

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-81816; File No. SR-NASDAQ-2017-087)

October 4, 2017

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change to Modify the Listing Requirements Related to Special Purpose Acquisition Companies Listing Standards to Reduce Round Lot Holders on Nasdaq Capital Market for Initial Listing From 300 to 150 and Eliminate Public Holders for Continued Listing from 300 to Zero, Require \$5 Million in Net Tangible Assets for Initial and Continued Listing, and Impose a Deadline to Demonstrate Compliance with Initial Listing Requirements on All Nasdaq Markets Within 30 Days Following Each Business Combination

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 September 20, 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 modify the listing requirements related to Acquisition Companies.

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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 2009 Nasdaq adopted a rule (IM-5101-2) to impose additional listing requirements on 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 ("Acquisition Companies").³ Based on experience listing these companies and reviewing the post-acquisition entities, Nasdaq proposes to modify the listing requirements applicable to them. Specifically, Nasdaq proposes to reduce the number of round-lot holders required for initial listing on the Nasdaq Capital Market from 300 to 150 and to eliminate the continued listing shareholder requirement on the Nasdaq Capital Market during the period that the company is subject to IM-5101-2.⁴ Nasdaq also proposes to require that an Acquisition Company listed on the Nasdaq Capital Market maintain at least \$5 million in net tangible assets for initial and continued listing. Finally, Nasdaq proposes to impose a deadline for the company to

³ Securities Exchange Act Release No. 58228 (July 25, 2008), 73 FR 44794 (July 31, 2008) (adopting the predecessor to IM-5101-2).

⁴ Under IM-5101-2(b), an Acquisition 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 within 36 months of the effectiveness of its IPO registration statement.

demonstrate compliance with all initial listing requirements, including the 300, 400, and 450 round-lot shareholder requirement on the Nasdaq Capital, Global and Global Select Markets, respectively, following a business combination.

The additional requirements currently applicable to an Acquisition Company require, in part, that 90% of the gross proceeds of the company's offering must be deposited into and retained in an escrow account through the date of a business combination; that the entity complete a significant business combination within 36 months of the effectiveness of the IPO registration statement; and that public shareholders who object to the combination have the right to convert their common stock into a pro rata share of the funds held in escrow.⁵ Following each business combination the combined company must meet Nasdaq's requirements for initial listing.

Nasdaq has observed that Acquisition Companies often have difficulty demonstrating compliance with the shareholder requirement for initial and continued listing.⁶ Based on conversations with marketplace participants, including the sponsors of Acquisition Companies and lawyers and bankers that advise these companies, Nasdaq believes these difficulties are due to the unique nature of Acquisition Companies, which limits the number of retail investors interested in the vehicle and encourages owners to hold their shares until a transaction is announced, as long as 3 years after their initial public offering. These same features, however, limit the benefit to investors of having a shareholder requirement. In that regard, Nasdaq notes that the purpose of the shareholder requirement, along with the listing requirements pertaining to

⁵ The rules also require that that each proposed business combination must be approved by a majority of the company's independent directors.

⁶ Rule 5505(a)(3) requires at least 300 round lot holders for initial listing on the Capital Market. Rule 5550(a)(3) requires at least 300 public holders for continued listing. To date, most Nasdaq-listed Acquisition Companies have opted to list on the Capital Market.

float and market value of public float, is to help ensure that a stock has an investor following and liquid market necessary for trading.⁷

Given the unique nature of Acquisition Companies, however, the potential for distorted prices occurring as a result of there being few shareholders or illiquidity is less of a concern for their investors. During the period between its public offering and the consummation of a business combination, the value of an Acquisition Company is based primarily on the value of the funds it holds in trust, and the Acquisition Company's shareholders have the right to redeem their shares for a pro rata share of that trust in conjunction with the business combination. As a result, Acquisition Companies, generally, have historically traded close to the value in the trust, even when they have had few shareholders, which suggests that their lack of shareholders has not resulted in distorted prices and the associated concerns.⁸ Acquisition Companies must also undergo a transformative transaction within 36 months of listing, at which time they must meet

⁷ See, e.g., Rocky Mountain Power Company, Securities Exchange Act Release No, 40648 (November 9, 1998) (text at footnote 11).

⁸ Nasdaq analyzed the trading history of Acquisition Companies listed since 2010, including those cited for non-compliance with the 300 shareholder requirement. Nasdaq observed that shares of all reviewed Acquisition Companies traded, on average, close to the \$10 redemption value with the median of the average daily range equal to \$0.07. This measure was the same for the overall group of the reviewed stocks, for the subset of stocks that received deficiency notifications for non-compliance with the 300 shareholder requirement, and for the remaining subset of stocks for the companies that were not cited for non-compliance with the 300 shareholder requirement. Similarly, the average of each stock's average last price was between \$9.85 and \$9.96 for all three groups.

