

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59217; File No. SR-NYSE-2008-138)

January 8, 2009

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by New York Stock Exchange LLC to Memorialize an Interpretation of the Listed Company Manual Concerning Shareholder Approval Requirements and to Describe a Certain Application of its Audit Committee Rule

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Exchange Act”),² and Rule 19b-4 thereunder,³ notice is hereby given that, on December 22, 2008, New York Stock Exchange LLC (the “NYSE” or the “Exchange”) filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III below, which items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule changes from interested persons.

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

The Exchange proposes to memorialize an interpretation of the Listed Company Manual. The text of the proposed rule change 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.

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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 NYSE 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

On September 7, 2008 the Secretary of the Treasury of the United States and the Director of the FHFA jointly announced that on September 6, 2008, pursuant to authority previously granted by Congress, FNM and FRE were placed into conservatorship with the FHFA, and Treasury entered into a Senior Preferred Stock Purchase Agreement with each company providing for, among other things, the issuance by each company to Treasury of senior preferred stock, and common stock warrants representing an ownership stake of 79.9% in each company.⁴

The issuance of a security convertible into common stock equal to or in excess of 20% of the then outstanding common stock of a listed company generally requires shareholder approval under Section 312.03 of the NYSE Listed Company Manual. The NYSE has for many years taken the position that a listed company which is a debtor-in-possession under the U.S. bankruptcy laws satisfies the stockholder approval that might

⁴ The Commission notes that the terms "FHFA," "FNM," and "FRE" refer to the Federal Housing Finance Agency, Fannie Mae, and Freddie Mac, respectively.

otherwise be required in connection with an issuance of common stock or a security convertible into common stock by obtaining bankruptcy court approval of the issuance of such stock. Such an interpretation is the only practical approach given that in such a circumstance the court, not the stockholders, has the authority to authorize or refuse to authorize the issuance of the security. Consequently, this rule filing codifies the Exchange's longstanding position that a listed company which is a debtor-in-possession satisfies any applicable stockholder approval requirement under Section 312.03 by obtaining bankruptcy court approval of the proposed issuance.

The FHFA has specified that "the powers of the stockholders [of FNM and FRE] are suspended until the conservatorship is terminated."⁵ Based on this, the NYSE has concluded that for purposes of its rules requiring stockholder approval of the issuance of securities, i.e., Sections 312.03 and 303A.08 of the Listed Company Manual, it is appropriate to treat FNM and FRE while they are in conservatorship in the same manner as if they were each a debtor-in-possession under the bankruptcy law. Accordingly, the NYSE takes the position that the requirement of Section 312.03 has been satisfied in connection with the issuance to the Department of the Treasury (the "Treasury") by each of FNM and FRE of the warrants exercisable for common stock.

Following the establishment of the conservatorship, the independent directors serving on the audit committees of the boards of directors of each of the companies left the board. Each of FNM and FRE are currently engaged in obtaining replacement

⁵ See Questions and Answers of Conservatorship, available on the website of the FHFA. (<http://www.ofheo.gov/media/pdf/FHFACONSERVQA.pdf>) Note that FHFA in the same paragraph stated that "Stockholders will continue to retain all rights in the stock's financial worth; as such worth is determined by the market."

directors and arranging the appropriate delegation from FHFA to the boards and the audit committees to allow the audit committees to function. In keeping with its normal procedures under the provisions of Listed Company Manual Section 303A.06, NYSE is allowing the companies an appropriate period of time in which to fill the vacancies on the audit committee. The NYSE was informed that in connection with the quarterly financial reports on Form 10-Q which were filed in November for the companies' third quarter, each company arranged for its staff and independent auditor to make a presentation regarding the quarterly report to appropriate departments of the FHFA that was intended to replicate the kind of review that an audit committee would normally conduct with respect to a company's quarterly financials. The NYSE believes that this action is appropriate in light of the fact that neither company had an audit committee that was able to conduct that review. The Exchange notes that this filing does not seek to interpret Rule 10A-3 under the Sarbanes-Oxley Act. Rather, the Exchange is simply describing its application of the requirements of Section 303A.06 of the Manual to FNM and FRE during the period that they do not have independent audit committees.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)⁶ of the Exchange Act in general and furthers the objectives of Section 6(b)(5) of the Exchange Act⁷ 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

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(5).

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 its proposed interpretations of Sections 312.03 and 303A.06 are reasonable in light of the policies underlying those rules and constitute a suitable application of its rules to this unique and unprecedented situation. In particular, the Exchange notes that (i) it is in the public interest that the issuance of securities to the Treasury should not be subject to shareholder approval in light of the scale of Treasury's provision of capital to the two companies and (ii) the oversight of the companies' financial reporting by FHFA provides a reasonable level of protection to investors while the companies are repopulating their independent audit committees required by Section 303A.06.

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 Exchange Act.

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

The proposed rule change is effective upon filing pursuant to Section 19(b)(3)(A) of the Exchange Act⁸ and paragraph (f)(1) of Rule 19b-4 thereunder⁹ as constituting a

⁸ 17 CFR 240.19b-4(f)(1).

⁹ 17 CFR 240.19b-4(f)(1).

stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing Exchange rule. 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 furtherance of the purposes of the Exchange 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 Exchange 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. Please include File Number SR-NYSE-2008-138 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NYSE-2008-138. 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, on official business days between the hours of 10:00 am and 3:00 pm. Copies of the 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-NYSE-2008-138 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.¹⁰

Florence E. Harmon
Deputy Secretary

¹⁰ 17 CFR 200.30-3(a)(12).