



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-97985; File No. SR-NASDAQ-2023-022]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Create a New, Non-Trading Limited Membership Class and Impose Related Requirements for Principal Underwriting Activity

July 25, 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 July 12, 2023, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“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 create a new, non-trading limited membership class and impose related requirements for principal underwriting activity, as described further below. 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 proposed rule change. The text of these statements may be examined at the places specified in

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

The purpose of the proposed rule change is to amend the Exchange’s Rules to create a new, limited membership class for those underwriters seeking only to perform underwriting activity as the principal underwriter on the Exchange³ (and not seeking access to trade via the Nasdaq Market Center) and require a company applying for initial listing in connection with a transaction involving an underwriter to have a principal underwriter⁴ that is a member or limited member of Nasdaq.

Specifically, the Exchange proposes to amend its General Rules to: (i) add a definition of “Limited Underwriting Member” to General 1, Section 1; (ii) add a new, limited underwriting membership to General 3, Section 1031; and (iii) provide an exemption from registration for certain investment banking representatives associated solely with Limited Underwriting Members in General 4, Section 1230, as described below. Finally, the Exchange proposes to amend Equity 7, Section 10 to exempt Limited Underwriting Members from being assessed a trading rights fee. In addition, the Exchange proposes to amend Rule 5210 of the Listing Rules to impose a requirement that each Company applying for initial listing in connection with a transaction involving an underwriter have a principal underwriter that is a Member or Limited Underwriting Member.

³ “Principal underwriter” will have the same definition used in Rule 405 promulgated under the Securities Act of 1933 (“Securities Act”): an underwriter in privity of contract with the issuer of the securities as to which he is underwriter. Such definition provides that the term “issuer” in the definition of “principal underwriter” has the meaning given in Sections 2(4) and 2(11) of the Securities Act. 17 CFR 230.405.

⁴ The Exchange proposes to apply the requirements herein to a principal underwriter (defined as an underwriter in privity of contract with the issuer of the securities as to which he is underwriter) because the definition of principal underwriter points to the lead underwriter, who is generally responsible for organizing the offering, including tasks such as determining allocation of shares and the offering price, in conjunction with the issuer. Although offerings may require more than one underwriter, or a group of underwriters known as an underwriting syndicate, the Exchange proposes to focus on the lead underwriters given the substantial role they typically play in the offering process.

Background

In the fall of 2022, Nasdaq observed instances of unusually high price spikes immediately following the pricing of certain initial public offerings (IPOs) on the Exchange and other national securities exchanges, mostly with respect to small-cap companies whose offerings were less than \$25 million. In many instances, the IPO securities that were the subject of these extreme price spikes then experienced equally dramatic price declines to a level at or below the offering price. These extreme price spikes may occur in the opening trade on an exchange, or in continuous trading on the day of, or days immediately following, the listing.

Underwriters play a critical role as gatekeepers to the capital markets in connection with the trading of newly issued securities. Unusual price volatility following IPOs of certain small-cap issuers highlights the essential role underwriters play. Nasdaq relies on underwriters to select the selling syndicate and ensure that the shares are placed in a way that is reasonably designed to allow liquid trading, consistent with Nasdaq's listing requirements, and the successful introduction of the company to the marketplace. In a recent Equity Regulatory Alert,⁵ Nasdaq highlighted the important role of underwriters as gatekeepers in the IPO process and the applicability of market rules and the federal securities laws. The Financial Industry Regulatory Authority (FINRA) and the New York Stock Exchange (NYSE) published similar alerts at the same time.⁶ In Nasdaq's Equity Regulatory Alert, the Exchange also noted:

Nasdaq members, as well as the members of other self-regulatory organizations, that underwrite IPOs, and that play other roles in the offering process, should expect a heightened focus when an IPO experiences unusual price movements. Nasdaq Regulation will continue to investigate to determine whether such members have complied with applicable rules designed to prevent fraudulent and manipulative acts and practices, to

⁵ <https://www.nasdaqtrader.com/MicroNews.aspx?id=ERA2022-9>.

