

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-57904; File No. SR-NYSE-2008-40)

June 2, 2008

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Discontinue its Policy of Requiring Listed Companies Whose Charters Contain Transfer Restrictions to Amend Their Charters to Include Language Specifying that those Restrictions Do Not Apply to Public Market Transactions

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 May 16, 2008, the New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange. The Exchange has designated the proposed rule change as “non-controversial” under Section 19(b)(3)(A)(iii)<sup>3</sup> of the Act and Rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to discontinue its policy of requiring listed companies whose charters contain transfer restrictions to amend their charters to include language specifying that those restrictions do not apply to public market transactions.

---

<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)(iii).

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

The text of the proposed rule changes 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. 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

The Exchange proposes to discontinue its policy of requiring listed companies whose charters contain transfer restrictions to amend their charters to include language specifying that those restrictions do not apply to public market transactions. The change in policy will apply to companies listing in connection with their initial public offerings, as well as companies transferring from other markets.

The Exchange has a long-standing policy of prohibiting the inclusion by any listed company in its charter of restrictions on transfers of the company's equity securities. Typically such provisions purport to enable the company to void transactions involving the transfer of the company's shares to purchasers who are designated prohibited holders. A purchaser is generally deemed to be a prohibited holder because it owns more than a specified threshold amount of the company's equity securities, or will do so if the prohibited transaction is consummated.

Companies impose transfer restrictions for a variety of reasons, but they are most commonly

found in the context of (i) real estate investment trusts (“REITs”) that wish to avoid losing their REIT status on the basis that a shareholder owns more than 5% of the company’s common equity or (ii) companies recently emerged from bankruptcy whose net operating loss (“NOL”) assets may be impaired as a result of changes in ownership levels by any shareholder owning more than 5% of the common equity securities. The charter will typically provide that the company will have the right to seize any shares bought by a prohibited purchaser and place them in trust to be sold for the benefit of that prohibited purchaser. The Exchange is generally not concerned with the application of this type of arrangement as it does not affect the finality of the sale as it relates to the seller. However, the Exchange is concerned if the language of the charter may be read as giving the company the ability to unwind the transaction or prohibit sellers from transferring to any willing purchaser in Exchange transactions. To that end, the Exchange requires companies that have transfer restrictions in their charters to include the following provision:

NYSE Transactions. Nothing in this Article [ ] shall preclude the settlement of any transaction entered into through the facilities of the New York Stock Exchange or any other national securities exchange or automated inter-dealer quotation system. The fact that the settlement of any transaction occurs shall not negate the effect of any provision of this Article [ ] and any transferee in such a transaction shall be subject to all of the provisions and limitations set forth in this Article [ ].

The Exchange believes that it is generally unproblematic for a company listing at the time of its initial public offering to amend its charter to insert the Exchange’s required language, as such companies are typically closely held and can easily amend the charter by written consent prior to listing. However, to the Exchange’s knowledge, none of the other national securities

exchanges impose such a requirement and, as a consequence, a company transferring from another market will typically need to secure a vote from its public shareholders to amend the charter. As an accommodation, the Exchange allows transferring companies to list on the basis of a commitment to have a vote with respect to adding the required language to the charter at the company's next scheduled annual meeting. Companies are frequently uncomfortable with this requirement, as they believe it is confusing to shareholders and is unnecessary from a practical standpoint. As such, the Exchange believes the continuation of this policy by it represents a barrier to effective competition with other markets that do not apply such a policy.

The Exchange has reviewed its transfer restrictions policy and concluded that it is no longer necessary in light of the structure of the modern securities markets. Because all exchange transactions are between anonymous street name accounts, it is impossible for a listed company to identify in advance a proposed transferee as a prohibited holder and block the transaction in advance of its execution. The company will only become aware of such a transfer when the purchaser files a Form 13D or 13G, at which time the company may exercise any right it may have to seize the shares and sell them. Notwithstanding the language contained in certain charters to the effect that prohibited transfers are "void," the Exchange does not believe that it is feasible for a listed company to require the unwinding of a prohibited transfer.<sup>5</sup> As such, the Exchange does not believe that requiring companies to include in their charters language specifying that any transfer restrictions do not apply to public market transactions provides any meaningful or necessary protection to sellers and believes that it is appropriate to discontinue this policy. The Exchange believes that discontinuing this policy will not result in any substantially

---

<sup>5</sup> The Exchange expresses no opinion as to the legal enforceability of transfer restriction provisions in company charters, which is a matter of the law of the jurisdiction of incorporation of the company in question.

greater likelihood that companies will be able to cause the unwinding of public market transactions in their equity securities. While it may be less burdensome in many cases for companies undertaking an IPO to comply with the existing policy than is the case for companies that are already public, the Exchange believes that it is appropriate to end the policy with respect to all companies including IPOs, as it believes that the policy is unnecessary for the reasons stated above and it places the Exchange at a potential competitive disadvantage to other markets that do not impose such a requirement on companies listing at the time of their IPO.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>6</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>7</sup> 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 change in policy will particularly promote competition among exchanges, as it will eliminate a potential impediment to the transfer of the listing of certain companies from other markets to 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 purposes of the Act.

---

<sup>6</sup> 15 U.S.C. 78f(b).

<sup>7</sup> 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 were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>8</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>9</sup>

A proposed rule change filed under 19b-4(f)(6) normally may not become operative prior to 30 days after the date of filing.<sup>10</sup> However, Rule 19b-4(f)(6)(iii)<sup>11</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day pre-operative delay and designate the proposed rule change to become operative upon filing.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because eliminating the NYSE's longstanding transfer restrictions policy should not have any effect on the settlement of public market

---

<sup>8</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>9</sup> 17 CFR 240.19b-4(f)(6).

<sup>10</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>11</sup> Id.

transactions on the Exchange. The Commission designates the proposal to become effective and operative upon filing.<sup>12</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such 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 the furtherance of the purposes of the Act.

#### 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-2008-40 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-2008-40. 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

---

<sup>12</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the impact of the proposed rule on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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 also will be available for inspection and copying at the principal office of 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-2008-40 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>13</sup>

Florence E. Harmon  
Acting Secretary

---

<sup>13</sup> 17 CFR 200.30-3(a)(12).