

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51777; File No. SR-NYSE-2004-49)

June 2, 2005

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Approving Proposed Rule Change and Amendment No. 3 Thereto Relating to Procedures for Companies that Fail to File Annual Reports in a Timely Manner

I. Introduction

On August 19, 2004, the New York Stock Exchange, Inc. (“NYSE” or “Exchange”) submitted to the Securities and Exchange Commission (“Commission” or “SEC”), 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 codifying existing procedures followed where companies fail to satisfy the Commission’s filing requirements for annual reports on Forms 10-K, 10-KSB, 20-F, 40-F, or N-CSR in a timely manner. The proposed rule change was published for public comment in the Federal Register on October 1, 2004.³ The Exchange filed Amendments No. 1⁴ and 2⁵ on October 29, 2004 and November 29, 2004, respectively. On December 21, 2004, the Exchange filed Amendment No. 3 to the proposed rule change.⁶ Amendment No. 3 was published for

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 50452 (September 27, 2004), 69 FR 58987.

⁴ See letter from Mary Yeager, Assistant Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated October 28, 2004 (“Amendment No. 1”).

⁵ Amendment No. 2 replaced and superseded Amendment No. 1. On December 21, 2004, the Exchange withdrew Amendment No. 2.

⁶ Amendment No. 3 clarified that the proposed rule change would apply to companies that are already late in filing their annual reports as of the date that the Commission approves the proposed rule change.

public comment in the Federal Register on January 14, 2005.⁷ The Commission received two comment letters regarding the proposed rule change.⁸ On March 1, 2005, the Exchange submitted a response to the comments.⁹ This order approves the proposed rule change, as amended.

II. Description of the Proposed Rule Change

The Exchange is proposing to codify existing procedures followed where companies fail to satisfy the Commission's filing requirements for annual reports on Forms 10-K, 10-KSB, 20-F, 40-F, or N-CSR in a timely manner. The proposed rule change would apply with full effect to companies that are already late in filing their annual report on Form 10-K, 20-F, 40-F, or N-CSR with the SEC as of the date that the Commission approves this rule filing.¹⁰ Specifically, a company that fails to file its annual report with the Commission in a timely manner would be subject to the following procedures under new Paragraph 802.01E of the Listed Company Manual:

Under Paragraph 802.01E, once the Exchange identifies that a company has failed to file a timely periodic annual report with the Commission by the later of (a) the date that the annual report was required to be filed with the Commission by the applicable

⁷ Securities Exchange Act Release No. 50982 (January 6, 2005), 70 FR 2686. Amendment No. 3 clarified that the proposed rule change would apply to companies that are already late in filing their annual reports as of the date that the Commission approves the proposed rule change.

⁸ See letters from James J. Angel, Associate Professor of Finance, McDonough School of Business, Georgetown University ("Angel"), to Jonathan G. Katz, Secretary, Commission ("Angel Letter"), and Edward S. Knight, Executive Vice President and General Counsel, The Nasdaq Stock Market, Inc. ("Nasdaq"), to Jonathan G. Katz, Secretary, Commission, dated February 4, 2005 ("Nasdaq Letter").

⁹ See letter from Mary Yaeger, Assistant Secretary, NYSE, to Sharon Lawson, Division of Market Regulation, Commission, dated March 1, 2005.

¹⁰ See Amendment No. 3, supra note 6.

form or (b) if a Form 12b-25 was timely filed with the Commission, the extended filing due date for the annual report, the Exchange would notify the company in writing of its status. The later of these two dates would be referred to as the “Filing Due Date.”

Within five days of receipt of this notification, the company would be required to (a) contact the Exchange to discuss the status of the annual report filing, and (b) if it has not already done so, issue a press release disclosing the status of the filing. If the company failed to issue this press release in a timely manner, the Exchange would itself issue a press release stating that the company has failed to timely file its annual report with the Commission.

During the nine-month period from the Filing Due Date, the Exchange would monitor the company and the status of the filing, including through contact with the company, until the annual report is filed. Under the procedure, if the company failed to file the annual report within nine months from the Filing Due Date, the Exchange would be permitted, in its sole discretion, to allow the company’s securities to be traded for up to an additional three-month trading period depending on the company’s specific circumstances. If the Exchange determined that an additional trading period of up to three months is not appropriate, suspension and delisting procedures would commence in accordance with the procedures set out in Paragraph 804.00 of the Listed Company Manual.¹¹ The new rule specifically states that a company would not be eligible to follow the procedures outlined in Paragraphs 802.02 and 802.03 with respect to this criteria.¹²

¹¹ Paragraph 804 sets forth the procedures the Exchange follows when it determines a security should be delisted, and the issuer’s right of review of such decisions.

