

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-68469; File No. SR-NYSEMKT-2012-70)

December 19, 2012

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Section 140 of the NYSE MKT LLC Company Guide to Introduce an Initial Application Fee

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 6, 2012, NYSE MKT LLC (“NYSE MKT” or “Exchange”) filed with the Securities and Exchange Commission (“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 140 of its Company Guide to introduce an Initial Application Fee. The Exchange proposes to immediately reflect the proposed changes in the Company Guide, but not to implement the proposed changes until January 1, 2013. The text of the proposed rule change is available on the Exchange’s website at 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 received on the proposed rule change. The text of those statements may be examined at the places

¹ 15 U.S.C.78s(b)(1).

² 17 CFR 240.19b-4.

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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Section 140 of its Company Guide to introduce an Initial Application Fee. The Exchange proposes to immediately reflect the proposed changes in the Company Guide, but not to implement the proposed changes until January 1, 2013.³

The Exchange proposes to introduce an Initial Application Fee of \$5,000 within Section 140 of the Company Guide, which would be effective January 1, 2013. An issuer would be required to pay an Initial Application Fee if it applied to list shares of common or preferred stock or common stock equivalents on the Exchange, including securities issued by non-U.S. companies, except that an issuer:

- (i) applying to transfer from a national securities exchange to list exclusively on the Exchange; or
- (ii) applying to list on the Exchange that is already listed on any other national securities exchange

would not be required to pay an Initial Application Fee in connection with its application for such listing or dual listing. Accordingly, issuers for which the Initial Application Fee waivers would be applicable would generally be the same as the issuers for which the Original Listing

³ The Exchange has proposed changes to the Company Guide, as reflected in the Exhibit 5 attached hereto, in a manner that would permit readers of the Company Guide to identify the changes that would be implemented on January 1, 2013. The Commission notes that the Exhibit 5 referenced in the previous sentence is attached to the filing, not to this Notice.

Fees would be waived, as provided in Section 140 of the Company Guide.⁴ The Initial Application Fee would be non-refundable.

In accordance with Section 201 of the Company Guide, an issuer applying to list an equity security on the Exchange is subject to a preliminary confidential review by NYSE Regulation, Inc. (“NYSER”) in which NYSER determines the issuer’s qualification for listing. If NYSER determines in connection with this preliminary confidential review that the issuer is qualified for listing, the issuer is informed that it has been cleared as eligible to list and that the Exchange will accept a formal Original Listing Application from the Issuer. It is the Exchange’s practice to notify the issuer of its eligibility clearance and the conditions to its listing by means of a letter (the “pre-clearance” letter).

For an issuer subject to the Initial Application Fee, its payment would be a prior condition to eligibility clearance being granted. As a practical matter, the Exchange anticipates that an issuer would pay the Initial Application Fee after NYSER has completed its preliminary confidential review and has determined that the issuer is eligible to submit a formal Original Listing Application, but before the “pre-clearance” letter has been issued. Typically, the Exchange is in contact with an issuer prior to the issuance of a “pre-clearance” letter and provides oral confirmation of the issuer’s eligibility clearance prior to the issuance of the “pre-clearance” letter.

The Initial Application Fee would be applied towards the applicable Original Listing Fees for an issuer that lists common or preferred stock or common stock equivalents on the Exchange.

⁴ See Section 140 of the Company Guide. See also Securities Exchange Act Release Nos. 68117 (October 26, 2012), 77 FR 66207 (November 2, 2012) (SR-NYSEMKT-2012-51), and 59560 (March 11, 2009), 74 FR 11392 (March 17, 2009) (SR-NYSEALTR-2009-02). The Initial Application Fee would only apply with respect to the listing of common or preferred stock or common stock equivalents. Original Listing Fees are not limited in this respect.

If an issuer paid an Initial Application Fee in connection with the application to list common or preferred stock or common stock equivalents but did not immediately list such security, the Issuer would not be required to pay a subsequent Initial Application Fee if it later listed such security so long as (i) the issuer had a registration statement regarding such security on file with the Commission, or, (ii) if the issuer withdrew its registration statement, the issuer refiled a registration statement regarding such security within 12 months of the date of such withdrawal. The Exchange is proposing the Initial Application Fee because it would allow the Exchange to recover, in part, the costs associated with processing and evaluating an issuer's application, irrespective of whether the relevant issuance qualifies for listing or whether such issuer decides to list on the Exchange. In addition, the Initial Application Fee would provide a disincentive for impractical applications by issuers. The proposed change is not otherwise intended to address any other matter, and the Exchange is not aware of any significant problem that issuers would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the "Act"),⁵ in general, and furthers the objectives of Section 6(b)(4) and 6(b)(5) of the Act,⁶ in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed Initial Application Fee of \$5,000 is reasonable because it would allow the Exchange to recover, in part, the costs associated with processing and

