

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-58299; File No. SR-NYSE-2008-68)

August 4, 2008

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change to Enable the Exchange to Determine that a Company Meets the Exchange's Market Value Requirements by Relying on a Third-Party Valuation of the Company

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Exchange Act"),<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on July 31, 2008, New York Stock Exchange LLC (the "NYSE" or the "Exchange") filed with the Securities and Exchange Commission the proposed rule changes as described in Items I, II and III below, which items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule changes from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Sections 102.01B and 102.01C of the Exchange's Listed Company Manual (the "Manual") to provide that the Exchange will, on a case by case basis, exercise discretion to list a company whose stock is not previously registered under the Exchange Act, where such a company is listing without a related underwritten offering upon effectiveness of a registration statement registering only the resale of shares sold by the company in earlier private placements. The proposed amendment would permit the Exchange to determine that such a company has met its market value requirements by relying on a third-party valuation of the company.

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

The text of the proposed rule change is available at <http://www.nyse.com>, the NYSE, and 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 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 these statements may be examined at the places specified in Item IV below. The NYSE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects 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 Sections 102.01B and 102.01C of the Manual to provide that the Exchange will, on a case by case basis, exercise discretion to list a company whose stock is not previously registered under the Exchange Act, where such a company is listing without a related underwritten offering upon effectiveness of a registration statement registering only the resale of shares sold by the company in earlier private placements. The proposed amendment would allow the Exchange to determine that such a company has met its market value requirements by relying on a third-party valuation of the company.

Section 102.01B of the Manual requires that companies listing on the Exchange in connection with their initial public offering ("IPO") or as a result of a spin-off or under the Affiliated Company standard must have \$60 million in market value of publicly-held shares at the time of listing and all other companies must have a market value of publicly-held shares of

\$100 million.<sup>4</sup> In addition, the Valuation/Revenue with Cash Flow, Pure Valuation/Revenue, and Affiliated Company standards of Section 102.01C require global market capitalization of \$500 million, \$750 million, and \$500 million, respectively. Sections 102.01B and 102.01C provide that, in connection with a company's IPO, the Exchange will rely on a written commitment from the underwriter to represent the anticipated value of the company's offering in order to determine a company's compliance with this listing standard. In the case of a spin-off, the company may rely on a letter from the parent company's investment banker or other financial adviser.

The Exchange has in recent years been approached by a number of private companies that would like to list upon the effectiveness of a selling shareholder registration statement. These private companies typically have sold a significant amount of their common stock to qualified institutional buyers in one or more private placements and, as a condition to those sales, will have agreed to file a registration statement to facilitate the resale of the privately-placed shares. These companies may meet all of the financial criteria for listing on the Exchange, except that they have not had any prior public market for their common stock and they are not contemplating an underwritten offering in connection with their selling shareholder registration statement. As such, the Exchange cannot rely on trading on any predecessor public market to evaluate the company's market value, as would be possible with a company transferring from another market. Nor is there a public offering whose price would provide the basis for a letter of the type provided by underwriters for companies listing in conjunction with an IPO.

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<sup>4</sup> Shares held by directors, officers, or their immediate families and other concentrated holding of 10 percent or more are excluded in calculating the number of publicly-held shares.

The Exchange believes that a company of this sort which otherwise meets the Exchange's listing criteria should not be barred from listing. As such, the Exchange proposes to list such companies if there is available an independent third-party valuation of the company (a "Valuation") and information regarding trading in a private placement trading market that, taken together, provide evidence that the company meets the relevant market value tests.

Therefore, the Exchange proposes to amend Sections 102.01B and 102.10C to provide that, in the case of a company whose stock is not previously registered under the Exchange Act that is listing upon effectiveness of a registration statement without a related underwritten offering, the Exchange will have the discretion to determine that such company has met the applicable market value requirements based on a combination of both (i) a Valuation and (ii) the most recent trading price for the company's common stock in a trading system for unregistered securities operated by a national securities exchange or a registered broker-dealer (a "Private Placement Market"). The Exchange will attribute a market value to the company equal to the lesser of (i) the value calculable based on the Valuation and (ii) the value calculable based on the most recent trading price in a Private Placement Market. Any Valuation used for this purpose must be provided by an entity that has significant experience and demonstrable competence in the provision of such valuations. The Valuation must be of a recent date as of the time of the approval of the company for listing and the evaluator must have considered, among other factors, the annual financial statements required to be included in the registration statement, along with financial statements for any completed fiscal quarters subsequent to the end of the last year of audited financials included in the registration statement. The Exchange will consider any market factors or factors particular to the listing applicant that would cause concern that the value of the company had diminished since the date of the Valuation and will continue to monitor the

