

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-65963; File No. SR-NASDAQ-2011-122)

December 15, 2011

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of Proposed Rule Change to Describe Complimentary Services that are Offered to Certain New Listings on NASDAQ's Global and Global Select Markets

I. Introduction

On August 30, 2011, The NASDAQ Stock Market LLC ("NASDAQ" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to describe services offered by NASDAQ to certain newly listing companies on NASDAQ's Global and Global Select Markets. The proposed rule change was published in the Federal Register on September 16, 2011.³ The Commission originally received five comment letters from three commenters on the proposal.⁴ NASDAQ submitted a letter in response to these comments.⁵ The Commission received three additional comment letters on

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 65324 (September 12, 2011), 76 FR 57781 ("Notice").

⁴ See Letters to Elizabeth M. Murphy, Secretary, Commission, from Neil Hershberg, Senior Vice President, Business Wire Inc., received September 28, 2011 ("Business Wire Letter 1"); John Viglotti, Vice President, PR Newswire Association LLC, received October 7, 2011 ("PR Newswire Letter"); Jesse W. Markham, Jr., Roger Myers, and Michael R. MacPhail, Holme Roberts & Owen LLP ("Holme Roberts") (writing on behalf of Business Wire, Inc.), dated October 7, 2011 ("Business Wire Letter 2"); Patrick Healy, CEO, Issuer Advisory Group LLC, dated October 22, 2011 ("Issuer Advisory Letter"); and Holme Roberts Letter, dated November 15, 2011 ("Business Wire Letter 3").

⁵ See Letter to Elizabeth M. Murphy, Secretary, Commission, from Joan Conley, Senior Vice President and Corporate Secretary, NASDAQ OMX, dated November 15, 2011 ("NASDAQ Response Letter").

November 30, 2011, December 8, 2011, and December 13, 2011.⁶ On October 28, 2011, the Commission extended the time period in which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change, to December 15, 2011.⁷ This order grants approval of the proposed rule change.

II. Description of the Proposal

In its filing, NASDAQ is proposing to amend its rules to include new Section IM-5900-7 to describe products that are offered to certain newly listing companies. As discussed in more detail below, NASDAQ proposes to offer complimentary products and services to companies listing on NASDAQ's Global and Global Select Markets 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").⁸ Additionally, NASDAQ proposes to offer such services to companies that switch their listing from the New York Stock Exchange ("NYSE") to NASDAQ's Global or Global Select Markets ("Eligible Switches"). In its filing, NASDAQ also noted that all NASDAQ-listed companies, including companies listed on the Capital Market, receive access to NASDAQ's Market Intelligence Desk and NASDAQ Online.

The Exchange is a subsidiary of The NASDAQ OMX Group, Inc. ("NASDAQ OMX").

NASDAQ proposes to offer these products and services through NASDAQ OMX Corporate

⁶ See Letter to Elizabeth M. Murphy, Secretary, Commission, from Janet McGinness, New York Stock Exchange LLC, dated November 30, 2011 ("NYSE Letter"); Holme Roberts Letter, dated December 8, 2011 ("Business Wire Letter 4"); and E-mail from Dominic Jones, IR Web Reporting International Inc., dated December 13, 2011 ("IR Letter").

⁷ See Securities Exchange Act Release No. 65653 (October 28, 2011), 76 FR 68237 (November 3, 2011).

⁸ NASDAQ represented that, under the proposal, a company transferring from the OTCBB or Pink Sheets or from the Capital Market would not be eligible to receive these services. See Notice supra note 3.

Solutions, Inc. (“Corporate Solutions”), also a subsidiary of NASDAQ OMX and an affiliate of the Exchange.⁹ According to NASDAQ, Corporate Solutions offers products and programs to private and public companies, including companies listed on the Exchange, designed to enhance transparency, mitigate risk, maximize efficiency and facilitate better corporate governance.

Pursuant to the proposal, Eligible New Listings and Eligible Switches with a market capitalization of up to \$500 million would receive the following services for two years from the date of listing, having a total retail value of approximately \$93,500 per year,¹⁰ and would receive a waiver of one-time development fees of approximately \$4,000 to establish the services:

- Governance Services
 - Board Tools: Use of Directors Desk for up to 10 users, with an approximate retail value of \$20,000 per year.
 - Whistleblower Hotline: Use of a financial reporting hotline that provides employees and others with fully-automated means of reporting incidents and concerns, with an approximate retail value of \$3,500 per year.

