

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-80619; File No. SR-NYSEMKT-2017-23)

May 8, 2017

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change to Harmonize the Requirements of the NYSE MKT Company Guide with Respect to Periodic Reporting with Those of the NYSE

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”),² and Rule 19b-4 thereunder,³ notice is hereby given that, on April 25, 2017, NYSE MKT LLC (the “Exchange” or “NYSE MKT”) filed with the Securities and Exchange Commission (the “SEC” or “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to harmonize the requirements of the NYSE MKT Company Guide (the “Company Guide”) with respect to periodic reporting with those of the NYSE. The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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 self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

The Exchange proposes to harmonize the requirements of the Company Guide with respect to periodic reporting with those of the NYSE. A consistent approach among the two NYSE sister exchanges will avoid confusion among investors and companies and their service providers about the applicable rules. Currently, the Exchange provides companies that are late in making required filings with a compliance plan under its general provisions for companies that are non-compliant with Exchange rules, as set forth in Section 1009 of the Company Guide. Section 1009 gives the Exchange the discretion to grant companies up to 18 months to cure events of noncompliance and does not provide specific guidance with respect to how compliance periods should be administered for companies late in submitting their filings. By contrast, Section 802.01E of the NYSE Listed Company Manual limits companies to a maximum cure period of 12 months to submit all delayed filings and includes specific provisions for determining how much time companies should be given to cure within the context of that maximum 12 months and what is required to be eligible for that additional time. As such, the Exchange believes that the NYSE's process for dealing with delayed filings is more stringent and more transparent than its own and believes that it is appropriate to harmonize its own process with that of the NYSE. The Exchange also proposes to harmonize its requirements with respect to semi-annual reporting by foreign private issuers with that of the NYSE, as the NYSE requirement is more precise. This greater precision will enable the Exchange to subject this semi-annual reporting obligation to the same compliance regime as it is proposing for other

delayed filings.

Semi-Annual Reporting by Foreign Private Issuers

Section 110(d) of the Company Guide currently requires all foreign-incorporated listed companies to publish, at least semi-annually, an English language version of their interim financial statements. As part of its harmonization with the rules of the NYSE and adoption of a more explicit compliance approach,⁴ the Exchange proposes to adopt new Section 110(e) as a more specific interim reporting requirement for listed foreign private issuers.⁵ Under proposed Section 110(e), each listed foreign private issuer will be required, at a minimum, to submit to the SEC a Form 6-K that includes (i) an interim balance sheet as of the end of its second fiscal quarter and (ii) a semi-annual income statement that covers its first two fiscal quarters. This Form 6-K must be submitted no later than six months following the end of the company's second fiscal quarter. The financial information included in the Form 6-K must be presented in English, but does not have to be reconciled to U.S. GAAP.

Amendments to Chapter Six of the Company Guide

Section 610(a) currently requires listed companies to provide specific enumerated disclosures with regard to outstanding options.⁶ The Exchange proposes to eliminate these requirements. The Exchange notes that companies are required to include disclosure in their

⁴ See Section 203.03 of the NYSE Listed Company Manual.

⁵ Foreign-incorporated listed companies that are not foreign private issuers are required to file quarterly reports on Form 10-Q as domestic filers, so proposed Section 110(e) is not relevant to them. Existing Section 110(e) will be renumbered as Section 110(f).

⁶ Section 610(a) provides that the company must disclose in its annual report to security holders, for the year covered by the report: (a) the number of unoptioned shares available at the beginning and at the close of the year for the granting of options under an option plan; and (b) any changes in the exercise price of outstanding options, through cancellation and reissuance or otherwise, except price changes resulting from the normal operation of anti-dilution provisions of the options.

Form 10-K in relation to options available under equity compensation plans pursuant to Item 201(d) of Regulation S-K and options issued as executive compensation pursuant to Item 402 of Regulation S-K. Consequently, the Exchange believes it is appropriate to defer to the SEC in determining what disclosures should be required with respect to options and to delete its own disclosure requirements from Section 610(a).

Section 610(a) currently specifies that a company that fails to file its annual report on Forms 10-K, 20-F, 40-F or N-CSR with the SEC in a timely manner is subject to delisting pursuant to Section 1002(d). The Exchange proposes to amend this provision to provide that companies delayed in making these filings will be subject to proposed Section 1007 as discussed below.