⁶ [https://www.nyse.com/publicdocs/nyse/markets/nyse/rule-interpretations/2022/NYSER_Reg_Memo_-_Regulatory_Scrutiny_in_Connection_with_IPOs_\(2022.11.17_final\).pdf](https://www.nyse.com/publicdocs/nyse/markets/nyse/rule-interpretations/2022/NYSER_Reg_Memo_-_Regulatory_Scrutiny_in_Connection_with_IPOs_(2022.11.17_final).pdf); <https://www.finra.org/rules-guidance/notices/22-25>.

promote just and equitable principles of trade, and to protect investors and the public interest. Areas of focus will include suspected manipulation and, beyond manipulation, whether the members are complying with their obligation to observe high standards of commercial honor and just and equitable principles of trade pursuant to Nasdaq Rule General 9, Section 1(a). That rule sets forth a standard intended to encompass a wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace.⁷

Notwithstanding the important role of underwriters, Nasdaq does not currently require underwriters of companies that are going public on the Exchange to be Members of the Exchange. As such, Nasdaq does not have authority to require responses to investigative inquiries or to enforce its Rules directly against non-member underwriters.⁸

Nasdaq proposes creating a new, limited membership class and requiring underwriters involved in Nasdaq-listed IPOs to be Members or Limited Underwriting Members in order to serve as a principal underwriter of an IPO on the Exchange. By creating a new, limited membership class, Nasdaq would provide those firms seeking only to perform principal underwriting activity on the Exchange (and not seeking access to trade via the Nasdaq Market Center) the option of selecting a membership that is less burdensome (*i.e.*, to become a Limited Underwriting Member rather than a Member).⁹

Proposed Changes to Listing Rules

⁷ Supra note 5.

⁸ Nasdaq does, however, have broad discretionary authority over the initial and continued listing of securities in Nasdaq in order to maintain the quality of and public confidence in its market, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest. The Exchange may request information from companies that are going public on the Exchange. The Exchange may also request information from non-Member underwriters, but they are not required to respond to these requests. As described further below, this proposal would provide the Exchange with authority to directly obtain information from Limited Underwriting Members, whether pre or post-IPO.

⁹ A revised Membership Application is attached [sic] as Exhibit 3, in which Nasdaq proposes to add a category for Limited Underwriting Members and clarify that Limited Underwriting Members are not subject to the requirement to provide an NSCC account number.

The proposed rule change primarily impacts membership rules and other non-listing rules, which would apply to the underwriters themselves. However, as part of the proposal, Nasdaq would impose a new requirement in its Listing Rules at 5210(l), requiring each Company applying for initial listing in connection with a transaction involving an underwriter to have a principal underwriter that is a Member or Limited Underwriting Member of Nasdaq. In proposed Rule 5210(l), the Exchange would also specify that “principal underwriter” shall have the same definition used in Rule 405 promulgated under the Securities Act.¹⁰ The rule would cross reference the definition of “Limited Underwriting Member,” which is proposed to be added at General 1, Section 1, and would define Limited Underwriting Member to mean a broker or dealer admitted to limited underwriting membership in Nasdaq.

Proposed Changes to General Rules

Within its General Rules, the Exchange proposes to amend General 1 (General Provisions), General 3 (Membership and Access), and General 4 (Registration Requirements).

The Exchange proposes to add the definition of “Limited Underwriting Member” to General 1, Section 1 (Definitions). As noted above, the Exchange proposes to define Limited Underwriting Member to mean a broker or dealer admitted to limited underwriting membership in Nasdaq.

The Exchange proposes to add the new category of membership to General 3, Section 1031, within which the Exchange proposes to include information about persons eligible to become Limited Underwriting Members, Limited Underwriting Member access to the Exchange, and rules applicable to Limited Underwriting Members.

The Exchange would specify in General 3, Section 1031(a), that (i) any registered broker or dealer shall be eligible for limited underwriting membership in the Exchange, except such registered brokers or dealers as are excluded under paragraph (b) of Rule 1002;¹¹ and (ii) any

¹⁰ Supra note 3.

