

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79784; File No. SR-NASDAQ-2016-135)

January 12, 2017

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 2, Relating to Continued Listing Requirements for Exchange-Traded Products

I. Introduction

On September 30, 2016, The NASDAQ Stock Market LLC (“Exchange” or “Nasdaq”) 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 related to continued listing requirements and delisting procedures for exchange-traded products listed pursuant to the Nasdaq Rule 5700 Series. The proposed rule change was published for comment in the Federal Register on October 17, 2016.³ On November 25, 2016, the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.⁴ On January 9, 2017, the Exchange filed Amendment No. 1 to the proposed rule change. On January 11, 2017, the Exchange filed Amendment No. 2 to the proposed rule change, which amended and replaced the original proposal as modified by Amendment No. 1.⁵ The Commission received no comment letters on

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 79081 (October 11, 2016), 81 FR 71548.

⁴ See Securities Exchange Act Release No. 79399, 81 FR 86759 (December 1, 2016).

⁵ In Amendment No. 2, the Exchange: (i) amended proposed Rule 5701(d) to require a Company with securities listed under the Rule 5700 Series to provide the Exchange with prompt notification if the Company (rather than an Executive Officer of the Company)

the proposed rule change. The Commission is publishing this notice to solicit comments on Amendment No. 2 from interested persons, and is approving the proposed rule change, as modified by Amendment No. 2, on an accelerated basis.

II. Description of the Proposed Rule Change, as Modified by Amendment No. 2

The Exchange proposes to amend the Rule 5700 Series to specify continued listing requirements for products listed under those rules, which include products listed pursuant to Rule 19b-4(e) under the Act (“generically-listed products”) and products listed pursuant to proposed rule changes filed with the Commission (“non-generically-listed products”).⁶

The Exchange also proposes to amend the Rule 5700 Series to specify issuer notification requirements related to failures to comply with continued listing requirements. Specifically, the Exchange proposes to add Rule 5701(d) to require an issuer with securities listed under the Rule 5700 Series to promptly notify the Exchange of any non-compliance with the requirements of the

becomes aware of its non-compliance with the requirements of the Rule 5700 Series; (ii) further amended rules within the Rule 5700 Series to reflect that certain listing requirements (including certain statements or representations in rule filings for the listing and trading of specific products) apply on an initial and ongoing basis; (iii) further amended rules within the Rule 5700 Series to consistently state that the Exchange will initiate delisting proceedings if continued listing requirements are not maintained; (iv) amended the Rule 5700 Series to provide that the Exchange would initiate delisting proceedings due to an interruption to the dissemination of index, reference asset, or intraday indicative values (as applicable to the product) only if the interruption persists past the trading day in which it occurred; (v) specified an implementation date for the proposed changes; and (vi) made non-substantive and conforming changes throughout the Rule 5700 Series in order to provide consistency throughout these rules, update rule numbering, and update cross-references. Amendment No. 2 is available at <https://www.sec.gov/comments/sr-nasdaq-2016-135/nasdaq2016135-1481751-130537.pdf>.

⁶ See *infra* notes 13-15 and accompanying text. The Exchange also proposes to amend certain listing requirements within the Rule 5700 Series. Specifically, the Exchange proposes to amend the requirement to delist a product if, following the initial 12-month period following commencement of trading on Nasdaq, there are fewer than 50 record or beneficial holders of the listed product for 30 or more consecutive trading days, by deleting the threshold of “30 or more consecutive trading days.” See, e.g., proposed changes to Rule 5705(a)(9)(B)(c).