⁹ In its filing, NASDAQ stated its belief that Corporate Solutions is not a “facility” of the Exchange as defined in 15 U.S.C. 78c(a)(2), and noted that its proposed rule change is being filed with the Commission under Section 19(b)(2) of the Act because it relates to services offered in connection with a listing on the Exchange. See Notice supra note 3. The Commission notes that the definition of a “facility” of an exchange is broad under the Act, and “includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange . . . and any right of the exchange to the use of any property or service.” The Commission further notes that any determination as to whether a service or other product is a facility of an exchange requires an analysis of the particular facts and circumstances.

¹⁰ Retail values are based on Corporate Solutions’ current price list. If a company does not fully use the services offered in a year, unused services do not carry forward into future years and cannot be used to offset the costs of other services or listing fees.

- Communications Services
 - Investor Relations Website: Use of a website with all the necessary content and features to communicate with investors, including a corporate governance library containing documents such as the Board committees' charters and the company's code of ethics, with a retail value of approximately \$16,000 per year.
 - Press Releases: Companies will be provided \$15,000 worth of distribution services for earnings or other press releases, including photographs, and filing of EDGAR and XBRL reports. The actual number of press releases will vary based on their length and the regional distribution network chosen by the company.
- Intelligence Services
 - Market Analytic Tools: Use of a market analytic tool, which integrates corporate shareholder communications, capital market information, investor contact management, and board-level reporting into a unified workflow environment for up to four users, including information about research and earnings estimates on the company and help identifying potential purchasers of the company's stock using quantitative targeting and qualitative insights, with an approximate retail value of \$39,000 per year.

Under the proposal, Eligible New Listings and Eligible Switches with a market capitalization of \$500 million or more would receive the services described above, including the waiver of one-time development fees, and the additional services described below, worth a total retail value of approximately \$169,000 per year.¹¹ Eligible New Listings with a market capitalization of \$500 million or more would receive all services for two years from the date of

¹¹ Id.

listing, and Eligible Switches with a market capitalization of \$500 million or more would receive all services for four years from the date of listing:

- Governance Services
 - Board Tools: An additional five licenses for Directors Desk, with a retail value of approximately \$10,000 per year.
- Communications Services
 - Press Releases: An additional \$5,000 worth of distribution services.
- Intelligence Services
 - Market Surveillance Tools: A stock surveillance package, that includes monitoring the daily movement and settlement activity of the company's stock, providing alerts on increases in trading volume and block trading activity, and offering color to any unusual change in stock price, with an approximate retail value of \$60,000 per year. To fully utilize this service, NASDAQ states that companies will have to subscribe to, and separately pay for, certain third party information, which is not included.¹²

The Exchange represents that it is proposing to offer four years of services to Eligible Switches with a market capitalization of \$500 million or more, as opposed to two years of services as is the case for other Eligible Switches and Eligible New Listings, because the Exchange believes that the issuers receive comparable services from the NYSE, which the issuer

¹² For example, companies would have to purchase position reports from the Depository Trust Corporation.

would forego by switching their listing to NASDAQ, and that those issuers will likely bring greater future value to NASDAQ than will other issuers by switching to its market.¹³

III. Summary of Comments and NASDAQ Response to Comments

Four commenters raised objections to the proposal,¹⁴ while one commenter supported the proposal.¹⁵

The commenter supporting the proposal believed that “NASDAQ’s presence in the market has been good for competition. . . .”¹⁶ This commenter noted that “NYSE’s favored service providers dominate the IR services industry” and that of the “companies in the Nasdaq-100 index, only 10 used NASDAQ’s PR wire service. . . . The remaining companies overwhelmingly used Business Wire or PR Newswire”¹⁷

Two commenters generally expressed concern that NASDAQ’s proposal would harm competing suppliers of information dissemination and investor relations (“IR”) services, adversely affect competition, and result in economic coercion of and unfair discrimination among issuers.¹⁸ These two commenters dispute NASDAQ’s comparison of its proposal to the recently approved rule change by the NYSE regarding complimentary services provided to issuers.¹⁹ These commenters argue that the proposals are fundamentally different in that NYSE offers IR services through a variety of independent service providers, while NASDAQ’s proposal only offers one

¹³ See e-mail from Arnold Golub, NASDAQ, to Sharon Lawson, Division of Trading and Markets, Commission, dated December 8, 2011 (“NASDAQ E-Mail”).

