

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-80888; File No. SR-NASDAQ-2017-053)

June 8, 2017

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rule 5110(c) to Permit a Reverse Merger Company to Qualify for Initial Listing Under Any Applicable Listing Standard After Satisfying the Required Seasoning Period

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 May 25, 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, II, and III 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 allow a former reverse merger company to qualify for initial listing under any applicable listing standard after satisfying the required seasoning period.

The text of the proposed rule change is set forth below. Proposed new language is underlined; deleted text is in brackets.

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5110. Change of Control, Bankruptcy and Liquidation, and Reverse Mergers

(a) – (b) No change.

(c) Reverse Mergers

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

(1) A Company that is formed by a Reverse Merger (a “Reverse Merger Company”) shall be eligible to submit an application for initial listing only if the combined entity has, immediately preceding the filing of the initial listing application:

(A) No change.

(B) maintained a closing price [of \$4 per share or higher]equal to the share price requirement applicable to the initial listing standard under which the Reverse Merger Company is qualifying to list for a sustained period of time, but in no event for less than 30 of the most recent 60 trading days.

(2) In addition to satisfying all of Nasdaq’s other initial listing requirements, a Reverse Merger Company will only be approved for listing if, at the time of approval, it has:

(A) No change.

(B) maintained a closing price [of \$4 per share or higher]equal to the share price requirement applicable to the initial listing standard under which the Reverse Merger Company is qualifying to list for a sustained period of time, but in no event for less than 30 of the most recent 60 trading days prior to approval.

(3) No change.

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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 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

In 2011, Nasdaq adopted additional requirements (the "Reverse Merger Rules") for companies applying to list after consummating a reverse merger with a shell company (a "Reverse Merger Company").³ These additional requirements were proposed in response to regulatory concerns, including accounting fraud allegations, which had arisen with respect to Reverse Merger Companies, and were designed to improve the reliability of the reported financial results of Reverse Merger Companies by requiring a pre-listing "seasoning period" during which the post-merger public company would have produced financial and other information in connection with its required Commission filings. A Reverse Merger Company was also required to meet the minimum share price requirement for a sustained period of time, but in no event for less than 30 of the most recent 60 trading days, before filing its application and before being approved for listing.⁴ Of course, a Reverse Merger Company is also required to meet all other requirements for initial listing before it could be approved.

³ See Exchange Act Release No. 65708 (November 8, 2011), 76 FR 70799 (November 15, 2011) (SR-NASDAQ-2011-073). Rule 5005(a)(35) defines a "Reverse Merger" as any transaction whereby an operating company becomes an Exchange Act reporting company by combining, either directly or indirectly, with a shell company which is an Exchange Act reporting company, whether through a reverse merger, exchange offer, or otherwise. The rule also provides certain exceptions to this general definition and provides guidance on the factors Nasdaq will consider in determining whether a company is a shell company.

⁴ Rule 5110(c). A publicly traded company that applies for listing under the Market Value of Listed Securities standard in Rule 5505(b)(2) would also need to meet the applicable

At the time Nasdaq adopted the Reverse Merger Rules, all companies were required to achieve a minimum \$4 bid price for listing. Subsequently, in 2012, Nasdaq modified its listing requirements to add an alternative to the \$4 minimum bid price per share requirement (the “Alternative Price Requirement”).⁵ Under the Alternative Price Requirement, a security could qualify for listing on the Nasdaq Capital Market if, for at least five consecutive business days prior to approval, the security has a minimum closing price of at least \$3 per share, if the issuer meets the Equity or Net Income standards, or at least \$2 per share, if the issuer meets the Market Value of Listed Securities standard, in addition to other criteria designed to ensure that the listed security would not be considered a penny stock.⁶

At the time, because Nasdaq did not yet have sufficient experience with the Reverse Merger Rules or any experience with the new alternative price criteria, Nasdaq did not allow Reverse Merger Companies to list under the Alternative Price Requirement.

Nasdaq now believes it is appropriate to allow a former Reverse Merger Company to qualify for initial listing under any applicable listing standard, including the Alternative Price Requirement, after satisfying the seasoning period required by the Reverse Merger Rules. In making this change, Nasdaq notes that the Reverse Merger Rules’ seasoning period requires that a company must wait at least one year after it files with the Commission or other Regulatory Authority all required information about the transaction, including audited financial statements

price requirement for 90 consecutive trading days prior to applying, although these periods can run concurrently.