Nasdaq also reviewed trading activity following the announcement by Acquisition Companies of a pending business combination with an operating company and observed no increase in volatility in the vast majority of cases. In every instance where volatility did increase following the announcement of a pending business combination, the Acquisition Company had not been cited for non-compliance with the 300 shareholder requirement.

Nasdaq believes that this data analysis supports a conclusion that trading in shares of an Acquisition Company, generally, does not suffer when the company has fewer shareholders than the current Nasdaq requirement.

all listing requirements, including the shareholder requirement. This provides an additional protection to shareholders, assuring that any liquidity issues are only temporary.

Nasdaq believes that an Exchange Traded Fund (“ETF”) is somewhat similar to an Acquisition Company in this regard in that an arbitrage mechanism keeps the ETF’s price close to the value of its underlying securities, even when trading in the ETF’s shares is relatively illiquid. The initial listing requirements for ETFs do not include a shareholder requirement and only 50 shareholders are required for continued listing after the ETF has been listed for one year.

For these reasons, Nasdaq proposes to reduce the shareholder requirement for the initial listing of an Acquisition Company on the Capital Market from 300 to 150 round-lot shareholders.

Nasdaq has also observed that it can be difficult for a company, once listed, to obtain evidence demonstrating the number of its shareholders because many accounts are held in street name and shareholders may object to being identified to the company. As a result, companies must seek information from broker-dealers and from third-parties that distribute information such as proxy materials for the broker-dealers. This process is time-consuming and particularly burdensome for Acquisition Companies because most operating expenses are typically borne by the Acquisition Company’s sponsors due to the requirement that the gross proceeds of the initial public offering remain in the trust account until the closing of the business combination.⁹

⁹ While under Nasdaq’s rules an Acquisition Company could pay operating and other expenses, subject to a limitation that 90% of the gross proceeds of the company’s offering must be retained in trust account, Nasdaq understands that marketplace demands typically dictate that 100% of the gross proceeds from the IPO be kept in the trust account and that only interest earned on that account be used to pay taxes and limited amount of operating expenses. Marketplace participants have also indicated that the current trend is to allow interest earned to be used for payments of taxes only, thus placing the burden for all operating expenses on the sponsors.

Accordingly, given the short life of an Acquisition Company,¹⁰ the trading characteristics of Acquisition Companies observed by Nasdaq,¹¹ and the requirement to meet the initial listing standards at the time of the business combination, Nasdaq also proposes to eliminate the continued listing shareholder requirement for Acquisition Companies.¹²

Nasdaq notes that Rule 3a51-1 under the Act¹³ defines a “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 Act¹⁴ impose certain additional disclosure and other requirements on brokers and dealers when effecting transactions in such securities. Rule 3a51-1(a)(2) under the Act¹⁵ excepts from the definition of penny stock securities registered on a national securities exchanges that have initial listing standards that meet certain requirements, including, in the case of primary common stock, 300 round lot holders. Rule 3a51-1 also includes alternative exceptions from the definition of penny stock. Nasdaq proposes to require that Acquisition Companies have \$5 million in net tangible assets for initial and continued listing on the Nasdaq Capital Market, thereby assuring that the

¹⁰ See, Footnote 4, supra.

¹¹ See, Footnote 8, supra.

¹² Listing Rule 5550(a)(1) requires that Acquisition Companies listed on the Nasdaq Capital Market will continue to have at least two registered and active Market Makers, one of which may be a Market Maker entering a stabilizing bid. As a result, Nasdaq does not expect that the proposed change will result in illiquidity or other problems trading the shares of Acquisition Companies.

¹³ 17 CFR 240.3a51-1.

¹⁴ 17 CFR 240.15g-1 et seq.

¹⁵ 17 CFR 240.3a51-1(a)(2).

securities of such companies satisfy the exclusion from being a penny stock contained in Rule 3a51-1(g)(1) of the Act.¹⁶

If an Acquisition Company no longer meets the applicable net tangible assets requirement following initial listing, its common stock could become subject to the penny stock rules.¹⁷

Broker-dealers that effect recommended transactions in such securities, 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 will monitor the Acquisition Companies that fail the net tangible assets test and will publishes on the Nasdaq Listing Center web site a daily list of any such company that no longer meets the net tangible assets requirement of the penny stock exclusion, and which does not satisfy any other penny stock exclusion.¹⁸ Nasdaq also specifically reminds broker-dealers of their obligations under the penny stock rules.¹⁹

¹⁶ 17 CFR 240.3a51-1 (g)(1). Nasdaq believes that all Acquisition Companies currently listed satisfy this alternative.

