

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-54999; File No. SR-NYSE-2006-30)

December 21, 2006

Self-Regulatory Organizations; New York Stock Exchange, Inc. (a/k/a New York Stock Exchange LLC); Order Approving a Proposed Rule Change and Amendments No. 1 & 2 Thereto Relating to the Treasury Share Exception in NYSE Listed Company Manual Section 312.03, Section 312.04, Section 703.01(A), and Section 903.02

I. Introduction

On May 5, 2006, the New York Stock Exchange LLC (the “Exchange” or “NYSE”) 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 relating to the “treasury share exception” in NYSE Listed Company Manual Sections 312.03, 312.04, 703.01(A), and 903.02. On August 11, 2006, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>3</sup> On September 25, 2006, the Exchange filed Amendment No. 2 to the proposed rule change.<sup>4</sup> The proposed rule change, as amended, was published for comment in the Federal Register on October 16, 2006.<sup>5</sup> The Commission received one comment on the proposal.<sup>6</sup> This order approves the proposed rule change, as amended.

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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> Amendment No. 1 replaced and superseded the original filing in its entirety.

<sup>4</sup> See Partial Amendment No. 2 to Form 19b-4 dated September 25, 2006 (“Partial Amendment No. 2”).

<sup>5</sup> See Securities Exchange Act Release No. 54579 (October 5, 2006), 71 FR 60786 (“Notice”).

<sup>6</sup> See Letter to Nancy M. Morris, Secretary, Commission, from Alan P. Eggleston, Executive Vice President & General Counsel, Peter M. Finn, First Vice President, Regulatory Affairs, and Peter Cunningham, First Vice President, Investor Relations, Astoria Financial Corporation, dated October 11, 2006 (“Astoria Letter”).

## II. Description of the Proposal

Section 312.03 of the Exchange's Listed Company Manual requires that companies obtain shareholder approval before issuing stock in certain situations or in significantly large amounts.<sup>7</sup> Historically, the rule has not been applied to any issuance by a company of shares from the treasury, that is, a reissuance of shares once issued but then reacquired by the company. This practice gave rise to what has become known as the "treasury share exception." The Exchange stated that the "treasury shares exception" results from the way the rule is written, making shareholder approval a "prerequisite to listing." The Exchange has taken the view that once listed, shares remain listed even if they are repurchased by the company and taken back into "treasury." Accordingly, when treasury shares are re-issued, the Exchange has not required that they be "re-listed." Since no listing application is required, the Exchange has taken the position that Section 312.03 is not triggered.

Prior to 2003, the Exchange's rule requiring shareholder approval of stock option plans resided in Section 312.03 as well, and the Exchange also applied the treasury share exception in that context. The rule regarding such plans was significantly revised in 2003, and codified in a different section of the Listed Company Manual, Section 303A.08. At this time, the "treasury share exception" was specifically made unavailable for equity compensation plans, so that

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<sup>7</sup> The section provides that shareholder approval is a "prerequisite to listing" additional shares by a listed company in several situations, including an issuance of: (1) more than 1% of the current outstanding common stock to an insider (an officer or director, or an entity affiliated with an officer or director); (2) more than 5% of the current outstanding to a 5% or greater shareholder or an affiliate thereof; (3) or more than 20% of the current outstanding in any transaction other than a public offering or "bona fide private financing" (as defined in Section 312.04(f)). Approval is also required when an issuance will result in a "change of control of the issuer." These provisions apply in the same way to offerings of securities that are convertible into common stock, and the percentages in each case apply either to outstanding common equity or common voting power. Shareholder approval is also required for equity compensation plans. See NYSE Listed Company Manual Sections 312.03(a) and 303A.08.

shareholder approval would be required regardless of whether a plan was funded in whole or in part through the use of treasury shares.<sup>8</sup>

In its proposed rule change, NYSE acknowledged that the treasury share exception has been criticized on the ground that it allows companies to store up large reserves of stock against a future issuance of shares in transactions that could significantly dilute existing shareholders without their approval. Accordingly, the Exchange filed a proposed rule change with the Commission to amend Section 312.03 to eliminate the treasury stock exception.<sup>9</sup> The Exchange has also modified Section 312.04(j) to clearly state that the issuance of shares from treasury is considered an issuance of shares for the purpose of Section 312.03.

The Exchange also proposed an amendment to Section 312.04 to state that the term “market value” means the official closing price on the Exchange as reported to the Consolidated Tape immediately preceding the entering into of a binding agreement to issue the securities. For example, if the transaction is entered into on a Tuesday after the close of the regular session at 4:00 pm Eastern Standard Time, then Tuesday's official closing price is used. If the transaction is entered into at any time between the close of the regular session on Monday and the close of the regular session on Tuesday, then Monday's official closing price is used.

The Exchange is also proposing to amend Section 312.03(b) to specify that it covers issuances that are part of a “series of related transactions.” This proposed change parallels the

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<sup>8</sup> See Securities Exchange Act Release No. 48108 (June 30, 2003), 68 FR 39995, 40002 (July 3, 2003) (“Equity Compensation Plan Release”).

