

SECURITIES AND EXCHANGE COMMISSION
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May 15, 2012

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Sections 102.01C and 103.01B of the Exchange's Listed Company Manual to Permit the Listing of Emerging Growth Companies on the Basis of Two Years of Reported Financial Data

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the "Act")² and Rule 19b-4 thereunder,³ notice is hereby given that, on May 4, 2012, New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend Sections 102.01C and 103.01B of the Exchange's Listed Company Manual (the "Manual") to permit the listing of companies on the basis of two years of reported financial data as permitted under the JOBS Act.⁴ The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and www.nyse.com.

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ The Commission notes that the JOBS Act permits companies that meet the definition of an "emerging growth company" to include two years of audited financial data in their registration statement rather than the normally required three years and does not specifically address exchange listings.

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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On April 5, 2012, President Obama signed into law the Jumpstart Our Business Startups Act (the “JOBS Act”),⁵ which amends the Securities Act of 1933 (“Securities Act”) and the Securities Exchange Act of 1934 (“Exchange Act”). Among other things, the JOBS Act amends the Securities Act by adding Section 7(a)(2) and amends Section 13(a) of the Exchange Act. These amendments provide that a company which qualifies as an emerging growth company (“EGC”), as defined in Section 2(a)(19) of the Securities Act and Section 3(a)(80) of the Exchange Act,⁶ may choose to include only two years of audited financial data in the registration statement used in connection with the “first sale of common equity securities of the issuer pursuant to an effective registration statement under the Securities Act of 1933” (the date of such first sale is defined in Section 101(c) of the JOBS Act as the company’s “initial public offering date”), rather than the three years of audited financial data that had previously been required. In addition, for as long as a company remains an EGC, it is not required to file selected

⁵ Public Law No.112-106

⁶ An EGC is defined as an issuer that had total annual gross revenues of less than \$1 billion during its most recently completed fiscal year.

financial data for any period prior to the earliest period for which it had included audited financial statements in its initial public offering registration statement in (i) any subsequent registration statement filed under the Securities Act or (ii) any Exchange Act registration statement. An issuer that is an EGC will continue to be considered an EGC until the earliest of: (i) the last day of the fiscal year during which it had total annual gross revenues of at least \$1 billion; (ii) the last day of the fiscal year following the fifth anniversary of its initial public offering date; (iii) the date on which it has, during the previous three-year period, issued more than \$1 billion in non-convertible debt; or (iv) the date on which it is considered to be a “large accelerated filer” under the Exchange Act.

Certain of the NYSE’s financial initial listing standards set forth in Sections 102.01C and 103.01B of the Manual require listing applicants to meet the applicable financial criteria over a period of three fiscal years. As the staff of NYSE Regulation, Inc. bases its determination as to a company’s compliance with the financial initial listing standards only on publicly available audited financial data, an EGC which availed itself of the right to file only two years of audited financial data as part of its initial public offering registration statement or subsequent registration statements would be unable to qualify for listing under those particular financial listing standards. The NYSE proposes to amend the initial financial listing standards in Sections 102.01C and 103.01B to permit an EGC to meet the applicable standard on the basis of the two years of audited financial data actually reported, rather than the three years of financial data that would otherwise be required. The proposed amendment would only be applicable to EGCs that actually avail themselves of their ability to report only two years of audited financial information. Under the proposed amendments, EGCs would still be required to meet the same aggregate financial requirements, but would be required to do so over a two-year period rather

than a three-year period, if they have availed themselves of the JOBS Act provision allowing EGCs to file only two years of audited financial statements. The Exchange notes that this approach is similar to that taken by Nasdaq with respect to the initial listing standards for its Nasdaq Global Select Market in Nasdaq Marketplace Rules 5310(g) and (h) and that the proposed amended listing standards would not establish lower initial listing requirements than all other national securities exchanges, as the amended standards would still be significantly more stringent than those applied by the Nasdaq Capital Market.

As a result of the changes to the financial reporting requirements applicable to EGCs, the Exchange has decided to amend certain of its initial listing standards to facilitate the listing of EGCs that avail themselves of the ability to report only two years of audited financial data. There are two separate financial listing standards in Section 102.01C which the NYSE proposes to amend, the Domestic Earnings Test and the Domestic Valuation/Revenue with Cash Flow Test. In addition, there are two separate financial listing standards in Section 103.01B which the NYSE proposes to amend, the International Earnings Test and the International Valuation/Revenue with Cash Flow Test.⁷

The Domestic Earnings Test requires that an applicant's earnings must total (x) at least \$10 million in the aggregate in the three most recent fiscal years together with a minimum of \$2 million in the two most recent years and positive amounts in all three years or (y) at least \$12 million in aggregate in the last three years with a minimum of \$5 million in the most recent fiscal year and a minimum of \$2 million in the next most recent fiscal year. The proposed amendment to the Domestic Earnings Test applicable to EGCs which elect to report only two years of audited financial data would require that the EGC's earnings must total at least \$10 million in the

⁷ Foreign companies are also permitted to list under the initial listing standards in Section 102.01B applicable to domestic companies.

aggregate in the two most recent fiscal years together with a minimum of \$2 million in each of the two years.

