

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-72669; File No. SR-NASDAQ-2014-058]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of Proposed Rule Change To Amend IM-5900-7 To, Among Other Things, Modify the Free Services Offered to Certain Newly Listing Companies

July 24, 2014.

#### I. Introduction

On May 27, 2014, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend IM-5900-7 to, among other things, modify the free services offered to certain newly listing companies. The proposed rule change was published in the **Federal Register** on June 10, 2014.<sup>3</sup> The Commission received one comment letter on the proposal.<sup>4</sup> Thereafter, Nasdaq submitted a letter in response to this comment.<sup>5</sup> This order grants approval of the proposed rule change.

#### II. Description of the Proposal

Nasdaq IM-5900-7 describes the complimentary services offered by Nasdaq to companies listing on the Nasdaq Global and Global Select Markets in connection with an initial public offering, upon emerging from bankruptcy, or in connection with a spin-off or carve-out from another company (“Eligible New Listings”) and to companies that switch their listing from the New York Stock Exchange to the Nasdaq Global or Global Select Markets (“Eligible Switches”). Under the current rule, Eligible Switches with a market capitalization of \$500 million or more receive complimentary services for four years from the date of their listing, while all other Eligible Switches and Eligible New Listings receive complimentary services for two years from the date of their listing. In addition, under the current rule, Eligible

Switches and Eligible New Listings with a market capitalization of \$500 million or more receive additional services that companies with a market capitalization below \$500 million do not receive (“Additional Services”).<sup>6</sup>

Nasdaq proposes to modify several aspects of IM-5900-7. First, Nasdaq proposes to increase the threshold for an Eligible Switch or Eligible New Listing to receive Additional Services from \$500 million or more in market capitalization to \$750 million or more in market capitalization. Nasdaq also proposes to provide three years of services, instead of four, to Eligible Switches with a market capitalization of \$750 million or more.<sup>7</sup>

Nasdaq also proposes to remove the use of Directors Desk, an online board portal, as a complimentary service offered under IM-5900-7.<sup>8</sup> Instead, Nasdaq proposes to offer all Eligible New Listings and Eligible Switches four interactive webcasts, with a retail value of approximately \$6,500 per year.

Under the current rule, Nasdaq provides market analytic tools for up to four users to all Eligible New Listings and Eligible Switches, at an approximate retail value of \$39,000. Nasdaq proposes to change its offer for market analytic tools for all Eligible News Listings and Eligible Switches from up to four users to up to two users, at an approximate retail value of \$30,000.

Nasdaq also proposes to update the approximate retail values set forth in the rule for the individual services offered and the total retail value of all services offered to Eligible New Listings or Eligible Switches to account for changes in prices since the rule was first adopted as well as changes in services as set forth in the proposal. Nasdaq states that the cumulative effect of these changes will reduce the stated annual value of the package from approximately \$94,000 to approximately \$70,000 for companies with a market capitalization of up to \$750 million and from approximately \$169,000 to approximately \$125,000 for companies with a market capitalization

of \$750 million or more.<sup>9</sup> Under the proposal the stated annual value of the package available to Eligible New Listings and Eligible Switches with a market capitalization between \$500 million and \$750 million will change from approximately \$169,000 to approximately \$70,000.<sup>10</sup>

Nasdaq proposes to remove the current language in IM-5900-7 that states that the complimentary period for the services starts from the date of listing and add new paragraph (d) to describe the start of the complimentary period. Under proposed IM-5900-7(d), if an Eligible New Listing or Eligible Switch begins to use a particular service provided under IM-5900-7 within 30 days after the date of listing, the complimentary period for that service will begin on the date of first use. In all other cases, the period for each complimentary service shall commence on the listing date.

Nasdaq proposes to implement the proposed rule change upon approval. However, the proposal provides that any company that applies to list on Nasdaq before July 31, 2014, and that actually lists before September 30, 2014, may elect to receive services under the terms of the rule as in effect prior to the amendment (“Prior Rule”),<sup>11</sup> instead of the terms of the proposed amended IM-5900-7. The proposal provides that companies that listed while the Prior Rule was in effect will continue to receive services under the terms of the Prior Rule.<sup>12</sup>

#### III. Discussion and Summary of Comment 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.<sup>13</sup> Specifically, the Commission believes it is consistent with the provisions of

<sup>9</sup> See Notice, *supra* note 3, at 33239. The prior value for each package is the amount currently reflected in the rule text. The value of the proposed package is based on retail prices as of May 2014. *Id.* at 33239, n.6.