¹⁴ See supra notes 4 and 6.

¹⁵ See IR Letter.

¹⁶ Id.

¹⁷ Id.

¹⁸ See Business Wire Letter 1, Business Wire Letter 2, and PR Newswire Letter.

¹⁹ See Business Wire Letter 1 and PR Newswire Letter.

affiliated service provider.²⁰ These commenters argue that NASDAQ's proposal effectively penalizes any company eligible for the free services that chooses to use a NASDAQ competitor.

These two commenters urge the Commission to reject the proposal because it would create an inequitable allocation of listing fees. One commenter states that the proposal would create a significant disparity between what otherwise indistinguishable companies pay and receive for their listing fees.²¹ This commenter alleges that the proposal would result in an inequitable allocation with respect to fees paid by issuers that are currently listed and that are not being offered the free services under the proposal, versus newly listed companies that are being offered the free services.²² The commenter disputes NASDAQ's justification of providing complimentary services to newly listing companies to help them adjust to the new responsibilities of being a publicly trading company, and conversely believes that NASDAQ is attempting to lock in newly listed companies into using Corporate Solutions once the free services expire.²³ Additionally, the commenter argues that offering complimentary services to issuers that switch their listings from the NYSE to NASDAQ discriminates among issuers and inequitably allocates listing fees among more mature companies.²⁴ The commenter also argues that a company that lists on NASDAQ and uses the complimentary IR services provided by Corporate Solutions effectively pays a lower listing fee than a similarly situated company that opts for IR services provided by another vendor.²⁵ Accordingly, the commenter believes that by bundling the listing fee with the IR services,

²⁰ See Business Wire Letter 4 (noting that this is the first time the Commission will be ruling on the permissibility of an exchange subsidizing IR services provided by its own providers).

²¹ See Business Wire Letter 1.

²² See Business Wire Letter 2.

²³ Id.

²⁴ Id.

²⁵ Id.

NASDAQ is distorting the new listing fees paid by a company that opts to use a competing IR vendor, resulting in an inequitable allocation of fees among issuers.²⁶

These two commenters also urge the Commission to reject the proposal because it will impose an unnecessary burden on competition in the IR services market.²⁷ These commenters argue that the proposal to bundle the complimentary services with listings is a form of unlawful tying.²⁸ One of these commenters argues that the proposal creates an uneven playing field in the market, distorts competition, and results in NASDAQ coercing issuers to use the services simply because they are free, even if they may not be the company's choice or meet its buying criteria.²⁹ One commenter notes that rival service providers could not possibly compete because they cannot offer IR services for free without the possibility of subsidizing the fees with listing fees.³⁰

One of these commenters argues that the proposal will burden competition in apparent violation of the antitrust laws.³¹ Specifically, the commenter alleges that NASDAQ's bundling of IR services with its listing service is an illegal "tying" in violation of Section 1 of the Sherman Act. According to the commenter, a tying arrangement violates Section 1 of the Sherman Act "if the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market."³² The commenter believes that NASDAQ's free or discounted services meets the legal standard of a tying arrangement because NASDAQ, by

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Id.

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See Business Wire Letter 2 and PR Newswire Letter.

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See Business Wire Letter 1 and PR Newswire Letter.

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See PR Newswire Letter.

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See Business Wire Letter 1.

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See Business Wire Letter 2 and Business Wire Letter 4. According to Business Wire, NASDAQ is seeking approval of its ongoing practice of tying free services to listed companies. See Business Wire Letter 3 and Business Wire Letter 4.

