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November 12, 2015

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-0609

Re: File No. SR-NYSE-2015-02

Dear Mr. Fields:

The New York Stock Exchange LLC ("NYSE" or the "Exchange") welcomes the opportunity to respond to the October 16, 2015 recommendation by Rick A. Fleming, Investor Advocate, to the Securities and Exchange Commission's ("Commission") to disapprove the Exchange's proposal exempt certain early stage companies ("Early Stage Companies")[1] from having to obtain shareholder approval prior to selling shares for cash to related parties, affiliates of related parties, or entities in which a related party has a substantial interest (the "Filing").

The Exchange's proposal was published for comment on April 30, 2015[2] and on August 4, 2015, the Commission issued an Order Instituting Proceedings to Determine Whether to Disapprove this proposed rule change.[3] The Exchange submitted a comment letter on August 31, 2015, addressing the issues raised in the Order Instituting Proceedings. Mr. Fleming raises additional concerns, including that transactions that would be exempted from shareholder approval under the Exchange's proposed rule could be dilutive of the economic and voting rights of existing shareholders. The Exchange believes that by providing Early Stage Companies with essential flexibility in raising capital, they will be better able to survive and grow, and that, therefore, the proposed exemption is in the interests of investors. It is also important to note that no transaction that the proposed rule change would exempt from shareholder approval would be subject to shareholder approval under the rules of either the NASDAQ Stock Market ("NASDAQ") or NYSE MKT.

The Investor Advocate states that "[w]hen new shares are sold at a discount from the greater of book or fair market value, it results in economic dilution" that "reduces the value of an existing shareholder's investment in the issuer." This analysis, however, does not take into account the fact that market participants recognize that there are factors that make it commercially reasonable to price private placement issuances of stock at a discount to the then current market price, especially when a large amount of stock is being sold. Specifically, a discount is commercially reasonable because investors in private placements are generally unable to resell the shares they purchase in the public market until either the end of the applicable Rule 144 holding period or such time as the company files and obtains effectiveness of a registration

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1 The proposed rule defines an Early Stage Company as a company that has not reported revenues greater than $20 million in any two consecutive fiscal years since its incorporation.

2 See Securities Exchange Act Release No. 74849 (April 30, 2015), 80 FR 26118.

3 See Securities Exchange Act Release No. 75599 (Aug. 4, 2015) ("Order Instituting Proceedings").

statement. It is generally understood that this limitation on resale makes restricted securities riskier and more illiquid in the hands of the purchaser in a private placement and therefore less valuable. Consequently, it is generally necessary to sell shares in a private placement at a lower price than the prevailing public market price. Companies factor this discount into their analysis of the relative cost of capital raised in private placement sales of their common stock and will only raise capital in that fashion if it is available on terms superior to other sources of capital. As such, the sale of shares in a private placement at a discount to the market price should only be viewed as truly economically dilutive to the interests of existing shareholders if there are other sources of capital available on better terms. Given the difficulty many Early Stage Companies experience in obtaining essential funding and the high cost of that capital, it is often makes good commercial sense and is in the interests of the shareholders to issue shares in private placements at a discount to the market price.

The Investor Advocate also expresses concern about the dilution of existing shareholders' voting interest in connection with issuances to related parties. While it is undeniable that any issuances pursuant to the proposed exemption will increase the relative voting power of the related parties participating in any private placement, we note that there is a significant limitation that will remain in effect. Section 312.03(d) of the Manual requires shareholder approval of any issuance that gives rise to a change of control. As such, the proposed exemption could never be used as a mechanism for obtaining overall voting control of a listed company without shareholder approval. Furthermore, we note that the voting rights of existing shareholders are not being diluted in any unfair manner. The investors in any private placement will receive voting rights on the same terms as all other shareholders, i.e., directly proportionate to their economic interest in the company.

The Investor Advocate suggests that the Exchange's existing rules already provide a way for companies in extreme financial distress to raise capital without first obtaining shareholder approval.[4] Unfortunately, this suggestion is inconsistent with the language and longstanding application of the limited exemption from obtaining shareholder approval forth in Section 312.05 of the Manual. As the Investor Advocate notes, this exemption is available only when the company's audit committee concludes that "the delay in securing shareholder approval would seriously jeopardize the financial viability of the enterprise" and publicly discloses that fact. The intent of this exemption, and application of it by the Exchange, is clearly that companies may only use the exemption when a bankruptcy filing is the only realistic alternative. The Exchange believes it is unrealistic to suggest that this exemption, intended for use only in a crisis, would be a useful tool to enable Early Stage Companies to meet their ongoing capital needs. The fact that the Exchange has not been asked to consider even one financial distress exemption application in the last 12 months is illustrative of the fact that the exemption is rarely a realistic option. Early Stage Companies frequently have capital needs that are pressing and where they would benefit from flexibility provided by the proposed exemption, but where the company is clearly not facing bankruptcy. In that circumstance, a company's audit committee would not be able to make the determination and public disclosure required by the financial distress exemption. The proposed exemption would provide additional flexibility to Early Stage Companies in need of raising capital.

