

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-74412; File No. SR-NYSE-2014-65)

March 2, 2015

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving a Proposed Rule Change Amending Its Continued Listing Requirements, As Set Forth in Section 802.01E of the Exchange's Listed Company Manual, In Relation to the Late Filing of a Company's Annual or Quarterly Report with the Securities and Exchange Commission

I. Introduction

On December 4, 2014, New York Stock Exchange LLC ("NYSE" or the "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 its continued listing requirements, set forth in Section 802.01E of its Listed Company Manual, with respect to companies whose required annual or quarterly reports are late or defective. The proposed rule change was published for comment in the Federal Register on December 17, 2014.³ On January 30, 2015, the Commission designated a longer period for Commission action on the proposed rule change, until March 17, 2015.⁴ The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

The Exchange proposes to amend Section 802.01E of its Listed Company Manual (the "Late Filer Rule") to: (i) expand the rule to impose a maximum period within which a company must file a late quarterly report on Form 10-Q in order to maintain its listing, and (ii) clarify the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 73821 (December 11, 2014), 79 FR 75217 ("Notice").

⁴ See Securities Exchange Act Release No. 74184, 80 FR 6558 (February 5, 2015).

Exchange's treatment of companies whose annual or quarterly reports are defective at the time of filing or become defective at some subsequent date.

Currently, the Late Filer Rule deems a listed company to be delinquent in filing its annual report on Forms 10-K, 20-F, 40-F or N-CSR with the Commission if it fails to submit the filing by the date such report was required to be filed by the applicable form, or if a Form 12b-25 was timely filed with the Commission, the extended filing due date for the annual report. During the six-month period from the date of such delinquency, the Exchange monitors the company and the status of the delinquent annual report, including through contact with the company, until the filing delinquency is cured. If the company fails to cure such delinquency within the initial six-month period, the Exchange may, in its sole discretion, allow the company's securities to be traded for up to an additional six-month period depending on the company's specific circumstances. The Exchange will commence suspension and delisting procedures in accordance with Section 804.00 of the Listed Company Manual if the Exchange determines that an additional trading period of up to six months is not appropriate, or if the Exchange determines that an additional trading period of up to six months is appropriate and the company fails to file its annual report by the end of the additional period.

A company is not currently subject to the compliance periods set forth in the Late Filer Rule in connection with a failure to timely file a quarterly report on Form 10-Q with the SEC.⁵

⁵ While a company is not currently subject to the compliance periods in the Late Filer Rule in connection with the failure to timely file a Form 10-Q, such companies are subject to the Exchange's late filer (or ".LF") indicator process. The .LF indicator is appended to the company's trading symbol as disseminated on the consolidated tape and to market data vendors, and the company's name is included on the late filer list on the Exchange's website. The .LF indicator and web posting commence five days after the due date or extended due date (if applicable) of the first late annual report or Form 10-Q (unless the company has submitted the required report within that five day period) and continue until the company becomes current again with respect to all required periodic reports. In

Moreover, the Late Filer Rule currently does not explicitly detail the Exchange's treatment of companies whose annual or quarterly reports are defective. The Exchange has now proposed to amend its Late Filer Rule to add these elements.

Specifically, the Exchange has proposed to amend its Late Filer Rule to explicitly state that, for purposes of remaining listed on the Exchange, a company would incur a filing delinquency and be subject to the procedures set forth in the amended rule on the date on which any of the following occurs:

- the company fails to file its annual report or its quarterly report on Form 10-Q with the Commission by the date such report was required to be filed by the applicable form (or extended due date if a Form 12b-25 is timely filed with the Commission) (the "Filing Due Date," and the failure to file a report by the applicable Filing Due Date, a "Late Filing Delinquency");
- the company files its annual report without an audit report from its independent auditor for any or all of the periods included in such annual report (a "Required Audit Report" and the absence of a Required Audit Report, a "Required Audit Report Delinquency");
- the company's independent auditor withdraws a Required Audit Report or the company files a Form 8-K with the Commission pursuant to Item 4.02(b) thereof disclosing that it has been notified by its independent auditor that a Required Audit Report or completed

addition, the Commission notes that a listed company is obligated to comply with the Exchange's listing agreement, which requires, among other things, that the company file all required periodic financial reports with the SEC, including quarterly or semi-annual reports (and annual reports), by the due dates established by the SEC, and which states that the Exchange may, consistent with applicable laws and SEC rules, suspend a listed company's securities and commence delisting proceedings upon failure of the company to comply with any one or more sections of the listing agreement.