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See Business Wire Letter 2.

offering complimentary Corporate Solution services to listing customers through its subsidiary, is tying the two services together, so that Eligible New Listings or Eligible Switches will treat NASDAQ's listing service and its free services as a single unit and direct their business to Corporate Solutions since they are already incurring that cost.³³

The commenter also believes that NASDAQ has sufficient market power to coerce at least a substantial number of newly listing companies to use the tied product because "NASDAQ, in its regulatory role, will, on the one hand, be informing new public companies of their public disclosure obligations while, on the other, be offering to provide them those very disclosure services for free."³⁴ The commenter further argues that competition for IR services will not remain robust if NASDAQ is allowed to use its market power with respect to NASDAQ listings to eliminate meaningful competition.³⁵ Further, the commenter believes that the amount of commerce affected in the IR services market is far above the "not insubstantial" requirement of the Sherman Act, noting that the threshold requirement is so modest it is always conceded.³⁶

Separately, the commenter alleges that, by offering the Corporate Solutions services for two to four years, NASDAQ has demonstrated an attempt to monopolize in violation of Section 2 of the Sherman Act.³⁷ According to the commenter, offering the services for free – clearly below marginal cost – is predatory/anti-competitive conduct.³⁸ Additionally, the commenter believes that NASDAQ's intent to monopolize can be inferred by the fact that NASDAQ OMX, as owner of both a national securities exchange and a subsidiary that provides information dissemination

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Id.

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Id.

³⁵

See Business Wire Letter 4.

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See Business Wire Letter 2.

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Id.

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Id.

services (“IDS”) and IR services, has an advantage and that by offering free IR services to listed companies through its subsidiary, NASDAQ OMX is acting to drive out competing IDS and IR vendors for new listings and ultimately for all NASDAQ-listed companies.³⁹ Finally, the commenter claims that once competitors are shut out of the IDS and IR market, Corporate Solutions would have an unfettered ability to raise prices and/or compromise service levels to the detriment of listed companies and the investing public – achieving monopoly power.⁴⁰

The commenter also is concerned that the proposal could reduce pricing transparency, stating that historically, listed companies have paid separate, transparent fees for listing services and ancillary IR services, but that NASDAQ’s proposal, by combining both services, “blurs the line between the core mandatory and auxiliary services” and makes it unclear, for example, the extent to which listing fee increases are cross-subsidizing IR services.⁴¹

Two commenters state that NASDAQ’s offering of IR services creates a conflict of interest with respect to its role as a self-regulatory organization (“SRO”).⁴² One commenter believes that NASDAQ’s authority in determining the adequacy of public disclosures by listed companies makes it inappropriate for NASDAQ’s sister company to be the “preferred provider” for such disclosure services.⁴³ In addition, this commenter believes that because NASDAQ is in a position to determine how much disclosure is required, it could manipulate the quantity of disclosures, such as reducing the amount of disclosures required to save costs during the period when such services are being offered for free and increasing the amount of disclosure required once such services are

³⁹ Id.

⁴⁰ Id.

⁴¹ Id.

⁴² See Business Wire Letter 2 and PR Newswire Letter (expressing concern that this could effectively coerce an issuer into using the SRO’s services).

⁴³ See Business Wire Letter 2.

being paid for.⁴⁴ In addition, this commenter argues that because NASDAQ has taken on this ancillary business of providing IR services, it may have an incentive to fund this services business to the detriment of its regulatory obligations.⁴⁵ The commenter argues that these conflicts are particularly high given that NASDAQ's IR services providers do not have an independent sales force and that NASDAQ's sales representatives market these IR services in addition to selling listings.⁴⁶ Accordingly, the commenter believes that not only should NASDAQ's proposal be rejected, but that the Commission should review NASDAQ's role in providing IR services and consider requiring NASDAQ OMX to divest its Corporate Solutions business or require Corporate Solutions to sell its IR service providers to an independent third party, or, alternatively, order NASDAQ to operate its Corporate Solutions business on a strict arms-length basis.⁴⁷

Another commenter recommends that the Commission disapprove the proposed rule change and request that the listing exchanges consider the idea of offering free listings or, alternatively, that the Commission appoint an independent task force comprised of issuers to recommend a model that would permit the exchanges to provide unlimited value-added services.⁴⁸ This commenter believes that NASDAQ's proposal inhibits competition for listings, would result in the equivalent of a maximum service cap and would be used by exchange as a justification for limiting their service offerings.⁴⁹

One commenter objects to the provision by NASDAQ of free IR services to Eligible Switches with a market capitalization of \$500 million for four years, while New Listings with the

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Id.

