

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-53152; File No. SR-NYSE-2005-75)

January 19, 2006

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Granting Approval to a Proposed Rule Change Relating to Section 802.01E of the Listed Company Manual Concerning Continued Listing of Companies that Fail to File Their Securities Exchange Act of 1934 Annual Reports in a Timely Manner

I. Introduction

On October 26, 2005, the New York Stock Exchange, Inc. (“NYSE” or “Exchange”) submitted to the Securities and Exchange Commission (“Commission” or “SEC”), 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 relating to amendments to the Listed Company Manual procedures applicable to companies that fail to file in a timely manner their annual report required by the Act. The proposed rule change was published for public comment in the Federal Register on November 16, 2005.³ The Commission received four comments regarding the proposed rule change.⁴ On December 14, 2005, the Exchange submitted a response to the comments.⁵ This order approves the proposed rule change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 52760 (November 10, 2005), 70 FR 69617.

⁴ See comments from James J. Angel (“Angel”), Associate Professor of Finance, McDonough School of Business, Georgetown University, dated December 5, 2005 (“Angel Letter”); Steve Berman (“Berman”), SRIC-Atlantic Trust, dated December 6, 2005 (“Berman Letter”); Edward S. Knight, Executive Vice President and General Counsel, The Nasdaq Stock Market, Inc. (“Nasdaq”), dated December 7, 2005 (“Nasdaq Letter”); and Mark Patterson (“Patterson”), Managing Director, NWQ Investment Management, LLC, dated December 7, 2005 (“Patterson Letter”).

⁵ See letter from Mary Yaeger, Assistant Secretary, NYSE, to Jonathan G. Katz, Secretary, Commission, dated December 14, 2005 (“NYSE Response Letter”).

II. Description of the Proposed Rule Change

The Exchange recently amended Section 802.01E of the NYSE's Listed Company Manual, which codifies the Exchange's procedures relating to 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.

Section 802.01E currently provides that if a company fails to timely file an annual report with the SEC, the Exchange will monitor the company and the status of the filing. If the company fails to file the annual report within nine months from the filing due date, the Exchange may, in its sole discretion, allow the company's securities to be traded for up to an additional three-month trading period depending on the company's specific circumstances.⁶ If the company does not file its annual report by the end of the nine-month or 12-month period, as applicable, the Exchange will begin suspension and delisting procedures in accordance with the procedures in Section 804.00.

The Exchange believes that there are very rare circumstances involving listed companies that have a position in the market (relating to both the nature of their business and their very large publicly-held market capitalization) such that their delisting from the Exchange would be significantly contrary to the national interest and the interests of public investors, notwithstanding a delay in an annual report filing that extended beyond one year.

The Exchange has proposed to amend Section 802.01E to provide that, in these very rare circumstances, a listed company may remain suitable for listing given: (1) its continuing

⁶ In determining whether an additional three-month trading period is appropriate, the Exchange considers the likelihood that the filing can be made during the additional three month 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.

compliance with the NYSE's quantitative and qualitative listing standards; (2) its continued ability to meet certain debt obligations and adequately finance operations; (3) its progress, as reported to the Exchange, in completing its financial statements; (4) its public transparency on its status, issuing press releases regarding its progress in completing its financial statements and providing other information regarding its financial status; and (5) the reasonable expectation that the company will be able to resume timely filings in the future. In these circumstances, the Exchange may forebear from commencing suspension and delisting proceedings notwithstanding the listed company's failure to file the annual report within the time periods specified in Section 802.01E. Under the proposal, the Exchange must advise the SEC of, and publish on the NYSE's Web site, any such determination. In addition, the Exchange will reevaluate such determination once every three months and, if the Exchange reaffirms its decision to allow trading to continue, the Exchange must advise the SEC of, and publish on the NYSE's Web site, that reaffirmation.

In all such cases, the NYSE has represented that Exchange staff will continue to hold regular discussions and meetings with the company's management, directors, regulators, and advisors to monitor the status of the annual report filing, as well as the company's compliance with the NYSE's other qualitative and quantitative requirements, and to determine whether to allow the company to continue to trade despite the continued failure to file an annual report with the SEC. In addition, in order to provide investors with appropriate notice that companies have failed to file their annual reports with the SEC in a timely manner, the Exchange will continue to monitor and disseminate information on the failure of such companies to file their annual report with the SEC, including through appending an ".LF" indicator in the financial

status field of the company's ticker symbol and distributing that information via the low speed ticker and through the data stream to market data vendors.⁷

With respect to all companies subject to Section 802.01E, the Exchange is also proposing to (1) shorten the initial monitoring period for companies that miss their filing due date from nine months to six months and (2) lengthen from three months to six months the additional period that the Exchange may grant companies prior to the commencement of suspension and delisting procedures. In addition, the Exchange is proposing minor amendments to Section 802.01E to clarify the type of information that must be included in the press release to be issued when the company is late in filing its annual report. Specifically, in addition to the status of the filing, the press release must note the delay and the reasons for it, as well as the anticipated filing date, if known. The proposal also makes some non-substantive clarifying changes to the rule language.