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(4) and 15 U.S.C. 78f(b)(5).

evaluating an issuer's application, irrespective of whether the relevant issuance qualifies for listing or whether such issuer decides to list on the Exchange. In this regard, the Exchange believes that the Initial Application Fee of \$5,000 is reasonably related to the amount of time, resources and cost associated with the Exchange's review of an initial application for listing common or preferred stock or common stock equivalents, including securities issued by non-U.S. companies.⁷ Furthermore, the Exchange believes that the Initial Application Fee is reasonable because it would provide a disincentive for impractical applications by issuers.

The Exchange believes that the Initial Application Fee is equitable and not unfairly discriminatory because it would be charged to all issuers that apply for listing common or preferred stock or common stock equivalents on the Exchange, except, as proposed, those issuers that qualify for a waiver. In this regard, the Exchange believes that it is equitable and not unfairly discriminatory to charge an Initial Application Fee to issuers that apply to list common or preferred stock or common stock equivalents on the Exchange, but not to issuers of other types of securities. Specifically, while the Exchange conducts a comprehensive and thorough review of every listing application it receives, regardless of security type or issuer, the Exchange believes that its costs associated with processing and evaluating an issuer's application to list common or preferred stock or common stock equivalents on the Exchange are generally significantly higher than the costs associated with other types of securities, such that it is equitable and not unfairly discriminatory to charge the Initial Application Fee only to issuers of

⁷ The Exchange notes that NASDAQ charges a non-refundable \$5,000 application fee to issuers on The NASDAQ Capital Market. See NASDAQ Rule 5920. See also Securities Exchange Act Release No. 59663 (March 31, 2009), 74 FR 15552 (April 6, 2009) (SR-NASDAQ-2009-018). NASDAQ also charges a non-refundable \$25,000 application fee to issuers on The NASDAQ Global Market. See NASDAQ Rule 5910. See also Securities Exchange Act Release No. 61669 (March 5, 2010), 75 FR 11958 (March 12, 2010) (SR-NASDAQ-2009-081).

common or preferred stock or common stock equivalents. In this regard, the Exchange notes that the review that is required to be performed with respect to an issuer of common or preferred stock or common stock equivalents is more extensive than that required for the review of, for example, an issuer of a closed-end fund.

The Exchange also believes that it is reasonable to provide a waiver of the Initial Application Fee to an issuer applying to transfer from a national securities exchange to list exclusively on the Exchange or applying to list on the Exchange that is already listed on any other national securities exchange because the issuer would have already paid a listing fee and may have already paid an application fee to the other exchange for the initial application to list on that market.⁸ Accordingly, it is reasonable to not charge the Initial Application Fee so as to avoid double-charging issuers for the listing of their shares of common or preferred stock or common stock equivalents. It is also equitable and not unfairly discriminatory to waive the Initial Application Fee because all such issuers would be eligible for the waiver of the Initial Application Fee. It is also equitable and not unfairly discriminatory because such issuers would be under no obligation to transfer their listing to the Exchange or dually list on the Exchange and would be disincentivized to do so if they were subject to the Initial Application Fee. In this regard, the waiver would contribute to providing issuers with the ability to choose the listing market that best suits their needs and that is the ideal market for listing their shares of common or preferred stock or common stock equivalents.

Overall, the Exchange believes that instances of the Initial Application Fee waiver being granted to issuers that apply to list on the Exchange will be relatively rare. Accordingly, the Exchange does not anticipate that it will experience any meaningful diminution in revenue as a

⁸ See Id. [sic]

result of the proposed waiver and therefore does not believe that the proposed waiver would in any way negatively affect its ability to continue to adequately fund its regulatory program or the services that the Exchange provides to issuers.

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.

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)⁹ of the Act and subparagraph (f)(2) of Rule 19b-4¹⁰ thereunder, because it establishes a due, fee, or other charge imposed by the NYSE MKT.

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.

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:

⁹ 15 U.S.C. 78s(b)(3)(A).

¹⁰ 17 CFR 240.19b-4(f)(2).

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEMKT-2012-70 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR- NYSEMKT-2012-70. 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 such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer

to File Number SR- NYSEMKT-2012-70 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.¹¹

Kevin M. O'Neill
Deputy Secretary

¹¹ 17 CFR 200.30-3(a)(12).