Rule 5700 Series. In addition, with respect to non-generically-listed products, the Exchange proposes to require an issuer to notify the Exchange of its failure to comply with any continued listing requirements that were specified in the proposals to list those products. As proposed, the Exchange would initiate delisting proceedings for a product listed under the Rule 5700 Series if any of its continued listing requirements (including those set forth in a Nasdaq Rule and those set forth in an applicable proposed rule change) are not continuously maintained.⁷

The Exchange also proposes to amend Rule 5810 to specify the delisting procedures for products listed under the Rule 5700 Series. Under proposed Rule 5810(c)(2)(A), unless the issuer is currently under review by an Adjudicatory Body for a Staff Delisting Determination, the Listing Qualifications Department may accept and review a plan to regain compliance when an issuer fails to meet a continued listing requirement contained in the Rule 5700 Series. The issuer would be required to submit its compliance plan within 45 calendar days of the Exchange staff's notification of deficiencies, and certain issuers would be required to pay a compliance plan review fee.

Finally, the Exchange proposes to make conforming and technical changes throughout the Rule 5700 Series to maintain consistency in its rules. For example, the Exchange proposes to consistently use the language "initiate delisting proceedings under the Rule 5800 Series" when describing the delisting process for a product that fails to meet continued listing requirements;⁸ consistently state in the Portfolio Depository Receipts and Index Fund Shares rules that, if the

⁷ Unlike failures to comply with other continued listing requirements, if there is an interruption to the dissemination of the reference asset, index, or intraday indicative values for a listed product, the Exchange would initiate delisting proceedings under the Rule 5800 Series only if the interruption persists past the trading day in which it occurred. See, e.g., proposed changes to Rules 5705(a)(9)(B)(i)(d)-(e) and 5705(b)(9)(B)(i)(d)-(e).

⁸ See, e.g., proposed changes to Rules 5705(a)(9)(B)(i) and 5705(b)(9)(B)(i).

index that underlies a series of Portfolio Depository Receipts or Index Fund Shares is maintained by a broker-dealer or fund advisor, the index shall be calculated by a third party who is not a broker-dealer or fund advisor;⁹ and consistently reflect that delisting “following the initial 12-month period following commencement of trading on Nasdaq” only applies to the record/beneficial holder, number of shares issued and outstanding, and the market value of shares issued and outstanding requirements.¹⁰

The Exchange proposes to implement the rule changes by August 1, 2017.

III. Discussion and Commission Findings

The Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹¹ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,¹² which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to

⁹ See proposed changes to Rules 5705(a)(4)(B)(i), 5705(a)(5)(A)(i), 5705(b)(4)(B)(i), and 5705(b)(5)(A)(i); see also Rule 5705(a)(3)(B)(i) (currently stating that, for certain Portfolio Depository Receipts, “[i]f the index is maintained by a broker-dealer or fund advisor . . . the index shall be calculated by a third party who is not a broker-dealer or fund advisor”) and 5705(b)(3)(B)(i) (currently stating that, for certain Index Fund Shares, “[i]f the index is maintained by a broker-dealer or fund advisor . . . the index shall be calculated by a third party who is not a broker-dealer or fund advisor”).

¹⁰ See, e.g., proposed changes to Rule 5711(d)(vi)(B); see also, e.g., Rule 5711(h)(iv)(B)(1) (currently applying the 12-month threshold only to the record/beneficial holder, number of units issued and outstanding, and market value of units issued and outstanding requirements for Partnership Units).

¹¹ 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).

¹² 15 U.S.C. 78f(b)(5).

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.

The Commission does not believe that the proposal raises unique or novel regulatory issues. As the Commission previously stated, the development, implementation, and enforcement of standards governing the initial and continued listing of securities on an exchange are activities of critical importance to financial markets and the investing public. Once a security has been approved for initial listing, continued listing criteria allow an exchange to monitor the status and trading characteristics of that issue to ensure that it continues to meet the exchange's standards for market depth and liquidity so that fair and orderly markets can be maintained.

