

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-54579; File No. SR-NYSE-2006-30)

October 5, 2006

Self-Regulatory Organizations; New York Stock Exchange, Inc. (a/k/a New York Stock Exchange LLC); Notice of Filing of 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 and Section 703.01(A)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, (the “Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on May 5, 2006, the New York Stock Exchange, LLC (the “Exchange” or “NYSE”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in items I, II, and III below, which items have been prepared by the Exchange. On August 11, 2006, the Exchange filed Amendment No. 1 to the proposed rule change.³ On September 25, 2006, the Exchange filed Amendment No. 2 to the proposed rule change.⁴ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The substance of Amendment No.1 was changed in Amendment No. 2. See *infra* note 4. In Amendment No. 1, the Exchange had (1) modified the proposed rule change to state that if a company has executed a binding contract prior to August 15, 2006 with respect to the issuance of common stock, the existing treasury share exception will continue to be available for the transaction; and (2) revised the definition of “market value.”

⁴ In Amendment No. 2, which replaced and superseded Amendment No. 1 in its entirety, the Exchange (1) revised the example provided with respect to the proposed definition of “market value” to make it clearer; and (2) amended the transition period proposed so that the existing treasury share exception would continue to be available for companies that have entered into a binding contract with respect to the issuance of common stock prior to the date that is five business days after the Commission publishes notice of the proposed rule change in the Federal Register.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule filing reflects amendments to the current NYSE Listed Company Manual shareholder approval requirements for certain transactions. The text of this proposed rule change is available on the Exchange's Web site at

[http://apps.nyse.com/commdata/pub19b4.nsf/docs/89637D57B29A9E63852571F40076E765/\\$FILE/NYSE-2006-30%20A-2.pdf](http://apps.nyse.com/commdata/pub19b4.nsf/docs/89637D57B29A9E63852571F40076E765/$FILE/NYSE-2006-30%20A-2.pdf), at the Exchange's principal office, and in 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 NYSE 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 Exchange 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

Section 312.03 of the Listed Company Manual has for many years required that companies obtain shareholder approval before issuing stock in certain situations or in significantly large amounts.⁵ The precise terms have changed somewhat over

⁵ The section provides that shareholder approval is a "prerequisite to listing" additional shares by a listed company in several situations. To paraphrase, they are an issuance of 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), more than 5% of the current outstanding to a 5% or greater shareholder or an affiliate thereof, or more than 20% of the current outstanding in any transaction other than a public offering or "bona fide private

the years, but the rule has historically 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.

The “treasury shares exception” results from the way the rule is written, making shareholder approval a “prerequisite to listing.” The Exchange takes the view that once listed, shares remain listed even if they are repurchased by the company and taken back into “treasury.”⁶ Accordingly, when treasury shares are re-issued, we do not require that they be “re-listed.” Since no listing application is required, Section 312.03 is not triggered.

Note that prior to 2003, the Exchange's rule requiring shareholder approval of stock option plans resided in Section 312.03 as well, and the treasury share exception was also applied 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 shareholder approval would be required regardless of whether a plan was funded in whole or in part through the use of treasury shares.⁷

The treasury share exception has been criticized because it potentially allows companies to store up large reserves of stock against a future issuance of shares in transactions that could

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. The Commission notes that shareholder approval is also required for equity compensation plans. See NYSE Listed Company Manual Sections 312.03(a) and 303A.08.

⁶ This approach is also reflected by the fact that, pursuant to Section 902.02 of the NYSE Listed Company Manual, listed companies are charged annual fees calculated for each class of security listed based on the number of shares issued and outstanding, including treasury stock and restricted stock.

⁷ See Securities Exchange Act Release No. 48108 (June 30, 2003), 68 FR 39995, 40002 (July 3, 2003).

significantly dilute existing shareholders without their approval. In light of this criticism, on December 30, 2005, the Exchange solicited comment from listed companies and investors on whether or not the treasury stock exception should be eliminated. We received 19 comment letters or emails in response. Fourteen of the commenters, primarily institutional investors, supported the elimination of the exception. These commenters generally criticized the current exception as detrimental to shareholders, providing the potential for significant dilution without shareholder approval. Several noted that the historic rationale for the exception was outdated and that the need for shareholder approval should be governed by the substance of the transaction, not the technical status of the shares used. Five commenters, primarily listed companies, advocated maintenance of the status quo. Several of these commenters expressed the view that the exception provides companies with important flexibility in structuring and negotiating transactions in a manner consistent with shareholders' interests.

The Exchange agrees that there is a legitimate concern that the exception could result in an unacceptable level of dilution without shareholder input. Accordingly, the Exchange proposes to amend Section 312.03 to eliminate the treasury stock exception.

The Exchange is also proposing to provide companies a limited transition period with respect to the proposed elimination of the treasury stock exception. The Exchange stated that it is sensitive to companies' need for certainty when planning a transaction involving the issuance of shares. Accordingly, the Exchange has proposed a limited 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 publishes notice of this filing in the Federal Register, so that the existing treasury share exception would continue to be available for

the transaction even though the transaction does not close until after the date of Commission approval of this proposed rule change.

The Exchange is also proposing related amendments to Section 312.04, a section that amplifies and interprets the operative provisions of Section 312.03. As initially filed with the Commission, one of these proposed amendments codified the guidance the Exchange historically provided to issuers on the time frame allowed where an issuer chose to establish the market value of the securities to be issued based on an averaged price. The Exchange allowed issuers to define market value in the context of Section 312.03 as either the last reported sale price on the trading date prior to the date that the issuer enters into a definitive agreement to issue the securities or with reference to average price over a period of time that can not exceed ten trading days prior to the date of issuance. In this amendment, the Exchange is revising its original proposal so 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. This change will result in issuers no longer having the ability to establish market value based on an averaged price. It will also bring this aspect of the rule in line with the similar Nasdaq Stock Market rule.

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

language used in Section 312.03(c) relating to the issuance of 20% or more of a company's voting common securities.

In addition, the Exchange 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.

2. Statutory Basis

The Exchange believes that its proposed rule change, as amended, is consistent with Section 6(b) of the Act⁸ in general, and furthers the objectives of Section 6(b)(5) of the Act⁹ 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.

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(5).

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

The Exchange requested comment from listed companies and investors on whether or not the treasury stock exception should be eliminated and received 19 comments in response. These comments are described in more detail above.

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 NYSE consents, the Commission will:

- A. by order approve such 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, as amended, 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. Please include File Number SR-NYSE-2006-30 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-2006-30. 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 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-2006-30 and should be submitted by [insert date 21 days from date of publication].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁰

Nancy M. Morris
Secretary

¹⁰ 17 CFR 200.30-3(a)(12).