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SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-85687; File No. SR-NASDAQ-2019-017)

April 18, 2019

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

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 5, 2019, 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 adopt an additional listing requirement for companies listing in connection with an offering under Regulation A<sup>3</sup> under the Securities Act of 1933 (“Securities Act”).<sup>4</sup>

The text of the proposed rule change is set forth below. Proposed new language is in italics.

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The Nasdaq Stock Market Rules

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 17 CFR 230.251-230.263.

<sup>4</sup> 15 U.S.C. 77a et seq.

5210. Prerequisites for Applying to List on The Nasdaq Stock Market

All Companies applying to list on The Nasdaq Stock Market must meet the following prerequisites:

(a)-(i) No change.

(j) Regulation A Offerings

Any Company listing on Nasdaq in connection with an offering under Regulation A of the Securities Act of 1933 must, at the time of approval of its initial listing application, have a minimum operating history of two years.

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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

The Exchange is proposing to adopt a new initial listing requirement that would require a company applying to list on the Exchange in connection with an offering under Regulation A of the Securities Act to have a minimum operating history of two years at the time of approval of its

initial listing application. Regulation A was amended in 2015 to implement provisions of the Jumpstart Our Business Startups Act<sup>5</sup> and to reflect the desire of Congress and the SEC to facilitate smaller companies' access to capital and provide investors with more investment choices.<sup>6</sup> As amended, Regulation A provides an exemption from registration under the Securities Act for offerings up to \$50 million, for "Tier 2" offerings, and permits a company to sell securities to "non-accredited", or retail, investors.<sup>7</sup> A company offering securities under Tier 2 may register its securities under the Exchange Act concurrently with the qualification of its Regulation A offering statement and list those securities on a national securities exchange, such as Nasdaq, if it meets applicable listing standards.<sup>8</sup>

To rely on the exemption under Regulation A, a company must file a Form 1-A with the SEC along with an offering statement, financial statements and other exhibits. The offering statement is reviewed and qualified by the SEC but requires less burdensome accounting and disclosure standards than a traditional initial public offering on Form S-1. For example, a Regulation A company qualifying its offering statement nine months after its most recently completed fiscal year can include balance sheets for its last two fiscal years, with no interim financial statements.<sup>9</sup> In contrast, a company conducting its initial public offering on Form S-1 at

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<sup>5</sup> Securities Exchange Act Release No. 74578 (March 25, 2015), 80 FR 21805 (April 20, 2015).

<sup>6</sup> See, e.g., "SEC Adopts Rules to Facilitate Smaller Companies Access to Capital" (March 25, 2015), available at <https://www.sec.gov/news/pressrelease/2015-49.html>.

<sup>7</sup> 17 CFR 230.251-230.263.

<sup>8</sup> See General Instruction A(a)(2) of Form 8-A for Registration of Certain Classes of Securities pursuant to Section 12(b) or (g) of the Securities Exchange Act of 1934, available at <https://www.sec.gov/about/forms/form8-a.pdf>. A company may apply to list on any of the Nasdaq Global Select Market, Global Market or Capital Market tiers in connection with an offering under Regulation A of the Securities Act.

<sup>9</sup> See Part F/S (b)(3)(A) and (c)(1)(i) of Form 1-A Regulation A Offering Statement under the Securities Act of 1933 available at <https://www.sec.gov/about/forms/form1-a.pdf>.

that same time would be required to include balance sheets for its last two fiscal years, in the case of emerging growth and smaller reporting companies, or three fiscal years, in the case of all other companies, and interim financial statements dated no later than 134 days prior to effectiveness.<sup>10</sup> As a result, the financial information presented to investors in Regulation A offerings may not be as current as the financial information presented to investors traditional public offerings.

The Exchange has observed problems with certain Regulation A companies.<sup>11</sup> Most significantly, the Exchange believes that companies seeking to list in conjunction with a Regulation A offering are generally less mature companies with less developed business plans than other companies seeking to list. In addition, the Exchange believes that the Regulation A offering process may not adequately prepare companies for the rigors of operating a public company and satisfying the SEC and Exchange's reporting and corporate governance requirements. The Exchange also notes that the financial press,<sup>12</sup> Congress (prior to the adoption of Regulation A)<sup>13</sup> and others<sup>14</sup> have raised concerns about the potential for fraud by companies conducting offerings under Regulation A.

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<sup>10</sup> 17 CFR 210.3-12.

<sup>11</sup> See, e.g., 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>.

<sup>12</sup> See, e.g., "Most Mini-IPOs Fail the Market Test", Barron's (February 13, 2018), available at <https://www.barrons.com/articles/most-mini-ipos-fail-the-market-test-1518526753>. See also, "Longfin Collapse Puts Focus on Lax IPO Rules", Wall Street Journal (April 3, 2018), available at [https://www.wsj.com/articles/longfin-collapse-puts-focus-on-lax-ipo-rules-1522788520?mod=cx\\_picks&cx\\_navSource=cx\\_picks&cx\\_tag=contextual&cx\\_artPos=5#cxrecs\\_s](https://www.wsj.com/articles/longfin-collapse-puts-focus-on-lax-ipo-rules-1522788520?mod=cx_picks&cx_navSource=cx_picks&cx_tag=contextual&cx_artPos=5#cxrecs_s).

<sup>13</sup> See, e.g., H.R. Rep. No. 206, 112th Cong. 1st Sess. at 13 (2011), available at <https://www.congress.gov/congressional-report/112th-congress/house-report/206>. See also Congressional Record Volume 157, Number 166 (Wednesday, Nov. 2, 2011), p.

