

NETSCOUT SYSTEMS INC
Form PRER14A
February 13, 2015
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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

SCHEDULE 14A

(RULE 14a-101)

INFORMATION REQUIRED IN PROXY STATEMENT

SCHEDULE 14A INFORMATION

Proxy Statement Pursuant to Section 14(a) of the Securities

Exchange Act of 1934

(Amendment No. 2)

Filed by the Registrant

Filed by a Party other than the Registrant

Check the appropriate box:

- Preliminary Proxy Statement
- Confidential, for Use of the Commission Only (as permitted by Rule 14a-6(e)(2))**
- Definitive Proxy Statement
- Definitive Additional Materials
- Soliciting Material Pursuant to §240.14a-12

NETSCOUT SYSTEMS, INC.

(Name of Registrant as Specified in its charter)

(Name of Person(s) Filing Proxy Statement, if Other than the Registrant)

Payment of Filing Fee (Check the appropriate box):

- No fee required.
- Fee computed on table below per Exchange Act Rules 14a-6(i)(1) and 0-11.
 - (1) Title of each class of securities to which transaction applies:
 - (2) Aggregate number of securities to which transaction applies:
 - (3) Per unit price or other underlying value of transaction computed pursuant to Exchange Act Rule 0-11 (set forth the amount on which the filing fee is calculated and state how it was determined):
 - (4) Proposed maximum aggregate value of transaction:
 - (5) Total fee paid:
- Fee paid previously with preliminary materials.

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Preliminary Copy

[], 2015

Dear Stockholders:

You are cordially invited to attend a special meeting of the stockholders of NetScout Systems, Inc., or NetScout, to be held on [], 2015 at [] local time, at NetScout Systems, Inc., 310 Littleton Road, Westford, Massachusetts to vote on actions associated with a strategic acquisition that your board of directors has determined represents an unprecedented opportunity to strengthen NetScout and position it to deliver enhanced, sustainable shareholder value. A notice of the special meeting and the proxy statement follow.

As previously announced, on October 12, 2014, NetScout entered into a definitive agreement with Danaher Corporation, or Danaher, under which NetScout will acquire Danaher's Communications Business, comprising Tektronix Communications, Arbor Networks, and certain parts of Fluke Networks, which we refer to as the Communications Business.

We believe the acquisition is highly compelling strategically, operationally and financially, and that it will create shareholder value well in excess of what NetScout could achieve on its own, based on benefits that include:

a broader portfolio of best-in-class solutions that will roughly double NetScout's total addressable market to over \$8 billion;

acceleration of our plans to participate more substantially in growth-oriented market sectors such as cyber intelligence and business intelligence analytics;

stronger go-to-market capabilities to support a broader, more global and diverse customer base of service provider and enterprise customers; and

notable operating synergies arising from our greater scale that will enable us to improve efficiencies across a number of key functional areas, along with the resources necessary to fund continued innovation and key sales, marketing and support programs.

In combination, we believe that these benefits will enable NetScout to sustain strong growth on a substantially larger revenue base, which, in combination with notable operating synergies and prudent investment, will enable us to drive our profitability to new levels.

At the special meeting, you will be asked to approve a proposal to issue shares of NetScout common stock in connection with the transactions necessary to combine the Communications Business with the business of NetScout. You will also be asked to approve a proposal to adjourn or postpone the special meeting, if necessary or appropriate, to solicit additional proxies if there are not sufficient votes at the time of the special meeting to approve the issuance

of shares of NetScout common stock in the acquisition. **If the proposal to approve the issuance of shares of NetScout common stock is not approved, the proposed acquisition cannot be completed.**

After consummation of the transactions described in the proxy statement, approximately 59.5% of NetScout common stock is expected to be held by pre-transaction holders of Danaher common stock and approximately 40.5% of NetScout common stock is expected to be held by pre-transaction NetScout stockholders. After the transactions, NetScout common stock issued will continue to be listed on NASDAQ under NetScout's current symbol, NTCT.

