

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-70155; File No. SR-NYSE-2013-57)

August 9, 2013

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Section 902.03 of the Listed Company Manual to Specify How the Initial Application Fee is Treated for Certain Issuers That Do Not Immediately List a Security For Which They Already Paid an Initial Application Fee

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on July 31, 2013, New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. 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 the Substance of the Proposed Rule Change

The Exchange proposes to amend Section 902.03 of the Listed Company Manual (the “Manual”) to specify how the Initial Application Fee is treated for certain issuers that do not immediately list a security for which they already paid an Initial Application Fee. In addition to the substantive changes proposed herein, the Exchange also proposes to make certain non-substantive changes to Section 902.03. 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

¹ 15 U.S.C.78s(b)(1).

² 17 CFR 240.19b-4.

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 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 902.03 of the Manual to specify how the Initial Application Fee is treated for certain issuers that do not immediately list a security for which they already paid an Initial Application Fee. In addition to the substantive changes proposed herein, the Exchange also proposes to make certain non-substantive changes to Section 902.03.

Background

Section 902.03 of the Manual provides for an Initial Application Fee of \$25,000 that is charged to an issuer that applies to list certain securities on the Exchange.³

An issuer applying to list a security on the Exchange is subject to a preliminary free confidential review by NYSE Regulation, Inc. (“NYSER”), in which NYSER determines the issuer’s qualification for listing. As set forth in Section 702.02 of the Manual, 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

³ See Securities Exchange Act Release No. 68470 (December 19, 2012), 77 FR 76116 (December 26, 2012) (SR-NYSE-2012-68). Certain issuers are not required to pay an Initial Application Fee. See Section 902.03.

notify the issuer of its eligibility clearance and the conditions to its listing by means of a letter (the “pre-clearance” letter).⁴

For an issuer subject to the Initial Application Fee, payment of the Initial Application Fee is 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 NYSE 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. To enable an issuer to make an informed decision about whether to submit an Initial Application Fee, promptly after making a determination that an issuer is eligible to list but subject to the payment of the Initial Application Fee, the Exchange shall inform such issuer in writing that it is entitled to receive a clearance letter upon payment of the Initial Application Fee.⁵

The Initial Application Fee is applied toward the applicable Listing Fees for an issuer that lists on the Exchange. If an issuer pays an Initial Application Fee in connection with the application to list a security but does not immediately list such security, the issuer is not required to pay an additional Initial Application Fee if it subsequently lists such security, so long as (i) the issuer has a registration statement regarding such security on file with the Commission, or, (ii) if the issuer has withdrawn its registration statement, the issuer refiles a registration statement regarding such security within 12 months of the date of such withdrawal.

⁴ The Exchange has submitted a rule filing to the SEC that would revise the sections of the Manual describing the listing application process and would delete Section 702.02. However, new Sections 104.00 and 702.00 will describe the eligibility clearance process in a manner that is substantively the same as that provided in this filing. See 34-69565 (May 13, 2013), 78 FR 29165 (May 17, 2013) (SR-NYSE-2013-33). See also 34-69878 (June 27, 2013) (extending until August 15, 2013 the Commission’s time to take action on the listing application filing).

⁵ The purpose of this notification is to assure any such issuer that it will not have to pay a non-refundable Initial Application Fee subject to any risk that it will not subsequently receive a clearance letter.

The Initial Application Fee is non-refundable. It is designed to 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, and to provide a disincentive for impractical applications by issuers.⁶

Emerging Growth Companies and Foreign Private Issuers

As noted above, if an issuer pays an Initial Application Fee in connection with the application to list a security but does not immediately list such security, the issuer is not required to pay an additional Initial Application Fee if it subsequently lists such security, so long as:

- (i) the issuer has 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 proposes to amend Section 902.03 of the Manual to add two additional circumstances in which an issuer will not be required to pay a subsequent Initial Application Fee, in order to address issuers that do not file a publicly-available registration statement with the Commission. Specifically, pursuant to Section 6(e) of the Securities Act of 1933 (the "Securities Act"),⁷ an "emerging growth company" (as defined in Section 2(a)(19) of the Securities Act⁸ and

⁶ See Securities Exchange Act Release No. 68470 (December 19, 2012), 77 FR 76116 (December 26, 2012) (SR-NYSE-2012-68).

⁷ 15 U.S.C. 77f(e). See Section 106 of the Jumpstart Our Business Startups Act (the "JOBS Act"), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3606enr/pdf/BILLS-112hr3606enr.pdf>.

⁸ 15 U.S.C. 77b(a)(19).

