

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-78153; File No. SR-NYSE-2016-22)

June 24, 2016

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment Nos. 5 and 6, to Adopt Initial and Continued Listing Standards for the Listing of Equity Investment Tracking Stocks and Adopt Listing Fees Specific to Equity Investment Tracking Stocks

I. Introduction

On April 7, 2016, the New York Stock Exchange LLC (“NYSE” or the “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 adopt initial and continued listing standards for the listing of Equity Investment Tracking Stocks and to adopt fees for Equity Investment Tracking Stocks. The proposed rule change was published for comment in the Federal Register on April 27, 2016.³ On April 20, 2016, the Exchange filed Amendment No. 1 to the proposed rule change, which superseded the original filing in its entirety.⁴ On May 17, 2016, the Exchange filed Amendment No. 5 to the proposal, which superseded the filing, as amended by Amendment No. 1. Amendment No. 5 was published for comment in the Federal Register on May 23, 2016.⁵ On June 6, 2016,

¹ 15 U.S.C.78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 77674 (April 21, 2016), 81 FR 24919 (April 27, 2016) (“Notice”).

⁴ On May 13, 2016, the Exchange submitted and withdrew Amendment No. 2 to the proposed rule change. On May 13, 2016, the Exchange filed Amendment No. 3 to the proposed rule change, and on May 16, 2016 the Exchange withdrew Amendment No. 3 to the proposed rule change. On May 16, 2016 the Exchange submitted Amendment No. 4 to the proposal, and on May 17, 2016, the Exchange withdrew Amendment No. 4 to the proposed rule change.

⁵ See Securities Exchange Act Release No. 77850 (May 17, 2016), 81 FR 32360 (May 23, 2016) (“Notice of Amendment No. 5”).

pursuant to Section 19(b)(2) of the Act,⁶ the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁷ On June 23, 2016, the Exchange filed Amendment No. 6 to the proposed rule change.⁸ The Commission received no comments on the proposed rule change, in response to either the original publication of the proposal in the Federal Register⁹ or to the subsequent publication of the proposal as modified by Amendment No. 5.¹⁰ This order grants approval of the proposed rule change, as modified by Amendment Nos. 5 and 6.

⁶ 15 U.S.C. 78s(b)(2).

⁷ See Securities Exchange Act Release No. 77996 (June 6, 2016), 81 FR 37659 (June 10, 2016). The Commission designated July 26, 2016 as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

⁸ In Amendment No. 6, the Exchange clarified the proposed rule change by deleting a representation that its existing surveillance procedures are generally adequate to properly monitor the trading of Equity Investment Tracking Stocks. The Commission notes that, as discussed further below, the Exchange will adopt enhanced surveillance procedures to enable it to monitor Equity Investment Tracking Stocks alongside the securities whose value they track. Additionally, the Exchange addressed a provision in proposed Section 102.07 that provides that the Exchange will not list an Equity Investment Tracking Stock if, at the time of the proposed listing, the issuer of the equity tracked by the Equity Investment Tracking Stock has been deemed below compliance with the Exchange's listing standards. The Exchange clarified that, for purposes of this provision, a company will be deemed to be below compliance if it has been identified as being below compliance for purposes of Sections 802.02 or 802.03 of the Listed Company Manual and subject to the procedures set forth in those rules. Amendment No. 6 is available at the Exchange's website and at <http://www.sec.gov/rules/sro/nyse.shtml>. Because Amendment No. 6 is a technical amendment that does not alter the substance of the proposed rule change, it is not subject to notice and comment.

⁹ See Notice, supra note 3.

¹⁰ See Notice of Amendment No. 5, supra note 5.

II. Description of the Proposed Rule Change

A. Listing Standards

The Exchange proposed to adopt initial and continued listing standards for the listing of Equity Investment Tracking Stocks. Proposed new Section 102.07 of the NYSE Listed Company Manual (“Manual”) defines an Equity Investment Tracking Stock as a class of common equity securities that tracks on an unleveraged basis the performance of an investment by the issuer in the common equity securities of a single other company listed on the Exchange. An Equity Investment Tracking Stock may track multiple classes of common equity securities of a single issuer, so long as all of those classes have identical economic rights and at least one of those classes is listed on the Exchange.¹¹

