

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-56606; File No. SR-NYSEArca-2007-69)

October 3, 2007

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Accelerated Approval of Proposed Rule Change, as modified by Amendment No. 1, and Notice of Filing of Amendment No. 1 Thereto Relating to Adoption of Revised Initial and Continued Listing Standards for the Pilot Program Expiring on November 30, 2007

I. Introduction

On July 23, 2007, NYSE Arca, Inc. (“NYSE Arca” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), 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> a proposed rule change to amend its initial and continued listing standards for the listing of common stock under a pilot program expiring on November 30, 2007 (“Pilot Program”).<sup>3</sup> The proposed rule change was published for comment in the Federal Register on August 16, 2007.<sup>4</sup> The Commission received no comments on the proposal. On September 27, 2007, NYSE Arca filed Partial Amendment No. 1 to the proposed rule change.<sup>5</sup> This order approves the proposed rule change, as modified

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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> The Commission initially approved the Pilot Program for six months, until May 29, 2007. See Securities Exchange Act Release No. 54796 (November 20, 2006), 71 FR 69166 (November 29, 2006) (SR-NYSEArca-2006-85). The Pilot Program was subsequently extended for an additional six months, until November 30, 2007. See Securities Exchange Act Release No. 55838 (May 31, 2007), 72 FR 31642 (June 7, 2007) (SR-NYSEArca-2007-51).

<sup>4</sup> See Securities Exchange Act Release No. 56232 (August 9, 2007), 72 FR 46119.

<sup>5</sup> In Partial Amendment No. 1, NYSE Arca (i) indicates that it is the Exchange’s current practice to require, in the case of initial public offerings, at least \$5 per share, based on the initial public offering price; (ii) codifies the Exchange’s current practice of requiring at least \$5 per share for initial public offerings; (iii) describes the Exchange’s process to verify compliance with the initial listing requirements; and (iv) clarifies that the Exchange is amending the closing price per share for currently listed issuers by requiring

by Amendment No. 1, on an accelerated basis, and provides notice of filing of Amendment No.

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II. Description of the Proposal

NYSE Arca proposes to amend its initial and continued listing standards under the Pilot Program. According to the Exchange, based on its experience in the initial six-month period of the Pilot Program, the Exchange concluded that the listing standards would qualify many companies for listing that are much smaller than the minimum size it wishes to include in its target market. NYSE Arca further noted that the proposed amended initial listing standard would exclude from qualification some companies that currently qualify to list but whose size or financial performance is not consistent with that of the kind of issuer NYSE Arca intends to list.

A. Initial Listing Standards

The current NYSE Arca listing standards require for initial listing that, at the time of initial listing, the listed class of common stock shall have:<sup>6</sup>

- At least 1.1 million publicly held shares.
- A closing price per share of \$5 or more.<sup>7</sup>
- A minimum of 400 round lot shareholders.

In addition, the requirements of one of Standards One, Two, or Three below must be met:

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them to meet the price for at least 90 consecutive trading days prior to applying for listing.

<sup>6</sup> See NYSE Arca Equities Rule 5.2(c).

<sup>7</sup> In the case of initial public offerings, the Exchange represents that it interprets the provision as requiring an initial public offering price of \$5 per share or more. See Partial Amendment No. 1, supra note 5.

### Standard One

- The issuer of the security had annual income from continuing operations before income taxes of at least \$1 million in the most recently completed fiscal year or in two of the last three most recently completed fiscal years.
- The market value of publicly held shares is at least \$8 million.
- The issuer of the security has stockholders' equity of at least \$15 million.

### Standard Two

- The issuer of the security has stockholders' equity of at least \$30 million.
- The market value of publicly held shares is at least \$18 million.
- The issuer has a two-year operating history.

### Standard Three

- The market value of publicly held shares is at least \$20 million.
- The issuer has:
  - A market value of listed securities of at least \$75 million (currently traded issuers must meet this requirement and the \$5 closing price requirement for 90 consecutive trading days prior to applying for listing); or
  - Total assets and total revenue of at least \$75 million each for the most recently completed fiscal year or in each of two of the last three most recently completed fiscal years.

NYSE Arca proposes to eliminate Standards One and Two and require all issuers to qualify under an amended version of existing Standard Three. As proposed, the market value of publicly held shares requirement of Standard Three would be raised from \$20 million to \$45 million. All issuers would be required to meet the market value of listed securities of Standard Three, which would be raised from \$75 million to \$150 million. In addition, the issuer of the security would be required to meet two of the following four conditions:

- Total assets of at least \$75 million.
- Total revenues of at least \$50 million for the most recently completed fiscal year.
- Stockholders' equity of at least \$50 million.
- Positive pre-tax earnings in the most recently completed fiscal year.

