

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-63207; File No. SR-NASDAQ-2010-134)

October 28, 2010

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt Additional Criteria for Listing Commodity Stockpiling Companies That Have Indicated That Their Business Plan is to Buy and Hold Commodities

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 October 15, 2010, 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 Nasdaq. 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 the Substance of the Proposed Rule Change

Nasdaq proposes to adopt additional criteria for listing companies that have indicated that their business plan is to buy and hold commodities and to provide transparency to the criteria Nasdaq will apply in doing so.

The text of the proposed rule change is below. Proposed new language is in *italics*; proposed deletions are in brackets.³

5101. Preamble to the Rule 5100 Series

No change

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at <http://nasdaqomx.cchwallstreet.com>.

IM-5101-1. Use of Discretionary Authority

No change

IM-5101-2. Listing of Companies Whose Business Plan is to Complete One or More Acquisitions

No change

IM-5101-3. Listing of Companies Whose Business Plan is to Purchase and Stockpile Raw Materials or Other Commodities

In the case of a Company whose business plan is to complete an initial public offering and use the proceeds to purchase and stockpile quantities of a raw material or other commodity (“commodity stockpiling companies” or “CSCs”), Nasdaq will permit the listing if the Company meets all applicable initial listing requirements, as well as the conditions described below.

(a) Within 18 months of the effectiveness of its IPO registration statement, or such shorter period that the company specifies in its registration statement, the Company must invest at least 85% of the net proceeds of the initial public offering in the raw material or other commodity identified in the registration statement, or return the unused amount pro-rata to its shareholders. The unused amount will be calculated based upon the sum of: a) monies spent by the CSC on acquiring the raw material or other commodity during the 18 month period; and b) monies contracted to be spent by the CSC on acquiring the raw material or other commodity over the ensuing 12 months.

(b) The Company must publish, or facilitate access to, at no cost and in an easily accessible manner, regular pricing information regarding the raw material or other commodity from a reliable, independent source, at least as frequently as current industry practice for the pricing of such raw material or other commodity, and no less frequently than twice per week.

(d) The Company must publish its Net Market Value (“NMV”) on a daily basis, or where pricing information for the raw material or other commodity is not available on a daily basis, no less frequently than twice per week. NMV is determined by multiplying the volume of the raw material or other commodity held in inventory by the last spot price published or otherwise relied upon by the Company, plus cash and other assets, less any liabilities. In addition, if the spot price of the raw material or other commodity fluctuates by more than 5%, the Company shall publish its NMV within one business day of such fluctuation.

(c) The Company must publish the quantity of the raw material or other commodity held in inventory, the average price paid and the Company’s NMV within two business days of any change in inventory held. Where the Company contracts to purchase or sell a material quantity of the raw material or other commodity, such information must be disclosed in a Form 8-K filing within four business days.

(e) The Company must employ the services of one or more independent third-party storage facilities, to safeguard the physical holdings of the raw material or other commodity that the Company acquires. Such facility should provide services consistent with those provided by custodians and these must include: storage and safeguarding; insurance; transfer of the raw material or other commodity in and out of the facility; visual inspections, spot checks and assays; confirmation of deliveries to supplier packing lists; and reporting of transfers and of inventory to the CSC and its auditors. Review of the third-party storage facility, including all lending, sales and delivery arrangements, must be overseen by a committee of Independent Directors.

(f) In addition to meeting the requirements in the Rule 5600 Series, the Company must create a committee comprised solely of Independent Directors who shall consider, at least quarterly, whether the Company’s purchasing activities have had a measurable impact on the market price

of the raw material or other commodity and shall report such determinations and make subsequent recommendations to the Board of Directors. The independent directors may rely upon, and shall have the authority to engage and pay, an industry expert in conducting this review. Should the Board of Directors disagree with, or not accept, the recommendations of this committee, the Company will be required to file a Form 8-K with the SEC outlining the relevant events, committee of independent directors' determinations and recommendations, and rationale for the Board's determination.