In order to qualify for initial listing under proposed Section 102.07, an Equity Investment Tracking Stock will be required to meet the distribution and public float requirements currently applicable to companies listing in connection with an initial public offering set forth in Sections 102.01A and 102.01B of the Manual, respectively, and the Global Market Capitalization Test set forth in Section 102.01C. Thus, at the time of initial listing an Equity Investment Tracking Stock will be required to: (i) have at least 400 holders of 100 shares or more and 1,100,000 publicly held shares available for trading, as required under Section 102.01A; and (ii) have an aggregate market value of publicly-held shares of \$40,000,000 and a price per share of \$4 at the time of initial listing, as required under Section 102.01B.¹² In addition, at the time of initial listing the issuer of an Equity Investment Tracking Stock will be required to have \$200 million in global market capitalization, as required under the Global Market Capitalization Test in Section

¹¹ See proposed Section 102.07 of the Manual.

¹² See Sections 102.01A and 102.01B of the Manual.

102.01C.¹³

Pursuant to proposed Section 102.07, the Exchange will not list an Equity Investment Tracking Stock if, at the time of the proposed listing, the issuer of the equity tracked by the Equity Investment Tracking Stock has been deemed below compliance with the Exchange's listing standards. In addition, the issuer of the Equity Investment Tracking Stock must own (directly or indirectly) at least 50% of both the economic interest and voting power of all of the outstanding classes of common equity securities of the issuer whose equity is tracked by the Equity Investment Tracking Stock.¹⁴

Proposed Section 102.07 provides that prior to the commencement of trading of any Equity Investment Tracking Stock, the Exchange will distribute an Information Memorandum to its Members and Member Organizations that includes (i) any special characteristics and risks of trading the Equity Investment Tracking Stock, and (ii) the Exchange Rules that will apply to the Equity Investment Tracking Stock including Exchange Rules that require Member Organizations: (a) to use reasonable diligence in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer; and (b) in recommending transactions in the Equity Investment Tracking Stock to have a reasonable basis to believe that (1) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such Member Organization, and (2) the customer can evaluate the special characteristics, and is

¹³ See Section 102.01C of the Manual. In addition, an issuer of an Equity Investment Tracking Stock must fully comply with the Exchange's corporate governance requirements set forth in Section 303A of the Manual, subject to applicable exemptions such as those applicable to controlled companies. See Notice of Amendment No. 5, supra note 5, at 32361.

¹⁴ See proposed Section 102.07 of the Manual.

able to bear the financial risks, of an investment in the Equity Investment Tracking Stock.¹⁵

The Exchange proposed to subject Equity Investment Tracking Stocks to the same continued listing standards under Sections 802.01A and 802.01B of the Manual as are applicable to other common stock listed on the Exchange. Thus, an Equity Investment Tracking Stock will be considered to be below compliance with Section 802.01A if: (i) the number of total stockholders is less than 400; or (ii) the number of total stockholders is less than 1,200 and the average monthly trading volume is less than 100,000 shares (for the most recent 12 months); or (iii) the number of publicly-held shares is less than 600,000.¹⁶ The issuer of an Equity Investment Tracking Stock will be deemed to be below compliance with Section 802.01B if its average global market capitalization over a consecutive 30 trading-day period is less than \$50,000,000 and stockholders' equity is less than \$50,000,000, and will be subject to immediate suspension and delisting procedures if its average global market capitalization over a consecutive 30 trading-day period is less than \$15,000,000.¹⁷

In addition, the Exchange has proposed to review the continued listing status of an Equity Investment Tracking Stock if: (i) the listed equity security or securities whose value is tracked by the Equity Investment Tracking Stock ceases or cease to be listed on the Exchange; (ii) the issuer of the Equity Investment Tracking Stock owns (directly or indirectly) less than 50% of either the economic interest or the voting power of all of the outstanding classes of common equity of the issuer whose equity is tracked by the Equity Investment Tracking Stock; or (iii) the Equity Investment Tracking Stock ceases to track the performance of the listed equity security or

¹⁵ See infra note 38.

¹⁶ See Section 802.01A of the Manual.

