

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-56835; File No. SR-NYSE-2007-104)

November 21, 2007

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Enable the Exchange to List Certain Companies Based on Two Completed Fiscal Years and Financial Statements Covering the First Six Months of the Current Fiscal Year As Long As Prior to Listing Certain Summary Financial Data Confirms that the Company Continues to Satisfy the Applicable Standard Based On At Least Nine Completed Months of the Current Fiscal Year

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 November 15, 2007, the New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule changes as described in Items I and II below, which items have been substantially prepared by the Exchange. The Exchange filed the proposed rule change 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 proposed rule change effective upon filing with the Commission. 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 amend the earnings standard and valuation/revenue with cash flow standard of Section 102.01B of the Exchange’s Listed Company Manual (“Manual”). The amendment will enable the Exchange, under certain limited circumstances, to qualify companies for listing under the three-year financial requirements of those two standards on the basis of two completed fiscal years of financial statements and financial statements covering the first six

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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).

months of the current fiscal year, provided that the company must include, in a public disclosure (either an SEC filing or a press release) prior to the date of listing, financial data as derived from financial statements that have been subject to a Statement of Auditing Standards 100 (“SAS 100”) review that confirms that the company continues to satisfy the applicable standard based on at least nine completed months of the current fiscal year.

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 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. 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 and valuation/revenue with cash flow standard of Section 102.01B of the Manual. The amendment will enable the Exchange, under certain limited circumstances, to qualify companies for listing under the three-year financial requirements of those two standards on the basis of two completed fiscal years of financial statements and financial statements covering the first six months of the current fiscal year, provided that the company must include, in a public disclosure (either an SEC filing or press release) prior to the date of listing, financial data as derived from financial statements that

have been subject to an SAS 100 review that confirms that the company continues to satisfy the applicable standard based on at least nine completed months of the current fiscal year.

The proposed rule change does not alter the quantitative requirements companies must meet under the Exchange's financial listing standards, but simply provides greater flexibility to certain companies in demonstrating their satisfaction of those requirements. Currently, where a company has changed its fiscal year or undergone a significant change in its operations<sup>5</sup> or capital structure, Section 102.01C provides that such company may satisfy the earnings test or valuation/revenue with cash flow test on the basis of financial information for a nine to twelve month period in the current fiscal year in lieu of the first year in the three fiscal year period otherwise required. When qualifying a company for listing based on interim financial information from the current fiscal year, 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. In reaching this conclusion, the Exchange considers whether the company's revenues or costs are subject to seasonal variation and the possible impact of any such variation on the suitability of predicting the company's full year performance based on its results in the first nine months of the year. In addition, if the company does not qualify under the regular standard at the end of such current fiscal year or qualify at such time for original listing under

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<sup>5</sup> The types of significant changes in operations considered by the Exchange, include, but are not limited to:

- 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.

another listing standard, Section 102.01C provides that the Exchange will promptly initiate suspension and delisting procedures with respect to the company.

Under the proposed amendment, the company would still need to demonstrate compliance with the relevant standard over at least nine completed months of the current fiscal year. The only distinction is that the company could demonstrate compliance through the inclusion of summary financial information for the nine-month period – rather than full financial statements – in a public disclosure (either an SEC filing or a press release). The information for the nine-month period would be required to be derived from financial statements that have been subject to an SAS 100 review. To ensure that Exchange staff has a more complete understanding of the company’s financial status, the proposed amendment requires that financial statements compliant with applicable SEC rules be available for the first six months of the period, demonstrating the company’s satisfaction of the applicable financial listing standard over that period. While the proposed rule change modifies the Exchange’s requirement with respect to the financial disclosure it will accept as evidence of a company’s compliance with the Exchange’s financial listing standards for those companies that are eligible,<sup>6</sup> companies listing on the Exchange will continue to be subject to the requirement to present financial statements in their SEC filings compliant with applicable SEC rules.<sup>7</sup>

The proposed amendment will enable the Exchange to facilitate the listing of companies that have completed at least nine months of their current fiscal year and qualify for listing on the

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<sup>6</sup> See note 5 *supra* and accompanying text.

