

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-79025; File No. SR-NASDAQ-2016-106)

October 3, 2016

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Modify Rule IM-5900-7 to Adjust the Entitlement to Services of Acquisition Companies

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on September 22, 2016, 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 self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to modify the treatment of acquisition companies under IM-5900-7.

The text of the proposed rule change is available on the Exchange’s website at <http://nasdaq.cchwallstreet.com>, 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

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

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

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

1. Purpose

Nasdaq proposes to modify IM-5900-7 to change the treatment of acquisition companies under that rule.

Nasdaq offers complimentary services under IM-5900-7 to companies listing on the Nasdaq Global and Global Select Markets in connection with an initial public offering, upon emerging from bankruptcy, or in connection with a spin-off or carve-out from another company (“Eligible New Listings”) and to companies that switch their listing from the New York Stock Exchange (“NYSE”) to the Global or Global Select Markets (“Eligible Switches”).<sup>4</sup>

Nasdaq believes that the complimentary service program offers valuable services to newly listing companies, designed to help ease the transition of becoming a public company or switching markets, makes listing on Nasdaq more attractive to these companies, and also provides Nasdaq Corporate Solutions the opportunity to demonstrate the value of its services and forge a relationship with the company. The services offered include a whistleblower hotline, investor relations website, disclosure services for earnings or other press releases, webcasting, market analytic tools, and may include market advisory tools such as stock surveillance.

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<sup>4</sup> See Exchange Act Release No. 65963 (December 15, 2011), 76 FR 79262 (December 21, 2011) (SR-NASDAQ-2011-122) (adopting IM-5900-7); Exchange Act Release No. 72669 (July 24, 2014), 79 FR 44234 (July 30, 2014) (SR-NASDAQ-2014-058) (adopting changes to IM-5900-7); Exchange Act Release No. 78806 (September 9, 2016), 81 FR 63523 (September 15, 2016) (SR-NASDAQ-2016-098). These adopting releases are collectively referred to as the “Prior Filings.”

Depending on a company's market capitalization and whether it is an Eligible New Listing or an Eligible Switch, the value of the services provided range from \$141,000 to \$754,000, and one-time development fees of approximately \$3,500 are waived.<sup>5</sup> In addition, all companies listed on Nasdaq receive services from Nasdaq, including Nasdaq Online and the Market Intelligence Desk.

Generally, Nasdaq will not permit the initial or continued listing of a company that has no specific business plan or that has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies. However, in the case of a company whose business plan is to complete an initial public offering and engage in a merger or acquisition with one or more unidentified companies within a specific period of time (an "Acquisition Company"), Nasdaq will permit the listing if the company meets all applicable initial listing requirements, as well as the additional conditions described in IM-5101-2. These additional conditions generally require, among other things, that at least 90% of the gross proceeds from the initial public offering must be deposited in a "deposit account," as that term is defined in the rule, and that the company complete within 36 months, or a shorter period identified by the company, one or more business combinations having an aggregate fair market value of at least 80% of the value of the deposit account at the time of the agreement to enter into the initial combination.

Acquisition Companies do not have operating businesses and tend to trade infrequently and in a tight range until the company completes an acquisition. In addition, Acquisition

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<sup>5</sup> The exact values are set forth in IM-5900-7 and no change to these services or their values is proposed in this filing.

Companies issue few press releases and frequently do not have detailed websites. Therefore, upon listing, these companies do not generally need shareholder communication services, market analytic tools or market advisory tools, and generally would only benefit from the complimentary whistleblower hotline provided under IM-5900-7.<sup>6</sup> Accordingly, Nasdaq proposes to provide that an Acquisition Company listing on the Global Market<sup>7</sup> before it has satisfied the requirement of IM-5101-2(b), whether as an Eligible New Listing or an Eligible Switch, will not receive complimentary services under IM-5900-7.<sup>8</sup>

However, once an Acquisition Company completes a business combination with an operating company, the combined company is much like any other newly public company and could benefit from the complimentary services Nasdaq offers other newly public companies. Accordingly, Nasdaq proposes to include in the definition of an “Eligible New Listing” that receives complimentary services under IM-5900-7 an Acquisition Company that completes a business combination that satisfies the conditions in IM-5101-2(b) and that lists on the Global or Global Select Market in conjunction with that business combination.<sup>9</sup>

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<sup>6</sup> It typically takes more than two years for an Acquisition Company to identify a target and complete an acquisition. As a result, the term of any complimentary services offered to an Acquisition Company under IM-5900-7 as an Eligible New Listing would usually expire before the company acquired a target and began operating as an operating company that could benefit from the services.