¹⁷ See Section 802.01B of the Manual.

securities that was tracked at the time of initial listing.¹⁸ In the event that any of the foregoing conditions exists, the Exchange will determine whether the Equity Investment Tracking Stock meets any other applicable initial listing standard in place at that time.¹⁹ If the Equity Investment Tracking Stock does not qualify for initial listing at that time under another applicable listing standard, the issuer will not be eligible to follow the procedures set forth in Sections 802.02 and 802.03 of the Manual²⁰ and the Exchange will immediately suspend the Equity Investment Tracking Stock and commence delisting proceedings.²¹ Furthermore, proposed Section 802.01B of the Manual provides that whenever trading in the equity security whose value is tracked by an Equity Investment Tracking Stock is suspended or delisting proceedings are commenced with respect to such security, such Equity Investment Tracking Stock will be suspended and/or delisting proceedings will be commenced with respect to such Equity Investment Tracking Stock at the same time.

The Exchange proposed to amend Section 202.06(B) of the Manual to provide that, in the event that the issuer of a common equity security tracked by an Equity Investment Tracking Stock intends to issue a material news release during the trading day and the Exchange determines to halt trading of such security under Section 202.06 pending dissemination of the

¹⁸ See proposed Section 802.01B of the Manual. For avoidance of doubt, the Commission notes that the third prong does not refer to the situation in which the Equity Investment Tracking Stock price diverges from the price of the equity security that it tracks, but rather refers to the situation in which the Equity Investment Tracking Stock no longer seeks to track the performance of the listed equity security or securities that was tracked at initial listing and instead seeks to track one or more other assets.

¹⁹ Id.

²⁰ Sections 802.02 and 803.03 of the Manual provide companies that have been identified as being below the Exchange's continued listing criteria with the opportunity to provide the Exchange with a plan of action the company has taken, or is taking, that will bring it into conformity with continued listing standards within 18 months.

²¹ See proposed Section 802.01B of the Manual.

news, or the Exchange implements any other required regulatory trading halt in a common equity security tracked by an Equity Investment Tracking Stock, the Exchange will also halt trading in the Equity Investment Tracking Stock that tracks the performance of such security. In such a case, the Exchange will halt trading of the Equity Investment Tracking Stock simultaneously with the halt in the common equity security being tracked and will also recommence trading in the two securities at the same time.²²

The Exchange has represented that it will monitor activity in Equity Investment Tracking Stocks to identify and deter any potential improper trading activity in such securities and will adopt enhanced surveillance procedures to enable it to monitor Equity Investment Tracking Stocks alongside the common equity securities whose value is tracked by such stocks.²³ Additionally, the Exchange stated that it will rely on its existing trading surveillances, administered by the Exchange, or the Financial Industry Regulatory Authority (“FINRA”) on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.²⁴

The Exchange has represented that it will conduct a review of compliance with continued listing standards of Equity Investment Tracking Stocks and their issuers and the trading characteristics of Equity Investment Tracking Stocks over the initial two year period that the proposed listing standard is in operation.²⁵ The Exchange has undertaken to provide the Commission with two reports based on this review, the first to be provided one year after the

²² See Notice of Amendment No. 5, supra note 5, at 32361-62.

²³ Id. at 32362.

²⁴ See Amendment No. 6, supra note 8. The Exchange stated that FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement; however, the Exchange is responsible for FINRA’s performance under this regulatory services agreement. Id.

²⁵ See Notice of Amendment No. 5, supra note 5, at 32362.

initial listing date of the first listed Equity Investment Tracking Stock and the second to be provided on the second anniversary of such initial listing date.²⁶ The Exchange has represented that, at a minimum, the reports will address the relationship between the trading prices of listed Equity Investment Tracking Stocks and those of the equity securities whose values they track, the liquidity of the market for the two securities, and any manipulation concerns arising in connection with the trading of Equity Investment Tracking Stocks and the securities whose values are being tracked.²⁷ The Exchange has represented that the reports will discuss any recommendations the Exchange may have for enhancements to the proposed listing standard based on its review.²⁸

B. Proposed Fees

The Exchange proposed to amend Sections 902.02 and 902.03 of the Manual to adopt fees relating to Equity Investment Tracking Stocks. Specifically, the Exchange proposed to establish a fixed initial listing fee of \$100,000 (inclusive of the one-time special charge of \$50,000)²⁹ the first time an issuer lists an Equity Investment Tracking Stock that is the issuer's only class of common equity securities listed on the Exchange.³⁰ The Exchange proposed to charge the same annual fee for Equity Investment Tracking Stocks as it charges for an issuer's primary class of common shares, which is currently \$0.001025 per share, subject to the

26

Id.