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Id.

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Id.

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Id.

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See Issuer Advisory Letter.

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Id.

same market capitalization would only receive such services for two years under the proposal.⁵⁰ This commenter argues that treating Eligible Switches differently from Eligible New Listings and existing NASDAQ listed issuers unfairly discriminates between issuers in violation of Section 6 of the Act.⁵¹ This commenter states that issuers transferring their listing from NYSE to NASDAQ are not a separate class of issuer, and giving Eligible Switches preferential treatment results in unfair discrimination.⁵² The commenter further argues that the proposed fee structure is not an equitable allocation of reasonable fees among issuers, and therefore violates Section 6(b)(4) of the Act, because for four years an Eligible Switch 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.⁵³ The commenter does not believe that it is equitable to treat issuers differently simply because one transferred from another exchange.⁵⁴ This commenter requests that if the proposed rule is approved by the Commission, that the Commission clarify that the rule encompasses the complete set of products and services that NASDAQ is allowed to provide Eligible New Listings and Eligible Switches, and that after the two or four year periods covered by the rule have expired, companies may only be provided with services that are applicable to all other listed companies as set forth in NASDAQ's rules.⁵⁵ In addition, to the extent that NASDAQ is currently in discussions with companies to list on NASDAQ, the commenter requests that the Commission direct NASDAQ to treat such issuers in accordance with the proposed rule, and prohibit NASDAQ from offering additional or different products or services, even if an issuer lists

⁵⁰ See NYSE Letter.

⁵¹ Id. See also Business Wire Letter 4.

⁵² See NYSE Letter.

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id.

prior to the proposed rule being approved.⁵⁶ Finally, the commenter requests the Commission to clarify that companies listed on NASDAQ within the two or four years (as applicable) prior to the rule's passage will be subject to the new rule, and to require NASDAQ to amend any agreements relating to services that such issuers may currently have in order to conform services to the proposed rule.⁵⁷

In the NASDAQ Response Letter, the Exchange responded to many of the issues raised by the commenters.⁵⁸ In response to commenter concerns that the proposal limits issuer choice regarding service providers and is unlawfully tying IR services to a company's listing, NASDAQ reiterates that no issuer is required to use the offered services, and to the extent that a company chooses to use the services, such services are provided only for a limited time.⁵⁹ Further, the Exchange argues that the NASDAQ proposal is similar to the Commission-approved NYSE proposal,⁶⁰ because the NYSE proposed rule change does not allow issuers unlimited choice as to which service providers they can choose, as NYSE issuers must use those providers selected by the exchange, with no transparency as to the selection process or the financial arrangement between the NYSE and the service provider.⁶¹ NASDAQ also states that by relying on services provided by an affiliated entity, rather than third parties, NASDAQ gains greater control to assure it can provide the products most valued by companies in a high quality manner.⁶²

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ See supra note 5 and accompanying text noting that NASDAQ's Response Letter responds to only those comments cited in note 4, supra.

⁵⁹ See NASDAQ Response Letter.

⁶⁰ See Securities Exchange Act Release No. 65127 (August 12, 2011), 76 FR 51449 (August 18, 2011) (SR-NYSE-2011-22) ("NYSE Order").

⁶¹ See NASDAQ Response Letter.

⁶² Id.

In response to claims that the proposal creates an inequitable allocation of listing fees, the Exchange states that its proposal is consistent with Section 6(b)(4) of the Act, because offering different services based on a company's market capitalization is appropriate given that larger companies generally will need more and different governance, communication and intelligence services. NASDAQ additionally believes that the distinction based on market capitalization is clear and transparent. NASDAQ also states that offering the complimentary services to newly listing companies and not to companies already listed on NASDAQ is appropriate given that the services offered will help ease the transition of becoming a public company and will help these companies fulfill their new responsibilities as public companies.⁶³ NASDAQ counters the concern that the proposal results in unfair discrimination in violation of Section 6(b)(5) of the Act, stating that it offers its program only to companies switching from the NYSE, and not from other exchanges or unlisted markets or to companies already listed on NASDAQ, because the companies listed on the NYSE receive comparable services from the NYSE (and not from other exchanges), which they would forego by switching their listing to NASDAQ,⁶⁴ and because NASDAQ believes attracting NYSE listed companies will bring greater future value to NASDAQ.

