

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58500; File No. SR-NYSE-2008-57)

September 9, 2008

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change to Adopt on a Permanent Basis a Pilot Program Which Allows the Exchange to Adjust the Earnings of Companies for Purposes of Its Earnings Standard by Reversing the Income Statement Effects of Changes in Fair Value of Financial Instruments Extinguished at the Time of Listing

I. Introduction

On July 23, 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 to enable the Exchange to adjust the earnings of companies by reversing the income statement effects for all periods of any changes in fair value of financial instruments classified as a liability recorded by the company in earnings, provided such financial instrument is either being redeemed with the proceeds of an offering occurring in conjunction with the listing or converted into or exercised for common stock of the company at the time of listing. The proposed rule change was published for comment in the Federal Register on August 5, 2008.³ The Commission received no comments on the proposal. This order approves the proposed rule change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 58253 (July 30, 2008), 73 FR 45509.

II. Description of the Proposal

The Exchange proposes to amend the earnings standard of Section 102.01C(I) of the Exchange's Listed Company Manual ("Manual") to enable the Exchange to adjust the earnings of companies listing in conjunction with an initial public offering ("IPO") by reversing the income statement effects for all periods of changes in fair value of financial instruments classified as a liability recorded by the company in earnings, provided such financial instrument is either being redeemed with the proceeds of an offering occurring in conjunction with the listing or converted into or exercised for common stock of the company at the time of listing. The proposed amendment was originally implemented for a six-month period as a Pilot Program.⁴ The Pilot Program expired and was subsequently renewed for an additional three months, expiring on September 2, 2008.⁵

The Exchange believes that it is appropriate to exclude the effects of changes in fair value of a financial instrument classified as a liability from a company's earnings where the financial instrument is being retired at the time of a company's listing either out of the proceeds of a concurrent offering or by conversion into common stock at the time of listing. The Exchange believes that adjusting company earnings for charges arising out of the changes in fair value of financial instruments that are retired with the proceeds of an offering occurring in conjunction with the listing or converted into common stock at the time of listing is consistent with the adjustments that are currently permitted under Section 102.01C. Section 102.01C currently provides for adjustments to earnings for certain nonrecurring charges to earnings that

⁴ See Securities Exchange Act Release No. 56290 (August 20, 2007), 72 FR 49033 (August 27, 2007) (SR-NYSE-2007-75).

are included in net income as recorded under GAAP, such as the exclusion of impairment charges on long-lived assets, the exclusion of gains and losses on sales of a subsidiary's or investee's stock and the exclusion of in-process purchased research and development charges. The Exchange believes that this adjustment is reasonable given the purpose of the earnings standard, which is to determine the suitability for listing of companies on a forward-looking basis.

The Exchange has stated that, as with all companies listed on the Exchange, the Financial Compliance staff of NYSE Regulation will monitor on an ongoing basis the compliance with the Exchange's continued listing standards of any companies listed in reliance upon the proposed amendment. The Exchange represents that such companies will be subject to delisting if they are found at any time to be below the Exchange's continued listing standards.

In its proposal, the Exchange stated that as it gains experience in listing companies in reliance upon the proposed amendment, it will continue to carefully reevaluate its appropriateness. If the Exchange becomes aware that companies listed pursuant to the proposed amendment have difficulty complying with the Exchange's continued listing standards, it will inform the Commission and discuss with the Commission the desirability of the continued use of the provision.

III. Discussion and Commission Findings

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

⁵ See Securities Exchange Act Release No. 57905 (June 2, 2008), 73 FR 32613 (June 9, 2008) (SR-NYSE-2008-44).

securities exchange and, in particular, with Section 6(b)(5) of the Act,⁶ which requires, among other things, that the rules of a national securities exchange be 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.⁷

The Commission believes that the proposed rule change is consistent with other adjustments the Exchange currently makes for certain nonrecurring charges to earnings when evaluating applicants on a forward-looking, post-IPO basis under the existing earnings standard in Section 102.01C(I) of the Manual and is reasonable given the purpose of the earnings standard, which is to determine the suitability for listing of companies on a forward-looking basis. The Commission notes that in determining a company's eligibility for listing, these changes will allow the Exchange to reverse the income statement effects for all periods of changes in fair value of financial instruments classified as a liability recorded by the company in earnings, provided such financial instrument is either being redeemed with the proceeds of an offering occurring in conjunction with the listing or converted into or exercised for common stock at the time of listing and will not impact the preparation of financial statements by the company listing on the Exchange. In addition, the Commission notes that the Exchange will monitor companies listing using this new adjustment and notes that the Exchange has agreed to

⁶ 15 U.S.C. 78f(b)(5).

⁷ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

discuss the standard with the Commission should it prove difficult for such companies to comply with the Exchange's continued listing standards.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁸ that the proposed rule change (SR-NYSE-2008-57) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹

Florence E. Harmon
Acting Secretary

⁸ 15 U.S.C. 78s(b)(2).

⁹ 17 CFR 200.30-3(a)(12).