UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 55304 / February 13, 2007

Admin. Proc. File No. 3-12564

In the Matter of the Application of

NAVISTAR INTERNATIONAL CORPORATION

For Review of Action Taken by the

New York Stock Exchange LLC

ORDER DENYING STAY

On February 7, 2007, Navistar International Corporation ("Navistar") requested that the Commission summarily stay the decision of the New York Stock Exchange LLC ("NYSE" or "Exchange") to remove the entire class of common stock and the entire class of convertible junior preference stock, series D of Navistar from listing and registration on the Exchange. 1/ The NYSE determined that Navistar's securities were no longer eligible for listing on the Exchange because Navistar has failed to file its annual report for fiscal year 2005 with the Commission.

I.

Exchange Act Section 13(a) requires issuers of securities registered under Exchange Act Section 12 to file periodic and other reports with the Commission containing such information as

1/ Commission Rule of Practice 401(d)(2) provides that we may consider a stay of an action by a self-regulatory organization summarily, without notice and opportunity for hearing. 17 C.F.R. § 201.401(d)(2); see also Section 19(d)(2) of the Securities Exchange Act of 1934, 15 U.S.C. § 78s(d)(2) (stating that the appropriate regulatory agency may consider summarily the question of whether to grant a stay of a self-regulatory organization's action).

the Commission's rules prescribe. 2/ Pursuant to Section 13(a), the Commission has promulgated Rules 13a-1 and 13a-13, which require issuers to file annual and quarterly reports. 3/

An NYSE-listed company that fails to file its annual report with the Commission in a timely manner is subject to the procedures contained in NYSE Rule 802.01E. This rule provides for NYSE monitoring of the company during the six-month period from the filing due date until the annual report is filed. If the company fails to file the annual report within this time, the NYSE has discretion to allow the company's securities to be traded for up to an additional six-month period.

Rule 802.01E ¶ 7 also provides that the NYSE has discretion to continue listing a company whose annual report is more than twelve months late in "certain unique circumstances," if the Exchange determines that the company "may have a position in the market (relating to both the nature of its business and its very large publicly-held market capitalization) such that its delisting from the Exchange would be significantly contrary to the national interest and the interests of public investors." 4/ In the event the Exchange makes such a determination, it may, in its "sole discretion," consider allowing an extension beyond the twelve-month period if five additional criteria are satisfied. 5/

2/ 15 U.S.C. § 78m.

3/ 17 C.F.R. §§ 240.13a-1 and 13a-13.

4/ The Exchange's discretion to allow a company to continue to be listed beyond the initial twelve-month period set forth in Rule 802.01.E ¶ 7 will expire on December 31, 2007. See Order Approving Rule Change Amending Annual Report Timely Filing Requirements, Exchange Act Rel. No. 55198 (Jan. 30, 2007), __ SEC Docket ____, ____. If, prior to December 31, 2007, the Exchange had determined to continue listing a company beyond the initial twelve-month period and the company fails to file its periodic annual report by December 31, 2007, suspension and delisting procedures will commence in accordance with the procedures set out in Section 804 of the Listed Company Manual. Id.

5/ These criteria are: (1) the company's continuing compliance with applicable quantitative and qualitative listing standards; (2) its continued ability to meet current debt obligations and adequately finance operations; (3) its progress, as reported to the Exchange, in completing its financial statements; (4) whether it has been publicly transparent on its status, issuing press releases regarding its progress in completing its financial statements and providing other information regarding its financial status; and (5) the reasonable expectation that the company will be able to resume timely filings in the future.

On January 17, 2006, Navistar announced that it would not timely file its annual report for the fiscal year ended October 31, 2005. Pursuant to Rule 802.01E, Navistar traded on the NYSE during an initial six-month grace period following its failure to file its fiscal 2005 Form 10-K in January 2006. On April 7, 2006, Navistar announced that it would restate its financial results for the fiscal years 2002 through 2004, and for the first nine months of fiscal year 2005, and stated that these financial statements "should no longer be relied upon because of errors in such financial statements." 6/ In July 2006, Navistar submitted a formal request for an additional six-month period to continue trading its securities. On July 24, 2006, NYSE staff granted Navistar an extension of up to six additional months, through February 1, 2007.

During a meeting on October 12, 2006, Navistar disclosed to NYSE staff that Navistar estimated its revised timing for completion of the 2005 annual report had been extended beyond February 1, 2007 by approximately four months. In response, NYSE staff stated that February 1, 2007 was an absolute deadline and that it marked the end of the maximum period that Navistar could be listed without filing the 2005 annual report with the Commission. On December 6, 2006, Navistar informed NYSE staff of a formal presentation Navistar had made to the Commission's Division of Market Regulation on December 5, 2006. The presentation outlined the reasons that Navistar believed it should be allowed to remain listed pursuant to the "national interest" exception contained in Rule 802.01E ¶ 7.

