

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-59823; File No. SR-NYSE-2009-40)

April 27, 2009

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC Amending the Exchange's Timely Alert Policy

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 8, 2009, New York Stock Exchange, LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission" or "SEC") 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 202.06 of the Listed Company Manual to provide that companies can comply with the Exchange's immediate release policy by disseminating the information by any Regulation Fair Disclosure ("Regulation FD") compliant method (or combination of methods). The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and [www.nyse.com](http://www.nyse.com).

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

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

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 Statutory Basis for, the Proposed Rule Change

1. Purpose

Section 202.05 of the Listed Company Manual requires a listed company to release quickly to the public any news or information which might reasonably be expected to materially effect the market for its securities (the “immediate release policy”). Section 202.06 provides that companies should comply with the immediate release policy by issuing a press release.

Regulation FD was adopted by the SEC in 2000 in order to curb the selective disclosure of material non-public information by issuers to analysts and institutional investors.<sup>3</sup> Generally, Regulation FD requires that when an issuer discloses material information, it do so publicly. Public disclosure under Regulation FD can be accomplished by filing a Form 8-K with the SEC or through another method of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public. In addition to a broadly disseminated press release, Regulation FD compliant methods of disclosure may include furnishing to or filing with the SEC a Form 8-K as well as conference calls, press conferences and webcasts, so long as the public is provided adequate notice (generally by press release) and granted access.<sup>4</sup>

Since the adoption of Regulation FD, some non-NYSE listed companies have adopted the practice of issuing material disclosures in a Form 8-K rather than by way of a press release. It has been the Exchange’s experience that some companies are confused as to their disclosure

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<sup>3</sup> See Securities Exchange Act Release No. 43154 (August 15, 2000), 65 FR 51716 (August 24, 2000) (“Regulation FD Adopting Release”).

<sup>4</sup> See Regulation FD Adopting Release at pages 51723-51724.

obligations under Exchange rules, with companies sometimes assuming that a disclosure in a Form 8-K is sufficient to comply with the Exchange's immediate release policy. Furthermore, some companies that do understand the Exchange's press release requirements have expressed the view that a press release is redundant when the company is filing a Form 8-K to meet its Regulation FD requirements. In addition, some companies wish to publicize material news through the company website, as the SEC has provided recent guidance that this approach is appropriate under certain circumstances.<sup>5</sup>

The Exchange now proposes to amend Section 202.06 to provide that companies may comply with the immediate release policy by disseminating the information using any method (or combination of methods) that constitutes compliance with Regulation FD. Foreign private issuers are subject to the timely alert policy but they are not required to comply with Regulation FD. Notwithstanding their exemption from Regulation FD, Section 202.06 will allow foreign private issuers to comply with the timely alert policy by any method (or combination of methods) that would constitute compliance with Regulation FD for a domestic U.S. issuer. While the Exchange continues to believe that there are benefits to the market and investors generally if companies issue press releases when disclosing material information, the Exchange nonetheless believes that it is appropriate to harmonize its requirements in this regard with Regulation FD and Nasdaq rules thereby eliminating the confusion inherent in having different regimes applied by the two largest listing exchanges and the SEC.<sup>6</sup> The Exchange believes that many companies will continue to issue press releases in relation to material news events, but also

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<sup>5</sup> See Securities Exchange Act Release No. 58288 (August 1, 2008), 73 FR 45862 (August 7, 2008).

<sup>6</sup> See Securities Exchange Act Release No. 46288 (July 31, 2002), 67 FR 51306 (August 7, 2002) (SR-NASD-2002-85) (the "Nasdaq Amendment").

believes that it is appropriate to enable companies to utilize the flexibility and discretion with respect to the method of disclosure provided by Regulation FD.

Section 202.06(B) currently provides that, when the announcement of news of a material event or a statement dealing with a rumor which calls for immediate release is made shortly before the opening or during market hours (9:30 A.M. to 5:00 P.M., New York time<sup>7</sup>), it is recommended that the company's Exchange representative be notified by telephone at least ten minutes prior to release of the announcement. This timely notification enables the Exchange to consider whether, in the opinion of the Exchange, trading in the security should be temporarily halted.<sup>8</sup> The Exchange proposes to amend this text to make it clear that the notification to the Exchange of such announcements is a requirement of the rule and not just a recommendation. In addition, the Exchange proposes to amend Section 202.06(B) to require the listed company when contacting the Exchange to disclose to the Exchange the substance of the announcement, identify to the Exchange the Regulation FD-compliant method it intends to use to disseminate the news and provide the Exchange with the information necessary to locate the information upon publication. The rule is also amended to require the company, when the announcement is in written form, to provide the text of the proposed announcement to the Exchange by email at the time it notifies the Exchange.

The Exchange will continue to evaluate the materiality of these disclosures and implement temporary trading halts, where appropriate, to facilitate the orderly dissemination of certain issuer announcements having a potentially material impact on the price of the securities.

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<sup>7</sup> While the NYSE's trading day ends officially at 4.00 p.m., New York time, there are crossing sessions until 5.00 p.m., New York time.

<sup>8</sup> See NYSE Rule 123D(1) for the Exchange's procedures with respect to delayed openings and trading halts pending dissemination of material news.

The Exchange is also proposing several other minor changes to Section 202.06. The Exchange is adding a parenthetical to Section 202.06(B), referring readers to Exchange Rule 123D(1) for the Exchange's policies with respect to delayed openings and trading halts. Additionally, Section 202.06(C) is being amended (i) to provide that public disclosures which may significantly affect trading should be provided to the Exchange by email rather than by facsimile as is currently the case and (ii) to conform to the change to Section 202.06(B) by providing that material news may be disseminated by any Regulation FD compliant method and not just by press release.

## 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with and furthers the objectives of Section 6(b)(5) of the Act,<sup>9</sup> in that it is designed to prevent fraudulent and manipulative practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system, and, in general, to protect investors and the public interest.<sup>10</sup>

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<sup>9</sup> 15 U.S.C. 78f(b)(5).

<sup>10</sup> The Commission notes that, in the purpose section of the Form 19b-4, the Exchange provided a more complete statutory basis for the proposed rule change, as follows:

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the "Act"), in general, and furthers the objectives of Section 6(b)(5) of the Act, 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 investors and the public interest. The Exchange believes that the proposed amendment is consistent with the investor protection objectives of the Act in that it harmonizes the Exchange's immediate release policies with the SEC's requirements in Regulation FD.

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.

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 Act<sup>11</sup> and Rule 19b-4(f)(6) thereunder.<sup>12</sup> 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.<sup>13</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate 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.

IV. Solicitation of Comments

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<sup>11</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>12</sup> 17 CFR 240.19b-4(f)(6).

<sup>13</sup> The Commission notes that pursuant to Rule 19b-4(f)(6)(iii) under the Act, the Exchange is required to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

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](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2009-40 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NYSE-2009-40. 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, on official business days between the hours of 10:00 am and 3:00 pm. 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-NYSE-2009-40 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.<sup>14</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>14</sup> 17 CFR 200.30-3(a)(12).