



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-97833; File No. SR-NASDAQ-2023-017]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Modify the Package of Complimentary Services Provided to Certain Eligible Switches and Make Other Changes to IM-5900-7 and IM-5900-7A

July 3, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on June 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 package of complimentary services provided to certain Eligible Switches, to update the values of complimentary services provided under Listing Rules IM-5900-7 and IM-5900-7A, and to remove certain obsolete provisions.

The text of the proposed rule change is available on the Exchange’s Website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

Nasdaq offers complimentary services under Listing Rule IM-5900-7 to Eligible New Listings³ and Eligible Switches⁴ newly listing on Nasdaq (collectively, “Eligible Companies”).⁵ Nasdaq believes that the complimentary service program offers valuable services to newly listing companies, designed to help ease the transition of becoming a public company or switching markets, and makes listing on Nasdaq more attractive to these companies. The services offered include a whistleblower hotline, investor relations website, disclosure services for earnings or other press releases, webcasting, market analytic tools, environmental, social and governance (“ESG”) services, and may include market advisory tools such as stock surveillance (collectively the “Service Package”).⁶ Nasdaq is filing this proposed rule change to modify the ESG services available to Eligible Switches with a market capitalization of \$5 billion or more. Nasdaq also is

³ IM-5900-7 defines an Eligible New Listing as “a Company listing on the Global or Global Select Market in connection with: (i) an initial public offering in the United States, including American Depository Receipts (other than a Company listed under IM-5101-2), (ii) upon emerging from bankruptcy, (iii) in connection with a spin-off or carve-out from another Company, (iv) in connection with a Direct Listing as defined in IM-5315-1 (including the listing of American Depository Receipts), or (v) in conjunction with a business combination that satisfies the conditions in IM-5101-2(b).”

⁴ IM-5900-7 defines an Eligible Switch as “a Company: (i) (other than a Company listed under IM-5101-2) switching its listing from the New York Stock Exchange to the Global or Global Select Markets, or (ii) that has switched its listing from the New York Stock Exchange and listed on Nasdaq under IM-5101-2 after the Company publicly announced that it entered into a binding agreement for a business combination and that subsequently satisfies the conditions in IM-5101-2(b) and lists on the Global or Global Select Market in conjunction with that business combination.”

⁵ IM-5900-7A describes the Service Package available to companies that listed before March 12, 2021, the effective date of SR-Nasdaq-2021-002. See Securities Exchange Act Release No. 91318 (March 12, 2021), 86 FR 14774 (March 18, 2021) (modifying the package of complimentary services provided to eligible companies and memorializing as IM-5900-7A the services offered to eligible companies that listed before the effective date of the change).

⁶ In addition, all companies listed on Nasdaq receive other standard services from Nasdaq, including Nasdaq Online and the Market Intelligence Desk.

proposing to update the values of the complimentary services provided under Rules IM-5900-7 and IM-5900-7A and to remove obsolete provisions from IM-5900-7A.

In 2021, Nasdaq first included ESG services in the Service Package for all Eligible Companies.⁷ Specifically, all Eligible Companies receive access to a Core ESG software solution,⁸ which simplifies the gathering, tracking, approving, managing and disclosing of ESG data.⁹ Based on Nasdaq's experience since first including the ESG services, Nasdaq has become aware that as companies mature and become larger, they no longer rely on services like the Core ESG software solution, but instead need more sophisticated programs with additional metrics. Accordingly, the Core ESG software solution is not valuable to these larger seasoned companies and Nasdaq proposes to instead offer Eligible Switches with a market capitalization of \$5 billion or more an advanced software solution, which will enable the company to select additional metrics to use in the solution ("Advanced ESG Software Solution").¹⁰ Specifically, the Advanced ESG Software Solution allows the company to track approximately ten times as many standard performance indicators and also allows the company to select and track additional custom performance indicators. In addition, each of these companies is at a different phase in implementing an ESG strategy and therefore Nasdaq will also offer these companies \$60,000 worth of bespoke ESG consulting services per year designed to aid the company in identifying and incorporating ESG metrics into communications, with customized analysis and recommendations ("ESG Advisory Services"). Each of these services would be available to

⁷ Securities Exchange Act Release No. 91318, supra.

