

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-89875; File No. SR-NASDAQ-2020-060)

September 15, 2020

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change, as modified by Amendment No. 1, to Treat as an Eligible Switch, for Purposes of IM-5900-7, an Acquisition Company that Switches from NYSE to Nasdaq After Announcing a Business Combination

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 September 1, 2020, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change. On September 14, 2020, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and replaced the proposed rule change in its entirety. The proposed rule change, as modified by Amendment No. 1, is 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, as modified by Amendment No. 1, from interested persons.

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

The Exchange proposes to treat as an Eligible Switch, for purposes of IM-5900-7, an Acquisition Company that switches from NYSE to Nasdaq after announcing a business combination. This Amendment No. 1 replaces and supersedes the original filing in its entirety.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 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 proposes to modify IM-5900-7 to treat as an Eligible Switch under that rule any Acquisition Company (as defined below) that both: (i) switched its listing from the New York Stock Exchange ("NYSE") to list on Nasdaq under IM-5101-2 after the company publicly announced that it entered into a binding agreement for a business combination; and (ii) subsequently satisfies the conditions in IM-5101-2(b) and lists on the Nasdaq Global or Global Select Markets in conjunction with that business combination.³

Nasdaq Rule IM-5101-2 imposes additional listing requirements on a company whose business plan is to complete an initial public offering ("IPO") and engage in a merger or acquisition with one or more unidentified companies within a specific period of time

³ This Amendment No. 1 replaces and supersedes the original filing in its entirety to make clarifying changes.

(“Acquisition Companies”).⁴ An Acquisition Company does not have an operating business and tends to trade infrequently and in a tight range until the company completes an acquisition. Therefore, these Acquisition Companies do not generally need shareholder communication services, market analytic tools or market advisory tools and, upon listing (whether as an IPO or when switching from another market), these Acquisition Companies do not receive complimentary services from Nasdaq under IM-5900-7.⁵ However, a company completing a business combination with a Nasdaq-listed Acquisition Company is eligible to receive services under IM-5900-7 when it lists on the Nasdaq Global or Global Select Market in conjunction with a business combination that satisfies the conditions in IM-5101-2(b).⁶ At this point, the Acquisition Company transitions to being an operating company and has a similar need as other companies for shareholder communication services, market analytic tools and market advisory tools. For this purpose, the Acquisition Company is treated as an “Eligible New Listing” under the rule, similar to a company listing in connection with its IPO.⁷

Nasdaq treats a company that switches its listing from NYSE to the Nasdaq Global or Global Select Market as an “Eligible Switch” and offers such companies a package of services

⁴ Securities Exchange Act Release No. 58228 (July 25, 2008), 73 FR 44794 (July 31, 2008) (adopting the predecessor to IM-5101-2).

⁵ See Securities Exchange Act Release No. 79366 (November 21, 2016), 81 FR 85663 (November 28, 2016).

⁶ IM-5900-7(e).

⁷ Under IM-5900-7 “Eligible New Listings” include “companies listing on the Global or Global Select Markets in connection with their initial public offering in the United States, including American Depositary Receipts (other than a company listed under IM-5101-2), upon emerging from bankruptcy, in connection with a spin-off or carve-out from another company, in connection with a Direct Listing as defined in IM-5315-1 (including the listing of American Depositary Receipts), or in conjunction with a business combination that satisfies the conditions in IM-5101-2(b).”

that can be more valuable than the package of services offered to Eligible New Listings.⁸ This enhanced package, in part, reflects the competition in the market for listing services.

Under this construct, an Acquisition Company listed on NYSE that switches to Nasdaq as an Acquisition Company would not receive any services when it switches, even if it has already announced its business combination, but would receive services as an Eligible New Listing when it completes a business combination that satisfies the requirements of IM-5101-2(b). On the other hand, if the company waits until it completes a business combination and then switches to Nasdaq, the company would not be listing on Nasdaq as an Acquisition Company under IM-5101-2 and the company would receive services with a higher value as an Eligible Switch.