<sup>7</sup> Rule 5310(i) provides that a company subject to IM-5101-2 is not eligible to list on the Global Select Market.

<sup>8</sup> To date, all companies listing under IM-5101-2 have listed on the Capital Market. The services described in IM-5900-7 are not available to companies listing on the Capital Market.

<sup>9</sup> The company would receive the same services under IM-5900-7, with the same value, as any other Eligible New Listing.

For purposes of IM-5900-7, Nasdaq will treat a company previously listed on the Capital Market as listing on the Global or Global Select Market in conjunction with a business combination that satisfies the conditions in IM-5101-2(b) if it files an application to list on the Global or Global Select Market before completing the combination and demonstrates compliance with all applicable criteria within 60 days of completing the business combination. This additional time may be required, in some cases, to allow the issuance of shares in the transaction and then for the newly formed entity to obtain information from third parties to demonstrate compliance with the shareholder and public float requirements.

If the Acquisition Company is listed on the Global Market at the time it completes a business combination that satisfies the conditions in IM-5101-2(b) and remains listed on the Global Market or transfers to the Global Select Market, the complimentary period will commence on the date of such business combination.<sup>10</sup> If the Acquisition Company is listed on the Capital Market at the time it completes the business combination that satisfies the conditions in IM-5101-2(b), the complimentary period will commence on the date of listing on the Global or Global Select Market.<sup>11</sup> In either case, however, if the company lists on the Global or Global Select Market and begins to use a particular service provided under IM-5900-7 within 30 days after the date of the business combination, the complimentary period for that service will begin on the date of first use.

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<sup>10</sup> An Acquisition Company must meet the initial listing requirements at the time of its business combination even if it is already listed on the Global Market. See IM-5101-2(d).

<sup>11</sup> An Acquisition Company that was listed on the Capital Market before the business combination would remain on the Capital Market until it demonstrates compliance with the applicable Global or Global Select Market initial listing criteria.

Nasdaq also proposes to delete a reference in the existing rule text to “NASDAQ” when referring to the Global and Global Select Markets, to conform to other references to the Global and Global Select Markets within the rule. Finally, Nasdaq proposes to update the introductory note in IM-5900-7 to include the specific date that a prior change to the rule was approved. This change is designed to ease understanding of the rule and eliminate the need to cross-reference the approval order for that prior change.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>12</sup> in general, and Section 6(b)(4), in particular, in that the proposal is designed, among other things, to provide for the equitable allocation of reasonable dues, fees, and other charges among Nasdaq members and issuers and other persons using its facilities. Nasdaq also believes that the proposed rule change is consistent with Section 6(b)(5) in that it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Nasdaq faces competition in the market for listing services,<sup>13</sup> and competes, in part, by offering valuable services to companies. Nasdaq believes that it is reasonable to offer complimentary services to attract and retain listings as part of this competition. All similarly situated companies are eligible for the same package of services.

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<sup>12</sup> 15 U.S.C. 78f.

<sup>13</sup> 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](http://www.justice.gov/atr/public/press_releases/2011/271214.htm).

Nasdaq also believes it is reasonable, and not unfairly discriminatory, to offer complimentary services to a company described in IM-5101-2 that acquires an operating business, ceases to be an Acquisition Company, and lists (or remains listed) on the Global or Global Select Market. When a company described in IM-5101-2 acquires an operating business and ceases to be an Acquisition Company, the company is similar to other Eligible New Listings, such as initial public offerings, and will have increased need to focus on identifying and communicating with its shareholders. Like the other Eligible New Listings that receive complimentary services under the existing rule, these companies are transitioning to the traditional public company model and the complimentary services provided will help ease that transition. In addition, these companies will be purchasing many of these services for the first time, and offering complimentary services will provide Nasdaq Corporate Solutions the opportunity to demonstrate the value of its services and forge a relationship with the company at a time when it is choosing its service providers. For these reasons, Nasdaq believes it is not an inequitable allocation of fees nor unfairly discriminatory to offer the services to a company described in IM-5101-2 when it completes a business combination satisfying IM-5101-2(b).

