

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-58499; File No. SR-NYSE-2008-58)

September 9, 2008

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change to Make Permanent a Pilot Program Under Which the Exchange Excludes From its Earnings Standard Gains or Losses from Extinguishment of Debt Prior to Maturity

I. Introduction

On July 22, 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”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to enable the Exchange to adjust the earnings of companies for purposes of the Exchange’s pre-tax earnings standard by excluding gains or losses recognized in connection with the extinguishment of debt prior to its maturity. The proposed rule change was published for comment in the Federal Register on August 5, 2008.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

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 for purposes of its pre-tax earnings standard by excluding gains or losses recognized in connection with the extinguishment of debt prior to its maturity. The adjustment would relate only to gains or losses incurred in the three-year period under examination for purposes of the

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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> See Securities Exchange Act Release No. 58254 (July 30, 2008), 73 FR 45511.

earnings standard. The proposed amendment was originally implemented for a six-month period as a Pilot Program.<sup>4</sup> The Pilot Program expired and was subsequently renewed for an additional three months, expiring on September 2, 2008.<sup>5</sup>

Prior to the promulgation of Statement of Financial Accounting Standards No. 145 (“SFAS No. 145”) in 2002, Financial Accounting Standards Board Statement No. 4 (“FASB No. 4”) required that gains and losses from the extinguishment of debt prior to its maturity that were included in the determination of net income be aggregated and, if material, classified as an extraordinary item, net of related income tax effect. SFAS No. 145 rescinded FASB No. 4 and, as a result, gains or losses in connection with the extinguishment of debt prior to its maturity are now generally included in the calculation of operating earnings under generally accepted accounting principles (“GAAP”). As a result, the Exchange has stated that some companies that would not otherwise be qualified to list may qualify as a result of the inclusion in pre-tax income of gains from the extinguishment of debt prior to its maturity. In addition, according to the Exchange, some prospective listed companies whose operating earnings would have met the requirements of the Exchange’s pre-tax earnings test prior to 2002 are now not qualified to list as they are required to include losses from the extinguishment of debt prior to its maturity in pre-tax income. In its proposal, the Exchange stated that in its experience, these gains and losses are primarily noncash in nature and that the gains generally represent the accelerated accrual of original issue discount, while the losses generally represent the remaining unamortized portion of costs incurred at the time of initial borrowing.

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<sup>4</sup> See Exchange Act Release No. 56195 (August 2, 2007), 72 FR 44904 (August 9, 2007) (SR-NYSE-2007-71).

The Exchange believes that it is appropriate to return to its pre-2002 approach of excluding gains and losses from debt extinguishment from pre-tax earnings as calculated for purposes of its earnings standard. In its proposal, the Exchange stated that the purpose of the earnings standard is to determine the suitability for listing of companies on a forward-looking basis in light of a sustained demonstration of strong earnings. The Exchange does not believe that it is relevant to include in pre-tax earnings gains and losses from the extinguishment of debt prior to its maturity that are principally nonrecurring in nature. Additionally, the Exchange believes that the analyst community routinely excludes these gains and losses from their analyses in making recommendations as to the desirability of investing in companies' publicly-traded equity securities. The Exchange believes that adjusting company earnings for gains and losses from the extinguishment of debt prior to its maturity 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.

The Exchange has stated that, as with all companies listed on the Exchange, the Financial Compliance staff of NYSE Regulation, Inc. will monitor on an ongoing basis the compliance with the Exchange's continued listing standards of any companies listed in reliance upon the

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<sup>5</sup> See Exchange Act Release No. 57903 (June 2, 2008), 73 FR 32610 (June 9, 2008) (SR-NYSE-2008-43).

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 the appropriateness of the amendment. 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 securities exchange and, in particular, with Section 6(b)(5) of the Act,<sup>6</sup> 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.<sup>7</sup>

The Commission believes that 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 Manual and is reasonable

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<sup>6</sup> 15 U.S.C. 78f(b)(5).

<sup>7</sup> 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).

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 these changes to the earnings standards will allow the Exchange to adjust the earnings of companies for purposes of satisfying the Exchange's pre-tax earnings standard, by excluding gains or losses recognized in connection with the extinguishment of debt prior to its maturity, 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 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,<sup>8</sup> that the proposed rule change (SR-NYSE-2008-58) be, and hereby is, approved.

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

Florence E. Harmon  
Acting Secretary

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<sup>8</sup> 15 U.S.C. 78s(b)(2).

<sup>9</sup> 17 CFR 200.30-3(a)(12).