

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79366; File No. SR-NASDAQ-2016-106)

November 21, 2016

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

I. Introduction

On September 22, 2016, 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”)¹ and Rule 19b-4 thereunder,² a proposed rule change to modify the treatment of acquisition companies under Rule IM-5900-7 so that acquisition companies will not be entitled to complimentary services under IM-5900-7 until they complete an acquisition meeting the Exchange’s requirements, as described below. The proposed rule change was published in the Federal Register on October 7, 2016.³ The Commission received no comments on the proposal. This order grants approval of the proposed rule change.

II. Description of the Proposal

The Exchange proposed to amend Rule IM-5900-7 to adjust the timing of when complimentary services are provided to listed acquisition companies under that rule. Under the current rules, except as described below, Nasdaq generally does 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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 79025 (October 3, 2016), 81 FR 69881 (October 7, 2016) (“Notice”).

However, in the case of 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 (an “Acquisition Company”), Nasdaq will permit the listing on the Nasdaq Global Market or Capital Market if the company meets all applicable initial listing requirements, as well as the additional conditions described in Nasdaq Rule IM-5101-2 (Listing of Companies Whose Business Plan is to Complete One or More Acquisitions).⁴ Pursuant to Rule IM-5101-2(b), among other requirements, within 36 months of the effectiveness of its IPO registration statement, or such shorter period that the company specified in its registration statement, the company must complete one or more business combinations having an aggregate fair market value of at least 80% of the value of the deposit account (excluding any deferred underwriters fees and taxes payable on the income earned on the deposit account) at the time of the agreement to enter into the initial combination (a business combination that satisfies the conditions of IM-5101-2(b) is referred to as a “Business Combination”).⁵ Rule IM-5101-2 also requires that following each Business Combination, the combined company must meet the

⁴ Id. at 69882. Rule IM-5101-2(a) requires that at least 90% of the gross proceeds from the IPO and any concurrent sale by the company of equity securities must be deposited in a trust account maintained by an independent trustee, an escrow account maintained by an “insured depository institution,” as that term is defined in Section 3(c)(2) of the Federal Deposit Insurance Act, or in a separate bank account established by a registered broker or dealer (collectively, a “deposit account”). For a full set of requirements to list an Acquisition Company, see Rule IM-5101-2. The Exchange permits Acquisition Companies to list only on the Capital and Global Markets but not the Global Select Market. See Notice, supra note 3, at 69882 (citing Rule 5310(i), which provides that a company subject to IM-5101-2 is not eligible to list on the Global Select Market).

⁵ Rule IM-5101-2 also provides, among other things, that if the company does not meet the requirements for initial listing following a business combination or does not comply with one of the requirements set forth in the rule, Nasdaq will issue a Staff Delisting Determination to delist the company’s securities.

requirements for initial listing.⁶

As set forth in Rule IM-5900-7, the Exchange offers certain complimentary services to companies newly listing on the Nasdaq Global and Global Select Markets in connection with an IPO, 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”).⁷ The complimentary services provided to some listed companies under IM-5900-7 are not, however, available to companies listing on the Capital Market. The Exchange also noted that, as of the date of filing its proposal with the Commission, all companies listing as an Acquisition Company have listed on the Capital Market.⁸

Currently, pursuant to Rule IM-5900-7, the services offered include a whistleblower hotline (with a retail value of approximately \$4,000 annually), an investor relations website (with a retail value of approximately \$16,000 annually), disclosure services for earnings or other press releases (with a retail value ranging from \$15,000 to \$20,000 annually, depending on the company’s market capitalization and whether it is an Eligible New Listing or an Eligible Switch), audio webcasting (with a retail value of approximately \$6,500 annually), market analytic tools (with a retail value ranging from approximately \$29,000 to \$51,000 annually, depending on the number of users granted access), and may include market advisory tools such as stock surveillance (with a retail value of approximately \$51,000 annually), global targeting

⁶ See Rule IM-5101-2. If the company does not meet the requirements for initial listing following a Business Combination or does not comply with one of the requirements set forth in the IM-5101-2, Nasdaq will issue a Staff Delisting Determination under Nasdaq Rule 5810 to delist the company’s securities. Id.

⁷ In addition, all companies listed on Nasdaq receive services from Nasdaq, including Nasdaq Online and the Market Intelligence Desk. See Notice, supra note 3, at 69882.