company and the appropriateness of relying on the Valuation up to the time of listing. In particular, the Exchange will examine the trading price trends for the stock in the Private Placement Market over a period of several months prior to listing and will only rely on a Private Placement Market price if it is consistent with a sustained history over that several month period evidencing a market value in excess of the applicable standard.

The Exchange may withdraw its approval of the listing at any time prior to the listing date if it believes that the Valuation no longer accurately reflects the company's likely market value.

Companies listed on the basis of a Valuation will be required to meet the \$100 million test applied to companies transferring from another market under Section 102.01B, rather than the \$60 million IPO standard. Companies listing under the Valuation/Revenue with Cash Flow standard of Section 102.01C(II)(a) of the Manual and the Affiliated Company standard of Section 102.01C(III) will be required to have a global market capitalization of \$600 million, rather than the usual \$500 million requirement. Companies listing under the Pure Valuation/Revenue standard of Section 102.01C(II)(b) will be required to have \$900 million of global market capitalization, rather than the usual \$750 million requirement.

The Exchange acknowledges that a Valuation is only an estimate of what a company's true market value will be upon commencement of public trading. The Exchange also acknowledges that Private Placement Markets generally do not have the depth of liquidity of the public trading markets and may therefore be an imperfect guide as to the likely performance of a security upon listing. However, the Exchange believes that the trading price in a Private Placement Market will provide evidence as to the reliability of a Valuation and that, by assuming a market value equal to the lesser of the Valuation and a value based on the most recent Private

Placement Market trading, the Exchange will be using a conservative estimation of a company's market value. Additionally, by applying the \$100 million transfer market value requirement rather than the \$60 million IPO requirement of Section 102.01B, along with imposing market value requirements under Section 102.01C that are 20% higher than the normal standards, the Exchange believes that it can have sufficient comfort that companies listed pursuant to this proposed procedure will evidence appropriate levels of market value immediately upon the commencement of public market trading. Furthermore, Exchange staff will consider each Valuation with care and, giving due consideration to the reputation and experience of the third party provider of the Valuation, make an individualized determination as to whether it is appropriate to utilize the Exchange's discretion to list a company on the basis of this proposed procedure. In making that determination, Exchange staff will consider the appropriateness of relying on Private Placement Market trading in light of the volume and degree of price volatility of such trading. As with all other listing applicants, the Exchange reserves the right to deny listing to any company seeking to utilize the provisions of this proposed rule amendment if the Exchange determines that the listing of any such company is not in the interests of the Exchange or the public interest.

Any company listing in reliance upon this proposed amendment will be required to meet the IPO distribution requirements of Section 102.01A, i.e., 400 beneficial holders of round lots of 100 shares and 1,100,000 publicly held shares. The Exchange will rely upon information provided by the company's transfer agent in determining whether the company meets the holders requirement. The Exchange will be able to determine compliance with the 1,100,000 publicly held shares requirement by reviewing the disclosure in the company's registration statement.

## 2. Statutory Basis

The basis under the Exchange Act for this proposed rule change is the requirement under Section 6(b)(5)<sup>5</sup> that an Exchange have rules that are 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. In particular, the Exchange believes that the safeguards it has included in its proposed amendment are sufficient to ensure that companies that are listed pursuant to the proposed Valuation procedure will evidence their compliance with the applicable market value requirements immediately after commencement of listed trading, thereby protecting investors by ensuring a liquid market in such companies' stocks.

### 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 purpose of the Exchange Act.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds

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

such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be 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 Exchange 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](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2008-68 on the subject line.

##### Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2008-68. 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 Web site (<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 inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. Copies of the 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-2008-68 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.<sup>6</sup>

Florence E. Harmon  
Acting Secretary

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<sup>6</sup> 17 CFR 200.30-3(a)(12).