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IM-5605-3. Audit Committee Charter

Each Company is required to adopt a formal written charter that specifies the scope of its responsibilities and the means by which it carries out those responsibilities; the outside auditor's accountability to the audit committee; and the audit committee's responsibility to ensure the independence of the outside auditor. Consistent with this, the charter must specify all audit committee responsibilities set forth in Rule 10A-3(b)(2), (3), (4) and (5) under the Act. Rule 10A-3(b)(3)(ii) under the Act requires that each audit committee must establish procedures for the confidential, anonymous submission by employees of the listed Company of concerns regarding questionable accounting or auditing matters. The rights and responsibilities as articulated in the audit committee charter empower the audit committee and enhance its effectiveness in carrying out its responsibilities.

Rule 5605(c)(3) imposes additional requirements for investment company and commodity stockpiling company audit committees that must also be set forth in audit committee charters for these Companies.

5605(c)(2) Audit Committee Composition

(A) No change

5605(c)(2)(B) Non-Independent Director for Exceptional and Limited Circumstances

No change

IM-5605-4. Audit Committee Composition

No change

5605(c)(3) Audit Committee Responsibilities and Authority

The audit committee must have the specific audit committee responsibilities and authority necessary to comply with Rule 10A-3(b)(2), (3), (4) and (5) under the Act (subject to the exemptions provided in Rule 10A-3(c) under the Act), concerning responsibilities relating to: (i) registered public accounting firms, (ii) complaints relating to accounting, internal accounting controls or auditing matters, (iii) authority to engage advisors, and (iv) funding as determined by the audit committee. Audit committees for investment companies must also establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting or auditing matters by employees of the investment adviser, administrator, principal underwriter, or any other provider of accounting related services for the investment company, as well as employees of the investment company. Audit committees for commodity stockpiling companies must also establish procedures for the identification and management of potential conflicts of interest, and must review and approve any transactions where such potential conflicts have been identified. This should include any material amendment to the management agreement, including any change with respect to the compensation of the manager.

IM-5605-5. The Audit Committee Responsibilities and Authority

Audit committees must have the specific audit committee responsibilities and authority necessary to comply with Rule 10A-3(b)(2), (3), (4) and (5) under the Act (subject to the exemptions provided in Rule 10A-3(c) under the Act), concerning responsibilities relating to registered public accounting firms; complaints relating to accounting; internal accounting controls or auditing matters; authority to engage advisors; and funding. Audit committees for investment companies must also establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting or auditing matters by employees of the investment adviser, administrator, principal underwriter, or any other provider of accounting related services for the investment company, as well as employees of the investment company. Audit committees for commodity stockpiling companies must also establish procedures for the identification and management of potential conflicts of interest, and must review and approve any transactions where such potential conflicts have been identified. This should include any material amendment to the management agreement, including any change with respect to the compensation of the manager.

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(b) Not applicable [sic]

(c) Not applicable [sic]

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

In its filing with the Commission, Nasdaq 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. Nasdaq 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 wants to list companies whose business plan is to complete an initial public offering and use the proceeds to purchase and stockpile quantities of a specified commodity. As a result, Nasdaq proposes to adopt IM-5101-3, which will set forth criteria designed to afford investors in CSCs additional protection.

As a threshold matter, a CSC will be required to meet all applicable initial listing requirements. Thus, for initial listing, companies seeking to list on the Nasdaq Global Market must have a minimum market value of listed securities of \$75 million and companies seeking to list on the Nasdaq Capital Market must have a minimum market value of listed securities of \$50 million.⁴ However, due to their special characteristics, including:

- there might not be an underlying futures market in the particular raw material or other commodity to be stockpiled;
- it may be impractical to appoint a custodian for certain types of raw material or commodity; and
- their structure as corporations, not exchange traded funds,

⁴ Rules 5405(b)(3)(A) and 5505(b)(2)(A). Note that given the nature of these companies, they will not satisfy the alternative initial listing requirements because of the income and operating history requirements of those standards.

