



BILLING CODE 8011-01P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-99557; File No. SR-NASDAQ-2023-022]

### **Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment No. 2 to a Proposed Rule Change to Create a New, Non-Trading Limited Underwriter Membership Class and Impose Related Requirements for Principal Underwriting Activity**

February 16, 2024

On July 12, 2023, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to create a new, non-trading limited underwriter membership class and impose related requirements for principal underwriting activity in connection with a company applying for initial listing on the exchange with a transaction involving an underwriter. The proposed rule change was published for comment in the *Federal Register* on July 31, 2023.<sup>3</sup>

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

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

<sup>3</sup> See Securities Exchange Act Release No. 97985 (July 25, 2023), 88 FR 49508.

On September 12, 2023, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>5</sup> On September 29, 2023, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act<sup>6</sup> to determine whether to disapprove the proposed rule change.<sup>7</sup> On September 29, 2023, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and replaced the proposed rule change in its entirety.<sup>8</sup>

On January 22, 2024, the Exchange filed Amendment No. 2 to the proposed rule change which amended and replaced the proposed rule change, as modified by Amendment No. 1, in its entirety.<sup>9</sup> The proposed rule change, as modified by Amendment No. 2, is described in Items I and II below, which Items have been prepared by the Exchange.

On January 26, 2024, the Commission extended the time period for approving or disapproving the proposal to March 27, 2024.<sup>10</sup> The Commission has received no comment letters on the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 2, from interested persons.

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<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> *See* Securities Exchange Act Release No. 98366, 88 FR 63999 (Sept. 18, 2023). The Commission designated October 29, 2023, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

<sup>6</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>7</sup> *See* Securities Exchange Act Release No. 98606, 88 FR 68894 (Oct. 4, 2023).

<sup>8</sup> Amendment No. 1 is available at <https://www.sec.gov/comments/sr-nasdaq-2023-022/srnasdaq2023022-267740-644342.pdf>.

<sup>9</sup> Amendment No. 2 is available at <https://www.sec.gov/comments/sr-nasdaq-2023-022/srnasdaq2023022-414859-982462.pdf>.

<sup>10</sup> *See* Securities Exchange Act Release No. 99433, 89 FR 6559 (Feb. 1, 2024).

I. *Self-Regulatory Organization’s Statement of the Terms of Substance of 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.

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.

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 that are FINRA members seeking only to perform underwriting activity as the principal underwriter on the Exchange<sup>11</sup> (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

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<sup>11</sup> “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.

underwriter to have a principal underwriter<sup>12</sup> that is a member or limited member of Nasdaq.<sup>13</sup>

Specifically, the Exchange proposes to amend its General Rules to: (i) add a definition of “Limited Underwriting Member” to General 1, Section 1; and (ii) add a new, limited underwriting membership to General 3, Section 1031, as described below. 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.

### *Background*

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- <sup>12</sup> 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.
- <sup>13</sup> This Amendment 2 modifies the Exhibit 5 by: (i) updating the numbering in Rule 5210 to account for recently added rule language; (ii) updating a related reference to Rule 5210 in General 3, Section 1031(b); (iii) excluding Section 1032 of General 3, a new provision, from the Rules the Exchange proposes to apply under General 3, Section 1031(c) for reasons described below; (iv) adds General 9, Section 21 to the Rules the Exchange proposes to apply under General 3, Section 1031(c) for reasons described below; and (v) updates existing Rule language in Equity 7, Section 10 due to recent changes in the Rule text. In addition, this Amendment 2 provides related updates and other clarifying updates to the narrative explanation herein and adds a statutory basis explanation for the imposition of fees. Amendment 1 modified the original filing to make several changes as it relates to Associated Persons, including: (i) removing a proposed exemption from registration for certain investment banking representatives associated solely with Limited Underwriting Members as the Exchange determined that such exemption was unnecessary because such representatives are not required to register as Associated Persons under current Rules; (ii) removing proposed rule language from proposed Rule 1032(a) about eligibility to become Associated Persons; (iii) removing General 4 from the list of Rules applicable to Limited Underwriting Members; and (iv) revising rule language to clarify that associated persons of Limited Underwriting Members shall at all times be properly qualified and registered under FINRA rules. In addition, Amendment 1 provided additional information about Nasdaq’s rationale in not applying certain existing rules to Limited Underwriting Members.

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,<sup>14</sup> 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.<sup>15</sup> In Nasdaq's Equity Regulatory Alert, the Exchange also noted:

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<sup>14</sup> <https://www.nasdaqtrader.com/MicroNews.aspx?id=ERA2022-9>.

<sup>15</sup> [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>.

