



THE NASDAQ STOCK MARKET  
ONE LIBERTY PLAZA, 50TH FLOOR  
NEW YORK, NY 10006

February 4, 2005

Mr. Jonathan G. Katz  
Secretary  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, DC 20549-0609

Re: **SR-NYSE-2004-49**

Dear Mr. Katz:

The Nasdaq Stock Market, Inc. ("NASDAQ") appreciates this opportunity to comment on the captioned rule filing, which sets forth proposed procedures by the New York Stock Exchange, Inc. ("NYSE") related to issuers that fail to timely file their annual reports with the Securities and Exchange Commission ("SEC").

In brief, the NYSE proposes that companies failing to timely file their annual reports would be eligible for continued trading, and not subject to being delisted for their failure to file, for nine months from the filing due date. Thereafter, the NYSE would have the discretion to continue to trade such companies, and continue to defer delisting action, for up to an additional three months. Since the filing is silent with respect to issuers that fail to timely file their required interim reports, e.g. Forms 10-Q, it appears that the NYSE does not intend to take any action with respect to such delinquencies.

NASDAQ believes that it is critically important that listed issuers timely file their required financial reports. No information has greater value to investors than the detailed disclosures, including audited financial statements and required issuer and auditor certifications, which are contained in annual filings. These views are reflected in the Sarbanes-Oxley Act of 2002, which is intended to assure the reliability of the financial information available to investors. Complete, accurate and timely corporate disclosures provide the framework against which all other on-going issuer disclosures are evaluated. While interim financial statements contained in Forms 10-Q are not audited, auditors are required to review all such filings, and these filings too are an important element of the mosaic of information which is available to investors. Moreover, in the absence of current financial information, it is impossible for a marketplace to determine whether its listed issuers are compliant with its continued listing requirements.

When a NASDAQ-listed issuer fails to timely file any required financial report with the SEC it receives prompt written notice that it will be delisted unless it files an appeal and requests a hearing within seven business days. This practice is followed with respect to both annual and interim filings. In addition, NASDAQ affixes an "E" identifier to the

symbol of such companies so that investors know that the issuer is delinquent.<sup>1</sup> And, NASDAQ's web site provides additional notice to investors of all filing delinquencies. If a NASDAQ issuer does file an appeal, hearings with respect to filing delinquencies are scheduled on an expedited basis and typically occur within three weeks. While a Hearing Panel is empowered to afford an issuer a short additional extension, it only does so if the issuer has undertaken specific actions to cure the delinquency and such issuers face delisting if they cannot file within the time specified by the Panel. It is also significant to note that even issuers quoted on the Over-the-Counter Bulletin Board are subject to prompt removal<sup>2</sup> if they fail to timely file their annual or interim reports with the SEC or other financial regulator.

While the NYSE's proposed rules acknowledge, in certain respects, the importance of the SEC's filing requirements, we do not believe that they go nearly far enough to protect investors. This failure to offer a comprehensive and timely regulatory response disadvantages investors in NYSE-listed securities and creates the potential for an inappropriate opportunity for regulatory arbitrage by an issuer which has reason to believe that it will be unable to timely file an upcoming SEC report.

In view of the foregoing, we believe that the NYSE should be required to treat delinquent interim financial reports the same as delinquent annual reports. And, we do not believe that a market should offer what is essentially a blanket nine months filing extension to delinquent issuers. If an issuer is late in submitting its annual report it is virtually self-evident that it will also fail to file any subsequent interim reports, until such time as it is able to file its audited annual financial statements. In these situations, the last published financial statement available to the public would be the nine months Form 10-Q from the prior fiscal year, assuming that all of the prior year's interim reports were timely filed. Thus, the issuer's financial statements would be at least a year old by the time the NYSE's proposed nine months grace period would expire. In light of this, the NYSE should be required to adopt a more reasonable timeframe to respond to annual report filing delinquencies.

While every marketplace need not have the same rules, certain issues cut across all markets and raise fundamental issues of investor protection. These issues should be treated in a reasonably consistent fashion. In this regard, it is noteworthy that the SEC staff worked closely with both NASDAQ and the NYSE to assure that the new corporate governance rules adopted in response to the financial scandals of recent years were similar. The availability and integrity of financial statements are also critical areas where a policy basis for different treatment by the markets does not exist. We urge the SEC to require that the proposed rules be significantly strengthened.

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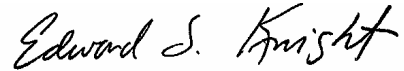
<sup>1</sup> Working with the SEC, NASDAQ is in the process of implementing a new procedure whereby symbol modifiers will be replaced by electronic notification of such delinquencies to vendors displaying quotations in NASDAQ-listed securities.

<sup>2</sup> Typically, an OTCBB issuer is removed if it fails to file within 30 days after the filing due date.

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If the SEC staff has any questions concerning our submission, please feel free to contact me or Michael S. Emen, Senior Vice President, (301) 978-8020.

Very truly yours,

A handwritten signature in black ink that reads "Edward S. Knight". The signature is written in a cursive style with a large, prominent "K" and "N".

Edward S. Knight  
Executive Vice President and General Counsel