¹² Paragraphs 802.02 and 802.03 provide generally, among other things, that when a

In determining whether an additional trading period of up to three-months is appropriate, the rule specifically states that the Exchange would consider the likelihood that the filing could be made during the additional period, as well as the company's general financial status, based on information provided by a variety of sources, including the company, its audit committee, its outside auditors, the staff of the Commission and any other regulatory body. The new procedures also state that the Exchange strongly encourages companies to provide ongoing disclosure on the status of the annual report filing to the market through press releases, and that the Exchange will take the frequency and detail of such information into account in determining whether an additional three-month trading period is appropriate. If the Exchange determined that an additional, up to three-month trading period was appropriate and the company failed to file its periodic annual report by the end of the additional period, suspension and delisting procedures would commence in accordance with the procedures set out in Paragraph 804.00 of the Listed Company Manual.¹³

listed company is not in compliance with the Exchange's continued listing criteria, the Exchange notifies the company of its status and the company is given the opportunity to provide a plan advising the Exchange of the definitive action the company intends to take that would bring it into conformity with continued listing standards.

Late filers of annual reports do not follow the procedures in Paragraphs 802.02 and 802.03 of the Listed Company Manual and will not be allowed any additional periods under these paragraphs to comply with the annual reporting requirements. Instead, late filers of annual reports will be subject to the new procedures adopted in this order and will immediately proceed to delisting under Paragraph 804.00 if they are still out of compliance with their filing requirement after the applicable 9 or 12 month period provided in new Paragraph 802.01E.

¹³ See also supra notes 11 and 12. In such a case, the procedures of Paragraphs 802.02 and 802.03 would not be available, as discussed above.

The Commission notes that new Paragraph 802.01E permits the Exchange to suspend trading immediately and commence delisting procedures for a late annual report filer in accordance with Paragraph 804. Specifically, the new rule states that if, at any time, the Exchange deemed it necessary or appropriate in the public interest or for the protection of investors, trading in any security could be suspended immediately, and, in accordance with the procedures set out in Paragraph 804.00, application made to the Commission to delist the security.

III. Comments

The Commission received a total of two comment letters: the Nasdaq Letter and the Angel Letter,¹⁴ and a response from the NYSE.¹⁵ Angel stated that the proposal seemed reasonable overall, but that the NYSE should place an indicator on the ticker symbol of companies that are late in making required filings with the SEC. The Angel Letter also noted that Nasdaq puts an “E” on the end of a ticker symbol of companies late in required Commission filings and that the same identifier should be seen on NYSE late filers. Angel also recommended expanding the scope of the proposal to companies that are late in filing their quarterly reports, noting that this is just as important, if not more so, than late filers of annual reports.

Nasdaq stated that the proposal does not “go nearly far enough to protect investors.” Nasdaq also stated that it does “not believe that a market should offer what is essentially a blanket nine months filing extension to delinquent issuers” and that “the NYSE should be required to adopt a more reasonable timeframe to respond to annual report filing delinquencies.” In support of this, Nasdaq notes that the issuer’s financial

¹⁴ See supra note 8.

¹⁵ See supra note 9.

statements would be at least a year old at the end of NYSE's nine month period. In addition, Nasdaq stated that quarterly reports are an important element of information which is available to investors and that without current financials, it is impossible for a marketplace to determine whether a listed issuer complies with continued listing standards. Further, Nasdaq noted that its own procedures cover late annual and interim reports and if an issuer fails to timely file required reports it is promptly notified it will be delisted unless it appeals.¹⁶

In response to these comments, the NYSE stated that it agrees that investors should be provided with timely notice of companies that fail to file annual reports on time.¹⁷ The NYSE further stated that "since July 2004, the Exchange has monitored and disseminated transparent information on companies that fail to satisfy the Commission's requirement to file their annual financials in a timely manner." The NYSE further stated that it "appends an '.LF' indicator in the financial status field of the company's ticker symbol and distributes that information via the low speed ticker and through [its] data stream to market vendors." The Exchange also stated that it keeps an updated list of companies that are late in their filings on its website, and notes the late filing status on the company's data page on its website. In response to Angel's and Nasdaq's recommendation of identifying and expanding the scope of the proposal to companies that are late in filing their quarterly reports, the NYSE stated that it is currently involved in conversations with the Commission regarding the identification of companies that have failed to timely file quarterly reports. The NYSE also noted that to the extent a company

¹⁶ Nasdaq further stated that appeal hearings with respect to filing delinquencies are scheduled on an expedited basis and generally occur within three weeks.