⁵ See Exchange Act Release No. 66830 (April 18, 2012), 77 FR 24549 (April 24, 2012) (approving SR-NASDAQ-2012-002) (the “Alternative Price Filing”).

⁶ Specifically, the company must have net tangible assets in excess of \$2 million, if the issuer has been in continuous operation for at least three years; or net tangible assets in excess of \$5 million, if the issuer has been in continuous operation for less than three years; or average revenue of at least \$6 million for the last three years. See Nasdaq Rule 5505(a)(1)(B) and IM-5505.

for the combined entity and that the Reverse Merger Company must have timely filed all required periodic financial reports with the Commission or other Regulatory Authority for the prior year, including at least one annual report with financial statements for a full fiscal year commencing after it filed the necessary information about the transaction. Nasdaq believes that, upon completion of this period, it is appropriate to treat a Reverse Merger Company in the same manner as any other company and to permit listing under any of Nasdaq's applicable listing requirements, including the Alternative Price Requirement.

Rule 3a51-1 under the Act⁷ defines "penny stock" as any equity security that does not satisfy one of the exceptions enumerated in subparagraphs (a) through (g) under the Rule. If a security is a penny stock, Rules 15g-1 through 15g-9 under the Act⁸ impose certain additional disclosure and other requirements on brokers and dealers when effecting transactions in such securities. Rule 3a51-1(a)(2) under the Act⁹ excepts from the definition of penny stock securities registered on a national securities exchanges that have initial listing standards that meet certain requirements, including a \$4 bid price at the time of listing. If a security listed under the Alternative Price Requirement no longer meets the applicable net tangible assets or average revenue tests following initial listing, and does not qualify for another exclusion under the penny stock rules, the security could become subject to the penny stock rules.¹⁰ Further, broker-dealers that effect recommended transactions in securities that originally qualified for

⁷ 17 CFR 240.3a51-1.

⁸ 17 CFR 240.15g-1 et seq.

⁹ 17 CFR 240.3a51-1(a)(2).

¹⁰ The Commission has previously noted the potential for abuse with respect to penny stocks. See, e.g., Securities Exchange Act Release No. 49037 (January 16, 2004), 69 FR 2531 (January 8, 2004) ("Our original penny stock rules reflected Congress' view that many of the abuses occurring in the penny stock market were caused by the lack of publicly available information about the market in general and about the price and trading volume of particular penny stocks").

listing under the Alternative Price Requirement, among other things, under Commission Rule 3a51-1(g), need to review current financial statements of the issuer to verify that the security meets the applicable net tangible assets or average revenue test, have a reasonable basis for believing they remain accurate, and preserve copies of those financial statements as part of its records. To facilitate compliance by broker-dealers, Nasdaq monitors the companies listed under the Alternative Price Requirement and publishes on the Nasdaq Listing Center web site a daily list of any such company that no longer meets the net tangible assets or average revenue tests of the penny stock exclusion, and which does not satisfy any other penny stock exclusion.¹¹ Nasdaq also specifically reminds broker-dealers of their obligations under the penny stock rules.¹²

To address concerns about the potential manipulation of lower priced stocks to meet the initial listing requirements, securities listing under the Alternative Price Requirement are generally required to maintain a \$2 or \$3 closing price for five consecutive business days prior to approval for listing, rather than on a single day as under the \$4 price test, to reduce the risk that someone might attempt to manipulate or otherwise artificially inflate the closing price in order to allow a security to qualify for listing.¹³ Under the proposed rule change, this requirement would

¹¹ <https://listingcenter.nasdaq.com/PennyStockList.aspx>

¹² In approving the Alternative Price Filing, the Commission stated that it believed that although the listing of securities that do not have a blanket exclusion from the penny stock rules and require ongoing monitoring may increase compliance burdens on broker-dealers, the additional steps taken by Nasdaq to facilitate compliance should reduce those burdens and that, on balance, Nasdaq's proposal is consistent with the requirement of Section 6(b)(5) of the Act that the rules of an exchange, among other things, 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. 77 FR at 24552.