Prior to an amendment to Section 610 in 2009,⁷ Section 610 required a listed company to physically deliver its annual report filed with the SEC to shareholders each year. In its amended form, Section 610 no longer requires companies to physically deliver their annual reports but relies instead on the fact that listed company annual reports are available on the SEC website and are required to be made available on or through the website of the applicable listed company. Proposed Section 1007 as described below establishes compliance procedures for companies that are delayed in filing their annual reports with the SEC. In light of the foregoing, the Exchange proposes to delete Sections 611 (Time of Publication), 612 (Request for Extension) and 613 (Good Cause for Delay) of the Company Guide in their entirety. Section 611 specifies timeframes within which a company's hard copy annual report must be submitted to the Exchange and distributed to shareholders. The Exchange proposes to delete this provision as Section 610 no longer requires the delivery of hard copy annual reports and proposed Section

⁷ See Securities Exchange Act Release No. 59685 (April 1, 2009); 74 FR 16031 (April 8, 2009) (SR-NYSEMKT-2009-04).

1007 will include detailed compliance requirements with respect to delayed annual report filings. Similarly, Section 612 sets forth a process for companies to request an extension of time from the Exchange to distribute hard copy annual reports to their shareholders. The Exchange proposes to delete this requirement, as companies are not required to deliver hard copy annual reports under the current rules and proposed Section 1007 will establish a process for granting companies additional time when they are delayed in submitting their annual reports to the SEC. Section 613 specifies circumstances under which good cause may exist for a company being delayed in publishing its annual report. The Exchange proposes to delete this provision, as in the future all determinations as to the continued listing of companies that are delayed in their annual report filings will be made pursuant to the provisions of proposed Section 1007.

Section 610(b) makes reference to providing notice of material news to the Exchange's StockWatch and Listing Qualifications Departments. The Exchange proposes to delete these references as those departments now have different names. In their place, the Exchange proposes to include a statement that companies should comply with the Exchange's material news policies set forth in Sections 401 and 402 of the Company Guide by providing notice to the Exchange's Market Watch Group pursuant to the material news notification requirements of Sections 401 and 402.

Section 610(b) currently provides that a listed company that receives an audit opinion that contains a going concern "qualification" must make a public announcement through the news media disclosing the receipt of such qualified opinion. The Exchange proposes to replace the reference to a going concern "qualification" with a reference to a going concern "emphasis" as this is a more correct characterization under the accounting literature. In addition, the Exchange proposes to provide that the public announcement of the existence of a going concern

emphasis in an audit opinion must be made contemporaneously with the filing of the SEC report including the going concern emphasis, rather than within seven calendar days of such filing as is currently the case. The Exchange believes a going concern emphasis is material to investors and should be immediately disclosed.

Proposed Section 1007 SEC Annual and Quarterly Report Timely Filing Criteria

Under proposed Section 1007, a company will incur a late filing delinquency and be subject to the procedures set forth in Section 1007 on the date on which any of the following occurs:

- the company fails to file its annual report (Forms 10-K, 20-F, 40-F or N-CSR) or its quarterly report on Form 10-Q or semi-annual report on Form N-CSR (“Semi-Annual Form N-CSR”) with the SEC by the date such report was required to be filed by the applicable form, or if a Form 12b-25 was timely filed with the SEC, the extended filing due date for the annual report, Form 10-Q, or Semi-Annual Form N-CSR (for purposes of this Section 1007, the later of these two dates, along with any Semi-Annual Report Filing Due Date as defined below, will be referred to as the “Filing Due Date” and the failure to file a report by the applicable Filing Due Date, a “Late Filing Delinquency”);
- a listed foreign private issuer fails to file the Form 6-K containing semi-annual financial information required by proposed Section 110(e) (the “Semi-Annual Report”) by the date specified in that rule (the “Semi-Annual Report Filing Due Date”);
- the company files its annual report without a financial statement audit report from its independent auditor for any or all of the periods included in such annual report

(a “Required Audit Report” and the absence of a Required Audit Report, a “Required Audit Report Delinquency”);