⁸ See Notice, supra note 3, at 69882.

(with a retail value of approximately \$40,000 annually), monthly ownership analytics and event driven targeting (with a retail value of approximately \$46,000 annually), and an annual perception study (with a retail value of approximately \$35,000 annually).⁹ The total retail value of the services provided ranges from approximately \$70,500 to \$188,500 annually, depending on a company's market capitalization and whether it is an Eligible New Listing or an Eligible Switch.¹⁰ In addition, one-time development fees of approximately \$3,500 to establish the services in the first year are waived.¹¹ The length of the complimentary period that a company receives services under IM-5900-7 is either two or four years from the listing date, depending on a company's market capitalization and whether it is an Eligible New Listing or an Eligible Switch.¹² Notwithstanding the foregoing, if an Eligible New Listing or Eligible Switch begins to use a particular service provided under IM-5900-7 within 30 days after the date of listing, the complimentary period for that service begins on the date of first use.¹³

The Exchange has now proposed to amend Rule IM-5900-7 to provide that an Acquisition Company will no longer be deemed to be an Eligible New Listing or an Eligible Switch at the time of its initial listing, but instead will be deemed to be an Eligible New Listing at such time as it has completed a Business Combination and lists such merged company on the

⁹ The Exchange noted that it does not propose to make any changes in its filing to the values of the various services provided to eligible listed companies discussed above, which values are specified in Rule IM-5900-7. See Notice, supra note 3, at 69882.

¹⁰ See Rule IM-5900-7.

¹¹ Id.

¹² Id.

¹³ Id.

Global or Global Select Market in conjunction with that Business Combination.¹⁴ Thus, under the proposal, an Acquisition Company will no longer be eligible to receive complimentary services under IM-5900-7 at the time of its initial listing on the Global Market before it has completed a Business Combination, but will instead be entitled to receive such services if and when it completes a Business Combination and lists on the Global or Global Select Market in conjunction with that Business Combination.

Under the proposal, for purposes of providing complimentary services under IM-5900-7 to certain listed companies, the Exchange would treat a company previously listed on the Nasdaq Capital Market as listing on the Global or Global Select Market in conjunction with a Business Combination 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. According to the Exchange, this additional 60-day period may be required, in some cases, to allow time for 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 of Nasdaq's Global or Global Select Market.¹⁵

Under the proposed rules, if the Acquisition Company is listed on the Global Market at the time it completes a Business Combination and remains listed on the Global Market or transfers to the Global Select Market, the complimentary period for services under IM-5900-7

¹⁴ The Exchange stated that after completing the Business Combination, the company would receive the same services under IM-5900-7, with the same value, as any other Eligible New Listing. See Notice, supra note 3, at 69882.

¹⁵ See Notice, supra note 3, at 69882. See, e.g., Nasdaq Rules 5315 and 5405, which set forth the quantitative listing requirements for Primary Equity Securities for the Nasdaq Global Select and Global Markets.

would commence on the date of such Business Combination.¹⁶ If the Acquisition Company is listed on the Capital Market at the time it completes the Business Combination, under the proposed rules the Acquisition Company would be given 60 days to demonstrate that it meets the listing criteria of the Global or Global Select Market; if it does qualify within 60 days, the complimentary period for services under IM-5900-7 would commence on the date of listing on the Global or Global Select Market.¹⁷ 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 would begin on the date of first use.

Finally, the Exchange proposed to make various non-substantive technical and conforming revisions to its Rules.¹⁸

III. Discussion and Commission's Findings

The Commission has carefully reviewed the proposed rule change and finds that it is

¹⁶ The Exchange noted that 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 Notice, supra note 3, at 69883 (citing Rule IM-5101-2(d)).

¹⁷ The Exchange stated that 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. See Notice, supra note 3, at 69882.