Finally, NYSE Arca is amending the closing price per share requirement. Currently, NYSE Arca requires a closing price of \$5 per share or more and does not differentiate between initial public offerings and currently traded issuers.<sup>8</sup> NYSE Arca proposes to require (1) in the case of initial public offerings, an initial public offering price of \$5 per share or more<sup>9</sup> and (2) in the case of currently traded issuers, a closing price of \$5 per share or more for 90 consecutive trading days prior to applying for listing.<sup>10</sup>

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<sup>8</sup> The Commission notes that the previous language in the \$5.00 minimum closing price did not specify how a company listing for the first time would meet this requirement since there would be no previous closing price history. In Partial Amendment No 1, NYSE Arca described the Exchanges process to verify compliance with initial listing standards in an initial public offering situation.

<sup>9</sup> According to the Exchange, in the case of initial public offerings, the issuer or principal underwriter must provide NYSE Arca with a letter of representation stating that the issuer is expected to be in compliance with the requisite holders, market value, and share price requirements upon completion of the offering. The letter of representation must provide NYSE Arca with an approximation of the anticipated numerical levels for each of the cited criteria. NYSE Arca also requires issuers to provide a distribution schedule signed by an executive officer of the issuer, providing the best available estimate of the number of beneficial holders. For transfer listings, this form is due prior to admission to trading. For initial public offerings, this form is due within 120 days after completion of the offering. NYSE Arca represents that it intends to continue the foregoing procedures in connection with the application of its initial listing standards as amended by this filing.

<sup>10</sup> Under current NYSE Arca rules, only issuers qualifying for listing under the first alternative of Standard Three would have to meet the \$5 closing price requirement for 90 consecutive trading days prior to applying for listing. This change would require all currently traded issuers to meet the price requirement for 90 consecutive days prior to listing.

## B. Continued Listing Standards

The current NYSE Arca listing standards require for continued listing that the listed class of common stock shall meet either Continued Listing Standard One or Continued Listing Standard Two. The factors for Continued Listing Standard One are:

- 750,000 publicly held shares;
- Market value of publicly held shares of \$5 million;
- The issuer has stockholders' equity of at least \$10 million; and
- 400 shareholders of round lots.

NYSE Arca proposes to amend Continued Listing Standard One as follows:

- The publicly held shares requirement would be raised from 750,000 to 1.1 million shares.
- The market value of publicly held shares requirement would be raised from \$5 million to \$15 million.
- The stockholders' equity would be raised from \$10 million to \$15 million.

The minimum of 400 round lot shareholders would remain the same. NYSE Arca is not amending Continued Listing Standard Two.

## III. Discussion

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 securities exchange.<sup>11</sup> In particular, the Commission finds that the proposed rule change is consistent with Section

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<sup>11</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

6(b)(5) of the Act,<sup>12</sup> which requires that an exchange have rules designed, among other things, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The development and enforcement of adequate standards governing the initial and continued listing of securities on an exchange is an activity of critical importance to financial markets and the investing public. Listing standards serve as a means for an exchange to screen issuers and to provide listed status only to bona fide companies with sufficient public float, investor base, and trading interest to ensure that the market for a company's stock has the depth and liquidity necessary to maintain fair and orderly markets. Adequate standards are especially important given the expectations of investors regarding exchange trading and the imprimatur of listing on a particular market. Once a security has been approved for initial listing, maintenance criteria allow an exchange to monitor the status and trading characteristics of that issue to ensure that it continues to meet the exchange's standards for market depth and liquidity so that fair and orderly markets can be maintained.

As discussed in more detail below, the new standards will allow NYSE Arca to list certain types of companies that meet specified criteria, including size, market value, holder, and price requirements, which should help to ensure that listed companies have sufficient depth and liquidity to maintain a fair and orderly market. The Commission notes that the proposed NYSE Arca initial listing standards remain more restrictive than the current Pilot Program requirements

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<sup>12</sup> 15 U.S.C. 78f(b)(5).

for current initial listing Standard Three. For example, the market value of publicly held shares would increase from \$20 million to \$45 million.<sup>13</sup> In addition, the market value of listed securities would increase from \$75 million to \$150 million.<sup>14</sup> As noted above, the continued listing standards under Standard One are being increased to reflect the increased initial listing standards. For example, the market value of publicly held shares is raised from \$5 million to \$15 million, the publicly held shares requirement is raised from 750,000 to 1.1 million shares, and the stockholders' equity is raised from \$10 million to \$15 million.

