

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58550; File No. SR-NYSE-2008-68)

September 15, 2008

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change to Determine that a Company Meets the Exchange's Market Value Requirements by Relying on a Third-Party Valuation of the Company

I. Introduction

On July 31, 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 allow the Exchange, on a case by case basis, to exercise discretion to list a company whose stock is not previously registered under the Act and that is listing upon effectiveness of a selling shareholder registration statement without a related underwritten offering, by relying on an independent third-party valuation of the company and information regarding trading in a private placement trading market to determine that such a company has met its market value requirements. The proposed rule change was published for comment in the Federal Register on August 11, 2008.³ The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

Section 102.01B of the Exchange's Listed Company Manual ("Manual") currently requires that companies listing on the Exchange in connection with their initial public offering

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 58299 (August 4, 2008), 73 FR 46670.

(“IPO”) or as a result of a spin-off or under the Affiliated Company standard must demonstrate an aggregate market value of publicly-held shares of \$60 million at the time of listing. All other companies must demonstrate a market value of publicly-held shares of \$100 million.⁴ In addition, the Valuation/Revenue with Cash Flow, Pure Valuation/Revenue, and Affiliated Company standards of Section 102.01C require a company to have a global market capitalization of \$500 million, \$750 million, and \$500 million, respectively. Sections 102.01B and 102.01C of the Manual provide that, in connection with a company’s IPO, the Exchange will rely on a written commitment from the underwriter to represent the anticipated value of the company’s offering in order to determine a company’s compliance with these listing standards. In the case of a spin-off, the company may rely on a letter from the parent company’s investment banker or other financial adviser.

The Exchange notes that it has been approached by a number of private companies that would like to list upon the effectiveness of a selling shareholder registration statement. NYSE represents that these private companies typically have sold a significant amount of common stock to qualified institutional buyers in one or more private placements and, as a condition to those sales, have agreed to file a registration statement to facilitate the resale of the privately-placed shares. These companies have not had any prior public market for their common stock and are not contemplating an underwritten offering in connection with their selling shareholder registration statement. As such, the company would not be able to obtain a written representation from an underwriter to determine compliance with the market value requirements,

⁴ Shares held by directors, officers, or their immediate families and other concentrated holding of 10 percent or more are excluded in calculating the number of publicly-held shares.

as a company would in the case of an IPO, and the Exchange cannot rely on trading on any predecessor public market to evaluate the company's market value, as would be possible with a company transferring from another market. Thus, while the company may meet all of the Exchange's other listing criteria, the company would not be able to satisfy NYSE's current market value requirements in Sections 102.01B and 102.01C of the Manual.

The Exchange proposes to amend Sections 102.01B and 102.01C of the Manual to provide that the Exchange will, on a case by case basis, exercise discretion to list a company whose stock is not previously registered under the Exchange Act, where such company is listing, without a related underwritten offering, upon effectiveness of a registration statement registering only the resale of shares sold by the company in earlier private placements. Specifically, the Exchange proposes that, for such companies, the Exchange will have the discretion to determine that the company has met the applicable market value requirements by attributing a market value to the company equal to the lesser of: (i) the value calculated based on an independent third-party valuation of the company ("Valuation"); and (ii) the value calculated based on the most recent trading price of the company's common stock in a trading system for unregistered securities operated by a national securities exchange or a registered broker-dealer ("Private Placement Market").

The proposed rule change further provides that any Valuation used for this purpose must be provided by an entity that has significant experience and demonstrable competence in the provision of such valuations. The Valuation must be of a recent date as of the time of the approval of the company for listing, and the evaluator must have considered, among other factors, the annual financial statements required to be included in the registration statement and

the financial statements for any completed fiscal quarters subsequent to the end of the last year of audited financials included in the registration statement.

The proposed rule change also provides that the Exchange will consider any market factors, or factors particular to the listing applicant, that would cause concern that the value of the company had diminished since the date of the Valuation. In addition, the Exchange will continue to monitor the company and the appropriateness of relying on the Valuation up to the time of listing. In particular, the Exchange will examine the trading price trends for the stock in the Private Placement Market over a period of several months prior to listing and will only rely on a Private Placement Market price if it is consistent with a sustained history over that several month period evidencing a market value in excess of the applicable standard. The Exchange may withdraw its approval of the listing at any time prior to the listing date if it believes that the Valuation no longer accurately reflects the company's likely market value.

Companies listed on the basis of a these new provisions will be required to meet the \$100 million test applied to companies transferring from another market under Section 102.01B, rather than the \$60 million IPO standard. Companies listing under the Valuation/Revenue with Cash Flow standard of Section 102.01C(II)(a) of the Manual and the Affiliated Company standard of Section 102.01C(III) will be required to have a global market capitalization of \$600 million, rather than the usual \$500 million requirement. Companies listing under the Pure Valuation/Revenue standard of Section 102.01C(II)(b) will be required to have \$900 million of global market capitalization, rather than the usual \$750 million requirement.

The Exchange also notes that any company listing in reliance upon this proposed amendment will still be required to meet the IPO distribution requirements of Section 102.01A,

i.e., 400 beneficial holders of round lots of 100 shares and 1,100,000 publicly held shares. The Exchange states that it will rely upon information provided by the company's transfer agent in determining whether the company meets the holder requirement. The Exchange also states that it will be able to determine compliance with the 1,100,000 publicly held shares requirement by reviewing the disclosure in the company's registration statement.

