

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-82213; File No. SR-NYSE-2017-32)

December 4, 2017

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, to Amend Section 202.06 of the NYSE Listed Company Manual to Prohibit Listed Companies From Issuing Material News After the Official Closing Time for the Exchange's Trading Session Until the Earlier of Publication of Such Company's Official Closing Price on the Exchange or Five Minutes After the Official Closing Time

I. Introduction

On August 17, 2017, New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend the NYSE Listed Company Manual (the "Manual") to prohibit listed companies from issuing material news after the official closing time for the Exchange's trading session until the earlier of publication of such company's official closing price on the Exchange or five minutes after the official closing time. The proposed rule change was published for comment in the Federal Register on September 5, 2017.³ The Commission received one comment letter on the proposed rule change.⁴ On October 20, 2017, the Commission extended the time period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 81494 (August 29, 2017), 82 FR 42008 ("Notice").

⁴ See letter to Eduardo A. Aleman, Assistant Secretary, Commission from John Dibacco Virtu Financial LLC ("Virtu"), dated September 20, 2017 ("Virtu Letter"). The Virtu Letter expressed support for the proposed rule change.

change to December 4, 2017.⁵ On November 28, 2017, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superceded the original filing in its entirety.⁶ This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposed Rule Change, as Modified by Amendment No. 1

Currently, the Exchange's rules for the public release of material information, set forth in Section 202.06 (Procedure for Public Release of Information; Trading Halts) of the Manual, contains an advisory that requests that listed companies that intend to issue material news after the close of trading on the Exchange delay such issuance until the earlier of publication of such company's official closing price or fifteen minutes after the close of trading in order to facilitate an orderly closing auction process. Continuous trading on the Exchange ends at the Exchange's official closing time of 4:00 P.M. Eastern Time, except for certain days on which trading closes early at 1:00 P.M. Eastern Time. After continuous trading ends at the official closing time (generally 4:00 pm unless there is a 1:00 pm close), the Designated Market Maker ("DMM") in a security facilitates the close of trading in a closing auction.⁷ The closing auction is a manual

⁵ See Securities Exchange Act Release No. 81914, 82 FR 49690 (October 26, 2017).

⁶ In Amendment No. 1, the Exchange amended the proposed rule language to clarify that the proposed restriction on issuing material news will not apply where a listed company was publicly disclosing material information following a non-intentional disclosure in order to comply with Regulation FD. Amendment No. 1 was also submitted as a comment to the rule proposal. See letter to Brent J. Fields, Secretary, Commission from Martha Redding, Associate General Counsel and Assistant Secretary, New York Stock Exchange, dated November 29, 2017 ("Amendment No. 1").

⁷ See Section 202.06 of the Manual. A DMM has a responsibility and duty to facilitate the close of trading for each of the securities in which the DMM is registered. See id. at 42009. Up until 4:00 p.m., the Exchange publishes order imbalance information, which includes real-time order imbalance information and information indicating the price at which closing interest may be executed in full and the price at which Exchange Book and closing-only interest may be executed in full. See id. Accordingly, a DMM facilitates a closing auction based on an order imbalance and order information established before 4:00 p.m. See id.

process unless the DMM chooses to automate the closing auction.⁸ At the official closing time, the Exchange stops accepting any new orders, including those orders designated for the closing auction and requests to cancel orders.

In its proposal, the Exchange stated that because there is trading after 4:00 p.m. Eastern Time on other exchange and non-exchange venues (“away markets”), if a listed company issues material news immediately after 4:00 p.m., but before the closing auction on the Exchange is completed, there can be a significant price difference in nearly contemporaneous trades on away markets and the official closing price on the Exchange.⁹ The Exchange previously had added the advisory text in Section 202.06 of the Manual, noted above, in order to mitigate investor confusion as a result of possible discrepancy between the official closing price on the Exchange and the prices of executions in away markets.¹⁰ The Exchange stated in its proposal, however, that it has continued to experience situations where material news issued by companies shortly after 4:00 p.m. has caused significant investor confusion.¹¹ Specifically, when a listed company releases material news shortly after 4.00 p.m., but before the DMM has been able to complete the Exchange closing auction, the material news release can cause the company’s stock to trade on away markets at materially different prices than the price of the NYSE’s closing auction.¹²

⁸ See NYSE Rule 123C, which establishes the Exchange’s Closing Procedures, including that closings may be effectuated manually or electronically by the DMM (Supplementary Material .10 to Rule 123C).

⁹ See Notice, supra note 3, at 42009.

¹⁰ See Securities Exchange Act Release No. 75809 (September 2, 2015), 80 FR 54362 (September 9, 2015).

¹¹ See Notice, supra note 3, at 42009.

¹² See Id.

The Exchange has therefore proposed to amend Section 202.06 of the Manual to prohibit listed companies from issuing material news after the official closing time for the Exchange's trading session until the earlier of publication of such company's official closing price on the Exchange or five minutes after the Exchange's official closing time, except when publicly disclosing material information following a non-intentional disclosure in order to comply with Regulation FD under the Act. The Exchange has also proposed to retain the existing advisory text in Section 202.06 of the Manual. Finally, the Exchange proposed to modify its description of the Exchange's trading hours to specify the official closing time is typically 4:00 P.M. Eastern Time, except for certain days on which the official closing time occurs early at 1:00 P.M. Eastern Time.¹³

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁴ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,¹⁵ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, 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.

