

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-77401; File No. SR-NYSEMKT-2016-12)

March 17, 2016

Self-Regulatory Organizations; NYSE MKT LLC; Order Approving Proposed Rule Change Amending the NYSE MKT Company Guide to Create a New Section 146 Under Which a Certain Category of Newly Listed Issuers Would Be Entitled to Receive Complimentary Products and Services from the Exchange

I. Introduction

On January 14, 2016, NYSE MKT LLC (the “Exchange” or “NYSE MKT”) 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 amend the NYSE MKT Company Guide (“Company Guide”) to create a new Section 146 under which a certain category of newly listed issuers (“Eligible New Listings”) would be entitled to receive complimentary products and services from the Exchange. The proposed rule change was published for comment in the Federal Register on February 3, 2016.³ No comment letters were received in response to the Notice. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to adopt Section 146 of the Company Guide to offer the following complimentary products and services to Eligible New Listings⁴ on the Exchange:

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 76996 (January 28, 2016), 81 FR 5803 (“Notice”).

⁴ For the purposes of the proposed rule, the term “Eligible New Listing” means (i) any U.S. company that lists common stock on the Exchange for the first time and any non-U.S. company that lists an equity security on the Exchange under Section 101 or 110 of the Company Guide for the first time, regardless of whether such U.S. or non-U.S. company conducts an offering, (ii) any U.S. or non-U.S. company that transfers its listing of common stock or equity securities, respectively, to the Exchange from another national

Web-hosting products and services (with an approximate commercial value of \$16,000 per year), web-casting services (with an approximate commercial value of \$6,500 per year), whistleblower hotline services (with an approximate commercial value of \$4,000 per year), news distribution products and services (with an approximate commercial value of \$20,000 per year), and corporate governance tools (with an approximate commercial value of \$15,000 per year).⁵

The Exchange proposes to provide Eligible New Listings with such products and services for a period of 24 calendar months, which period would begin on the date of listing on the Exchange.⁶ Notwithstanding the foregoing, however, the proposal provides that if an Eligible New Listing begins to use a particular product or service under proposed Section 146 within 30 days of its initial listing date, the complimentary period will begin on the date of first use.⁷ Under the proposal, Eligible New Listings may elect to receive some or all of the products and services for which they are eligible under Section 146 of the Company Guide and are under no obligation to accept any product or service for which they are eligible.⁸

The Exchange states that the specific products and services offered by the Exchange will be developed by the Exchange or by third-party vendors.⁹ The Exchange states that NYSE Governance Services, an entity that is owned by the Exchange's parent company that provides

securities exchange and (iii) any U.S. or non-U.S. company emerging from a bankruptcy, spinoff (where a company lists new shares in the absence of a public offering), and carve-out (where a company carves out a business line or division, which then conducts a separate initial public offering). For purposes of the proposed rule, "equity securities" means common stock or common share equivalents such as ordinary shares, New York shares, global shares, American Depositary Receipts, or Global Depositary Receipts. See proposed Section 146 of the Company Guide.

⁵ See proposed Section 146 of the Company Guide.

⁶ Id.

⁷ Id.

⁸ Id.

⁹ See Notice, supra note 3, at 5804.

corporate governance, risk, and compliance services to its clients, which include companies listed on the Exchange, will offer and develop the corporate governance tools provided to Eligible New Listings, but will not provide any other service related to the proposed rule.¹⁰

The Exchange proposes to codify in proposed Section 146 of the Company Guide that all companies listed on the Exchange are entitled to certain complimentary products and services via the Exchange’s Market Access Center, as described on the Exchange’s website.¹¹ The Exchange represents that all issuers listed on the Exchange have access to the Exchange’s Market Access Center on the same basis and that the products and services currently available through the Exchange’s Market Access Center have a commercial value of approximately \$50,000.¹²

¹⁰ Id. In its filing, the Exchange stated its belief that NYSE Governance Services 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 id. at 5804 n.6. 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.

