

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-53700; File No. SR-BSE-2005-46)

April 21, 2006

Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Order Granting Accelerated Approval of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 3 to the Proposed Rule Change to Amend Exchange Delisting Rules to Conform to Recent Amendments to Commission Rules Regarding Removal from Listing and Withdrawal from Registration

I. Introduction

On October 24, 2005, the Boston Stock Exchange, Inc. (“BSE” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “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 amend Exchange delisting rules to conform to recent amendments to Commission rules regarding removal from listing and withdrawal from registration. On March 16, 2006, BSE filed Amendment No. 1 to the proposed rule change.³ On March 21, 2006, BSE filed Amendment No. 2 to the proposed rule change.⁴ The proposed rule change, as amended, was published for comment in the Federal Register on March 28, 2006.⁵ On April 17, 2006,

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ In Amendment No. 1, BSE amended its rule text to clarify that an issuer that is below the continued listing policies and standards of the Exchange and seeks to voluntarily apply to withdraw a class of securities from listing must disclose that it is no longer eligible for continued listing in its statement of material facts relating to the reason for withdrawal from listing, its public press release, and its Web site notice. In addition, BSE revised its rule text to clarify which provisions in its appeal procedures were based on calendar or business days and to cross-reference its rules regarding the Exchange's basis for involuntary delisting of a class of securities by the Exchange.

⁴ Amendment No. 2 replaced and superseded the Exchange's original proposed rule change and Amendment No. 1.

⁵ See Securities Exchange Act Release No. 53544 (March 23, 2006), 71 FR 15499.

BSE filed Amendment No. 3 to the proposed rule change.⁶ No comments were received regarding the proposal. This order approves the proposed rule change, as amended by Amendment Nos. 1 and 2, on an accelerated basis, publishes notice of Amendment No. 3 to the proposed rule change, and grants accelerated approval to Amendment No. 3.

II. Description of the Proposed Rule Change, As Amended

Section 12 of the Act⁷ and Rule 12d2-2 thereunder⁸ (“SEC Rule 12d2-2”) govern the process for the delisting and deregistration of securities listed on national securities exchanges. Recent amendments to SEC Rule 12d2-2 (“amended SEC Rule 12d2-2”) and other Commission rules require the electronic filing of revised Form 25⁹ on the Commission’s Electronic Data Gathering, Analysis, and Retrieval (“EDGAR”) system by exchanges and issuers for all delistings, other than delistings of standardized options and securities futures, which are exempted.¹⁰

⁶ Amendment No. 3 replaced and superseded the proposed rule change and Amendment Nos. 1 and 2. While Amendment No. 3 replaced and superseded the proposed rule change in its entirety, only certain changes were made to the proposal as published. The changes made in Amendment No. 3 are as follows: (1) charging issuers a \$3,000 fee (instead of the previously proposed \$5,000 fee) when issuers appeal the Exchange’s delisting determinations; (2) modifying the appeal procedures so that the issuer is entitled to a hearing before the Stock List Committee and deleting proposed language that issuers must first request a hearing and the hearing is at the option of the Exchange; (3) providing that the decision of the Stock List Committee shall be issued within 15 business days of the hearing or final request for documentation or information; (4) referencing amended SEC Rule 12d2-2 in the commentary; and (5) specifying the time period the Exchange must publicize its final determination to remove a security from listing by issuing a press release and posting on Web site as no fewer than ten days before the delisting becomes effective.

⁷ 15 U.S.C. 78j.

⁸ 17 CFR 240.12d2-2.

⁹ 17 CFR 249.25.

¹⁰ See Securities Exchange Act Release No. 52029 (July 14, 2005), 70 FR 42456 (July 22, 2005) (“SEC Rule 12d2-2 Approval Order”).

In the case of exchange-initiated delistings, amended SEC Rule 12d2-2(b) states that a national securities exchange may file an application on Form 25 to strike a class of securities from listing and/or withdraw the registration of such securities, in accordance with its rules, if the rules of such exchange, at a minimum, provide for:

- (i) Notice to the issuer of the exchange's decision to delist its securities;
- (ii) An opportunity for appeal to the exchange's board of directors, or to a committee designated by the board; and
- (iii) Public notice of the national securities exchange's final determination to remove the security from listing and/or registration, by issuing a press release and posting notice on its Web site. Public notice must be disseminated no fewer than 10 days before the delisting becomes effective pursuant to amended SEC Rule 12d2-2(d)(1), and must remain posted on its Web site until the delisting is effective.