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[4] Section 312.05 of the Manual.

As requested, the Exchange is providing data with respect to the likely impact of the proposed exemption.

- There are currently only 21 listed companies (out of 2,133 operating companies listed on the Exchange) that the Exchange has identified as qualifying as Early Stage Companies. This number is significant reduction from 31 companies that qualified as Early Stage Companies when the Exchange ran its first analysis on October 14, 2014. We also note that many of these 21 companies that currently qualify as Early Stage Companies do not have an extensive history of selling stock in private placements to fund their operations while listed on the Exchange.
- We note that 13 out of the 15 companies that were designated as Early Stage Companies a year ago that no longer qualify as such are still listed on the Exchange,[5] while only five companies listed in the past year currently qualify as Early Stage Companies.

These data show that while the proposed rule change would be significantly helpful to that small number of Early Stage Companies that choose to use it, the number is tiny both in absolute terms and as a percentage of listed companies (less than 1%) and the impact would be minimal. It also shows that many companies remain Early Stage Companies for a limited period and that, therefore, the availability of the exemption to specific companies would typically be for a limited period.

The Investor Advocate suggests that we provide data with respect to NASDAQ listed companies that would qualify as Early Stage Companies. We do not believe that data would be particularly helpful. We note that a large percentage of NASDAQ listed companies do not qualify for listing on the Exchange and that transfers between the two exchanges are relatively infrequent. For example, none of the five current Early Stage Companies, referenced above, that listed on the Exchange over the last 12 months was a transfer from NASDAQ.

The costs to comply with the shareholder approval requirement will vary from company to company depending on the number and type of their shareholders and the complexity of the issues raised. However, the Exchange does have significant experience in the listing of early stage companies on its affiliated exchange, NYSE MKT, which lists many r&d-focused biotech companies and exploration stage mining companies. Our experience on NYSE MKT has been that listed companies that would qualify as Early Stage Companies are frequently highly dependent on capital infusions from private placements in which management and significant shareholders participate to enable them to continue their operations until they reach the point of commercialization. These companies frequently raise capital in transactions that would have required shareholder approval under Section 312.03(b), but to which shareholder approval requirements are not applicable under NYSE MKT rules (or NASDAQ rules). As such, the Exchange believes that, while the companies that would avail themselves of the proposed exemption would likely be very small, the alternative could be very significant to the survival and success of those that utilize it.

The Investor Advocate expresses concern about the possibility that providing this exemption would be tantamount to creating a *de facto* two-tier exchange and expresses concern that investors may be confused as to which standards apply to specific listed companies. The Exchange believes these concerns are misplaced for a number of reasons. First, as discussed

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[5] One company delisted due to a merger and one company was delisted for cause.

above, the number of companies that would qualify for the exemption would be small and, the Exchange believes it is exaggerated to refer to a provision with such limited applicability as creating a two-tier structure. Second, all of the listing exchanges have a complex set of corporate governance requirements that apply in different ways to different categories of issuers (for example, all of the exchanges provide significant corporate governance exemptions to controlled companies). Accordingly, the Exchange's proposal to create a limited exception from one of its rules for a small subset of listed companies is not a novel approach.

The Exchange appreciates the Investor Advocate's concerns with respect to how investors would become aware that an Early Stage Company qualifies for the proposed exemption. As previously discussed, many listed companies benefit from a number of different exemptions under the rules of their listing exchange. Generally, companies disclose the applicability of these exemptions in their annual reports or proxy statements filed with the Commission. Similarly, the Exchange believes that Early Stage Companies that were likely to avail themselves of the exemption should include disclosure in their SEC filings about that fact and the possible risks to investors. Given the limited nature of the exemption, the Exchange believes that a separate designation for these companies would be confusing and would be unnecessary given the issuers' own disclosure obligations.

The Investor Advocate makes reference to the undesirability of a "race to the bottom." We agree that this would be undesirable, but we disagree that the proposed amendment represents any such thing. The proposed amendment would have no relevance to the vast majority of companies listed on the Exchange, as they would not qualify for the Early Stage Company exemption and would therefore remain subject to shareholder approval requirements for sales of stock to related parties, requirements to which companies listed on other exchanges are not subject. As noted above, the proposed amendment would only provide an exemption from shareholder approval to Early Stage Companies for transactions that would also be exempt from shareholder approval under the rules of NASDAQ and NYSE MKT. Furthermore, even Early Stage Companies would remain subject to a shareholder approval requirement for private placements relating to more than 20% of their outstanding shares without regard to price. Accordingly, even if the proposal is approved, the Exchange's requirements would remain higher than those on other exchanges.

We thank the Commission for the opportunity to provide this additional comment on the Release and the proposed Filing. If you have any additional question, or if we can be of further assistance in this matter, please do not hesitate to contact us.

Very truly yours,