¹³ See proposed Section 202.06 of the Manual.

¹⁴ 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).

¹⁵ 15 U.S.C. 78f(b)(5).

The Commission believes that the proposed amendment is reasonably designed to promote just and equitable principles of trade by ensuring that participants in the closing auction on the Exchange do not have their trades executed at a price that is different from essentially contemporaneous trades being executed on away markets. As is noted above, the price on such away markets can reflect material news that was released after the Exchange's official closing time but before the DMM is able to complete the closing auction. Such an occurrence can increase the risk of market disruption and reduce investor confidence in trading on the Exchange given that once the official closing time occurs on the Exchange, orders cannot be cancelled or modified (including orders designated for the closing price) to take into account the material news even though the Exchange closing price may not yet have been established by the closing auction process.

According to Section 202.05 (Timely Disclosure of Material News Developments) of the Manual, a listed company is expected to release quickly to the public any news or information which might reasonably be expected to materially affect the market for its securities.¹⁶ While the Commission recognizes the importance of the requirement in Section 202.05 that listed companies release material news to the public as quickly as possible, the Commission also believes that the maximum five minute delay mandated by the proposal is consistent with investor protection in that it will reduce the likelihood of investor confusion that could result if material news is issued prior to the completion of the Exchange's closing auction but while trading is continuing on away markets. The Exchange has also represented that DMMs are able to complete the closing auctions for the securities assigned to a DMM in almost all cases within

¹⁶ Section 202.05 of the Manual further states that a listed company should also act promptly to dispel unfounded rumors which result in unusual market activity or price variations.

five minutes of the Exchange's official closing time, thereby minimizing the possible amount of time delay for a listed company to issue material news after the Exchange's official closing time, consistent with the protection of investors and the public interest.¹⁷

The Commission further notes that the commenter supported the goals of the proposal stating that they agreed with the Exchange that, in order to prevent investor confusion, the closing price for NYSE listed companies must be consistent with the contemporaneous trading prices on other markets and a brief "cooling off" period was warranted to enable the DMM to complete the closing auction process.¹⁸

The amended proposed rule language, moreover, makes clear that, despite the limited time prohibition in the rule for releasing material information after the Exchange's official closing time, a listed company is never expected to withhold material information if doing so would violate Regulation FD under the Act. The Commission notes that this exception in the new rule requirement ensures that listed companies will not be prohibited from disclosing material information following a non-intentional disclosure in compliance with Regulation FD, even if the closing auction on the Exchange has not yet been completed. The Commission believes that this provision is designed to ensure, among other things, that all market participants have equal access to information that is material to trading in the securities of listed companies and therefore finds it is consistent with the protection of investors and the public interest.¹⁹

¹⁷ See Notice, supra note 3, at 42009.

¹⁸ See Virtu Letter at 2. Additionally, Virtu requested that the Exchange review compliance with Section 202.06 of the Manual to determine whether appropriate actions are being taken to prevent the dissemination of material news during the trading day. The Commission believes that Virtu's request to review Section 202.06 of the Manual is beyond the scope of the proposed rule change.

¹⁹ The Commission notes that it expects listed companies to comply with their obligations under the federal securities laws, including Regulation FD, notwithstanding provisions in

Finally, the Commission believes that making clear the official closing time of the Exchange is consistent with investor protection and the public interest in that it reduces potential confusion in determining when the rule applies

Accordingly, for the reasons discussed above, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the Exchange Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether this filing, as modified by whether Amendment No. 1, is consistent with the Exchange 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-NYSE-2017-32 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-NYSE-2017-32. 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

the Exchange rules that require listed companies to provide the Exchange advance notice of material news announcements, such as in Section 202.05 (B) of the Manual.

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 Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. 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. 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-NYSE-2017-32 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act, to approve the proposed rule change, as modified by Amendment No. 1, prior to the 30th day after the date of publication of Amendment No. 1 in the Federal Register. As discussed above, Amendment No. 1 explicitly makes clear that the proposed restriction on issuing material news will not apply when a listed company is publicly disclosing material information following a non-intentional disclosure in order to comply with Regulation FD.²⁰ The Commission believes that this revision provides greater clarity on the application of the proposed amendments to Section 202.06 of the Manual and removes uncertainty as to the new prohibitions in the

²⁰ See supra note 6.

Exchange rules and a listed company's obligation to make disclosures that would be required under Regulation FD pursuant to the federal securities laws.

Accordingly, the Commission finds good cause for approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis, pursuant to Section 19(b)(2) of the Exchange Act.

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,²¹ that the proposed rule change (SR-NYSE-2017-32), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²²

Eduardo A. Aleman
Assistant Secretary

²¹ 15 U.S.C. 78f(b)(2).

²² 17 CFR 200.30-3(a)(12).