Nasdaq believes that certain companies may prefer to switch markets after they announce their business combination, but before they consummate it, and that the competition for listing such a company is similar to the competition for a company that qualifies as an Eligible Switch today. Accordingly, Nasdaq proposes to treat as an Eligible Switch any company that switches its listing from NYSE and lists on Nasdaq under IM-5101-2 after the company has 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.⁹

⁸ An Eligible Switch with a market capitalization less than \$750 million receives the same package of services for the same two year term as an Eligible New Listing. An Eligible Switch with a market capitalization of \$750 million or more receives service with a higher total retail value than a comparably sized Eligible New Listing and will receive those services for four years instead of two years.

⁹ In the event that the Acquisition Company terminates the business combination that was announced when it switched it would not be eligible to receive services as an Eligible Switch under the proposed rule; however, if the Acquisition Company subsequently completes a different business combination it may be eligible to receive services as an Eligible New Listing as described in existing IM-5900-7(e).

Removing the existing incentive for an Acquisition Company to delay switching until the time of its business combination will allow Nasdaq to process both the removal of the Acquisition Company and the simultaneous addition of the operating company, which will help ensure that the transaction is processed smoothly for the benefit of the company's investors. Otherwise, multiple markets would need to carefully choreograph the removal of the company's securities from one market, a change in the name and symbol of the securities, and the addition of securities to another market, which all occurs in conjunction with a significant corporate event – the closing of the business combination.

Of course an Acquisition Company could only switch its listing to Nasdaq if it satisfies all of Nasdaq's initial listing requirements. In addition, the combined company would again have to satisfy all initial listing requirements at the time of the business combination.¹⁰ As under existing rules, the Acquisition Company itself would not receive services as an Eligible Switch under the proposed rule and the services would only be available to the company upon completing its business combination and listing on the Nasdaq Global or Global Select Markets pursuant to the conditions described in IM-5900-7(e).¹¹

¹⁰ See IM-5101-2(d) and (e).

¹¹ Nasdaq has proposed to offer Acquisition Companies listed on Nasdaq a complimentary global targeting tool. See Exchange Act Release No. 89413 (July 28, 2020), 85 FR 46759 (August 3, 2020) (SR-Nasdaq-2020-044). If approved, an Acquisition Company that switches its listing to Nasdaq after the public announcement that the company entered into a binding agreement for the business combination intended to satisfy the conditions in IM-5101-2(b), as described herein, would be eligible to receive that tool from the date of listing until 60 days following the completion of the business combination, or such time that the Acquisition Company publicly announces that such agreement is terminated.

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.

Finally, Nasdaq proposes non-substantive technical amendments to IM-5900-7. Specifically, Nasdaq proposes to eliminate most of the description of the history of the rule from the rule text because it is no longer applicable to any companies. However, Nasdaq proposes to relocate to a new paragraph (g) and make minor non-substantive changes to the discussion about the 2018 change to the services offered because some companies are still eligible to receive services under the rule in effect prior to the 2018 change.¹² Nasdaq also proposes to renumber other paragraphs of the rule in order to improve the rules' readability.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Exchange Act,¹³ in general, and furthers the objectives of Section 6(b)(5) of the Exchange Act,¹⁴ 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 and is not designed to permit unfair discrimination between issuers. Nasdaq also believes that the proposed rule change is

¹² See Securities Exchange Act Release No. 82976 (March 30, 2018), 83 FR 14683 (April 5, 2018) (SR-NASDAQ-2018-023). This rule change became operative for new listings on or after April 23, 2018. An Eligible Switch that listed under the rule in effect before this date could receive services under the prior rule for up to four years from its listing date.

¹³ 15 U.S.C. 78f(b).

