

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-54344; File No. SR-NYSE-2005-68)

August 21, 2006

Self-Regulatory Organizations; New York Stock Exchange, Inc. (n/k/a New York Stock Exchange LLC); Order Approving Proposed Rule Change and Amendment No. 1 Thereto, and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 3, Relating to Annual Financial Statement Distribution Requirements and Listed Company Manual Sections 103.00, 202.05, 203.00, 203.01, 203.02, 203.03, 204.00 through .33, 303A.14, 313.00, 401.04, and 703.09

I. Introduction

On September 30, 2005, 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”)¹ and Rule 19b-4 thereunder,² a proposed rule change relating to the Exchange’s annual financial statement distribution requirements and Listed Company Manual Sections 103.00, 202.05, 203.00, 203.01, 203.02, 203.03, 204.00 through .33, 303A.14, 313.00, 401.04, and 703.09. On June 9, 2006, the Exchange submitted Amendment No. 1 to the proposed rule change.³ The proposed rule change, as amended, was published for comment in the Federal Register on June 29, 2006.⁴ The Commission received five comments regarding the proposal.⁵ On

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Amendment No. 1 dated June 9, 2006 (“Amendment No. 1”). In Amendment No. 1, the Exchange eliminated from the present filing other proposed rule changes to Section 103 and 302 of the Listed Company Manual, and clarified certain details of its proposal.

⁴ See Securities Exchange Act Release No. 54029 (June 21, 2006), 71 FR 37147 (June 29, 2006) (“Notice”).

⁵ See Letter from Richard J. Daly, Group Co-President, ADP Brokerage Services Group (“ADP”), to Nancy M. Morris, Secretary, Commission, dated July 20, 2006 (“ADP Letter”); Letter from Dorothy M. Donohue, Associate Counsel, Investment Company Institute, to Nancy M. Morris, Secretary, Commission, dated July 20, 2006

August 10, 2006, the Exchange filed Amendment No. 3 to the proposed rule change.⁶ On August 11, 2006, the Exchange submitted a letter to the Commission responding to the comments.⁷ This order approves the proposed rule change, as amended by Amendments Nos. 1 and 3, provides notice of Amendment No. 3, solicits comments from interested persons on Amendment No. 3, and grants accelerated approval of Amendment No. 3.

II. Description of the Proposal

The Exchange proposes to amend Section 203.01 of the Listed Company Manual to allow a listed company to satisfy NYSE's annual financial statement distribution requirement by making the company's annual report on Form 10-K, 20-F, 40-F or N-CSR available on or by a link through its corporate Web site. In Amendment No. 3, the Exchange modified the proposal to provide that in the case of a listed company that is a closed-end fund, if the company does not maintain its own Web site, the company may utilize a Web site that the

("ICI Letter"); Letter from David P. Cosper, Chief Financial Officer, Executive Vice President, Sonic Automotive Inc., to Nancy M. Morris, Secretary, Commission, dated July 6, 2006 ("Sonic Letter"); Letter from Philip Broadley, Chair, The Hundred Group of Finance Directors, and Mark Harding, Chair, General Counsel 100 Group, to Nancy M. Morris, Secretary, Commission, dated June 19, 2006 ("Hundred Group Letter"); Letter from Scott Lamb, Vice President, Investor Relations, Coeur d'Alene Mines Corporation, to Jonathan G. Katz, Secretary, Commission, dated October 18, 2005 ("Coeur Letter").

⁶ See Amendment No. 3 dated August 10, 2006 ("Amendment No. 3"). In Amendment No. 3, the Exchange modified the proposed rule language in Section 303A.14 in response to the ICI Letter. ICI recommended that the Exchange modify the proposed rule change to make it clear that investment companies that do not have their own Web sites can use a related Web site. See *infra* Part III. In Amendment No. 3, the Exchange also modified the proposed rule change to require that that when a listed company issues a press release announcing the filing of its annual report with the Commission, that this press release also state the Web site where shareholders may access the annual report. The Exchange submitted Amendment No. 2 to the Commission on August 4, 2006 and withdrew Amendment No. 2 on August 10, 2006.