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 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.<sup>16</sup>

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.<sup>17</sup>

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<sup>16</sup> *Supra* note 14.

<sup>17</sup> Nasdaq does, however, have broad discretionary authority over the initial and continued listing of securities in Nasdaq and over Members of the Exchange 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 and from Members who are permitted to trade on the Exchange. They are required to respond to those requests. The Exchange may also request information from non-Members, including 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.

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).<sup>18</sup>

#### *Proposed Changes to Listing Rules*

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 Rule 5210(m), 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(m), the Exchange would also specify that “principal underwriter” shall have the same definition used in Rule 405 promulgated under the Securities Act.<sup>19</sup> 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.

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<sup>18</sup> 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.

<sup>19</sup> *Supra* note 11.

### *Proposed Changes to General Rules*

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

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 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.<sup>20</sup> Proposed Rule 1031(a) is consistent with the existing rules for persons eligible to become Members 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

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<sup>20</sup> 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 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.

to serve as a principal underwriter for a Company seeking to list on the Exchange, pursuant to Rule 5210(m).

Nasdaq proposes applying a limited ruleset to this newly proposed limited membership class.<sup>21</sup> 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), with the exception of Section 1032; General 5 (Discipline), with the exception of Rules 8211 and 9557; General 9 (Regulation), Sections 1, 20, and 21; 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. Of course, a firm registering as a Limited Underwriting Member on Nasdaq would remain subject to all applicable rules of the Commission and any other Self-Regulatory Organization of which it is a member, including FINRA.

The Exchange acknowledges that there are additional, existing Rules that it could propose to apply to Limited Underwriting Members. However, the Exchange is proposing to apply only a narrow ruleset as the Exchange does not intend to create comprehensive rules to regulate underwriting activity. Rather, the Exchange proposes to apply a limited ruleset, primarily to provide the Exchange with the authority to require information directly from the Limited Underwriting Members and enhance its tools for

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<sup>21</sup> 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).

oversight with respect to the role the underwriter plays in connection with a company listing on the Exchange, as described below. Limited Underwriting Members would be subject to FINRA's rules, including its rules that substantively regulate underwriting activity. Nasdaq would consider whether additional existing Rules that are not proposed in the limited ruleset for Limited Underwriting Members or new Rules are warranted as the Exchange gains more experience in applying the rules proposed herein. As the Exchange adopts new Rules over time, it also would consider whether to apply such Rules to Limited Underwriting Members.

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 (with the exception of Section 1032) 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. The Exchange proposes to specifically exclude General 3, Section 1032 because such section includes requirements related to Nasdaq Market Center Participant registration. This section is inapplicable to Limited Underwriting Members because they are not permitted to transact on the Nasdaq Market Center. As described herein, the proposed rule change would also add additional details regarding the limited underwriting membership to General 3, Rule 1031.

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.<sup>22</sup> Notably, General 5, Rule 8210 provides the Exchange with authority to require 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

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<sup>22</sup> 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 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.

must abide. Specifically, of importance, General 9, Section 1(a) requires Members to observe just and equitable principles of trade. General 9, Sections 20 and 21 require 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, and to identify principles who must establish, maintain, and enforce a system of supervisory control policies and procedures that, among other things, tests that the member's supervisory procedures are reasonably designed with respect to the activities of the member and its associated persons, to achieve compliance with applicable securities laws and regulations, and with applicable Nasdaq rules. The Exchange believes it is important to apply these provisions 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. With the exception of General 9, Section 1, Section 20, and Section 21, the Exchange does not propose to apply other sections of General 9 to Limited Underwriting Members at this time. Although the Exchange acknowledges that certain other sections of General 9 could be applied to underwriters, the Exchange is targeting limited inclusion of those Rules it deems critical. Further, many of the standards in General 9 are FINRA rules that are incorporated by reference into the Exchange's Rules. Limited Underwriting Members would therefore be subject to such FINRA rules by virtue of their FINRA membership.

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. As noted above, Nasdaq would consider whether additional existing Rules that are not proposed in the limited ruleset for Limited Underwriting Members or new Rules are warranted as the Exchange gains more experience in applying the rules proposed herein.

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 shall at all times be members of FINRA and associated persons of Limited Underwriting Members shall at all times be properly qualified and registered under FINRA rules.<sup>23</sup>

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<sup>23</sup> 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 18) 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.

### *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 Underwriting Members would be subject to a \$2,000 application fee (per Equity 7, Section 10(b)) and a \$4,000 yearly membership fee (per Equity 7, Section 10(a)).