The Exchange proposes to adopt new Section 2 of BSE Rule Chapter XXVII to set forth its rules and procedures with respect to issuer-initiated and Exchange-initiated delistings. The proposal incorporates the Exchange's current delisting practices and the requirements of amended SEC Rule 12d2-2.

Proposed Section 2(b) provides the procedures for Exchange-initiated action to strike a security from listing on the Exchange. Proposed Section 2(b)(1) codifies the Exchange's current practice to provide notice to the issuer of the Exchange's decision to strike a security from listing on the Exchange when the issuer has fallen below the Exchange's continued listing policies and standards. BSE rules do not currently set forth appeal procedures for issuers to appeal the Exchange's delisting decision. Accordingly, BSE proposed new Section 2(b)(2) to provide issuers

with an opportunity to appeal the Exchange's delisting decision to the Exchange's Stock List Committee. Proposed new Sections 2(b)(2)(A) – (C) outline the procedures for such appeals.

Specifically, proposed Section 2(b)(2)(A) provides that an issuer shall file a request to appeal the Exchange's delisting decision no later than five business days following the issuer's receipt of the Exchange's delisting decision. Further, the issuer's request to appeal must include a \$3,000 appeal fee. During the appeal process, the Exchange may suspend dealings in the security. If the issuer does not request an appeal within the relevant time period, BSE would file a Form 25 to strike the security from listing on the Exchange in accordance with the requirements of amended SEC Rule 12d2-2(b).

Proposed Section 2(b)(2)(B) provides that once the Exchange received an appeal, the issuer would be entitled to present an appeal before the Exchange's Stock List Committee. The issuer must submit any written materials, if any, within 15 calendar days of the filing of the notice to appeal. The Exchange would not hold a hearing without providing five business days notice to the issuer of the time and place of the hearing. Proposed Section 2(b)(2)(C) provides that the decision of the Exchange's Stock List Committee is final and would be issued within 15 business days of the hearing or the final request for information. The Exchange would issue a written decision to the issuer.

BSE also proposed new Section 2(b)(3) to incorporate the new requirements set forth in amended SEC Rule 12d2-2(b)(1)(iii). The Exchange would provide public notice of its final determination to strike a security from listing by issuing a press release and posting a notice on the Exchange's Web site, no fewer than ten days before the delisting becomes effective. The public notice would remain on the Exchange's Web site until the delisting becomes effective. Finally, in

accordance with amended SEC Rule 12d2-2(b)(2), the Exchange would provide a copy of the filed Form 25 to the issuer.

With respect to issuer-initiated delisting procedures, the Exchange proposes to codify its current practices and adopt new procedures to comply with the requirements of amended SEC Rule 12d2-2. Proposed Section 2(a) would require an issuer to provide the Exchange a certified copy of resolutions adopted by the issuer's Board of Directors authorizing the withdrawal from listing. After notice to the Exchange, the proposed rules state that the issuer must comply with amended SEC Rule 12d2-2(c). Proposed Section 2(a) provides that the issuer must:

- (i) Comply with all applicable laws in effect in the state in which the issuer is incorporated;
- (ii) Provide written notice, which describes the security involved and all material facts relating to the reasons for withdrawal, to the Exchange no fewer than 10 days before the issuer files an application on Form 25 with the Commission; and
- (iii) Publish notice, contemporaneous with providing written notice to the Exchange, through a press release, and if it has a publicly accessible Web site, post such notice on that Web site, which shall remain available until the delisting become effective.

Proposed Section 2(a) further provides that the Exchange, after notice from the issuer with respect to voluntary withdrawal from listing, shall post the notice of the issuer's intent on the Exchange's Web site the next business day, and such notice shall remain until the delisting is effective. In addition, the issuer must provide a copy of the Form 25 to the Exchange contemporaneously with the filing of the Form 25.

The Exchange has also proposed, as commentary to Section 2, that an issuer seeking to voluntarily apply to withdraw a class of security from listing when the issuer has received notice

from the Exchange that the issuer is below the Exchange's continued listing policies and standards, or that the issuer is aware that it is below such continued listing policies and standards notwithstanding that the issuer has not received a notice from the Exchange, must disclose that it is no longer eligible for continued listing (including the specific continued listing policies and standards that the issue is below) in: (i) the statement of all material facts relating to the reasons for withdrawal from listing provided to the Exchange along with written notice of its determination to withdraw from listing as required by amended SEC Rule 12d2-2(c)(2)(ii); and (ii) the public press release and Web site notice as required by amended SEC Rule 12d2-2(c)(2)(iii).

III. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change and Amendment Nos. 1, 2, and 3

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange¹¹ and, in particular, the requirements of Section 6 of the Act.¹² Specifically, as discussed below, the Commission finds that the proposal, as amended, is consistent with Sections 6(b)(4),¹³ 6(b)(5),¹⁴ and 6(b)(7) of the Act.¹⁵ Section 6(b)(4) of the Act requires that the rules of an exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. Section 6(b)(5) of the Act requires, in part, that the rules of an exchange be designed to prevent fraudulent and

¹¹ In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹² 15 U.S.C. 78f.

¹³ 15 U.S.C. 78f(b)(4).

¹⁴ 15 U.S.C. 78f(b)(5).

¹⁵ 15 U.S.C. 78f(b)(7).

manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, and 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. Section 6(b)(7) of the Act requires, among other things, that the rules of an exchange provide a fair procedure for the prohibition or limitation by the exchange of any person with respect to access to services offered by the exchange or a member thereof. Further, as noted in more detail below, the changes being adopted by BSE meet the requirements of amended SEC Rule 12d2-2.

A. Exchange Delisting

Amended SEC Rule 12d2-2(b) states that a national securities exchange may file an application on Form 25 to strike a class of securities from listing and/or withdraw the registration of such securities, in accordance with its rules, if the rules of such exchange, at a minimum, provide for notice to the issuer of the exchange's decision to delist, opportunity for appeal, and public notice of the exchange's final determination to delist. The Commission believes that BSE's proposal complies with the dictates of amended SEC Rule 12d2-2(b).

The proposed rule change requires the Exchange to provide notice to issuers of the Exchange's decision to remove a security from listing and/or registration. In addition, the proposal provide issuers an opportunity to appeal the Exchange's delisting decision to a committee designated by the Board. As discussed above, the proposal sets forth the specific procedures for issuers appealing the Exchange's delisting decision to the Stock List Committee, which is a committee designated by the Board. Finally, the proposed rule change would provide

for public notice of BSE's final determination to remove the security from listing and/or registration.

The Commission believes that the proposed rule requiring notice to the issuer of the Exchange's decision to remove a security from listing and/or registration and establishing appeal procedures provides issuers with adequate notice and opportunity to appeal the delisting as required by amended SEC Rule 12d2-2(b). The Commission notes that the appeal procedures being adopted by the Exchange set forth an adequate structure to meet the requirements of Section 6(b)(7) of the Act¹⁶ and for BSE to review mandatory delistings upon appeal. In addition, public notice of the Exchange's final determination should ensure that investors have adequate notice of an exchange delisting and is consistent with the protection of investors under Section 6(b)(5) of the Act.¹⁷

Finally, the Exchange proposes to charge issuers a \$3,000 appeal fee in connection with a request to appeal the Exchange's delisting decision. The Commission believes that the proposed fee is consistent with Section 6(b)(4) of the Act.¹⁸ The Commission also believes that the fee likely is not overly burdensome or excessive to the extent that an issuer would be deterred from employing its due process right to present an appeal before the Stock List Committee, and therefore, is consistent with Section 6(b)(7) of the Act.¹⁹ Further, the Commission notes that the appeal fee is comparable to fees of other exchanges.²⁰

¹⁶ 15 U.S.C. 78f(b)(7).

¹⁷ 15 U.S.C. 78f(b)(5).

¹⁸ 15 U.S.C. 78f(b)(4).

¹⁹ 15 U.S.C. 78f(b)(7).

²⁰ See, e.g., NASD Rule 4805 and Amex Company Guide Section 1203(a) (charging issuers a \$4,000 fee where the consideration is on the basis of written submission and \$5,000 fee where the consideration is on the basis of an oral hearing).