⁷ See Letter from Mary Yeager, Assistant Secretary, NYSE, to Nancy M. Morris, Secretary, Commission, dated August 11, 2006 ("NYSE Response Letter").

company is allowed to use to satisfy the Web site posting requirement in Rule 16a-3(k) of the Act.⁸ Included with this link or posting, the listed company must also include a prominent undertaking in English that it would deliver a paper copy of the company's complete audited financial statements free of charge to any shareholder who requests it. The Exchange would also require a listed company to issue a press release simultaneously with its Web site posting stating that its annual report has been filed with the Commission. This press release must also specify the company's Web site address⁹ and indicate that shareholders have the ability to receive a hard copy of the company's complete audited financial statements free of charge upon request within a reasonable period of time.

The Exchange also proposes to amend Section 203.01 of the Listed Company Manual to eliminate the following provisions: (i) that a company inform the NYSE if it is unable to file its annual report with the Commission in a timely manner; (ii) that a company notify the NYSE prior to the filing deadline if it will not file its annual report with the Commission on time, as well as the language setting out the date by which a company must distribute its annual report once the late annual report has been filed with the Commission; (iii) the Exchange's requirements regarding the content of annual reports and annual financial statements; and (iv) requirements regarding the publication and distribution of annual financial statements.¹⁰

⁸ 17 CFR 240.16a-3(k) states, in pertinent part, that: "In the case of an issuer that is an investment company that does not maintain its own Web site, if any of the issuer's investment advisor, sponsor, depositor, trustee, administrator, principal underwriter, or any affiliated person of the investment company maintains a Web site that includes the name of the issuer, the issuer shall comply with the posting requirements by posting the forms on one such Web site." See also Amendment No. 3, supra note 6.

⁹ See Amendment No. 3, supra note 6.

¹⁰ See Notice at 37148-49.

The Exchange also proposes to amend Section 203.02 of the Listed Company Manual to consolidate and summarize the Exchange's reporting requirements for interim financial statements and to eliminate those provisions of Section 203.02 of the Listed Company Manual that are no longer applicable or that do not contain actual listing requirements.¹¹

The Exchange also proposes to amend Section 103.00 of the Listed Company Manual to eliminate the requirement that foreign private issuers distribute to shareholders at least a summary annual report that includes summary financial information reconciled to US generally accepted accounting principles and provide a full annual report to shareholders upon request, as well the requirement that a company that proposes to distribute a summary annual report contact an Exchange representative to determine whether the proposed use of the summary annual report meets the Exchange's requirements. NYSE also proposes to eliminate language from the first and sixth paragraphs of Section 103.00 of the Listed Company Manual to the extent that such language does not set forth actual listing requirements.¹²

The Exchange also proposes conforming amendments to Sections 202.05, 203.03, 204.00 through .33 and 313.00 of the Listed Company Manual.¹³ These amendments include renumbering of sections and the elimination of references to annual report obligations throughout the Listed Company Manual, including with respect to procedures relating to the distribution of annual reports.

The Exchange also proposes to amend Section 204.00 of the Listed Company Manual to consolidate the requirements for companies to provide notice to and file certain documents

¹¹ See id. at 37149-50.

¹² See id. at 37147-48.

¹³ See id. at 37148, 37150-51.

with the Exchange.¹⁴ In particular, the Exchange proposes to limit the need for companies to provide information to the Exchange that is available via the Commission's Electronic Data Gathering Analysis and Retrieval (EDGAR) system. The Exchange also proposes to eliminate certain explanatory language from Section 204.00 of the Listed Company Manual that the Exchange represented to be superfluous as a result of the proposed changes.

The Exchange also proposes to add a new Section 303A.14 to the Listed Company Manual that specifically requires listed companies to have and maintain a Web site.¹⁵ This proposed section also includes the information required under Section 303A of the Listed Company Manual that listed companies must post to their Web sites, including committee charters, corporate governance guidelines and their code of business conduct and ethics. In Amendment No. 3, the Exchange modified the proposal to provide that in the case of a listed company that is a closed-end fund, if the company does not maintain its own Web site, the company may utilize a Web site that the company is allowed to use to satisfy the Web site posting requirement in Rule 16a-3(k) of the Act.¹⁶

The Exchange also proposes to eliminate Section 401.04 of the Listed Company Manual which provides guidance regarding the interval between the end of a listed company's fiscal year and its annual meeting of shareholders.¹⁷ Lastly, the Exchange proposes to amend Section 703.09 of the Listed Company Manual to eliminate requirements relating to the disclosure of options, stock purchase and other remuneration plans.¹⁸

¹⁴ See id. at 37150-51.

¹⁵ See id. at 37151.

¹⁶ See supra note 8.

¹⁷ See id. at 37152.

¹⁸ See id.

