

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-54810; File No. SR-NYSE-2005-90)

November 22, 2006

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Granting Approval of Proposed Rule Change and Amendment No. 1 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2 Thereto to Allow Certain Institutional Customers to Elect Not to Receive Account Statements

On December 21, 2005, the New York Stock Exchange, Inc. (now known as New York Stock Exchange LLC) (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”), pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Exchange Act” or “Act”),² and Rule 19b-4 thereunder,³ a proposed amendment to NYSE Rule 409 (Statements of Accounts to Customers). On March 28, 2006, the NYSE filed Amendment No. 1 to the proposed rule change.⁴ The proposed rule change, as amended by Amendment No. 1, was published for comment in the Federal Register on May 25, 2006.⁵ The Commission received two

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a et seq.

³ 17 CFR 240.19b-4.

⁴ In Amendment No. 1, the NYSE proposed to partially amend the text of proposed amended Rule 409.

⁵ See Exchange Act Release No. 53826 (May 18, 2006), 71 FR 30211 (May 25, 2006).

comments on the proposal.⁶ On August 14, 2006, the NYSE filed Amendment No. 2 to the proposed rule change.⁷ This order approves the proposed rule change, as amended by Amendment No. 1. Simultaneously, the Commission is providing notice of filing of Amendment No. 2 and granting accelerated approval of Amendment No. 2.

I. Description

The proposed amendment to NYSE Rule 409 would allow institutional customers conducting a Delivery versus Payment and Receive versus Payment (“DVP/RVP”) business to elect not to receive quarterly account statements. Rule 409, in pertinent part, specifies the obligations of member organizations with respect to customer statements, including frequency of delivery and elements of content.

NYSE Rule 409(a) requires that, except with the permission of the Exchange, members and member organizations shall send statements at least quarterly to customers for accounts showing security and money positions and entries during the preceding quarter. The proposed amendment would provide relief from this requirement for customer accounts that are carried solely for the purpose of DVP/RVP transactions. A DVP/RVP account is an arrangement whereby delivery of securities sold is made to the

⁶ See letter from Tom DiSpaldo, Compliance Officer, BNP Paribas Securities Corporation, to Nancy M. Morris, Secretary, Commission, dated June 12, 2006 (“BNP letter”) (available for review on the Commission’s website at <http://www.sec.gov/comments/sr-nyse-2005-90/tdispaldo7238.htm>); and letter from Noland Cheng, Chairman, Operations Committee, Securities Industry Association, to Nancy M. Morris, Secretary, Commission, dated June 16, 2006 (“SIA letter”) (available for review on the Commission’s website at <http://www.sec.gov/comments/sr-nyse-2005-90/sia061606.pdf>).

⁷ In Amendment No. 2, the NYSE proposed to partially amend the text of proposed amended Rule 409 as discussed in Section III below.

buying customer's bank in exchange for payment, usually in cash, at settlement. Such accounts must comply with the requirements outlined in NYSE Rule 387 (COD Orders).⁸

Due to the nature of DVP/RVP accounts, their statements do not generally reflect any cash balance or security position at the end of a quarter. Consequently, according to NYSE, DVP/RVP customers (chiefly institutional customers) generally rely on confirmations (issued pursuant to Rule 10b-10 under the Exchange Act) or trade runs for transaction-related information. Such records provide critical transactional information (such as security name and price, commission or markup, if applicable, trade date, settlement date, etc.) in a timely fashion. According to NYSE, institutional investors prefer transaction confirms or trade run information to quarterly account statements.

The proposed amendment to NYSE Rule 409 would relieve member organizations of the obligation to send quarterly statements to customers if: (1) the customer's account is carried solely for the purpose of execution on a DVP/RVP basis; (2) all transactions effected for the account are done on a DVP/RVP basis in conformity with Rule 387; (3) the account does not show security or money positions at the end of the quarter; (4) the customer consents to the suspension of such statements in writing and such consents are maintained by the member organization in a manner consistent with

⁸ NYSE Rule 387 sets out specific prerequisites for the acceptance of such orders:

- (1) The member or member organization must have previously received the name and address of the agent, together with its customer number;
- (2) The order must note the payment on delivery or collect on delivery nature of the trade;
- (3) The member or member organization must deliver to the customer a confirmation in the specified form; and
- (4) The member organization must have obtained an agreement from the customer regarding the furnishing of appropriate instructions for the settlement of the trade.