In response to these concerns, Nasdaq staff has adopted heightened review procedures for companies applying to list on the Exchange in connection with an offering under Regulation A. However, the Exchange also believes that additional requirements for listing such companies are appropriate to help ensure that adequate safeguards are in place to better protect investors. Accordingly, Nasdaq proposes to enhance its initial listing standards by adopting a new requirement at Listing Rule 5210(j) that a company listing in connection with an offering under Regulation A must, at the time of approval of its initial listing application, have a minimum operating history of two years. Nasdaq believes that this proposed requirement will help assure that companies have more established business plans and a history of operations upon which investors can rely. In addition, the proposed operating history requirement will help assure that the company has been able to fund the initial phase of its operations. Further, Nasdaq believes that these more seasoned companies are more likely to be ready for the rigors of being a public company, including satisfying the SEC and Exchange's reporting and corporate governance requirements. Nasdaq believes that these are important benefits given the lighter disclosure requirements otherwise associated with a Regulation A offering.<sup>15</sup>

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H7231, available at <https://www.congress.gov/congressional-record/2011/11/02/house-section/article/H7229-1>.

<sup>14</sup> See, e.g., Letter from the North American Securities Administrators Association, Inc., to Elizabeth M. Murphy (March 24, 2014), available at <http://www.nasaa.org/wp-content/uploads/2011/07/NASAA-Comment-File-S7-11-13-03242014.pdf>.

<sup>15</sup> Nasdaq has also proposed to revise its initial listing criteria to exclude restricted securities from the Exchange's calculations of a company's publicly held shares, market value of publicly held shares and round lot holders in another filing, and these requirements would also apply to Regulation A companies. See Securities Exchange Act Release No. 85503 (April 3, 2019) (SR-NASDAQ-2019-009) ("Notice of Filing of Proposed Rule Change to Revise the Exchange's Initial Listing Standards Related to Liquidity").

Nasdaq proposes that this change be effective 30 days after approval by the SEC. Nasdaq notes that it had originally solicited comment on a similar proposal in October 2018,<sup>16</sup> which provided companies with notice that Nasdaq was considering adopting a minimum operating history requirement for companies listing in connection with a Regulation A offering. The proposed 30-day delay from approval until operation of the proposed rule will 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.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Exchange Act,<sup>17</sup> in general, and furthers the objectives of Section 6(b)(5) of the Exchange Act,<sup>18</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, 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 to protect investors and the public interest; and is not designed to permit unfair discrimination between issuers, because it is reasonably designed to enhance investor protection by imposing an additional requirement on a category of companies that are able to sell securities to non-accredited investors with limited accounting and disclosure requirements.

Nasdaq believes that the addition of an operating history requirement will protect investors and the public interest by helping to assure that a company listing in conjunction with a

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<sup>16</sup> See [https://listingcenter.nasdaq.com/assets/Liquidity\\_Measures\\_Comment\\_Solicitation.pdf](https://listingcenter.nasdaq.com/assets/Liquidity_Measures_Comment_Solicitation.pdf).

<sup>17</sup> 15 U.S.C. 78f(b).

<sup>18</sup> 15 U.S.C. 78f(b)(5).

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 will be better prepared to satisfy public company requirements, including reporting and corporate governance requirements.

The Exchange believes that this proposal does not result in unfair discrimination between companies because companies relying on Regulation A are subject to limited accounting and disclosure requirements, which exposes investors, many of which may be non-accredited, to increased risk. The Exchange believes that this proposal will help lower the risk to such investors by helping to assure that a company was able to fund its initial phase of operations, has an established business plan and a history of operations upon which investors can rely and is more likely to be ready for the rigors of being a public company. For the foregoing reasons, the Exchange believes it is not unfair to impose the requirement for a minimum operating history of at least two years only on companies relying on Regulation A and not on companies conducting a traditional initial public offering on Form S-1.

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 Exchange Act. All companies seeking to list on the Exchange in connection with an offering under Regulation A would be affected in the same manner by this change. While this is an additional requirement that would not apply to a company that does not rely upon Regulation A, Nasdaq believes that to the extent this distinction places a burden on competition between companies, such burden is necessary and appropriate to enhance investor protection from companies with limited accounting and disclosure requirements in furtherance of the investor protection purposes of the Exchange Act. Moreover, Nasdaq also notes that companies have a choice as to whether or not

to rely upon Regulation A and, therefore, can control whether they are subject to the proposed requirement.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

On October 5, 2018, Nasdaq launched a formal comment solicitation on proposals to adopt additional initial listing criteria for companies applying to list on the Exchange in connection with an offering under Regulation A (“2018 Solicitation”), a copy of which is attached hereto as Exhibit 2.<sup>19</sup> No comments were received in response to the comment solicitation.

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 up to 90 days (i) as the Commission may designate 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

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<sup>19</sup> The Commission notes that Exhibit 2 is attached to the Exchange’s Form 19b-4 relating to the proposed rule change and not to this notice.

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2019-017 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-2019-017. 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 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make

available publicly. All submissions should refer to File Number SR-NASDAQ-2019-017, 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.<sup>20</sup>

Jill M. Peterson  
Assistant Secretary

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<sup>20</sup> 17 CFR 200.30-3(a)(12).

[FR Doc. 2019-08205 Filed: 4/23/2019 8:45 am; Publication Date: 4/24/2019]