<sup>10</sup> *Id.*

<sup>11</sup> See Exchange Act Release No. 65963 (December 15, 2011), 76 FR 79262 (December 21, 2011) (SR-NASDAQ-2011-122) (order approving the adoption of IM-5900-7) (“Original Approval Order”). Nasdaq states that it will maintain, in its online rule book, a link to the text of the rule as in effect before the proposed amendment. The text of the Prior Rule will be made available at <http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2011/SR-NASDAQ-2011-122.pdf>.

<sup>12</sup> The proposed rule change would also make non-substantive changes to the rule to consistently use the term “services” instead of interchangeably using the terms “products” and “services.”

<sup>13</sup> 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).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 72311 (June 4, 2014), 79 FR 33239 (“Notice”).

<sup>4</sup> See Letter to Elizabeth M. Murphy, Secretary, Commission, from Patrick Healy, CEO, Issuer Advisory Group LLC, dated July 3, 2014 (“IAG Letter”).

<sup>5</sup> See Letter to Elizabeth M. Murphy, Secretary, Commission, from Arnold P. Golub, Vice President, NASDAQ OMX, dated July 14, 2014 (“Nasdaq Response Letter”).

<sup>6</sup> The Additional Services include extra licenses for Directors Desk, additional press release distribution services and market surveillance tools.

<sup>7</sup> All other Eligible New Listings or Eligible Switches will continue to receive complimentary services for two years, as they do under the current rule.

<sup>8</sup> Under the current rule, all Eligible New Listings and Eligible Switches receive use of Directors Desk for up to 10 users, with an approximate retail value of \$20,000 per year, and Eligible New Listings and Eligible Switches with a market capitalization of \$500 million or more receive an additional five licenses for Directors Desk, with a retail value of approximately \$10,000 per year.

Sections 6(b)(4) and (5) of the Act,<sup>14</sup> 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 Act<sup>15</sup> 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 raise the market capitalization threshold for companies to qualify for Additional Services from \$500 million or more to \$750 million or more, and for the Exchange to reduce the time period of complimentary services provided to Eligible Switches with a market capitalization of \$750 million or more from four years to three years. Moreover, the Commission believes that it is consistent with the Act for the Exchange to offer varying services to different categories of issuers since larger capitalized companies generally will need and use more services.<sup>16</sup> Nasdaq represents that the new threshold better reflects the level where a company will most benefit from the Additional Services, and will most likely continue to purchase those services after the complimentary period has expired.<sup>17</sup> In addition, Nasdaq states that the higher threshold will better reflect the type of companies that, when listing on Nasdaq, will assist in Nasdaq's efforts to attract and retain other listings.<sup>18</sup> Nasdaq states that, based on its experience, this higher threshold is appropriate to differentiate the companies that will most benefit from the Additional Services and provide the most future value to Nasdaq.<sup>19</sup> Based on the above, the Commission believes that Nasdaq has provided a sufficient basis for increasing the threshold by which companies will receive increased services and that this

change does not unfairly discriminate among issuers.

Further, Nasdaq notes that reducing the time period from four to three years for free services available to larger Eligible Switches will reduce an existing difference between Eligible Switches and other Eligible New Listings.<sup>20</sup> Nasdaq states that these proposed changes will result in fewer companies receiving the Additional Services and shorten the period for which some companies receive services, which may have the result of enhancing competition with other listing venues and with other service providers.<sup>21</sup> As noted below, this reflects the competitive environment for exchange listings.

The Commission believes that it is consistent with the Act for the Exchange to modify its existing complimentary service offerings by removing Directors Desk, adding interactive webcasts, and reducing the number of users for market analytic tools services. Nasdaq states that it has observed that companies offered the complimentary Directors Desk package may decline to use it, or may only use a few of the available seats, and that a number of companies have expressed interest in interactive webcasts during their discussions with Nasdaq and many purchase this service from NASDAQ OMX Corporate Solutions.<sup>22</sup> Thus, Nasdaq believes that although the interactive webcasts may cost less than Directors Desk, the expected increase in utilization by companies could make this substitution more valuable to companies.<sup>23</sup> In addition, with respect to the reduction in market analytic tools users, Nasdaq states that it has observed that many companies have contracted for four users just because they were available, and not because they were actually needed by the company, and that these companies may not be interested in continuing to pay for those users at the retail price when the package expires.<sup>24</sup> The Commission understands that Nasdaq faces competition in the market for listing services, and that it competes, in part, by offering valuable services to its listed companies. Nasdaq states that it believes that the changes to the services offered will result in a more enticing package for potential new listings, even though the individual value of the services offered may be less,

