

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-84527; File No. SR-NYSEAMER-2018-47)

November 2, 2018

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Section 805(c)(5) of the Guide to Change the Threshold for Qualifying as a Smaller Reporting Company to Qualify for Certain Exemptions from the Compensation Committee Requirements

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that on October 23, 2018, NYSE American LLC (“NYSE American” 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 805(c)(5) of the NYSE American Company Guide (the “Company Guide”) to change the threshold for listed companies to benefit from the exemptions from the Exchange’s compensation committee requirements applicable to smaller reporting companies so that all companies that qualify for smaller reporting company status under the revised SEC definition will qualify for those exemptions. 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 15 U.S.C. 78a.

³ 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 SEC recently adopted⁴ amendments to the definition of “smaller reporting company” set forth in Item 10(f)(1) of Regulation S-K⁵, Rule 12b-2 under the Act⁶ and Rule 405 under the Securities Act of 1933.⁷ The amendments raise the smaller reporting company cap from less than \$75 million in public float to less than \$250 million and also include as smaller reporting companies issuers with less than \$100 million in annual revenues if they also have either no public float or a public float that is less than \$700 million. The amendments became effective on September 10, 2018. The Exchange estimates that a consequence of the SEC rule changes is that a significantly larger number of its listed companies will qualify for smaller reporting company status than was previously the case.

⁴ Release Nos. 33–10513 and 34–83550 (June 28, 2018); 83 FR 31992 (July 10, 2018).

⁵ 17 CFR 229.10(F)(1).

⁶ 17 CFR 240.12b-2.

⁷ 17 CFR 230.405.

Section 805(c)(1) of the Company Guide requires a heightened standard of independence for compensation committee members.⁸ Section 805(c)(4) requires the compensation committee to undertake an independence analysis when hiring a compensation consultant. Section 801(h) of the Company Guide provides that smaller reporting companies are exempt from these heightened independence requirements. Section 805(c)(5) of the Company Guide includes a provision describing the period within which a company must comply with Sections 805(c)(1) and 805(c)(4) after it ceases to be smaller reporting company.⁹ This provision currently states

⁸ In addition to the director independence requirements of Section 803A, the board must affirmatively determine that all of the members of the Compensation Committee or, in the case of a company that does not have a Compensation Committee, all of the independent directors, are independent under Section 805(c)(1). In affirmatively determining the independence of any director who will serve on the Compensation Committee, the Board must consider all factors specifically relevant to determining whether a director has a relationship to the listed company which is material to that director's ability to be independent from management in connection with the duties of a Compensation Committee member, including, but not limited to: (A) the source of compensation of such director, including any consulting, advisory or other compensatory fee paid by the listed company to such director; and (B) whether such director is affiliated with the listed company, a subsidiary of the listed company or an affiliate of a subsidiary of the listed company.

⁹ Under the applicable SEC rules, a company tests its status as a smaller reporting company on an annual basis at the end of its most recently completed second fiscal quarter (the "Smaller Reporting Company Determination Date"). A smaller reporting company ceases to be a smaller reporting company as of the beginning of the fiscal year following the Smaller Reporting Company Determination Date. The compensation committee of a company that has ceased to be a smaller reporting company is required to comply with Section 805(c)(4) as of six months from the date it ceases to be a smaller reporting company and must have:

- one member of its compensation committee that meets the independence standard of Section 805(c)(1) within six months of that date;
- a majority of directors on its compensation committee meeting those requirements within nine months of that date; and
- a compensation committee comprised solely of members that meet those requirements within twelve months of that date.

Any such company that does not have a compensation committee must comply with this transition requirement with respect to all of its independent directors as a group.

explicitly that a smaller reporting company must have less than \$75 million in public float. In light of the recent changes to the SEC's rules with respect to smaller reporting companies, the Exchange proposes to delete this reference to the \$75 million public float cap and revise the provision to state simply that a smaller reporting company that fails to meet the requirements for smaller reporting company status as of the Smaller Reporting Company Determination Date will cease to be a smaller reporting company as of the beginning of the following fiscal year. The effect of this amendment will be to change the threshold for listed companies to be eligible to benefit from the exemptions from the compensation committee independence requirements applicable to smaller reporting companies so that all companies that qualify for smaller reporting company status under the revised SEC definition will qualify for those exemptions.

The Exchange also proposes to delete from Section 805(c)(5) text referencing the transition period for companies to comply with the enhanced compensation committee provisions at the time of their original adoption, as the transition period ended on October 31, 2014 and the text is therefore no longer relevant.¹⁰

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,¹¹ in general, and furthers the objectives of Section 6(b)(5) of the Act¹² 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 general, to protect

¹⁰ The Exchange also proposes to remove a typographical error from Section 805(c)(5).

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(5).

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

As noted above, the effect of the proposed change to the definition in Section 805(c)(5) of the definition of a smaller reporting company is to change the threshold for listed companies to benefit from the exemptions from the compensation committee independence requirements applicable to smaller reporting companies so that all companies that qualify for smaller reporting company status under the revised SEC definition will qualify for those exemptions. Listed smaller reporting companies must comply with all other applicable Exchange corporate governance requirements, including all other applicable compensation committee requirements. The Commission has already determined through its own rulemaking that the revised thresholds for smaller reporting company status proposed in this rule proposal are consistent with the goal of the Act to further the protection of investors and the public interest¹³ and the Exchange believes that its own proposal is consistent with Section 6(b)(5) of the Act for the same reasons.

The deletion from Section 805(c)(5) of the text referencing the transition period for companies to comply with the enhanced compensation committee provisions at the time of their original adoption is consistent with Section 6(b)(5), as the transition period ended on October 31, 2014 and the text is therefore no longer relevant.

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 change to the definition of smaller reporting company in Section 805(c)(5) will not impose any burden competition as its sole purpose is to change the threshold for listed

¹³ See footnote 4, supra.

companies to benefit from the exemptions from the Exchange's compensation committee independence requirements applicable to smaller reporting companies so that all companies that qualify for smaller reporting company status under the revised SEC definition will qualify for those exemptions. The deletion from Section 805(c)(5) of the text referencing the transition period for companies to comply with the enhanced compensation committee provisions at the time of their original adoption will not impose any burden on competition, as the transition period ended on October 31, 2014 and the text is therefore no longer relevant.

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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act¹⁴ and Rule 19b-4(f)(6) thereunder.¹⁵ Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, 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 and Rule 19b-4(f)(6)(iii) thereunder.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend 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. If the Commission takes such action, the

¹⁴ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁵ 17 CFR 240.19b-4(f)(6).

Commission shall institute proceedings under Section 19(b)(2)(B)¹⁶ of the Act to determine whether the proposed rule change should be approved or 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-NYSEAMER-2018-47 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-NYSEAMER-2018-47. 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

¹⁶ 15 U.S.C. 78s(b)(2)(B).

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-NYSEAMER-2018-47, 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.¹⁷

Eduardo A. Aleman
Assistant Secretary

¹⁷ 17 CFR 200.30-3(a)(12).