



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

December 7, 2005

Mr. Jonathan G. Katz  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-9303

Re: **SR-NYSE-2005-75**

Dear Mr. Katz:

The Nasdaq Stock Market, Inc. ("NASDAQ") appreciates this opportunity to comment on the above captioned rule filing, which proposes to weaken rules recently adopted by the New York Stock Exchange, Inc. (the "NYSE") related to issuers that fail to timely file their annual reports with the Securities and Exchange Commission (the "Commission" or "SEC"). NASDAQ encourages the Commission to reject this proposal.

In June 2005, the Commission approved NYSE Rule 802.01E, which, for the first time, indicated that the NYSE would delist companies that fail to timely file their annual reports.<sup>1</sup> Under this rule, an NYSE issuer that fails to file an annual report is eligible for continued trading for nine months from the filing due date.<sup>2</sup> Thereafter, the NYSE has the discretion to continue to trade such companies, and continue to defer delisting action, for up to an additional three months. At the end of these time periods, the latest financial statement possibly 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 filed. Thus, the issuer's financial statements would be at least 18 months old when the NYSE's existing grace periods expire. Nonetheless, the NYSE believes that certain companies should be afforded even more time to trade without complying with the Commission's filing requirements and has therefore proposed extending those timeframes indefinitely for these companies. It has proposed this step before removing even a single company under the new rules.<sup>3</sup>

The Commission approved Rule 802.01E as "a reasonable first step for dealing with companies that fail to file annual reports on time."<sup>4</sup> NASDAQ does not believe that when

---

<sup>1</sup> Exchange Act Release No. 51777 (June 2, 2005), 70 FR 33573 (June 8, 2005), approving SR-NYSE-2004-49 (the "Prior Approval Order").

<sup>2</sup> The rule does not require the NYSE to take any action with respect to issuers that fail to timely file their required interim reports, e.g. Forms 10-Q.

<sup>3</sup> Based on a review of review/suspension news releases available on [www.nyse.com](http://www.nyse.com). We note that on November 8, 2005, subsequent to filing this proposed rule change, the NYSE suspended the securities of an issuer due, in part, to the failure to file its Form 10-K, due seven months earlier.

<sup>4</sup> Prior Approval Order at 33574.

the Commission approved the prior rule change “as a reasonable first step” that the contemplated next step was for the NYSE to weaken the rule. Rather, the Commission expressly stated that it believed the “NYSE should consider shortening the timeframes within which a company must file annual reports before being delisted, as well as extending such requirements to issuers that are late in filing their quarterly reports with the Commission.”<sup>5</sup> Instead of responding to the Commission’s appeal and shortening the timeframes within which certain companies must file annual reports, the NYSE’s proposal would further extend those timeframes; the NYSE’s proposal also does nothing to extend its requirements to issuers that are late in filing their quarterly reports.

NASDAQ believes that the NYSE’s proposed rule change is antithetical to the Securities Exchange Act of 1934 (the “Exchange Act”). Section 6(b)(5) of the Exchange Act 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. Nonetheless, the proposed NYSE rule would allow certain issuers to continue to trade indefinitely without publicly available audited financial statements and without the specific disclosures required by the Exchange Act and under the Commission’s rules. This is clearly contrary to the protection of investors and the public interest. Furthermore, this special rule would be available only to those issuers that the NYSE subjectively determines, in its sole discretion, have “very large” market capitalizations or otherwise warrant it based on the nature of their businesses.<sup>6</sup> Nowhere in its filing does the NYSE explain how being “very large” or the nature of certain businesses justify allowing 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 feels the information contained in these reports is critical, both to existing investors and to prospective investors, and provide the fundamental framework with which an investor evaluates a company and a marketplace determines compliance with continued listing requirements. In sharp contrast to the extended time the NYSE allows delinquent filers to trade, NASDAQ begins delisting proceedings immediately when an issuer is late with a required annual or quarterly report. While a NASDAQ-listed issuer may receive a short exception to remain listed, such exceptions come from independent hearing panels and cannot exceed 90 days from the date of the panel’s decision.<sup>7</sup> Allowing such a company to continue to trade for an extended period ignores the emphasis that the Commission has stated should be placed on prospective investors, who have the right to assume that a listed security meets the listing requirements,<sup>8</sup> and who are “peculiarly in need of the sort of protection which is afforded by delisting.”<sup>9</sup> Of course every marketplace need not have the same rules. Nonetheless, 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 and therefore we urge the SEC not to allow the NYSE to weaken its rule as proposed.

---

<sup>5</sup> Id.

<sup>6</sup> The NYSE’s proposal would be available to companies that “have a position in the market (relating to both the nature of its business and its very large publicly-held market capitalization) such that its delisting from the Exchange would be significantly contrary to the national interest and the interests of public investors.”

<sup>7</sup> See NASD Rules 4803 and 4802(b).

<sup>8</sup> In re Tassaway, Exchange Act Release No. 11291, 45 S.E.C. 706, 709 (March 31, 1975).

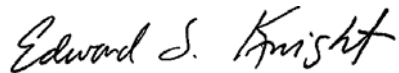
<sup>9</sup> Exchange Buffet Corp. v. New York Stock Exchange, 244 F.2d 507, 510 (2<sup>nd</sup> Cir. 1957).

NASDAQ also notes that while the proposed rule change modifies the initial, automatic extension available to non-filers, it does not reduce the overall time available to such filers. Currently, after missing a filing due date for an annual report, NYSE issuers receive a nine month initial monitoring period followed by a three month additional period. As proposed, the NYSE would restructure that same twelve month period such that companies receive an initial six month monitoring period, followed by an additional six month period. As such, NASDAQ does not believe this should be viewed as satisfying the Commission's call for shorter timeframes within which a company must file annual reports before being delisted. In addition, as noted above, the NYSE's proposal also does nothing to extend its requirements to issuers that are late in filing their quarterly reports, which could place a delinquent company under review sooner.

In view of the foregoing, we believe that the Commission should reject the proposed rule change. The availability and integrity of financial statements are critical to investors and no company should be permitted to trade for such an extended period without current information.

If the SEC staff has any questions concerning our submission, please feel free to contact me at (301) 978-8480.

Very truly yours,

A handwritten signature in cursive script that reads "Edward S. Knight".

Edward S. Knight  
Executive Vice President and General Counsel