

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-55264; File No. SR-NYSE-2006-45)

February 9, 2007

Self-Regulatory Organizations; New York Stock Exchange LLC.; Order Approving Proposed Rule Change Relating to Amendments to Exchange Rule 638 Concerning Mediation

I. Introduction

On June 22, 2006, the New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change relating to amendments to Exchange Rule 638 concerning mediation. The proposed rule change was published for comment in the Federal Register on December 21, 2006,³ and the Commission received one comment on the proposal.⁴ This order approves the proposed rule change.

II. Description

The proposal would delete references in NYSE Rule 638 to the mediation pilot program that expired on January 31, 2003. The proposed amendments would also codify or, in some cases, recodify certain existing mediation procedures, including that: (1) the mediator’s fees and method of payment are subject to agreement of the parties and the mediator, and all such fees and costs incurred in mediation are the parties’ responsibility; (2) an adjournment fee will be assessed if an arbitration hearing is adjourned for purposes of the parties pursuing mediation unless the fee is waived under Exchange Rule 617; (3) a

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Exchange Act Release No. 54917 (Dec. 11, 2006), 71 FR 76714 (Dec. 21, 2006).

⁴ See letter from Stephen A. Hochman to Nancy Morris, dated January 16, 2007 (“Hochman”).

mediator may not represent a party or act as an arbitrator in an arbitration relating to the matter mediated, nor be called to testify regarding the mediation in any proceeding;⁵ and (4) the mediation is confidential and no record is kept of the proceeding,⁶ and, except as may be required by law, the parties and mediator agree not to disclose the substance of the mediation without the prior written authorization of all parties to the mediation.

In addition, the proposed rule change would clarify that any party may withdraw from mediation at any time prior to the execution of a settlement agreement upon written notification to all other parties, the mediator, and the Director of Arbitration. It also would clarify that parties may select a mediator on their own or request a list of potential mediators from the Exchange, and that, upon request of any party, the Director of Arbitration would send the parties a list of five potential mediators together with the mediators' biographical information described in Rule 608.⁷

Finally, the proposed rule change would provide that the parties will advise the Exchange as to the name of the agreed-upon mediator. In addition, it would clarify that once the parties agree to mediate, the Exchange would facilitate the mediation, if requested, by contacting the mediator selected and by assisting in making necessary arrangements, as well as that parties to mediation may use the Exchange meeting facilities in New York, when available, without charge.

⁵ See current NYSE Rule 638(a)(4).

⁶ Id.

⁷ See current NYSE Rule 638(a)(2).

III. Summary of Comment

The Commission received one comment on the proposal.⁸ The commenter objected to the provision of the proposed rule change that would prohibit a mediator from acting as an arbitrator in an arbitration related to the matter mediated.⁹ The NYSE responded that because the provision is substantially the same as in the current rule this comment is outside the scope of this rule filing.¹⁰ The Commission finds the NYSE's determination that these comments are beyond the scope of the rule filing to be reasonable because they suggest substantive changes from the current mediation rules that were not intended to be addressed by this rule filing. Thus, the Commission finds the NYSE's determination not to amend the proposed rule change in connection with this comment at this time to be reasonable.

IV. Discussion and Findings

After careful review, the Commission finds that the proposed rule change is consistent with the Act and, in particular, with Section 6(b)(5) of the Act, which requires, among other things, that the NYSE's rules be designed to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.¹¹ The Commission believes that the proposed rule change will bring greater clarity to the mediation process by deleting outdated references to the expired mediation pilot program and codifying certain existing mediation procedures.

⁸ Hochman.

⁹ *Id.*

¹⁰ See letter from Mary Yeager, Assistant Secretary, NYSE, to Katherine A. England, Assistant Director, Division of Market Regulation, dated February 7, 2007.

¹¹ 15 U.S.C. 78f(b)(5).

V. **Conclusion**

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act¹² that the proposed rule change (SR-NYSE-2006-45), be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹³

Florence E. Harmon
Deputy Secretary

¹² 15 U.S.C. 78s(b)(2).

¹³ 17 CFR 200.30-3(a)(12).