

enough to qualify companies on the NYSE that previously would not qualify.<sup>14</sup> However, as described above, the quantitative requirements of the new Assets and Equity Test exceed, and are more rigorous than, an existing Amex listing standard and meet or exceed the penny stock requirements in Exchange Act Rule 3a51-1(a)(2). Further, companies listing under the new Assets and Equity Test would still have to meet all the distribution, market value, and price requirements under Sections 102.01A and Section 102.01B of the Manual, and comply with all the corporate governance requirements as any other listed company.<sup>15</sup> The Commission believes that these requirements, taken together, will help to ensure that the company has the requisite liquidity for listing on the Exchange and the maintenance of fair and orderly markets, consistent with the Act. The Commission also finds that the continued listing standards are appropriate and help ensure that only those companies with adequate depth and liquidity remain listed on the Exchange. We note that these continued listing standards are the same as for those companies that currently qualify to list under the Earnings Test.

Finally, the Commission is approving the adoption of procedures similar to those previously approved by the Commission to qualify for listing upon a selling shareholders registration rather than an underwritten offering for the same reasons noted in the original approval order.<sup>16</sup> As discussed above, the Commission had previously permitted, under limited circumstances, the use of third party valuations to meet applicable market capitalization requirements to qualify for listing under the various sections of Section 102.01C,<sup>17</sup> and the Exchange is proposing to extend these identical requirements to the newly adopted Assets and Earnings Test. For third party valuations using the Assets and Earnings Test, the Exchange has proposed to increase the market capitalization requirement to \$180,000,000 million, rather than the \$150,000,000 currently proposed for other companies. As noted above, this increase is consistent with the 20% increase adopted for using a third party valuation for the other standards in

102.01C.<sup>18</sup> The Commission believes the provisions allowing the use of third party valuations for companies listing using the new Assets and Equity Test raises no new regulatory issues that were not discussed in the original approval order.<sup>19</sup>

In approving the new Assets and Equity Test, 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.

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

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>20</sup> that the proposed rule change (SR-NYSE-2008-98), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>21</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58931; File No. SR-NYSE-2008-97]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Order Granting Approval of Proposed Rule Change, as Modified by Amendment No. 1, To Adopt an Initial Listing Standard Applicable Only to Companies Transferring From NYSE Arca

November 12, 2008.

#### I. Introduction

On October 1, 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 amending Section 102.01C of the Exchange's Listed Company Manual ("Manual") to adopt an initial listing standard that will be applicable only to companies that are listed on NYSE Arca, Inc. ("NYSE Arca") as of October 1, 2008 and that transfer to the Exchange on or before March 31, 2009. On October 10, 2008, the proposed rule change was published for comment in the **Federal Register**.<sup>3</sup> On November 10, 2008, NYSE filed Amendment No. 1 to the proposed rule change.<sup>4</sup> The Commission received no comments on the proposed rule change. This order approves the proposed rule change, as modified by Amendment No. 1.

#### II. Description of the Proposal

The Exchange has proposed to amend Section 102.01C of the Manual to adopt an initial listing standard that will be applicable only to companies that are listed on NYSE Arca as of October 1, 2008 and that transfer to the Exchange on or before March 31, 2009. The Exchange also has proposed to apply the continued listing standard applicable under Section 802.01B to companies listed under the Earnings Test<sup>5</sup> to companies listed under the proposed new initial listing standard.

NYSE Euronext has three equity listing markets: the NYSE; NYSE Arca; and NYSE Alternext US.<sup>6</sup> NYSE Euronext management made a business decision to move forward with only two operating company equity listing markets and, consequently, decided to discontinue the operating company equity listing program on NYSE Arca. As part of this transition, the Exchange wants to offer the opportunity for all suitable NYSE Arca companies to list on the NYSE. NYSE notes that NYSE Arca listed companies wishing to transfer to the NYSE will be required to submit a listing application and be subject to the same listing application process as all

<sup>14</sup> Section 102.06 of the Manual, however, does allow the listing of SPACs, which do not have a prior operating history. As noted above, SPACs cannot qualify to list under the new Assets and Equity Test.

<sup>15</sup> See *supra* text accompanying note 5.

<sup>16</sup> See *supra* note 7.

<sup>17</sup> See *supra* note 7, 73 FR at 54443.

<sup>18</sup> The Commission notes that in relying on the third party 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 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.

<sup>19</sup> See *supra* note 7.

<sup>20</sup> 15 U.S.C. 78s(b)(2).

<sup>21</sup> 17 CFR 200.30-3(a)(12).

<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. 58741 (October 6, 2008), 73 FR 60378.

<sup>4</sup> Amendment No. 1 shows how Section 802.01B would be effected by changes proposed in SR-NYSE-2008-98. Because Amendment No. 1 is technical in nature, the Commission is not required to publish the amendment for comment.