Section 3(a)(80) of the Act⁹) may submit a draft registration statement to the Commission for confidential, nonpublic review. Additionally, a foreign private issuer (as defined in Rule 3b-4(c) under the Act¹⁰) is also eligible to submit a draft registration statement as an emerging growth company or pursuant to a nonpublic submission policy of the Commission’s Division of Corporation Finance.¹¹

The Exchange proposes to add two additional provisions that specify that, if an issuer pays an Initial Application Fee in connection with the application to list a security but does not immediately list such security, and the issuer is an emerging growth company and/or foreign private issuer and has submitted a draft registration statement to the Commission for confidential, nonpublic review pursuant to Section 6(e) of the Securities Act or the foreign issuer nonpublic submission policy of the Commission’s Division of Corporation Finance (a “Confidential Submission”), the issuer will not be required to pay an additional Initial Application Fee if it subsequently lists a security, so long as:

- (a) the issuer has submitted to the Commission through the Commission’s electronic submission system a Confidential Submission within the previous 120 days (for purposes of this rule, a “Current Confidential Submission”) and the issuer provides evidence of such Current Confidential Submission to the Exchange; or
- (b) if the Confidential Submission has ceased to be a Current Confidential Submission, then, within 12 months of the date such Confidential Submission

⁹ 15 U.S.C. 78c(a)(80).

¹⁰ 17 CFR 240.3b-4(c).

¹¹ The policy is available at <http://www.sec.gov/divisions/corpfin/internatl/nonpublicsubmissions.htm>.

ceased to be a Current Confidential Submission the issuer resubmits a Confidential Submission regarding such security and the issuer provides evidence of such Confidential Submission to the Exchange, or publicly files a registration statement regarding such security.

Non-Substantive Change

In addition to the substantive changes proposed herein, the Exchange also proposes non-substantive changes to remove obsolete text from Section 902.03 of the Manual (i) stating that the Initial Application Fee became effective January 1, 2013, and (ii) referring to payment of Listing Fees for a security that transfers from another market.¹² Additionally, the Exchange proposes to specify that, as is the case today, the Initial Application is non-refundable.

The Exchange notes that the proposed change is not otherwise intended to address any other issues surrounding Initial Application Fees and that the Exchange is not aware of any problems 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 Act,¹³ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁴ 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.

¹² As provided in Section 902.02 of the Listed Company Manual, an issuer is not required to pay Listing Fees in connection with transferring the listing of any class of equity securities, any structured product or any closed-end fund from any other national securities exchange.

¹³ 15 U.S.C. 78f(b).

¹⁴ 15 U.S.C. 78f(b)(4) and (5).

Generally, the Exchange believes that the proposed change is reasonable because it will ensure that a company that submits a confidential, nonpublic, draft registration statement to the Commission for review but does not immediately list the security, for which it has paid an Initial Application Fee will be treated the same as an issuer that has filed a public registration statement. The proposed rule change is reasonable because it protects issuers entitled to avail themselves of the ability to make a Confidential Submission by ensuring that they are not required to pay the Initial Application Fee twice.

The Exchange also believes that the proposed change is equitable and not unfairly discriminatory because it will maintain the effectiveness of an already-paid Initial Application Fee for an issuer that submits a confidential, nonpublic draft registration statement to the Commission for review, but does not immediately list the security, on the same general terms as is currently applicable to an issuer that publicly files its registration statement.

The Exchange believes that the proposed non-substantive changes are reasonable because they will ensure that the description of the Initial Application Fee is clear and accurate. These changes are also equitable and not unfairly discriminatory because they will benefit all issuers and all other readers of the Manual.

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. The proposed change is designed to specify how the Initial Application Fee is treated for an issuer that submits a confidential, nonpublic draft registration statement to the Commission for review, but does not immediately list the security. Additionally, the proposed rule change does not impose a burden on competition because it ensures that companies that avail themselves of the

ability to make a Confidential Submission are treated the same as issuers that file a public registration statement for purposes of the Initial Application Fee. Therefore, there is no disincentive to make a Confidential Submission as opposed to publicly filing a registration statement.

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

Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁵ and Rule 19b-4(f)(6) thereunder.¹⁶

The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Doing so will allow the Exchange to immediately specify in its rules how the Initial Application Fee is treated for an issuer that makes a Confidential Submission with respect to a security but does not immediately list the security, which is similar to the current treatment for

¹⁵ 15 U.S.C. 78s(b)(3)(A).

¹⁶ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

public filers for purposes of paying the Initial Application Fee. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.¹⁷

At any time within 60 days of the filing of the 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. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) of the Act¹⁸ to determine whether the proposed rule change should be approved or disapproved.

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:

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-NYSE-2013-57 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.

¹⁷ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁸ 15 U.S.C. 78s(b)(2)(B).

All submissions should refer to File Number SR-NYSE-2013-57. 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 at 100 F Street, NE, Washington, DC 20549-1090 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 available publicly. All submissions should refer

to File Number SR-NYSE-2013-57, 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.¹⁹

Kevin M. O'Neill
Deputy Secretary

¹⁹ 17 CFR 200.30-3(a)(12).