<sup>9</sup> The Exchange also proposed a transition period for companies that execute a binding contract with respect to the issuance of common stock prior to the date that is five business days after the date that the Commission noticed the proposed rule change in the Federal Register, so that the treasury share exception was available for such transactions even though the transactions do not close until after the date of Commission approval of this proposed rule change. See Partial Amendment No. 2, supra note 4. The proposal was published in the Federal Register on October 16, 2006. See supra note 5.

language used in Section 312.03(c) relating to the issuance of 20% or more of a company's voting common securities. The Exchange further proposes to amend Section 703.01(A) to require that companies issuing shares from treasury in a transaction or series of related transactions notify the Exchange in writing in advance of the issuance, indicating whether shareholder approval is required pursuant to Section 312.03 and, if required, the date such shareholder approval was obtained. The Exchange also proposes to amend Sections 703.01(A) and 903.02 to require that companies indicate in the Subsequent Listing Application whether shareholder approval is required with respect to the issuance being listed pursuant to Sections 303A.08 or 312.03 and, if required, the date such shareholder approval was obtained.

### III. Comments

The Commission received one comment letter on the proposed rule change.<sup>10</sup> Astoria Financial Corporation, an NYSE-listed company, stated that, "concerns recently raised by certain shareholders and other market participants regarding the use of treasury shares to circumvent shareholder approval rules for transactions which result in a change of control have merit." However, Astoria thought that the proposal should provide some mechanism to exempt the issuance of treasury shares related to equity compensation plans previously approved by shareholders.

The Exchange responded to Astoria's comment letter.<sup>11</sup> NYSE explained that the treasury stock exception, currently available under Section 312.03, is not available with respect to equity compensation plans. Shareholder approval requirements for equity compensation plans are set forth in Section 303A.08 of the Listed Company Manual. Under that provision of the

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<sup>10</sup> Astoria Letter, supra note 6.

<sup>11</sup> See Letter to Nancy M. Morris, Secretary, Commission, from Mary Yeager, Assistant Secretary, NYSE, dated December 4, 2006 ("NYSE Response Letter").

Listed Company Manual, the definition of the term “equity compensation plan” clearly states that the definition encompasses the delivery of either newly issued or treasury shares. As a result, the Exchange stated that the proposed elimination of the treasury stock exception under Section 312.03 does not impact equity compensation plans.

#### IV. Discussion

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, with the requirements of Section 6(b) of the Act.<sup>12</sup> Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act<sup>13</sup> in that it is 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 is not designed to permit unfair discrimination between issuers.

The Commission believes that, with respect to NYSE-listed companies, the proposed rule change will reduce the potential for significant dilution without shareholder approval. The Commission believes that the necessity of shareholder approval of a transaction should be governed by the substantive nature of the transaction, not the status or type of shares used in the transaction. In this regard, the proposed rule change should promote greater shareholder input in control transactions and other corporate actions resulting in issuances of stock involving NYSE-listed companies. The proposed changes to Section 312.03 and 312.04 will also make these

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<sup>12</sup> 15 U.S.C. 78f(b). In approving this proposal, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>13</sup> 15 U.S.C. 78f(b)(5).

provisions consistent with the Exchange’s elimination of the treasury share exception from the Exchange’s equity compensation plan approval rules.<sup>14</sup>

With respect to the proposed change in Section 312.03(b), to clarify that the rule covers issuances that are part of a “a series of related transactions, the Commission believes this change is beneficial as it is designed to ensure that the overall substance of a transaction or series of transactions indicates the necessity of shareholder approval. In particular, the Commission believes that this change ensures that companies cannot avoid the shareholder approval requirements by simply issuing stock in a piecemeal fashion to avoid the requirements of the rule and makes Section 312.03(b) consistent with the requirements of Section 312.03(c). With respect to the proposed changes in Sections 703.01(A) and 903.02, which, in general, require that listed companies notify the Exchange in writing in advance of an issuance, state whether shareholder approval is required and, if so, when it was obtained, and indicate such information in any Subsequent Listing Application, the Commission believes these changes are reasonable as they will facilitate the Exchange’s monitoring of listed companies for compliance with the revised shareholder approval rules. The Commission also believes that the Exchange’s clarification of the term “market value” is consistent the protection of investors as it ensures that the most recent closing price, and not an average price, is used in situations where reference is made to the market value of an issuer’s securities. This change should provide certainty as to

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<sup>14</sup> See Equity Compensation Plan Release, *supra* note 8. With respect to the sole commenter on the proposed rule change, the Commission agrees with the Exchange that the treasury share exception being eliminated by the NYSE’s proposed changes in Section 312.03 is currently not available with respect to shareholder approval of equity compensation plans as set forth in Section 303A.08. As the Exchange’s response notes, the existing definition of “equity compensation plan” in Section 303A.08 encompasses the delivery of either newly issued or treasury shares. As a result, the proposed elimination of the treasury stock exception does not have any effect on the shareholder approval requirements for equity compensation plans.

what price is being used when determining market value. Finally, the Exchange has provided for a transition period for companies that execute a binding contract with respect to the issuance of common stock prior to the date that is five business days after the date that the Commission noticed the proposed rule change in the Federal Register. The Commission believes that this transition period is a reasonable way to provide listed companies with guidance as to on-going transactions and sufficient notice of the proposed rule change.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>15</sup> that the proposed rule change (SR-NYSE-2006-30), as amended by Amendment Nos. 1 and 2, be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>16</sup>

Florence E. Harmon  
Deputy Secretary

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

<sup>16</sup> 17 CFR 200.30–3(a)(12).