III. Comments

The Commission received four comments on the proposal.⁸ Three commenters supported the proposal;⁹ one commenter opposed the proposal.¹⁰ Angel stated that the proposal seemed reasonable and should be approved. In his letter, however, he states that the markets should adopt a uniform method of alerting investors of issuers that are late in filing their annual reports, and expresses concern that common financial portals do not carry late filer identifiers

⁷ The NYSE represented that it maintains an up-to-date list of companies that are late in filing their annual reports with the SEC on its Web site at www.nyse.com. Additionally, the NYSE represented that each listed company has a unique data page on the site and, when applicable, this page indicates that the company is considered a late filer.

⁸ See supra note 4.

⁹ See Angel Letter; Berman Letter; and Patterson Letter.

¹⁰ See Nasdaq Letter.

appended by the markets. Patterson stated that he believed the proposal “sets forth reasonable and workable guidelines regarding the evaluation and execution of the delisting process.” Berman stated that “[c]ompanies with strong financials, but for certain circumstances are involved in a lengthy historical restatement and re-audit process to comply with GAAP can be unfairly penalized by this existing rule as presently stated.” The Berman Letter supports allowing some discretion under certain circumstances in the current delisting standard for late filers, noting that a hard and fast rule has the potential to cause short-term volatility that may be especially harmful to individual investors.

Nasdaq believes that the Commission should reject the proposed rule change, arguing that it is “antithetical” to Section 6(b)(5) of the Act,¹¹ which requires that the rules of the NYSE be designed to protect investors and the public interest and not be designed to permit unfair discrimination between issuers. According to Nasdaq, the NYSE proposal would allow certain issuers to trade indefinitely without publicly available audited financial statements and without the required disclosures.¹² Nasdaq believes that “the availability and integrity of financial statements is an issue that cuts across all markets and raises fundamental issues of investor protection.” Furthermore, the proposed rule change would be available only to a company having a position in the market such that its delisting would be significantly contrary to the national interest and the interests of public investors, due to the nature of its business and its “very large” publicly-held market capitalization. According to Nasdaq, not only are these criteria subjective, the NYSE does not specifically explain how these criteria “justify allowing

¹¹ 15 U.S.C. 78f(b)(5).

¹² Nasdaq stated that, rather than shortening the total timeframe within which a company must file annual reports before being delisted, a goal articulated by the Commission in the order approving Section 802.01E, the NYSE’s proposal would extend that timeframe.

an issuer to continue to trade when that issuer has been unable to provide required audited financial statements and disclosures to investors for a period longer than one year.” Nasdaq further states that allowing such a company to continue to trade for an extended period of time ignores the emphasis the Commission has placed on prospective investors, who have a right to assume that companies meet listing requirements.

The NYSE responded to Nasdaq’s concerns by stating that it “does not agree that the proposed rule change is contrary to the interests of investors, as there will be significant protections for investors built into its application.”¹³ The NYSE pointed out specifically that the provision will apply only “in circumstances where Exchange staff have determined that a company remains suitable for listing given its relative financial health and compliance with the NYSE’s quantitative and qualitative listing standards and that there is a reasonable expectation that the company will be able to resume timely filings in the future.” According to the NYSE, the proposal protects investors “by requiring the Exchange to take into consideration the relative transparency of the company’s public disclosures relating to the status of its completion of its filing and its provision of other information regarding its financial status.” The NYSE also noted its obligation to reconsider extensions every three months, to monitor the company’s progress in compliance efforts, and to identify late filers by means of an “LF” appendage to the company’s ticker symbol and Web site disclosure.

The NYSE does not agree that the proposed rule is “antithetical” to Section 6(b)(5) of the Act for unfairly discriminating among issuers. The NYSE stated that the motivation for the rule is that “the effective functioning of certain companies is of particular importance to the national interest and that a disruption in the orderly market for their securities would have

¹³ See NYSE Response Letter.

serious implications not just for those companies and their shareholders but also for the country as a whole.” The NYSE asserts that the “effect on the national interest” and not merely the size of an issuer will be considered in determining whether to grant an exception.

