

Memorandum

NYSE Amends “Late Filer” Rule

March 17, 2015

Effective March 2, 2015, the New York Stock Exchange (“NYSE”) has amended its rule that provides compliance procedures for NYSE-listed companies that fail to timely file certain periodic reports with the Securities and Exchange Commission (“SEC”).¹ The amendments to the NYSE’s “late filer” rule, as set forth in Section 802.01E of the NYSE’s Listed Company Manual, are intended to strengthen the investor protection afforded by “access to accurate and current disclosure about the business and financial position of companies listed on the Exchange.”

The previous “late filer” rule deemed delinquent only those listed companies that failed to file an annual report on Form 10-K, 20-F, 40-F or 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.”² The revised rule, however, expands the “late filer” classification to also include listed companies that:

- fail to file a quarterly report on Form 10-Q by the date on which the filing is due; or
- file “annual or quarterly reports that are deemed to be defective either at the time of their filing with the SEC or subsequently.”³

¹ See Memorandum from [NYSE Regulation, Inc. to NYSE Listed Company Executives](#) (Mar. 5, 2015) (“NYSE Memorandum”); see also [Self-Regulatory Organizations; New York Stock Exchange LLC: Order Approving a Proposed Rule Change Amending Its Continued Listing Requirements, As Set Forth in Section 802.01E of the Exchange’s Listed Company Manual, In Relation to the Late Filing of a Company’s Annual or Quarterly Report with the Securities and Exchange Commission](#), Release No. 34-74412; File No. SR-NYSE-2014-65 (Mar. 2, 2015).

² [NYSE Proposed Rule Change filed with the Securities and Exchange Commission on Form 19b-4, at 4](#) (“NYSE Proposed Rule Change”) (Dec. 4, 2014).

³ NYSE Memorandum.

The revised rule includes a non-exhaustive list of situations that signify a defective filing:

- “[T]he 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.”
- The company’s independent auditor withdraws its audit report from a previously filed report.
- The company discloses “that previously issued financial statements should no longer be relied upon because of an error in such financial statements,” and “the company does not refile all required corrected financial statements within 60 days of the issuance” of this non-reliance disclosure. The NYSE, however, may determine earlier than 60 days that the company is delinquent if the NYSE believes that the company is “unlikely to refile all required corrected financial statements” within the 60-day time frame or that the errors giving rise to the non-reliance disclosure are “particularly severe in nature.”⁴

Moreover, under the revised rule, a company is considered delinquent if it “submits an annual report or Form 10-Q to the SEC by the applicable” filing 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.”

The revised rule also clarifies the procedures for curing a delinquency and regaining compliance. Under the revised rule, once a filing delinquency occurs, the NYSE will promptly send written notification to the company, explaining the necessary compliance procedures. Specifically, within five days of the date of the notification, the company must:

- contact the NYSE to discuss the status of the delinquent filing; and
- “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 refile of the applicable report, as the case may be.”

If the company does not issue the requisite press release, the NYSE will issue a press release disclosing the filing delinquency.

In the six months following the date of the filing delinquency (the “Initial Cure Period”), the NYSE will monitor the company and the status of its delinquent filing and any subsequent reports until the delinquency is cured. In the event the company does not cure the delinquency within the Initial 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” (the “Additional Cure Period”). In its revised rule, the NYSE “strongly encourages companies to provide ongoing disclosure on the status of the Delinquent Report and any Subsequent Reports to the market through press releases,” as the NYSE will consider “the frequency and detail of such information,” among other factors, in determining whether an Additional Cure Period is warranted. If, however, the NYSE

⁴ NYSE Proposed Rule Change at 22-23.

decides that an Additional Cure Period is not appropriate, it will begin suspension and delisting procedures.

Notwithstanding these procedures, the revised rule makes clear that the NYSE may decide, in its sole discretion, not to afford a company any Initial Cure Period or Additional Cure period or to truncate either of these periods and commence suspension and delisting procedures if it believes that it is advisable to do so, based on an analysis of all relevant factors.

If a company is afforded an Additional Cure Period but fails to file the delinquent report and all subsequent reports by the end of this period, the NYSE will commence suspension and delisting procedures immediately. The revised rule notes that “[i]n 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.”

If you have any questions or would like additional information, please do not hesitate to contact **Yafit Cohn** at +1-212-455-3815 or yafit.cohn@stblaw.com, or any other member of the Firm’s Public Company Advisory Practice.

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