III. Comments

The Commission received five comment letters regarding the proposal.¹⁹ Four comment letters supported the Exchange's proposed rule change. The ICI stated that the Exchange's proposal was "highly appropriate" given the tremendous growth in the Internet and its importance to investors as an information source.²⁰ The ICI also stated that internet access provides a more efficient way to access the reports, as well the ability to search in the reports for information of particular interest to investors. Finally, the ICI recommended that in the case of an investment company that does not maintain its own Web site, the investment company make its annual report available on, or by a link through, a Web site maintained, for example, by the company's investment adviser.²¹

Another commenter, Sonic Automotive, an NYSE-listed company, commented that it was sensible to deliver information in the most expeditious and efficient manner in a day and age of instant communications.²² Coeur d'Alene Mines Corporation, also an NYSE-listed company, expressed support for the proposal, citing its own experience that most investors prefer the immediacy and ease of access associated with electronic delivery, and that the rule change would permit it to materially reduce costs associated with distributing the annual report.²³ This commenter also noted that the company's annual report and other Commission filings are already routinely available on or through the company's Web site, and on other sites such as EDGAR, long before they are available through mass mailings or individual

¹⁹ See supra note 5.

²⁰ ICI Letter, supra note 5.

²¹ Id.; see also Amendment No. 3, supra note 6.

²² Sonic Automotive Letter, supra note 5.

²³ Coeur Letter, supra note 5.

mailings. In this regard, the commenter noted that each year's newly published annual report is already "old news" by the time it arrives in an investor's mailbox. Another commenter expressed the view that shareholders prefer immediately available electronic information, and that hard copies provided later are of limited use.²⁴ Moreover, this commenter stated that these benefits would be achieved while allowing for a "significant" cost reduction for foreign private issuers listed on the Exchange.

One commenter, ADP, opposed the proposed rule change.²⁵ ADP argued that the Exchange's proposal to eliminate the annual financial statement distribution requirement in Section 203.01 of the Listed Company Manual could have adverse affects on U.S. holders of securities of NYSE-listed foreign private issuers. ADP expressed a broad concern regarding the "access equals delivery" model upon which the proposed amendments are based, and stated that the Exchange has proposed making the change to Section 203.01 in the absence of any meaningful data supporting its underlying premise. ADP disagrees with the Exchange's belief that the vast majority of people in this country that review company financials access them online - either through the company's own Web site, EDGAR, or some other service provider. In particular, ADP asserted that (i) fewer shareholders would have access to annual financial statements, (ii) fewer shareholders would look at annual financial statements, (iii) more votes being cast without the benefit of financial statement review, and (iv) costs would be shifted to shareholders.²⁶

²⁴ Hundred Group Letter, supra note 5. This commenter also noted that its clientele, many publicly traded United Kingdom companies, must incur the costs of distributing two annual reports to shareholders, one consisting of the annual report and accounts required under the relevant U.K. laws, and the other containing financial statements reconciled to U.S. GAAP.

²⁵ ADP Letter, supra note 5.

²⁶ Id.

The Exchange responded by stating that the Commission did not receive any negative comment letters from a retail or institutional investor with respect to the proposed rule change.²⁷ The Exchange also noted that the proposed rule change would not confine investors to online access. Rather, the Exchange explained that the proposed rule requires listed companies to issue a press release to inform investors that the annual report filed with the Commission is available on the listed company's Web site, and that the Exchange will also require that shareholders have the ability to receive a hard copy of the complete audited financial statements free of charge upon request within a reasonable period of time. Finally, the NYSE noted that the proposed rule change simply provides listed companies with an alternative to physical delivery, and that a listed company may continue to physically distribute an annual report if it wishes to do so.

IV. Discussion

After careful consideration of the proposal and the comments received, 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 exchange.²⁸ Specifically, the Commission finds that the proposal, as amended, is consistent with Section 6(b)(5) of the Act,²⁹ which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, 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.

²⁷ See NYSE Response Letter, supra note 7.

²⁸ In approving this proposal, the Commission has considered its impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

²⁹ 15 U.S.C. 78f(b)(5).

With respect to the Exchange's proposal to amend Section 203.01 of its Listed Company Manual to allow companies to satisfy the Exchange's annual financial distribution requirement by making the company's annual report on Form 10-K, 20-F, 40-F or N-CSR available on its corporate Web site, the Exchange and several of the commenters have stated that the new rule will be a more efficient way for listed companies to deliver, and shareholders to utilize, annual financial statements.³⁰ The Commission believes that electronic delivery may offer shareholders immediate access to financial information and greater ability to search such information. The Commission also believes that the proposed rule change may lead to significant cost savings for listed companies, savings that will ultimately accrue to those companies' shareholders.