Currently, certain rules within the Rule 5700 Series impose specific listing requirements on an initial basis, without imposing ongoing listing requirements that are intended to achieve the same goals as these initial listing requirements.¹³ To fill this gap, the proposal would specify that certain listing requirements within the Rule 5700 Series apply both on an initial and ongoing basis, rather than only at a single point in time (i.e., at the time of initial listing).¹⁴ Also, with

¹³ Moreover, certain of the listing requirements do not explicitly state that they apply on an ongoing, as well as initial, basis. In these cases, the proposal would make explicit that the requirements apply both on an initial and ongoing basis. See, e.g., proposed changes to Rule 5705(a)(3)(B)-(C) (making explicit that, for Portfolio Depository Receipts, requirements related to index methodology and index value dissemination, as well as intraday indicative value dissemination, apply on an initial and ongoing basis); proposed changes to Rule 5710(e) (making explicit that, for Linked Securities, requirements related to tangible net worth and earnings apply on an initial and ongoing basis); proposed changes to Rule 5711(c), Commentary .03 (making explicit that, for Trust Certificates, requirements related to the qualifications of a trustee and changes to a trustee apply on an initial and ongoing basis).

¹⁴ For example, current Rule 5705(a)(3)(A)(i) sets forth requirements for component stocks of an index or portfolio underlying a series of generically-listed Portfolio Depository Receipts, which apply upon initial listing. These requirements include, for example, minimum market value, minimum monthly trading volume, and concentration limits for the component stocks. The proposal would specify that these requirements apply both on an initial and continued basis.

respect to non-generically listed products, the Exchange proposes to amend the Rule 5700 Series to provide that any of the statements or representations in a proposed rule change regarding: (i) the description of the index, holdings, or reference asset (as applicable to a specific product); (ii) limitations on index composition, holdings, or reference assets (as applicable to a specific product); (iii) dissemination and availability of index, reference asset, or intraday indicative values (as applicable to a specific product); or (iv) the applicability of Exchange rules and surveillance procedures, constitute continued listing requirements.¹⁵

Because the proposal specifies continued listing requirements for products listed pursuant to the Rule 5700 Series, the Commission believes the proposal is designed to achieve on a continuing basis the goals of the listing requirements, including ensuring that the Exchange lists products that are not susceptible to manipulation and maintaining fair and orderly markets for the listed products. In particular, the Commission believes that the proposal is designed to ensure that stocks with a substantial market capitalization and trading volume account for a substantial portion of the weight of an index or portfolio underlying a listed product;¹⁶ provide transparency

¹⁵ See, e.g., proposed Rule 5705(a)(9)(B)(i)(b). The Commission notes that it has approved proposed rule changes for the listing and trading of exchange-traded products that included similar representations. See, e.g., Securities Exchange Act Release No. 77548 (April 6, 2016), 81 FR 21626 (April 12, 2016) (SR-NASDAQ-2015-161). The Commission also notes that similar types of requirements exist in the Rule 5700 Series. See, e.g., Rule 5705(a)(3) (setting forth, among other things, index composition requirements and intraday indicative value dissemination requirements for certain generically-listed Portfolio Depository Receipts).

¹⁶ For example, as proposed, the requirements under Rule 5705(a)(3)(A), including minimum market value and minimum monthly trading volume requirements for components of the index or portfolio underlying Portfolio Depository Receipts, would apply both on an initial and ongoing basis. Also, for non-generically listed products, the proposal would provide that statements or representations made in the proposed rule changes relating the description of the portfolio, among other things, constitute continued listing requirements. See, e.g., proposed Rule 5705(a)(9)(B)(i)(b).

regarding the components of an index or portfolio underlying a listed product;¹⁷ ensure that there is adequate liquidity in the listed product itself;¹⁸ and provide timely and fair disclosure of useful information that may be necessary to price the listed product.¹⁹ Moreover, the Commission believes that the proposal to require an issuer to notify the Exchange of its failures to comply with continued listing requirements would supplement the Exchange's own surveillance of the listed products.²⁰

As noted above, the proposal specifies the delisting procedures for products listed pursuant to the Rule 5700 Series. The Commission believes that the proposed amendments to

¹⁷ For example, as proposed, the requirements under Rule 5705(a)(3)(A), including the requirement that components of the index or portfolio underlying Portfolio Depository Receipts be exchange-listed and NMS stocks, would apply both on an initial and ongoing basis.