27

Id.

28

Id.

29

The first time that an issuer lists a class of common shares, the issuer is subject to a one-time special charge of \$50,000. See Section 902.03.

30

See proposed Section 902.03. In contrast, initial listing fees the first time an issuer lists a class of common shares are charged at a rate of \$0.0032 per share, subject to a minimum fee of \$125,000 and a maximum fee of \$250,000 (inclusive of the one-time special charge of \$50,000). See Section 902.03.

minimum annual fee of \$52,500.³¹ The Exchange proposed to cap the total fees that may be billed in a calendar year (“Total Maximum Fee”) to an issuer of an Equity Investment Tracking Stock at \$200,000, so long as the Equity Investment Tracking Stock is the only class of common equity securities listed by the issuer on the Exchange.³²

The Exchange further proposed to amend Section 907.00 of the Manual, which sets forth certain complimentary products and services that are offered to certain currently and newly listed issuers. Specifically, proposed Section 907.00 provides that the issuer of an Equity Investment Tracking Stock that is that issuer’s only class of common equity securities listed on the Exchange will not receive the products and services provided for under Section 907.00, with the exception that such issuers will receive the complimentary products and services and access to discounted third-party products and services through the NYSE Market Access Center available to all listed issuers, as described on the Exchange’s website. The Exchange stated that issuers of Equity Investment Tracking Stocks will be eligible for tier-based complimentary products and services set forth in Section 907.00 commencing when they have an additional class of common equity securities listed on the Exchange.³³ Proposed Section 907.00 further provides that in determining eligibility for the various service tiers under Section 907.00, the Exchange will aggregate all of the outstanding shares of listed classes of common equity securities of a company, including all outstanding shares of any listed Equity Investment Tracking Stock that is not the issuer’s only listed class of common equity securities.³⁴

³¹ See proposed Section 902.03.

³² See proposed Section 902.02. In contrast, the Total Maximum Fee for other listed companies is \$500,000. See Section 902.02.

³³ See Notice of Amendment No. 5, *supra* note 5, at 32363.

³⁴ The Exchange’s proposal also makes minor changes to the rule text to: (i) remove obsolete language from Sections 802.01B and 902.03, and (ii) update a website link

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.³⁵ In particular, the Commission finds that the proposed rule change, as modified by Amendment Nos. 5 and 6, is consistent with Section 6(b)(5) of the Act,³⁶ in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and 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.

The development, implementation, and enforcement of standards governing the initial and continued listing of securities on an exchange are activities of critical importance to financial markets and the investing public. Listing standards, among other things, serve as a means for an exchange to screen issuers and to provide listed status only to bona fide companies that have or, in the case of an initial public offering, will have sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets. Once a security has been approved for initial listing, maintenance criteria allow an exchange to monitor the status and trading characteristics of that issue to ensure that fair and orderly markets can be maintained.

The Commission believes that the proposed quantitative and qualitative initial and

included in Section 907.00.

³⁵ 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).

³⁶ 15 U.S.C. 78f(b)(5).

continued listing standards for Equity Investment Tracking Stocks are consistent with the Act. These standards, which require issuers of Equity Investment Tracking Stocks to meet the quantitative and qualitative listing standards applicable to other common stock listed on the Exchange, should ensure that only substantial companies that are capable of meeting their financial obligations and have adopted robust corporate governance procedures can issue Equity Investment Tracking Stocks.³⁷

The listing and trading of Equity Investment Tracking Stocks on the Exchange present unique issues by virtue of the fact that they are designed to track the performance of another publicly traded company. As a result, investors may expect that the trading price of an Equity Investment Tracking Stock will be related to the trading price of the tracked company and, as such, affected by news and information disclosed by such company. To address these issues, the Exchange has proposed to adopt additional requirements for the initial and continued listing of Equity Investment Tracking Stocks that are not applicable to other common stock listed on the Exchange.