¹¹ In relevant part, General 3, Section 1002(b) provides that, subject to certain exceptions, no registered broker or dealer shall be admitted to membership, and no Member shall be continued in membership, if

person shall be eligible to become an Associated Person of a Limited Underwriting Member, except such persons as are excluded under paragraph (b) of Rule 1002.¹² Proposed Rule 1031(a) is consistent with the existing rules for persons eligible to become Members and Associated Persons in General 3, Rule 1002(a).

The Exchange proposes to state, in General 3, Section 1031(b) that (i) a limited underwriting membership provides no rights to transact on the Exchange and (ii) a limited underwriting membership is solely to allow a firm that is not otherwise a Member to serve as a principal underwriter for a Company seeking to list on the Exchange, pursuant to Rule 5210(1).

Nasdaq proposes applying a limited ruleset to this newly proposed limited membership class.¹³ Specifically, the Exchange proposes to apply only the following rules to Limited Underwriting Members: General 1 (General Provisions); General 2 (Organization and Administration), with the exception of Sections 6(a) and 22; General 3 (Membership and Access); General 4 (Registration Requirements); General 5 (Discipline), with the exception of Rules 8211 and 9557; General 9 (Regulation), Sections 1 and 20; and Equity 7, Section 10 (Pricing Schedule, Membership Fees). The Exchange would specify the aforementioned rules applicable to this new membership class in General 3, Section 1031(c)(1). With the proposal, the Exchange aims to apply only those rules it deems appropriate to a firm serving as a principal underwriter, including those rules it deems critical to such firms.

such broker, dealer, or Member fails or ceases to satisfy the qualification requirements established by the Rules, or if such broker, dealer, or Member is or becomes subject to a statutory disqualification, or if such broker, dealer, or Member fails to file such forms as may be required in accordance with such process as the Exchange may prescribe.

¹² In relevant part, General 3, Section 1002(b) provides that, subject to such exceptions as may be explicitly provided elsewhere in the Rules, no person shall become associated with a Member, continue to be associated with a Member, or transfer association to another Member, if such person fails or ceases to satisfy the qualification requirements established by the Rules, or if such person is or becomes subject to a statutory disqualification; and no broker or dealer shall be admitted to membership, and no Member shall be continued in membership, if any person associated with it is ineligible to be an Associated Person under this subsection.

¹³ Members of the Exchange, unlike Limited Underwriting Members, are subject to all of the Exchange's Rules (which includes the limited ruleset applicable to the newly proposed limited membership class).

The Exchange proposes to apply General 1 to Limited Underwriting Members because General 1 provides defined terms that would be applicable to Limited Underwriting Members and, as explained above, the proposed rule change would also add a definition (“Limited Underwriting Member”) to General 1.

The Exchange proposes to apply General 2 (with the exception of Sections 6(a) and 22) to Limited Underwriting Members because General 2 relates to organization and administration including requirements surrounding fees, limitations on affiliations, and a requirement for an executive representative, among other obligations. The Exchange proposes to specifically exclude General 2, Sections 6(a) and Section 22. General 2, Section 6(a) states that General Equity and Options Rules and Equity Rules shall apply to all members and persons associated with a member, which is not accurate in the case of Limited Underwriting Members. General 2, Section 22 relates to Sponsored Participants and client access to the Nasdaq Market Center via a Member, which is not applicable to underwriting activity.

The Exchange also proposes to subject Limited Underwriting Members to General 3 because General 3 contains membership rules, including an obligation to follow specified procedures for applying to be a member, making changes to membership, or terminating membership. As described herein, the proposed rule change would also add additional details regarding the limited underwriting membership to General 3, Rule 1031.

The Exchange proposes to apply General 4 to Limited Underwriting Members, which includes registration requirements that are applicable to Limited Underwriting Members. The proposal would also add an exemption within General 4, as described below.