On December 15, 2006, Navistar announced that it would not complete its 2005 financial statements by February 1, 2007, and therefore would not do so until after the twelve-month period to complete the filing as permitted under Rule 802.01E. 7/ In a letter dated December 15, 2006, NYSE Regulation staff notified Navistar of its decision to suspend trading in, and to commence procedures to delist, Navistar's listed securities and, on that same date, the NYSE announced this decision in a press release. 8/ On December 18, 2006, Navistar requested a review of that decision by the NYSE Regulation Board of Directors Committee for Review (the "Review Committee"). NYSE Regulation determined that trading in Navistar's securities would continue through the NYSE's review process.

On January 30, 2007, the Review Committee held a hearing after receiving briefs, witness statements, and other documents from Navistar and NYSE Regulation staff in support of their

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6/ Navistar International Company, Form 8-K, at 3 (2006).

7/ Navistar represents to us that it "expects to complete its restatement in 2007 and to be current with all filing requirements for public companies by the end of the calendar year."

8/ Press Release, NYSE and NYSE Arca Suspend Trading in Navistar International Corporation: Move to Remove from the Lists (Dec. 15, 2006), http://www.nyse.com/Frameset.html?nyseref=&displayPage=/press/1166094393003.html

respective positions. 9/ Navistar addressed the application of Rule 802.01E ¶ 7 to its situation. On February 6, 2007, the Review Committee affirmed the decision of NYSE Regulation staff to suspend and delist Navistar's securities. On this same date, NYSE Regulation announced that Navistar's securities would be suspended from trading prior to the opening on February 14, 2007. Also on February 6, 2007, the NYSE filed a Form 25 with the Commission notifying us of NYSE's intention to remove Navistar from listing and registration on the Exchange at the opening of business on February 16, 2007, pursuant to the provisions of Exchange Act Rule 12d2-2. 10/ On February 7, 2006, the Commission received Navistar's Rule 420 Application for Review of the Review Committee's decision affirming the suspension and delisting and the Motion for Summary Expedited Stay. On February 9, 2006, the NYSE informed the Commission that it was "neutral on whether or not the Commission should grant such an immediate interim stay."

II.

Under Rule of Practice 401(d), we may stay an action of the NYSE upon a motion by a person aggrieved by such action. 11/ In determining under Rule 401(d) whether to stay Navistar's delisting from the NYSE, we consider (1) whether there is a strong likelihood that Navistar will succeed on the merits of its application for review, (2) whether, absent a stay, Navistar will suffer irreparable injury, (3) whether there will be substantial harm to the public if we stay the delisting, and (4) whether staying the delisting will serve the public interest. 12/

9/ The following witnesses testified on behalf of Navistar: Daniel C. Ustian, Navistar's Chairman, President, and Chief Executive Officer; William A. Caton, Navistar's Executive Vice-President and Chief Financial Officer; James H. Keyes, Chairman of the Audit Committee of Navistar's Board of Directors; and Timothy P. Flynn, Chairman and Chief Executive Officer of KPMG LLP, Navistar's current auditors. Counsel for Navistar also distributed to the Review Committee copies of affidavits from Heather Kos, Navistar's Director of Investor Relations, and Terry Endsley, Navistar's Treasurer.

10/ 17 C.F.R. § 240.12d2-2.

11/ 17 C.F.R. § 201.401(d).

12/ Rules of Practice, 60 Fed. Reg. 32738, 32772 (1995) (comment to Rule 401); JD American Workwear, Inc., Securities Exchange Act Rel. No. 43283 (Sept. 12, 2000), 73 SEC Docket 748, 752; Robert J. Prager, Exchange Act Rel. No. 50634 (Nov. 4, 2004), 84 SEC Docket 162, 163 (citing Cuomo v. Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1988)).

Commission review of the suspension and delisting of Navistar is governed by Exchange Act Section 19(f). 13/ Pursuant to Section 19(f), the Commission must dismiss an application for review of an NYSE delisting if we find that "the specific grounds on which such [delisting] . . . is based exist in fact, that such [delisting] . . . is in accordance with the rules of [NYSE], and that such rules are, and were applied in a manner, consistent with the purposes of [the Exchange Act]." 14/

We first address whether Navistar is strongly likely to succeed on the merits. Then we will address the harm and public interest considerations.

