

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-68143; File No. SR-NYSE-2012-44)

November 2, 2012

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Granting Approval of Proposed Rule Change Amending Section 907.00 of the Listed Company Manual, Which Describes Certain Complimentary Products and Services that are Offered to Certain Issuers

I. Introduction

On August 30, 2012, the New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend Section 907.00 of the Listed Company Manual (“Manual”), which describes certain complimentary products and services that are offered to certain issuers. The proposed rule change was published in the Federal Register on September 18, 2012.<sup>3</sup> The Commission did not receive any comments on the proposal. This order grants approval of the proposed rule change.

II. Description of the Proposal

Section 907.00 of the Manual sets forth certain complimentary products and services that are offered to certain currently and newly listed issuers. According to the Exchange, these products and services are developed or delivered by NYSE or by a third party for use by NYSE-listed companies. All listed issuers receive some complimentary products and services through the NYSE Market Access Center. Certain tiers of currently listed issuers and newly listed issuers receive additional products and services.

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

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 67846 (September 12, 2012), 77 FR 57625 (“Notice”).

Under Section 907.00, a newly listed issuer is defined as a U.S. issuer conducting an initial public offering (“IPO”) or an issuer emerging from a bankruptcy, spinoff (where a company lists new shares in the absence of a public offering), or carve-out (where a company carves out a business line or division, which then conducts a separate IPO), but does not include an issuer that transfers its listing from another U.S. exchange.<sup>4</sup>

The Exchange proposes to broaden the definition of newly listed issuer to mean any U.S. company listing common stock on the Exchange for the first time, and any non-U.S. company<sup>5</sup> listing an equity security<sup>6</sup> on the Exchange under Section 102.01 or 103.00 of the Manual for the first time, regardless of whether such U.S. or non-U.S. company conducts an offering; the definition would continue to exclude any issuer that transfers its listing from another U.S. securities exchange.<sup>7</sup> Under the proposed rule change, the definition of “newly listed issuer” also would mean 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

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<sup>4</sup> See Securities Exchange Act Release No. 65127 (Aug. 12, 2011), 76 FR 51449, 51450 n. 13 (Aug. 18, 2011) (SR-NYSE-2011-20) (“Approval Order”).

<sup>5</sup> The Exchange also proposes to amend the text of Section 907.00 to refer to “non-U.S. companies” rather than “Foreign Private Issuers.” According to the Exchange, this change is non-substantive. See Notice, supra note 3.

<sup>6</sup> The Exchange proposes to define the term “equity security” to mean common stock or common share equivalents such as ordinary shares, New York shares (a type of share used by Canadian companies), global shares, American Depositary Receipts (“ADRs”), or Global Depositary Receipts, and to amend the text of Section 907.00 throughout to change specific references to ADRs to the broader term “equity security.” In its filing, the Exchange noted that each of these types of securities in the definition of equity security has been used by non-U.S. companies when listing on the Exchange.

<sup>7</sup> The current text of Section 907.00 states that the definition of “newly listed issuer” excludes an issuer that transfers its listing from another exchange. In a prior filing, the Exchange stated that the exclusion applied to transfers from a national securities exchange, *i.e.*, another U.S. securities exchange. See supra note 4. According to the Exchange, for purposes of greater clarity, the text of the Section 907.00 would be amended to provide specifically that a transfer from a U.S. securities exchange would be excluded from the definition of newly listed issuers.

carves out a business line or division, which then conducts a separate initial public offering).

Under the existing rules, the Exchange uses global market value based on the public offering price for determining the types of services a newly listed issuer would qualify for. Because the rules will no longer require an offering to qualify as a newly listed issuer, the Exchange proposes to amend the text that refers to global market value based on public offering price. The Exchange proposes to add text to Section 907.00 that would provide that if a newly listed issuer does not conduct a public offering, then its global market value will be determined by the Exchange at the time of listing for purposes of determining whether the issuer qualifies for Tier A or B.

