

NYSE Proposes Rule Changes Requiring Foreign Private Issuers to Submit Semi-Annual Financial Information to SEC

The New York Stock Exchange (NYSE) recently proposed amendments to the NYSE Listed Company Manual (Manual) to adopt a requirement that NYSE-listed foreign private issuers (FPIs)¹ submit semi-annual unaudited financial information to the Securities and Exchange Commission (SEC) on Form 6-K. This rule proposal is based on Nasdaq's Marketplace Rule 5250(c)(2) and is part of the NYSE's ongoing efforts to protect investors and the public interest by ensuring that NYSE-listed companies provide timely financial information necessary for investors to make informed investment decisions.

The Proposed Rules

Specifically, the NYSE proposes to include in the Manual a new Section 203.03 (Semi-Annual Reporting by Foreign Private Issuers) which would mandate that NYSE-listed FPIs submit to the SEC under Form 6-K (i) an interim balance sheet as of the end of the second fiscal quarter, and (ii) a semi-annual income statement that covers the first two fiscal quarters. The Form 6-K containing these financial reports would be required to be submitted no later than six months following the end of the FPI's second fiscal quarter. Though the FPI's financial information included in the Form 6-K would not be required to be reconciled to US Generally Accepted Accounting Principles or presented in US dollars, such financial information would be required to be in English.

Additionally, the NYSE proposes to amend the Manual (Section 802.01E – SEC Annual and Quarterly Report Timely Filing Criteria) to subject listed FPIs that have not timely complied with the new Form 6-K submission requirement to the same compliance procedures as are applied to NYSE-listed companies that are not FPIs and that are late in filing their annual report or Form 10-Q. That is, a failure to submit the required Form 6-K within the period specified by proposed Section 203.03 would constitute a "Late Filing Delinquency" under Section 802.01E. Companies that fail to submit the requisite Form 6-K would have an initial six month cure period within which to submit the Form 6-K and any subsequently due Form 20-F or Form 6-K, as is the case with any other Late Filing Delinquency under that rule. Under the proposed rules, if an NYSE-listed FPI fails to submit all required information during the initial six month cure period, the staff of the NYSE would have the discretion to provide an additional (up to) six month cure period, after which continued non-compliance with the submission obligations would subject such FPI to delisting.

The Reasoning

The NYSE's reasoning for the proposed rule changes focuses on the current reporting requirements imposed upon NYSE-listed domestic US issuers. To summarize, any listed company that is a domestic US issuer is required under the SEC's rules to file a quarterly report (on Form 10-Q) containing unaudited financial information with respect to the most recently completed fiscal quarter. Listed companies that are FPIs are not currently subject to any interim financial reporting obligations under US regulatory requirements. The NYSE's proposed rule changes seek to narrow the gap between listed FPI and listed non-FPI obligations to report interim financial information to the SEC.

The NYSE readily acknowledges that financial reporting practices outside the US often differ from those in the US and that foreign companies are not typically required to issue interim financial information on a quarterly basis in their local markets. That notwithstanding, the NYSE asserts that virtually all NYSE-listed FPIs publicly provide interim financial information at least semi-annually. The NYSE argues that semi-annual financial disclosure is critical to protect investors on the basis that annual financial disclosure alone is too infrequent to ensure investors' ability to make informed investment decisions.

In light of the importance to investors of publicly reported mid-year results, the NYSE seeks to make the current practice of most NYSE-listed FPIs mandatory (i) to ensure financial disclosure among all listed FPIs is uniform, and (ii) to enable the standardized application of NYSE compliance procedures (for companies that are late in their periodic reporting) to FPIs that have failed to comply with their semi-annual financial reporting obligations.

The NYSE has solicited comment on the proposed rule changes from interested persons, who are invited to do so using the SEC's Internet comment form at:

<http://www.sec.gov/rules/sro.shtml>

If you have any questions regarding the scope or applicability of the NYSE's proposed rules, please contact Herman H. Raspé at 212.336.2301 (hhraspe@pbwt.com), Jean-Claude Lanza at 212.336.2022 (jlanza@pbwt.com), or Dana B. Fritz at 212.336.2039 (dbfritz@pbwt.com).

1. A "foreign private issuer" is defined under Rule 3b-4 of the US Securities Exchange Act of 1934, as any issuer incorporated or organized under the laws of a foreign country, except an issuer meeting both of the following conditions: (i) more than 50 percent of the outstanding voting securities of the issuer are directly or indirectly held of record by residents of the United States; and (ii) any one of the following: (a) the majority of the executive officers or directors of the issuer are United States citizens or residents; or (b) more than 50 percent of the assets of the issuer are located in the United States; or (c) the business of the issuer is administered principally in the United States.

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