

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58934; File No. SR-NYSE-2008-98)

November 12, 2008

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Granting Approval of Proposed Rule Change, as Modified by Amendment No. 1, to Adopt an Additional Initial Listing Standard for Operating Companies

I. Introduction

On October 1, 2008, the New York Stock Exchange LLC (“NYSE” or “Exchange”), filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change amending Section 102.01C of the Exchange’s Listed Company Manual (“Manual”) to adopt an additional initial listing standard under which companies may qualify to list on the Exchange. On October 10, 2008, the proposed rule change was published for comment in the Federal Register.³ On November 10, 2008, NYSE filed Amendment No. 1 to the proposed rule change.⁴ The Commission received no comments on the proposed rule change. This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposal

The Exchange has proposed to amend Section 102.01C of the Manual to adopt an additional initial listing standard under which companies may qualify to list on the Exchange. The Exchange has also proposed to apply the continued listing standard applicable under Section

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 58740 (October 6, 2008), 73 FR 60382 (“Notice”).

⁴ Amendment No. 1 shows how Section 802.01B would be effected by changes proposed in SR-NYSE-2008-97. Because Amendment No. 1 is technical in nature, the Commission is not required to publish the amendment for comment.

802.01B to companies listed under the Earnings Test to companies listed under the proposed new initial listing standard.

The proposed new standard (the “Assets and Equity Test”) is an additional alternative standard under which companies may qualify to list, and will not replace any of the existing initial listing standards set forth in Section 102.01C. Companies qualifying to list under the proposed new standard will have to meet the same holder, publicly-held share and trading volume requirements as set forth in Section 102.01A as companies that list under the existing initial listing standards. Further, like companies that list under the existing initial listing standards in Section 102.01C, companies that list under the proposed standard must meet the same market value of publicly-held shares requirements⁵ and \$4 stock price requirement in Section 102.01B. Under the proposed standard, in addition to these other requirements, a company at the time of listing would be required to have, at a minimum, (i) \$75 million in total assets, (ii) \$50 million in stockholders’ equity and (iii) \$150 million of total market capitalization.⁶ The new standard also states that in considering the listing under the Assets and Equity Test of companies transferring from other markets, the Exchange will consider whether the company’s business prospects and operating results indicate that the company’s market capitalization value is likely to be sustained or increase over time.

⁵ Section 102.01B requires either \$60 million market value in the case of IPOs or \$100 million market value for all other companies.

⁶ The total assets and stockholders equity that the Exchange will use for qualification purposes will be taken from the company’s most recent balance sheet included in an SEC filing, in each case as adjusted pursuant to Sections 102.01C(I)(3)(a) (adjusting for the use of offering proceeds) and (b) (adjusting for the effects of acquisitions and dispositions) as applicable. In the case of companies listing in connection with an IPO, the company’s underwriter (or, in the case of a spin-off, the parent company’s investment banker or other financial advisor) must provide a written representation that demonstrates the company’s ability to meet the \$150 million global market capitalization requirement based upon the completion of the offering (or distribution).

Under the proposed rule, while companies that list under the Assets and Equity Test will not be required to have any minimum operating history prior to listing, companies that would otherwise have been considered for listing under Section 102.06 of the Manual – the Exchange’s Acquisition Company standard (i.e., “SPACs”) – will not qualify for listing under the Assets and Equity Test. SPACs will continue to be listed only under Section 102.06. The continued listing standards, in Section 802.01B of the Manual, which currently apply to companies that qualify to list under the Earnings Test is proposed to be extended to companies that qualify to list under the new Assets and Equity Test. Such companies will be considered to be below compliance standards if their average global market capitalization over a consecutive 30 trading-day period is less than \$75 million and, at the same time, total stockholders' equity is less than \$75 million. In addition, the holder, publicly-held share and trading volume requirements of Section 802.01A, the \$25 million global market capitalization requirement in Section 802.01B, the \$1.00 minimum stock price requirement in Section 802.01C, Section 802.01D (“Other Criteria”), and Section 802.01E (“SEC Annual Report Timely Filing Criteria”) will also apply to companies qualifying under the Assets and Equity Test.