¹⁸ Specifically, the Exchange proposed 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. In addition, the Exchange proposed to update the introductory note in Rule IM-5900-7 to include the specific date that a prior change to the rule was approved. See Securities Exchange Act Release No. 78806 (September 9, 2016), 81 FR 63523 (September 15, 2016) (approving NASDAQ-2016-098) (“NASDAQ 2016 Order”).

consistent with the requirements of Section 6 of the Act.¹⁹ Specifically, the Commission believes it is consistent with the provisions of Sections 6(b)(4) and (5) of the Act,²⁰ in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among Exchange members, issuers, and other persons using the Exchange's facilities, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Moreover, the Commission believes that the proposed rule change is consistent with Section 6(b)(8) of the Act²¹ in that it does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Commission believes that it is consistent with the Act for the Exchange to adjust the timing of when Acquisition Companies are eligible to receive complimentary services under IM-5900-7 from the time of initial listing of the Acquisition Company on the Global Market in connection with an IPO or with switching their listing from the NYSE,²² to the time of listing on the Global or Global Select Market in conjunction with a Business Combination. The Exchange represented that, in its view, Acquisition Companies do not generally need the services provided under IM-5900-7 upon listing, but would find these services useful if they remain listed after they complete a Business Combination.²³ The Exchange explained that at the time of initial listing, Acquisition Companies do not have operating businesses, issue few press releases, and

¹⁹ 15 U.S.C. 78f. In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²⁰ 15 U.S.C. 78f(b)(4) and (5).

²¹ 15 U.S.C. 78f(b)(8).

²² An Acquisition Company that has not yet completed a Business Combination may switch from NYSE to the Capital or Global Market, but would only be eligible to receive the services under IM-5900-7 at the time it completes a Business Combination.

²³ See Notice, supra note 3, at 69882.

frequently do not have detailed websites.²⁴ The Exchange stated when an Acquisition Company completes a Business Combination with an operating company, the combined company is similar to other Eligible New Listings, such as IPOs, and will have increased need to focus on identifying and communicating with its shareholders.²⁵ The Exchange explained that 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 under IM-5900-7 will help ease that transition.²⁶ Therefore, the Exchange stated that it believes that it is not an inequitable allocation of fees nor unfairly discriminatory to offer the services to an Acquisition Company, as described in IM-5101-2, only upon completion of a Business Combination.²⁷

In addition, the Exchange stated that in many cases Acquisition Companies will consider transferring to a new listing venue at the time they complete a Business Combination, and that the proposed rule change will enable the Exchange to compete to retain these companies by offering them a package of complimentary services that assists their transition to becoming a traditional public operating company.²⁸

The Exchange also recognized that not all Acquisition Companies will complete a

²⁴ Id. The Exchange stated in its filing that Acquisition Companies tend to trade infrequently and in a tight range until the company completes an acquisition. Id. The Exchange also stated that it typically takes more than two years for an Acquisition Company to identify a target and complete an acquisition and, as a result, the term of any complimentary services offered to an Acquisition Company upon initial listing would usually expire before the company acquired a target and began operating as an operating company that could benefit from the services. Id.

²⁵ See id. at 69883.

²⁶ Id.

²⁷ Id.

²⁸ Id.

Business Combination and that some listed Acquisition Companies will therefore never become eligible for the complimentary services under IM-5900-7.²⁹ However, the Exchange reiterated that it does not believe that the services under IM-5900-7 generally would be useful to an Acquisition Company and that any such Acquisition Company therefore would not suffer any meaningful detriment as a consequence.³⁰

As noted in the previous order approving IM-5900-7, Section 6(b)(5) of the Act does not require that all issuers be treated the same; rather, the Act requires that the rules of an Exchange not unfairly discriminate between issuers.³¹ In its proposal, the Exchange has made representations that reasonably justify treating an Acquisition Company that lists on the Global or Global Select Market in conjunction with a Business Combination similar to a newly-listed operating company. In addition, when listed as an Acquisition Company, the Acquisition Company will also be eligible to receive complimentary products through the Exchange's Market Intelligence Desk and NASDAQ Online similar to all listed companies.³² The Commission further notes that an Acquisition Company that completes a Business Combination will be receiving the same package of services as an Eligible New Listing³³ and that it will not be receiving any additional benefits or services by virtue of the proposed rule change. The Commission has previously found that the package of complimentary services offered to Eligible

²⁹ Id.

³⁰ Id.

³¹ 15 U.S.C. 78f(b)(5); see also Securities Exchange Act Release No. 65963 (December 15, 2011), 76 FR 79262 (December 21, 2011) (approving NASDAQ-2011-122) (“NASDAQ 2011 Order”).

³² See supra, note 7; see also NASDAQ 2011 Order, supra note 31, at 79262.

