SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-81640; File No. SR-NYSE-2017-30)

September 15, 2017

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 2, to Amend Section 102.01B of the NYSE Listed Company Manual to Provide for the Listing of Companies that List Without a Prior Exchange Act Registration and that Are Not Listing in Connection with an Underwritten Initial Public Offering and Related Changes to Rules 15, 104, and 123D

I. Introduction

On June 13, 2017, New York Stock Exchange LLC ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC"), pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Exchange Act")[2] and Rule 19b-4 thereunder,[3] a proposed rule change to amend (i) Footnote (E) to Section 102.01B of the NYSE Listed Company Manual (the "Manual") to modify the provisions relating to the qualification of companies listing without a prior Exchange Act registration; (ii) Rule 15 to add a Reference Price for when a security is listed under Footnote (E) to Section 102.01B; (iii) Rule 104 to specify DMM requirements when a security is listed under Footnote (E) to Section 102.10B and there has been no trading in the private market for such security; and (iv) Rule 123D to specify that the Exchange may declare a regulatory halt in a security that is the subject of an initial listing on the Exchange.

The proposed rule change was published for comment in the Federal Register on June 20,

---

1 15 U.S.C.78s(b)(1).

2 15 U.S.C. 78a.

3 17 CFR 240.19b-4.

2017.[4] The Exchange filed Amendment No. 1 to the proposed rule change on July 28, 2017 which, as noted below, was later withdrawn. On August 3, 2017, the Commission extended the time period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change, to September 18, 2017.[5] On August 16, 2017, the Exchange withdrew Amendment No. 1 and filed Amendment No. 2 to the proposed rule change, which amended and replaced the proposed rule change as originally filed.[6] Amendment No. 2 was published for comment in the Federal Register on August 24, 2017.[7] The Commission received one comment on the proposal.[8] This order institutes proceedings under Section 19(b)(2)(B) of the Exchange Act to determine whether to approve or disapprove the proposal.

II. Description of the Amended Proposal

1. Listing Standards

Generally, Section 102 of the Manual sets forth the minimum numerical standards for domestic companies, or foreign private issuers that choose to follow the domestic standards, to list equity securities on the Exchange. Section 102.01B of the Manual requires a listed company to demonstrate at the time of listing an aggregate market value of publicly-held shares of either

---

4 See Securities Exchange Act Release No. 80933 (June 15, 2017), 82 FR 28200 (June 20, 2017).

5 See Securities Exchange Act Release No. 81309 (August 3, 2017), 82 FR 37244 (August 9, 2017).

6 See Notice, infra note 7, at n. 8, which describes the changes proposed in Amendment No. 2 from the original proposal. Amendment No. 2 replaced the original proposal in its entirety so the description below describes the proposal, as modified by Amendment No. 2.

7 See Securities Exchange Act Release No. 81440 (August 18, 2017), 82 FR 40183 (August 24, 2017) ("Notice").

8 See Letter from James J. Angel, Associate Professor of Finance, Georgetown University, to SEC (July 28, 2017).

$40 million or $100 million, depending on the type of listing.[9] Section 102.01B also states that, in these cases, the Exchange relies on written representations from the underwriter, investment banker or other financial advisor, as applicable, with respect to this valuation.[10] While Footnote (E) to Section 102.01B states that the Exchange generally expects to list companies in connection with a firm commitment underwritten initial public offering ("IPO"), upon transfer from another market, or pursuant to a spin-off, Section 102.01B of the Manual also contemplates that companies that have not previously had their common equity securities registered under the Exchange Act, but which have sold common equity securities in a private placement, may wish to list their common equity securities on the Exchange at the time of effectiveness of a registration statement[11] filed solely for the purpose of allowing existing shareholders to sell their shares.[12] Specifically, Footnote (E) to Section 102.01B of the Manual permits the Exchange, on a case by case basis, to exercise discretion to list such companies and provides that the Exchange will determine that such a company has met the $100 million aggregate market value of publicly-held shares requirement based on a combination of both (i) an independent third-party valuation

---

9 Section 102.01B of the Manual states that a company must demonstrate "…an aggregate market value of publicly-held shares of $40 million for companies that list either at the time of their IPO (C) or as a result of a spin-off or under the Affiliated Company standard or, for companies that list at the time of their Initial Firm Commitment Underwritten Public Offering (C), and $100,000,000 for other companies (D)(E)." Section 102.01B also requires a company to have a closing price, or if listing in connection with an IPO or Initial Firm Commitment Underwritten Public Offering, a price per share of at least $4.00 at the time of initial listing.