⁸ This service is currently called "ESG Core" in IM-5900-7. Nasdaq is proposing to make a technical change to rename the service to "Core ESG Software Solution" in the proposed rule filing. No other changes are being proposed to the service.

⁹ Eligible Companies that have a market capitalization of \$750 million or more also receive access to an ESG Education & Sector Benchmarking Service to help them understand the ESG landscape. No change is proposed with respect to this service.

¹⁰ This service has a retail value of approximately \$52,500 per year. In addition, one-time development fees of up to \$21,500 to establish the services in the first year will be waived. The one-time development fees reflect the high level of customization available in this product. The total one-time development fees that are waived for Eligible Companies that receive this service, as reflected in proposed Rule IM-5900-7(d)(3)(A) is approximately \$26,500, which also includes approximately \$5,000 to establish the investor relations website.

Eligible Switches with a market capitalization of \$5 billion or more for the same four-year term provided for other services under IM-5900-7. While Nasdaq believes that these services will be valuable to these companies, and will provide information important for communicating with their investors and other stakeholders, no company is required to use these services as a condition of listing. As is the case with other complimentary services, at the end of the package term, companies may choose to renew these services or discontinue them.

The proposed new services will be available to Eligible Switches with a market capitalization of \$5 billion or more that list after the date of approval of the proposed rule change. Nasdaq proposes to add a new paragraph to IM-5900-7(d)(3) to memorialize the services provided to an Eligible Switch with a market capitalization of \$5 billion or more that listed before that date.

Nasdaq also proposes to update the values of the services contained in Listing Rules IM-5900-7 and IM-5900-7A to their current values.¹¹ Depending on a company's market capitalization and whether it is an Eligible New Listing or an Eligible Switch, the total revised value of the services provided to Eligible Companies (including the waiver of one-time fees) ranges from \$364,800 to \$1,533,000.¹² Finally, Nasdaq proposes to simplify Rule IM-5900-7A by cross-referencing the description of services and their values that also appears in IM-5900-7 and by deleting the descriptions of offerings that are no longer available to any companies.¹³

¹¹ These services are offered through Nasdaq Corporate Solutions, LLC, an affiliate of Nasdaq, or a third-party provider selected by Nasdaq.

¹² The exact values are set forth in proposed IM-5900-7 and IM-5900-7A. In describing the total value of the services for companies that can select more than one market advisory tool, Nasdaq presumes that a company would use stock surveillance, which has an approximate retail value of \$56,500, and global targeting, which has an approximate retail value of \$48,000. Companies could, of course, select different combinations of the three services offered, but these other combinations would have lower total approximate retail values.

¹³ The services described in IM-5900-7A(c) and (d)(1) were provided for a term of two years to companies that listed before March 12, 2021. In addition, no company still receives the services described in IM-5900-7A(g), which applies only to companies that listed before April 23, 2018.

Nasdaq notes that no other company will be required to pay higher fees as a result of the proposed amendments and represents that providing these services will have no impact on the resources available for its regulatory programs.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁴ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁵ 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. It is also consistent with this provision because it is not designed to permit unfair discrimination between issuers. Nasdaq also believes that the proposed rule change is consistent with the provisions of Sections 6(b)(4)¹⁶ and 6(b)(8),¹⁷ in that the proposal is designed, among other things, to provide for the equitable allocation of reasonable dues, fees, and other charges among Exchange members and issuers and other persons using its facilities and that the rules of the Exchange do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Nasdaq faces competition in the market for listing services,¹⁸ and competes, in part, by offering valuable services to companies. Nasdaq believes that it is reasonable to offer complimentary services to attract and retain listings as part of this competition. All similarly situated companies are eligible for the same package of services. The proposed Advanced ESG Software Solution and ESG Advisory Services will help eligible companies communicate with their shareholders and other stakeholders by helping collect, store and disclose ESG data chosen

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(5).

¹⁶ 15 U.S.C. 78f(4).

¹⁷ 15 U.S.C. 78f(8).

