

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58253; File No. SR-NYSE-2008-57)

July 30, 2008

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change to Adopt on a Permanent Basis a Pilot Program Which Allows the Exchange to Adjust the Earnings of Companies for Purposes of its Earnings Standard by Reversing the Income Statement Effects of Changes in Fair Value of Financial Instruments Extinguished at the Time of Listing

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Exchange Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on July 23, 2008, New York Stock Exchange LLC (the “NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (the “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 adopt on a permanent basis an amendment to the earnings standard of Section 102.01C(I) of the Exchange’s Listed Company Manual (the “Manual”) which is currently in force pursuant to a pilot program (the “Pilot Program”). The amendment will enable the Exchange to adjust the earnings of companies by reversing the income statement effects for all periods of any changes in fair value of financial instruments classified as a liability recorded by the company in earnings, provided such financial instrument is either being redeemed with the proceeds of an offering occurring in conjunction with the listing or converted into or exercised for common stock of the company at the time of listing.

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

2 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 the earnings standard of Section 102.01C(I) of the Manual. The amendment will enable the Exchange to adjust the earnings of companies listing in conjunction with an initial public offering ("IPO") by reversing the income statement effects for all periods of changes in fair value of financial instruments classified as a liability recorded by the company in earnings, provided such financial instrument is either being redeemed with the proceeds of an offering occurring in conjunction with the listing or converted into or exercised for common stock of the company at the time of listing. The proposed amendment was originally implemented for a six-month period as a Pilot Program.³ The Pilot Program expired and was subsequently renewed for an additional three months, expiring on September 2, 2008.⁴

³ See Securities Exchange Act Release No. 55974 (July 6, 2007), 72 FR 37067 (June 28, 2007) (SR-NYSE-2007-52). [sic]

⁴ See Securities Exchange Act Release No. 57905 (June 2, 2008), 73 FR 32613 (June 9, 2008) (SR-NYSE-2008-43).

Nonpublic companies engaging in pre-IPO financings often raise capital through the sale of preferred stock and warrants to purchase preferred stock. Preferred stock and preferred stock warrants are also sometimes issued by pre-IPO companies to service providers in lieu of cash compensation. Typically, at the time of the company's IPO, the preferred stock is converted into common stock and the preferred stock warrants are automatically exercised and the underlying preferred stock is converted into common stock of the company. In some cases, companies may also redeem some or all of the outstanding preferred stock with a portion of the proceeds from the IPO.

Some pre-IPO companies have determined that they must record in earnings changes in the fair value of certain financial instruments classified as liabilities. As the fair value of a pre-IPO company's equity often increases as the company gets closer to its IPO, many companies have had to record significant reductions in earnings associated with increases in the fair value of the preferred stock warrant liability. In certain cases, the impact on the company's earnings as reported under generally accepted accounting principles ("GAAP") of the preferred stock liability causes otherwise qualified companies to fail to qualify under the Exchange's earnings standard. Under the Exchange's current rules, the Exchange cannot list these companies even though the preferred stock warrant liability will be extinguished at the time of the IPO by conversion into common stock or redemption out of the proceeds of the IPO.

The Exchange believes that it is appropriate to exclude the effects of changes in fair value of a financial instrument classified as a liability from a company's earnings where the financial instrument is being retired at the time of a company's listing either out of the proceeds of a concurrent offering or by conversion into common stock at the time of listing. The Exchange believes that adjusting company earnings for charges arising out of the changes in fair value of

financial instruments that are retired with the proceeds of an offering occurring in conjunction with the listing or converted into common stock at the time of listing is consistent with the adjustments that are currently permitted under Section 102.01C for a number of other nonrecurring charges to earnings that are included in net income as recorded under GAAP, such as the exclusion of impairment charges on long-lived assets, the exclusion of gains and losses on sales of a subsidiary's or investee's stock and the exclusion of in-process purchased research and development charges. The Exchange also believes that this adjustment is reasonable given the purpose of the earnings standard, which is to determine the suitability for listing of companies on a forward-looking basis.

As with all companies listed on the Exchange, the Financial Compliance staff of NYSE Regulation will monitor on an ongoing basis the compliance with the Exchange's continued listing standards of any companies listed in reliance upon the proposed amendment. Such companies will be subject to delisting if they are found at any time to be below the Exchange's continued listing standards.

As the Exchange gains experience in listing companies in reliance upon the proposed amendment, we will continue to carefully reevaluate its appropriateness. If we become aware that companies listed pursuant to the proposed amendment have difficulty complying with our continued listing standards, we will inform the Commission and discuss with the Commission the desirability of the continued use of the provision.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)⁵ of the Exchange Act, in general, and furthers the objectives of Section 6(b)(5) of the Exchange

⁵ 15 U.S.C. 78f(b).

Act,⁶ in particular in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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. The Exchange believes that the proposed amendment is consistent with the investor protection objectives of the Exchange Act in that it provides for an adjustment to listing applicants' historical financial results that is consistent with other adjustments already permitted under the Exchange's earnings standard and is reasonable given the purpose of the earnings standard, which is to determine the suitability for listing of companies on a forward-looking basis.

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 Exchange 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

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 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:

⁶ 15 U.S.C. 78f(b)(5).

- (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. Please include File Number SR-NYSE-2008-57 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-2008-57. 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-2008-57 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.⁷

Florence E. Harmon
Acting Secretary

⁷ 17 CFR 200.30-3(a)(12).