NASDAQ also disputes allegations that it illegally ties its Corporate Solutions services to a company's listing on NASDAQ, asserting that companies wishing to list on NASDAQ are not forced to use services provided by NASDAQ, since neither the receipt of such services nor a NASDAQ listing are conditioned on the other.⁶⁵ NASDAQ attached a prior response letter from

⁶³ Id.

⁶⁴ Id.

⁶⁵ Id.

its outside counsel on an earlier filing that addresses the antitrust claims and notes that antitrust laws “were enacted for the protection of competition not competitors.”⁶⁶

Finally, NASDAQ represents that it achieves separation between its business and regulatory conflicts by appropriately distinguishing the regulatory functions from the influence of business considerations.⁶⁷ According to the Exchange, it houses its regulatory functions, including the Listing and Market Watch Departments, in a regulatory group that is organizationally and institutionally separate from its business lines.⁶⁸ NASDAQ also notes that this structure, its effectiveness in managing conflicts, and the effectiveness of the regulatory program in practice, are subject to periodic Commission examination, and any NASDAQ rule change to increase or decrease the amount of information that a company must publicly disclose would require Commission approval.⁶⁹

IV. Discussion and Commission’s Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of Section 6 of the Act.⁷⁰ Specifically, as discussed in more detail below, the Commission finds that the proposal is consistent with Sections 6(b)(4),⁷¹ 6(b)(5),⁷² and 6(b)(8)⁷³ in that the proposal is designed, among other things, to provide for the equitable

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ Id.

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

⁷¹ 15 U.S.C. 78f(b)(4).

⁷² 15 U.S.C. 78f(b)(5).

⁷³ 15 U.S.C. 78f(b)(8).

allocation of reasonable dues, fees, and other charges among Exchange members and issuers and other persons using its facilities and to promote just and equitable principles of trade, and is not designed to permit unfair discrimination between issuers, and that the rules of the Exchange do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Commission notes that while all issuers will receive some services from NASDAQ, such as NASDAQ Online and the Market Intelligence Desk, some issuers will receive additional products and services based on their status as either an Eligible New Listing or Eligible Switch and their market capitalization.⁷⁴ NASDAQ has represented that offering additional services only to companies listing on the Global and Global Select Markets and offering different services based on a company's market capitalization reflects the higher demand for these services by larger companies.⁷⁵ Moreover, according to NASDAQ, offering such services to newly listed companies should ease the transition of becoming a public company. As to only offering services to transfers from the NYSE to NASDAQ rather than all transfers, NASDAQ notes that this should make up for services that issuers would otherwise forego by switching their listing from NYSE to NASDAQ, and that issuers listed on NYSE are better known and therefore have more value to NASDAQ when they switch to its market.⁷⁶

⁷⁴ See Notice supra note 3

⁷⁵ See Notice supra note 3 and NASDAQ Response Letter supra note 5.

⁷⁶ See NASDAQ Response Letter supra note 5 and NASDAQ E-mail. Specifically, NASDAQ states that "when companies switch to NASDAQ, it helps in our efforts to attract other new listings . . . and to retain companies' listings. This benefit is more pronounced when the company switches from the NYSE because NYSE-listed companies tend to be larger and better known than companies listed on NYSE Amex, NYSE Arca or regional exchanges. Having these companies as clients is also valuable to NASDAQ OMX Corporate Solutions (NOCS), which benefits from having well-known companies use its products." NASDAQ E-mail; see also NYSE Order supra note 60.

As noted above, NASDAQ's proposal will provide complimentary products and services to Eligible New Listings and Eligible Switches based on market capitalization. The Commission has previously approved an NYSE proposal providing different tiers of complimentary services to certain NYSE issuers based on shares of common stock issued and outstanding or total global market value based on a public offering price and has found this consistent with Sections 6(b)(4) and Sections 6(b)(5) of the Act.⁷⁷ For similar reasons, we also find that it is reasonable for NASDAQ to provide different services to tiers based on market capitalization since larger capitalized companies generally will need and use more services. Further, the Commission believes that by describing in NASDAQ's rules the products and services available to Eligible New Listings and Eligible Switches and the values of the products and services, the Exchange is adding greater transparency to its rules and the fees applicable to issuers.