¹⁸ The Justice Department has noted the intense competitive environment for exchange listings. See “NASDAQ OMX Group Inc. and Intercontinental Exchange Inc. Abandon Their Proposed Acquisition Of NYSE Euronext After Justice Department Threatens Lawsuit” (May 16, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/271214.htm.

by the company and guiding messaging and reporting of that information. The services will also help assess the company's current ESG program, identify ESG risk and opportunities, and establish strategies for risk management and opportunity capture. While the proposed services will be available only to Eligible Switches with a market capitalization of \$5 billion or more, Nasdaq does not believe that it is unfairly discriminatory to offer different services based on a company's market capitalization given that larger companies generally will need more and different ESG services, and that those issuers will likely bring greater future value to Nasdaq than will other issuers by switching to its market.¹⁹ Moreover, those companies would more likely forego ESG services offered by their current exchange when switching their listing to Nasdaq, which smaller companies would not.²⁰

The Commission has previously indicated pursuant to Section 19(b) of the Exchange Act²¹ that updating the values of the services within the rule is necessary,²² and Nasdaq does not believe this update has an effect on the allocation of fees nor does it permit unfair discrimination, as issuers will continue to receive the same services, except for the additional services described above. Further, this change to update the values will enhance the transparency of Nasdaq's rules and the value of the services it offers companies, thus promoting just and equitable principles of trade. As such, this aspect of the proposed rule change is consistent with the requirements of Section 6(b)(4) and (5) of the Exchange Act.

¹⁹ See Securities Exchange Act Release No. 65963 (December 15, 2011), 76 FR 79262 at 79265 (December 21, 2011).

²⁰ See Securities Exchange Act Release No. 94222 (February 10, 2022), 87 FR 8886 (February 16, 2022) (approving changes to NYSE Listed Company Manual Section 907.00, including the offer of ESG tools to currently listed companies with 270 million or more total shares of common stock outstanding, but not to companies with fewer shares outstanding).

²¹ 15 U.S.C. 78s(b).

²² See Exchange Act Release No. 72669 (July 24, 2014), 79 FR 44234 (July 30, 2014) (SR-NASDAQ-2014-058) (footnote 39 and accompanying text: "We would expect Nasdaq, consistent with Section 19(b) of the Exchange Act, to periodically update the retail values of services offered should they change. This will help to provide transparency to listed companies on the value of the free services they receive and the actual costs associated with listing on Nasdaq.").

Finally, Nasdaq notes that the proposed change to include the effective date of IM-5900-7A, the changes to cross reference duplicate product descriptions and values, and the changes to eliminate obsolete parts of the rules, are consistent with Section 6(b)(5) of the Exchange Act because they will simplify and clarify the rule and remove duplication without making any substantive change.

Nasdaq represents, and this proposed rule change will help ensure, that individual listed companies are not given specially negotiated packages of products or services to list, or remain listed, which the Commission has previously stated would raise unfair discrimination issues under the Exchange Act.²³

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. As noted above, Nasdaq faces competition in the market for listing services, and competes, in part, by offering valuable services to companies. Nasdaq believes that it is reasonable to offer complimentary services to attract and retain listings as part of this competition. The proposed rule changes reflect that competition, but do not impose any burden on the competition with other exchanges. Other exchanges can also offer similar services to companies, thereby increasing competition to the benefit of those companies and their shareholders.

Further, all similarly situated companies are eligible for the same package of services. While the proposed services will be available only to Eligible Switches with a market capitalization of \$5 billion or more, Nasdaq does not believe that it is unfairly discriminatory to offer different services based on a company's market capitalization given that larger companies generally will need more and different ESG services, and that those issuers will likely bring greater future value to Nasdaq by switching to its market than would other issuers.

²³ See Exchange Act Release No. 79366, 81 FR 85663 at 85665 (citing Securities Exchange Act Release No. 65127 (August 12, 2011), 76 FR 51449, 51452 (August 18, 2011) (approving NYSE-2011-20)).

Accordingly, Nasdaq does not believe the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

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

Electronic Comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NASDAQ-2023-017 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-2023-017. 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-2023-017 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.²⁴

Vanessa A. Countryman,

Secretary.

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