Janet McGinness
Senior Vice President – Legal & Corporate Secretary
Legal & Government Affairs

20 Broad Street
New York, New York 10005
t 212.656.2039 | f 212.656.8101
jmcginness@nyx.com

VIA EMAIL AND FEDERAL EXPRESS

November 30, 2011

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington D.C. 20549-1090

Re: Release No. 34-65324; File No. SR-NASDAQ-2011-122—Notice of Filing of Proposed Rule Change to Describe Complimentary Services that are Offered to Certain New Listings on NASDAQ's Global and Global Select Markets

Dear Ms. Murphy:

New York Stock Exchange LLC ("NYSE") hereby submits this comment letter in response to the above-referenced Securities and Exchange Commission (the "Commission") notice and request for comments. Our comments are focused on the proposal by The NASDAQ Stock Market LLC ("NASDAQ") to offer products to companies that switch their listing from NYSE to the NASDAQ Global or Global Select Markets. As described in more detail below, NYSE believes that the proposed rule is not consistent with Section 6 of the Securities Exchange Act of 1934 (the "Exchange Act").

NASDAQ proposes to provide specific services of its sister company NASDAQ OMX Group Corporate Solutions, Inc. ("Corporate Solutions") to two categories of companies newly listed on NASDAQ's Global and Global Select Markets: (1) companies listing in connection with an initial public offering, upon emerging from bankruptcy, or in connection with a spin-off or carve-out from another company ("Eligible New Listings"), and (2) companies that switch their listing from NYSE to the Global or Global Select Markets ("Eligible Switches"). The specific mix of Corporate Solutions services that such companies received would depend on their market capitalization.[1]

The proposed rule makes a further distinction between companies. Eligible Switches with a market capitalization equal to or greater than $500 million would receive Corporate Solutions services for four years from the date of listing, but New Listings with the same market capitalization would receive services for only half that time. NASDAQ states that it proposes

[1] Under the proposed rule, a company with a market capitalization equal to or greater than $500 million would receive services with an estimated value of $169,000 per year, while a company with a market capitalization below that threshold would receive services with an estimated value of $94,000 per year.

to offer Eligible Switches with a market capitalization of $500 million or more the additional two years of services because it believes that these companies receive comparable services from the NYSE, which they would forgo by switching their listing.[2]

I. The NASDAQ Proposal Is Not Consistent With Section 6 of the Exchange Act

NYSE does not believe that treating Eligible Switches differently from Eligible New Listings complies with Section 6(b)(5) of the Exchange Act, which requires exchange rules that "are not designed to permit unfair discrimination between . . . issuers". On its face, the proposed rule discriminates between issuers, in that, even with all other things being equal, among companies that meet the $500 million market capitalization threshold, an Eligible Switch would receive services for twice as long as an Eligible New Listing—and an issuer already listed on NASDAQ would be subject to a separate rule entirely. Transferring issuers are not a separate class of filer, and giving them treatment preferential to both Eligible New Listings and existing NASDAQ listed issuers is unfair discrimination.

This flaw in the rule's structure is reflected in the arguments that NASDAQ marshals to support its proposal. To justify the level of services offered Eligible New Listings, NASDAQ argues that "the services offered will help ease the transition of becoming a public company and will help the Eligible New Listings fulfill their new responsibilities as public companies."[3] NASDAQ cannot call on this need-based argument in contending that its treatment of Eligible Switches is not unfair discrimination, however, because on a needs basis Eligible New Listings should receive services for a longer period than Eligible Switches, not a shorter one, as proposed. Eligible Switches by definition are existing public companies that simply are listed on the NYSE. As such, when they list on NASDAQ they are not transitioning into being a public company or taking on related responsibilities, and so do not need extra services.

Accordingly, NASDAQ departs from the issuers' needs argument, and states that it "believes it is not unfair discrimination to offer its program only to companies switching from the NYSE . . . because the companies listed on the NYSE receive comparable services from the NYSE, which they would forgo by switching their listing to NASDAQ."[4] Put more bluntly, NASDAQ's proposed rule is not based on concepts of fairness, but on what it needs to induce issuers to transfer to NASDAQ from NYSE.

Indeed, a NYSE-listed company with sufficient market capitalization, faced with the stated value of the Corporate Solutions services and the four year period they would be provided, could reasonably conclude that it is being offered four years of virtually free listing on

---

[2] Securities Act Release No. 34-65324 (September 12, 2011); 76 FR 57781, at 57783 (September 16, 2011) (SR-NASDAQ-2011-122) ("Release No. 34-65324").

[3] Release No. 34-65324, at 57783. *See also* November 15, 2011 letter from Joan C. Conley to Ms. Elizabeth M. Murphy (the "NASDAQ Response Letter"), at 3.