³³ See Rule IM-5101-2, requiring, among other things, that an Acquisition Company meet the requirements for initial listing after it meets the business combination requirements of IM-5101-2(b) just as is required for other Eligible New Listings.

New Listings and Eligible Switches is equitably allocated among issuers consistent with Section 6(b)(4) of the Act and that describing the values of the services adds greater transparency to the Exchange's rules and to the fees applicable to such companies.³⁴ The Commission also believes that describing in the exchange's rules the products and services available to listed companies and their associated values will ensure that individual listed companies are not given specially negotiated packages of products or services to list, or remain listed, that would raise unfair discrimination issues under the Act.³⁵ Based on the foregoing, the Commission believes that the Exchange has provided a sufficient basis for adjusting the timing of when Acquisition Companies are eligible to receive the additional complimentary services set forth under IM-5900-7 from the time of an Acquisition Company's initial listing on the Global Market in connection with an IPO or with switching their listing from NYSE, to the time of an Acquisition Company's listing on the Global or Global Select Market in conjunction with a Business Combination, and that this change does not unfairly discriminate among issuers and is therefore consistent with the Act. For similar reasons, and as the value of the services offered are not changing, only the timing of when such services are provided to an Acquisition Company, we find that the proposal is consistent with Section 6(b)(4) of the Act.³⁶

The Commission also believes that it is consistent with the Act for the Exchange to allow the complimentary period for a particular service to begin on the date of first use if an Acquisition Company that has completed a Business Combination begins to use the service

³⁴ See NASDAQ 2011 Order, supra note 31, at 79266 and NASDAQ 2016 Order, supra note 18, at 63525.

³⁵ See, e.g., Securities Exchange Act Release No. 65127 (August 12, 2011), 76 FR 51449, 51452 (August 18, 2011) (approving NYSE-2011-20).

³⁶ The Commission has also approved similar rule proposals filed by other exchanges. See infra note 48 and accompanying text.

within 30 days after the date of the Business Combination. The Exchange stated in its filing that, in its experience, it can take companies a period of time to review and complete necessary contracts and training for the complimentary services under IM-5900-7 following their becoming eligible for those services and that allowing this modest 30 day period, if the company needs it, will help to 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.³⁷ The Commission notes that Rule IM-5900-7 currently allows an Eligible New Listing or an Eligible Switch to begin using services within 30 days of its initial listing date.³⁸ As noted in the NASDAQ 2014 Order, the Commission believes that this would provide only a short window of additional time to allow companies to finalize their contracts for the complimentary services. The Commission notes that under the proposed rule this additional 30 day window would only be available to Acquisition Companies that list on the Global or Global Select Markets in conjunction with a Business Combination and thereby treats such Acquisition Companies, at the time they qualify for listing as an operating company, the same as other newly-listed companies that qualify as Eligible New Listings under Rule IM-5900-7.³⁹

The Commission believes that it is consistent with the Act for the Exchange to define a company listing on Nasdaq's Global or Global Select Markets in conjunction with a Business Combination to include a company that is listed on the Capital Market at the time of the Business Combination if it both filed an application to list on the Global or Global Select Market before completing the Business Combination and demonstrates compliance with all applicable criteria

³⁷ See Notice, supra note 3, at 69883.

³⁸ See Securities Exchange Act Release No. 72669 (July 24, 2014), 79 FR 44234 (July 30, 2014) (approving NASDAQ-2014-058) ("NASDAQ 2014 Order").

³⁹ The Commission expects the Exchange to track the start (and end) date of each free service.

for the Global or Global Select Market within 60 days of completing the Business Combination, and to provide that the period of complimentary services for such a company will commence on the date of its listing on the Global or Global Select Market. The Exchange represented that, in its experience, 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.⁴⁰ The Exchange stated 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.⁴¹ The Exchange further stated that it 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, as the Exchange expects it would be rare for a company already on the Global Market to need additional time to demonstrate compliance with initial listing requirements.⁴² The Commission also notes that the treatment of an Acquisition Company completing a Business Combination on the Capital Market as an Eligible New Listing under IM-5900-7 for purposes of listing on the Global and Global Select Markets, as long as it completes the Business Combination and lists no later than 60 days from that date, is consistent with the other changes noted above concerning when complimentary services are received by an Acquisition Company listed on the Global and Global Select Markets.