As discussed in more detail below, similar to recently adopted provisions under Section 102.01C, companies may apply to list under the Assets and Equity Test that have not previously had their common equity securities registered under the Act but which have sold common equity securities in a private placement, and wish to list their common equity securities on the Exchange at the time of effectiveness of a registration statement filed solely for the purpose of allowing existing shareholders to sell their shares. For these companies, the Exchange is proposing that they have a global market capitalization of \$180 million. In such cases, the Exchange may exercise its discretion to determine that such a company has met the global market capitalization

requirement based on a combination of both (i) an independent third party valuation 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. The lesser of these values will be used for determining the company's compliance with the Exchange's global market capitalization requirement.

The Exchange recently adopted provisions in relation to all of its existing initial listings standards that enable it to use third party valuations, in limited situations, as a basis for determining compliance with the applicable market capitalization requirements.⁷ The circumstances under which third party valuations may be used in connection with listings under the Assets and Equity Test will be identical to those that are applied under the existing initial listing standards. In particular, companies listing on this basis will be required to demonstrate a global market capitalization of \$180 million, representing a 20% increase over the general market capitalization requirement of the listing standard.⁸ The Exchange stated in its filing that it is appropriate to use third party valuations in connection with the determination of the market capitalization of companies listing under the Assets and Equity Test, because the market capitalization requirement is 20% higher than that normally required under the standard, and the additional reliance on private market trading prices as a verification of the adequacy of the valuation in each case constitute, in the Exchange's view, significant safeguards to ensure the validity of the market capitalization derived from the third party valuation.

⁷ See Securities Exchange Act Release No. 58550 (September 15, 2008), 73 FR 54442 (September 19, 2008) (SR-NYSE-2008-68).

⁸ The Commission notes that the global market capitalization requirements under NYSE's other listing standards in 102.01C were also increased 20% for the purposes of listing using a third party valuation. Id.

In its filing, the Exchange stated its belief that, upon adoption of the proposed Assets and Equity Test, its listing standards will continue to ensure that only companies of a significant size and financial standing will be able to list on the Exchange. The Exchange noted that, while many companies will qualify for listing under the Assets and Equity Test that do not qualify under any other Exchange listing standard, many companies will continue to qualify to list on Nasdaq or the American Stock Exchange (n/k/a NYSE Alternext US LLC or “NYSE Alternext” or “Amex”) that will not meet any of the Exchange’s initial listing standards.

The NYSE stated that the Assets and Equity Test requires all of the elements that must be met by a company listing under the total value of market capitalization option of Amex Initial Listing Standard 4.⁹ However, the Assets and Equity Test establishes equivalent or higher thresholds for each of the relevant criteria.¹⁰

The Exchange’s listing standards after adoption of the proposed Assets and Equity Test will exceed those established by Exchange Act Rule 3a51-1(a)(2) (the “Penny Stock Rule”).¹¹ The proposed standard’s \$50 million stockholders’ equity requirement exceeds the \$5 million option and the proposed standard’s \$150 million total market capitalization requirement exceeds the \$50 million market capitalization option in the Penny Stock Rule. In addition, the Exchange requires all initial listings, regardless of which standard they are listed under, to have \$60 million (in the case of IPOs) or \$100 million (in all other cases) of market capitalization of publicly-held

⁹ See Amex Initial Listing Standard 4 (Amex Company Guide Section 101(d)). Companies may list under Amex Initial Listing Standard 4 without demonstrating any minimum market capitalization if the company has total assets and total revenue of \$75 million each in its last fiscal year, or in two of its last three fiscal years.

¹⁰ See Notice, supra note 3 for a comparison with Amex Initial Listing Standard 4.

¹¹ 17 CFR 240.3a51-1(a)(2).

shares, a \$4 stock price, 400 round lot holders and 1.1 million publicly held shares, which meet or exceed all of the Penny Stock Rule's remaining requirements.

Companies listing under the Assets and Equity Test will have to comply with all other applicable Exchange listing rules, including the Exchange's corporate governance requirements. As with all other listing applicants, the Exchange reserves the right to deny listing to any company seeking to list under the Assets and Equity Test if the Exchange determines that the listing of any such company is not in the interests of the Exchange or the public interest.

