

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-53825; File No. SR-NYSE-2006-38)

May 17, 2006

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Exchange's Financial Listing Criteria

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 May 16, 2006, the New York Stock Exchange LLC ("NYSE" or "Exchange"), 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. NYSE has filed this proposal pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. 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

The NYSE proposes to amend its domestic financial listing standards for companies proposing to list on the Exchange contained in Section 102.01C of the Exchange's Listed Company Manual (the "Manual") to allow domestic companies to qualify for listing, under certain limited circumstances, on the basis of their earnings, cash flows or revenues, as applicable, in the most recent completed nine-month period. However the Exchange must conclude that the company can reasonably be expected to qualify under the regular standard upon completion of its then current fiscal year.

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

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

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

The text of the proposed rule change is available on the Exchange's Web site (<http://www.nyse.com>), at the Exchange's Office of the Secretary, and at 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 Exchange 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. 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

NYSE proposes to amend its domestic financial listing standards for companies proposing to list on the Exchange contained in Section 102.01C of the Exchange's Listed Company Manual (the "Manual") to allow companies seeking to list under the Exchange's domestic standards to qualify for listing, under certain limited circumstances, on the basis of their earnings, cash flows or revenues, as applicable, in the most recent completed nine-month period.

Section 102.01C of the Manual allows companies to list under the Exchange's domestic listing criteria by meeting one of the following three standards:

- Earnings Test (1) Pre-tax earnings from continuing operations and after minority interest, amortization and equity in the earnings or losses of investees, adjusted for certain specified items, must total at least \$10,000,000 in the aggregate for the last three fiscal years together with a minimum of \$2,000,000 in each of the two most recent fiscal years, and positive amounts in all three years.

- Valuation/Revenue with Cash Flow Test -
  - (1) at least \$500,000,000 in global market capitalization,
  - (2) at least \$100,000,000 in revenues during the most recent 12 month period, and
  - (3) at least \$25,000,000 aggregate cash flows for the last three fiscal years with positive amounts in all three years, subject to certain adjustments.
- Pure Valuation/Revenue Test –
  - (1) at least \$750,000,000 in global market capitalization, and
  - (2) at least \$75,000,000 in revenues during the most recent fiscal year.

Over the years, the Exchange states that it has been unable to list a number of financially healthy companies because those companies had insufficient earnings, cash flows, or revenues in the earliest fiscal year required by the applicable standard. In many cases, such a company is very different at the time of its listing application from the company that had existed in such earlier period. Such company may have undergone a recapitalization transaction in which it substantially reduced its debt burden. Alternatively, the company may have undergone a significant change in its operations, including, but not limited to:

- a divestiture or discontinuation of a loss-making business line,
- a change in management,
- an acquisition or series of acquisitions,
- economies of scale and increased revenues as the company emerges from its start-up phase,
- the effect of foreign currency valuation,
- entering a new geographic region or market or exiting a geographic region or market, or
- the launch of a new product or service.

Therefore, the Exchange proposes to amend Section 102.01C(I) and (II) (the “Earnings” and “Valuation/Revenue with Cash Flow” Tests) to enable it to qualify a company based on the most recent completed nine months in lieu of the earliest fiscal year otherwise required by the applicable standard, in circumstances where a recapitalization transaction or significant change in operations has rendered irrelevant the financial position of the company in that third year back and the company would meet the requirements of Section 102.01C(I) or (II) based on the most recent nine months and the two immediately preceding fiscal years. For the same reasons, the Exchange proposes to amend Section 102.01C(III) (the “Pure Valuation/Revenue” Test) on the basis of the most recent nine months, instead of a full fiscal year. In such cases, the Exchange must conclude that the Company can reasonably be expected to qualify under the regular standard upon completion of its then current fiscal year.

The Exchange believes that investors are not protected less by the qualification for listing of companies that can meet the Earnings or Valuation/Revenue with Cash Flow Tests on the basis of 33 months of financial history, including their last two completed fiscal quarters, than by the qualification of companies based on an older three-year period, particularly if a recapitalization or significant change in operations has materially changed the nature of the company. Similarly, the Exchange believes that investors are not protected less by the qualification for listing of companies that can meet the Pure Valuation/Revenue Test on the basis of the most recently completed nine months period, rather than an older twelve month period. The Exchange believes that any company it would qualify for listing on the basis of the proposed

amendment would meet the existing standards of Section 102.01C with the passage of time upon completion of its next fiscal year.<sup>5</sup>

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)<sup>6</sup> of the Act, in general, and Section 6(b)(5)<sup>7</sup> of the Act, in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

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 purposes of the Act.

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

Written comments were neither solicited nor received.

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

Because the proposed rule change: (1) does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest,

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<sup>5</sup> For purposes of Rule 3a51-1(a)(1) under the Act, the Exchange states that, as proposed to be amended herein, its initial listing standards will be substantially similar to the initial listing standards in place on January 8, 2004. 17 CFR 240.3a51-1(a)(1).

<sup>6</sup> 15 U.S.C. 78(f)(b).

<sup>7</sup> 15 U.S.C. 78(f)(b)(5).

the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>8</sup> and Rule 19b-4(f)(6) thereunder.<sup>9</sup>

The Exchange has asked the Commission to waive the 30-day operative delay specified in Rule 19b-4(f)(6)(iii).<sup>10</sup> The Commission hereby grants that request because the Commission believes that waiving the 30-day operative period is consistent with the protection of investors and public interest.<sup>11</sup> In its proposal to qualify a company, in the case of the Earnings Test and Valuation/Revenue with Cash Flow Test, on the basis of 33 months of financial history and, in the case of the Pure Valuation/Revenue Test, on the basis of nine months of financial history, the Exchange has stated its belief that any company that it would qualify for listing on the basis of the proposed rule change would meet the existing standards of Section 102.01C upon completion of its next fiscal year. Therefore, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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<sup>8</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>9</sup> 17 CFR 240.19b-4(f)(6). As required by Rule 19b-4(f)(6)(iii) under the Act, the Exchange also provided with the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of the proposed rule change.

<sup>10</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>11</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f). The Exchange also requested that the Commission waive the five-day pre-filing requirement; however, the Exchange provided the Commission with such notice; therefore, this request is moot.

#### 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 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 e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2006-38 on the subject line.

##### Paper Comments:

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

All submissions should refer to File Number SR-NYSE-2006-38. 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. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. 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-2006-38 and should be submitted by [insert date 21 days from date of publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

Nancy M. Morris  
Secretary

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