interim review should no longer be relied upon (a “Required Audit Report Withdrawal Delinquency”); or

- the company files a Form 8-K with the Commission pursuant to Item 4.02(a) thereof to disclose that previously issued financial statements should no longer be relied upon because of an error in such financial statements or, in the case of a foreign private issuer, makes a similar disclosure in a Form 6-K filed with the Commission or by other means (a “Non-Reliance Disclosure”) and, in either case, the company does not refile all required corrected financial statements within 60 days of the issuance of the Non-Reliance Disclosure (an “Extended Non-Reliance Disclosure Event” and, together with a Late Filing Delinquency, a Required Audit Report Delinquency and a Required Audit Report Withdrawal Delinquency, a “Filing Delinquency”) (for purposes of the cure periods described in the rule, an Extended Non-Reliance Disclosure Event would be deemed to have occurred on the date of original issuance of the Non-Reliance Disclosure); if the Exchange believes that a company is unlikely to refile all required corrected financial statements within 60 days after a Non-Reliance Disclosure or that the errors giving rise to such Non-Reliance Disclosure are particularly severe in nature, the Exchange may, in its sole discretion, determine earlier than 60 days that the applicable company has incurred a Filing Delinquency as a result of such Non-Reliance Disclosure.⁶

Additionally, under the proposed rule, the Exchange would deem a company to have incurred a Late Filing Delinquency if it submits an annual report or Form 10-Q to the Commission by the applicable Filing Due Date, but such filing fails to include an element required by the applicable

⁶ See proposed Section 802.01E of the Listed Company Manual (“Manual”). The proposed rule states that the annual report or Form 10-Q that gives rise to a Filing Delinquency shall be referred to therein as the “Delinquent Report.” Id.

form and the Exchange determines in its sole discretion that such deficiency is material in nature.⁷

Upon the occurrence of a Filing Delinquency, the Exchange would promptly send written notification to a company of its procedures relating to late filings (the “Filing Delinquency Notification”).⁸ As is the case under the current rule, within five days of the date of the Filing Delinquency Notification, the company would be required to contact the Exchange to discuss the status of the Delinquent Report and issue a press release disclosing the occurrence of the Filing Delinquency, the reason therefor, and (if known) the anticipated date such Filing Delinquency will be cured via the filing or refiling of the applicable report, as the case may be.⁹

During the six-month period from the date of the Filing Delinquency (the “Initial Cure Period”), the Exchange would monitor the company and the status of the Delinquent Report and any subsequent annual report or quarterly report on Form 10-Q the company fails to file by the applicable Filing Due Date (a “Subsequent Report”), through contact with the company, until the

⁷ Id. The Exchange states that the following is a non-exclusive list of elements that would cause the Exchange to deem the company to have incurred a Late Filing Delinquency: the filing does not include required financial statements or a required audit opinion; a required financial statement audit opinion includes qualifying or disclaiming language or the auditor provides an adverse financial statement audit opinion; a required financial statement audit opinion is unsigned or undated; there is a discrepancy between the period end date for required financial statements and the date cited in the related audit report; the company’s auditor has not conducted a SAS 100 review with respect to the company’s Form 10-Q; required chief executive officer or chief financial officer certifications are missing; a Sarbanes-Oxley Act Section 404 required internal control report or auditor certification is missing; the filing does not comply with the applicable SEC XBRL requirements; or the filing does not include signatures of officers or directors required by the applicable form. See Notice, 79 FR at 75218 n.6.

⁸ See proposed Section 802.01E of the Manual. The Exchange states that it typically sends such notification within five business days. See Notice, 79 FR at 75218.