¹⁷ 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”).

¹⁸ <https://listingcenter.nasdaq.com/PennyStockList.aspx>.

¹⁹ In 2012, Nasdaq modified its listing requirements to add an alternative to the \$4 minimum bid price per share requirement (the “Alternative Price Filing”). 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

In addition, if an Acquisition Company no longer meets the applicable net tangible assets requirement following initial listing, Nasdaq would initiate delisting proceedings under the Rule 5800 Series by sending a Staff Delisting Determination.²⁰ While the Acquisition Company could request review of that determination by an independent Hearings Panel, the Company must make disclosure about its receipt of the Delisting Determination and the Hearings Panel can only allow a company to remain listed for a maximum of 180 calendar days from the date of the Staff Delisting Determination.²¹ Thus, an Acquisition Company that became subject to the penny stock rules could remain listed on the Nasdaq Capital Market only for a limited time and investors would have notice of the pending delisting.

Last, Nasdaq notes that the existing rules require that following a business combination with an Acquisition Company, the resulting company must satisfy all initial listing requirements. The rule does not provide a timetable for the company to demonstrate that it satisfies those requirements, however. In order to assure that any company that does not satisfy the initial listing requirements following a business combination enters the delisting process promptly,

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. See, Exchange Act Release No. 66830 (April 18, 2012), 77 FR 24549 (April 24, 2012) (approving SR-NASDAQ-2012-002).

²⁰ Nasdaq also proposes to modify Listing Rule 5810(c)(1) to include a failure to meet the requirements of IM-5101-2 in the list of circumstances where Nasdaq Staff will send an immediate Staff Delisting Determination. This change will conform Rule 5810 with the language already contained in Listing Rule IM-5101-2, which states 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 [of Listing Rule IM-5101-2], Nasdaq will issue a Staff Delisting Determination under Rule 5810 to delist the Company’s securities.”

²¹ See, Rule 5815(c)(1). A company could also request review of a Panel decision by the Nasdaq Listing and Hearing Review Council; however, the Panel decision is generally effective immediately and is not stayed even if the company does appeal. See, Rules 5815(d)(1) and 5820(a).

Nasdaq proposes to codify that a company must demonstrate that it meets the initial listing requirements within 30 days following a business combination. If the company has not demonstrated that it meets the requirements for initial listing in that time, Nasdaq staff would issue a Delisting Determination, which the company could appeal to an independent Hearings Panel as described in the Nasdaq Rule 5800 Series.

Nasdaq also proposes to delete a duplicative paragraph from the rule text and separate certain provisions into new paragraphs to enhance the readability of the rule.

These proposed changes will be effective upon approval of this rule by the Commission. However, Nasdaq will permit Acquisition Companies, if any, that were listed on the Capital Market before this proposal was approved and that have less than \$5 million net tangible assets to remain listed, provided that such a company must continue to comply with the 300 public holder requirement for continued listing.²²

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,²³ in general, and furthers the objectives of Section 6(b)(5) of the Act²⁴, which requires that the rules of an exchange promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, protect investors and the public interest. While the change would allow Acquisition Companies to list with fewer shareholders, this proposed change is consistent with the investor protection provisions of the Act because other protections help assure that market prices will not be distorted by any potential resulting lack of liquidity, which is the underlying purpose of the

²² See, Footnote 16, supra.

²³ 15 U.S.C. 78f(b).

²⁴ 15 U.S.C. 78f(b)(5).

shareholder requirement. In particular, the ability of a shareholder to redeem shares for a pro rata share of the trust helps assure that the Acquisition Company will trade close to the value of the assets held in trust.²⁵

The proposed rule change will also continue to assure that any listed Acquisition Company satisfies an exclusion from the definition of a “penny stock” under the Act by imposing a new requirement that an Acquisition Company must maintain \$5 million of net tangible assets. Further, 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.

Thus, this change will remove impediments to and perfect the mechanism of a free and open market by removing listing requirements that prohibit certain companies from listing or remaining listed without any concomitant investor protection benefits. In addition, the change would also limit the amount of time that an Acquisition Company could remain listed following a business combination if it has not demonstrated compliance with the initial listing requirements, thereby enhancing investor protection. Accordingly, Nasdaq believes that the proposal satisfies the Exchange Act requirements.

Finally, Nasdaq does not believe that this change affecting only Acquisition Companies should affect the designation in Rule 146(b) under the Securities Act²⁶ of securities listed on the Nasdaq Capital Market as “Covered Securities,” exempt from state registration requirements.