The Commission recognizes, however, that there are two main differences between the NYSE and NASDAQ proposals. First, the NYSE believes that NASDAQ's treatment of Eligible Switches is not comparable to NYSE Rule 907 since NYSE does not provide different services to an issuer because it is transferring from another exchange; rather, such issuers would be entitled to the same services as issuers currently listed on the NYSE. As noted above, NASDAQ states that it makes this distinction to compensate issuers for services they would forego from switching their listing to NASDAQ from the NYSE, as well as to provide its listing market broader benefits from attracting the larger, better known companies that are listed on NYSE.⁷⁸ Specifically, NASDAQ asserts that larger Eligible Switches receive four years of complimentary services because "having larger companies switch to NASDAQ is more valuable in attracting other potential listings and NOCS' customers than having smaller companies, which are

⁷⁷ See NYSE Order supra note 60.

⁷⁸ See supra note 76.

generally not as well known, switch. Finally, these larger companies generally will pay higher listings fees and purchase more NOCS services . . . thereby making their listing more valuable to NASDAQ and NOCS.”⁷⁹

The Commission notes that Section 6(b)(5) of the Act does not require that all issuers be treated the same; rather, the Act requires that the rules of an exchange not unfairly discriminate between issuers. The Commission believes that NASDAQ has provided a sufficient basis for its different treatment of Eligible Switches and that this portion of NASDAQ’s proposal meets the requirements of the Act in that it reflects competition between exchanges, with NASDAQ offering discounts for transfers of listings from a competing exchange. In making this determination, we note that the provision of services under the proposal is for a limited duration and that NASDAQ has provided a reasonable basis for deciding to treat NYSE transfers different from other types of transfers. Among other things, NASDAQ has stated that offering services to issuers that must forego similar services provided by the NYSE if they switch their listing to NASDAQ, and that add greater future value to NASDAQ through their listing than do other issuers justify such differential treatment.

Second, the NASDAQ proposal also differs from the NYSE proposal in that NASDAQ will provide services through an affiliated service provider. The Commission notes, however, that under NYSE’s approved proposal, issuers are offered services only from certain third party vendors selected by the NYSE. We note that NASDAQ’s use of its affiliate to provide services to date does not appear to have adversely affected the nature of competition among suppliers in the market for these services.⁸⁰

⁷⁹ See NASDAQ E-mail.

⁸⁰ One commenter noted that NASDAQ has been engaged, on an ongoing basis, in the practice of offering free services to issuers in connection with a listing on NASDAQ. See

The NASDAQ Response Letter responded to issues relating to competition in markets served by Corporate Services. Specifically, NASDAQ reiterated that issuers are not required to use the offered services as a condition of listing. Furthermore, to the extent an issuer chooses to use the services, such services are provided only for a very limited time – between two to four years. Further, it has been NASDAQ’s experience that some companies choose not to use its services, even though they are offered free.⁸¹

The Commission recognizes, however, that the proposed rule change may affect the purchase decisions of some listed issuers. The effect of offering Corporate Solutions’ services on a complimentary basis is to provide issuers with the services of Corporate Solutions at a price that is lower in relative terms than what other vendors charge. As the Commission has previously discussed, a reduction in a vendor’s relative price will generally cause some issuers to substitute their business toward that vendor.⁸² Accordingly, the Commission believes that NASDAQ’s offering of Corporate Solutions’ products and services on a complimentary basis will, by lowering its relative price, likely cause some listed issuers to substitute their business away from other vendors and toward Corporate Solutions. The Commission believes, however, that the impact of this substitution would be limited for the reasons discussed below.

As asserted in the Notice, the number of companies eligible for the free services will be small in comparison to the total number of companies that comprise the target market for such

Business Wire Letter 3 and infra note 87 and accompanying text. The Commission notes that any such offer of free or discounted services in connection with an initial or continued exchange listing requires the filing by the exchange of an appropriate proposed rule change with the Commission, and approval or effectiveness thereof, before such offer of services can be made, and that a failure to do so would constitute a violation of Section 19(b) of the Act and Rule 19b-4 thereunder.

