

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. Copies of such 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-CBOE-2006-46 and should be submitted on or before June 14, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

Nancy M. Morris,

Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-53825; File No. SR-NYSE-2006-38]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Exchange's Financial Listing Criteria

May 17, 2006.

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> notice is hereby given that on May 16, 2006, the New York Stock Exchange LLC ("NYSE" or "Exchange"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. NYSE has filed this proposal pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. 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 NYSE proposes to amend its domestic financial listing standards for companies proposing to list on the Exchange contained in Section 102.01C of the Exchange's Listed Company Manual (the "Manual") to allow domestic companies to qualify for listing, under certain limited circumstances, on the basis of their earnings, cash flows or revenues, as applicable, in the most recent completed nine-month period. However the Exchange must conclude that the company can reasonably be expected to qualify under the regular standard upon completion of its then current fiscal year.

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.

### 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 Exchange 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 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

NYSE proposes to amend its domestic financial listing standards for companies proposing to list on the Exchange contained in Section 102.01C of the Exchange's Listed Company Manual (the "Manual") to allow companies seeking to list under the Exchange's domestic standards to qualify for listing, under certain limited circumstances, on the basis of their earnings, cash flows or revenues, as applicable, in the most recent completed nine-month period.

Section 102.01C of the Manual allows companies to list under the Exchange's domestic listing criteria by meeting one of the following three standards:

- *Earnings Test* (1) Pre-tax earnings from continuing operations and after minority interest, amortization and

equity in the earnings or losses of investees, adjusted for certain specified items, must total at least \$10,000,000 in the aggregate for the last three fiscal years together with a minimum of \$2,000,000 in each of the two most recent fiscal years, and positive amounts in all three years.

- *Valuation/Revenue with Cash Flow Test*—

- (1) At least \$500,000,000 in global market capitalization,

- (2) At least \$100,000,000 in revenues during the most recent 12 month period, and

- (3) At least \$25,000,000 aggregate cash flows for the last three fiscal years with positive amounts in all three years, subject to certain adjustments.

- *Pure Valuation/Revenue Test*—

- (1) At least \$750,000,000 in global market capitalization, and

- (2) At least \$75,000,000 in revenues during the most recent fiscal year.

Over the years, the Exchange states that it has been unable to list a number of financially healthy companies because those companies had insufficient earnings, cash flows, or revenues in the earliest fiscal year required by the applicable standard. In many cases, such a company is very different at the time of its listing application from the company that had existed in such earlier period. Such company may have undergone a recapitalization transaction in which it substantially reduced its debt burden. Alternatively, the company may have undergone a significant change in its operations, including, but not limited to:

- A divestiture or discontinuation of a loss-making business line,

- A change in management,

- An acquisition or series of acquisitions,

- Economies of scale and increased revenues as the company emerges from its start-up phase,

- The effect of foreign currency valuation,

- Entering a new geographic region or market or exiting a geographic region or market, or

- The launch of a new product or service.

Therefore, the Exchange proposes to amend Section 102.01C(I) and (II) (the "Earnings" and "Valuation/Revenue with Cash Flow" Tests) to enable it to qualify a company based on the most recent completed nine months in lieu of the earliest fiscal year otherwise required by the applicable standard, in circumstances where a recapitalization transaction or significant change in operations has rendered irrelevant the financial position of the company in

<sup>12</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> 15 U.S.C. 78s(b)(3)(A).

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

that third year back and the company would meet the requirements of Section 102.01C(I) or (II) based on the most recent nine months and the two immediately preceding fiscal years. For the same reasons, the Exchange proposes to amend Section 102.01C(III) (the "Pure Valuation/Revenue" Test) on the basis of the most recent nine months, instead of a full fiscal year. In such cases, the Exchange must conclude that the Company can reasonably be expected to qualify under the regular standard upon completion of its then current fiscal year.

The Exchange believes that investors are not protected less by the qualification for listing of companies that can meet the Earnings or Valuation/Revenue with Cash Flow Tests on the basis of 33 months of financial history, including their last two completed fiscal quarters, than by the qualification of companies based on an older three-year period, particularly if a recapitalization or significant change in operations has materially changed the nature of the company. Similarly, the Exchange believes that investors are not protected less by the qualification for listing of companies that can meet the Pure Valuation/Revenue Test on the basis of the most recently completed nine months period, rather than an older twelve month period. The Exchange believes that any company it would qualify for listing on the basis of the proposed amendment would meet the existing standards of Section 102.01C with the passage of time upon completion of its next fiscal year.<sup>5</sup>

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)<sup>6</sup> of the Act, in general, and Section 6(b)(5)<sup>7</sup> of the Act, in particular, in that it is 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, in general, to protect investors and the public interest.

### *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*

Written comments were neither solicited nor received.

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

Because the proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days after the date of the filing, 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<sup>8</sup> and Rule 19b-4(f)(6) thereunder.<sup>9</sup>

The Exchange has asked the Commission to waive the 30-day operative delay specified in Rule 19b-4(f)(6)(iii).<sup>10</sup> The Commission hereby grants that request because the Commission believes that waiving the 30-day operative period is consistent with the protection of investors and public interest.<sup>11</sup> In its proposal to qualify a company, in the case of the Earnings Test and Valuation/Revenue with Cash Flow Test, on the basis of 33 months of financial history and, in the case of the Pure Valuation/Revenue Test, on the basis of nine months of financial history, the Exchange has stated its belief that any company that it would qualify for listing on the basis of the proposed rule change would meet the existing standards of Section 102.01C upon completion of its next fiscal year. Therefore, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.