⁹ See proposed Section 802.01E of the Manual. If the company has not issued the required press release within five days of the date of the Filing Delinquency Notification, the Exchange will issue a press release stating that the company has incurred a Filing Delinquency and providing a description thereof. Id.

Filing Delinquency is cured.¹⁰ If the company fails to cure the Filing Delinquency within the Initial Cure Period, the Exchange may, in its sole discretion, allow the company's securities to be traded for up to an additional six-month period (the "Additional Cure Period") depending on the company's specific circumstances.¹¹ If the Exchange determines that an Additional Cure Period is not appropriate, suspension and delisting procedures would commence in accordance with the procedures set out in Section 804.00 of the Manual.¹² A company would not be eligible to follow the procedures outlined in Sections 802.02 and 802.03 with respect to this criterion.¹³ Notwithstanding the foregoing, however, under the proposed rule the Exchange may in its sole discretion decide: (i) not to afford a company any Initial Cure Period or Additional Cure Period, as the case may be, at all; or (ii) at any time during the Initial Cure Period or Additional Cure Period, as the case may be, to truncate the Initial Cure Period or Additional Cure Period, as the case may be, and immediately commence suspension and delisting procedures if the company is subject to delisting pursuant to any other provision of the Manual, including if the Exchange believes, in its sole discretion, that continued listing and trading of a company's securities on the Exchange is inadvisable or unwarranted in accordance with Sections 802.01A, 802.01B, 802.01C or 802.01D of the Manual.¹⁴

¹⁰ Id. Under the proposed amended rule, a company that has an uncured Filing Delinquency would not incur an additional Filing Delinquency if it fails to file a Subsequent Report by the applicable Filing Due Date. However, in order for the company to cure its initial Filing Delinquency, no Subsequent Report may be delinquent or deficient on the date by which the initial Filing Delinquency is required to be cured. Id.

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ Id.

The Exchange may also commence suspension and delisting procedures if it believes, in its sole discretion, that it is advisable to do so based on an analysis of all relevant factors, including, but not limited to:

- whether there are allegations of financial fraud or other illegality in relation to the company's financial reporting;
- the resignation or termination by the company of the company's independent auditor due to a disagreement;
- any extended delay in appointing a new independent auditor after a prior auditor's resignation or termination;
- the resignation of members of the company's audit committee or other directors;
- the resignation or termination of the company's chief executive officer, chief financial officer or other key senior executives;
- any evidence that it may be impossible for the company to cure its Filing Delinquency within the cure periods otherwise available under the Late Filer Rule; and
- any past history of late filings.¹⁵

In determining whether an Additional Cure Period after the expiration of the Initial Cure Period is appropriate, the Exchange would, as is currently the case, consider the likelihood that the Delinquent Report and all Subsequent Reports can be filed or refiled, as applicable, during the Additional Cure 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 SEC and any other regulatory body.¹⁶ Further, the Exchange, as

¹⁵ Id.

¹⁶ Id.

it currently does, would strongly encourage companies to provide ongoing disclosure on the status of the Delinquent Report and any Subsequent Reports to the market through press releases, and would also take the frequency and detail of such information into account in determining whether an Additional Cure Period is appropriate.¹⁷

As proposed, if the Exchange determines that an Additional Cure Period is appropriate and the company fails to file the Delinquent Report and all Subsequent Reports by the end of such additional period, suspension and delisting procedures would commence immediately in accordance with the procedures set out in Section 804.00.¹⁸ In no event would the Exchange continue to trade a company's securities if: (i) it has failed to cure its Filing Delinquency; and (ii) it is not current with all Subsequent Reports, on the date that is twelve months after its initial Filing Delinquency.¹⁹

The Exchange has proposed that its amended Late Filer Rule become operative on March 1, 2015.²⁰ Accordingly, the current provisions of Section 802.01E of the Manual would be applicable to any listed company that fails to timely file an annual report (Forms 10-K, 20-F, 40-F or N-CSR) prior to March 1, 2015.²¹ On or after March 1, 2015, any listed company that fails to timely file an annual report, or quarterly report on Form 10-Q, would be subject to the amended provisions of Section 802.01E.²² Any listed company that is late as of March 1, 2015,

¹⁷ Id.