¹⁸ For example, the Exchange proposes to amend Rule 5715(b)(2) to explicitly state that listing requirements for Selected Equity-Linked Debt Securities ("SEEDS") apply both on an initial and ongoing basis, including, for example, the minimum public distribution and the minimum market value of an issue of SEEDS.

The Commission also believes that the proposal to delete the threshold of "30 or more consecutive trading days" in the requirements for the number of beneficial or record holders is consistent with the goal of ensuring that there is adequate liquidity in the listed product on an ongoing basis. As proposed, the Exchange would initiate delisting proceedings for a product if it fails to comply with the minimum number of beneficial holders requirement, even if the non-compliance does not continue for 30 consecutive trading days. See supra note 6.

¹⁹ For example, the proposed changes to Rule 5705(a)(3)(B)-(C) would make explicit that the requirements related to the dissemination of the value of the index underlying Portfolio Depository Receipts and the Intraday Indicative Value for Portfolio Depository Receipts apply on an initial and ongoing basis.

²⁰ The Commission notes that this concept of issuer notification is not novel. For example, in connection with its proposal to adopt generic listing standards for Managed Fund Shares, the Exchange stated that, prior to listing pursuant to the generic listing standards, an issuer would be required to represent to the Exchange that it will advise the Exchange of any failure by a series of Managed Fund Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. See Securities Exchange Act Release No. 78918 (September 23, 2016), 81 FR 67033, 67036 (September 29, 2016) (SR-NASDAQ-2016-104).

Rule 5810 provide transparency regarding the process that the Exchange will follow if a listed product fails to meet its continued listing requirements. The Commission also notes that the process surrounding compliance plans already exists in Rule 5810. As a result, the proposed delisting procedures are not novel.

Finally, the Commission believes that the conforming and technical proposed changes do not raise novel issues, are designed to further the goals of the listing standards, and provide clarity and consistency in the Exchange's rules.

For the reasons discussed above, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with the Act.

IV. Accelerated Approval of Amendment No. 2

As noted above, in Amendment No. 2, the Exchange: (i) amended proposed Rule 5701(d) to require a Company with securities listed under the Rule 5700 Series to provide the Exchange with prompt notification if the Company (rather than an Executive Officer of the Company) becomes aware of its non-compliance with the requirements of the Rule 5700 Series; (ii) further amended rules within the Rule 5700 Series to reflect that certain listing requirements (including certain statements or representations in rule filings for the listing and trading of specific products) apply on an initial and ongoing basis; (iii) further amended rules within the Rule 5700 Series to consistently state that the Exchange will initiate delisting proceedings if continued listing requirements are not maintained; (iv) amended rules within the Rule 5700 Series to provide that the Exchange will initiate delisting proceedings due to an interruption to the dissemination of index, reference asset, or intraday indicative values (as applicable to the product) only if the interruption persists past the trading day in which it occurred; (v) specified an implementation date for the proposed changes; and (vi) made conforming and non-substantive

changes throughout the Rule 5700 Series. The Commission believes that Amendment No. 2 furthers the goals of the proposed rule change and does not raise novel regulatory issues. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,²¹ to approve the proposed rule change, as modified by Amendment No. 2, on an accelerated basis.

V. Solicitation of Comments on Amendment No. 2

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 2 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-2016-135 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-2016-135. 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

²¹ 15 U.S.C. 78s(b)(2).

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-2016-135 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²² that the proposed rule change (SR-NASDAQ-2016-135), as modified by Amendment No. 2, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²³

Brent J. Fields
Secretary

²² 15 U.S.C. 78s(b)(2).

²³ 17 CFR 200.30-3(a)(12).