<sup>5</sup> See Manual Section 802.01B(1).

<sup>6</sup> NYSE Alternext US LLC ("Alternext") is the successor to the Amex, after being acquired by the NYSE. See Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR-Amex-2008-63 and SR-NYSE-2008-60).

other applicant companies. In its filing, the NYSE noted that not all NYSE Arca companies qualify to list under any of the existing NYSE initial listing standards.<sup>7</sup> In order to list these companies, the Exchange proposes to adopt a special listing standard applicable only to those companies listed on NYSE Arca on the date of initial submission of this filing, that transfer their listing to NYSE on or before March 31, 2009.

Companies transferring from NYSE Arca under the proposed standard ("NYSE Arca Transfer Standard") would be required to have \$75 million in total market capitalization for 90 consecutive days prior to applying for listing and \$20 million in market value of publicly held shares (but not the \$100 million market value of publicly held shares requirement of Section 102.01B). Such companies would have to meet the same holder, publicly held share and trading volume requirements as set forth in Section 102.01A as companies that list under the existing initial listing standards and the \$4 stock price requirement of Section 102.01B.<sup>8</sup> Upon listing, the NYSE is also proposing to apply the current continued listing standards set forth in Section 802.01B for companies listing under the Exchange's Earning Test to companies transferring from NYSE Arca under the newly proposed standard in Section 102.01C. Accordingly, Arca transfers will be considered below compliance if their average global market capitalization over a consecutive 30 trading-day period is less than \$75,000,000 and, at the same time, total stockholders' equity is less than \$75,000,000.<sup>9</sup> In addition, other requirements of Section 802, such as the requirement that all listed companies maintain a minimum of \$25 million in global market capitalization<sup>10</sup> and that all listed companies maintain a \$1.00 minimum stock price,<sup>11</sup> would also apply to NYSE Arca transfers. The Exchange has also represented that the holder, trading volume and publicly held share requirements of Section 802.01A along with the requirements of Sections 802.01D ("Other Criteria") and 802.01E ("SEC Annual Report Timely Filing Criteria") would also apply.

In its filing, the Exchange stated that it believes it is appropriate to adopt a

short-term listing standard applicable only to NYSE Arca companies. In support of this, the Exchange noted that these companies listed on NYSE Arca on the assumption that it would exist as a permanent listing market and it is solely because of a business decision made by NYSE Euronext that these companies will need to transfer their listings. Further, NYSE noted that many of these companies listed on NYSE Arca because of its association with the NYSE and in the expectation that they would ultimately switch their listing to the NYSE when they met the NYSE's listing standards. As such, the Exchange believes that fairness dictates that it should seek to list these companies on the NYSE where, in its view, such a listing is appropriate and in the interests of the investing public.

In its filing, the NYSE stated that it will only list companies under the NYSE Arca Transfer Standard if it believes that those companies are suitable for trading on the NYSE. NYSE also noted that all of the companies that would be listed under the NYSE Arca Transfer Standard will far exceed the NYSE's continued listing standards at the time of initial listing and will be in compliance with NYSE Arca continued listing standards. In addition, the same staff in NYSE Regulation's Financial Compliance and Corporate Governance groups is responsible for ongoing compliance reviews of both NYSE and NYSE Arca companies. As such, according to the NYSE, the NYSE Regulation staff involved in making initial listing determinations on the NYSE is extremely familiar with the companies currently listed on NYSE Arca and is uniquely positioned to determine whether those companies are suitable for listing on the NYSE. The Exchange believes its depth of knowledge with respect to NYSE Arca companies makes it appropriate to list them on this one time basis under a less onerous standard than the Exchange applies to other listing applicants. As noted above, companies listing under the new NYSE Arca Transfer Standard will be subject to the standard listing application and review process applicable to all listing applicants and, if Exchange staff determine that an NYSE Arca company is not suitable for listing on the NYSE—notwithstanding its qualification under the numerical requirements of the NYSE Arca Transfer Standard—the Exchange will not list that company.

In its proposal, NYSE represented that the requirements of the NYSE Arca Transfer Standard will exceed those established by the Exchange Act Rule 3a51-1(a)(2) (the "Penny Stock

Rule").<sup>12</sup> The proposed standard's requirement that an applicant have \$75 million in global market capitalization for 90 days prior to transferring from NYSE Arca exceeds the \$50 million market capitalization for 90 days prior to listing option in the Penny Stock Rule, as well as the \$50 million market capitalization requirement of Rule 3a51-1(a)(2)(i)(B). In addition, companies listing under the NYSE Arca Transfer Standard will be required at the time of transfer to have a \$4 stock price, 400 round lot holders and 1.1 million publicly held shares, thereby meeting or exceeding all of the Penny Stock Rule's remaining requirements.