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The NetScout board of directors recommends that you vote FOR the proposal to issue shares of NetScout common stock to facilitate the completion of the acquisition and FOR the proposal to approve adjournments or postponements of the special meeting, if necessary or appropriate, to solicit additional proxies if there are not sufficient votes at the time of the special meeting to approve the issuance of shares of NetScout common stock.

Your proxy is being solicited by the board of directors of NetScout. After careful consideration, our board of directors unanimously approved the definitive agreement and determined that this agreement and the other transactions associated with it are advisable and fair to, and in the best interests of, NetScout and its stockholders.

We urge all NetScout stockholders to read the accompanying proxy statement carefully and in its entirety. In particular, we urge you to read carefully the matters discussed under Risk Factors beginning on page 31.

Your vote is very important, regardless of the number of shares you own. We cannot complete the acquisition unless the proposal to issue NetScout shares in the transaction is approved by the affirmative vote of a majority of the outstanding shares of common stock that are voted at the special meeting. Regardless of your plans to attend the special meeting in person, please vote by proxy over the telephone, on the internet or by mail as described in the enclosed proxy materials. If you submit your proxy without indicating how you want to vote, your proxy will be counted as a vote **FOR** each of the proposals presented at the special meeting. If you do not vote by telephone, by using the internet or by mail, or if you do not specifically instruct your bank, broker or other nominee how to vote any shares held for you in street name, your shares will not be voted at the special meeting.

On behalf of our Board of Directors, we thank you for your support and appreciate your consideration of this matter. We look forward to reporting the results from the special meeting to you.

Very truly yours,

Anil Singhal
Chairman, President, and Chief Executive
Officer

This document is dated [], 2015 and is first being mailed to NetScout's stockholders on or about [], 2015.

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REFERENCES TO ADDITIONAL INFORMATION

This document incorporates important business and financial information about NetScout from documents filed with the SEC that have not been included or delivered with this document. This information is available to NetScout stockholders without charge by accessing the SEC's website maintained at www.sec.gov, or upon written or oral request to NetScout Systems, Inc., 310 Littleton Road, Westford, Massachusetts 01886, Attention: Investor Relations, telephone: (978) 614-4000. See "Where You Can Find More Information; Incorporation by Reference."

All information contained or incorporated by reference in this document with respect to NetScout, Merger Sub and Merger Sub II and their respective subsidiaries, as well as information on NetScout after the consummation of the Transactions, has been provided by NetScout. All other information contained or incorporated by reference in this document with respect to Danaher, Newco or their respective subsidiaries, or the Communications Business and with respect to the terms and conditions of Danaher's exchange offer and/or spin-off has been provided by Danaher. This document contains or incorporates by reference references to trademarks, trade names and service marks, including AIRMAGNET®, FLUKE NETWORKS®, ARBOR NETWORKS®, TEKTRONIX® Communications and VSS MONITORING® that are owned by Danaher and its related entities.

The information included in this document regarding Danaher's exchange offer is being provided for informational purposes only and does not purport to be complete. For additional information on Danaher's exchange offer and the terms and conditions of Danaher's exchange offer, NetScout's stockholders are urged to read Newco's registration statement on Form S-4 and Form S-1 (Reg. No. 333-200711), NetScout's registration statement on Form S-4 (Reg. No. 333-200704), when each is available, and all other documents Newco or NetScout file with the SEC relating to the Mergers. This document constitutes only a proxy statement for NetScout stockholders relating to the special meeting and is not an offer to sell or a solicitation of an offer to purchase shares of NetScout common stock, Danaher common stock or Newco common units.