¹⁸ Id.

¹⁹ Id. See supra note 10.

²⁰ See Notice, 79 FR at 75219.

²¹ Id. Both prior to and after March 1, 2015, the Exchange's other continued listing standards would, of course, continue to apply, including the ability to suspend and delist if any other event or condition exists or occurs that makes further dealings or listing of the securities on the Exchange inadvisable or unwarranted.

²² Id.

in filing a Form 10-Q with a due date prior to that date would not be subject to the proposed amended rule with respect to that filing; however, any such company would be subject to the proposed amended rule with respect to any periodic report it does not file on a timely basis with a due date that is on or after March 1, 2015.²³

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.²⁴ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,²⁵ 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; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission believes that the goal of ensuring that listed companies have filed accurate, up-to-date reports under the Act is of critical importance so that investors have reliable information upon which they can make informed investment decisions. For the same reason, it is also important that companies with stale or defective publicly filed financial information do not remain listed on a national securities exchange if such information is not brought up-to-date or the deficiency cured in a timely manner. The Commission previously stated its view that the NYSE should consider shortening the timeframes within which a company would be delisted for

²³ Id.

²⁴ 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).

²⁵ 15 U.S.C. 78f(b)(5).

failing to file annual reports as well as extending such requirements to issuers that are late in filing their quarterly reports with the Commission.²⁶ The Commission believes that the proposed rule change, by including quarterly reports, should help to prevent an undue amount of time from passing without the company's annual or quarterly reports being provided to the marketplace.

The Commission also believes that the proposed changes to Section 802.01E of the Manual should help to ensure that companies cannot continue to trade for extended periods of time without making their annual and interim reports publicly available.²⁷ In this regard, the Commission notes that the proposed rule change should help reduce those situations in which investors continuously have outdated or stale financial information upon which to base their investment decisions. As is discussed above, a company that has an uncured Filing Delinquency would not be able to cure the Filing Delinquency until all subsequent annual or quarterly reports that are delinquent have been filed.²⁸ In other words, once it is a delinquent filer, a company can only become current in its filings if all of its annual and quarterly filings have been submitted to the SEC within 12 months of the first Filing Delinquency. Under the current rule by contrast, only annual reports trigger the suspension and delisting procedures of Section 802.01E of the Manual. Furthermore, a listed company that demonstrates a history of delinquent filings could

²⁶ See Securities Exchange Act Release No. 51777 (June 2, 2005), 70 FR 33573 (June 8, 2005).

²⁷ The Commission notes that, although Section 802.01E does not specifically provide for late filer treatment if a foreign private issuer fails to provide quarterly or semi-annual financial information, violation of Section 802.01D could result in a foreign private issuer becoming subject to delisting. Specifically, Section 802.01D provides that a listed company could be subject to delisting under Sections 802.02 and 802.03 for "failure of a company to make timely, adequate, and accurate disclosures of information to its shareholders and the investing public." The Commission believes that failure by a listed company to make interim financial disclosures, on at least a semi-annual basis, would meet this definition.

²⁸ See supra note 10.

still be subject to delisting under the proposed rule change without the Exchange affording it any cure period at all (or at any time during an initial or additional cure period) as a result of the Exchange’s ability to commence suspension and delisting procedures based on a company’s “past history of late filings.”²⁹ The Commission believes these provisions will enable the Exchange to delist those companies that have demonstrated a history of providing outdated or stale financial information to investors and help the Exchange address the situation where a company becomes current within 12 months and then a short while later, such as by the next Commission filing date, incurs another Filing Delinquency. In such a case, the Commission would be concerned that investors continue to rely on outdated information and do not have current financial information on a timely basis in which to make their trading and investment decisions. The Commission believes that the proposal is reasonably designed to further these goals of investor protection and therefore is consistent with the Act and Section 6(b)(5) thereunder.

