

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79056; File No. SR-NYSEMKT-2016-62)

October 6, 2016

Self-Regulatory Organizations; NYSE MKT LLC; Order Granting Approval of Proposed Rule Change Amending Section 146 of the NYSE MKT Company Guide to Adjust the Entitlement to Services of Special Purpose Acquisition Companies

I. Introduction

On August 2, 2016, NYSE MKT LLC (“NYSE MKT” 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 amend Section 146 of the NYSE MKT Company Guide (“Company Guide”) to adjust the entitlement to services of special purpose acquisition companies. The proposed rule change was published in the Federal Register on August 22, 2016.³ The Commission received no comments on the proposal. This order grants approval of the proposed rule change.

II. Description of the Proposal

The Exchange proposed to amend Section 146 of the Company Guide to adjust the service entitlements of special purpose acquisition companies (“SPACs”) under that rule. In its filing, the Exchange stated that a SPAC is a special purpose company formed for the purpose of effecting a merger, capital stock exchange, asset acquisition, stock purchase, reorganization or similar business combination with one or more operating businesses or assets.⁴ The Exchange further stated that to qualify for initial listing, a SPAC must meet one of the quantitative

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 78586 (August 16, 2016), 81 FR 56720 (“Notice”).

⁴ Id. at 56721.

standards in Section 101 or 102 of the Company Guide and must also meet the SPAC-specific requirements of Section 119 of the Company Guide.⁵ Pursuant to Section 119(b) of the Company Guide, within 36 months of the effectiveness of a SPAC's initial public offering registration statement, or such shorter period that the company specifies in its registration statement, the company must complete one or more business combinations having an aggregate fair market value of at least 80% of the value of the deposit account (excluding any deferred underwriter's fees and taxes payable on the income earned on the deposit account) at the time of the agreement to enter into the initial combination (the condition set forth in Section 119(b) is referred to as the "Business Combination Condition"). Under Section 119 of the Company Guide, among other things, a SPAC must also meet the requirements for initial listing after it meets the Business Combination Condition.

As set forth in Section 146 of the Company Guide, the Exchange offers complimentary products and services for a period of 24 calendar months from the date of initial listing to a category of listed companies defined as "Eligible New Listings." Under the current rule, Eligible New Listings include: (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

⁵ Id. Section 119(a) of the Company Guide requires that at least 90% of the gross proceeds from the SPAC's initial public offering and any concurrent sale by the SPAC of equity securities must be deposited in a trust account maintained by an independent trustee, an escrow account maintained by an "insured depository institution," as that term is defined in Section 3(c)(2) of the Federal Deposit Insurance Act, or in a separate bank account established by a registered broker or dealer (collectively, a "deposit account"). For the full set of requirements to list a SPAC, see Section 119 of the Company Guide.

exchange; or (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).

Currently, pursuant to Section 146 of the Company Guide, Eligible New Listings are entitled to receive 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 from the date of initial listing on the Exchange. Notwithstanding the foregoing, however, if an Eligible New Listing begins to use a particular product or service provided for under Section 146 within 30 days of its initial listing date, the complimentary period begins on the date of first use.

The Exchange has now proposed to amend Section 146 of the Company Guide to provide that a SPAC will no longer be deemed to be an Eligible New Listing at the time of its initial listing, and instead will be deemed to be an Eligible New Listing at such time as it has completed the Business Combination Condition, if it remains listed thereafter on the Exchange. Thus, under the proposal, a SPAC will no longer be eligible to receive complimentary products and services under Section 146 at the time of its initial listing, but will instead be entitled to receive such products and services if and when it meets the Business Combination Condition. A SPAC that remains listed on the Exchange after meeting the Business Combination Condition will be entitled to the complimentary products and services under Section 146 for a period of 24 months from the date on which it meets the Business Combination Condition. Notwithstanding the

foregoing, however, if such a company begins to use a particular product or service provided for under Section 146 within 30 days of meeting the Business Combination Condition, the complimentary period for that product or service will begin on the date of first use.

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.⁶ Specifically, the Commission believes it is consistent with the provisions of Sections 6(b)(4) and (5) of the Act,⁷ 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 Act⁸ 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 adjust the timing of when SPACs are eligible to receive complimentary products and services under Section 146 of the Company Guide from the time of initial listing to the period immediately after meeting the Business Combination Condition. The Exchange represented that SPACs are unlikely to utilize these complimentary products and services at the time of initial listing, but would likely find these products and services useful if they remain listed after they meet the

⁶ 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).

⁷ 15 U.S.C. 78f(b)(4) and (5).

⁸ 15 U.S.C. 78f(b)(8).

Business Combination Condition.⁹ The Exchange explained that at the time of initial listing, SPACs are typically not focused on their stock price and investor relations to the same degree as operating companies.¹⁰ The Exchange stated that the complimentary products and services provided under Section 146 are targeted in large part toward the market-driven concerns of newly-listed operating companies, and are therefore less useful to SPACs that have not met the Business Combination Condition.¹¹ The Exchange stated that a SPAC that has met the Business Combination Condition, on the other hand, is similarly situated to a newly-formed publicly-traded operating company.¹² Therefore, the Exchange said that it believes that the complimentary products and services provided under Section 146 will be as relevant and attractive to a SPAC that has met the Business Combination Condition as to the newly-listed operating companies that are generally eligible for those services.¹³

In addition, the Exchange stated that in many cases SPACs will consider transferring to a new listing venue at the time they meet the Business Combination Condition, and that the proposed rule change will enable the Exchange to compete for the retention of these companies by offering them a package of complimentary products and services that assist their transition to becoming a publicly listed operating company for the first time.¹⁴

The Exchange also stated that it recognizes that not all SPACs will meet the Business Combination Condition and that some listed SPACs will therefore never become eligible for the

⁹ See Notice, supra note 3, 81 FR at 56721.