In addition, because Acquisition Companies described in IM-5101-2 have little use for services upon listing, and because they will be eligible to receive services if they complete a business combination satisfying IM-5101-2(b), Nasdaq does not think it is unfairly discriminatory to modify the rule so that a company described in IM-5101-2 does not receive services upon listing.

An Acquisition Company could list on the Global Market at the time of its initial public offering, but never complete an acquisition that satisfies the requirements of IM-5101-2(b). While under the proposed rule change such a company would never receive complimentary

services, Nasdaq does not believe that the services generally would be useful to the Acquisition Company and the Acquisition Company therefore would not suffer any meaningful detriment as a consequence.

Allowing an Acquisition Company up to 30 days after completing a business combination to start using the complimentary services reflects Nasdaq's experience that it can take companies a period of time to review and complete necessary contracts and training following their becoming eligible for those services. Allowing this modest 30-day period, if the company needs it, helps ensure that the company will have the benefit of the full period permitted under the rule to actually use the services, thus giving companies the full intended benefit.

Defining a company to be listing in conjunction with a business combination that satisfies the conditions in IM-5101-2(b) to include a company listed on the Capital Market that both filed an application to list on the Global or Global Select Market before completing the business combination and demonstrated compliance with all applicable criteria for the Global or Global Select Market within 60 days of completing the business combination reflects Nasdaq's experience that such a company may need a period of as long as 60 days to obtain information from third parties to demonstrate compliance with the listing requirements. Beginning the complimentary period for a company in this situation on the date of its listing on the Global or Global Select Market is consistent with the period provided to other Eligible New Listings and Eligible Switches, which begins on the date of listing. Moreover, prior to that point, there is no certainty as to whether the company will qualify for the Global or Global Select Market and be eligible to receive the services and, as a result, complimentary services could not be provided prior to that date. Nasdaq believes that this 60-day period appropriately recognizes the practical



problem that a company may have with demonstrating compliance with the initial listing requirements for the Global or Global Select Market at exactly the time of its business combination. However, a company that takes advantage of this time period cannot further extend the start of the complimentary period by using an additional 30-day period to start using the complimentary services.

Nasdaq further believes that it is not unfairly discriminatory to limit this 60-day period to Acquisition Companies transitioning from the Capital Market to the Global or Global Select Market and to not also extend it to Acquisition Companies already listed on the Global Market. An Acquisition Company that is listed on the Global Market was required to have 400 round lot holders upon initially listing and is required to have 400 total holders for continued listing. As a result, Nasdaq expects it would be rare for a company already on the Global Market to need additional time to demonstrate compliance with this, or other, initial listing requirement. Nasdaq believes that this is a non-discriminatory reason to distinguish between these types of companies.

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. The proposed rule change reflects Nasdaq's ongoing assessment of the competitive market for listings and does not place any unnecessary burden on that competition. In many cases, an Acquisition Company will consider transferring to a new listing venue when it completes a business combination. The proposed rule change will allow Nasdaq to compete to retain these companies by offering them a package of complimentary services that assists their transition to being a traditional public company.

Nasdaq believes that when the complimentary period ends, a former Acquisition Company that had acquired an operating business will be more likely to continue to use the Nasdaq Corporate Solutions service or a competing service, whereas otherwise they may not be exposed to the value of these services and therefore may not purchase any. This will create additional users of the service class and enhance competition among service providers.

In addition, other service providers can also offer similar services to companies, thereby increasing competition to the benefit of those companies and their shareholders. Accordingly, Nasdaq does not believe the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

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

No written comments were either solicited or received.

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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 60 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](mailto:rule-comments@sec.gov). Please include File Number SR- NASDAQ-2016-106 on the subject line.

##### Paper comments:

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

All submissions should refer to File Number SR-NASDAQ-2016-106. 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 the 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-2016-106 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.<sup>14</sup>

Robert W. Errett  
Deputy Secretary

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<sup>14</sup> 17 CFR 200.30-3(a)(12).