### *Excluded Rules*

As noted above, Nasdaq acknowledges that additional Rules could theoretically be applied to Limited Underwriting Members. However, Nasdaq proposes to apply the limited ruleset for the reasons described above. In addition to the Rules discussed above, the Exchange has not proposed to apply the following Rules to Limited Underwriting Members at this time: General 4; General 6; General 7; General 8; Equity Rules (with the exception of Equity 7, Section 10); and Options Rules. General 4 requires certain categories of persons associated with members to register with the Exchange. Because these categories do not relate to underwriting, the Exchange does not propose to apply General 4 to Limited Underwriting Members. However, as noted above, the Exchange would require all Limited Underwriting Members to be FINRA members and associated persons of Limited Underwriting Members to be properly qualified and registered under FINRA rules. Limited Underwriting Members and their associated persons would be

subject to FINRA’s registration and qualification rules,<sup>24</sup> including, for example, requirements regarding relevant examinations for underwriting (Series 79, Investment Banking, IB) and supervision of underwriting (Series 79 plus Series 24, Investment Banking Principal). General 6 relates generally to FINRA arbitration rules to which the Limited Underwriting Members would be subject to directly by virtue of their FINRA membership. The Exchange does not propose to apply General 7 to Limited Underwriting Members because it governs consolidated audit trail compliance and would not apply to underwriting activity. General 8 governs connectivity to the Exchange and would not be relevant to Limited Underwriting Members given their lack of access to trade on the Exchange. Similarly, the Equities Rules and the Options Rules are generally not relevant to the activities of Limited Underwriting Members due to their lack of access to trade on the Exchange. Although Limited Underwriting Members could access the Exchange via other means, such as trading through another Member, Limited Underwriting Members would have no direct access to trade on the Exchange.

### *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, as amended, 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.

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<sup>24</sup> See FINRA Rules, Rule 1210 (Registration Requirements) and Rule 1220 (Registration Categories).

## 2. *Statutory Basis*

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>25</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>26</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, 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.<sup>27</sup> 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. 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

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<sup>25</sup> 15 U.S.C. 78f(b).

<sup>26</sup> 15 U.S.C. 78f(b)(5).

<sup>27</sup> 15 U.S.C. 78f(b)(7).

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)), the requirement to establish and maintain a system to supervise the activities of registered representatives and associated persons (per General 9, Section 20), and the requirement to test and verify that the system is reasonably designed (per General 9, Section 21). 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<sup>28</sup> 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. Nasdaq also believes that it is appropriate and consistent with the protection of investors and the public interest that it not impose those rules excluded from proposed Rule 1031(c)(1) because these rules are not directly applicable to the activities a Limited Underwriting Member is permitted to conduct on the Exchange, and the firms will be subject to all applicable FINRA rules.

The Exchange also believes that the proposed rule change is not designed to permit unfair discrimination between customers, issuers, brokers and dealers, consistent with Section 6(b)(5) of the Act.<sup>29</sup> 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 and therefore, are not designed to

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<sup>28</sup> As noted above, the Exchange acknowledges that additional, existing Rules could apply to underwriters. The Exchange proposes to apply a limited ruleset to Limited Underwriting Members, consisting of those Rules it deems most critical. Today, underwriters are not required to be Members and therefore, non-member underwriters are not subject to any of the Exchange's Rules.

<sup>29</sup> 15 U.S.C. 78f(b)(5).

permit unfair discrimination. The Exchange's proposal to subject Limited Underwriting Members to a limited set of rules and exclude certain rules applicable to Members is not designed to permit unfair discrimination between brokers and dealers because the limited underwriting membership does not confer the same benefits as a standard Exchange membership and does not warrant application of the same ruleset. All Limited Underwriting Members would be subject to the same specified rules.

Finally, Nasdaq believes that its proposal to impose certain fees on Limited Underwriting Members is consistent with Section 6(b) of the Act, in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act, in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange believes that its proposal to charge the \$2,000 application fee and \$4,000 yearly membership fee but not charge the \$1,250 monthly trading rights fee is reasonable, equitable and not unfairly discriminatory. The Exchange would apply fees that are already in existence and the Exchange believes such fees reflect the value of services it provides its applicants and membership. By charging Limited Underwriting Members the same application and yearly membership fee as Members, the Exchange believes that it would be treating the membership equitably. Further, the Exchange believes it is reasonable and equitable to exempt Limited Underwriting Members from the monthly trading rights fee because such members would not have access to trade on the Exchange. The Exchange believes that the fee proposal is not designed to permit unfair discrimination between Exchange members because the fees would be applied equally to all similarly situated members.

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, 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. *Solicitation of Comments*

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether Amendment No. 2 to 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](mailto: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.<sup>30</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>30</sup> 17 CFR 200.30-3(a)(12).