- the company’s independent auditor withdraws a Required Audit Report or the company files a Form 8-K with the SEC pursuant to Item 4.02(b) thereof disclosing that it has been notified by its independent auditor that a Required Audit Report or completed interim review should no longer be relied upon (a “Required Audit Report Withdrawal Delinquency”); or
- the company files a Form 8-K with the SEC pursuant to Item 4.02(a) thereof to disclose that previously issued financial statements should no longer be relied upon because of an error in such financial statements or, in the case of a foreign private issuer, makes a similar disclosure in a Form 6-K filed with the SEC or by other means (a “Non-Reliance Disclosure”) and, in either case, the company does not refile all required corrected financial statements within 60 days of the issuance of the Non-Reliance Disclosure (an “Extended Non-Reliance Disclosure Event” and, together with a Late Filing Delinquency, a Required Audit Report Delinquency and a Required Audit Report Withdrawal Delinquency, a “Filing Delinquency”) (for purposes of the cure periods described below, an Extended Non-Reliance Disclosure Event will be deemed to have occurred on the date of original issuance of the Non-Reliance Disclosure); if the Exchange believes that a company is unlikely to refile all required corrected financial statements within 60 days after a Non-Reliance Disclosure or that the errors giving rise to such Non-Reliance Disclosure are particularly severe in nature, the Exchange may, in its

sole discretion, determine earlier than 60 days that the applicable company has incurred a Filing Delinquency as a result of such Non-Reliance Disclosure.

The Exchange will also deem a company to have incurred a Filing Delinquency if the company submits an annual report, Form 10-Q, or Semi-Annual Form N-CSR to the SEC by the applicable Filing Due Date, but such filing fails to include an element required by the applicable SEC form and the Exchange determines in the Exchange's sole discretion that such deficiency is material in nature.⁸

The annual report, Form 10-Q, Semi-Annual Form N-CSR or Semi-Annual Report that gives rise to a Filing Delinquency shall be referred to herein and in proposed Section 1007 as the "Delinquent Report."

Subsequent Late Reports. A company that has an uncured Filing Delinquency will not incur an additional Filing Delinquency if it fails to file a subsequent annual report, Form 10-Q, Semi-Annual Form N-CSR or Semi-Annual Report (a "Subsequent Report") by the applicable Filing Due Date for such Subsequent Report. However, in order for the company to cure its initial Filing Delinquency, no Subsequent Report may be delinquent or deficient on the date by which the initial Filing Delinquency is required to be cured.

⁸ The following is a non-exclusive list of scenarios involving material filing elements that would cause the Exchange to deem the company to have incurred a Late Filing Delinquency: the filing does not include required financial statements or a required audit opinion; a required financial statement audit opinion includes qualifying or disclaiming language or the auditor provides an adverse financial statement audit opinion; a required financial statement audit opinion is unsigned or undated; there is a discrepancy between the period end date for required financial statements and the date cited in the related audit report; the company's auditor has not conducted a SAS 100 review with respect to the company's Form 10-Q; required chief executive officer or chief financial officer certifications are missing; a Sarbanes-Oxley Act Section 404 required internal control report or auditor certification is missing; the filing does not comply with the applicable SEC XBRL requirements; or the filing does not include signatures of officers or directors required by the applicable form.

Notification and Cure Periods. Upon the occurrence of a Filing Delinquency, the Exchange will promptly (typically within five business days) send written notification (the “Filing Delinquency Notification”) to a company of the procedures set forth below. Within five days of the date of the Filing Delinquency Notification, the company will be required to (a) contact the Exchange to discuss the status of the Delinquent Report and (b) issue a press release disclosing the occurrence of the Filing Delinquency, the reason for the Filing Delinquency and, if known, the anticipated date such Filing Delinquency will be cured via the filing or refiling of the applicable report, as the case may be. If the company has not issued the required press release within five days of the date of the Filing Delinquency Notification, the Exchange will issue a press release stating that the company has incurred a Filing Delinquency and providing a description thereof.

During the six-month period from the date of the Filing Delinquency (the “Initial Cure Period”), the Exchange will monitor the company and the status of the Delinquent Report and any Subsequent Reports, including through contact with the company, until the Filing Delinquency is cured.⁹ If the company fails to cure the Filing Delinquency within the Initial Cure Period, the Exchange may, in its sole discretion, allow the company’s securities to be traded for up to an additional six-month period (the “Additional Cure Period”) depending on the company’s specific circumstances. If the Exchange determines that an Additional Cure Period is not appropriate, suspension and delisting procedures will commence in accordance with the procedures set out in Section 1010 of the Company Guide. A company is not eligible to follow

⁹ Under the proposed rule, a company that has an uncured Filing Delinquency would not incur an additional Filing Delinquency if it fails to file a Subsequent Report by the applicable Filing Due Date. However, in order for the company to cure its initial Filing Delinquency, no Subsequent Report may be delinquent or deficient on the date by which the initial Filing Delinquency is required to be cured.

the procedures outlined in Section 1009 with respect to these criteria. Notwithstanding the foregoing, however, the Exchange may in its sole discretion decide (i) not to afford a company any Initial Cure Period or Additional Cure Period, as the case may be, at all or (ii) at any time during the Initial Cure Period or Additional Cure Period, to truncate the Initial Cure Period or Additional Cure Period, as the case may be, and immediately commence suspension and delisting procedures if the company is subject to delisting pursuant to any other provision of the company Guide, including if the Exchange believes, in the Exchange's sole discretion, that continued listing and trading of a company's securities on the Exchange is inadvisable or unwarranted in accordance with Sections 1001-1006 of the Company Guide.