IV. Discussion

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. In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act, which requires an Exchange to have rules that are 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.¹⁴

Although the Commission believes that the goal of ensuring that listed companies have filed accurate, up-to-date annual reports under the Act is of critical importance, the Commission recognizes that there may be certain very rare circumstances under which the new NYSE delisting requirements could be too inflexible. In this regard, the Commission believes that the proposed rule change provides the Exchange with appropriately limited flexibility to allow a company that is more than 12 months late in filing its annual report with the Commission to remain listed on the NYSE. This limited discretion is available only in certain very rare circumstances where the company has a position in the market such that its delisting would be significantly contrary to the national interest and the interests of public investors, due to the nature of its business and its very large publicly-held market capitalization.

¹⁴ In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

The Commission notes that the proposal has provisions that help to assure the availability to investors of information on which to base trading decisions, even in the absence of formal SEC filings. For instance, before the NYSE could grant an extension beyond 12 months, the proposal would require it to consider whether the company has been publicly transparent on its status, issuing press releases regarding its progress in completing its financial statements and providing other information regarding its financial status. In addition, the NYSE also must consider the issuer's continuing compliance with applicable quantitative and qualitative listing standards, its continued ability to meet current debt obligations and adequately finance operations, its progress in completing its financial statements, and whether there is a reasonable expectation the issuer will be able to resume timely filings in the future.

The Commission emphasizes that the new standards apply only in certain very rare circumstances where the Exchange determines that delisting of the late filer would be contrary to the national interest and the interests of public investors, due to the late filer's position in the market (i.e., the nature of its business and its very large publicly-held market capitalization). As the NYSE noted in the NYSE Response Letter, the standard is meant to apply only to those companies where a "disruption in the orderly market for their securities would have serious implications not just for those companies and their shareholders but also for the country as a whole." While the Commission clearly believes that information in the annual report required under the Act is critical to investors and our national markets, we believe that, under these circumstances, and subject to the conditions in the proposed rule change, some limited flexibility to allow a company to remain listed is appropriate.

The Commission also notes the Exchange must advise the Commission of, and publish on the NYSE's Web site, any determination to allow a company that is more than 12 months

late in filing its annual report with the Commission to remain listed on the NYSE.¹⁵ In addition, the Exchange will reevaluate such determination once every three months and, if the Exchange reaffirms its decision to allow trading to continue, the Exchange will advise the SEC of, and publish on the NYSE's Web site, that reaffirmation.¹⁶ The NYSE rules also make clear that, regardless of the procedures for continued listing of a late annual report filer under Section 802.01E of the Listed Company Manual, if at any time the Exchange believes it is necessary in the public interest or for the protection of investors, it can suspend trading immediately in any security and commence delisting under Section 804.00 of the NYSE's Listed Company Manual. Indeed, the Commission expects the NYSE to suspend trading quickly and commence delisting proceedings immediately against any late filer continuing to trade under these new provisions should it be necessary to do so based on the facts of the particular situation. The Commission intends to monitor the NYSE's use of the proposed exception to its delisting requirement to ensure that such use is in compliance with the procedures and safeguards set forth in this filing.

Finally, the Commission notes that Section 802.01E of the Exchange's Listed Company Manual currently requires the delisting of the securities of any company that is nine months late

¹⁵ As discussed above, the NYSE will continue to identify late filers by means of an "LF" appendage to the company's ticker symbol. The Commission continues to urge the NYSE to encourage data vendors and subscribers to display the indicator.

¹⁶ As noted above, the NYSE states, among other things, that it will continue to hold regular discussions and meetings with the company's management, directors, regulators and advisors to monitor the status of the annual report filing and compliance with other listing standards, and to determine if continued trading should be permitted despite the failure of the company to file its annual report with the Commission. The Commission notes that despite the formal reaffirmation required under the rule every three months and the public announcement of such decision, the Commission expects the monitoring of such companies to take place on an on-going basis throughout the extended continued trading period.

in filing its annual report on Form 10-K, unless the Exchange determines that an additional three months is appropriate. The Commission believes that changing the initial time frame that a late filer has to be delisted under the rule from nine months to six months is an improvement. However, because in conjunction with this change, the NYSE is proposing to lengthen the additional period the Exchange can allow a late filer to continue to trade from three months to six months, the total specified time periods under the rule for late filers remains 12 months. While the change will have companies reevaluated more quickly for delisting with no assurance the additional six months will be granted, the Commission continues to believe that the NYSE should consider shortening the total timeframes specified under Rule 802.01E for delisting a late filer, as well as extending such requirements to issuers that are late in filing their quarterly reports with the Commission.¹⁷

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁸ that the

¹⁷ In considering shortening the time periods, the NYSE may want to assess whether the shortened initial six month period for delisting has had any noticeable impact on when later filers actually submit up-to-date annual reports.

¹⁸ 15 U.S.C. 78s(b)(2).

proposed rule change (SR-NYSE-2005-75) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁹

Nancy M. Morris
Secretary

¹⁹ 17 CFR 200.30-3(a)(12).