Companies listing under the NYSE Arca Transfer Standard will have to comply with all other applicable Exchange listing rules, including the Exchange's corporate governance requirements. As with all other listing applicants, the Exchange reserves the right to deny listing to any company seeking to list under the NYSE Arca Transfer Standard if the Exchange determines that the listing of any such company is not in the interests of the Exchange or the public interest.

### 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)(5) of the Act,<sup>13</sup> 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 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, and to not permit unfair discrimination between customers, issuers, brokers, or dealers.<sup>14</sup>

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, including those applicable to companies

<sup>7</sup> See Manual Section 102.

<sup>8</sup> The total market capitalization and market value of publicly held shares requirements of the NYSE Arca Transfer Standard equal those of Amex Initial Listing Standard 4 (Amex Company Guide Section 101(d)).

<sup>9</sup> See Manual Section 802.01B(I).

<sup>10</sup> See Manual Section 802.01B.

<sup>11</sup> See Manual Section 802.01C.

<sup>12</sup> 17 CFR 240.3a51-1(a)(2).

<sup>13</sup> 15 U.S.C. 78f(b)(5).

<sup>14</sup> In approving this rule, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

transferring from another exchange, serve as a means for an exchange to screen issuers and to provide listed status only to bona fide companies that 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 common stock is currently listed on NYSE Arca, to list on the Exchange. In particular, for companies that otherwise meet NYSE's distribution, market value, and price listing requirements,<sup>15</sup> the proposed rule change will allow the Exchange the discretion to list companies that meet the proposed standards. In addition, 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.

In accordance with the terms of the proposed rule, the Exchange will apply this standard only for the very narrow category of companies, listed on NYSE Arca as of October 1, 2008, that transfer to the Exchange on or before March 31, 2009. Since NYSE Regulation's Financial Compliance and Corporate Governance groups are responsible for ongoing compliance reviews of both NYSE and NYSE Arca companies, the Commission believes the Exchange should be sufficiently familiar with companies seeking to transfer to be able to determine if any such company is an appropriate transfer candidate. While the new standards are lower than those previously applied to new NYSE listings, the Commission believes that the new criteria, coupled with the

existing applicable listing requirements in Sections 102.01(A) and (B),<sup>16</sup> should help to ensure a minimum level of depth and liquidity to maintain fair and orderly markets.

In approving the proposal, the Commission recognizes that the new standard is applicable only to a small segment of transfers from a single market for a limited time. The Commission believes that this is reasonable and consistent with the Act given the business plans of the Exchange, but more importantly the compliance expertise of NYSE staff in evaluating the potential NYSE Arca transfers. The Commission expects the NYSE to only list those NYSE Arca transfers which they believe, through their past expertise reviewing these companies, are suitable for trading on the NYSE and the maintenance of fair and orderly markets.

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

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>17</sup> that the proposed rule change (SR-NYSE-2008-97), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58933; File No. SR-NYSEALTR-2008-05]

#### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Alternext US LLC To Extend Its Temporary Program Relating to Section 31-Related Funds

November 12, 2008.

Pursuant to Section 19(b)(1) <sup>1</sup> of the Securities Exchange Act of 1934 (the "Act") <sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on November 7, 2008, NYSE Alternext US LLC

("NYSE Alternext" or the "Exchange") filed with the Securities and Exchange Commission the proposed rule changes as described in Items I and II 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 NYSE Alternext, formerly known as the American Stock Exchange LLC ("Amex"), proposes to extend until January 13, 2009 a temporary program, which allows member firms to voluntarily submit funds previously accumulated by the member firms pursuant to Rule 393 and not forwarded to be subsequently used by the Exchange to satisfy its obligation to remit Section 31 fees to the Commission.

The text of the proposed rule change is available on the Exchange's Web site at [www.nyse.com](http://www.nyse.com), at the Exchange's principal office, 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. NYSE Alternext 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

Pursuant to Section 31 of the Act <sup>4</sup> and Commission Rule 31,<sup>5</sup> NYSE Alternext US and other national securities exchanges are required to pay a transaction fee to the Commission that is designed to recover the costs related to the government's supervision and regulation of the securities markets and securities professionals. To offset this obligation, NYSE Alternext US assesses its clearing and self-clearing members a regulatory fee in accordance with Rule 393, which mirrors Section 31 in both

<sup>15</sup> Companies listing under this standard would still have to meet all the requirements set forth in Section 102.01A and the price listing requirement in Section 102.01B. Those sections include distribution, market value and price requirements. The Commission believes that these requirements will help ensure that the company has requisite liquidity for listing on the Exchange. Companies would also have to comply with all applicable NYSE corporate governance requirements.

<sup>16</sup> Only the price requirement in 102.01B would apply to NYSE Arca transfers. See *supra* note 8 and accompanying text.

<sup>17</sup> 15 U.S.C. 78s(b)(2).

<sup>18</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> 15 U.S.C. 78ee.

<sup>5</sup> 17 CFR 240.31.