A. Likelihood of Success on the Merits

Although any final determination must await a review on the merits, it appears, based on the briefs filed by the parties thus far, that Navistar has not established a strong likelihood that it will prevail on the merits. It is undisputed that the specific grounds on which NYSE based it delisting determination, that Navistar has failed to file its annual report for the fiscal year ended October 31, 2005, exist in fact, and it appears unlikely that Navistar will be able to establish that NYSE's delisting determination was not in accordance with its rules or the purposes of the securities laws.

Navistar makes three main arguments: (1) the NYSE staff refused to consider whether Navistar meets the requirements of Rule 802.01E ¶ 7 and thereby violated the Due Process Clause of the Fifth Amendment; (2) the NYSE failed to explain why Navistar does not meet the requirements of Rule 802.01E ¶ 7; and (3) Navistar meets the requirements of Rule 802.01E ¶ 7. The first two are procedural arguments; the last concerns the substance of Rule 802.01E ¶ 7.

First, Navistar argues that the NYSE staff said several times it could not consider Rule 802.01E ¶ 7 because of the staff's "perception that the Commission viewed the Rule with disfavor" and contends that "NYSE staff never told Navistar that the staff had considered and determined that Navistar did not meet the threshold requirements" of Rule 802.01E ¶ 7. However, it is the determination reached by the Review Committee, and not the NYSE staff, that is the subject of our review. 15/

13/ 15 U.S.C. § 78s(f).

14/ Fog Cutter Capital Group, Inc., Exchange Act Rel. No. 52993 (Dec. 21, 2005), 86 SEC Docket 3164, 3169-70, aff'd, __ F.3d __ (D.C. Cir. 2007). Navistar has not alleged that the decision imposes any unnecessary or inappropriate burden on competition under the Act. See 15 U.S.C. § 78s(f); Fog Cutter, 86 SEC Docket at 3170 n.13.

15/ Cf. James B. Chase, Exchange Act Rel. No. 47476 (Mar. 10, 2003) 79 SEC Docket 2892, 2901 n.26 ("The [NASD's] Hearing Panel's decision is not before us on review; rather it is

(continued...)

The Review Committee's decision states that the record establishes that NYSE considered Navistar's possible qualification for continued listing pursuant to Rule 802.01.E ¶ 7 and determined that it did not meet the threshold criteria. Specifically, the Review Committee cited NYSE staff's declaration filed before the Review Committee that Navistar's market capitalization was not large enough and that there was no evidence that delisting would have an impact on the national interest. The NYSE staff determined that "unlike Fannie Mae, the only company to which the 'national interest' exception has been applied to date, Navistar has a relatively modest market capitalization and there was no evidence that delisting would have an impact on the national infrastructure such as the risk to the national housing market that was posed by delisting Fannie Mae." 16/

Thus, contrary to Navistar's claim, this determination was not based solely on the size of Navistar's market capitalization, but also on a determination that delisting Navistar was unlikely to have an impact on national interests or the markets beyond the market for Navistar's stock. Navistar's claim that the NYSE's application of Rule 802.01.E ¶ 7 unfairly discriminates in favor of large companies misperceives the national interest analysis. The express terms of the Rule make "very large publicly-held market capitalization" one of two criteria necessary to determine that delisting would be significantly contrary to the national interest.

The Review Committee also stated that it "fully considered all of the evidence presented to it by the Company and NYSE Regulation in reaching its decision to affirm the decision of NYSE Regulation Staff." Navistar was allowed a full opportunity to raise any issue before the Review Committee and was not limited to issues raised by the NYSE staff in its December 15, 2006 determination. The submissions to date indicate that the Review Committee explicitly considered whether Navistar met the requirements of the Rule with respect to the nature of its business and the size of its market capitalization.

Navistar maintains that it was denied due process in NYSE's delisting determination. The NYSE is required by Exchange Act Section 6(b)(7) to "provide a fair procedure for . . . the prohibition or limitation by [the NYSE] of any person with respect to access to services offered

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15/ (...continued)
the NAC decision we consider here."); Charles V. Mercer. Jr., 46 S.E.C. 65, 70 (1975) ("And the decision that we review here is that made by the [NASD's] Board of Governors, not the one reached by the District Committee."). Rule 12d2-2(b)(1)(ii), 17 C.F.R. § 240.12d2-2(b)(1)(ii), requires an exchange to have rules providing an opportunity for appeal to the exchange's board or a committee thereof in order to strike a class of securities from listing.