Additionally, by clearly stating that the Exchange’s Late Filer Rule applies not only to companies that file late or defective annual reports but also broadening the delisting procedures to include listed companies that file late or defective quarterly reports, the Commission believes that the proposal should benefit the public interest and protect investors by helping to assure that a larger segment of the financial information investors may rely upon when deciding whether to invest in a company listed on the Exchange is up-do-date and accurate. Further, by detailing what the Exchange considers to be a defective annual or quarterly report and how the Exchange treats listed companies whose filed reports suffer from a deficiency, the Commission believes that the proposed rule change promotes just and equitable principles of trade by providing

²⁹ See supra note 15 and accompanying text.

additional transparency to listed companies as to what could cause them to become subject to the Section 802.01E delisting procedures for a late or deficient filing. For example, as noted above, Exchange rules will be clear that a company that files an 8-K pursuant to Item 4.02(b) thereof and has a Required Audit Report Withdrawal Delinquency will be subject to the procedures in Section 802.01E and can only be extended a maximum of 12 months to cure the delinquency. Moreover, and importantly, this additional transparency, as well as the more stringent requirements set forth in the amended rule, could encourage listed companies to take extra care to ensure that their filed reports are timely and accurate, which would protect investors and the public interest. To the extent this occurs, the Commission believes that the proposal also has the potential to enhance the reliability of reports filed by companies listed on the Exchange as well as investor confidence in such reports, which should help to perfect the mechanism of a free and open market.

The new rules also give the Exchange discretion in certain areas when a filing fails to include an element required by the applicable Commission form and the Exchange determines in its sole discretion that such deficiency is material in nature. The rule filing provided a non-exclusive list of elements that, if missing from a filing, would cause the Exchange to deem the company to have incurred a Filing Delinquency. The Exchange stated in its rule filing that, in making this determination, it would not be making any judgments as to the sufficiency of the filing in question for purposes of compliance with Commission rules, but rather only for purposes of compliance with Exchange rules. The Commission emphasizes that any determination by the Exchange that a missing element is not material for purposes of a Filing Delinquency has no effect on the company's compliance with Commission rules. The Commission further notes that while there is a provision in the new rules concerning a listed

company that files an 8-K or 6-K announcing a Non-Reliance Disclosure having 60 days to correct its financial statements, the proposal makes clear that the Filing Delinquency will date from the original announcement of the Non-Reliance Disclosure if it is not cured within 60 days. This will ensure that the period for curing a Non-Reliance Disclosure will not extend past the 12 month period given to listed companies that have had another type of Filing Delinquency.

Finally, the Commission notes that the time periods allowed to cure a Filing Delinquency are maximums for purposes of continued listing. The new provisions being adopted provide additional transparency to investors and the marketplace but also give the Exchange discretion to analyze the particular case and consider whether it is appropriate to commence suspension and delisting procedures immediately based on the particular facts, as well giving the Exchange discretion to grant an additional six month cure period, or shorten any time periods previously given. The new rules provide additional transparency by setting forth certain factors that may cause immediate delisting or shortened periods, such as resignation of a company's chief executive officer, financial officer or members of the audit committee; allegations of fraud or other illegality in relation to financial reporting; and past history of late filings. We expect the Exchange to carefully review each Filing Deficiency and ensure that the public interest is being served by continued trading. As noted above, the importance of timely and complete Commission filings to ensure that investors and the marketplace have accurate and up-to-date information about publicly traded companies is of extreme importance for confidence in our public markets.³⁰

³⁰ As noted above, the Exchange strongly encourages companies to provide ongoing disclosure on the status of the Delinquent Report and any Subsequent Reports to the market through press releases, and would also take the frequency and detail of such information into account in determining whether an Additional Cure Period is

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,³¹ that the proposed rule change (SR-NYSE-2014-65) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³²

Brent J. Fields
Secretary

appropriate. The Commission believes such disclosures are very important to the marketplace during the delinquency period.

³¹ 15 U.S.C. 78s(b)(2).

³² 17 CFR 200.30-3(a)(12).