10 See Section 102.01B, Footnote (C) of the Manual which states that for companies listing at the time of their IPO or Initial Firm Commitment Underwritten Public Offering, the Exchange will rely on a written commitment from the underwriter to represent the anticipated value of the company's offering. For spin-offs, the Exchange will rely on a representation from the parent company's investment banker (or other financial advisor) in order to estimate the market value based upon the distribution ratio.

11 The reference to a registration statement refers to a registration statement effective under the Securities Act of 1933 ("Securities Act").

12 See Section 102.01B, Footnote (E) of the Manual.

(a "Valuation")[13] of the company 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").[14] Under the current rules, the Exchange will attribute a market value of publicly-held shares 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.

The Exchange has proposed three changes to Footnote (E) to Section 102.01B of the Manual. First, the Exchange has proposed to amend such Footnote to explicitly permit the Exchange, on a case by case basis, to exercise its discretion to list companies whose stock is not previously registered under the Exchange Act upon effectiveness of only an Exchange Act registration statement, without any concurrent IPO or Securities Act registration, provided the company meets all other listing requirements. The Exchange noted that a company is able to become an Exchange Act registrant without a concurrent public offering by filing a Form 10 (or, in the case of a foreign private issuer, a Form 20-F) with the Commission, and expressed its belief that it is appropriate to list such companies immediately upon effectiveness of an Exchange Act registration statement without a concurrent Securities Act registration statement provided the company meets all other listing requirements.[15] In articulating the statutory basis for its proposal, the Exchange stated that permitting companies to list upon effectiveness of an

---

13 See Section 102.01B, Footnote (E) of the Manual which sets forth specific requirements for the Valuation. Among other factors, any Valuation used for purposes of Footnote (E) must be provided by an entity that has significant experience and demonstrable competence in the provision of such valuations.

14 Section 102.01B, Footnote (E) also sets forth specific factors for relying on a Private Placement Market Price including that such price must be a consistent with a sustained history of trading over several months prior to listing.

15 See Notice supra note 7 at 40184.

Exchange Act registration statement without a concurrent public offering or Securities Act registration is designed to protect investors and the public interest because such companies will be required to meet all of the same quantitative requirements met by other listing companies.[16]

Second, the Exchange has proposed to amend Footnote (E) to provide that, in the absence of any recent trading in a Private Placement Market, the Exchange will determine that a company has met its market value of publicly-held shares requirement if the company provides a recent Valuation evidencing a market value of publicly-held shares of at least $250 million. In proposing this change, the Exchange expressed the view that the current requirement of Footnote (E) to rely on recent Private Placement Market trading in addition to a Valuation may cause difficulties for certain companies that are otherwise clearly qualified for listing.[17] The Exchange stated that some companies that are clearly large enough to be suitable for listing on the Exchange do not have their securities traded at all on a Private Placement Market prior to going public and, in other cases, the Private Placement Market trading is too limited to provide a reasonable basis for reaching conclusions about a company's qualification.[18] In proposing to adopt a Valuation that must be at least two-and-a-half times the $100 million requirement of Section 102.01B of the Manual, the Exchange stated that this amount "will give a significant degree of comfort that the market value of the company's shares will meet the [$100 million] standard upon commencement of trading on the Exchange," particularly because any such valuation "must be provided by an entity that has significant experience and demonstrable competence in the provision of such valuations."[19]

---

16 Id. at 40186.

17 Id. at 40184.

18 Id.

19 Id. In its proposal, the Exchange stated that it believed that it is unlikely that any

Lastly, the Exchange proposed to further amend Footnote (E) by establishing certain criteria that would preclude a valuation agent from being considered "independent" for purposes of Footnote (E), which the Exchange believes will provide a significant additional guarantee of the independence of any entity providing such a Valuation. Specifically, the Exchange proposed that a valuation agent will not be deemed to be independent if:

- At the time it provides such valuation, the valuation agent or any affiliated person or persons beneficially own in the aggregate as of the date of the valuation, more than 5% of the class of securities to be listed, including any right to receive any such securities exercisable within 60 days.
- The valuation agent or any affiliated entity has provided any investment banking services to the listing applicant within the 12 months preceding the date of the valuation.[20]
- The valuation agent or any affiliated entity has been engaged to provide investment banking services to the listing applicant in connection with the proposed listing or any related financings or other related transactions.

2. Trading Rules

The Exchange also proposed to amend Exchange Rules 15, 104 and 123D, governing the

---

Valuation would reach a conclusion that was incorrect to the degree necessary for a company using this provision to fail to meet the $100 million requirement upon listing, in particular because 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.