<sup>8</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>9</sup> 17 CFR 240.19b-4(f)(6). As required by Rule 19b-4(f)(6)(iii) under the Act, the Exchange also provided with the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of the proposed rule change.

<sup>10</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>11</sup> 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). The Exchange also requested that the Commission waive the five-day pre-filing requirement; however, the Exchange provided the Commission with such notice; therefore, this request is moot.

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 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 e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2006-38 on the subject line.

#### *Paper Comments*

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

All submissions should refer to File Number SR-NYSE-2006-38. 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. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. 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-2006-38 and should be submitted by June 14, 2006.

<sup>5</sup> For purposes of Rule 3a51-1(a)(1) under the Act, the Exchange states that, as proposed to be amended herein, its initial listing standards will be substantially similar to the initial listing standards in place on January 8, 2004. 17 CFR 240.3a51-1(a)(1).

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

<sup>7</sup> 15 U.S.C. 78f(b)(5).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

Nancy M. Morris,  
Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-53834; File No. SR-NYSE-2006-32]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Relating to the NYSE Retail Trading Product and the NYSE Program Trading Product

May 18, 2006.

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> notice is hereby given that on May 9, 2006, the New York Stock Exchange LLC ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NYSE. 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 is proposing to establish fees for two new market data products: The NYSE Retail Trading Product and the NYSE Program Trading Product. The text of the proposed rule change is available on the Exchange's Web site (<http://www.nyse.com>), at the NYSE's Office of the Secretary, 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 Exchange 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 Exchange 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 a separate proposed rule change that NYSE has filed contemporaneously with the proposed rule change (see SR-NYSE-2006-31; the "Pilot Program Filing"), NYSE proposes to make available to vendors and investors the following:

(1) The NYSE Retail Trading Product will consist of (A) a real-time datafeed of certain execution report information that has been recorded as trades for accounts of "individual investors"<sup>3</sup> and (B) an end-of-day summary of the retail trading activity on the Exchange for that day, including total buy-and-sell retail share volume for each stock traded (the "End-of-Day Retail Trading Summary").

(2) The NYSE Program Trading Product will consist of (A) a real-time datafeed of certain execution report information that has been recorded as program trades<sup>4</sup> and (B) an end-of-day summary of program trading activity on the Exchange for that day, including total index arbitrage (as opposed to non-index arbitrage) program trading volume (the "End-of-Day Program Trading Summary").

Each published report of a trade execution that is included in the datafeed for either product shall indicate such information as the security's symbol, the size of the trade, the time of the trade's execution and other related information.<sup>5</sup> (More information regarding the NYSE Retail Trading Product and the NYSE Program Trading Product can be found on the NYSE Web site at <http://www.nysedata.com/InfoTools>.)

The Exchange believes the NYSE Retail Trading Product should provide investors with increased information

regarding individual investors' trading activity on the Exchange. Similarly, the NYSE Program Trading Product should provide investors with increased information regarding program trading activity.

Pursuant to the proposed rule change, NYSE proposes to establish:

(1) A monthly access fee of \$1,500 for receipt of the NYSE Retail Trading Product datafeed (for receipt of the real-time datafeed, the end-of-day summaries, or both);

(2) A monthly access fee of \$1,500 for receipt of the NYSE Program Trading Product datafeed (for receipt of the real-time datafeed, the end-of-day summaries, or both);

(3) A monthly display fee of \$2.00 that the vendor or its subscribers are to pay for each display device receiving NYSE Retail Product information and/or NYSE Program Trading Product information (collectively, "NYSE Trading Information") that the vendor makes available from the real-time datafeed; and

(4) A monthly fee of \$250 if the vendor makes NYSE Trade Information available from the end-of-day summaries, rather than from the real-time datafeeds.

In addition, each vendor of NYSE Trading Information will receive a monthly credit of \$2 for each device that the vendor has entitled to receive displays of NYSE Trading Information, up to a maximum of:

(1) \$3,000 per month if the vendor pays the monthly access fees for both the NYSE Retail Trading Product datafeed and the NYSE Program Trading Product datafeed (which two monthly access fees total \$3,000); and

(2) \$1,500 per month if the vendor pays the monthly access fees for either the NYSE Retail Trading Product datafeed or the NYSE Program Trading Product, but not both (either of which monthly access fees equals \$1,500).

The Exchange would commence to impose those fees 30 days after the Commission approves them. NYSE believes that the access and device fees for the NYSE Retail Trading Product and the NYSE Program Trading Product would reflect an equitable allocation of NYSE's overall costs to users of its facilities.

The access fees, the device fees and the device fee credit apply equally to every vendor. The Exchange notes that it proposes to set the device fee offset of access fees (*i.e.* the device fee credit) at such low levels (*i.e.*, a \$1500 access fee is offset in full if only 750 of a vendor's customers subscribe to the service) that the vast majority of vendors that wish to

<sup>12</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> For this purpose, the "account of an individual investor" means an account covered by Section 11(a)(1)(E) of the Act. That section refers to the "account of a natural person, or a trust created by a natural person for himself or another natural person."

<sup>4</sup> For this purpose, "program trading" has the definition that Supplementary Material .40(b) to NYSE Rule 80A ("Index Arbitrage Trading Restrictions") gives to that term.

<sup>5</sup> NYSE will only include in the NYSE Retail Trading Product and the NYSE Program Trading Product information that is attached to execution reports. While the NYSE believes the information contained in the NYSE Retail Trading Product and the NYSE Program Trading Product is accurate, the NYSE does not guarantee the completeness or accuracy of account information submitted by order entry firms on which the InfoTools product is based.