The Exchange also proposes to make changes to rules relating to the products and services available to currently listed issuers. Under existing rules, the Exchange has two tiers of products and services that are available to currently listed issuers. Under Tier One, the Exchange offers market surveillance and Web-hosting products and services to U.S. issuers that have 270 million or more total shares of common stock issued and outstanding in all share classes, including and in addition to Treasury shares, and Foreign Private Issuers that have 270 million or more in ADRs issued and outstanding, each calculated annually as of December 31 of the preceding year. Under Tier Two, at each such issuer's election, the Exchange offers either market analytics or Web-hosting products and services to U.S. issuers that have 160 million to 269,999,999 total shares of common stock issued and outstanding in all share classes, including and in addition to Treasury shares. Tier Two products and services also are offered to Foreign Private Issuers that have 160 million to 269,999,999 in ADRs issued and outstanding, each calculated annually as of December 31 of the preceding year.

In its filing, the Exchange noted that using December 31 as the date of qualification is not

optimal because it provides issuers with too little notice of their qualification for Tier One or Tier Two products and services. It is therefore proposing to amend the rule to make the date to determine issuers' qualifications as of September 30 of the preceding year. Under the proposal, shortly after September 30, 2012, the Exchange would run the calculations for each issuer and determine which are eligible for Tier One or Tier Two for calendar year 2013, and so notify the qualifying issuers. According to the Exchange, this is beneficial because qualifying issuers then would have nearly three months to select from the available services in their tier for the following calendar year, and non-qualifying issuers would have additional time to budget and plan for obtaining the services elsewhere should they so wish.

As described above, the Exchange proposes to update references to ADRs throughout the text of Rule 907.00 to reflect the broader term "equity security."<sup>8</sup> Thus, the Exchange would use shares of an equity security issued and outstanding in the U.S. in lieu of ADRs for non-U.S. companies in determining whether the Tier One and Tier Two thresholds have been satisfied.

Furthermore, with respect to Tier One offerings, the Exchange proposes to permit a Tier One issuer to choose market analytics products and services as an alternative to market surveillance products and services. Web-hosting products and services would continue to be offered to Tier One issuers.

The Exchange also proposes changes to the products and services available to newly listed issuers. Tiers A and B describe the products and services available to newly listed issuers. Under existing rules, Tier A includes issuers with a global market value of \$400 million or more based on the public offering price and Tier B includes issuers with a global market value of less than \$400 million based on the public offering price.

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<sup>8</sup> See supra note 6.

With one exception, the specified products and services for newly listed issuers are offered for 24 months after listing, at which time the issuers may be eligible for the Tier One or Tier Two products and services offered to existing issuers. The exception is market surveillance products and services, which currently are offered to Tier A issuers for the initial 12 months after listing. Under the current Manual, those issuers would not be eligible to receive the market surveillance products and services for the next 12 months, until they qualified for Tier One status at the end of the 24-month period following listing. The Exchange proposes to eliminate that 12-month gap by amending Section 907.00 to provide that if, at the end of the 12-month period following a new listing, an issuer that has selected market surveillance products and services meets the qualifications of a Tier One issuer, then such issuer may continue to receive such services for an additional 12 months.

### III. 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.<sup>9</sup> Specifically, the Commission believes it is consistent with the provisions of Sections 6(b)(4) and (5) of the Act,<sup>10</sup> in particular, in that it 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 Act<sup>11</sup> in that it does not impose any burden on competition not necessary or

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<sup>9</sup> 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).

<sup>10</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>11</sup> 15 U.S.C. 78f(b)(8).

appropriate in furtherance of the purposes of the Act.

According to the Exchange, a non-U.S. company that is listing an equity security for the first time on the Exchange, or is emerging from a bankruptcy, spinoff, or carve-out, is similarly situated to a U.S. issuer conducting an IPO or emerging from a bankruptcy, spinoff, or carve-out, and should be eligible to receive the same products and services from the NYSE Market Access Center as those U.S. issuers do. Moreover, the Exchange has further represented that (i) referring to listing on the Exchange for the first time, rather than the specific offerings that may occur in conjunction with the listing, and (ii) using the term “equity security” rather than ADRs for a non-U.S. company, should make the coverage of the Section sufficiently broad to account for different types of offerings and securities that may occur with a new listing.<sup>12</sup> Further, under Section 907, the term “equity security” for purposes of currently listed non-U.S. companies eligible for products and services would be defined only to include common stock or common share equivalents, such as ordinary shares, New York shares, global shares, ADRs, or Global Depository Receipts, which is consistent with the type of security, common stock, used for currently listed U.S. companies receiving products and services under Section 907.<sup>13</sup> Accordingly, the Commission believes that it is consistent with the Act to treat U.S. and non-U.S. issuers similarly and that the products and services are equitably allocated among issuers consistent with Section 6(b)(4) and do not unfairly discriminate between issuers consistent with Section 6(b)(5) of the Act.

