

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-78806; File No. SR-NASDAQ-2016-098)

September 9, 2016

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Approving Proposed Rule Change to Modify the Complimentary Services Offered to Certain New Listings

I. Introduction

On July 11, 2016, 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 modify the complimentary services offered to certain new listings. The proposed rule change was published for comment in the Federal Register on July 28, 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 offers complimentary services to companies listing on the Nasdaq 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”) and to companies that switch their listing from the New York Stock Exchange (“NYSE”) to the Nasdaq Global or Global Select Markets (“Eligible Switches” and, with Eligible New Listings, “Eligible Companies”).⁴ According to the Exchange, this program offers

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 78392 (July 22, 2016), 81 FR 49705 (“Notice”).

⁴ See Notice, supra note 3, at 49705. See also Securities Exchange Act Release Nos. 65963 (December 15, 2011), 76 FR 79262 (December 21, 2011) (SR-NASDAQ-2011-122) (“Original Approval Order”) and 72669 (July 24, 2014), 79 FR 44234 (July 30, 2014) (SR-NASDAQ-2014-058) (“2014 Approval Order”).

valuable services to newly listing companies designed to help ease the transition of becoming a public company or switching markets, makes listing on Nasdaq more attractive to these companies, and provides Nasdaq Corporate Solutions the opportunity to demonstrate the value of its services and forge a relationship with the company.⁵ Currently, Eligible Companies receive a whistleblower hotline, investor relations website, press release distribution services, interactive webcasting, and market analytic tools, and may receive a market surveillance service.⁶ As discussed in more detail below, the Exchange proposed to modify its current offerings to Eligible Companies.

The Exchange currently offers Eligible Companies that have a market capitalization of \$750 million or more a stock surveillance tool, through which an analyst attempts to determine who is buying and selling the company's stock.⁷ While any public company can use this offering, the Exchange stated in its proposal that it may not be an appropriate fit for some companies, such as those that are closely held or otherwise have low liquidity or low volume, which may prioritize different investor relations tools over stock surveillance.⁸ Therefore, the Exchange proposed to allow companies eligible for this service to choose from the existing stock surveillance offering or other alternatives, which Nasdaq stated are also designed to help companies identify current owners, potential buyers or sellers of their stock, or otherwise enhance their investor relations efforts.⁹ Specifically, Eligible Companies that have a market

⁵ See Notice, supra note 3, at 49705.

⁶ See Nasdaq Rule IM-5900-7(b)-(c). Only Eligible Companies with a market capitalization of \$750 million or more receive the market surveillance service. The Exchange proposed to rename this service as "stock surveillance" to better reflect its purpose.

⁷ See Nasdaq Rule IM-5900-7(c).

⁸ See Notice, supra note 3, at 49705.

⁹ See id.

capitalization of \$750 million or more would be allowed to choose the existing stock surveillance offering or from among the following alternatives: (i) a global targeting package, where an investor targeting specialist will help focus the company's investor relations efforts on appropriate investors, tailor messaging to those investors' interests and measure the company's impact on their holdings; (ii) monthly ownership analytics and event driven targeting, which provide a monthly shareholder analysis and tracking report, which an analyst will help interpret during a monthly call, and a shareholder targeting plan around one event each year, such as a roadshow or investor conference; or (iii) an annual perception study designed to identify how the company is perceived by key stakeholders and provide the company with actionable recommendations for enhancing its perception in the market.¹⁰ The approximate retail value of the proposed new services ranges from \$35,000 to \$46,000 per year, as compared to the approximate retail value of \$51,000 for the existing stock surveillance tool.¹¹

The Exchange also proposed to create a new tier of services for Eligible Companies with a market capitalization of \$5 billion or more. As noted in the Original Approval Order and the 2014 Approval Order, the Exchange believes that it is appropriate to offer different services based on a company's market capitalization given that larger companies generally will need more and different governance, communication, and intelligence services.¹² According to the Exchange, companies with a market capitalization of \$5 billion or more can benefit from, and are

¹⁰ See proposed Rule IM-5900-7(a) under section being renamed "Market Advisory Tools."

¹¹ See Notice, supra note 3, at 49705. The Exchange also proposed to update the description of the stock surveillance tool to clarify that it is a single, dedicated analyst who provides that service, as opposed to the team approach used for the proposed alternative market advisory tools, and to note that the analyst attempts to identify institutional buyers and sellers in the company's stock. See id.

¹² See Notice, supra note 3, at 49706. See also Original Approval Order, supra note 4, at 79265.

more likely to purchase at the end of the complimentary period, investor targeting or perception studies in addition to surveillance services because they have more complex investor relations functions and frequently have more shareholders and a greater change in their shareholdings.¹³ As such, the Exchange proposed to offer these companies, with a market capitalization of \$5 billion or more, the choice of a second market advisory tool.