These proposed listing standards require, among other things, that for the initial and continued listing of an Equity Investment Tracking Stock, the issuer of the equity security tracked by the Equity Investment Tracking Stock (the “tracked stock”) must be listed on the Exchange and in good standing. Similarly, the proposed rules provide that whenever trading in the tracked stock is subject to a regulatory halt, or the tracked stock is suspended or delisting proceedings are commenced, trading in the Equity Investment Tracking Stock will also be halted, or the Equity Investment Tracking Stock will be suspended or delisting proceedings will be commenced, respectively.

³⁷ See supra notes 12-13.

The Commission believes that these additional requirements should protect investors and the public interest by assuring that pricing and other information with respect to the tracked stock is publicly available whenever the Equity Investment Tracking Stock is being traded. In addition, these requirements should help assure that the tracked stock is subject to comparable quantitative and qualitative requirements as the Equity Investment Tracking Stock, and that the Exchange has a listing relationship with, and direct access to information from, the issuer of the tracked stock.

In addition, the proposal requires that for initial and continued listing on the Exchange an issuer of an Equity Investment Tracking Stock must own, directly or indirectly, at least 50% of the economic interest and voting power of all of the outstanding classes of common equity securities of the issuer of the tracked stock. By effectively allowing only a single Equity Investment Tracking Stock to be issued for any tracked stock, and by requiring the issuer to be the controlling shareholder of the tracked stock, the Commission believes the proposal is reasonably designed to address concerns that the proliferation of tracking stocks could lead to undue market complexity or investor confusion.

Further, the Exchange has proposed to distribute an Information Memorandum prior to the commencement of trading apprising member firms of the special characteristics and risks of the Equity Investment Tracking Stock, as well as the Exchange's know-your-customer, suitability, and other rules applicable thereto.³⁸ The Commission believes distribution of this Information Memorandum should help address concerns, among others, that the complexity of

³⁸ See, e.g., NYSE Rules 2090 and 2111 (requiring member organizations to, among other things, use due diligence to learn the essential facts relative to every customer prior to trading or recommending a transaction in an Equity Investment Tracking Stock and have a reasonable basis to believe that a customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in an Equity Investment Tracking Stock).

an Equity Investment Tracking Stock and its relationship with the tracked stock could lead to investor confusion and create certain risks.

The Exchange also has represented that it will monitor activity in Equity Investment Tracking Stocks to identify and deter any potential improper trading activity in such securities and will adopt enhanced surveillance procedures to enable it to monitor Equity Investment Tracking Stocks together with the related tracked stocks. In addition, the Exchange has agreed to conduct a review both of compliance with continued listing standards and the trading characteristics of Equity Investment Tracking Stocks, provide certain reports to the Commission, and make any appropriate recommendations for enhancements to its listing standards for Equity Investment Tracking Stocks based on this review. The Commission believes these measures should reduce the risks of manipulative or other improper activity in connection with Equity Investment Tracking Stocks, help assure compliance with the proposed listing standards, and identify areas where such standards might need to be strengthened going forward.

With respect to the proposed fees, the Commission believes it is consistent with the Act for the Exchange to exclude issuers whose only common equity security listed on the Exchange is an Equity Investment Tracking Stock from receiving the complimentary products and services provided for under Section 907.00 of the Manual. The Exchange stated that most of the services provided under Section 907.00 would be of limited value and appeal to issuers of Equity Investment Tracking Stocks.

Finally, the Commission believes that the proposed listing and annual fees for Equity Investment Tracking Stocks are an equitable allocation of reasonable fees. The Exchange stated that it is appropriate to charge lower fees to issuers whose only common equity security listed on the Exchange is an Equity Investment Tracking Stock because there are regulatory efficiencies

for the Exchange when the issuer of an Equity Investment Tracking Stock and the issuer of the tracked stock are both listed on the Exchange. The Exchange represented that it does not believe that the proposed fees would negatively affect its ability to continue to adequately fund its regulatory program or the services the Exchange provides to issuers. According to the Exchange, these lower fees also reflect the fact that issuers whose only listed security is an Equity Investment Tracking Stock will not receive the complimentary products and services that other listed issuers of equity securities are eligible for under Section 907.00 of the Manual.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,³⁹ that the proposed rule change (SR-NYSE-2016-22), as modified by Amendment Nos. 5 and 6, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁰

Brent J. Fields
Secretary

³⁹ 15 U.S.C. 78s(b)(2).

⁴⁰ 17 CFR 200.30-3(a)(12).