 2021, the Exchange submitted an amendment to the Board Diversity Proposal, as modified by Amendments No. 1, to the Commission to allow for additional comment on the Board Diversity Proposal. The Commission is instituting proceedings to allow for additional comment on the Board Diversity Proposal.
No. 1, with Section 6(b)(5) of the Act, \textsuperscript{115} which requires that the rules of a national securities exchange be designed, among other things, 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 not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by the Act matters not related to the purposes of the Act or the administration of the exchange; and Section 6(b)(8) of the Act, \textsuperscript{116} which requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Commission is instituting proceedings to also allow for additional analysis of, and input from commenters with respect to, the consistency of the Board Recruiting Service Proposal, as modified by Amendment No. 1, with Section 6(b)(4) of the Act, \textsuperscript{117} which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.

V. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposals. In particular, the Commission invites the written views of interested persons concerning whether the proposals, as modified by Amendments No. 1, are consistent with Sections 6(b)(4), \textsuperscript{118} 6(b)(5) \textsuperscript{119} and 6(b)(8) \textsuperscript{120} of the Act or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4 under the Act, \textsuperscript{121} any request for an opportunity to make an oral presentation. \textsuperscript{122}

Interested persons are invited to submit written data, views, and arguments regarding whether the proposals, as modified by Amendments No. 1, should be approved or disapproved by April 6, 2021. Any person who wishes to file a rebuttal to any other person’s submission must file that rebuttal by April 20, 2021. 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 email to rule-comments@sec.gov. Please include File Number SR–NASDAQ–2020–081 or SR–NASDAQ–2020–082 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–2020–081 or SR–NASDAQ–2020–082. 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 (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission’s Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2020–081 or SR–NASDAQ–2020–082 and should be submitted by April 6, 2021. Rebuttal comments should be submitted by April 20, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority. \textsuperscript{123}

J. Matthew DeLesDernier,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–267, OMB Control No. 3235–0272]

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension:

Rule 11a–2

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), the Securities and Exchange Commission (the “Commission”) has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Rule 11a–2 (17 CFR 270.11a–2) under the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.) permits certain registered insurance company separate accounts, subject to certain conditions, to make exchange offers without prior approval by the Commission of the terms of those offers. Rule 11a–2 requires disclosure, in certain registration statements filed pursuant to the Securities Act of 1933 (15 U.S.C. 77a et seq.) of any administrative fee or sales load imposed in connection with an exchange offer.

There are currently 676 registrants governed by Rule 11a–2. The Commission includes the estimated burden of complying with the information collection required by Rule

\textsuperscript{115} 15 U.S.C. 78b(b)(5).

\textsuperscript{116} 15 U.S.C. 78b(b)(8).


\textsuperscript{118} Id.

\textsuperscript{119} 15 U.S.C. 78b(b)(5).

\textsuperscript{120} 15 U.S.C. 78b(b)(8).

\textsuperscript{121} 17 CFR 240.19b–4.
