

The Commission recognizes, however, that the proposed rule change may affect the purchase decisions of some listed issuers. The effect of offering Corporate Solutions' services on a complimentary basis is to provide issuers with the services of Corporate Solutions at a price that is lower in relative terms than what other vendors charge. As the Commission has previously discussed, a reduction in a vendor's relative price will generally cause some issuers to substitute their business toward that vendor.<sup>82</sup> Accordingly, the Commission believes that NASDAQ's offering of Corporate Solutions' products and services on a complimentary basis will, by lowering its relative price, likely cause some listed issuers to substitute their business away from other vendors and toward Corporate Solutions. The Commission believes, however, that the impact of this substitution would be limited for the reasons discussed below.

As asserted in the Notice, the number of companies eligible for the free services will be small in comparison to the total number of companies that comprise the target market for such services, so that we anticipate there is not likely to be competitively meaningful foreclosure of similar services offered by third parties.<sup>83</sup> NASDAQ represents that only 34 companies in 2009, 77 companies in 2010, and 62 companies through June 30, 2011 would have qualified for free services as Eligible New Listings by virtue of listing in connection with an IPO or a spin-off or a carve out from another company had the proposed rule been in effect.<sup>84</sup> Additionally, NASDAQ states that only 10 companies in 2009, three companies in 2010 and no companies through June 30, 2011 would have qualified for free services as Eligible Switches had the proposal been in place. According to NASDAQ, this represents no more than approximately 3 percent of listed companies.<sup>85</sup>

Further, NASDAQ notes that there are multiple third party services vendors and that those vendors appear to operate in highly competitive markets. In addition, one commenter believed that approving NASDAQ's proposal was necessary to preserve competition.<sup>86</sup> Further, another commenter—a competing services firm—stated that despite “NASDAQ's current practice of offering ‘free’ or significantly

discounted services[,]” its business continues to grow and to compete for business from NASDAQ issuers based on the quality of its services.<sup>87</sup>

The Commission also believes that NASDAQ is responding to competitive pressures in the market for listings in making this proposal.<sup>88</sup> Specifically, NASDAQ is offering complimentary products and services to attract new listings. The Commission understands that NASDAQ faces competition in the market for listing services, and that it competes in part by providing complimentary services to its listed companies through its affiliate versus third party vendors like NYSE. The ability to select from a choice of vendors and the use of a specific affiliate vendor are among the different ways that NASDAQ and NYSE may compete for listings and provide services for listed companies. In fact, NASDAQ notes that, by relying on services provided by an affiliate company rather than third parties, NASDAQ gains greater control to assure it can provide the services most valued by companies in a high quality manner.<sup>89</sup> Accordingly, the Commission believes that NASDAQ's proposal reflects the current competitive environment for exchange listings among national securities exchanges, and is appropriate and consistent with Section 6(b)(8) in furtherance of the purposes of the Act.<sup>90</sup>

With respect to concerns raised by commenters that NASDAQ's offering of IR services creates a conflict of interest with respect to its role as an SRO, NASDAQ has represented that it has effectively separated its regulatory functions from its business functions. The Commission notes that its oversight of NASDAQ as a registered national securities exchange is designed, among other things, to assure NASDAQ performs its regulatory functions in a manner consistent with the Act. Finally, the Commission notes that any change to NASDAQ's rules to increase or decrease the amount of information that a company must publicly disclose, or the manner of doing so, would require Commission approval.

The Commission has carefully considered the comment letters. Although some of the alternative proposals by the Investor Advisory Group might also satisfy the standards under Sections 6(b) and 19(b) of the

Act<sup>91</sup> depending on the facts and circumstances, those proposals are not before us, and the Commission believes that NASDAQ's proposal is consistent with these standards and, therefore, should be approved.<sup>92</sup>

## V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>93</sup> that the proposed rule change (SR-NASDAQ-2011-122) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>94</sup>

**Kevin M. O'Neill,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65971; File No. SR-NYSEArca-2011-75]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change Expanding the Scope of Potential “Users” of Its Co-Location Services To Include Any Market Participant That Requests To Receive Co-Location Services Directly From the Exchange and Amending Its Fee Schedule To Establish a Fee for Users That Host Their Customers at the Exchange's Data Center

December 15, 2011.

## I. Introduction

On October 14, 2011, NYSE Arca, Inc. (“NYSE Arca” 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”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to expand the scope of potential “Users” of its co-location services, and to amend its Fee Schedule. The proposed rule change was published for comment in the **Federal Register** on

<sup>91</sup> 15 U.S.C. 78f(b) and 15 U.S.C. 78s(b).

<sup>92</sup> The Commission notes that Business Wire and PR Newswire raised concerns that NASDAQ would subsequently file a proposed rule change attempting to lock all NASDAQ listed issuers into using Corporate Solutions' services. The Commission notes that prior to any such change being implemented, it would have to be filed with, and approved, by the Commission pursuant to Section 19(b) of the Act.

<sup>93</sup> 15 U.S.C. 78s(b)(2).

<sup>94</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.

<sup>82</sup> See NYSE Order *supra* note 60.

<sup>83</sup> See Notice *supra* note 3.

<sup>84</sup> *Id.* The Commission notes that Business Wire believes these figures are low because IPOs were depressed by the worldwide financial crises.

<sup>85</sup> We note that these numbers may be different had the proposal been in place at that time.

