

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-80348; File No. SR-NASDAQ-2017-032)

March 30, 2017

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Nasdaq Rule 5710

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 March 22, 2017, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. 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 amend Nasdaq Rule 5710 (Securities Linked to the Performance of Indexes and Commodities (Including Currencies)).

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 proposed rule change. The text of these statements may be examined at the places specified in

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The Exchange proposes to amend Nasdaq Rule 5710 (Securities Linked to the Performance of Indexes and Commodities (Including Currencies)), which allows the listing of Linked Securities.³ The proposed rule change will modify language in Nasdaq Rule 5710(e) to reflect a substantially similar change previously made by NYSE Arca, Inc. (“Arca”) to Arca Rule 5.2(j)(6)(A)(e)⁴ so both the Nasdaq and Arca provisions will be substantively identical.

Specifically, Nasdaq Rule 5710(e) states that for listing of a Linked Security,⁵ the issuer will be expected to have a minimum tangible net worth in excess of \$250 million and exceed by at least 20% the earnings requirements set forth in Nasdaq Rule 5405(b)(1)(A).⁶ The proposed

³ See Nasdaq Rule 5710, which in defining Linked Securities states that “Nasdaq will consider for listing and trading equity index-linked securities (“Equity Index-Linked Securities”) and commodity-linked securities (“Commodity-Linked Securities”), fixed income index-linked securities (“Fixed Income Index-Linked Securities”), futures-linked securities (“Futures-Linked Securities”) and multifactor index-linked securities (“Multifactor Index-Linked Securities” and, together with Equity Index-Linked Securities, Commodity-Linked Securities, Fixed Income Index-Linked Securities and Futures-Linked Securities, “Linked Securities”) that in each case meet the applicable criteria of this Rule.”

⁴ See Securities Exchange Act Release No. 56637 (Oct. 10, 2007), 72 FR 58704 (Oct. 16, 2007) (SR-NYSEArca-2007-92). At the time of Arca’s initial filing, this rule was Arca Rule 5.2(j)(6)(e).

⁵ This requirement will also apply for continued listing effective August 1, 2017. See Securities Exchange Act Release No. 79784 (Jan. 12, 2017), 82 FR 6664 (Jan. 19, 2017) (SR-NASDAQ-2016-135).

⁶ Nasdaq Rule 5405(b)(1)(A) requires a company under the “Income Standard” alternative for the initial listing of a primary equity security on the Nasdaq Global Market to have “Annual income from continuing operations before income taxes of at least \$1,000,000 in

rule change deletes the portion of this rule that requires that a company exceed by at least 20% the earnings requirements set forth in Nasdaq Rule 5405(b)(1)(A).⁷

The proposed rule change will also modify the \$250 million minimum tangible net worth requirement with a parenthetical stating that if the Linked Securities are fully and unconditionally guaranteed by an affiliate of the company, Nasdaq will rely on such affiliate's tangible net worth for purposes of this requirement.

Nasdaq Rule 5710(e) also provides an alternative listing requirement where a company can list a Linked Security with tangible net worth requirement in excess of \$150 million (instead of \$250 million), provided that the original issue price of all the company's other index-linked note offerings (combined with index-linked note offerings of the company's affiliates) listed on a national securities exchange does not exceed 25% of the company's tangible net worth.

This alternative listing requirement also will be modified to be substantively identical to the Arca provision. Thus, while a company's listing of a Linked Security under the Nasdaq provision must currently also meet the requirement that the company also exceed by at least 20% the earnings requirements set forth in Nasdaq Rule 5405(b)(1)(A), that earnings test will likewise be deleted.⁸

The proposed rule change will both delete the Nasdaq language discussed above, as well as add the following substantively identical language from the Arca provision, to substantially conform the Nasdaq language to the Arca language. First, that the original issue price of the Linked Securities, combined with all of the company's other Linked Securities listed on a

the most recently completed fiscal year or in two of the three most recently completed fiscal years.”

⁷ Id.

⁸ Id.

national securities exchange or otherwise publicly traded in the United States, must not be greater than 25 percent of the company's tangible net worth at the time of issuance. Second, a parenthetical will be added following this to say that if the Linked Securities are fully and unconditionally guaranteed by an affiliate of the Company, Nasdaq will apply the provisions of this paragraph to such affiliate instead of the Company and will include in its calculation all Linked Securities that are fully and unconditionally guaranteed by such affiliate. Third, as with the Arca provision, a sentence at the end of this listing standard will state that Government issuers and supranational entities will be evaluated on a case-by-case basis.

The Exchange believes that conforming Nasdaq's listing standards to Arca's does not impact investor protections and will enhance competition by establishing an equivalent listing standard across Arca and Nasdaq for Linked Securities. Although Nasdaq will be deleting the earnings test, investors will not be adversely affected since a Company will still be required to have at least either (i) \$250 million, or (ii) \$150 million in tangible net worth and subject to a maximum issuance threshold (depending on which requirement the Company is able to satisfy). Nasdaq will also take into consideration whether the Linked Securities are fully and unconditionally guaranteed by an affiliate of the Company. These conforming changes will provide a strong indication of the company's ability to make necessary payments on the Linked Security.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁹ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁰ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(5).

the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

The Exchange believes that the proposed rule change to conform Nasdaq Rule 5710(e) so that it is substantially similar to Arca Rule 5.2(j)(6)(A)(e) will promote just and equitable principles of trade, and, in general protect investors and the public interest since it will promote the application of consistent listing standards for Linked Securities. Specifically, although Nasdaq will be deleting the earnings test, investors will not be adversely affected since a Company will still be required to have at least either (i) \$250 million, or (ii) \$150 million in tangible net worth and subject to a maximum issuance threshold (depending on which requirement the Company is able to satisfy). Nasdaq will also take into consideration whether the Linked Securities are fully and unconditionally guaranteed by an affiliate of the Company. The continuing minimum tangible net worth requirements coupled with the conforming changes will provide a strong indication of the company's ability to make necessary payments on the Linked Security.

For these reasons, Nasdaq believes the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, as amended. Instead, the Exchange believes that the proposed rule change to conform Nasdaq Rule 5710(e) so that it is substantially similar to Arca Rule 5.2(j)(6)(A)(e) may enhance competition since Nasdaq and Arca¹¹ will have substantially similar listing requirements for Linked Securities.

¹¹ Supra note 4.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹² and Rule 19b-4(f)(6) thereunder.¹³

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative prior to 30 days after the date of filing. However, pursuant to Rule 19b-4(f)(6)(iii),¹⁴ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange has stated that the proposal will lead to a more consistent initial and continued listing standard across Nasdaq and Arca for Linked Securities and thereby enhance competition. The Exchange also has noted that the proposed rule change is substantially similar to a change previously made by Arca.¹⁵ Based on the foregoing, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest.

¹² 15 U.S.C. 78s(b)(3)(A).

¹³ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

¹⁴ 17 CFR 240.19b-4(f)(6)(iii).

¹⁵ See supra note 4.

Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change to be operative upon filing.¹⁶

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or 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-2017-032 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NASDAQ-2017-032. This file number should be included on the subject line if e-mail is used. To help the Commission process and review

¹⁶ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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-2017-032 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.¹⁷

Eduardo A. Aleman
Assistant Secretary

¹⁷ 17 CFR 200.30-3(a)(12).