The Exchange may also commence suspension and delisting procedures without affording any cure period at all or at any time during the Initial Cure Period or Additional Cure Period if the Exchange believes, in the Exchange's sole discretion, that it is advisable to do so on the basis of an analysis of all relevant factors, including but not limited to:

- whether there are allegations of financial fraud or other illegality in relation to the company's financial reporting;
- the resignation or termination by the company of the company's independent auditor due to a disagreement;
- any extended delay in appointing a new independent auditor after a prior auditor's resignation or termination;
- the resignation of members of the company's audit committee or other directors;
- the resignation or termination of the company's chief executive officer, chief financial officer or other key senior executives;

- any evidence that it may be impossible for the company to cure its Filing Delinquency within the cure periods otherwise available under this rule; and any past history of late filings.

In determining whether an Additional Cure Period after the expiration of the Initial Cure Period is appropriate, the Exchange will consider the likelihood that the Delinquent Report and all Subsequent Reports can be filed or refiled, as applicable, during the Additional Cure 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 SEC and any other regulatory body. The Exchange strongly encourages companies to provide ongoing disclosure on the status of the Delinquent Report and any Subsequent Reports to the market through press releases, and will also take the frequency and detail of such information into account in determining whether an Additional Cure Period is appropriate. If the Exchange determines that an Additional Cure Period is appropriate and the company fails to file the Delinquent Report and all Subsequent Reports by the end of such Additional Cure Period, suspension and delisting procedures will commence immediately in accordance with the procedures set out in Section 1010. In no event will the Exchange continue to trade a company's securities if that company (i) has failed to cure its Filing Delinquency or (ii) is not current with all Subsequent Reports, on the date that is twelve months after the company's initial Filing Delinquency.

The Exchange proposes that the proposed amendments will become operative immediately upon approval by the SEC. Any company that is delayed in making a filing that would be subject to proposed Section 1007 will continue to be subject to the compliance plan

provisions of Section 1009 in relation to that delayed filing but will be subject to proposed Section 1007 in relation to any subsequent delayed filings.

The Exchange proposes to include a cross-reference to proposed Section 1007 in Section 1101 of the Company Guide, which discusses SEC filing obligations of listed companies. The Exchange also proposes to remove a reference to a company's Listing Qualifications analyst in Section 1101 and replace it with a reference to Exchange staff, as the Exchange no longer has a department under the Listings Qualification title.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)¹⁰ of the Act, in general, and furthers the objectives of Section 6(b)(5) of the Act,¹¹ in particular in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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 is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange believes that the proposed amendment is consistent with the investor protection objectives of Section 6(b)(5) because: (i) it strengthens the Exchange's continued listing requirements with respect to delinquent SEC filings by deeming companies delinquent if they fail to file their annual report or Form 10-Q on a timely basis and by subjecting companies to the late filer process if there are material inadequacies in their required annual or quarterly filings; and (ii) the more stringent requirements will encourage

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(5).

listed companies to submit timely and compliant periodic reports to the SEC.¹²

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

The Exchange believes that the proposed amendments to the Company Guide do not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change does not affect competition in any way, but rather simply seeks to protect investors by insuring that companies cannot remain listed for any extended period of time without appropriately filing their required periodic financial reports with the SEC.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

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

¹² The amended procedures in relation to delayed periodic reports are more stringent than those currently in effect primarily because proposed Section 1007 would allow a company to remain listed for a maximum of 12 months from the filing due date of a delayed periodic report, while current rules give the Exchange the discretion to continue the listing for a period of up to 18 months.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change 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. Please include File Number SR-NYSEMKT-2017-23 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-NYSEMKT-2017-23. 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 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 such filing also will be available for inspection and copying at the principal office of the Exchange. 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-NYSEMKT-2017-23, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹³

Eduardo A. Aleman
Assistant Secretary

¹³ 17 CFR 200.30-3(a)(12).