¹¹ See Notice, supra note 3, at 5804. According to the Exchange, the Market Access Center is a market information analytics platform that is a combination of technology-enabled market intelligence insight and a team of highly skilled market professionals. According to the Exchange, the platform was created to provide issuers with better market insight and information across all exchanges and trading venues and includes products and services that were (i) developed by the Exchange using proprietary data and/or intellectual property or (ii) built by a third-party expressly for the Exchange’s listed companies. According to the Exchange, within this platform all issuers have access to tools and information related to market intelligence, education, investor outreach, media visibility, corporate governance, and advocacy initiatives. For example, the Market Access Center offers daily trading summaries, a trading alert system highlighting user-defined trading or market events, and a website featuring timely content for Exchange-listed senior executives featuring trading information, market data, and institutional ownership. Id.

¹² See id.

III. Discussion and Commission 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.¹³ Specifically, the Commission finds that the proposal is consistent with Sections 6(b)(4)¹⁴ and 6(b)(5) of the Act¹⁵ in particular, in that the proposed rule is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among Exchange members, issuers, and other persons using the Exchange's facilities, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Moreover, the Commission believes that the proposed rule change is consistent with Section 6(b)(8) of the Act¹⁶ in that it does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Commission believes that the proposed rule change, which would permit the Exchange to provide additional complimentary products and services to Eligible New Listings, as well as services to all listed companies through the Exchange's Market Access Center, as described above,¹⁷ is appropriate and consistent with the Act. The Commission believes that by describing in the Company Guide the products and services available to listed companies and the values of the products and services, the Exchange is adding greater transparency to its rules and the fees applicable to such companies. This will help to ensure that individual listed companies are not given specially negotiated packages of products and services to list or remain listed that

¹³ 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).

¹⁴ 15 U.S.C. 78f(b)(4).

¹⁵ 15 U.S.C. 78f(b)(5).

¹⁶ 15 U.S.C. 78f(b)(8).

¹⁷ See supra notes 5 and 11-12 and accompanying text.

would raise unfair discrimination issues under the Act.

The Commission notes that while all listed companies will receive some services from the Exchange via the Exchange's Market Access Center, some listed companies will receive additional products and services for 24 months from the date of listing based on their status as an Eligible New Listing. 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 the Exchange has provided a sufficient basis for its different treatment of Eligible New Listings and that this portion of the Exchange's proposal meets the requirements of the Act in that it reflects competition between exchanges, with the Exchange offering additional products and services to those companies choosing to list for the first time on the Exchange or transferring their listing from a competing exchange. In making this determination, the Commission notes that the provision of services under the proposal is for a limited duration and that the Exchange has provided a reasonable basis for deciding to treat Eligible New Listings differently from other listed companies. Among other things, the Exchange has stated that the offered products and services will help to ease the transition of these companies that are becoming public for the first time or are transferring their listing to a new exchange.¹⁸ In addition, all Eligible New Listings will receive the same package

¹⁸ See Notice, supra note 3, at 5805. Specifically, the Exchange states that the Web-hosting products and services will assist Eligible New Listings in engaging with their shareholders by providing them with a website that contains business content that can be viewed by investors; the web-casting services allow listed companies to communicate with shareholders in connection with their quarterly earnings release process; the whistleblower hotline will assist Eligible New Listings in complying with, among other things, the requirements of the Sarbanes-Oxley Act, Foreign Corrupt Practices Act, and UK Bribery Act; the news distribution products and services will assist Eligible New Listings in complying with Exchange disclosure requirements; and the corporate governance tools will help educate the board of directors of each Eligible New Listing about corporate governance best practices. See id. at 5804.

of services. Further, the Exchange states that it hopes to better compete with the Nasdaq Global Market for listings in the future.¹⁹ The Commission has also previously approved proposals providing different services to newly-listed issuers, including those transferring their listing from another exchange, and has found this consistent with Sections 6(b)(4) and 6(b)(5) of the Act.²⁰ The Commission notes that, according to the Exchange, Nasdaq offers similar products and services to new listings and those companies transferring their listing from the New York Stock Exchange.²¹ Accordingly, based on the factors noted above, the Commission believes that the proposed rule changes to the Company Guide are consistent with the requirements of the Act and, in particular, that the products and services and their commercial value are equitably allocated among issuers consistent with Section 6(b)(4) of the Act, and the rule does not unfairly discriminate between issuers consistent with Section 6(b)(5) of the Act.