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EXPLANATORY NOTE

This proxy statement relates to the special meeting of stockholders of NetScout Systems, Inc. (NetScout) to approve the issuance of shares of NetScout common stock, par value \$0.001 per share, that will be issued in the two-step merger process whereby (i) RS Merger Sub I, Inc., a Delaware corporation (Merger Sub), which is a wholly-owned subsidiary of NetScout Systems, Inc., a Delaware corporation (NetScout), will merge with and into Newco, with Newco continuing as the surviving company (the First Merger) and (ii) immediately following the First Merger, Newco will merge with and into RS Merger Sub II, LLC, a Delaware limited liability company (Merger Sub II), which is a wholly-owned subsidiary of NetScout, with Merger Sub II surviving as a wholly-owned subsidiary of NetScout (the Second Merger , and together with the First Merger, the Mergers). Prior to the Mergers, Danaher will transfer certain assets and liabilities related to the communications business of Danaher, including Tektronix Communications, Arbor Networks and certain parts of Fluke Networks Enterprise, but excluding Danaher's data communications cable installation business and its communication service provider (field and test tools systems) business (the Communications Business), to Newco or one of its subsidiaries. In exchange therefor, Danaher will receive all of the issued and outstanding Newco common units. Newco is a newly formed, wholly-owned subsidiary of Danaher that was organized specifically for the purpose of effecting the Separation (as defined below). Newco has engaged in no business activities to date and it has no material assets or liabilities of any kind, other than those incident to its formation and those incurred in connection with the Transactions (as defined below). The Newco common units will be immediately converted into shares of NetScout common stock in the First Merger. NetScout has filed this proxy statement that relates to the special meeting of stockholders of NetScout to approve the issuance of shares of NetScout common stock in the First Merger. In addition, NetScout has filed a registration statement on Form S-4 (Registration No. 333-200704) to register the shares of its common stock, which will be issued in the First Merger.

Based on market conditions prior to the closing of the Mergers, Danaher will determine whether the Newco common units will be distributed to Danaher's stockholders in a spin-off or a split-off. In a spin-off, all Danaher stockholders would receive a pro rata number of Newco common units. In a split-off, Danaher would offer its stockholders the option to exchange their shares of Danaher common stock for Newco common units in an exchange offer. If the exchange offer is undertaken and consummated but the exchange offer is not fully subscribed because fewer than all Newco common units owned by Danaher are exchanged, the remaining Newco common units owned by Danaher would be distributed on a pro rata basis to Danaher stockholders whose shares of Danaher common stock remain outstanding after consummation of the exchange offer. After the distribution of Newco common units in a split-off and/or spin-off, as applicable, Newco common units would immediately be converted into shares of NetScout common stock in the First Merger, resulting in a reduction in Danaher's outstanding shares.

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NETSCOUT SYSTEMS, INC.

310 Littleton Road

Westford, MA 01886

NOTICE OF SPECIAL MEETING OF STOCKHOLDERS

To Be Held []

To the Stockholders of NetScout Systems, Inc.:

A special meeting of stockholders (the special meeting) of NetScout Systems, Inc. (NetScout) will be held at [] a.m. local time, on [], 2015, at NetScout Systems, Inc., 310 Littleton Road, Westford, Massachusetts 01886. The special meeting will be held for the following purposes:

1. To approve the issuance of shares of NetScout common stock in the First Merger;
2. To adjourn or postpone the special meeting, if necessary or appropriate, to solicit additional proxies if there are not sufficient votes at the time of the special meeting to approve the issuance of shares of NetScout common stock in the First Merger; and
3. To transact any other business that may properly come before the special meeting or any adjourned or postponed session of the special meeting.

NetScout's board of directors has unanimously approved the Mergers, the Merger Agreement, and the other Transactions (each as defined in this proxy statement), and determined that the Transactions contemplated by the Merger Agreement are advisable and fair to, and in the best interests of, NetScout and its stockholders. NetScout's board of directors recommends that stockholders vote FOR the proposal to issue shares of NetScout common stock in the First Merger and FOR the proposal to approve adjournments or postponements of the special meeting for the purpose of soliciting additional proxies, if necessary or appropriate. If the proposal to approve the issuance of shares of NetScout common stock in the First Merger is not approved, the Mergers cannot be completed.