[20] For purposes of this provision, "investment banking services" includes, without limitation, acting as an underwriter in an offering for the issuer; acting as a financial adviser in a merger or acquisition; providing venture capital, equity lines of credit, PIPEs (private investment, public equity transactions), or similar investments; serving as placement agent for the issuer; or acting as a member of a selling group in a securities underwriting.

opening of trading, to specify procedures for the opening trade on the day of initial listing of a company that lists under the proposed amendments to Footnote (E) to Section 102.01B of the Manual, and did not have any recent trading in a Private Placement Market.

Rule 15(b) provides that a designated market maker ("DMM") will publish a pre-opening indication before a security opens if the opening transaction on the Exchange is anticipated to be at a price that represents a change of more than the "Applicable Price Range," as specified in Rule 15(d), from a specified "Reference Price," as specified in Rule 15(c).[21] Rule 15(c)(1) specifies the Reference Price for a security other than an American Depository Receipt, which would be either (A) the security's last reported sale price on the Exchange; (B) the security's offering price in the case of an IPO; or (C) the security's last reported sale price on the securities market from which the security is being transferred to the Exchange, on the security's first day of trading on the Exchange.

The Exchange proposed to amend Rule 15(c)(1) to add new sub-paragraph (D) to specify the Reference Price for a security that is listed under Footnote (E) to Section 102.01B of the Manual. The Exchange proposed that if such security has had recent sustained trading in a Private Placement Market prior to listing the Reference Price in such scenario would be the most recent transaction price in that market or, if not, the Reference Price used would be a price determined by the Exchange in consultation with a financial advisor to the issuer of such security.

Rule 104(a)(2) provides that the DMM has a responsibility for facilitating openings and reopenings for each of the securities in which the DMM is registered as required under Exchange rules, which includes supplying liquidity as needed. The Exchange proposed to amend Rule

[21] Rule 15(b) also provides that a DMM will publish a pre-opening indication before a security opens if a security has not opened by 10:00 a.m. Eastern Time.

104(a)(2) to require the DMM to consult with the issuer's financial advisor when facilitating the opening on the first day of trading of a security that is listing under Footnote (E) to Section 102.01B of the Manual and that has not had recent sustained history of trading in a Private Placement Market prior to listing, in order to effect a fair and orderly opening of such security.[22]

The Exchange stated that it believes that such a financial advisor would have an understanding of the status of ownership of outstanding shares in the company and would have been working with the issuer to identify a market for the securities upon listing.[23] As a result, it believes such financial advisor would be able to provide input to the DMM regarding expectations of where such a new listing should be priced, based on pre-listing selling and buying interest and other factors that would not be available to the DMM through other sources.[24]

In its proposal, the Exchange stated that the proposed amendments to both Rule 15 and Rule 104 are designed to provide DMMs with information to assist them in meeting their obligations to open a new listing under the proposed amended text of Footnote (E) to Section 102.01B of the Manual.[25]

---

22 The Exchange stated that this requirement is based in part on Nasdaq Rule 4120(c)(9), which requires that a new listing on Nasdaq that is not an IPO have a financial advisor willing to perform the functions performed by an underwriter in connection with pricing an IPO on Nasdaq.

23 See Notice supra note 7 at 40185.

24 Id. The Exchange noted that despite the proposed obligation to consult with the financial advisor, the DMM would remain responsible for facilitating the opening of trading of such security, and the opening of such security must take into consideration the buy and sell orders available on the Exchange's book. Id. Accordingly, the Exchange stated that just as a DMM is not bound by an offering price in an IPO, and will open such a security at a price dictated by the buying and selling interest entered on the Exchange in that security, a DMM would not be bound by the input he or she receives from the financial advisor. Id. at 40185-86.

25 Id. at 40186.

The Exchange further proposed to amend its rules to provide authority to declare a regulatory halt for a non-IPO new listing. As proposed, Rule 123D(d) would provide that the Exchange may declare a regulatory halt in a security that is the subject of an initial pricing on the Exchange that has not been listed on a national securities exchange or traded in the over-the-counter market pursuant to FINRA Form 211 ("OTC market") immediately prior to the initial pricing.[26] In addition, proposed Rule 123D(d) would provide that this regulatory halt would be terminated when the DMM opens the security.[27] The Exchange stated its belief that it would be consistent with the protection of investors and the public interest for the Exchange, as a primary listing exchange, to have the authority to declare a regulatory halt for a security that is the subject of a non-IPO listing because it would ensure that a new listing that is not the subject of an IPO could not be traded before the security opens on the Exchange.[28]

