

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-57905; File No. SR-NYSE-2008-44)

June 2, 2008

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change 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 on a Three Month Pilot Basis

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on May 20, 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)³ of the Act and Rule 19b-4(f)(6) thereunder,⁴ 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 amend the earnings standard of Section 102.01C(I) of the Exchange’s Listed Company Manual (“Manual”). The amendment will 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(iii).

⁴ 17 CFR 240.19b-4(f)(6).

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 filed with the Commission as a pilot program (“Pilot Program”),⁵ which has since expired and this filing seeks to renew the Pilot Program for an additional three months. 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 amend the earnings standard of Section 102.01C(I) of the Manual. The amendment will enable the Exchange to adjust the earnings of companies listing in conjunction with an 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 filed with the

⁵ See Securities Exchange Act Release No. 56290 (August 20, 2007), 72 FR 49033 (August 27, 2007) (SR-NYSE-2007-75).

Commission for a six month period as a Pilot Program.⁶ The Pilot Program has expired and this filing seeks to renew the Pilot Program for an additional three months.

Nonpublic companies engaging in pre-IPO financings often raise capital through the sale of preferred stock and warrants to purchase preferred stock. Preferred stock and preferred stock warrants are also sometimes issued by pre-IPO companies to service providers in lieu of cash compensation. Typically, at the time of the company's IPO, the preferred stock is converted into common stock and the preferred stock warrants are automatically exercised and the underlying preferred stock is converted into common stock of the company. In some cases, companies may also redeem some or all of the outstanding preferred stock with a portion of the proceeds from the IPO.

Some pre-IPO companies have determined that they must record in earnings changes in the fair value of certain financial instruments classified as liabilities. As the fair value of a pre-IPO company's equity often increases as the company gets closer to its IPO, many companies have had to record significant reductions in earnings associated with increases in the fair value of the preferred stock warrant liability. In certain cases, the impact on the company's earnings as reported under generally accepted accounting principles ("GAAP") of the preferred stock liability causes otherwise qualified companies to fail to qualify under the Exchange's earnings standard. Under the Exchange's current rules, the Exchange cannot list these companies even though the preferred stock warrant liability will be extinguished at the time of the IPO by conversion into common stock or redemption out of the proceeds of the IPO.

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

⁶ Id.

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 for a number of other nonrecurring charges to earnings that 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 also 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.

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. Such companies will be subject to delisting if they are found at any time to be below the Exchange's continued listing standards.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,⁷ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁸ 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

⁷ 15 U.S.C. 78f(b).

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 amendment is consistent with the investor protection objectives of the Act in that it provides for an adjustment to list applicants' historical financial results that is consistent with other adjustments already permitted under the Exchange's earnings standard 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.

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

No written comments were solicited or received with respect to the proposed rule change.

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 Act⁹ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹⁰

⁸ 15 U.S.C. 78f(b)(5).

⁹ 15 U.S.C. 78s(b)(3)(A).

¹⁰ 17 CFR 240.19b-4(f)(6).

A proposed rule change filed under 19b-4(f)(6) normally may not become operative prior to 30 days after the date of filing.¹¹ However, Rule 19b-4(f)(6)(iii)¹² 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 the proposed rule change is consistent with other adjustments the Exchange makes when evaluating applicants on a forward-looking, post-IPO basis under the existing earnings standard in Section 102.01C(I) of the Listed Company Manual, and the proposal will take effect as a Pilot Program, allowing the Commission to evaluate the suitability of the proposal during the pilot period. The Commission designates the proposal to become effective and operative upon filing.¹³

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:

¹¹ 17 CFR 240.19b-4(f)(6)(iii).

¹² Id.

¹³ 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).

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-2008-44 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-2008-44. 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 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-2008-44 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.¹⁴

Florence E. Harmon
Acting Secretary

¹⁴ 17 CFR 200.30-3(a)(12).