

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-88999; File No. SR-NYSE-2020-42)

June 3, 2020

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Section 902.02 of the NYSE Listed Company Manual Concerning Pre-Revenue Companies That Can Qualify for Reduced Listing and Annual Fees

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on May 21, 2020, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Section 902.02 of the NYSE Listed Company Manual (the “Manual”) to modify the definition of a Pre-Revenue Company contained in that rule. The proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it

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<sup>1</sup> 15 U.S.C.78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Section 902.02 of the Manual includes a provision providing for modified listing and annual fees for companies that meet the definition of a Pre-Revenue Company set forth in that rule. For purposes of this provision, a “Pre-Revenue Company” is a company whose initial listing date is on or after June 1, 2019, and which has not recorded revenue in excess of \$5 million in either (i) the most recent completed fiscal year prior to listing or (ii) during the year of listing through the most recently completed fiscal quarter before the listing date.<sup>4</sup>

In adding the provisions specific to Pre-Revenue Companies,<sup>5</sup> the Exchange noted that its Global Market Capitalization Test (as set forth in Section 102.01C of the Manual) allows the Exchange to list companies that have not yet recorded any significant revenues, provided the issuer has at least a \$200 million global market capitalization and meets the other requirements

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<sup>4</sup> The Annual Fees of any company which qualifies as a Pre-Revenue Company at the time of listing will be calculated quarterly for the fiscal quarter in which it lists and in each of the succeeding 12 full fiscal quarters, at a rate of one-fourth of the applicable Annual Fee rate. The total fees (including Listing Fees and Annual Fees, but excluding listing fees paid at the time of initial listing) that may be billed to such an issuer during this period will be subject to a \$25,000 cap in the fiscal quarter in which the issuer lists and in each of the succeeding 12 full fiscal quarters. This fee cap is subject to the same exclusions as apply in relation to the \$500,000 per year fee cap described in the subsection of Section 902.02 entitled “Total Maximum Fee Payable in a Calendar Year.” If there are one or more fiscal quarters remaining in the calendar year after the conclusion of the period described herein, the issuer will, on a prorated basis, be billed the regular Annual Fee subject to the \$500,000 total fee cap for the remainder of that calendar year.

<sup>5</sup> See Exchange Act Release No. 85961 (May 29, 2019), 84 FR 25856 (June 4, 2019) (SR-NYSE-2019-30).

for listing. These companies are typically engaged in research and development (in many cases they are biotechnology companies focused on developing new drug candidates) or are in the early stages of commercialization of a product. Generally, a company of this kind relies primarily on the proceeds from its initial public offering to fund its operations. As such, the fees charged by the Exchange represent a more significant expense for these companies than they do for other newly-listed companies and in many cases these fees are an impediment to the Exchange in competing for the listing of these companies. The adoption of the special provisions applicable to Pre-Revenue Companies was intended to address the particular difficulties faced by Pre-Revenue Companies in being able to pay the Exchange's fees.

Since adopting the provisions for Pre-Revenue Companies, the Exchange has observed that some companies that would otherwise qualify as a Pre-Revenue Company will have a single revenue-generating event that is not typical for a company at that stage in its life cycle. An event of this nature renders the company ineligible for Pre-Revenue Company status, notwithstanding the fact that the company has not previously generated any material revenue and does not have the prospect of generating any meaningful additional revenue for the foreseeable future. An example of this sort of one-time revenue event that the Exchange has observed is a one-time licensing payment received by a biotechnology company that is otherwise fully engaged in pre-commercial research and development activity and does not generate any revenue in the ordinary course. The Exchange believes that a company that has this sort of event that is anomalous given the nature of that company's business can still be the kind of company for which the Pre-Revenue Company provision was designed. Such a company continues to face the same challenges faced by a Pre-Revenue Company. Consequently, the Exchange now proposes to amend the definition of a Pre-Revenue Company to provide that, in determining whether a

company qualifies as a Pre-Revenue Company, the Exchange will exclude from its calculations any one-time non-recurring revenue items.<sup>6</sup>

The Exchange does not expect there to be a significant number of listings in which this proposed revision of the definition of a Pre-Revenue Company would be applicable.

Consequently, the proposed rule change would not affect the Exchange's commitment of resources to its regulatory oversight of the listing process or its regulatory programs.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>7</sup> in general, and furthers the objectives of Section 6(b)(4)<sup>8</sup> of the Act, in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges. The Exchange also believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>9</sup> in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

### The Proposed Change is Reasonable

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<sup>6</sup> The determination of Pre-Revenue Company status is made at the time of initial listing. Therefore, there are no companies currently listed that would benefit from the proposed modification to the definition of Pre-Revenue Company.

<sup>7</sup> 15 U.S.C. 78f(b).

<sup>8</sup> 15 U.S.C. 78f(b)(4).

<sup>9</sup> 15 U.S.C. 78f(b)(5).

The Exchange operates in a highly competitive marketplace for the listing of equity securities. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets.

The Exchange believes that the ever-shifting market share among the exchanges with respect to new listings and the transfer of existing listings between competitor exchanges demonstrates that issuers can choose different listing markets in response to fee changes. Accordingly, competitive forces constrain exchange listing fees. Stated otherwise, changes to exchange listing fees can have a direct effect on the ability of an exchange to compete for new listings and retain existing listings.

Given this competitive environment, the Exchange believes that the proposed fee waivers are reasonable because the cost of paying initial listing fees and Annual acts as a disincentive to listing on the Exchange for companies that do not yet generate significant recurring revenues.

#### The Proposal is an Equitable Allocation of Fees

The Exchange believes that the proposal is equitable as it is designed to address an anomaly in the treatment of companies that are similar in nature to companies that meet the current definition of a Pre-Revenue Company.

#### The Proposal is Not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory because the proposed waive is designed solely to avoid the impact on a small group of issuers of an anomalous fee outcome arising from the manner in which a one-time nonrecurring event causes them to be treated differently for fee purposes than companies that are similar to them in every other respect. Occasionally, a company will receive a one-time non-recurring payment that causes it to be ineligible for treatment as a Pre-Revenue Company for fee purposes,

notwithstanding the fact that it has not generated any recurring stream of ordinary course revenue in the past and does not expect to do so for the foreseeable future. A company in this situation is subject to the same ongoing financial challenges as other companies that meet the definition of a Pre-Revenue Company and the Exchange believes that it is consistent with the purpose of the modified listing fees for a Pre-Revenue Company to modify the definition of such a company to include a company that would qualify but for the existence of a one-time, non-recurring revenue item

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*Intramarket Competition.*

The proposed waiver will be available to all similarly situated issuers on the same basis. The Exchange does not believe that the proposed modification of the definition of a Pre-Revenue Company will have any meaningful effect on the competition among issuers listed on the Exchange.

*Intermarket Competition.*

The Exchange operates in a highly competitive market in which issuers can readily choose to list new securities on other exchanges and transfer listings to other exchanges if they deem fee levels at those other venues to be more favorable. Because competitors are free to

modify their own fees in response, and because issuers may change their listing venue, the Exchange does not believe its proposed modification of the definition of a Pre-Revenue Company can impose any burden on intermarket competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)<sup>10</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>11</sup> thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>12</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

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<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>11</sup> 17 CFR 240.19b-4(f)(2).

<sup>12</sup> 15 U.S.C. 78s(b)(2)(B).

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2020-42 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2020-42. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that



you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2020-42 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>13</sup> 17 CFR 200.30-3(a)(12).