III. Discussion

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) of the Act⁵ and the rules and regulations thereunder. Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act⁶ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, 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, to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers or dealers.⁷

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, among other things, serve as a means for an exchange to screen issuers and to provide listed status only to bona fide companies that have or,

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(5).

in the case of an IPO, will have sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote 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.

The Commission believes that the proposed rule change will provide a means for a narrow category of companies whose stock is not previously registered under the Act and that are listing upon effectiveness of a selling shareholder registration statement, without a related underwritten offering, to list on the Exchange. In particular, for such companies that otherwise meet NYSE's listing standards,⁸ the proposed rule change will allow the Exchange to have the discretion to determine that a company has met the market value requirement by attributing a market value to the company equal to the lesser of the value calculated based on a third-party Valuation and the value calculated based on the most recent trading price in a Private Placement Market. The Commission believes that using the lesser of these values to determine the market value of the company provides a reasonable means of assessing the market value of the company in these special circumstances where a company's stock is not previously registered under the

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).

⁸ Companies listing upon an effective registration statement would have to meet the distribution requirements set forth in Section 102.01A and comply with all applicable NYSE corporate governance requirements.

Act and is listing upon effectiveness of a selling shareholder registration statement, without a related underwritten offering.

The Commission recognizes that each value, by itself, has limitations. As NYSE noted in its proposal, the Valuation is only an estimate of what a company's true market value will be upon commencement of public trading. Further, the most recent trading price in a Private Placement Market may be an imperfect indication as to the value of a security upon listing, in part because the Private Placement Markets generally do not have the depth and liquidity and price discovery mechanisms found on public trading markets. However, recognizing these limitations, the Commission agrees with the Exchange that consideration of both of these values should provide the Exchange with an estimation of a company's market value that supports listing the company on the Exchange. In addition, the proposed rule is designed to ensure that the Valuation is reliable by providing that the Valuation must be provided by an entity that has significant experience and demonstrable competence in providing valuations of companies, and must be of a recent date as of the time of the approval of the company for listing. Further, by assuming a market value equal to the lesser of the Valuation and a value based on the most recent Private Placement Market trading, the Exchange will be using the more conservative estimate of a company's market value.

In addition, the Commission notes that companies listing under this alternative provision will be required to meet higher market value standards. Specifically, companies will have to meet the \$100 million transfer market value requirement, rather than the \$60 million IPO requirement of Section 102.01B. Further, companies will be required to meet global market

capitalization standards in Section 102.01C of the Manual that are 20% higher than the normal standards.⁹

The Commission notes that it expects the vast majority of companies to continue to list in connection with a firm commitment underwritten IPO, upon transfer from another market, or pursuant to a spin-off, and that this proposed alternative standard will be used by the Exchange at its discretion. In particular, in accordance with the terms of the proposed rule, the Exchange will apply this standard only for the very narrow category of companies that are seeking to list their common equity securities on the Exchange without an underwritten offering at the time of effectiveness of a registration statement registering only the resale of shares sold by the company in earlier private placements. Further, the Commission expects the Exchange to utilize its discretion only after thorough consideration and evaluation of the specific company and all relevant factors. Specifically, the proposed rule change requires the Exchange to consider the appropriateness of relying on Private Placement Market trading in light of the price trends for the stock over a period of several months and only rely on a Private Placement Market price if consistent with a sustained history evidencing a market value in excess of the listing requirement. In relying on such Private Placement Market, the Commission expects the NYSE to consider the trading characteristics of the stock, including its trading volume and price volatility over a sustained period of time. In addition, in relying on the Valuation, the Exchange must consider any market factors or factors particular to the listing applicant that would cause concern that the value of the company had diminished since the date of Valuation and continue to monitor the company and the appropriateness of relying on the Valuation up until the time of listing. The Commission expects that where these factors indicate that the value calculated may

⁹ See Section II, Description of the Proposal, supra.

not be an accurate estimation of a company's market value, the Exchange will use its discretion to determine not to list such company pursuant to the proposed provisions. In general, the Commission expects that the Exchange will deny listing to any company seeking to list pursuant to the proposed rule change if the Exchange determines that the listing of any such company is not in the interests of the Exchange or the public interest.

The Commission also notes that companies listing pursuant to the new proposed provision will still be required to meet the IPO distribution requirements of Section 102.01A of the Manual, *i.e.*, that the company have 400 beneficial holders of round lots of 100 shares and 1,100,000 publicly held shares. The Commission believes that these existing provisions will continue to help ensure that the company has the requisite liquidity for listing on the Exchange.¹⁰ The Exchange's reliance on the transfer agent for assurance that the holder requirement is met, and on the disclosure in the company's registration statement for assurance that the publicly held shares requirement is met, will ensure that these important liquidity requirements are verified before a company may qualify for listing.

For the reasons set forth above, the Commission finds that the proposed rule change is consistent with the Act.

¹⁰ See also note 8 supra. The Commission notes that once listed, the company would have to comply with the continued listing standards like other companies. The NYSE has not proposed any changes to the continued listing standards for companies listing under the provisions approved herein. See Section 802 of the Manual.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹¹ that the proposed rule change (SR-NYSE-2008-68) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Florence E. Harmon
Acting Secretary

¹¹ 15 U.S.C. 78s(b)(2).

¹² 17 CFR 200.30-3(a)(12).