

NYSE Proposes to Amend Rules to Permit Use of Regulation FD Release Procedures

On April 8, 2009, the New York Stock Exchange (“NYSE”) announced that it had submitted a proposal to the Securities and Exchange Commission (“SEC”) to amend the NYSE’s immediate release policy to allow exchange-listed companies to comply by disseminating information by any Regulation FD-compliant method.¹ This announcement is an effort by the NYSE to modernize its regulatory regime and, most importantly, to harmonize its immediate release policies with the SEC’s requirements in Regulation FD and with similar Nasdaq rules adopted over the past decade to curb selective disclosure of material non-public information.²

The NYSE has proposed that the rule become immediately effective as permitted by Section 19(b)(3) of the Securities Exchange Act of 1934.³ Under Section 19(b)(3), the SEC can summarily abrogate the rule change within 60 days and require the NYSE to refile the proposed rule change if such action is found necessary or appropriate in the public interest.

A summary of the proposed rule change follows. The NYSE’s immediate release policy, embodied in Section 202.05 of the Listed Company Manual, requires that an exchange-listed company release quickly to the public any news or information which might reasonably be expected to materially affect the market for such company’s securities. Prior to the rule change, Section 202.06 required that companies comply with the immediate release policy by issuing a press release. The NYSE has now broadened the acceptable methods of complying with its immediate release policy by allowing any method of public disclosure that would constitute compliance with Regulation FD.⁴ This means that exchange-listed companies can now comply with the immediate release policy by filing a Form 8-K or through any other method of disclosure that is *reasonably designed to provide broad, non-exclusionary distribution of the information to the public*. This includes conference calls, press conferences and webcasts, so long as the public is provided adequate notice and granted access. In addition, the SEC has recently provided interpretative guidance on how companies might design and utilize web sites in a way that satisfies the requirements of Regulation FD.⁵

In addition, the proposed rule change affects Section 202.06 of the Listed Company Manual, which governs how exchange-listed companies must communicate with the NYSE regarding material events and

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- ¹ See Proposed Rule Change by New York Stock Exchange, SR-NYSE-2009-40 (available at [http://apps.nyse.com/commdata/pub19b4.nsf/docs/6DED0EC2FFB9E05685257592007748EB/\\$FILE/NYSE-2009-40.PDF](http://apps.nyse.com/commdata/pub19b4.nsf/docs/6DED0EC2FFB9E05685257592007748EB/$FILE/NYSE-2009-40.PDF)).
- ² See Securities Exchange Act Release No. 43154 (August 15, 2000), 65 FR 51716 (August 24, 2000) (announcing the adoption of Regulation FD); Securities Exchange Act Release No. 46288 (July 31, 2002), 67 FR 51306 (August 7, 2002) (SR-NASD-2002-85) (announcing the amendment of certain Nasdaq rules to conform to the requirements of Regulation FD).
- ³ Pursuant to Section 19(b)(3), a rule change proposed by the NYSE may take effect upon filing the proposal with the SEC if designated by the NYSE as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing NYSE rule.
- ⁴ Despite the fact that foreign private issuers are exempt from Regulation FD, the rule change allows exchange-listed foreign private issuers to comply with the immediate release policy by using any Regulation FD compliant method.
- ⁵ For a more detailed discussion of the use of company web sites in the context of Regulation FD, see *SEC Provides Interpretive Guidance on the Use of Company Web Sites under the Exchange Act and the Antifraud Provisions of the Federal Securities Laws*, Cahill Gordon & Reindel LLP Firm Memorandum (August 11, 2008) available at <http://www.cahill.com/news/memoranda/000106>.

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rumors. Prior to the rule change, it was recommended that an exchange-listed company notify its NYSE representative by telephone as least ten minutes prior to the release of an announcement of news of a material event or a statement dealing with a rumor. The NYSE has amended this rule to make clear that such notification is an absolute requirement, which enables the NYSE to consider whether trading in the security should be temporarily halted. The amended rule will also require that communications to the NYSE include (i) the substance of the announcement, including any written statements to be included in the public announcement and (ii) an explanation of which Regulation FD-compliant method the company intends to use to make the public dissemination. Finally, in the event that the public disclosure may significantly affect trading, the new rule requires that the exchange-listed company provide notice to the NYSE by email, rather than by facsimile as is currently the case.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Banks Bruce at 212.701.3052 or bbruce@cahill.com.