¹⁷ Id.

files an overdue annual report, the NYSE will not remove the .LF indicator or the company's late filing status on its website until such time as all outstanding interim reports are up to date. In response to Nasdaq's comment that the proposal would give a blanket nine month extension to delinquent issuers, the NYSE stated that, during the nine month period, it is in frequent contact with the company and can suspend trading and delist the company at any point during this nine month period should it determine that it is not appropriate to allow the company's securities to continue to trade. The NYSE further noted in support of its proposal that, as of the date of its letter, only six companies were delinquent in filing their annual report and that some of these companies were restating their financials in response to, or in conjunction with, an SEC investigation.

IV. Discussion

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. In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act¹⁸ which requires an Exchange to have rules that are 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.¹⁹

The Commission believes that the proposed rule change provides a reasonable first step for dealing with companies that fail to file annual reports on time. The Commission notes that if a company fails to file its annual report within the timeframes

¹⁸ 15 U.S.C. 78f(b)(5).

¹⁹ In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

set forth in the proposed rule change, the Exchange would commence suspension and delisting procedures under Paragraph 804 of the Listed Company Manual. The Commission also notes that at any time during the 9 or 12 month period, as applicable, the Exchange may suspend trading and delist the company where it believes it is appropriate to do so in the public interest or for the protection of investors. The Commission believes that this should help to prevent an undue amount of time from passing without the company's audited financial statements being provided to the marketplace. In addition, since the NYSE is constantly monitoring the late filing issuers during the 9 or 12 month period, the NYSE has stated that it will, and the Commission expects the NYSE to, quickly suspend trading and commence delisting proceedings against any issuer during the 9 month period should it become necessary to do so based on the facts of the particular situation.²⁰ The Commission believes, however, that the NYSE should consider shortening the timeframes within which a company must file annual reports before being delisted, as well as extending such requirements to issuers that are late in filing their quarterly reports with the Commission.

In addition, the Commission notes that the Exchange appends an “.LF” indicator in the financial status field of the company's ticker symbol, distributes that information via the low speed ticker and through its data stream to market vendors, and keeps an updated list of companies that are late in their filings on its website. The NYSE also has stated that it actively encourages vendors and subscribers to display this indicator. The

²⁰ If a company that is late in filing its annual report appeals any decision to suspend trading, the NYSE has stated that the company's securities would not be permitted to trade on the exchange during the appeal process. See NYSE Letter *supra* note 8; see also e-mail from Annemarie Tierney, Office of General Counsel, NYSE, to Sharon Lawson, Senior Special Counsel, Division of Market Regulation, Commission (April 14, 2005).

Commission believes that these measures should provide notice to the investing public that an issuer is late in filing its annual report with the Commission.²¹

The Commission also notes that to the extent a late annual report filer files an overdue report, the NYSE has indicated it will not remove the indicator or the company's name from the late filer posting on its website until all outstanding quarterly reports have been submitted. While this is helpful to the public to ensure that investors are aware of the information available on a particular issuer, the Commission believes the NYSE should consider developing systems that identify all late filers of quarterly reports, irrespective of whether the annual report is also late. The Commission will continue to work with the NYSE in this area.

As noted above, Amendment No. 3 clarifies that the proposed rule change would apply to companies that are already late in filing their annual reports as of the date that the Commission approves the proposed rule change. The Commission notes that this amendment was published for notice and comment and that no comments were received addressing this issue. The Commission believes that applying the proposal to companies that are already late in filing their annual reports as of the date that the Commission approves the proposed rule change should help to ensure that such companies do not remain late filers for an extended time period past the 9 or 12 month period allowed under new Paragraph 802.01E of the Listed Company Manual, thereby benefiting the public interest.

In summary, the Commission believes that the procedures being approved herein will provide clarity to both issuers and investors on the delisting procedures applicable to

²¹ The Commission urges the NYSE to continue to encourage data vendors and subscribers to display the indicator.

late annual report filers and will help to ensure that delisting procedures are commenced no later than 12 months after the date the annual report was due. Further, the Commission continues to encourage the NYSE to further refine its policies to address late quarterly reports and other related matters.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²² that the proposed rule change (SR-NYSE-2004-49), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²³

Margaret H. McFarland
Deputy Secretary

²² 15 U.S.C. 78s(b)(2).

²³ 17 CFR 200.30-3(a)(12).