<sup>86</sup> See IR Letter.

<sup>87</sup> See PR Newswire Letter; see also *supra* note 80.

<sup>88</sup> See NYSE Letter (stating “NASDAQ's proposed rule is not based on concepts of fairness, but on what it needs to induce issuers to transfer to NASDAQ from NYSE”).

<sup>89</sup> See NASDAQ Response Letter *supra* note 5.

<sup>90</sup> 15 U.S.C. 78f(b)(8).

November 1, 2011.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

## II. Description of the Proposed Rule Change

The Exchange operates a data center in Mahwah, New Jersey from which it provides co-location services to Users.<sup>4</sup> For purposes of its co-location services, the term “User” currently includes any OTP Holder, OTP Firm or Sponsored Participant that is authorized to obtain access to the NYSE Arca System pursuant to NYSE Arca Options Rule 6.2A (*see* NYSE Arca Options Rule 6.1A(a)(19)). The Exchange proposed to expand the scope of potential Users of its co-location services to include any market participant that requests to receive co-location services directly from the Exchange.<sup>5</sup> Under the proposed rule change, Users could therefore include OTP Holders, OTP Firms, Sponsored Participants, non-OTP Holder and non-OTP Firm broker dealers and vendors.<sup>6</sup>

The Exchange also proposed to amend its Price List to establish a fee applicable to Users that provide hosting services to their customers (“Hosted Users”) at the Exchange’s data center.<sup>7</sup> “Hosting” would be a service offered by a User to a Hosted User and could include, for example, a User supporting its Hosted User’s technology, whether hardware or software, through the User’s co-location space. Specifically, the Exchange proposed to charge each User a fee of \$500.00 per month for each Hosted User that the User hosts in the Exchange’s data center. Users would independently set fees for their Hosted Users and the Exchange would not receive a share of any such fees.

## III. Discussion and Commission’s Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national

securities exchange.<sup>8</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>9</sup> which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities, and with Section 6(b)(5) of the Act,<sup>10</sup> which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, 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, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange noted that the expansion of the scope of potential Users of the Exchange’s co-location services increases access to the Exchange’s co-location facilities and that the co-location services would be offered to these additional Users in a manner that is not unfairly discriminatory.<sup>11</sup> The Commission believes that this expansion of the scope of potential Users is consistent with the Exchange Act and should increase access to the Exchange co-location facilities by allowing additional categories of market participants to access the Exchange’s co-location services.

Regarding the proposed hosting fee, the Exchange represented that it will be applied uniformly and will not unfairly discriminate between Users of co-location services, as the hosting fee will be applicable to all interested Users that provide hosting services.<sup>12</sup> The Exchange also represented that the hosting fee is reasonable because it is designed to defray expenses incurred or resources expended by the Exchange.<sup>13</sup> In light of the Exchange’s representations, the Commission believes that the hosting fee is consistent with Section 6(b)(4) of the Exchange Act.

## IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>14</sup> that the

proposed rule change (SR–NYSEArca–2011–75) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

Kevin M. O’Neill,  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65969; File No. SR–NASDAQ–2011–169]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Extension of the Exchange’s Penny Pilot Program and Replacement of Penny Pilot Issues That Have Been Delisted

December 15, 2011.

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> notice is hereby given that on December 2, 2011, The NASDAQ Stock Market LLC (the “Exchange” or “Nasdaq”) 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 Substance of the Proposed Rule Change

Nasdaq is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal for the NASDAQ Options Market (“NOM” or “Exchange”) to amend Chapter VI, Section 5 (Minimum Increments) to: Extend through June 30, 2012, the Penny Pilot Program in options classes in certain issues (“Penny Pilot” or “Pilot”); and replace any Penny Pilot issues that have been delisted.<sup>3</sup>

<sup>15</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.

<sup>3</sup> The Penny Pilot was established in March 2008 and in October 2009 was expanded and extended through December 31, 2010. *See* Securities Exchange Act Release Nos. 57579 (March 28, 2008), 73 FR 18587 (April 4, 2008) (SR–NASDAQ–2008–026) (notice of filing and immediate effectiveness establishing Penny Pilot); 60874 (October 23, 2009), 74 FR 56682 (November 2, 2009) (SR–NASDAQ–2009–091) (notice of filing and immediate effectiveness expanding and extending Penny Pilot); 60965 (November 9, 2009), 74 FR 59292 (November 17, 2009) (SR–NASDAQ–2009–097).

<sup>3</sup> *See* Securities Exchange Act Release No. 65624 (October 26, 2011), 76 FR 67526 (“Notice”).

<sup>4</sup> *See* Securities Exchange Act Release No. 63275 (November 8, 2010), 75 FR 70048.

<sup>5</sup> As stated by the Exchange, Users must agree to, and be capable of satisfying, any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange. *See* Notice, 76 FR at 67527.

<sup>6</sup> *Id.* The Exchange anticipated that the potential additional Users would provide, for example, hosting, service bureau, technical support, risk management, order routing and market data delivery services to their customers while the User is co-located in the Exchange’s data center.

<sup>7</sup> *Id.*

<sup>8</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule’s impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

<sup>9</sup> 15 U.S.C. 78f(b)(4).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

<sup>11</sup> *See* Notice, 76 FR at 67527.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> 15 U.S.C. 78s(b)(2).