¹³ A publicly traded company that applies for listing under the Market Value of Listed Securities standard in Rule 5505(b)(2) would also need to meet the applicable price requirement for 90 consecutive trading days prior to applying.

be further heightened in the case of a Reverse Merger Company, and the security would have to maintain the applicable \$2 or \$3 closing price for a sustained period of time, but in no event for less than 30 of the most recent 60 trading days prior to its application and approval for listing.

In addition, if a security listed under the Alternative Price Requirement subsequently achieves a \$4 closing price over at least five consecutive business days, and the issuer and the security satisfy all other relevant initial listing criteria, then such security would no longer be considered as having listed under the Alternative Price Requirement. While this potentially could provide an incentive for market participants to manipulate the price of the security in order to achieve the \$4 closing price and no longer be considered as having listed under the Alternative Price Requirement, Nasdaq adopted measures designed to address those concerns for any company listed under the Alternative Price Requirement, which the Commission concluded should help reduce the potential for price manipulation to achieve the \$4 closing price, and in this respect are designed to prevent fraudulent and manipulative acts and practices consistent with Section 6(b)(5) of the Act. Specifically, Nasdaq will conduct a robust, wholesale review of the issuer's compliance with all applicable initial listing criteria, including qualitative and quantitative standards, at the time the \$4 closing price is achieved, and will have a reasonable basis to believe that that price was legitimately, and not manipulatively, achieved. Nasdaq also applies enhanced surveillance procedures to monitor securities listed under the Alternative Price Requirement in the period around when they achieve \$4, and would no longer be considered as having listed under the Alternative Price Requirement, to identify anomalous trading that would be indicative of potential price manipulation. These measures would also apply to a Reverse Merger Company listed under the proposed rule change.

Accordingly, Nasdaq proposes to remove references within the Reverse Merger Rule requiring the security of a Reverse Merger company to achieve a \$4 minimum bid price and replace those references with a requirement that the security satisfy the share price requirement applicable to the initial listing standard under which the Reverse Merger company is qualifying to list.¹⁴

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁵ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁶ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to 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 proposed rule change will allow a Reverse Merger Company to satisfy any of the already approved listing requirements for listing on Nasdaq and, thereby, eliminate an unnecessary impediment to a free and open market and a national market system. A company listing under the alternative price requirements of Rule 5505(a)(1)(B), including a Reverse Merger Company listing under this proposed rule change, must also satisfy additional requirements designed to ensure that the listed security would not be considered a penny stock and, following listing Nasdaq will monitor the company and publish on its website if the company no longer satisfies those additional requirements or any of the other exclusions from being a penny stock contained in Rule 3a51-1 under the Securities Act of 1933. In

¹⁴ Nasdaq rules permit Nasdaq to apply additional or more stringent criteria for the initial listing of securities in situations where it would be inappropriate to list a Reverse Merger company at a reduced price, such as where the company has not demonstrated the ability to maintain compliance with the continued listing requirements. See Nasdaq Rule 5101.

¹⁵ 15 U.S.C. 78f(b).

¹⁶ 15 U.S.C. 78f(b)(5).

addition, whereas other companies listing under the Alternative Price Requirement must satisfy the applicable closing price for five consecutive business days, a Reverse Merger Company listing under the proposed rule change will be required to meet the heightened requirement in the Reverse Merger Rules and must satisfy that price for a sustained period of time, but in no event for less than 30 of the most recent 60 trading days before it can apply and be approved. Further, given that a Reverse Merger Company must satisfy a seasoning period, and timely file financial information during that period, Nasdaq believes that the proposed change to allow a Reverse Merger Company to list under any of the approved listing requirements protects investors and the public interest.

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. To the contrary, by eliminating a disparity between Nasdaq's rules and those of NYSE MKT, the proposed rule change will enhance competition.¹⁷

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)(iii) of

¹⁷ Section 101(e) of the NYSE MKT Company Guide permits a Reverse Merger Company to list on NYSE MKT upon satisfaction of any applicable listing requirement, including those with a \$2 or \$3 minimum price.

the Act¹⁸ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹⁹

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: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) 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 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-2017-053 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.

¹⁸ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁹ 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 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.

All submissions should refer to File Number SR-NASDAQ-2017-053. 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-2017-053, 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.²⁰

Robert W. Errett
Deputy Secretary

²⁰ 17 CFR 200.30-3(a)(12).