

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-81783; File No. SR-NYSEAMER-2017-05)

September 29, 2017

Self-Regulatory Organizations; NYSE American LLC; Order Approving Proposed Rule Change to Amend the Complimentary Products and Services Available to Certain Eligible New Listings Pursuant to Section 146 of the NYSE American Company Guide

I. Introduction

On August 11, 2017, NYSE American LLC (the “Exchange” or “NYSE American”) 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 Section 146 of the NYSE American Company Guide (the “Company Guide”) to provide that companies initially listed on or after October 1, 2017 will not be eligible to receive corporate governance tools under the Exchange’s current services offering. The proposed rule change was published for comment in the Federal Register on August 29, 2017.³ 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 has proposed to amend Section 146 of the Company Guide to provide that companies initially listed on or after October 1, 2017 will not be eligible to receive the corporate governance tools described under the Exchange’s current services offering.

As set forth in Section 146 of the Company Guide, the Exchange currently provides

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 81470 (August 23, 2017), 82 FR 41075 (“Notice”).

Eligible New Listings⁴ with complimentary Web-hosting products and services (with a commercial value of approximately \$16,000 annually), web-casting services (with a commercial value of approximately \$6,500 annually), whistleblower hotline services (with a commercial value of approximately \$4,000 annually), news distribution products and services (with a commercial value of approximately \$20,000 annually), and corporate governance tools (with a commercial value of approximately \$15,000 annually) for a period of 24 calendar months.⁵ According to the Exchange, companies that qualify as Eligible New Listings have generally not been interested in utilizing the corporate governance tools available as part of the Exchange's services offering.⁶ The Exchange has therefore proposed to discontinue the corporate governance tools portion of its service offering for companies that list on or after October 1, 2017.⁷ The Exchange proposal states, however, that any Eligible New Listing that lists prior to October 1, 2017 will continue to be able to access the corporate governance tools for a period of 24 months to the extent their eligibility permits under current Section 146 of the Company Guide.⁸

⁴ For the purposes of Section 146, 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 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).

⁵ See Section 146 of the Company Guide.

⁶ See Notice, supra note 3, at 41076.

⁷ See id.

⁸ 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.⁹ Specifically, the Commission finds that the proposal is consistent with Sections 6(b)(4)¹⁰ and 6(b)(5) of the Act¹¹ 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 Act¹² 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 it is consistent with the Act for the Exchange to modify its existing complimentary service offerings to no longer offer corporate governance tools to Eligible New Listings that list on or after October 1, 2017. The Exchange states that Eligible New Listings have generally not been interested in utilizing the corporate governance tools offered by the Exchange.¹³ The Commission believes it is reasonable and consistent with the Act for the Exchange to discontinue such services if it believes they are not being utilized. The Commission notes that the effect of the proposal is to reduce the commercial value of offerings to Eligible New Listings by \$15,000 annually, which is the value of the corporate governance

⁹ 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).

¹⁰ 15 U.S.C. 78f(b)(4).

¹¹ 15 U.S.C. 78f(b)(5).

¹² 15 U.S.C. 78f(b)(8).

¹³ See Notice, supra note 3, at 41076.

tools as currently set forth in Section 146 of the Company Guide. The value of the remaining offerings to Eligible New Listings will continue to remain transparent under Section 146 of the Company Guide. The Commission believes that by accurately describing in the Company Guide the current products and services available to listed companies and the current values of those products and services, the Exchange is maintaining transparency with respect to its rules and the fees applicable to such companies. This helps to ensure that individual listed companies are not given specially negotiated packages of products and services to list or remain listed that would raise unfair discrimination issues under the Act.¹⁴

Under the proposal, Eligible New Listings that list prior to October 1, 2017 will remain eligible to receive all the complimentary products and services currently provided by the Exchange, including the corporate governance tools. 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 Exchange states that it believes it is not unfairly discriminatory to continue to offer corporate governance tools to companies listed prior to October 1, 2017, as that benefit was part of the services offering that was available at the time of such companies' initial listing and may have had some influence over their listing decisions.¹⁵

The Commission believes that the Exchange has provided a sufficient basis for its different treatment of Eligible New Listings that list prior to October 1, 2017 and that this portion of the Exchange's proposal meets the requirements of the Act. In making this determination, the Commission notes that the provision of services under Section 146 of the

¹⁴ See Securities Exchange Act Release No. 77401 (March 17, 2016), 81 FR 15585 (March 23, 2016) (SR-NYSEMKT-2016-12) (order approving the initial complimentary products and services provided by the Exchange to Eligible New Listings).

¹⁵ See Notice, supra note 3, at 41076.

Company Guide is for a limited duration and that the Exchange has provided a reasonable basis for deciding to treat Eligible New Listings that list prior to October 1, 2017 differently from other listed companies going forward. The Commission notes that at the time such companies listed, they had an expectation, if they intended to utilize the corporate governance tools, to be able to do so for the entire 24 month period as set forth in the current rule. To allow such companies listed prior to October 1, 2017 to finish utilizing corporate governance tools for any remainder of their 24 month period appears to be reasonable, equitable, and not unfairly discriminatory. In addition, the Commission notes that the October 1, 2017 date, to curtail the offering of corporate governance tools for Eligible New Listings that list on or after that date, was transparent and published for comment in advance of approval by the Commission in the order discussed herein. As noted above, the Commission received no comments on the proposal. Finally, 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.¹⁶

Accordingly, the Commission finds that the proposed rule change is consistent with the requirements of the Act and, in particular, that the products and services provided under Section 146 of the Company Guide are equitably allocated among issuers consistent with Section 6(b)(4) of the Act, the proposed rule change does not unfairly discriminate among issuers consistent with Section 6(b)(5) of the Act, and the proposed rule change is appropriate and consistent with Section 6(b)(8) of the Act in that it does not impose any burden on competition not necessary or

¹⁶ 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 SR-NASDAQ-2014-058); 65963 (December 15, 2011), 76 FR 79262 (December 21, 2011) (order approving SR-NASDAQ-2011-122).

appropriate in furtherance of the purposes of the Act.¹⁷

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁸ that the proposed rule change (SR-NYSEAMER-2017-05), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

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Assistant Secretary

¹⁷ 15 U.S.C. 78f(b)(4), (5), and (8).

¹⁸ 15 U.S.C. 78s(b)(2).

¹⁹ 17 CFR 200.30-3(a)(12).