and therefore will enhance competition among listing exchanges.<sup>25</sup>

Accordingly, the Commission believes that Nasdaq's proposed changes to its complimentary services offerings, including changes to the eligibility thresholds and the time period of services offered, reflects the current competitive environment for exchange listings among national securities exchanges and is appropriate and consistent with Section 6(b)(8). The Commission notes that all listed companies receive some services from Nasdaq, including Nasdaq Online and the Market Intelligence Desk.<sup>26</sup>

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 company begins to use the service within 30 days after the date of listing. Nasdaq states that, in its experience, it can take companies a period of time to review and complete necessary contracts and training for the complimentary services offered under IM-5900-7 following their listing, 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.<sup>27</sup> Nasdaq states that this change also more closely aligns Nasdaq's treatment of these companies with other customers of NASDAQ OMX Corporate Solutions, who do not receive or pay for services until they are contracted.<sup>28</sup> Nasdaq states that it believes that the increased flexibility surrounding the start date of services will result in a more enticing package for potential new listings and therefore will enhance competition among listing exchanges.<sup>29</sup> The Commission notes that this change would provide only a short window of additional time to allow companies to finalize their contracts for the complimentary services, and that this additional time would only be available to companies that have already determined to list on Nasdaq.<sup>30</sup> The Commission also notes, as Nasdaq points out, that a competing service provider could continue to offer its services during this 30-day period,

<sup>14</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>15</sup> 15 U.S.C. 78f(b)(8).

<sup>16</sup> See Original Approval Order, *supra* note 1111, 76 FR at 79266, finding that it is reasonable for Nasdaq to provide different services to tiers based on market capitalization since larger capitalized companies generally will need and use more services.

<sup>17</sup> See Notice, *supra* note 3, 79 FR at 33239. As noted by Nasdaq, in its prior filing, it offers more services to larger companies because they need more and different governance, communications and intelligence services.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 33240.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 33240-1.

<sup>22</sup> *Id.* at 33239.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 33240.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> The Commission expects Nasdaq to track the start (and end) date of each free service.

which could potentially enhance competition among service providers.<sup>31</sup>

Nasdaq proposes to allow a company that applies for listing on Nasdaq before July 31, 2014, and lists before September 30, 2014, to elect to receive services under the terms of the rule as in effect before the amendment. Nasdaq notes that companies near a listing or switch may have relied upon the services described in the previous version of the rule in making their decision to list on Nasdaq.<sup>32</sup> The IAG Letter received argues that Nasdaq should go further and grandfather under the old rule any company that can demonstrate that it has been offered the services under the prior version of the rule.<sup>33</sup> This commenter argues that being forced to file an application by July 31, 2014 and list with Nasdaq by September 30, 2013 in order to receive the services offered under the prior version of the rule will disadvantage companies utilizing the confidentiality protection offered under the JOBS Act.<sup>34</sup> In response, Nasdaq states its continued belief that the grandfather period as proposed is appropriate and consistent with the Act and fully addresses the situation where companies made a listing decision based, in part, on the services provided under the old rule.<sup>35</sup> Nasdaq states its view that companies that have not applied to list by July 31, 2014 will be able to make their listing decision based on the services provided under the amended rule and would, therefore, not be disadvantaged.<sup>36</sup> In addition, Nasdaq states that the commenter's suggestion would result in unfair treatment of certain companies that read the current rule but did not meet with Nasdaq, introduces unnecessary complexity into the rule by having to indefinitely track such companies, and would be impractical to administer.<sup>37</sup> The Commission agrees with Nasdaq that the grandfather period proposed is consistent with the Act. The Commission believes that the application and listing deadlines proposed by Nasdaq in order to receive services under the prior version of the rule are reasonable, and that adequate notice of the cutoff dates has been provided to issuers. The Commission

notes that the Notice of the proposal, which clearly sets forth the grandfather provision, was published in the **Federal Register** on June 10, 2014.<sup>38</sup>

Finally, the Commission believes that is reasonable, and in fact required by Section 19(b) of the Exchange Act, that Nasdaq amend IM-5900-7 to update the rule text to reflect the actual retail values of the services offered, which have changed since the original adoption of the rule.<sup>39</sup> This provides greater transparency to Nasdaq's rules and the fees applicable to companies listing on the Exchange.