The Exchange also proposed to modify the complimentary services offered to Eligible Switches. In particular, the Exchange proposed to increase the number of users of the market analytic tool to three users for Eligible Switches with a market capitalization of \$750 million or more but less than \$5 billion and to four users for Eligible Switches with a market capitalization of \$5 billion or more.¹⁴ In addition, Nasdaq proposed to increase the term of the complimentary services from three years to four years for any Eligible Switch with a market capitalization of \$750 million or greater.¹⁵

The Exchange also proposed to revise the values and descriptions of the complimentary services offered.¹⁶ In addition, the Exchange proposed to amend the description of the market

¹³ See Notice, supra note 3, at 49706.

¹⁴ See proposed Rule IM-5900-7(c)(2)-(3). This service has a retail value of approximately \$29,000 per year for two users, \$40,000 for three users, and \$51,000 for four users. See Notice, supra note 3, at 49706.

¹⁵ See proposed Rule IM-5900-7(c)(2)-(3). The Exchange noted that this proposal would restore some features and the term of complimentary services that was previously in effect for such companies. See Notice, supra note 3, at 49706.

¹⁶ In particular, the approximate retail value would be updated from \$15,000 to \$16,000 for the investor relations website, from \$30,000 to \$29,000 for the market analytic tool for two users, and from \$50,000 to \$51,000 for the stock surveillance tool. See proposed Rule IM-5900-7(a). The Exchange also proposed to eliminate rounding in the total retail value of the services offered to each category of Eligible Company. See Notice, supra note 3, at 49706. In addition, the Exchange proposed to modify the introductory note to Rule IM-5900-7 to reference the historical changes to the program and explain the impact of the revisions to companies that are already listed, and to reorganize the rule to enhance its readability and usability. See id.

analytic tool to reflect the addition of mobile access to the users of that service and to add the value of that offering for three and four users (\$40,000 and \$51,000, respectively).¹⁷ In its filing, the Exchange also proposed to rename the “Interactive Webcasting” service “Audio Webcasting” to reflect the voice-only nature of the service, which is delivered through a platform branded with the company’s name and logo that allows real-time questions from the audience, and to describe the four audio webcasts as a “package” to reflect the basis for the approximate retail value provided.¹⁸ In addition, the Exchange proposed to rename the current “Press Release” service to “Disclosure Services” to better reflect the availability of EDGAR and XBRL services, and to specify that these services are provided as an annual stipend usable with Nasdaq Corporate Solutions.¹⁹ The Exchange also proposed to delete the reference to factors affecting the number of press releases available because the revised rule would explicitly state that an annual stipend is provided and would emphasize disclosure services generally rather than just press releases.²⁰

The Exchange stated that if a company has a choice among different complimentary services under the proposed rule, the company must make its selection when it first begins to use a complimentary service and will not be permitted to subsequently change to a different complimentary service offered in the package.²¹ The Exchange noted in its proposal that a company can discontinue using a service at any time without penalty and can also elect to purchase from Nasdaq Corporate Solutions a service alternative that was previously declined or a

¹⁷ See proposed Rule IM-5900-7(a).

¹⁸ See Notice, supra note 3, at 49706.

¹⁹ See proposed Rule IM-5900-7(a).

²⁰ See Notice, supra note 3, at 49706.

²¹ See id.

comparable service from another competitor.²²

The Exchange noted that any company receiving services under the terms of the Original Approval Order or the 2014 Approval Order on the date this proposal is approved may elect to receive services under the revised terms in this proposal. If a company elects to receive services under this proposal, the services that the company is eligible to receive will be determined based on its status and market capitalization at the time of its original listing and the length of time that services are available to the company under the revised package will be calculated from the company's original listing date.²³

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.²⁴ Specifically, the Commission finds that the proposal is consistent with Sections 6(b)(4)²⁵ and 6(b)(5) of the Act²⁶ 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 Act²⁷ in that it does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

²² See id.

²³ See id.

²⁴ 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).

²⁵ 15 U.S.C. 78f(b)(4).

²⁶ 15 U.S.C. 78f(b)(5).

²⁷ 15 U.S.C. 78f(b)(8).

The Commission believes that it is consistent with the Act for the Exchange to revise the products and services it offers to companies. According to Nasdaq, the stock surveillance tool that certain Eligible Companies receive may not be an appropriate fit for some of these companies, such as those that are closely held or otherwise have low liquidity or low volume.²⁸ Accordingly, these companies may derive more value from the other market advisory services, as described above, that Nasdaq is now going to be offering as a choice, in addition to the stock surveillance tool, to Eligible Companies with a market capitalization of \$750 million or more.