Nasdaq believes that a separate set of listing standards is appropriate and will impose the following additional criteria for listing a CSC:⁵

- (a) The CSC must represent that unless at least 85% of the net proceeds of the offering are used to acquire the raw material or other commodity within 18 months of the effectiveness of the registration statement, it will return the unused amount to its common stockholders. The unused amount will be calculated based upon the sum of: a) monies spent by the CSC on acquiring the raw material or other commodity during the 18 month period; and b) monies contracted to be spent by the CSC on acquiring the raw material or other commodity over the ensuing 12 months.
- (b) The CSC shall publish, or otherwise facilitate access to (at no-cost in an easily accessible manner), regular pricing information in the raw material or other commodity from a reliable, independent source at least as frequently as current industry practice for pricing of such raw material or other commodity, and no less frequently than twice per week.
- (c) The CSC shall publish its Net Market Value (“NMV”)⁶ on a daily basis, or where pricing information for the raw material or other commodity is not available on a daily basis, no less frequently than twice per week. NMV is determined by multiplying the volume of the raw material or other commodity held in inventory by the last spot price published, plus cash and other assets, less any liabilities. In the event that the spot price of the raw material or other commodity fluctuates by more than 5%, the CSC shall publish its revised NMV within one business day of such fluctuation.

⁵ These criteria were in places derived from protections Nasdaq has built into the rules relating to Special Purpose Acquisition Companies.

⁶ NMV differs from Net Asset Value (“NAV”) as NMV reflects the market price of indium, whereas NAV reflects the lower of cost or market price.

- (d) The CSC shall publish information concerning the quantity of the raw material or other commodity that it holds in inventory no later than two business days after taking delivery of or removing such raw material or other commodity from its warehouse.
- (e) The CSC must retain independent third-party storage facilities that provide services consistent with those provided by custodians. These services must include:
- a. Storage and safeguarding;
 - b. Insurance;
 - c. Transfer of the raw material or other commodity in and out of the facility;
 - d. Visual inspections, spot checks and assays;
 - e. Confirmation of deliveries to supplier packing lists;
 - f. Reporting of transfers and of inventory to the CSC and its auditors.

Review of the third-party storage facility, including all lending, sales and delivery arrangements, must be overseen by a committee of independent directors.

- (f) The CSC shall create a committee comprised solely of independent directors, which shall consider not less than quarterly, whether the CSC's purchasing activities have had a measurable impact on the price of the raw material or other commodity and shall report such determinations and make subsequent recommendations to the Board of Directors.
- The independent directors may rely upon, and shall have the authority to engage and pay, an independent industry expert in conducting this review. Should the Board of Directors disagree with, or not accept, the recommendations of this committee, the Company will be required to file a Form 8-K with the SEC outlining the relevant events, committee of independent directors' determinations and recommendations, and rationale for the Board's determination.

(g) The Audit Committee charter shall include the responsibility to establish procedures for the identification and management of potential conflicts of interest where such conflicts might act to the detriment of investors, and to review and approve any transactions where such conflicts have been identified. This should include any material amendment to the management agreement, including any change with respect to the compensation of the manager.

Nasdaq believes that these additional requirements will help protect investors by ensuring that CSCs remain committed to their described investment objectives and strategy; that adequate information will be available to investors on an ongoing basis regarding the value of their underlying investment; and that additional safeguards will exist in the form of independence and oversight of certain activities.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁷ in general and with Sections 6(b)(5) of the Act,⁸ in particular. Section 6(b)(5) requires, among other things, that a registered national securities exchange's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The proposed rule change is consistent with these requirements in that it imposes additional requirements on CSCs, which are designed to protect investors and the public interest and prevent fraudulent and manipulative acts and practices on the part of the CSC and their promoters.

⁷ 15 U.S.C. 78f.

⁸ 15 U.S.C. 78f(b)(5).

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

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

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

Written comments were neither solicited nor 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 (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2010-134 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NASDAQ-2010-134. 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, DC 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; the

Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2010-134 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.⁹

Florence E. Harmon
Deputy Secretary

⁹ 17 CFR 200.30–3(a)(12).