

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58740; File No. SR-NYSE-2008-98)

October 6, 2008

Self-Regulatory Organizations; Notice of Filing by New York Stock Exchange LLC to Adopt an Additional Initial Listing Standard for Operating Companies

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”),² and Rule 19b-4 thereunder,³ notice is hereby given that on October 1, 2008, New York Stock Exchange LLC (“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 amend Section 102.01C of the Exchange’s Listed Company Manual (the “Manual”) to adopt an additional initial listing standard under which companies may qualify to list on the Exchange. The Exchange also proposes to apply the continued listing standard applicable under Section 802.01B to companies listed under the Earnings Test to companies listed under the proposed new initial listing standard.⁴

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.

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ The Commission notes that NYSE is also proposing to adopt a new initial listing standard applicable only to companies transferring from NYSE Arca. See Securities Exchange Act Release No. 58741 (October 6, 2008) (SR-NYSE-2008-97).

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 Exchange 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 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 also proposes to apply the continued listing standard applicable under Section 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”) will not replace any of the existing initial listing standards set forth in Section 102.01C. Rather it will be an additional alternative standard under which companies may qualify to list. Companies qualifying to list under the proposed new standard will have to meet the same holders, publicly-held shares and trading volume requirements as set forth in Section 102.01A as companies that list under the existing initial listing standards and must meet the same market value of publicly-held shares requirements⁵ and \$4 stock price requirement in Section 102.01B as companies that list under

⁵ \$60 million in the case of IPOs and \$100 million for all other companies.

the existing initial listing standards in Section 102.01C. In addition, at the time of listing, they will 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 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.

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. Companies qualifying under the Assets and Equity Test will be subject to the same continued listing standard in Section 802.01B

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. The adjustments referenced in the prior sentence enable the Exchange to analyze the company's balance sheet at the time of listing on a pro forma basis to reflect the infusion of new capital from a concurrent financing or the balance sheet effects of any acquisition or disposition of assets taking place in conjunction with the listing. This is consistent with the Exchange's approach in listing companies under its existing initial listing standards and the Exchange believes that making these pro forma adjustments provides a more accurate understanding of the entity that will actually list. The Exchange also adjusts listing applicants' market capitalization and public float to give effect to any new shares issued at the time of listing. All of these adjustments are typical of the financial presentation provided by companies in their offering prospectuses that are reviewed by the Division of Corporation Finance and included in the related registration statements declared effective by the Division of Corporation Finance. 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).

as companies that qualify under the Earnings Test, i.e., they 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. Of course, the holders, trading volume and publicly-held shares 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.

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. These companies will be required to demonstrate 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 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, as is the case with companies utilizing a third party valuation under any of the other original listing standards. The Exchange believes 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, as the requirement that the market capitalization demonstrated must be 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.

The Exchange believes 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 notes 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 that will not meet any of the Exchange's initial listing standards.

⁷ See 34-58550 (September 15, 2008) (SR-NYSE-2008-68).

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 4.⁸ However, the Assets and Equity Test establishes equivalent or higher thresholds for each of the relevant criteria. Under Amex Initial Listing Standard 4, a company may list if it has a total market capitalization of \$75 million, while the Assets and Equity Test requires a minimum total market capitalization of at least \$150 million, as well as \$75 million in total assets and \$50 million in stockholders' equity. Amex Initial Listing Standard 4 requires \$20 million of publicly-held shares, while companies listing under the Assets and Equity Test must have either \$60 million (for IPOs) or \$100 million (for all other companies) of publicly-held shares. The Amex will list a company that has 400 public holders and 1 million publicly-held share, while the minimum distribution required by the NYSE is 400 round lot holders and 1.1 million publicly-held shares.⁹

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").¹⁰ 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

⁸ 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.

⁹ The Exchange believes that its round lot holder requirement is at least as stringent as the Amex's public holders requirement, as the Amex counts all public holders regardless of how insignificant their holdings may be.

¹⁰ 17 CFR 240.a51-1(a)(ii).

(in the case of IPOs) or \$100 million (in all other cases) of market capitalization of publicly-held shares, a \$4 stock price, 400 round lot holders and 1.1 million publicly held shares, thereby meeting or exceeding 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.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)¹¹ 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 impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest. The Exchange believes that the proposed amendment is consistent with the protection of investors and the public interest in that the requirements of the proposed new listing standard will ensure that only companies of a suitable size will qualify for listing and many companies that are eligible to list on other national securities exchanges will continue to be ineligible for listing on the Exchange.

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 purpose of the Act.

¹¹ 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

Written comments on the proposed rule change 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:

- (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-2008-98 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-2008-98. 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-2008-98 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.¹²

Florence E. Harmon
Acting Secretary

¹² 17 CFR 200.30-3(a)(12).