The Commission also notes the concern raised by ADP that such an approach may have the unintended effect of preventing certain shareholders from obtaining annual financial information from listed companies.³¹ The Commission believes, however, that this risk is minimized by virtue of the fact that the proposed rule change requires the listed company to issue a press release simultaneously with the posting of the annual report stating that the annual report is available, listing the Web site where the annual report may be accessed, and requiring the listed company to send paper copies to those shareholders that request one within a reasonable time at no charge. The Commission believes that it is reasonable to assume that individual shareholders will follow the public announcements of those

³⁰ The Commission notes that because U.S. companies listed on the Exchange must still distribute annual financial information as required by the Commission's proxy solicitation rules, the Exchange's proposed rule change will currently have minimal impact on U.S. issuers. See 17 CFR 240.14a-3. For foreign private issuers listed on the Exchange, however, the proposed rule change will eliminate the only mandated physical distribution requirement for annual financial statements.

³¹ See ADP Letter, supra note 5.

companies in which they own stock, and that these shareholders will either be able to access the Web site with the annual report or request a free paper copy if they wish. Further, as noted by one commenter on the proposal,³² because of existing internet and EDGAR access to annual reports, the information received in hard copy can be “old news.” Indeed, information in the annual report can already be incorporated into the market price of the listed company’s stock by the time investors receive the hard copy.³³

ADP also expressed concern that the proposed rule change is based upon an “access equals delivery” model of disclosure.³⁴ The Commission notes that it considered the NYSE’s elimination of its annual report distribution requirement for listed companies under Section 19(b) of the Act.³⁵ The Commission’s determination of what constitutes an appropriate SRO rule under Section 19(b) of the Act is distinct from the Commission’s consideration of rulemaking under the Act, and will not have any impact on the Commission’s consideration of the proposal concerning amendments to the proxy rules.³⁶

³² Coeur Letter, *supra* note 5.

³³ The Commission also notes that in its response letter, the NYSE stated that all of the comment letters, with the exception of ADP’s comment letter, were positive, that there were no negative comments from individual or institutional investors, and that the proposed rule change provides listed companies with an alternative to physical delivery, but that listed companies may continue to physically distribute annual reports if they so wish.

³⁴ ADP Letter, *supra* note 5.

³⁵ Section 19(b)(2) of the Act states, in pertinent part, that: “The Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this title and the rules and regulations thereunder applicable to such organization.” 15 U.S.C. 78s(b)(2).

³⁶ *See* Securities Exchange Act Release No. 52926 (December 8, 2005), 70 FR 74598 (December 15, 2005) (proposing amendments to the proxy rules that would provide an alternative method for issuers and other persons to furnish proxy materials to shareholders by posting them on an Internet Web site and providing shareholders with notice of the availability of the proxy materials with copies being made available to shareholders on request, at no cost).

In connection with the Exchange's proposed amendments to the annual financial distribution requirements in Section 203.01 of the Listed Company Manual, the Commission notes that the Exchange has proposed conforming amendments to Section 203.01 and other sections of the Listed Company Manual. For example, the Exchange's proposal would also eliminate the requirements currently contained in Section 203.01 that detail the procedures for physical distribution of the annual financial statements as well as the notice requirement that companies have followed if they could not meet these physical distribution requirements.³⁷ Additionally, the Exchange proposes to eliminate provisions in Section 203.01 of the Listed Company Manual that detail the form and substance of the annual financial statements.³⁸ The Commission notes that the Exchange has represented that the notice requirement for companies that fail to distribute annual financial statements is no longer necessary because the Exchange monitors listed companies for timely filing of their Commission reports on an ongoing basis.³⁹ Given this monitoring, and the Exchange's representation that it monitors listed companies for timely filing on an ongoing basis, the Commission believes this aspect of the proposed rule change is reasonable. The Commission believes that the Exchange's deletion of the provisions of Section 203.01 of the Listed Company Manual regarding the form and substance of the annual financial statements eliminates duplicative, and potentially confusing, disclosure requirements for companies that are fully described in the Act.⁴⁰

³⁷ See Notice at 37148.

³⁸ Id.