⁸¹ See NASDAQ Response Letter supra note 5.

⁸² See NYSE Order supra note 60.

services, so that we anticipate there is not likely to be competitively meaningful foreclosure of similar services offered by third parties.⁸³ NASDAQ represents that only 34 companies in 2009, 77 companies in 2010, and 62 companies through June 30, 2011 would have qualified for free services as Eligible New Listings by virtue of listing in connection with an IPO or a spin-off or a carve out from another company had the proposed rule been in effect.⁸⁴ Additionally, NASDAQ states that only 10 companies in 2009, three companies in 2010 and no companies through June 30, 2011 would have qualified for free services as Eligible Switches had the proposal been in place. According to NASDAQ, this represents no more than approximately 3 percent of listed companies.⁸⁵

Further, NASDAQ notes that there are multiple third party services vendors and that those vendors appear to operate in highly competitive markets. In addition, one commenter believed that approving NASDAQ's proposal was necessary to preserve competition.⁸⁶ Further, another commenter – a competing services firm – stated that despite “NASDAQ's current practice of offering ‘free’ or significantly discounted services[,]” its business continues to grow and to compete for business from NASDAQ issuers based on the quality of its services.⁸⁷

The Commission also believes that NASDAQ is responding to competitive pressures in the market for listings in making this proposal.⁸⁸ Specifically, NASDAQ is offering complimentary products and services to attract new listings. The Commission understands that NASDAQ faces

⁸³ See Notice supra note 3.

⁸⁴ Id. The Commission notes that Business Wire believes these figures are low because IPOs were depressed by the worldwide financial crises.

⁸⁵ We note that these numbers may be different had the proposal been in place at that time.

⁸⁶ See IR Letter.

⁸⁷ See PR Newswire Letter; see also supra note 80.

⁸⁸ See NYSE Letter (stating “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”).

competition in the market for listing services, and that it competes in part by providing complimentary services to its listed companies through its affiliate versus third party vendors like NYSE. The ability to select from a choice of vendors and the use of a specific affiliate vendor are among the different ways that NASDAQ and NYSE may compete for listings and provide services for listed companies. In fact, NASDAQ notes that, by relying on services provided by an affiliate company rather than third parties, NASDAQ gains greater control to assure it can provide the services most valued by companies in a high quality manner.⁸⁹

Accordingly, the Commission believes that NASDAQ's proposal reflects the current competitive environment for exchange listings among national securities exchanges, and is appropriate and consistent with Section 6(b)(8) in furtherance of the purposes of the Act.⁹⁰

With respect to concerns raised by commenters that NASDAQ's offering of IR services creates a conflict of interest with respect to its role as an SRO, NASDAQ has represented that it has effectively separated its regulatory functions from its business functions. The Commission notes that its oversight of NASDAQ as a registered national securities exchange is designed, among other things, to assure NASDAQ performs its regulatory functions in a manner consistent with the Act. Finally, the Commission notes that any change to NASDAQ's rules to increase or decrease the amount of information that a company must publicly disclose, or the manner of doing so, would require Commission approval.

The Commission has carefully considered the comment letters. Although some of the alternative proposals by the Investor Advisory Group might also satisfy the standards under Sections 6(b) and 19(b) of the Act⁹¹ depending on the facts and circumstances, those proposals

⁸⁹ See NASDAQ Response Letter supra note 5.

⁹⁰ 15 U.S.C. 78f(b)(8).

⁹¹ 15 U.S.C. 78f(b) and 15 U.S.C. 78s(b).

are not before us, and the Commission believes that NASDAQ's proposal is consistent with these standards and, therefore, should be approved.⁹²

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁹³ that the proposed rule change (SR-NASDAQ-2011-122) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹⁴

Kevin M. O'Neill
Deputy Secretary

⁹² The Commission notes that Business Wire and PR Newswire raised concerns that NASDAQ would subsequently file a proposed rule change attempting to lock all NASDAQ listed issuers into using Corporate Solutions' services. The Commission notes that prior to any such change being implemented, it would have to be filed with, and approved, by the Commission pursuant to Section 19(b) of the Act.

⁹³ 15 U.S.C. 78s(b)(2).

⁹⁴ 17 CFR 200.30-3(a)(12).