Holders of record at the close of business on [], 2015, the Record Date for determining stockholders entitled to vote at the special meeting, will be entitled to vote at the meeting and any adjournments or postponements of the special meeting.

The attached proxy statement contains a description of the Merger Agreement and the proposed Transactions.

All NetScout stockholders are cordially invited to attend the special meeting in person. However, whether or not NetScout stockholders plan to attend the meeting, we urge each NetScout stockholder to vote by proxy by following the instructions on the enclosed proxy card to ensure its vote is counted. A NetScout stockholder may still attend the meeting in person even if it has already voted by proxy. If your shares are held in the name of a bank, broker or other

nominee, you may be eligible to vote electronically or by phone please refer to the voting instruction form provided to you by your bank, broker or other nominee. If you attend the meeting, you may vote in person even if you have previously returned your vote in accordance with the foregoing.

By Order of the Board of Directors,

Anil K. Singhal

Chairman, President, and Chief Executive Officer

Westford, Massachusetts

[], 20[]

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Certain abbreviations and terms used in the text and notes are defined below:

| Abbreviation/Term | Description |
|------------------------------|--|
| Ancillary Agreements | The Tax Matters Agreement, the Transition Services Agreement, the Employee Matters Agreement, the Trademark License Agreement, the DBS License Agreement, the IP License Agreement, the Lease Agreement and any other agreements mutually agreed to by the parties pursuant to the Distribution Agreement |
| Audited Financial Statements | The audited combined financial statements of (x) the Communications Business and (y) Newco (before giving effect to the internal restructuring described in the Distribution Agreement), including the combined balance sheets of (x) the Communications Business and (y) Newco (before giving effect to the internal restructuring described in the Distribution Agreement) as of December 31, 2013 and December 31, 2012 and the three years in the period ended December 31, 2013 together with a report on the financial statements from the independent registered public accounting firm for the Communications Business |
| Code | The Internal Revenue Code of 1986, as amended |
| Communications Business | The communications group business of Danaher conducted under the brands Tektronix Communications, Fluke Networks and Arbor Networks, and including Newco and its subsidiaries; provided, however, that the Communications Business shall exclude Danaher's data communications cable installation business and its communication service provider (field and test tools systems) business |
| Danaher | Danaher Corporation |
| Danaher common stock | The common stock, par value \$0.01 per share, of Danaher |
| Danaher Equity Award | Any Danaher Option that is issued and unexercised and any Danaher RSU that is issued and unvested, in each case at the effective time of the First Merger, and which is treated in each case in accordance with the Employee Matters Agreement |
| Danaher group | Danaher and each of its subsidiaries, but excluding any member of the Newco group |
| Danaher Option | Options to purchase shares of Danaher common stock from Danaher, whether granted by Danaher pursuant to the Danaher Stock Plans, assumed by Danaher in connection with any merger, acquisition or similar transaction or otherwise issued or granted and whether vested or unvested |
| Danaher RSU | Each restricted stock unit representing the right to vest in and be issued shares of Danaher common stock by Danaher, whether granted by Danaher pursuant to a Danaher Stock Plan, assumed by Danaher in connection with any merger, acquisition or similar transaction or otherwise issued or granted |

and whether vested or unvested

Danaher Shared Contract

Any contract relating to (but not relating primarily to) the Communications Business that also relates to any business or business function of the Danaher group to which Danaher, Newco or any member of their respective groups is a party or by which any of their respective assets is bound