16/ Declaration of Richard G. Ketchum and Glenn W. Tyranski, Exhibit 1 to the Memorandum submitted to the Review Committee by NYSE staff, paragraph 13.

by [the NYSE] or a member thereof." 17/ Navistar has not demonstrated that the NYSE's consideration of Navistar's delisting was unfair. After NYSE staff determined that Navistar should be delisted, Navistar requested review of that decision by the Review Committee. The Review Committee's opinion states that Navistar "was given a full opportunity to present oral argument, witness testimony, and any additional evidence it wished to present regarding whether its circumstances did, in fact, qualify it for continued listing under Section 802.01E." 18/ Prior to the Review Committee hearing, Navistar and NYSE staff presented briefs, witness statements, and other documents in support of their positions. On January 30, 2007, counsel for Navistar and NYSE staff presented oral argument. Navistar presented four witnesses who testified on its behalf and submitted the affidavits of two other witnesses. Navistar also submitted a written presentation that expressed the company's view of its significance to the national interest. Based on the record before us, it appears that the review procedure complied with NYSE's rules. Navistar had not suggested that it was prevented from presenting relevant evidence or that it lacked sufficient time to formulate its position. We conclude that, at this stage of the proceeding, it does not appear likely that Navistar will succeed on the merits of its due process claim.

Navistar contends that it satisfies Rule 802.01E ¶ 7 because delisting from the NYSE would be contrary to the interests of public investors and the national interest due to its position in the market with respect both to the nature of its business and its size. Even assuming that Navistar had met the threshold requirements for continued listing on the Exchange pursuant to NYSE Rule 802.01E ¶7, the Rule provides that the determination to allow the company to continue listing beyond the twelve-month period rests with the "sole discretion" of the Exchange. In approving NYSE Rule 802.01E, we stated that the rule provides the Exchange with "limited discretion" and "limited flexibility" to allow a company that is more than twelve months late in filing its annual report with the Commission to remain listed on the Exchange. 19/ We stated that although there might be "certain very rare circumstances" in which delisting could be too

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17/ 15 U.S.C. § 78f(b)(7). Navistar contends that trading and listing on the NYSE is a "property interest." We assume without deciding that this is the case for purposes of this stay application, because Navistar has failed to establish a likelihood that it will prevail on its claim that it was deprived of due process.

18/ To the extent that Navistar argues that it was deprived of due process by the NYSE staff's December 15, 2006 decision, any defect was cured by the Review Committee's subsequent hearing. See In re Hancock, 192 F.3d 1083, 1086 (7th Cir. 1999) (holding that "generally speaking, 'procedural errors are cured by holding a new hearing in compliance with due process requirements'") (citing Batanic v. Immigration and Naturalization Service, 12 F.3d 662, 667 (7th Cir. 1993)).

19/ Order Granting Approval to a Proposed Rule Change Relating to Section 802.01E of the Listed Company Manual Concerning Continued Listing of Companies that Fail to File Their Securities Exchange Act of 1934 Annual Reports in a Timely Manner, Exchange Act Rel. No. 53152 (Jan. 19, 2006), 87 SEC Docket 515, 517.

inflexible, continued listing must be balanced against the "critical importance" of "ensuring that listed companies have filed accurate, up-to-date annual reports under the Act." 20/

Thus, under the Rule, the Exchange nearly always should determine not to extend the twelve-month period for a late filer to remain listed on the Exchange. The refusal to exercise discretion in most cases is consistent with the purposes of the Exchange Act given the importance of current financial information about the issuer. Based on the briefs and materials filed by the parties thus far, Navistar has failed to establish a strong likelihood that it will be able to show that the NYSE exercised its discretion in this proceeding in a manner inconsistent with its rules or the purposes of the Exchange Act.

Rule 802.01E ¶ 7 provides a single, narrow exception to the presumption that delisting will occur if a company does not cure its status as a late filer within twelve months. The standard contained in Rule 802.01E ¶ 7 is meant to apply only to those companies where a "disruption in the orderly market for their securities would have serious implications not just for those companies and their shareholders but also for the country as a whole." 21/ Navistar states that it is the nation's largest combined commercial truck and mid-range diesel engine producer with a market capitalization of over $3.2 billion. According to Navistar, it has a level of specialization and experience in the truck industry that allows it to supply military vehicles to the United States for use in Iraq and Afghanistan. These facts alone, however, fail to establish a substantial likelihood that NYSE abused its discretion by concluding that Navistar's delisting would not be significantly contrary to the national interest or have serious implications for the country as a whole. Navistar does not contend, and nothing in the briefs or other submissions to date supports the conclusion, that the NYSE's delisting of Navistar will prevent it from continuing to operate its business and to provide military vehicles for use in Iraq and Afghanistan.