Exchange Rule 440 and Rule 17a-4 under the Exchange Act;⁹ (5) the member organization undertakes to provide any particular statement or statements to the customer promptly upon request; and (6) the member organization undertakes to promptly reinstate the delivery of such statements to the customer upon request. The proposed rule change specifies that Rule 409 does not qualify or condition the obligations of a member organization under Rule 15c3-2 under the Exchange Act concerning quarterly notices of free credit balances on statements.¹⁰

II. Summary of Comments

The Commission received two comments on the proposal, both of which generally were supportive.¹¹ BNP opposed condition number (3) of the proposal (*i.e.*, that the account not show security or money positions at the end of the quarter). BNP believed that proposed condition (3) could, among other things, require members to monitor qualifying accounts to ensure that they had no money or positions at the end of the quarter. BNP also contended that the condition could be triggered as a result of a failed receipt or delivery at the end of the quarter. In such case, the customer would

⁹ Under NYSE Rule 440, NYSE member organizations are, among other things, required to make and preserve books and records as prescribed by Rule 17a-3 under the Exchange Act. Rule 440 also states that the recordkeeping format, medium, and retention period must comply with Rule 17a-4 under the Exchange Act. Rule 17a-4 specifies the manner in which broker-dealers must maintain the records created in accordance with Rule 17a-3, and certain other records produced by broker-dealers, and the required retention periods for these records.

¹⁰ Rule 15c3-2 under the Exchange Act requires broker-dealers to provide each of their customers for whom a free credit balance is carried, not less frequently than once every three months, a written statement informing the customer of the amount due to the customer, and written notice that the funds are not segregated and may be used in the broker-dealer's business operations, and that the funds are payable on the customer's demand.

¹¹ See footnote 6, supra.

receive a quarterly statement even though it had consented not to receive one. BNP contended that the customer would be confused by such statement and the statement would not benefit the customer.¹²

The SIA letter supported the proposed amendment to NYSE Rule 409 but commented that the proposal would unnecessarily and impractically require individual firms to retain a record that reflects each institution's consent to the suspension of statements. SIA proposed that the NYSE interpret proposed amended Rule 409 to make an institution's notification to Omgeo¹³ and Omgeo's population of their database sufficient for recordkeeping purposes.

III. NYSE's Response to Comments

In filing Amendment No. 2, NYSE addressed comments on the proposal by revising proposed amended Rule 409(a)(3) to confirm that transactional positions, such as those arising from a fail to receive or deliver money or securities, will not be deemed money or security positions for purposes of this rule. This proposed change is intended to avoid the possibility raised by BNP that firms could be in violation of the rule due to a failed receipt or delivery at the end of a quarter.

IV. Discussion

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder

¹² In its comment, discussed below, SIA does not believe that condition (3) should apply to those accounts that show a money or position balance at the end of the quarter because of unsettled items or a "DK."

¹³ According to SIA, Omgeo, LLC is the leading industry provider of institutional processing services. SIA believes that other vendors would also provide such indicators.

applicable to a national securities exchange.¹⁴ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act.¹⁵ Section 6(b)(5) of the Act requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and national market system, and in general, to protect investors and the public interest. The Commission believes that the proposed rule change, as amended, should remove impediments to and perfect the mechanisms of a free and open market and national market system by removing an unnecessary and potentially costly obligation on firms to deliver quarterly account statements to DVP/RVP customers. At the same time, the proposal maintains certain investor protections (i.e., requiring NYSE member organizations to obtain affirmative consent to the suspension of quarterly account statements, preserving the ability of customers to obtain particular statements upon request and to resume receipt of statements promptly upon request, and precluding member organizations from unilaterally terminating delivery of such statements). Therefore, the Commission believes the proposal is consistent with the Exchange Act.

Accelerated Approval of Amendment No. 2

The Commission finds good cause to approve Amendment No. 2 to the proposed rule change, as amended, prior to the thirtieth day after Amendment No. 2 is published

¹⁴ In approving this proposed rule change, the Commission has considered whether the proposed rule change will promote efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁵ 15 U.S.C. 78f(b)(5).

for comment in the Federal Register pursuant to Section 19(b)(2) of the Act.¹⁶

Amendment No. 2 clarifies that transactional positions, such as those arising from a fail to receive or deliver money or securities, will not be deemed money or security positions for purposes of the proposed amended rule. The Commission finds that Amendment No. 2 appropriately addresses a concern raised by a commenter.¹⁷ For these reasons, the Commission believes that good cause exists to accelerate approval of Amendment No. 2.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,¹⁸ that the proposed rule change (SR-NYSE-2005-90), as amended by Amendment No. 1 thereto, be, and hereby is, approved, and that Amendment No. 2 thereto, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁹

Nancy M. Morris
Secretary

¹⁶ 15 U.S.C. 78s(b)(2).

¹⁷ See BNP letter, footnote 6, supra.

¹⁸ 15 U.S.C. 78s(b)(2).

¹⁹ 17 CFR 200.30-3(a)(12).