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| Abbreviation/Term | Description |
|----------------------------|---|
| Danaher Stock Plans | Danaher's 1998 Stock Option Plan, Danaher's 2007 Stock Incentive Plan, Tektronix 2002 Stock Incentive Plan and Tektronix 2005 Stock Incentive Plan |
| DBS License Agreement | The DBS License Agreement substantially in the form attached as Exhibit E to the Distribution Agreement |
| Debt Financing | Any debt financing entered into by the NetScout Companies in connection with the Mergers, the Distribution and other transactions contemplated by the Transaction Documents, including the amendment of that certain Credit and Security Agreement, dated as of December 21, 2007, by and among NetScout, KeyBank National Association, Wells Fargo Bank, National Association, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Bank of America, N.A., Silicon Valley Bank, Comerica Bank, and the lenders party thereto, as amended by First Amendment Agreement, dated as of December 4, 2009 |
| DGCL | General Corporation Law of the State of Delaware |
| The Distribution | The distribution by Danaher, pursuant to the Merger Agreement, of 100% of the Newco common units to Danaher's stockholders in either an exchange offer followed, if necessary, by a spin-off or in a spin-off distribution not including an exchange offer. Danaher expects for the Distribution to be effected through an exchange offer, but the ultimate structure selected will be based on market conditions |
| The Distribution Agreement | The Separation and Distribution Agreement, dated as of October 12, 2014, by and among Danaher, NetScout and Newco (as the same may be amended from time to time) |
| Distribution Date | The date selected by the Danaher board or its designee for the distribution of Newco common units to holders of Danaher common stock as of the record date in connection with the Distribution |
| Employee Matters Agreement | The Employee Matters Agreement substantially in the form attached as Exhibit C to the Distribution Agreement |
| Exchange Act | The Securities Exchange Act of 1934, as amended |
| The exchange offer | An exchange offer whereby Danaher is offering to its stockholders the option to exchange all or a portion of their shares of Danaher common stock for all of the Newco common units, which Newco common units will be immediately exchanged for NetScout common stock in the Mergers |
| The First Merger | The merger of Merger Sub with and into Newco, with Newco surviving the merger as a wholly-owned subsidiary of NetScout, as contemplated by the Merger Agreement |
| GAAP | Generally accepted accounting principles in the United States |
| HSR Act | The Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended |
| Internal Restructuring | The corporate structuring steps contemplated by the Plan of Reorganization |

IP License Agreement

The Intellectual Property Cross-License Agreement substantially in the form attached as Exhibit G to the Distribution Agreement

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| Abbreviation/Term | Description |
|--------------------------|---|
| IRS | Internal Revenue Service |
| IRS ruling | Private letter ruling from the IRS with respect to certain aspects of the anticipated non-taxable nature of the Transactions |
| Lease Agreement | The Commercial Lease Agreement substantially in the form attached as Exhibit F to the Distribution Agreement |
| The Merger Agreement | The Agreement and Plan of Merger and Reorganization, dated as of October 12, 2014, by and among Danaher, Newco, NetScout, Merger Sub and Merger Sub II (as the same may be amended from time to time) |
| The Mergers | The First Merger together with the Second Merger |
| Merger Sub | RS Merger Sub I, Inc., which is a wholly-owned subsidiary of NetScout |
| Merger Sub II | RS Merger Sub II, LLC, which is a wholly-owned subsidiary of NetScout |
| NASDAQ | The NASDAQ Global Select Market |
| NetScout | NetScout Systems, Inc. |
| NetScout Bylaws | NetScout's Amended and Restated Bylaws |
| NetScout Charter | NetScout's Third Amended and Restated Certificate of Incorporation |
| NetScout common stock | The common stock, par value \$0.001 per share, of NetScout |
| NetScout Companies | NetScout and each of NetScout's subsidiaries, including Merger Sub and Merger Sub II |
| NetScout Products | Products or services (i) both (x) designated or developed and (y) sold, or (ii) under development and substantially completed, or (iii) manufactured, sold or distributed, in each of the foregoing (i), (ii) and (iii), by or on behalf of the NetScout Companies as of October 12, 2014, including the products listed in the NetScout disclosure letter to the Merger Agreement |
| NetScout Superior Offer | An unsolicited bona fide written offer by a third party to purchase at least a majority of the outstanding shares of NetScout common stock or at least a majority of the assets of NetScout (whether through a tender offer, merger or otherwise), that is determined by the NetScout board of directors, in its good faith judgment, after consulting with its financial advisor and outside legal counsel, and after taking into account the terms and conditions of the offer, including the likelihood and anticipated timing of consummation, (i) to be more favorable, from a financial point of view, to NetScout's stockholders than the combination with Newco, (ii) is reasonably likely to be completed, taking into account any financing and approval requirements that the NetScout board of directors determines to be relevant and all other financial, legal, regulatory and other aspects of such proposal that the NetScout board of directors determines to be relevant, and (iii) for which financing, if a cash transaction (in whole or part), is then fully committed |
| Newco | Potomac Holding LLC, which is a Delaware limited liability company and currently a wholly-owned subsidiary of Danaher Corporation |