The Exchange believes it is critical to subject Limited Underwriting Members to General 5 (with the exception of Rules 8211 and 9557), which contains the Exchange’s disciplinary rules.¹⁴ Notably, General 5, Rule 8210 provides the Exchange with authority to require

¹⁴ General 5, Rule 8001 provides that the Exchange and FINRA are parties to the FINRA Regulatory Contract (often referred to as a Regulatory Services Agreement (“RSA”)) pursuant to which FINRA has agreed to

information from Exchange Members. The Exchange proposes to specifically exclude General 5, Rule 8211 and Rule 9557. Rule 8211 relates to members submission of trade data. Rule 9557 relates to procedures for regulating activities under General 9, Sections 40 and 41, which incorporate FINRA Rules 4110 and 4120, which relate to FINRA carrying or clearing members. Therefore, Rule 8211 and Rule 9557 are not relevant to underwriting activity.

The Exchange also believes it is important to subject Limited Underwriting Members to General 9, Section 1 which includes general standards by which Members must abide. Specifically, of importance, General 9, Section 1(a) requires Members to observe just and equitable principles of trade. General 9, Section 20 requires Members to establish and maintain a system to supervise the activities of each registered representative and associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations and with applicable Nasdaq rules. The Exchange believes it is important to apply this provision on supervision as it would provide the Exchange with authority to assess whether a Limited Underwriting Member has an adequate supervisory system and written supervisory procedures in place.

Finally, the Exchange proposes to include Equity 7, Section 10 to Limited Underwriting Members because this section includes the membership and application fees applicable to Limited Underwriting Members. The Exchange proposes to avoid applying all those Exchange rules not specified in proposed General 3, Section 1031(c)(1) to Limited Underwriting Members in an effort to impose minimal burden on Limited Underwriting Members, while still allowing the Exchange to have regulatory authority over such members. Furthermore, the Exchange believes that the Exchange's rules that Limited Underwriting Members would not be subject to under the proposal primarily relate to trading activity and are, therefore, not relevant to the activities of Limited Underwriting Members.

perform certain functions described in the Exchange's Rules on behalf of the Exchange. The Exchange does not anticipate that the proposed rule change would have any material impact on the current RSA.

The Exchange proposes to include language in General 3, Section 1031(c)(1) providing that, for purposes of interpreting and applying the rules to Limited Underwriting Members, references to “Member,” “Members,” or “membership” shall be functionally equivalent to “Limited Underwriting Member,” “Limited Underwriting Members,” or “limited underwriting membership” respectively. The Exchange also proposes to include a requirement, in General 3, Section 1031(c)(2), that Limited Underwriting Members and their Associated Persons shall at all times be members of FINRA.¹⁵

Finally, the Exchange proposes to exempt persons associated solely with a Limited Underwriting Member whose functions are related solely and exclusively to underwriting and who are registered with FINRA as an Investment Banking Representative¹⁶ from the requirement to register with the Exchange. The Exchange proposes to add such exemption to General 4, Section 1230(4).

Proposed Change to Equity Rules

The Exchange proposes to exempt Limited Underwriting Members from the trading rights fee of \$1,250 per month that is normally charged to Members because such Limited Underwriting Members would not be eligible to trade on the Exchange. Accordingly, the Exchange proposes to add language to Equity 7, Section 10(a) to specify that Limited Underwriting Members would not be charged the monthly trading rights fee. Limited

¹⁵ Limited Underwriting Members would, therefore, be eligible to waive-in to Exchange membership, as provided for in General 3, Section 1013(b). Prospective Limited Underwriting Members would need to submit a membership application (*see supra* note 9) in which they would select “Waive-In Membership” for the application type and “Limited Underwriting Member of NQX” for the nature of intended activity. For “waive-in” applicants, the Exchange relies substantially upon FINRA’s determination to approve the applicant for FINRA membership when the Exchange evaluates the applicant for Exchange membership.

