

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-55743; File No. SR-NYSEArca-2007-24)

May 10, 2007

Self-Regulatory Organizations; NYSE Arca Inc.; Order Approving a Proposed Rule Change to Waive Certain Listing Fees

I. Introduction

On February 28, 2007, NYSE Arca, Inc. (“NYSE Arca” or “Exchange”), through its wholly owned subsidiary, NYSE Arca Equities, Inc., filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposal to waive certain listing fees. The proposal was published for comment in the Federal Register on March 16, 2007.³ The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

The Exchange proposes to amend its listing fee schedule to provide that there shall be no initial listing fee applicable to (i) any company listing following emergence from bankruptcy, or (ii) any company listing its primary class of common stock that is not listed on a national securities exchange but is registered under the Act.

The Exchange believes that the initial listing fee waiver for companies listing upon emergence from bankruptcy is justified the unique circumstances of those issuers, which, according to the NYSE, among other things, tend to be more sensitive to the initial and continued costs associated with listing because of the desire in bankruptcy proceedings to ensure creditors

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 55430 (March 8, 2007), 72 FR 12651 (the “Notice”).

are paid as much as possible. According to the Exchange, because bankrupt companies face unique challenges in the listing process, and because the number of companies that will benefit from the fee waiver will be very limited, the Exchange does not believe that the treatment this proposal would afford to bankrupt companies constitutes an inequitable or unfairly discriminatory allocation of fees.

In addition, the Exchange believes that waiving initial listing fees for a company listing its primary class of common stock which is registered under that Act but not listed on a national securities exchange is appropriate and does not constitute an inequitable or unfairly discriminatory allocation of fees. The Exchange anticipates that most companies taking advantage of this waiver will be formerly-listed companies that were delisted as a result of a failure to timely file annual reports with the Commission. These companies usually seek to re-list on the Exchange as soon as their filings are up to date.⁴ According to the Exchange, because such companies had previously paid initial listing fees to the Exchange or to another national securities exchange, the Exchange believes that to make them pay these fees again would further penalize them unnecessarily.

The Exchange stated that other companies trading in the over-the-counter market that have not previously been listed on a national securities exchange may seek to qualify for the waiver of initial listing fees. However, the Exchange believes that not many of these companies will be able to meet its quantitative initial listing standards, and thus does not believe that

⁴ In its filing, the Exchange stated that typically, such companies are otherwise in good standing with a national securities exchange, but fell behind on their reporting obligations under the Act because their auditors or the Commission required restatements of their financial statements. The Commission notes that the timely filing of accurate financial reports under the Act is critical to investors and our national market and assures that investors receive up to date financial information about listed companies.

waiving initial listing fees for such companies will have a meaningful effect on the Exchange's revenue or constitute an inequitable or unfairly discriminatory allocation of fees.

The Exchange has represented that the proposed rule change will not affect the Exchange's commitment of resources to its regulatory oversight of the listing process or its regulatory programs. Companies that benefit from one of the proposed waivers will be reviewed for compliance with Exchange listing standards in the same manner as any other company that applies to be listed on the Exchange. The Exchange will conduct a full and independent review of each issuer's compliance with the Exchange's listing standards.

The Exchange also has represented that it does not expect the financial impact of this proposed rule change to be material, either in terms of increased levels of annual fees from transferring issuers or in terms of diminished initial listing fee revenues. A limited number of companies are qualified and seek to list on the Exchange that are either emerging from bankruptcy or have a registered class of common stock but are not currently listed on another market. Accordingly, the proposed rule change will not impact the Exchange's resource commitment to its regulatory oversight of the listing process or its regulatory programs.

Following their approval, the Exchange would apply the amendments contained in the proposal retroactively to February 28, 2007, the date of filing of the proposed rule change.⁵

III. Discussion

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.⁶ In particular, the Commission finds that the proposal is

⁵ See supra note 3.

⁶ 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).

consistent with Section 6(b)(4) of the Act,⁷ which requires that an exchange have rules that provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Commission also finds that the proposal is consistent with Section 6(b)(5) of the Act,⁸ which requires, inter alia, that the rules of a national securities exchange be designed to remove impediments to and perfect the mechanism of a free and open market and a national market system and not designed to permit unfair discrimination between issuers. The Commission has not received any comments on the proposal. This order approves the proposed rule change.

The Commission notes that companies who re-list upon emerging from bankruptcy or who re-list upon a return to good standing following delisting have usually paid listing fees to either the Exchange or to another national securities exchange at the time of their initial listing. For this reason, the Exchange argues, the waiver of listing fees constitutes an equitable allocation of reasonable fees.

The Commission recognizes that, as drafted, the initial fee waiver would extend to companies that have never listed on a national securities exchange, which thus have never paid listing fees. In this regard, the Exchange acknowledges that some companies other than those returning to good standing after recent delisting—e.g., a company trading on the over-the-counter market—may seek to take advantage of the waiver of listing fees for companies not listed on a national securities exchange but registered under the Act. However, the Exchange expects the number of such companies eligible for the waiver to be very small, since not many of these companies would meet the Exchange’s quantitative listing requirements.

⁷ 15 U.S.C. 78f(b)(4).

⁸ 15 U.S.C. 78f(b)(5).

The Commission also notes that the Exchange has represented that the waiver of listing fees should not have a material financial impact on the exchange, or impact the Exchange's resource commitment to its regulatory oversight of the listing process or its regulatory programs.

Further, the proposal does not have any impact on whether a company is actually eligible to list on the Exchange. The Commission expects, and the Exchange has represented, that a full and independent review of compliance with listing standards will be conducted for any company seeking to take advantage of either of the fee waivers, just as for any company that applies for listing on the Exchange.

In light of these arguments, the Commission agrees that the proposed waivers, which are retroactively effective to February 28, 2007, the date of the filing of the proposed rule change,⁹ do not constitute an inequitable allocation of reasonable dues, fees, and other charges, do not permit unfair discrimination between issuers, and are generally consistent with the Act.

⁹ See supra note 3.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁰ that the proposed rule change (File No. SR-NYSEArca-2007-24) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Florence E. Harmon
Deputy Secretary

¹⁰ Id.

¹¹ 17 CFR 200.30-3(a)(12).