Under the Domestic Valuation/Revenue with Cash Flow Test, the applicant must have (1) at least \$500 million in global market capitalization; (2) at least \$100 million in revenues during the most recent twelve month period; and (3) an aggregate of at least \$25 million in cash flows for the last three fiscal years with positive amounts in all three years. Under the proposed amended Domestic Valuation/Revenue with Cash Flow Test applicable to EGCs that have availed themselves of the JOBS Act provision allowing EGCs to file only two years of audited financial statements, the market capitalization and revenue requirements in (1) and (2) would remain unchanged, but the cash flow requirement in (3) would be amended to require an aggregate of at least \$25 million in cash flows for the two most recent fiscal years with positive amounts in both years.

The International Earnings Test requires that an applicant's earnings must total at least \$100 million in the aggregate in the three most recent fiscal years together with a minimum of \$25 million in the two most recent years. The proposed amendment to the International Earnings Test applicable to EGCs which report only two years of audited financial data would require that the EGC's earnings must total at least \$100 million in the aggregate in the two most recent fiscal years together with a minimum of \$25 million in each of the two years.

Under the International Valuation/Revenue with Cash Flow Test, the applicant must have (1) at least \$500 million in global market capitalization; (2) at least \$100 million in revenues during the most recent twelve month period; and (3) an aggregate of at least \$100 million in cash flows for the last three fiscal years with a minimum of \$25 million in each of the two most recent fiscal years. Under the proposed amended International Valuation/Revenue with Cash Flow Test

applicable to EGCs that have availed themselves of the JOBS Act provision allowing EGCs to file only two years of audited financial statements, the market capitalization and revenue requirements in (1) and (2) would remain unchanged, but the cash flow requirement in (3) would be amended to require an aggregate of at least \$100 million in cash flows for the two most recent two fiscal years with a minimum of \$25 million in each of the two years.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)⁸ of the Exchange Act in general, and furthers the objectives of Section 6(b)(5) of the Exchange Act,⁹ 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 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 that the proposed amendments are consistent with the protection of investors and the public interest because: (i) the financial requirements for initial listing under the proposed amendments would be the same as those under the Exchange's existing standards, except that companies would need to meet the aggregate financial requirements over a two-year rather than a three-year period; (ii) the proposed amended listing standards are similar to listing standards already applied by the Nasdaq Global Select Market; and (iii) the proposed amended listing standards would not establish lower initial listing requirements than all other national securities exchanges, as the amended standards would still be significantly more stringent than those applied by the Nasdaq Capital Market. In addition, the Exchange notes that the proposed amendments would facilitate the listing of EGCs

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(5).

by the Exchange on the basis of two years of audited financial data, which is the level of financial disclosure permissible for an EGC under the JOBS Act.

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 Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act¹⁰ and Rule 19b-4(f)(6) thereunder.¹¹ Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.¹²

A proposed rule change filed under Rule 19b-4(f)(6)¹³ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule

¹⁰ 15 U.S.C. 78s(b)(3)(A)(iii).

¹¹ 17 CFR 240.19b-4(f)(6).

¹² Id. In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

¹³ 17 CFR 240.19b-4(f)(6).

19b4(f)(6)(iii),¹⁴ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest and, therefore, designates the proposal operative upon filing.¹⁵ The Commission notes that the proposed amendments are similar to rules currently in effect for the Nasdaq Global Select Market and therefore do not raise any novel regulatory issues and would allow the Exchange to list such companies immediately. Furthermore, the Commission notes that the amended listing standards are higher than the initial listing requirements of other national securities exchanges.¹⁶ Finally, the Commission notes that although companies will be allowed to meet certain financial listing standards over a two-year period as opposed to a three-year period as currently required, the aggregate dollar amounts of the financial requirements are remaining the same. Based on the above, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such

¹⁴ 17 CFR 240.19b-4(f)(6)(iii).

¹⁵ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁶ See e.g. NASDAQ Stock Market Rules 5000 Series (detailing listing requirements for the NASDAQ Global Market and NASDAQ Capital Market) and NYSE Amex LLC Company Guide Section 101.

action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the 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 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-2012-12 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-2012-12. 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 website (<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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m.

and 3:00 p.m. 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-2012-12 and should be submitted on or before [insert date 21 days after publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁷

Kevin M. O'Neill
Deputy Secretary

¹⁷ 17 CFR 200.30-3(a)(12).