

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-50982; File No. SR-NYSE-2004-49)

January 6, 2005

Self-Regulatory Organizations; Notice of Filing of Amendment No. 3 to Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Procedures for Companies that Fail to File Annual Reports in a Timely Manner

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 21, 2004, the New York Stock Exchange, Inc. (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) Amendment No. 3 to the proposed rule change as described in Items I, II, III below, which Items have been prepared by the Exchange.<sup>3</sup> The proposed rule change was published for public comment in the Federal Register on October 1, 2004.<sup>4</sup> The Commission is publishing this notice to solicit comments on Amendment No. 3 to the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change reflects amendments to the Listed Company Manual to include procedures applicable to companies that fail to file their Exchange Act annual report in a timely manner.

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

<sup>2</sup> 17 CFR 240-19b-4.

<sup>3</sup> The Exchange filed Amendment No. 1 on October 29, 2004, which stated 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. On November 29, 2004, the Exchange filed Amendment No. 2, which replaced and superseded Amendment No. 1. On December 21, 2004, the Exchange withdrew Amendment No. 2.

<sup>4</sup> Securities Exchange Act Release No. 50452 (September 27, 2004), 69 FR 58987.

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 NYSE included statements concerning the purpose of and basis for Amendment No. 3 to the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below and is set forth in Sections A, B, and C below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to codify existing procedures followed in situations 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 purpose of Amendment No. 3 is to provide notice that, since the proposed rule codifies existing NYSE procedures, it 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.

Set forth below is a description of the proposed rule change as originally proposed:

The Exchange closely monitors whether listed companies have filed their annual reports with the Commission as part of its continued listing program. At any given point over the past four years, no more than approximately two dozen NYSE-listed companies failed to file their annual reports with the Commission by the later of the date the filing was required to be made or, if the company filed a Form 12b-25 in a timely manner, by

the extended due date. Most of these companies subsequently filed the required annual report within three to four months of the filing due date, and the vast majority of the remaining companies complied within six months of the filing due date. Cumulatively, approximately 13 companies took more than six months to make their filings over the past four years.

In all cases where a company failed to file its annual report by the filing due date, Exchange staff held regular discussions and meetings with each company's management, directors, regulators and advisors to monitor the status of the annual report filing and to determine whether to allow the company to continue to trade despite the continued failure to file an annual report with the Commission. In several of these situations, the Exchange ultimately moved to suspend the company's trading and delist its securities due to the length of time that passed without the company providing audited financial statements to the marketplace.

In order to formalize the process that the Exchange currently follows when a company has failed to file its annual report on a timely basis, the Exchange proposes to amend Section 802.01 of the Listed Company Manual as described below.

Proposed Section 802.01E

A company that fails to file its annual report (Forms 10-K, 10-KSB, 20-F, 40-F or N-CSR) with the Commission in a timely manner will be subject to the following procedures:

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 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 fails 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. If the company fails 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 determines 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 Para. 804.00 of the Listed Company Manual. A company would not be eligible to follow the procedures outlined in Paras. 802.02 and 802.03 with respect to this criteria.

In determining whether an additional up to three-month trading period is appropriate, 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 Exchange strongly encourages companies to provide ongoing disclosure on the status of the annual report filing to the market through press releases, and would also 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 Para. 804.00.

Note 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 Para. 804.00, application made to the Commission to delist the security.

## 2. Statutory Basis

The Exchange believes that the basis for this proposed rule change, as amended, is the requirement under Section 6(b)(5)<sup>5</sup> of the Act that an exchange have rules that are 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, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

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

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, 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

The Exchange has neither solicited nor received written comments on the proposed rule change, as amended.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

- A. by order approve the proposed rule change, or
- B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the amendment 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-2004-49 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-NYSE-2004-49. 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. Copies of the filing also will be available for inspection and copying at the principal offices of the NYSE. 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-2004-49 and should be submitted on or before [insert date 21 days from date of publication].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>6</sup>

J. Lynn Taylor  
Assistant Secretary

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<sup>6</sup> 17 CFR 200.30-3(a)(12).