<sup>7</sup> The Commission notes that companies listing on the Exchange will still have to meet the registration requirements of Section 12(b), and any other requirements, under the Act. See 15 U.S.C. 78l(b). The NYSE’s proposal only alters certain time periods, and the type of financial information the Exchange would review, when considering the eligibility of these companies for listing on the Exchange under Sections 102.01C(1) and (II) of the Manual and has no effect on the financial statements, or any other information, required by the Commission.

basis of their interim results but have not yet been able to prepare full financial statements for the relevant period. Market conditions and the timing of companies' financing needs frequently make it undesirable for companies to delay their listing. As such, companies that would like to list on the Exchange, and have financial results that qualify them for listing, may occasionally feel compelled to list elsewhere because they cannot wait until work is finished on their interim financial statements. The Exchange believes that the proposed amendment will provide reasonable flexibility to enable it to list companies that find themselves in this circumstance, without in any way diluting the financial standards those companies must meet.<sup>8</sup>

## 2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5) of the Act<sup>9</sup> that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove

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<sup>8</sup> The Exchange notes that the NYSE earnings standard – both currently and as proposed to be amended by this filing – would always require a higher level of earnings in the most recently completed fiscal year than is required by Nasdaq Global Market Standard 1. The Nasdaq standard requires \$1 million of earnings in either the most recent fiscal year or two of the three most recent fiscal years, so a company listing could have either: (i) \$1 million of earnings in the most recently completed fiscal year with no limit as to its losses in the two preceding years or (ii) \$1 million of earnings in each of the two preceding years with no limits as to losses in the most recent fiscal year. Assuming using the six/nine month exemption, the same company on NYSE would have to have either: (i) \$10 million aggregate earnings in the two most recent completed fiscal years and the current partial year with at least \$2 million in each of the current fiscal year and the most recent completed fiscal year and positive earnings in the preceding fiscal year or (ii) \$12 million aggregate over the same period, with at least \$5 million in the current fiscal year and \$2 million in the most recent completed fiscal year. As such, an NYSE company listing under the earnings standard could never have less than \$2 million of earnings in the most recent completed fiscal year, while a company listing under Nasdaq Global Market Standard 1 could have either \$1 million of earnings or a loss. While Nasdaq has a \$15 million shareholders' equity requirement that the NYSE does not have, NYSE's public float requirement of \$60 million far exceeds the \$8 million required by Nasdaq.

<sup>9</sup> 15 U.S.C. 78f(b)(5).

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>10</sup> and Rule 19b-4(f)(6)<sup>11</sup> thereunder because the proposal does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) by its terms, become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, provided that the Exchange has given the Commission 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 filing of the proposed rule change, or such shorter time as designated by the Commission.

A proposed rule change filed under Rule 19b-4(f)(6) normally may not become operative prior to 30 days after the date of filing. However, Rule 19b-4(f)(6)(iii)<sup>12</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of

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<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>11</sup> 17 CFR 240.19b-4(f)(6).

<sup>12</sup> 17 CFR 240.19b-4(f)(6)(iii).

investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay period so that the proposal becomes operative upon filing with the Commission. The Exchange states that the proposal would allow the Exchange to list those companies that have changed their fiscal year or undergone a significant change in their operations<sup>13</sup> if they have completed at least nine months of their current fiscal year but have not prepared full financial statements for such nine-month period.<sup>14</sup> The Exchange further notes that the proposal does not alter the quantitative requirements of its financial listing standards, but provides greater flexibility for companies to demonstrate they meet those requirements.

The Commission notes that the Exchange's quantitative requirements for the last fiscal year are not changing. Rather, under the proposal, the Exchange's requirements could be met in a shorter period of time and through the review of summary interim financial information. The rule specifically requires that when qualifying companies for listing based on interim financial information from the current fiscal year, the Exchange must conclude that the company can reasonably be expected to qualify under the regular standard upon completion of the companies' then current fiscal year. In reaching this conclusion, the Exchange states that it would consider whether the company's revenues or costs are subject to seasonal variation and the possible impact of any such variation on the suitability of predicting the company's full year performance based on its results for the first nine months of the year.<sup>15</sup> The Commission notes that scrutinizing companies in this manner should help to ensure that only those companies that can be expected to meet the Exchange's standard will be listed. Finally, the Commission notes that

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<sup>13</sup> See note 5 supra and accompanying text.

<sup>14</sup> See note 7 supra.

<sup>15</sup> In implementing the proposal, the Commission expects the Exchange to thoroughly review companies for any such variations.

companies listed under the proposal would be required to meet the existing standards of Section 102.01C of the Manual at the end of their current fiscal year or qualify at such time for original listing under another listing standard—otherwise, the Exchange would promptly initiate suspension and delisting procedures.<sup>16</sup> Thus, the Commission believes that waiver of the 30-day operative delay period is consistent with the protection of investors and the public interest.<sup>17</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such proposed 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.<sup>18</sup>

#### 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 an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2007-104 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.

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<sup>16</sup> See proposed Sections 102.01C(I)(2) and 102.01C(II) of the Manual.

<sup>17</sup> For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>18</sup> 15 U.S.C. 78s(b)(3)(C).



All submissions should refer to File Number SR-NYSE-2007-104. 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 such 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-2007-104 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.<sup>19</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>19</sup> 17 CFR 200.30-3(a)(12).