In 1996, Congress amended Section 18 of the Securities Act to exempt from state registration requirements securities listed, or authorized for listing, on the New York Stock Exchange LLC (“NYSE”), the American Stock Exchange LLC (now known as NYSE American

²⁵ See, Footnote 8, supra.

²⁶ 17 CFR 230.146(b).

LLC), or the National Market System of The Nasdaq Stock Market LLC (“the Nasdaq Global Market”) (collectively, the “Named Markets”), or any national securities exchange designated by the Commission as having “substantially similar” listing standards to those of the Named Markets.²⁷ The securities listed on these markets are defined in Section 18 as “Covered Securities.”

In 2007, the Commission amended Rule 146(b) to designate securities listed on the Nasdaq Capital Market as Covered Securities.²⁸ After careful comparison, the Commission concluded that the listing standards of the Nasdaq Capital Market were substantially similar to the listing standards of NYSE American.²⁹

When the Commission expanded Rule 146(b) to include the Nasdaq Capital Market, it compared the listing requirements of the Named Markets to those of the Capital Market for common stock, secondary classes of common stock and preferred stocks, convertible debt, warrants, index warrants and units.³⁰ At the time, no other securities were listed on the Capital Market, including Exchange Traded Products or Acquisition Companies. When the Commission later expanded Rule 146(b) to also include securities listed on BATS, it also separately

²⁷ See, National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (October 11, 1996), adopting Section 18 of the Securities Act, 15 U.S.C. 77r(a).

²⁸ See, Securities Act Release No. 8791 (April 18, 2007), 72 FR 20410 (April 24, 2007).

²⁹ At the time, NYSE American was known as NYSE MKT. When determining that Nasdaq Capital Market securities are Covered Securities, the Commission did not specifically discuss Nasdaq’s 300 round lot requirement for initial listing nor the difference between this requirement NYSE MKT’s 400 public holder requirement. However, in determining to treat securities listed on the BATS Exchange, Inc. (“BATS”) as Covered Securities, the Commission reviewed the BATS listing standards, which are identical to Nasdaq’s, and stated that this difference does not preclude “a determination of substantial similarity between the standards.” Securities Act Release No. 9295 (January 20, 2012), 77 FR 3590 (January 25, 2012).

³⁰ See, Securities Act Release No. 8791 (April 18, 2007), 72 FR 20410 (April 24, 2007).

considered BATS' listing requirements for other securities including Exchange Traded Funds, Portfolio Depository Receipts and Index Fund Shares.³¹ Thus, the Commission has recognized that it is appropriate to create different listing standards for different categories of companies and that such differences do not preclude the Commission from finding those securities are Covered Securities.

Nasdaq notes that it is not proposing to reduce the shareholder requirement for operating companies listed on the Nasdaq Capital Market. The proposed change affects only the separate listing requirements for Acquisition Companies, which were adopted because Nasdaq viewed Acquisition Companies as presenting different risks than operating companies and created listing requirements designed to address those risks. Similarly, and as described above, just as Nasdaq believes Acquisition Companies have unique risks, other facets of their structure and the requirements of Nasdaq's rules for Acquisition Companies minimize the need for a shareholder requirement. As described above, the Commission has previously concluded that categories of securities differing from common stock of operating companies can be Covered Securities, even though such securities are subject to lower listing requirements. Nasdaq believes that, here, the earlier decision to regulate Acquisition Companies listed on the Capital Market under the quantitative requirements of the Rule 5500 Series should not preclude the decision now to adopt a lower minimum shareholder requirement for Acquisition Companies, which are a unique category of securities, nor should it affect the designation of securities listed on the Capital Market as Covered Securities so long as the other investor protection requirements of the Act are satisfied. As described above, Nasdaq believes such investor protection requirements are satisfied. Moreover, preventing Nasdaq from making this change for the Capital Market would

³¹ See, Securities Act Release No. 9251 (August 8, 2011), 76 FR 49698 (August 11, 2011).

create the perverse, anti-competitive result that the Named Markets (including the Nasdaq Global Market) would be allowed to make this change, or any change, but that the markets identified in Rule 146(b) could never innovate and could only copy the changes made by the Named Markets [sic].

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. While the rule may permit more Acquisition Companies to list, or remain listed, on Nasdaq, other exchanges could adopt similar rules to compete for such listings.

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 90 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. Please include File Number SR-NASDAQ-2017-087 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-2017-087. 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-2017-087 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.³²

Eduardo A. Aleman
Assistant Secretary

³² 17 CFR 200.30-3(a)(12).