III. Summary of Comment Letter Received

The Commission received one comment letter on the proposal urging the Commission to approve the proposal promptly and without further delay.[29] The commenter stated the belief that there is no public interest served in excluding the listing of a large company with many investors

---

26 Id.

27 The Exchange stated that proposed Rule 123D(d) is based in part on (i) Nasdaq Rule 4120(c)(9), which provides that the process for halting and initial pricing of a security that is the subject of an IPO on Nasdaq is also available for the initial pricing of any other security that has not been listed on a national securities exchange or traded in the OTC market immediately prior to the initial public offering, provided that a broker-dealer serving in the role of financial advisor to the issuer of the securities being listed is willing to perform the functions under Rule 4120(c)(7)(B) that are performed by an underwriter with respect to an initial public offering and (ii) Nasdaq Rule 4120(c)(8)(A), which provides that such halt condition shall be terminated when the security is released for trading on Nasdaq.

28 Id.

29 See supra note 8.

that does not need to raise additional capital through an IPO.[30] The commenter further stated that in determining whether a company is large enough to meet the listing standards, if a company were to trade at a market capitalization far below the thresholds, it would harm the Exchange's reputation not the investing public.[31] The commenter further discussed concerns about how the NYSE will open the market for a security under the proposal when there is no reliable previous price or offering price.[32] The commenter stated that if NYSE gets the "offering price 'wrong,' secondary market trading will quickly find the market price at which supply equals demand within a few minutes if not a few seconds."[33]

IV. Proceedings to Determine Whether to Approve or Disapprove SR-NYSE-2017-30 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act[34] to determine whether the proposal should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposal, as discussed below. Institution of disapproval proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved.

Pursuant to Section 19(b)(2)(B) of the Exchange Act, the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis and input concerning the proposed rule change's consistency

---

30 Id. at 2.

31 Id. at 3.

32 Id.

33 Id.

34 15 U.S.C. 78s(b)(2)(B).

with the Exchange Act.[35] In particular, the Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act 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.[36]

The Commission notes that NYSE has proposed to adopt listing standards that would permit broadly, for the first time, the listing on the Exchange of a company immediately upon effectiveness of an Exchange Act registration statement for the purpose of creating a liquid trading market without any concurrent Securities Act registration. NYSE states that its proposal to list such companies is designed to protect investors and the public interest, consistent with Section 6(b)(5) of the Act, because such companies will be required to meet all of the same quantitative requirements that are met by other listing applicants.

The Commission notes, however, that a direct listing of this sort based only on an Exchange Act registration without prior trading and Securities Act registration may raise a number of unique considerations, including with respect to the role of various distribution participants, the extent and nature of pricing information available to market participants prior to the commencement of trading, and the availability of information indicative of the number of shares that are likely to be made available for sale at the commencement of trading.

V. Commission's Solicitation of Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other

---

35 15 U.S.C. 78f(b)(5).

36 Id.

concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5), or any other provision of the Exchange Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.[37]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register]. The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal which are set forth in the Notice, in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment, including, where relevant, any specific data, statistics, or studies, on the following:

1. Would a direct listing based only on an Exchange Act registration without prior trading and Securities Act registration present unique considerations, including with respect to the role of various distribution participants, the extent and nature of pricing information available to market participants prior to the commencement of trading, and the availability of information indicative

[37] Section 19(b)(2) of the Exchange Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding – either oral or notice and opportunity for written comments – is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

of the number of shares that are likely to be made available for sale at the commencement of trading? Would these considerations raise any concerns, including with respect to promoting just and equitable principles of trade, removing impediments to and perfecting the mechanism of a free and open market and a national market system, and, in general, protecting investors and the public interest? If so, please identify those risks and explain their significance.

2. To what extent would a direct listing impact the ability of the DMM to facilitate the opening (or otherwise fulfill its obligations as a DMM) on the first day of trading of a security listed only with an Exchange Act registration? To the extent there would be an impact, please identify it and explain its significance. To what extent would any such impact be mitigated by the proposed requirement that the DMM consult with a financial adviser to the issuer in order to effect a fair and orderly opening of the security?

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. Please include File Number SR-NYSE-2017-30 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 Numbers SR-NYSE-2017-30. 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 website (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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of these filings 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-2017-30 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[38]

Eduardo A. Aleman
Assistant Secretary

[38] 17 CFR 200.30-3(a)(57).