## V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>40</sup> that the proposed rule change (SR-NASDAQ-2014-058) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>41</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-72665; File No. SR-NYSEArca-2014-59]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Shares of the AdvisorShares Athena High Dividend ETF Under NYSE Arca Equities Rule 8.600

July 24, 2014.

## I. Introduction

On May 20, 2014, NYSE Arca, Inc. ("Exchange" or "NYSE Arca") 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")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to list and trade shares ("Shares") of the

AdvisorShares Athena High Dividend ETF ("Fund") under NYSE Arca Equities Rule 8.600. The proposed rule change was published for comment in the **Federal Register** on June 9, 2014.<sup>3</sup> On July 23, 2014, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>4</sup> The Commission received no comments on the proposal. This order approves the proposed rule change, as modified by Amendment No. 1.

## II. Description of the Proposal

The Exchange proposes to list and trade Shares of the Fund under NYSE Arca Equities Rule 8.600 ("Managed Fund Shares"), which governs the listing and trading of Managed Fund Shares on the Exchange. The Shares will be offered by AdvisorShares Trust ("Trust"), a statutory trust organized under the laws of the State of Delaware and registered with the Commission as an open-end management investment company.<sup>5</sup> AdvisorShares Investments, LLC ("Adviser") will be the investment adviser to the Fund, and AthenaInvest Advisors LLC ("Sub-Adviser") will be the Fund's sub-adviser and will provide day-to-day portfolio management of the Fund.<sup>6</sup> The Bank of New York Mellon ("Administrator") will serve as the administrator, custodian, transfer agent and accounting agent for the Fund.

<sup>3</sup> See Securities Exchange Act Release No. 72298 (June 3, 2014), 79 FR 33024 ("Notice").

<sup>4</sup> In Amendment No. 1, the Exchange clarifies that the Fund's investments in reverse repurchase agreements will not be used to enhance leverage. Amendment No. 1 provides clarification to the proposed rule change, and because it does not materially affect the substance of the proposed rule change, or raise any unique or novel regulatory issues, Amendment No. 1 does not require notice and comment.

<sup>5</sup> The Trust is registered under the Investment Company Act of 1940 ("1940 Act"). The Exchange states that on February 18, 2014, the Trust filed with the Commission an amendment to its registration statement on Form N-1A under the Securities Act of 1933 (15 U.S.C. 77a) ("Securities Act") and under the 1940 Act relating to the Fund (File Nos. 333-157876 and 811-22110) ("Registration Statement"). In addition, according to the Exchange, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. See Investment Company Act Release No. 29291 (May 28, 2010) (File No. 812-13677).

<sup>6</sup> The Exchange represents that neither the Adviser nor the Sub-Adviser is registered as a broker-dealer or is affiliated with a broker-dealer. The Exchange states that in the event (a) the Adviser or the Sub-Adviser becomes a registered broker-dealer or becomes newly affiliated with a broker-dealer or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, such adviser or sub-adviser will implement a fire wall with respect to its relevant personnel or its broker-dealer affiliate regarding access to information concerning the composition of or changes to the portfolio, and the adviser or sub-adviser will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the portfolio.

<sup>31</sup> See Notice, *supra* note 3, 79 FR at 33241.

<sup>32</sup> *Id.* at 33240.

<sup>33</sup> See IAG Letter, *supra* note 4, at 2. The IAG also commented on the reduction in the dollar value of the services and encouraged the Commission to remain vigilant on this issue. For the reasons discussed above, the Commission believes that Nasdaq's proposed changes are consistent with the Act.

<sup>34</sup> *Id.* at 1.

<sup>35</sup> See Nasdaq Response Letter, *supra* note 5.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See *supra* note 3.

<sup>39</sup> We would expect Nasdaq, consistent with Section 19(b) of the Act, to periodically update the retail values of services offered should they change. This will help to provide transparency to listed companies on the value of the free services they receive and the actual costs associated with listing on Nasdaq.

<sup>40</sup> 15 U.S.C. 78s(b)(2).

<sup>41</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.