¹⁴ 15 U.S.C. 78f(b)(5).

consistent with the provisions of Sections 6(b)(4),¹⁵ and 6(b)(8),¹⁶ 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,¹⁷ 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. In particular, Nasdaq believes it is reasonable, and not unfairly discriminatory, to treat an Acquisition Company as an Eligible Switch for purposes of IM-5900-7 following the public announcement of the business combination that is intended to satisfy the conditions in Listing Rule IM-5101-2(b) because the Acquisition Company may reconsider its listing market at that time, in connection with its rebranding and the launch of the operating company as a public company. Nasdaq believes that treating the company as an Eligible Switch would provide an incentive to the company to list on Nasdaq.

In addition, Nasdaq believes that in most instances involving an Acquisition Company that has announced a business combination, the operating company plays a significant role in deciding where to list the combined company. Accordingly, it is not unfair to treat an

¹⁵ 15 U.S.C. 78f(4).

¹⁶ 15 U.S.C. 78f(8).

¹⁷ The Justice Department has noted the intense competitive environment for exchange listings. See “NASDAQ OMX Group Inc. and IntercontinentalExchange 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.

Acquisition Company that has announced a business combination differently from one that has not yet made such an announcement. Nasdaq believes it is not an inequitable allocation of fees to treat an Acquisition Company as an Eligible Switch following the public announcement of the business combination that is intended to satisfy the conditions in Listing Rule IM-5101-2(b) for these same reasons and because the consideration about whether to switch markets is roughly the same for an Acquisition Company that has publicly announced a business combination as it is for other companies that are considered Eligible Switches.

Nasdaq also believes that the proposed rule change is consistent with the objectives of Section 6(b)(5) because it will remove an impediment to a free and open market and a national market system, and will help to protect investors by removing an impediment for an Acquisition Company to switch its listing prior to the closing of its business combination. If a company is forced to wait to switch to Nasdaq until the time it closes the business combination in order to be treated as an Eligible Switch, additional risks can be introduced into the process because both the exchange transfer and the closing of the transaction, which will typically includes a concurrent name and symbol change, must be coordinated between two exchanges. In contrast, if the Acquisition Company is able to switch earlier, then there is no additional cross-market coordination required at the time of closing, which is a significant step in the company's life-cycle. The ability to switch before the closing without an adverse effect in the services that the company will receive from Nasdaq reduces potential risks for the company and its investors at the time of closing of the business combination and it will thereby remove an impediment to a free and open market and a national market system and help to better protect investors.

The non-substantive changes to eliminate non-applicable history from the rule text and renumber and reorganize the rule will improve the rule's readability and thereby remove an

impediment to a free and open market and a national market system and help to better protect investors.

Nasdaq further 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.¹⁸

Finally, Nasdaq also believes it is reasonable to balance its need to remain competitive with other listing venues, while at the same time ensuring adequate revenue to meet its regulatory responsibilities. Nasdaq notes that no other company will be required to pay higher fees as a result of the proposed amendments and it represents that providing this service will have no impact on the resources available for its regulatory programs.

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. The proposed rule change reflects that competition, but it does not impose any burden on the competition with other exchanges. Rather, Nasdaq believes the proposed changes will enhance competition for listings of Acquisition Companies.

Other exchanges can also offer similar services to companies, thereby increasing competition to the benefit of those companies and their shareholders. Accordingly, Nasdaq does

¹⁸ 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)).

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.

Nasdaq also notes that Nasdaq Corporate Solutions competes with other service providers in providing the services that are offered to Eligible Switches. To the extent that these other providers believe that Nasdaq offering a complimentary services for a limited time creates a competitive burden on their offerings, they are able to craft a similar program to attract Acquisition Companies that have publicly announced a business combination to their services.

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, as modified by Amendment No. 1, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2020-060 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR- NASDAQ-2020-060. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule 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, D.C. 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to

make available publicly. All submissions should refer to File Number SR- NASDAQ-2020-060, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

J. Matthew DeLesDernier
Assistant Secretary

¹⁹ 17 CFR 200.30-3(a)(12).