The Commission also believes that it is consistent with the Act for the Exchange to create a new tier of services for Eligible Companies with a market capitalization of \$5 billion or more and to offer varying services to different categories of issuers since larger capitalized companies generally will need and use more services.²⁹ The Exchange represents that companies with a market capitalization of \$5 billion or more have more complex investor relations functions and therefore can benefit from additional market advisory services and are more likely to purchase additional services at the end of the complimentary period.³⁰ In addition, the Exchange's proposal would provide Eligible Switches additional user seats for the market analytic tool than those provided to similarly capitalized Eligible New Listings. In making this distinction, the Exchange has stated that Eligible Switches are more likely to benefit from additional market

²⁸ See Notice, supra note 3 at 49705.

²⁹ See Original Approval Order, supra note 4, at 79266 (finding 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). See also Notice, supra note 3, at 49707. The Commission notes that, as stated in the 2014 Approval Order, all listed companies receive some services from Nasdaq, including Nasdaq Online and the Market Intelligence Desk. See 2014 Approval Order, supra note 4, at 44235.

³⁰ See Notice, supra note 3, at 49707. As noted by the Exchange in its prior filing, it offers more services to larger companies because they need more and different governance, communications, and intelligence services. See Original Approval Order, supra note 4, at 79265.

analytic user seats than Eligible New Listings because these companies generally have larger investor relations teams already in place, whereas Eligible New Listings receive support from investment banks and others for a period of time after listing as their investor relations programs mature and therefore have, in the Exchange's view, less need for additional user seats.³¹ Moreover, Nasdaq stated in its proposal that Eligible Switches will, in its view, forego more services paid for by their former exchange and that larger Eligible Switches will forego even more services. In support of this, Nasdaq notes that NYSE recently modified its services offered to listed companies so that they are now valued higher so that some companies will need a greater incentive to forego the services offered by NYSE and switch to Nasdaq.³² Based on the above, the Commission believes that the Exchange has provided a sufficient basis for providing additional services to certain Eligible New Listings and Eligible Switches, as well as varying services to these different categories of listings, and that these changes do not unfairly discriminate among issuers and reflect the competitive environment for exchange listings for transfers from a competing exchange.³³

Further, the Commission believes that it is consistent with the Act for the Exchange to reinstate the four year term for services provided to Eligible Switches with a market capitalization of \$750 million or more. According to the Exchange, this change reflects Nasdaq's ongoing assessment of the competitive market for listings.³⁴ Specifically, the

³¹ See Notice, supra note 3, at 49707. The Commission notes that in a prior filing Nasdaq reduced its market analytic tools to all Eligible Companies from four users to two users based on Nasdaq's experience with company use of the service.

³² See id. at 49706. See also Securities Exchange Act Release No. 76127 (October 9, 2015), 80 FR 62584 (October 16, 2015) (SR-NYSE-2015-36).

³³ See 2014 Approval Order, supra note 4, at 44235.

³⁴ See Notice, supra note 3, at 49707. The Commission notes that the Original Approval Order found four years of services for Eligible Switches as consistent with the Act. As

Exchange has represented that it faces competition in the market for listing services and that it competes in part by offering valuable services to listed companies.³⁵ The Exchange states that the proposed changes will result in a more enticing package for potential listings and therefore will enhance competition among listing exchanges.³⁶ 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.³⁷

Finally, the Commission believes that it is reasonable, and in fact required by Section 19(b) of the Exchange Act, that Nasdaq amend IM-5900-7 to update the rule text to reflect the actual retail values of the services offered, which have changed since the original adoption of the rule.³⁸ The Commission also believes it is reasonable for the Exchange to make certain non-substantive changes, as described above, to the names and descriptions of certain services provided. This provides greater transparency to Nasdaq's rules and the fees applicable to companies listing on the Exchange.

noted above, Nasdaq had reduced services to Eligible Switches from four to three years in 2014 and is now proposing to change back to four years of services for these transfers for competitive reasons. See id. at 49706 & n.13. See also supra note 32 and accompanying text.

³⁵ See Notice, supra note 3, at 49707 & n.13.

³⁶ See id. at 49708.

³⁷ 15 U.S.C. 78f(b)(8).

³⁸ We would expect Nasdaq, consistent with Section 19(b) of the Act, to periodically update the retail values of services offered should they change. This will help to provide transparency to listed companies on the value of the free services they receive and the actual costs associated with listing on Nasdaq.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,³⁹ that the proposed rule change (SR-NASDAQ-2016-098), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁰

Brent J. Fields
Secretary

³⁹ 15 U.S.C. 78s(b)(2).

⁴⁰ 17 CFR 200.30-3(a)(12).