B. Issuer Voluntary Delisting

The Exchange proposes to adopt rules concerning the general requirements of amended SEC Rule 12d2-2(c) regarding issuer voluntary delisting. Proposed BSE Chapter XXVII Section 2(a) states that an issuer proposing to withdraw its security from listing shall first provide to the Exchange a certified copy of its Board of Directors resolutions authorizing such action. The Commission believes that this requirement may help ensure that the decision to delist a security voluntarily has been well-considered by the issuer's board of directors. Thereafter, the issuer must comply with the requirements of amended SEC Rule 12d2-2(c), which are specifically set out in BSE's rules. The Commission believes that the proposed changes will inform issuers of the requirements for voluntary delisting of their securities under BSE rules and federal securities laws.

The proposal also sets forth a new requirement not in amended SEC Rule 12d2-2 that would require an issuer seeking to voluntarily delist its security to provide a copy of the Form 25 that was filed with the Commission, contemporaneous with such filing. The Commission believes that this requirement will allow the Exchange to be fully informed of the filing of a Form 25 and be prepared to take timely action to delist the security in accordance with the filing of the Form.

In addition, BSE proposes to adopt a new commentary to require that not less than ten days before the issuer submits a Form 25, the issuer seeking to voluntarily apply to withdraw a security from listing on the Exchange when the issuer has received notice from the Exchange that the issuer is below the Exchange's continued listing policies and standards, or that the issuer is aware that it is below such continued listing policies and standards notwithstanding that it has not received such notice from the Exchange, must disclose in:

- (i) its statement of all material facts relating to the reasons for withdrawal from listing provided to the Exchange along with written notice of its determination to withdraw from listing required by amended SEC Rule 12d2-2(c)(2)(ii); and
- (ii) its public press release and Web site notice required by amended SEC Rule 12d2-2(c)(2)(iii).

The Commission believes that this requirement will allow shareholders to be informed and aware that the issuer has failed to meet Exchange listing standards and is voluntarily delisting with the consent of the Exchange. Issuers will therefore not be permitted to delist voluntarily without public disclosure of their noncompliance with Exchange listing standards.

C. Accelerated Approval of Proposed Rule Change and Amendment Nos. 1, 2, and 3

Pursuant to Section 19(b)(2) of the Act,²¹ the Commission may not approve any proposed rule change, or amendment thereto, prior to the 30th day after the date of publication of notice of the filing thereof, unless the Commission finds good cause for so doing and publishes its reasons for so finding. The Commission hereby finds good cause for approving the proposed rule change, as amended by Amendment Nos. 1 and 2, prior to the 30th day after publishing the notice in the Federal Register. In the SEC Rule 12d2-2 Approval Order, the Commission stated that the compliance date of the amendments is April 24, 2006.²² In addition, no comments were received on the proposal, as originally published.²³ Accelerated approval of the proposal, as amended, would enable the Exchange's amended rules to become operative by the compliance date set forth by the Commission.

The Commission further finds good cause for approving Amendment No. 3 to the

²¹ 15 U.S.C. 78s(b)(2).

²² See SEC Rule 12d2-2 Approval Order, supra note 10.

²³ See note 5, supra.

proposal, prior to the 30th day after publishing notice of Amendment No. 3 in the Federal Register. As previously discussed, the revisions made to the proposal in Amendment No. 3 as compared to the proposal as published²⁴ would provide issuers with specific appeal procedures, and allow shareholders to be informed and aware that the issuer has failed to meet Exchange listing standards and is voluntarily delisting with the consent of the Exchange. The Commission believes that granting accelerated approval of Amendment No. 3 will permit the Exchange to implement this new provision as expeditiously as possible, to the benefit of investors. The Commission also believes that accelerating approval of Amendment No. 3 is appropriate because these revisions do not raise new regulatory issues.

Accordingly, pursuant to Section 19(b)(2) of the Act,²⁵ the Commission finds good cause to approve the proposed rule change, as amended by Amendment Nos. 1, 2, and 3, prior to the 30th day after notice of the proposed rule change and Amendment Nos. 1, 2, and 3 are published in the Federal Register.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 3, including whether Amendment No. 3 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-BSE-2005-46 on the subject line.

²⁴ See note 6, *supra*.

²⁵ 15 U.S.C. 78s(b)(2).

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-BSE-2005-46. 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 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-BSE-2005-46 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁶ that the proposed rule change (File No. SR-BSE-2005-46), as amended, is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁷

Nancy M. Morris
Secretary

²⁶ 15 U.S.C. 78s(b)(2).

²⁷ 17 CFR 200.30-3(a)(12).