Newco Assets

Has the meaning ascribed to the Communications Assets in the Distribution Agreement

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| Abbreviation/Term | Description |
|------------------------------|---|
| Newco common units | Common units representing limited liability company interests in Newco |
| Newco Companies | Newco and its subsidiaries after giving effect to the transactions and transfer of assets and liabilities as set forth in the Distribution Agreement |
| Newco Employee | Each employee who as of the date of the Separation is an employee of Danaher's Tektronix Communications business or Danaher's Arbor Networks business and each employee of Danaher's Fluke Networks Enterprise business who is determined to be either primarily dedicated to the Communications Business in the ordinary course or required for the ongoing operation of the Communications Business, and in all cases regardless of whether any such employee is actively at work as of the date of the Separation or is not actively at work as of the date of the Separation as a result of disability or illness, an approved leave of absence (including military leave with reemployment rights under federal law and leave under the Family and Medical Leave Act of 1993), vacation, personal day or similar short- or long-term absence |
| Newco group | Newco, and each of the subsidiaries of Danaher contemplated to be owned (directly or indirectly) by Newco immediately prior to the Separation Time pursuant to the Plan of Reorganization |
| Newco Indemnitees | Newco, each member of the Newco group, NetScout (from and after the Separation Time), each of their respective successors and assigns, all persons who are or have been stockholders, directors, partners, managers, managing members, officers, agents or employees of any member of the Newco group (in each case, in their respective capacities as such), and their respective heirs, executors, administrators, successors and assigns |
| Newco Independent Contractor | Each independent contractor who as of the date of the Separation provides services to Danaher's Tektronix Communications business or Danaher's Arbor Networks business and each independent contractor providing services to Danaher's Fluke Networks Enterprise business who is determined to be either primarily dedicated to the Communications Business in the ordinary course or required for the ongoing operation of the Communications Business |
| Newco IP | (a) All intellectual property constituting, and all intellectual property rights embodied by, the Newco Products and for which Danaher has (or purports to have, including as a result of the transfers under the Distribution Agreement) ownership rights; and (b) all other material intellectual property rights with respect to which any of the Newco Companies has (or purports to have, including as a result of the transfers under the Distribution Agreement) an ownership interest |
| Newco Products | Products or services (i) both (x) designated or developed and (y) sold, or (ii) under development and substantially completed, or (iii) manufactured, sold or distributed, in each of the foregoing (i), (ii) and (iii), by or on behalf of the Communications Businesses or Newco Companies as of October 12, |

2014, including the products listed in the Danaher disclosure letter to the Merger Agreement

Newco Shared Contract

Any contract primarily relating to the Communications Business that also relates to any business or business function of the Danaher group to which Danaher, Newco or any member of their respective groups is a party or by which any of their respective assets is bound

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| Abbreviation/Term | Description |
|--------------------------|-----------------------------|
| NYSE | The New York Stock Exchange |
| Operating Profit | |