

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-86246; File No. SR-NASDAQ-2019-017)

June 28, 2019

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Granting Approval of a Proposed Rule Change to Adopt Additional Requirements for Listings in Connection with an Offering Under Regulation A of the Securities Act

I. Introduction

On April 5, 2019, The Nasdaq Stock Market LLC (“Nasdaq” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to adopt a new initial listing requirement for any company applying to list on the Exchange in connection with an offering under Regulation A³ of the Securities Act of 1933 (“Securities Act”).⁴ The proposed rule change was published for comment in the Federal Register on April 24, 2019.⁵ The Commission received one comment in support of the proposed rule change.⁶ On June 7, 2019, pursuant to Section 19(b)(2) of the Act,⁷ 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 17 CFR 230.251-230.263.

⁴ 15 U.S.C. 77a et seq.

⁵ See Securities Exchange Act Release No. 85687 (April 18, 2019), 84 FR 17224 (April 24, 2019) (“Notice”).

⁶ See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, dated May 2, 2019 (“CII Letter”), available at <https://www.sec.gov/comments/sr-nasdaq-2019-017/srnasdaq2019017-5441017-184816.pdf>.

⁷ 15 U.S.C. 78s(b)(2).

proposed rule change.⁸ This order approves the proposed rule change.

II. Description and Summary of Comment

The Exchange proposed to adopt a new initial listing requirement for companies listing on the Exchange in connection with an offering under Regulation A of the Securities Act.⁹ Specifically, the Exchange proposed to require any company listing on the Exchange in connection with an offering under Regulation A¹⁰ to have a minimum operating history of two years at the time of approval of its initial listing application.¹¹

The Exchange stated in its proposal that it has observed problems with certain companies listing on the Exchange in connection with an offering under Regulation A.¹² Nasdaq also noted, among other things, that Regulation A offering statements have lighter disclosure requirements as compared to a traditional initial public offering on Form S-1.¹³

⁸ See Securities Exchange Act Release No. 86067 (June 7, 2019), 84 FR 27672 (June 13, 2019). The Commission designated July 23, 2019, as the date by which the Commission shall approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.

⁹ The Exchange stated that its staff has also adopted heightened review procedures for companies applying to list on the Exchange in connection with an offering under Regulation A. See Notice, supra note 5, at 17225.

¹⁰ Regulation A of the Securities Act was amended in 2015 to implement provisions of the Jumpstart Our Business Startups Act. Among other things, such amendments provide for an exemption from registration under the Securities Act for securities offerings of up to \$50 million in a 12-month period. See Securities Exchange Act Release No. 74578 (March 25, 2015), 80 FR 21805 (April 20, 2015) (Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A); Final Rule) (“Regulation A Adopting Release”).

¹¹ See proposed Rule 5210(j).

¹² See Notice, supra note 5, at 17225 (citing to Securities and Exchange Commission vs. Longfin Corp., Case No. 18-cv-2977 (DLC) (S.D.N.Y., filed April 4, 2018), available at <https://www.sec.gov/litigation/complaints/2018/comp-pr2018-61.pdf>).

¹³ See id.

The Exchange stated that it believes that the proposed new minimum two-year operating history requirement will help assure that a company listing in connection with an offering under Regulation A has a more established business plan and a history of operations upon which investors can rely, has been able to fund the initial phase of its operations, and will be more likely to be ready for the rigors of being a public company, including satisfying the Commission's and Exchange's reporting and corporate governance requirements. The Exchange stated these are important benefits given the lighter disclosure requirements associated with Regulation A offerings.¹⁴

Nasdaq proposed that this proposed rule change be effective 30 days after approval by the Commission, and stated that such 30-day delay would allow companies that have substantially completed the Nasdaq review process, or are near completion of their offering, a short opportunity to complete that offering and list before the new rules become effective.¹⁵

The Commission received one comment letter in support of the Nasdaq proposal.¹⁶ The commenter noted that companies relying on Regulation A are subject to less burdensome accounting and disclosure standards than companies conducting a traditional initial public offering on Form S-1.¹⁷ The commenter agreed with Nasdaq that its proposal will "...help assure that [listed] companies have more established business plans and a history of operations upon which investors can rely" and that such more seasoned companies are more likely to be ready for the rigors of being a public company.¹⁸

¹⁴ See id.

¹⁵ See id.

¹⁶ See CII Letter, supra note 6.

¹⁷ See id. at 2.