Navistar asserts further that its has complied with the additional five criteria for continued listing contained in Rule 802.01E ¶ 7. These additional five criteria are to be considered only if and after the NYSE determines that a late filer meets the national interest threshold criteria. To permit continued listing of companies that do not satisfy the threshold criteria would open the exemption to a broad category of companies and is not consistent with the purpose of the Rule.

Navistar argues that the NYSE failed to explain how delisting will protect the interest of shareholders or qualify for the national interest exception. As a preliminary matter, under Rule 802.01E ¶ 7, the NYSE is not required to undertake such an analysis and provide an explanation. Rather, in a situation in which a company has failed to file timely its annual report with the Commission, delisting is presumed to be appropriate unless the Exchange determines, in its "sole discretion," that delisting would be significantly contrary to the national interest and the interest of the investing public. Maintaining a listing is to occur only in "unique" and "very rare

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20/ Id.

21/ Id.

circumstances." This presumption is based on the belief that information in the annual report is critical to investors and our national market. "Requiring public companies to file appropriate reports ensures the maintenance of fair and honest markets in securities. Such reports provide a valuable function by disseminating information to the investing public." 22/ Moreover, as we have stated previously, "[t]he Commission strongly believes that listed companies that no longer satisfy exchange listing standards should be delisted quickly in accordance with exchange rules and the Exchange Act." 23/ In these circumstances, delisting serves to "protect the public from being misled into believing that these companies retain the imprimatur of an exchange listing." 24/ Rule 802.01E makes clear that an issuer's failure to file timely its annual report provides a basis for a decision to delist. The Exchange must provide a well reasoned analysis and explanation when it chooses to exercise its discretion to depart from this criterion and permit continued listing.

B. Harm and Public Interest Considerations

Navistar argues that delisting would unfairly penalize Navistar and its shareholders. We have held that the fact that a security is delisted does not necessarily result in irreparable harm to the issuer because its securities may continue to trade in other markets. 25/ According to the Form 25, Navistar anticipates that its securities will be quoted on the Pink Sheets Electronic Quotation Service following the suspension. Navistar also may seek to be listed on the Exchange if it achieves compliance with the Commission's reporting requirements. Although we realize that the existing Navistar shareholders may be disadvantaged, this detriment is outweighed by the public interest in Navistar's compliance with the disclosure requirements so that both existing

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22/ SC&T Int'l, Inc., 54 S.E.C. 320, 326 (1999) (citing Exchange Act § 2, 15 U.S.C. § 78b).

23/ Removal from Listing and Registration of Securities Pursuant to Section 12(d) of the Securities Exchange Act of 1934, Exchange Act Rel. No. 52029 (July 14, 2005), 85 SEC Docket 3615, 3618.

24/ Id.

25/ JD American Workwear, Inc., Exchange Act Rel. No. 43283 (Sept. 12, 2000), 73 SEC Docket 748, 753-54 (citing Millenia Hope, Exchange Act Rel. No. 42739 (May 1, 2000), 72 SEC Docket 965, 966); see also East St. Louis Laborers' Local 100 v. Bellon Wrecking & Salvage Co., 414 F.3d 700, 704 (7th Cir. 2005) (claims of "speculative injuries" do not demonstrate irreparable harm); Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) ("injury must be certain and great; it must be actual and not theoretical").

and prospective investors on the NYSE will have full, current information about Navistar. 26/ Moreover, in this particular case we note that Navistar's stock has risen approximately forty percent since December 15, 2006, when the NYSE announced its initial delisting decision, and that the stock reached a new fifty-two week high on the day after the NYSE filed Form 25 notifying the Commission of the NYSE's intent to delist Navistar on February 16, 2007. 27/ Given these facts, Navistar has failed to establish that it will suffer irreparable harm or that there will be substantial harm to the public absent a stay of the NYSE's delisting decision.

Accordingly, IT IS ORDERED that the motion to stay the ruling by the New York Stock Exchange LLC to delist Navistar International Corporation and to suspend trading of its securities be, and it hereby is, denied.

By the Commission.

Nancy M. Morris
Secretary

26/ JD American Workwear, 73 SEC Docket at 754 (citing Millenia Hope, 72 SEC Docket at 966-67); see also Biorelease Corp., 52 S.E.C. 219, 224 (1995) (noting that, while delisting may hurt existing investors, their interests are outweighed by prospective future investors).

27/ Navistar's Executive Vice-President stated that "[w]herever we are listed, we are committed to continued communications with our shareholders." Press Release, Navistar International Corporation, Navistar Says NYSE Moves to Delist Company from Exchange; Trading Suspension Set for Feb. 14; Appeal Planned (Feb. 6, 2007), http://ir.navistar.com/releasedetail.cfm?ReleaseID=228892.