¹⁰ Id. The Exchange stated in its filing that SPACs raise money on a one-time basis and typically trade at a price that is very close to their liquidation value. Id.

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ Id. at 56722.

complimentary products and services under Section 146 that would be provided to an otherwise similarly qualified operating company.¹⁵ However, the Exchange reiterated that, given the specific characteristics of the SPAC structure, the complimentary products and services provided under Section 146 are generally not of any particular value to a SPAC prior to meeting the Business Combination Condition, and the Exchange therefore believes that those SPACs that never meet the Business Combination Condition and therefore never qualify for the products and services under Section 146 will not suffer any meaningful detriment as a consequence.¹⁶

As noted in the previous order approving Section 146 of the Company Guide, 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.¹⁷ In its proposal, the Exchange has made representations that reasonably justify treating a SPAC that decides to continue to list on the Exchange after meeting the Business Combination Condition similar to a newly-listed operating company. In addition, when listed as a SPAC, the SPAC will also be eligible to receive complementary products through the Exchange's Market Access Center similar to all listed companies.¹⁸ The Commission further notes that a SPAC that completes the Business Combination Condition will be receiving the same package of services as an Eligible New Listing¹⁹ and that it will not be receiving any additional benefits or services by virtue of the

¹⁵ Id.

¹⁶ Id.

¹⁷ 15 U.S.C. 78f(b)(5); see also Securities Exchange Act Release No. 77401 (March 17, 2016), 81 FR 15585 (March 23, 2016) (approving NYSEMKT-2016-12) (“Previous Order”).

¹⁸ See Section 146 of the Company Guide; see also Previous Order, supra note 17, footnotes 11-12 and accompanying text.

¹⁹ See Section 119 of the Company Guide, requiring, among other things, that a SPAC meet the requirements for initial listing after it meets the Business Combination Condition just as is required for other Eligible New Listings.

proposed rule change. The Commission has previously found that the package of complimentary products and services offered to Eligible New Listings is equitably allocated among issuers consistent with Section 6(b)(4) of the Act and that describing the values of the products and services will add greater transparency to the Exchange's rules and to the fees applicable to such companies.²⁰ The Commission also previously noted that describing in the Company Guide the products and services available to listed companies and their associated values will ensure that individual listed companies are not given specially negotiated packages of products or services to list or remain listed that would raise unfair discrimination issues under the Act.²¹ Based on the foregoing, the Commission believes that the Exchange has provided a sufficient basis for adjusting the timing of when SPACs are eligible to receive the additional complimentary products and services, set forth under Section 146, from the time of a SPAC's initial listing to the period immediately after a SPAC meets the Business Combination Condition, and that this change does not unfairly discriminate among issuers and is therefore consistent with the Act. For similar reasons, and as the value of the services offered are not changing, only the timing of when such services are provided to a SPAC, we find that the proposal is consistent with Section 6(b)(4) of the Act.

The Commission also believes that it is consistent with the Act for the Exchange to allow the complimentary period for a particular service to begin on the date of first use if a SPAC that has met the Business Combination Condition begins to use the service within 30 days after the date of meeting the Business Combination Condition. The Exchange stated in its filing that, in its experience, it will often take companies a period of time to review and complete necessary contracts and training for the complimentary products and services under Section 146 following

²⁰ See Previous Order, supra note 17, at 15586.

²¹ Id.

their becoming eligible for those services and that allowing this modest 30 day period, if the company needs it, will help to ensure that the company will have the benefit of the full period permitted under the rule to actually use the services, thereby enabling companies to receive the full intended benefit.²² The Commission notes that Section 146 currently allows an Eligible New Listing to begin using services within 30 days of its initial listing date.²³ As noted in the Previous Order, the Commission believes that this would provide only a short window of additional time to allow companies to finalize their contracts for the complimentary products and services. The Commission notes that under the proposed rule this additional 30 day window would only be available to SPACs that have determined to remain listed on the Exchange after meeting the Business Combination Condition and thereby treats such SPACs, at the time they qualify for listing as an operating company, the same as other newly-listed companies that qualify as Eligible New Listings under Section 146.²⁴

The Commission believes that the Exchange is responding to competitive pressures in the market for listings in making this proposal. Specifically, the Exchange has represented that in many cases, SPACs will consider transferring to a new listing venue at the time they meet the Business Combination Condition, and that the proposed rule change would enable it to compete for the retention of these companies by offering them a package of complimentary products and services that assist their transition to being a publicly listed operating company for the first time.²⁵ Further, the Commission notes that other exchanges have recently filed similar rule changes with respect to the timing of complementary services offered to SPACs under their

²² See Notice, supra note 3, 81 FR at 56722.

²³ See Previous Order, supra note 17.

²⁴ The Commission expects the Exchange to track the start (and end) date of each free service.

²⁵ See Notice, supra note 3, 81 FR at 56722.

rules.²⁶ The Commission also notes that nothing in the Exchange's rules requires a SPAC to remain listed on the Exchange after it meets the Business Combination Condition and that such company is free to list on other markets. 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.²⁷

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁸ that the proposed rule change (SR-NYSEMKT-2016-62) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁹

Brent J. Fields
Secretary

²⁶ See Securities Exchange Act Release No. 78782 (September 7, 2016), 81 FR 62937 (September 13, 2016) (SR-NYSE-2016-58) and Securities Exchange Act Release No. 79025 (October 3, 2016) (SR-NASDAQ-2016-106).

²⁷ 15 U.S.C. 78f(b)(8).

²⁸ 15 U.S.C. 78s(b)(2).

²⁹ 17 CFR 200.30-3(a)(12).