[4] NASDAQ Response Letter, at 3. *See also* Release No. 34-65324, at 57783.

NASDAQ as an inducement to switch.[5] NYSE believes that this is not consistent with the requirements of Section 6(b)(4) of the Exchange Act, because for those four years, the Eligible Switch effectively would be paying substantially lower fees than any company of the same capitalization already listed on NASDAQ or, for the final two years, any Eligible New Listing. This structure does not constitute an "equitable allocation of reasonable dues, fees, and other charges among. . . issuers".

II. NASDAQ's Treatment of Eligible Switches is Not Comparable to NYSE Rule 907.00

In support of its position that without the proposed rule Eligible Switches with a market capitalization of $500 million or more would forego comparable services from NYSE by switching to NASDAQ, NASDAQ cites the Commission's recent approval of NYSE Listed Company Manual Rule 907.00.[6]

In so doing, NASDAQ highlights the flaw in its own argument. Under Rule 907.00, NYSE offers complimentary products and services to all listed companies and additional products and services to certain companies based on (a) total shares or total ADRs issued and outstanding for currently listed issuers or (b) global market value based on a public offering price for newly listed issuers. The rule is appropriate and consistent under the Exchange Act precisely because it provides products and services to issuers based on transparent, quantitative criteria. NYSE does not treat a company differently simply because it transferred from another exchange, and does not believe it would be equitable to do so.

In its response to comments received on the proposed rule NASDAQ compares the two rules, stating that NYSE Rule 907.00, "like NASDAQ's proposal, offers different products and services to companies based on their size and status (e.g., IPO or market transfer)."[7] The comparison goes too far in including market transfers. Indeed, NYSE Rule 907.00 explicitly states that for purposes of the rule, "newly listed issuers" does not include issuers that transfer their listing from another exchange. Rather, an issuer that transfers from another exchange would be eligible for Tier One or Tier Two products and services the same as any other currently listed issuer.[8] NYSE believes that this is a far more equitable treatment of listed issuers. If NASDAQ's intent is to give Eligible Transfers treatment similar to that which they receive at the NYSE, it should treat all companies the same, based on issuer need and transparent and quantifiable measures.

---

5 As discussed in Section II, below, NYSE offers no such inducement.

6 Release No. 34-65324, at 57782, note 8. *See* Securities Act Release No. 65127 (August 12, 2011), 76 FR 51449 (August 18, 2011) (SR-NYSE-2011-20) ("Release No. 65127").

7 NASDAQ Response Letter, at 1, note 6.

8 NYSE Listed Company Manual Rule 907.00.

In its approval of Rule 907.00, the Commission noted that, although under the rule not all issuers would receive the same level of services, the NYSE had represented that the relevant criteria, trading volume and market activity, "are related to the level of services that the listed companies would use in the absence of the complimentary services arrangements."[9] That is not true under NASDAQ's proposed rule. The extra two years of services an Eligible Transfer would receive is related to how the issuer arrived at NASDAQ, not its needs or level of services it would use.

Similarly, in the same release the Commission noted that in Listed Company Manual Rule 907.00 "the criteria for satisfying the tiers are the same for all issuers."[10] By contrast, under the proposed NASDAQ rule the extent of complimentary services that companies will receive is not the same for all companies of the same market capitalization. Instead, as noted above, three issuers with the same market capitalization may receive different services, simply because one is a new issuer, one switched from NYSE, and one has been listed on NASDAQ for some years.

For the above reasons, NYSE believes that the proposed rule is not consistent with Section 6 of the Exchange Act and therefore should not be approved in its current form.

In connection with the proposed rule, NYSE requests that the Commission clarify that the proposed rule, if approved, encompasses the complete set of products and services that NASDAQ is authorized to provide Eligible Switches and Eligible New Listings, whether directly through Corporate Solutions or another entity or by means of compensation for third party services, and that subsequent to the two or four year periods encompassed by the rule the companies will only be provided the services set out in NASDAQ's rules applicable to all other listed companies.

In addition, NYSE asks for confirmation that to the extent NASDAQ is currently in discussion with issuers regarding listing on NASDAQ, NASDAQ will treat such issuers in accordance with the proposed rule, offering no additional or different products or services, even if an issuer lists prior to the rule being approved.

Finally, we ask that the SEC clarify that companies that listed with NASDAQ within the two years prior to the rule's passage (or, if applicable, four years) be subject to the new rule, such that NASDAQ will amend any package of services the issuers may currently receive to conform to the rule.

---

9 Release No. 65127, 76 FR 51449 at 51452.

10 Release No. 65127, 76 FR 51449 at 51452.

Thank you for this opportunity to comment on the proposed rule.

Respectfully yours,