

Securities Alert

NYSE Proposes Rule Change for Delinquent Filers

On December 4, 2014, the New York Stock Exchange (NYSE) filed a proposed rule change with the Securities and Exchange Commission (SEC) to amend Section 802.01E (Late Filer Rule) of the NYSE Listed Company Manual (Manual).

Currently, the Late Filer Rule applies only to annual reports and deems a listed company to be delinquent in its filing if it fails to file the annual report with the SEC by its due date, or if a Form 12b-25 was timely filed, its extended due date. During the six-month period following such delinquency, the NYSE monitors the company and the status of the delinquent report. If the company fails to cure such delinquency within the initial six-month period, the NYSE may, in its sole discretion, allow the company's securities to be traded for up to an additional six-month period, or, if it determines that such an additional period is not appropriate, commence suspension and delisting procedures under Section 804.00 of the Manual.

The proposal would expand the application of the Late Filer Rule to quarterly reports on Form 10-Q and clarify the treatment of companies whose annual or quarterly reports are defective at the time of filing or thereafter.

Under the proposal, a company would be deemed to be a delinquent filer as of the due date (or extended due date if a Form 12b-25 is timely filed with the SEC) of the first 10-Q or annual report with respect to which a company incurs a delinquency (Late Filing Delinquency). The NYSE will also deem a company to have incurred a Late Filing Delinquency if it submits an annual report or Form 10-Q to the SEC by the applicable due date, but such filing is deficient in

some respect in meeting the requirements of the applicable form and the NYSE determines, in its sole discretion, that such deficiency is material in nature¹.

In addition, the amended rule would apply to a company: (a) that files its annual report without an audit report from its independent auditor for any or all of the periods included therein; (b) whose independent auditor withdraws its audit report, or who files a Form 8-K to disclose that it has been notified by its independent auditor that its audit report or completed interim review should no longer be relied upon; or (c) that files a Form 8-K² to disclose that previously issued financial statements should no longer be relied upon because of an error in such financial statements, and all required corrected financial statements are not re-filed within 60 days of such non-reliance disclosure (an “Extended Non-Reliance Disclosure Event”; each of a Late Filing Delinquency and the events described in clauses (a), (b) and (c) above, a “Filing Delinquency”)³.

Upon the occurrence of a Filing Delinquency, the NYSE will promptly notify a company in writing of its procedures relating to late filings. During the six-month period from the date of the Filing Delinquency, the NYSE will monitor the company and the status of the delinquent report, and any subsequent annual report or quarterly report on Form 10-Q the company fails to file by the applicable due date, until the Filing Delinquency is cured.⁴

If the company fails to cure the Filing Delinquency within the initial six-month cure period, the NYSE may, in its sole discretion, allow the company’s securities to be traded for up to an additional six-month period. If the NYSE determines that such additional cure period is not appropriate, however, suspension and delisting procedures will commence⁵. In its sole discretion, the NYSE may decide not to allow any cure period, or to cut a cure period short, and

¹ The following is a non-exclusive list of deficiencies that would cause the NYSE to deem a company to have incurred a Late Filing Delinquency: (i) the filing does not include required financial statements or a required audit opinion; (ii) a required financial statement audit opinion includes qualifying or disclaiming language or the auditor provides an adverse financial statement audit opinion; (iii) a required financial statement audit opinion is unsigned or undated; (iv) there is a discrepancy between the period end date for required financial statements and the date cited in the related audit report; (v) the company’s auditor has not conducted an SAS 100 review with respect to the company’s Form 10-Q; (vi) required chief executive officer or chief financial officer certifications are missing; (vii) the filing is missing a Sarbanes-Oxley Act Section 404 required internal control report or auditor certification; (viii) the filing does not comply with the applicable SEC XBRL requirements; or (ix) the filing does not include signatures of officers or directors required by the applicable form.

² Or with respect to a foreign private issuer, files a 6-K or discloses such information by other means.

³ For purposes of the cure periods, 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 NYSE believes that a company is unlikely to re-file all required corrected financial statements within 60 days after such non-reliance disclosure or that the errors giving rise thereto are particularly severe in nature, the NYSE may determine earlier than 60 days that the company has incurred a Filing Delinquency as a result of such non-reliance disclosure.

⁴ Under the proposal, a company that has an uncured Filing Delinquency will not incur an additional Filing Delinquency if it fails to file a subsequent report by its applicable due date; however, 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.

⁵ In such event, a company is not eligible to follow the procedures outlined in Sections 802.02 and 802.03 of the Manual (general cure procedures for companies that fall below the NYSE’s continued listing standards).

immediately commence suspension and delisting procedures if the company is otherwise subject to delisting under the Manual, including if the NYSE believes that continued listing and trading of a company's securities on the NYSE is inadvisable or unwarranted.

In determining whether an additional cure period after the expiration of the initial cure period is appropriate, the NYSE will consider the likelihood that the delinquent report and all delinquent subsequent reports can be filed or re-filed, as applicable, during such period, as well as the company's general financial status, based on information provided by, among others, the company, its audit committee, its outside auditors, the staff of the SEC and any other regulatory body.⁶

If the NYSE determines that an additional cure period is appropriate and the company fails to file the delinquent report and all delinquent subsequent reports by the end of such additional period, suspension and delisting procedures will commence immediately under Section 804.00 of the Manual. In no event will the NYSE continue to trade a company's securities if it has failed to cure its Filing Delinquency and is not current with all subsequent reports twelve months after its initial Filing Delinquency.

Under the proposed rule, the NYSE may also commence suspension and delisting procedures if it believes, in its sole discretion, that it is advisable to do so on the basis of an analysis of all relevant factors, including, but not limited to, the following:

- whether there are allegations of financial fraud or other illegality in relation to the company's financial reporting;
- the resignation or termination 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 CEO, CFO 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 the Late Filer Rule; and
- any past history of late filings.

The NYSE proposes that the revised Late Filer Rule become operative on March 1, 2015⁷.

⁶ In its proposal, the NYSE "strongly encourages" companies to provide ongoing disclosure on the status of delinquent reports through press releases, and will also take the frequency and detail of such information into account in determining whether an additional trading period is appropriate.

⁷ Any listed company that is late as of March 1, 2015 in filing a Form 10-Q with a due date prior to that date will not be subject to the proposed amended rule with respect to that filing.

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Within 45 days of publication in the Federal Register, or up to 90 days as the SEC may designate or as to which the self-regulatory organization consents, the SEC will by order approve or disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. Interested persons are invited to submit comments.

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