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<sup>12</sup> The Commission notes that the Exchange is also proposing to amend its reference to global market value based on public offering price to reflect that some listed companies may not conduct a public offering in connection with a listing. Section 907 would be amended so that if there is no public offering in connection with a listing on the Exchange, the Exchange will determine the issuer’s global market value. The Commission believes this change is consistent with the other changes proposed by the Exchange and approved by the Commission in this order, consistent with the Act.

<sup>13</sup> See also supra note 6.

The Commission also believes that it is consistent with the Act for the Exchange to give issuers under Tier One the option of receiving market analytics products and services in addition to market surveillance services, as well as allow qualifying issuers under Tier A to continue to receive surveillance products and services for an additional twelve months. The Exchange has represented that it faces competition in the market for listing services, and it competes in part by improving the quality of the services that it offers to listed companies. According to the Exchange, 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.<sup>14</sup> Accordingly, the Commission believes that NYSE's proposal reflects the current competitive environment for exchange listings among national securities exchanges and is appropriate and consistent with Section 6(b)(8). Moreover, with respect to the change to Tier A, the Commission notes that by offering market surveillance products and services throughout the 24-month period following listing, rather than just the initial 12 months, the Exchange should eliminate the interruption in service that would otherwise occur for issuers that would qualify for Tier One status as existing issuers at the end of the 24-month period. Further, as to the additional choice of market analytics products and services for issuers qualifying under Tier One, the Commission notes that such services are already permitted for newly listed issuers under Tier A and currently listed issuers under Tier Two. Therefore, it

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<sup>14</sup> The NYSE has also represented that it does not have exclusive agreements or arrangements with the vendors providing the products and services, and NYSE may use multiple vendors for the same type of product or service. Moreover, currently listed and newly listed companies would not be required to accept the offered products and services from NYSE, and an issuer's receipt of an NYSE listing is not conditioned on the issuer's acceptance of such products and services. Further, the Exchange has represented that, from time to time, issuers elect to purchase products and services from other vendors at their own expense instead of accepting the products and services described above offered by the Exchange.

appears reasonable to allow such issuers to receive those services if they qualify as a Tier One issuer. Further, all issuers, both U.S. and non-U.S., that qualify for services under Tier A and Tier One will be able to avail themselves of the changes to the products and services being offered under these tiers.<sup>15</sup>

The Commission also believes that it is consistent with the Act for the Exchange to use September 30, instead of December 31, for determining whether an issuer qualifies for complimentary products and services under Tier One and Tier Two. The Commission believes that this change should provide issuers with additional time to either select the services and products, if any, it qualifies for, as well as provide sufficient time to select another vendor if the issuer so chooses. The Commission also notes that certain other proposed changes are merely technical in nature, such as specifically excluding transfers from other U.S. exchanges from the definition of a newly listed issuer and replacing the term “Foreign Private Issuer” with “non-U.S. companies.” With respect to excluding transfers from other U.S. exchanges, the Commission notes that the Exchange, in a prior filing, had specifically excluded transfers from another national securities exchange from its definition of “newly listed issuers,”<sup>16</sup> but did not codify the exclusion in Section 907. The Commission believes that codifying this exclusion should make the NYSE’s rule more transparent.

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<sup>15</sup> See Approval Order, supra note 4, finding that the existing tiers are consistent with the Act. In particular, the Approval Order states that while not all issuers receive the same level of services, NYSE has stated that trading volume and market activity are related to the level of services that the listed companies would use in the absence of complimentary arrangements. The Commission found, among other things, 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.”

<sup>16</sup> See supra note 4.



IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>17</sup> that the proposed rule change (SR-NYSE-2012-44) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>17</sup> 15 U.S.C. 78s(b)(2).

<sup>18</sup> 17 CFR 200.30-3(a)(12).