⁴⁰ See Notice, supra note 3, at 69883. As noted above, the Exchange stated that 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. See supra note 15 and accompanying text.

⁴¹ See Notice, supra note 3, at 69883.

⁴² See id. For example, the Exchange explained that an Acquisition Company that is already listed on the Global Market would be required to have 400 round lot holders upon initially listing and would be required to have 400 total holders for continued listing. Id.

In addition, the Exchange stated that beginning the complimentary period for a company in this situation on the date of its listing on the Global or Global Select Market (rather than on the date of the Business Combination as is the case for companies listed on Global Market at the time of the Business Combination) is consistent with the period provided to other Eligible New Listings and Eligible Switches under the current rules, which begins on the date of listing.⁴³ The Exchange also noted that, prior to the point of demonstrating compliance with the listing requirements, 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.⁴⁴ Furthermore, the Exchange noted that the proposal provides that a company that takes advantage of the 60-day time period to demonstrate compliance cannot further extend the start of the complimentary period by using an additional 30-day period to start using the complimentary services.⁴⁵

Based on the foregoing, the Commission believes that the Exchange has provided a sufficient basis for treating a company listed on the Capital Market at the time it completes a Business Combination as listing on the Global or Global Select Market in conjunction with a

⁴³ As described above, while the complimentary period will begin on the date of listing on the Global or Global Select Markets, if the company begins to use a particular service within 30 days after the date of the Business Combination, the period begins for that service on the date of first use.

⁴⁴ See Notice, supra note 3, at 69883.

⁴⁵ See id. For example, if a company completes a Business Combination on Day 1, demonstrates compliance with Global or Global Select Market listing standards and becomes listed on that market on Day 45, and begins using a certain complimentary service on Day 90, the complimentary period for that service would begin on Day 45, the day of listing. However, if a company completes a Business Combination on Day 1 and demonstrates compliance with Global or Global Select Market listing standards and becomes listed on one of those markets on Day 15, and begins using a certain complimentary service on Day 30, the complimentary period for that service would begin on Day 30, which is 30 days from the Business Combination or 15 days after listing.

Business Combination 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, and for beginning the complimentary period for a company in this situation on the date of its listing on the Global or Global Select Market rather than on the date of the Business Combination, and that these changes do not unfairly discriminate among issuers and are therefore consistent with Section 6(b)(5) of the Act.

The Commission also believes that the Exchange is responding to competitive pressures in the market for listings in making this proposal. Specifically, the Exchange has represented that, in many cases, an Acquisition Company will consider transferring to a new listing venue when it completes a Business Combination and that the proposed rule change would allow it to compete to retain these companies by offering them a package of complimentary services that assists their transition to being a traditional public company.⁴⁶ The Exchange also represented 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, which will create additional users of the service class and enhance competition among service providers.⁴⁷ Further, the Commission notes that it has recently approved similar proposals filed by other exchanges with respect to the timing of complimentary services offered to Acquisition Companies under their rules.⁴⁸ The Commission

⁴⁶ See Notice, supra note 3, at 69883.

⁴⁷ See id. The Exchange also noted that other service providers can also offer similar services to companies, thereby increasing competition to the benefit of those companies and their shareholders. Id.

⁴⁸ See Securities Exchange Act Release Nos. 79056 (October 6, 2016), 81 FR 70449 (October 12, 2016) (approving NYSEMKT-2016-62) and 79187 (October 28, 2016), 81 FR 76403 (November 2, 2016) (approving NYSE-2016-58).

also notes that nothing in the Exchange's rules requires an Acquisition Company to remain listed on the Exchange after it completes a Business Combination and that such company is free to list on other markets. Accordingly, the Commission believes that the proposed rule reflects the current competitive environment for exchange listings among national securities exchanges, and is appropriate and consistent with Section 6(b)(8) of the Act.⁴⁹

Finally, the Commission finds that it is consistent with Section 6(b)(5) of the Act⁵⁰ for the Exchange to make various technical and conforming revisions to facilitate clarity of its Rules.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁵¹ that the proposed rule change (SR-NASDAQ-2016-106) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵²

Robert W. Errett
Deputy Secretary

⁴⁹ 15 U.S.C. 78f(b)(8).

⁵⁰ 15 U.S.C. 78f(b)(5).

⁵¹ 15 U.S.C. 78s(b)(2).

⁵² 17 CFR 200.30-3(a)(12).