³⁹ See Notice at 37153 (stating that the Exchange monitors listed companies for timely filing of their Commission reports on an ongoing basis).

⁴⁰ See, e.g., 17 CFR 210.1-01 et seq.

The Exchange also proposes to amend Section 103.00 of the Listed Company Manual to eliminate the requirement that foreign private issuers distribute at least summary annual reports to shareholders. The elimination of this requirement is consistent with the Exchange's proposal in Section 203.01 of the Listed Company Manual because the Exchange is no longer requiring companies to physically distribute annual financial information to shareholders. The Commission notes that the Exchange's proposal would still require foreign private issuers to send hard copies of the annual financial statements to shareholders, free of charge, upon request, within a reasonable period of time.

The Exchange also proposes to delete Section 401.04 from the Listed Company Manual. In approving this portion of the proposed rule change, the Commission notes that the Exchange has specifically stated that it is not disavowing that best practice is for a listed company to hold its annual meeting within a reasonable time after the close of the company's fiscal year.⁴¹ While the Commission also agrees that best practice is for a listed company to hold its annual meeting within a reasonable time after the close of its fiscal year, the Commission believes that it is not unreasonable for the Exchange to eliminate from the Listed Company Manual language that is, by its express terms, not an enforceable requirement, both to prevent confusion amongst listed companies and to reduce the Listed Company Manual to a codification of mandatory requirements for listed companies.

Lastly, the Exchange proposes to eliminate certain provisions of Section 703.09 of the Listed Company Manual regarding disclosure of options, stock purchase and other remuneration plans. The Commission believes the Exchange's deletion of these provisions

⁴¹ See Notice, 71 FR at 37154 (stating that the Exchange is not disavowing that best practice is to hold the annual meeting within a reasonable interval after the close of the fiscal year).

from Section 703.09 of the Listed Company Manual is consistent with the Act since it eliminates duplicative, and potentially confusing, disclosure requirements for companies that are already more fully described in the Act.⁴²

Notice of Filing of and Order Granting Accelerated Approval to Amendment No. 3 to the Proposed Rule Change

In Amendment No. 3, the Exchange modified the proposal to provide that in the case of a listed company that is a closed-end fund, if the company does not maintain its own Web site, the company may utilize a Web site that the company is allowed to use to satisfy the Web site posting requirement in Rule 16a-3(k) of the Act.⁴³ The Exchange also added a requirement that when a company issues the press release announcing that its annual report has been filed, it must also specify in the press release the Web site address where shareholders may access the annual report.⁴⁴

The changes proposed by the Exchange in Amendment No. 3 respond to a concern raised by the ICI and are designed to ensure that the proposed rule change works as intended with respect to investment companies.⁴⁵ The proposed change also improves the press release proposal by requiring that the Web site address where financial statement can be

⁴² See, e.g., 17 CFR 229.201(d) and 17 CFR 229.402.

⁴³ 17 CFR 240.16a-3(k); see also Amendment No. 3, supra note 6.

⁴⁴ See Amendment No. 3, supra note 6.

⁴⁵ The Commission notes that in its comment letter, the ICI's proposed modifications to Section 303A.14 referred to "investment companies," whereas the Exchange's proposed rule text contained in Amendment No. 3 refers to "closed-end funds." See ICI Letter, supra note 5; see also Amendment No. 3, supra note 6. The Exchange has represented that the reason that it made this change to the ICI's suggested language is because under the Exchange's rules, the only listed "investment companies" to which the proposed rule change can apply are closed-end funds. See Telephone Conference between Annmarie Tierney, Assistant General Counsel, NYSE, and Raymond Lombardo, Special Counsel, Division of Market Regulation, Commission, on August 14, 2006.

accessed be included in the press release. The Commission believes that these proposed changes strengthen the proposed rule change and do not raise any new regulatory issues beyond those raised by the original proposal. Therefore, the Commission finds good cause, consistent with Sections 19(b) and 6(b)(5) of the Act, to approve Amendment No. 3 to the proposed rule change prior to the 30th day after the amendment is published for comment in the Federal Register.

V. 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 No. SR-NYSE-2005-68 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 No. SR-NYSE-2005-68. 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 No. SR-NYSE-2005-68 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁴⁶ that the proposed rule change (SR-NYSE-2005-68), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁴⁷

Nancy M. Morris
Secretary

⁴⁶ 15 U.S.C. 78s(b)(2).

⁴⁷ 17 CFR 200.30-3(a)(12).