III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, with Section 6(b)(5) of the Act,¹² which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, 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, and to not permit unfair discrimination between customers, issuers, brokers, or dealers.¹³

The development and enforcement of adequate standards governing the initial and continued listing of securities on an exchange is an activity of critical importance to financial markets and the investing public. Listing standards, including those applicable to companies

¹² 15 U.S.C. 78f(b)(5).

¹³ In approving this rule, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

transferring from another exchange, serve as a means for an exchange to screen issuers and to provide listed status only to bona fide companies that have sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets. Adequate standards are especially important given the expectations of investors regarding exchange trading and the imprimatur of listing on a particular market. Once a security has been approved for initial listing, maintenance criteria allow an exchange to monitor the status and trading characteristics of that issue to ensure that it continues to meet the exchange's standards for market depth and liquidity so that fair and orderly markets can be maintained.

The Commission recognizes that this is the first time that NYSE would be adopting a traditional equity security listing standard under Section 102.01C that does not require some previous operating history of the listing company and that the proposed standards are low enough to qualify companies on the NYSE that previously would not qualify.¹⁴ However, as described above, the quantitative requirements of the new Assets and Equity Test exceed, and are more rigorous than, an existing Amex listing standard and meet or exceed the penny stock requirements in Exchange Act Rule 3a51-1(a)(2). Further, companies listing under the new Assets and Equity Test would still have to meet all the distribution, market value, and price requirements under Sections 102.01A and Section 102.01B of the Manual, and comply with all the corporate governance requirements as any other listed company.¹⁵ The Commission believes that these requirements, taken together, will help to ensure that the company has the requisite liquidity for listing on the Exchange and the maintenance of fair and orderly markets, consistent with the Act. The Commission also finds that the continued listing standards are appropriate and

¹⁴ Section 102.06 of the Manual, however, does allow the listing of SPACs, which do not have a prior operating history. As noted above, SPACs cannot qualify to list under the new Assets and Equity Test.

¹⁵ See supra text accompanying note 5.

help ensure that only those companies with adequate depth and liquidity remain listed on the Exchange. We note that these continued listing standards are the same as for those companies that currently qualify to list under the Earnings Test.

Finally, the Commission is approving the adoption of procedures similar to those previously approved by the Commission to qualify for listing upon a selling shareholders registration rather than an underwritten offering for the same reasons noted in the original approval order.¹⁶ As discussed above, the Commission had previously permitted, under limited circumstances, the use of third party valuations to meet applicable market capitalization requirements to qualify for listing under the various sections of Section 102.01C,¹⁷ and the Exchange is proposing to extend these identical requirements to the newly adopted Assets and Earnings Test. For third party valuations using the Assets and Earnings Test, the Exchange has proposed to increase the market capitalization requirement to \$180,000,000 million, rather than the \$150,000,000 currently proposed for other companies. As noted above, this increase is consistent with the 20% increase adopted for using a third party valuation for the other standards in 102.01C.¹⁸ The Commission believes the provisions allowing the use of third party valuations

¹⁶ See supra note 7.

¹⁷ See supra note 7, 73 FR at 54443.

¹⁸ The Commission notes that in relying on the third party valuation, the Exchange must 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 Valuation and continue to monitor the company and the appropriateness of relying on the Valuation up until the time of listing. The Commission expects that where these factors indicate that the value calculated may not be an accurate estimation of a company's market value, the Exchange will use its discretion to determine not to list such company pursuant to the proposed provisions.

for companies listing using the new Assets and Equity Test raises no new regulatory issues that were not discussed in the original approval order.¹⁹

In approving the new Assets and Equity Test, the Commission expects that the Exchange will deny listing to any company seeking to list pursuant to the proposed rule change if the Exchange determines that the listing of any such company is not in the interests of the Exchange or the public interest.

For the reasons set forth above, the Commission finds that the proposed rule change is consistent with the Act.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁰ that the proposed rule change (SR-NYSE-2008-98), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²¹

Florence E. Harmon
Acting Secretary

¹⁹ See supra note 7.

²⁰ 15 U.S.C. 78s(b)(2).

²¹ 17 CFR 200.30-3(a)(12).