¹⁸ See id. at 3. The commenter also raised additional issues that were beyond the scope of the Commission's review of this rule proposal.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁹ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,²⁰ 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, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The development and enforcement of meaningful listing standards for an exchange is of critical importance to financial markets and the investing public. Among other things, listing standards provide the means for an exchange to screen issuers that seek to become listed, and to provide listed status only to those that are bona fide companies with sufficient public float, investor base, and trading interest likely to generate depth and liquidity sufficient to promote fair and orderly markets. Meaningful listing standards also are important given investor expectations regarding the nature of securities that have achieved an exchange listing, and the role of an exchange in overseeing its market and assuring compliance with its listing standards.²¹

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

²⁰ 15 U.S.C. 78f(b)(5).

²¹ See, e.g., Securities Exchange Act Release Nos. 65708 (November 8, 2011), 76 FR 70799 (November 15, 2011) (SR-Nasdaq-2011-073) (order approving a proposal to adopt additional listing requirements for companies applying to list after consummation of a "reverse merger" with a shell company), and 57785 (May 6, 2008), 73 FR 27597 (May 13, 2008) (SR-NYSE-2008-17) (order approving a proposal to adopt new initial and continued listing standards to list securities of special purpose acquisition companies).

The Commission believes the proposed two-year minimum operating history requirement for companies that seek to list on the Exchange in connection with an offering under Regulation A of the Securities Act is reasonably designed to address the Exchange's concerns regarding maturity and preparedness for listing of these types of issuers. Regulation A allows companies to raise money from the public in securities offerings of up to \$50 million with the filing of Form 1-A but with somewhat more limited disclosure requirements than what is required in a registration statement on Form S-1 for an initial public offering.²² For example, Form 1-A requires less disclosure about the compensation of officers and directors and less detailed management discussion and analysis of the issuer's liquidity and capital resources and results of operations.²³ The Commission further notes that Regulation A issuers tend to be smaller companies in earlier stages of development.²⁴ As a general matter, early-stage ventures may be relying on the development of a new business, product, or service that may or may not find a market, unlike a mature business that is more likely to have a track record of revenue or income.

The Commission believes, based on the factors discussed above, that the proposed operating history requirement may help to ensure that a company listing in connection with a Regulation A offering is more seasoned, and thus more likely to be ready for the rigors of being a public, exchange-listed and traded, company, and that therefore the requirement would be

²² See Regulation A Adopting Release, *supra* note 10.

²³ See *id.* at 21889. The Commission notes that a company that conducts an offering under Regulation A at the same time as listing can include balance sheets for its last two fiscal years, with no interim financial statements, whereas a company that conducts an initial public offering on Form S-1 at the time of listing would be required to have interim financial statements dated no later than 134 days prior to effectiveness of the Form S-1 and at the time of listing. See Notice, *supra* note 5, at 17225.

²⁴ See Securities Exchange Act Release No. 86129 (June 18, 2019), 84 FR 30460, 30492-93 (June 26, 2019) (File No. S7-08-19) (Concept Release on Harmonization of Securities Offering Exemptions).

consistent with the investor protection provisions of Section 6(b)(5) of the Exchange Act. The Commission notes that, as Nasdaq stated in its proposal, the additional two-year operating history requirement can help to assure that a company listing in connection with a Regulation A offering will be more likely to have a developed business plan upon which investors can rely, was able to successfully fund its initial phase of operations, and may be more likely to be better prepared to satisfy public company requirements, including reporting and corporate governance requirements.

While capital formation and access to markets is very important, the Commission notes that the additional listing requirement applies to a small subset of companies applying to list in connection with a Regulation A offering and that the Exchange has identified a reasonable requirement that it believes will help it to ensure the suitability of such companies for an Exchange listing, consistent with the requirements of Section 6(b)(5) of the Exchange Act. Finally, the Commission would expect Nasdaq to review its experience with the new initial listing standard for Regulation A listed companies and consider whether the adoption of the new rule has addressed the concerns identified by Nasdaq and propose any appropriate changes, if necessary, to its listing standards.

For the reasons discussed above, the Commission believes that Nasdaq's proposal will further the purposes of Section 6(b)(5) of the Exchange Act by, among other things, protecting investors and the public interest, and preventing fraudulent and manipulative acts and practices, as well as promoting fair and orderly markets under the Exchange Act.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,²⁵ that the proposed rule change (SR-NASDAQ-2019-017) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁶

Eduardo A. Aleman
Deputy Secretary

²⁵ 15 U.S.C. 78s(b)(2).

²⁶ 17 CFR 200.30-3(a)(12).