

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of \* 24

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549  
Form 19b-4

File No. \* SR 2023 - \* 031

Amendment No. (req. for Amendments \*)

Filing by The Nasdaq Stock Market LLC

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input checked="" type="checkbox"/>	Amendment * <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input type="checkbox"/>	Section 19(b)(3)(A) * <input checked="" type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
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Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>
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Rule

<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)
<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)
<input type="checkbox"/> 19b-4(f)(3)	<input checked="" type="checkbox"/> 19b-4(f)(6)

Submit with link to Prefiling or Request for Waiver option

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010  
Section 806(e)(1) \*

Section 806(e)(2) \*

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934  
Section 3C(b)(2) \*

Exhibit 2 Sent As Paper Document

Exhibit 3 Sent As Paper Document

### Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked \*).

A proposal to modify the requirements related to the waiver of the code of conduct in Listing Rules 5610 and IM-5610.

### Contact Information

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name \* Nikolai Last Name \* Utochkin

Title \* Counsel Listing and Governance

E-mail \* Nikolai.utochkin@nasdaq.com

Telephone \* (301) 978-8029 Fax

### Signature

Pursuant to the requirements of the Securities Exchange of 1934, The Nasdaq Stock Market LLC has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date 08/21/2023

(Title \*)

By John Zecca

EVP and Chief Legal Officer

(Name \*)

NOTE: Clicking the signature block at right will initiate digitally signing the form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

 Date: 2023.08.21 14:37:29 -04'00'

Required fields are shown with yellow backgrounds and astericks.

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

**Form 19b-4 Information \***

Add Remove View

SR-NASDAQ-2023-031 19b-4.doc

The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change \***

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SR-NASDAQ-2023-031 Exhibit 1.doc

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 1A - Notice of Proposed Rule Change, Security-Based Swap Submission, or Advanced Notice by Clearing Agencies \***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2- Notices, Written Comments, Transcripts, Other Communications**

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Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit Sent As Paper Document

**Exhibit 3 - Form, Report, or Questionnaire**

Add Remove View

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit Sent As Paper Document

**Exhibit 4 - Marked Copies**

Add Remove View

The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

Add Remove View

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change

**Partial Amendment**

Add Remove View

If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

(a) The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal to modify the requirements related to the waiver of the code of conduct in Listing Rules 5610 and IM-5610.

A notice of the proposed rule change for publication in the Federal Register is attached as Exhibit 1. The text of the proposed rule change is set forth below. Proposed new language is underlined; deleted text is in brackets.

\* \* \* \* \*

**The Nasdaq Stock Market Rules**

\* \* \* \* \*

**5610. Code of Conduct**

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.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

**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.

\* \* \* \* \*

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by senior management of the Exchange pursuant to authority delegated by the Board of Directors of the Exchange (the “Board”). Exchange staff will advise the Board of any action taken pursuant to delegated authority. No other action is necessary for the filing of the rule change.

Questions and comments on the proposed rule change may be directed to:

Nikolai Utochkin  
Counsel, Listing and Governance  
Nasdaq, Inc.  
(301) 978-8029

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

a. 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.<sup>3</sup> 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.<sup>4</sup> Nasdaq believes this disclosure requirement provides investors the comfort that waivers are not granted except

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<sup>3</sup> See 17 C.F.R. 229.406.

<sup>4</sup> 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.

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 approval of related party transactions by the company's audit committee or another independent body of the board of directors.<sup>5</sup> 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").<sup>6</sup>

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<sup>5</sup> See Listing Rule 5630.

<sup>6</sup> 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).

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.<sup>7</sup>

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.

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>8</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>9</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove

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<sup>7</sup> 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 days. 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.

<sup>8</sup> 15 U.S.C. 78f(b).

<sup>9</sup> 15 U.S.C. 78f(b)(5).



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 committee of the code of conduct substantively similar to those of the NYSE.<sup>10</sup> 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.

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<sup>10</sup> 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.

4. 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.

5. 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.

6. Extension of Time Period for Commission Action

Not applicable.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(iii)<sup>11</sup> of the Act and Rule 19b-4(f)(6) thereunder<sup>12</sup> in that it effects a change that: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.

The proposed rule change does not significantly affect the protection of investors or the public interest because there would continue to be other significant protections for

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<sup>11</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>12</sup> 17 CFR 240.19b-4(f)(6).

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. The proposed amendment would make Nasdaq's requirements regarding the waivers of the code of conduct substantively similar to those of the NYSE and Nasdaq believes that the long experience of that market in applying those substantially similar rules provides evidence that they provide an appropriate level of investor protection.<sup>13</sup>

The Exchange believes that the proposed rule change does not impose any significant burden on competition because all listed companies would be affected in the same manner by these changes and because this proposal is consistent with the approach of the NYSE.

Furthermore, Rule 19b-4(f)(6)(iii)<sup>14</sup> requires a self-regulatory organization to give the Commission written notice of its intent to file a proposed rule change under that subsection at least five business days prior to the date of filing, or such shorter time as designated by the Commission. The Exchange has provided such notice.

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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

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<sup>13</sup> See footnote 10, above.

<sup>14</sup> 17 CFR 240.19b-4(f)(6)(iii).

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

The proposed rule changes are based on Rule 303A.10 of the NYSE Listed Company Manual.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

1. Notice of Proposed Rule Change for publication in the Federal Register.

**EXHIBIT 1**

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

August \_\_, 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 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on August 21, 2023, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to 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.

\* \* \* \* \*

**The Nasdaq Stock Market Rules**

\* \* \* \* \*

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

**5610. Code of Conduct**

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.

\* \* \* \* \*



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.

\* \* \* \* \*

(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.<sup>3</sup> 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.<sup>4</sup> 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

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<sup>3</sup> See 17 C.F.R. 229.406.

<sup>4</sup> 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.

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 approval of related party transactions by the company's audit committee or another independent body of the board of directors.<sup>5</sup> 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").<sup>6</sup>

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

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<sup>5</sup> See Listing Rule 5630.

<sup>6</sup> 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).

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.<sup>7</sup>

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,<sup>8</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>9</sup> 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

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<sup>7</sup> 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 days. 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.

<sup>8</sup> 15 U.S.C. 78f(b).

<sup>9</sup> 15 U.S.C. 78f(b)(5).

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 committee of the code of conduct substantively similar to those of the NYSE.<sup>10</sup> 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.

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<sup>10</sup> 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.

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 as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>11</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>12</sup>

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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

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<sup>11</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>12</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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.

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](mailto: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.

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.<sup>13</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>13</sup> 17 CFR 200.30-3(a)(12).