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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-85937; File No. SR-NYSE-2019-28]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Amending Section 303A.08 of the Listed Company Manual Relating to Shareholder Approval of Equity Compensation Plans

May 24, 2019

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on May 13, 2019, New York Stock Exchange LLC (“NYSE” or the “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 Exchange. 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 Section 303A.08 of the Listed Company Manual (the “Manual”) to clarify the circumstances under which certain sales of a listed company’s securities will not be deemed to be equity compensation for purposes of that rule and to make a clarifying change in Section 312.04. The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 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 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Section 303A.08 of the Manual to clarify the circumstances under which certain sales of a listed company's securities will not be deemed to be equity compensation for purposes of that rule.

Section 303A.08 provides that an "equity-compensation plan" is a plan or other arrangement that provides for the delivery of equity securities (either newly issued or treasury shares) of the listed company to any employee, director or other service provider as compensation for services. The adoption of an equity compensation plan under the rule -- or any material revision to a plan -- is subject to shareholder approval. However, Section 303A.08 provides for certain exclusions from its definition of equity compensation plan, including for:

Plans that merely allow employees, directors or other service providers to elect to buy shares on the open market or from the listed company for their current fair market value, regardless of whether:

- the shares are delivered immediately or on a deferred basis; or

- the payments for the shares are made directly or by giving up compensation that is otherwise due (for example, through payroll deductions).

The Exchange has always interpreted the above provision with respect to the purchase of shares for fair market value as applying only when the securities are acquired directly from the company, either in the form of treasury shares or newly-issued shares. Plans that merely allow their participants to elect to buy shares on the open market do not give rise to any concern about diluting the economic interests of the company's shareholders.

For purposes of the above exclusion from the definition of equity compensation plan, the Exchange has always interpreted "current fair market value" as requiring that the price used be the most recent official closing price on the Exchange. For the avoidance of doubt, the Exchange now proposes to include in Section 303A.08 text specifying how the fair market value of the issuer's common stock should be calculated for this purpose. "Fair market value" will be defined as the most recent official closing price on the Exchange, as reported to the Consolidated Tape, at the time of the issuance of the securities. For example, if the securities are issued after the close of the regular session at 4:00 pm Eastern Standard Time on a Tuesday, then Tuesday's official closing price will be used. If the securities are issued at any time between the close of the regular session on Monday and the close of the regular session on Tuesday, then Monday's official closing price will be used.

The proposed definition of fair market value under Section 303A.08 is modeled on the definition of "Official Closing Price" set forth in Section 312.04(j), as such definition is proposed to be amended by this filing (as discussed below).³ However, the definitions differ in one material respect. The Official Closing Price as defined in Section 312.04(j) (as proposed to

³ See Securities Exchange Act Release No. 85374 (SR-NYSE-2018-54) (March 20, 2019); 84 FR 11354 (March 26, 2019).

be amended) when used in calculating whether a transaction qualifies for an applicable exemption from the shareholder approval requirements of Sections 312.03(b) and (c) is defined as the most recent official closing price on the Exchange, as reported to the Consolidated Tape, at the time of the signing of a binding agreement to issue the securities. By comparison, “fair market value” for purposes of Section 303A.08 will be the most recent official closing price on the Exchange, as reported to the Consolidated Tape, at the time of the issuance of the securities themselves, rather than most recently reported at the time of the signing of the binding agreement.

In particular, issuers may issue shares in lieu of cash at the election of participants in a deferred compensation arrangement because the exclusion from the definition of equity compensation plan applies to plans that allow employees, directors and service providers to elect to buy shares from the listed company for their current fair market value regardless of whether the shares are issued immediately or on a deferred basis. Arrangements of this type are common and they are appropriate as they are primarily designed to ensure that the issuances under the deferred compensation arrangement are not economically dilutive to the other shareholders at the time of such issuance. For example, a director compensation plan may require its participants to defer receipt of a portion of their director fees until the director retires from the board. Such arrangements may provide that an individual director can elect to receive shares in lieu of the deferred cash compensation, with the number of shares to which such director is entitled representing the number of shares whose fair market value at the time of issuance equals the amount of the deferred compensation. Because any economic dilution to the issuer’s shareholders would be incurred at the time of the deferred issuance, requiring that the shares are

issued for fair market value measured at the time of issuance of the shares rather than at the time the company incurs the obligation ensures that the issuance is not economically dilutive.

The Exchange also proposes to clarify the definition of “Official Closing Price” used in Section 312.04(j) of the Manual. That provision currently reads in relevant part as follows:

“Official Closing Price” of the issuer's common stock means the official closing price on the Exchange as reported to the Consolidated Tape immediately preceding the signing of a binding agreement to issue the securities.

As amended, the provision will read as follows:

“Official Closing Price” of the issuer's common stock means the most recent official closing price on the Exchange, as reported to the Consolidated Tape, at the time of the signing of a binding agreement to issue the securities.

The purpose of this amendment is simply to clarify the meaning of the provision and it is not intended to have any substantive effect.

In addition, the Exchange proposes to correct a typographical error in Section 312.04(j) by replacing the word “if” with the word “of” in the last full line of that provision.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act,⁴ in general, and furthers the objectives of Section 6(b)(5) of the Exchange Act,⁵ 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

⁴ 15 U.S.C. 78f(b).

⁵ 15 U.S.C. 78f(b)(5).

general, to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposed definition of “fair market value” for purposes of Section 303A.08 protects investors and the public interest because it harmonizes the calculation of market value under Section 303A.08 with the Official Closing Price definition set forth in Section 312.04(j) (as amended by this proposal) and used for purposes of calculating the qualification of transactions for price-based exemptions from the shareholder approval requirements under Sections 312.03(b) and (c). The proposed definition of “fair market value” is consistent with the Exchange’s interpretation of that provision since the original adoption of the rule.

As discussed above, the proposed definition of “fair market value” for purposes of Section 303A.08 differs in one respect from the definition of Official Closing Price in Section 312.04(j) (as amended by this proposal), in that the official closing price used is the most recent official closing price on the Exchange, as reported to the Consolidated Tape, at the time of issuance of the securities rather than at the time of entry into a binding agreement. This distinction is necessary to accommodate the Exchange’s longstanding interpretation under Section 303A.08 that the issuance of shares in lieu of cash at the election of participants in a deferred compensation arrangement is not subject to shareholder approval under Section 303A.08 if the number of shares issued in lieu of cash compensation is based on the fair market value of the shares at the time of issuance. Arrangements of this type are common and they are protective of investors as they are designed to ensure that the issuances under the deferred compensation arrangement are not economically dilutive to the other shareholders at the time of such issuance.

The proposed amendments to Section 312.04(j) simply clarify the rule text and has [sic] no substantive effect.

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. The proposed rule change would simply clarify the applicable rule to ensure that it will be applied in a manner that is consistent with the Exchange's long standing interpretation of that rule. As such, the amendment is neither intended to, nor expected to, impose any burden on competition. The proposed amendments to Section 312.04(j) clarify the rule text and have no substantive effect.

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

Within 45 days of the date of publication of this notice in the Federal Register or up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

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-2019-28 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NYSE-2019-28. 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 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.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2019-28, 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.⁶

Eduardo A. Aleman,

Deputy Secretary.

⁶ 17 CFR 200.30-3(a)(12).

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