¹⁶ In FINRA Rule 1220(b)(5), FINRA describes the requirement for representatives to register as an “Investment Banking Representative” if his or her activities in the investment banking or securities business of a member involve: (i) advising on or facilitating debt or equity securities offerings through a private placement or a public offering, including but not limited to origination, underwriting, marketing, structuring, syndication, and pricing of such securities and managing the allocation and stabilization activities of such offerings, or (ii) advising on or facilitating mergers and acquisitions, tender offers, financial restructurings, asset sales, divestitures or other corporate reorganizations or business combination transactions, including but not limited to rendering a fairness, solvency or similar opinion.

Underwriting Members would be subject to a \$2,000 application fee (per Equity 7, Section 10(b)) and a \$3,000 yearly membership fee (per Equity 7, Section 10(a)).

Implementation

The Exchange would designate the proposed changes to be operative 60 days after publication of the Commission's approval order of SR-NASDAQ-2023-022 in the Federal Register. This delay will allow time for firms involved with upcoming IPOs to become Limited Underwriting Members, if they choose, and for companies planning IPOs to select alternative underwriters if their current firm is not, and does not intend to become, a Member or Limited Underwriting Member.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁷ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁸ 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, by strengthening Nasdaq's ability to carry out its oversight responsibilities. It is also consistent with Section 6(b)(7) of the Act in that it provides for a fair procedure for prohibiting or limiting any person with respect to access to services offered by the Exchange or a Member thereof.¹⁹ As discussed above, the proposal would create a new, limited membership class for those firms seeking only to perform activity as the principal underwriter of an IPO on the Exchange (and not seeking access to trade via the Nasdaq Market Center) and require a company applying for initial listing in connection with a transaction involving an underwriter to have a principal underwriter that is a member or limited member of Nasdaq. The Exchange would apply specified rules to Limited Underwriting Members, as explained above.

¹⁷ 15 U.S.C. 78f(b).

¹⁸ 15 U.S.C. 78f(b)(5).

¹⁹ 15 U.S.C. 78f(b)(7).

Such rules include general provisions and standards, membership and access rules, organization and administration rules, registration requirements, disciplinary rules, and certain fees. Creating this new membership class and subjecting principal underwriters to such specified rules supports fair and orderly markets, which protects investors and the public interest, consistent with Section 6(b)(5) of the Act. Notably, the proposal would subject Limited Underwriting Members to Nasdaq's disciplinary rules, which provides Nasdaq authority to require information from such underwriters (per General 5, Rule 8210), as well as other general rules, including the requirement to observe just and equitable principles of trade (per General 9, Section 1(a)) and the requirement to establish and maintain a system to supervise the activities of registered representatives and associated persons (per General 9, Section 20). Nasdaq believes that imposing these Nasdaq rules, as well as the other rules included in proposed Rule 1031(c)(1), on principal underwriters will strengthen Nasdaq's ability to carry out its oversight responsibilities and deter potential violative conduct, such as fraud or manipulation, thereby protecting investors and the public interest.

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 changes to the Listing Rules will apply equally to all similarly situated companies applying for initial listing in connection with a transaction involving an underwriter on the Exchange.

Likewise, the proposed changes to the General and Equity Rules, including to the membership rules, will apply equally to all similarly situated Applicants and Members and they will confer no relative advantage or disadvantage upon any category of Exchange Applicant or Member.

Although the Exchange proposes to subject Limited Underwriting Members to a limited set of rules, the limited underwriting membership does not confer the same benefits as a standard Exchange membership. Namely, a Limited Underwriting Member would not be permitted to transact on the Nasdaq Market Center. Therefore, applying a limited ruleset to Limited

Underwriting Members is justified. All Limited Underwriting Members would be subject to the same specified rules, as noted above. Moreover, the Exchange does not expect that its proposal will have an adverse impact on competition among exchanges for members. The Exchange believes the proposed rule changes, overall, will strengthen the Exchange's ability to carry out its role and responsibilities as a self-regulatory organization and deter potential violative conduct. As such, 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.

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-2023-022 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-2023-022. 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-2023-022 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.²⁰

J. Matthew DeLesDernier,

Deputy Secretary.

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²⁰ 17 CFR 200.30-3(a)(12).