The Commission also believes that it is consistent with the Act for the Exchange to allow the complimentary period for a particular service offered to Eligible New Listings to begin on the date of first use if a company begins to use the service within 30 days after the date of listing.

¹⁹ See id. at 5804.

²⁰ See Securities Exchange Act Release Nos. 76127 (October 9, 2015), 80 FR 62584 (October 16, 2015) (order approving SR-NYSE-2015-36); 72669 (July 24, 2014), 79 FR 44234 (July 30, 2014) (order approving NASDAQ-2014-058) (“Nasdaq Order”); 65963 (December 15, 2011), 76 FR 79262 (December 21, 2011) (order approving SR-NASDAQ-2011-122).

²¹ The Commission notes that the Nasdaq Global Market offers new listings and companies transferring their listing from the New York Stock Exchange complimentary products and services, while the Nasdaq Capital Market does not offer similar services. See Nasdaq Stock Market Rule IM-5900-7(a). The Exchange states that it currently competes with the Nasdaq Capital Market and, in some cases, with the Nasdaq Global Market. See Notice, supra note 3, at 5804. While we recognize that Nasdaq does not currently provide services to transfers from NYSE MKT, based on the current competitive environment for listings it is not unreasonable for NYSE MKT to want to offer services to companies transferring from another national securities exchange to attract new listings, and is consistent with the Act as long as such offerings, among other things, under Section 6(b)(5), do not discriminate between issuers.

According to the Exchange, companies listing on the Exchange for the first time often require a period of time after listing to complete the contracting and training process with vendors providing the complimentary products and services.²² Therefore, many companies are not able to begin using the suite of products offered to them immediately on the date of listing.²³ The Commission notes that this proposed change is substantially similar to Nasdaq Rule IM-5900-7, which also allows a company to begin using services within 30 days of listing.²⁴ As noted in the Nasdaq Order, the Commission believes that this change would provide only a short window of additional time to allow companies to finalize their contracts for the complimentary products and services, and that this additional time would only be available to companies that have already determined to list on the Exchange.²⁵

The Exchange will provide the corporate governance tools to Eligible New Listings through an affiliated service provider, and all other products and services will be developed by the Exchange or by third-party vendors. The Exchange has represented that listed companies that are offered products under Section 146 of the Company Guide are under no obligation to accept them and a company's listing on the Exchange is not conditioned upon acceptance of any product or service. Moreover, the Exchange represents that, from time to time, companies elect to purchase products and services from other vendors at their own expense rather than accepting comparable products and services offered by the Exchange.²⁶

The Commission believes that the Exchange is responding to competitive pressures in the

²² See Notice, supra note 3, at 5805.

²³ See id.

²⁴ See Nasdaq Order, supra note 20.

²⁵ The Commission expects the Exchange to track the start (and end) date of each free service.

²⁶ See Notice, supra note 3, at 5805.

market for listings in making this proposal. Specifically, the Exchange has represented that it faces competition in the market for listing services and that it competes in part by improving the quality of the services that it offers to listed companies.²⁷ The Exchange states that by offering products and services on a complimentary basis and ensuring that it is offering the services most valued by its listed issuers, it improves the quality of the services that listed companies receive.²⁸ Further, the Exchange states that it hopes to better compete with the Nasdaq Global Market, which offers a comparable suite of complimentary products and services to new listings and certain transfers, and expects the proposed rule change to enable the Exchange to more effectively compete with this market for listings.²⁹ Accordingly, the Commission believes that the proposed rule reflects the current competitive environment for exchange listings among national securities exchanges, and is appropriate and consistent with Section 6(b)(8) of the Act.³⁰

²⁷ See id.

²⁸ See id.

²⁹ See id. at 5804-05. See also Nasdaq Stock Market Rule IM-5900-7(b).

³⁰ 15 U.S.C. 78f(b)(8).

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,³¹ that the proposed rule change (SR-NYSEMKT-2016-12), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³²

Robert W. Errett
Deputy Secretary

³¹ 15 U.S.C. 78s(b)(2).

³² 17 CFR 200.30-3(a)(12).