While the rule proposal will allow NYSE Arca to exclude from qualification some companies that currently qualify to list, but whose size or financial performance is not consistent with the kind of issuer the Exchange has stated it intends to list, the Commission believes that as long as there are requirements to ensure adequate depth and liquidity, and other regulatory requirements are in place to ensure adequate investor protections, that it is within the Exchange's business judgment to determine it no longer wants to qualify for listing these type of smaller companies under its rules.<sup>15</sup> Further, the Exchange has represented that any currently listed issuers who would be below the proposed continued listing standards will have an ability to gain compliance through the Exchange's normal process. The Exchange's rules, among other things,

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<sup>13</sup> See proposed NYSE Arca Equities Rule 5.2(c)(iv).

<sup>14</sup> See proposed NYSE Arca Equities Rule 5.2(c)(v). In addition, under the proposal, an issuer must meet two of the four factors noted above that serve as indicators of the issuer's financial condition.

<sup>15</sup> The Commission notes that under NYSE Arca rules, the Exchange has broad discretion to deny listing to any company based on any event, condition, or circumstance that makes listing of the company inadvisable or unwarranted in the opinion of the Exchange. Further, the Commission notes that the rule permits the Exchange to deny listing even if the company meets the listing standards. See NYSE Arca Equities Rule 5.2(a)

set forth certain due process procedures, including a right of review, with respect to any delisting determination by the Exchange.<sup>16</sup>

Finally, NYSE Arca is making some clarifying changes to the \$5.00 minimum closing price requirement.<sup>17</sup> For initial public offerings, NYSE Arca is codifying its current practice of requiring an initial public offering price per share of \$5 or more.<sup>18</sup> For currently traded issuers, NYSE Arca is amending the current \$5 price per share requirement by adding the Standard Three requirement of meeting the minimal price per share for 90 consecutive trading days prior to applying for listing. The Commission believes that the proposed changes to the price per share requirement will provide clarity to issuers on the price requirements to list on NYSE Arca and ensure that currently traded issuers must evidence some minimum price history to qualify for listing.

Based on the above, the Commission believes the rule change is reasonable and should continue to provide only for the listing of securities with a sufficient investor base to maintain fair and orderly markets. While the changes will remove certain alternative initial listing standards under NYSE Arca rules that may have actually been higher in some respects from the current standards, because these are all alternative standards and the proposal actually increases existing requirements under initial listing alternative Standard Three and makes that the sole alternative for qualifying for listing, taken as a whole, the Commission believes the standards are an increase over the current standards. The continued listing standards also are an increase

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<sup>16</sup> See NYSE Arca Equities Rule 5.5(m).

<sup>17</sup> See proposed NYSE Arca Equities Rule 5.5(c)(ii).

<sup>18</sup> See supra note 9, which discuss compliance with the initial listing standards for initial public offerings.



compared to existing standards. Accordingly, the Commission believes that the changes adequately protect investors and the public interest.

IV. Accelerated Approval of Proposed Rule Change as Modified by Amendment No. 1

Pursuant to Section 19(b)(2) of the Act,<sup>19</sup> the Commission finds good cause to approve the proposal, as modified by Amendment No. 1, prior to the thirtieth day after the publication of the proposal in the Federal Register. The Commission notes that the Exchange is codifying its current procedures with respect to the initial public offering price per share requirement and clarifies that the proposal would change the price per share requirement for currently listed issuers by requiring them to meet this price requirement for a specified period of time. The Commission believes that Amendment No. 1 clarifies the proposed rule language and does not introduce any new regulatory issues. For these reasons, the Commission finds good cause for approving the proposal, as modified by Amendment No. 1, on an accelerated basis.

V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 1, including whether the amendment 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-NYSEArca-2007-69 on the subject line.

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<sup>19</sup> 15 U.S.C. 78s(b)(2).

Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEArca-2007-69. 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-NYSEArca-2007-69 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

VI. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the Act and the rules and regulations

thereunder applicable to a national securities exchange, and, in particular, with Section 6(b)(5) of the Act.<sup>20</sup>

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>21</sup> that the proposed rule change (SR-NYSEArca-2007-69), as modified by Amendment No. 1, be, and hereby is, approved on an accelerated basis, as a pilot until November 30, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>22</sup>

Nancy M. Morris  
Secretary

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<sup>20</sup> The approval order for the Pilot Program noted that the staff of the Division of Market Regulation would not recommend enforcement action to the Commission under Rules 15g-2 through 15g-9 under the Act if broker-dealers treated equity securities listed pursuant to the initial and continued listing standards set forth in amended NYSE Arca Equities Rule 5 as meeting the exclusion from the definition of penny stock contained in Rule 3a51-1 under the Act pursuant to paragraph (a)(2) thereof. See supra note 3. Because the alternative listing standard contained in Rule 5.2(c)(3)(ii)(b) of the Pilot Program, which necessitated no-action relief, is not included in the amended listing standards, no-action relief would not be required for the new standards being adopted in this order.

<sup>21</sup> 15 U.S.C. 78s(b)(2).

<sup>22</sup> 17 CFR 200.30-3(a)(12).