

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-52475; File No. SR-NYSE-2005-50)

September 20, 2005

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change Relating to Proposed Amendments to Rules 282 (Mandatory Buy-In), 284 (Procedure for Closing Defaulted Contract), 289 (Must Receive Delivery), and 290 (Defaulting Party May Deliver After Notice of Intention to Close)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ notice is hereby given that on July 15, 2005, the New York Stock Exchange, Inc. (“NYSE”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change described in Items I, II, and III below, which items have been prepared primarily by the NYSE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The NYSE hereby proposes an amendment to Rules 282 (“Mandatory Buy-In”), 284 (“Procedure for Closing Defaulted Contract”), 289 (“Must Receive Delivery”), and 290 (“Defaulting Party May Deliver After Notice of Intention to Close”) to standardize buy-in rules and procedures. The proposed rule change is set forth below. Proposed new language is italicized; proposed deletions are in [brackets].

Rule 282 – [Mandatory] Buy-In Procedures

A contract in securities, [other than] except a contract where its [the] close-out [of which] is governed by the rules of a Qualified Clearing Agency, which has not been [fulfilled] completed by the seller in accordance with its terms, [for a period of thirty calendar days] may be

¹ 15 U.S.C. 78s(b)(1).

closed-out by the buyer (i.e., the initiating member organization) no sooner than three business days after the due date for delivery, [shall be closed] pursuant to the following procedures:

(a) [A NOTICE of intention in triplicate] An initiating member organization (buyer) may deliver a written "buy-in" notice [shall be delivered] to the defaulting member organization [in default] at or before 12:00 [p.m.] noon ET at least two business days before the proposed execution of a "buy-in" [on the fourth business day prior to the thirty-first calendar day after the due date of the contract] (the buy-in execution date shall be referred to as the "effective date" of the notice). [Hereafter, such fourth business day shall be referred to as the Effective Date of NOTICE. A copy of a receive order] Receipt of delivery to the defaulting member organization, [issued by a Qualified Clearing Agency or a stamped comparison must accompany] must be maintained with the [NOTICE when delivered] notice as part of the initiating member organization's books and records. [If neither of these documents is available, then, if possible, other evidence of the item should accompany the NOTICE.]

(b) The defaulting member organization receiving the [NOTICE of intention] "buy-in" notice must [indicate on the copies of the NOTICE] send a signed, written response to the initiating organization stating its position with respect to the resolution of the item [and then return, to the initiating organization, a copy signed by a member, allied member officer or authorized representative of the organization] no later than 5:00 p.m. ET on [the third business day after the Effective Date of NOTICE] the date of issuance of the "buy-in" notice (the "buy-in" notice date).

[(c) If the NOTICE is returned to the initiating party "DK'd," the initiating party shall itself "close-out" the contract with reasonable promptness. The party which "DK'd"

the NOTICE may not seek to fulfill the contract at a later date. No such "close-out" by the initiating organization shall preclude it from taking action to recover any resulting damages.]

([d] c) If the [NOTICE] "buy-in" notice has not been returned by 5:00 p.m. ET on the "buy-in" notice date, [duly signed, when due] or the "buy-in" notice is returned as "DK'd," or the [NOTICE] "buy-in" notice is returned with the indication that the contract is known but that delivery cannot be made, a "buy-in" [ORDER in duplicate shall be sent to the member or organization in default by 9:30 a.m.] shall be executed on the "effective date" by the initiating member organization by purchasing all or part of the securities necessary to satisfy the amount requested in the "buy-in" notice. [on the thirty-first calendar day after the due date or, if the Exchange is closed on such day, on the next day that the Exchange is open for trading.]

(d) Where the buyer is a customer (other than another member organization), upon failure of a defaulting member organization to effect delivery in accordance with a "buy-in" notice, the contract may be closed-out by purchasing for "cash" in the best available market, or at the option of the initiating member organization, for guaranteed delivery for all or any part of the securities necessary to complete the contract. "Buy-ins" executed in accordance with this paragraph shall be for the account and risk of the defaulting member organization.

(e) [Such ORDER shall be filed on the mandatory "buy-in" ORDER form and shall be understood to be entered as an open order capable of being executed on a "cash," "next-day" or "regular-way" basis.] Every "buy-in" notice shall state the date of the contract to be closed, the quantity and the contract price of the securities covered by said

contract, the settlement date of said contract and any other information deemed necessary to properly identify the contract to be closed. Such notice shall state further that ‘unless delivery of the underlying securities is effected at or before 3:00 p.m. ET on the “effective date” of the “buy-in” notice, the security may be “bought in” on the date specified for the account of the initiating member organization.’ Each "buy-in" notice shall also state the name and telephone number of the individual authorized to pursue further discussions concerning the “buy-in.”

(f) [The original ORDER will be given for execution to a member of or a representative designated by the member organization listed on the order as being in default. Such ORDER shall be executed on that day, unless (1) a Floor Governor, Senior Floor Official, or Executive Floor Official shall defer the execution because a fair market in which to close the contract is not available or (2) the party in default has physical possession of the security and has notified the member organization which initiated the ORDER that it intends to make immediate delivery.] Securities delivered subsequent to the receipt of the "buy-in" notice should be considered as received pursuant to the "buy-in" notice. Delivery of the requisite number of shares, as stated in the "buy-in" notice, or execution of the “buy-in” will also operate to close-out all contracts covered under re-transmitted notices of “buy-ins” issued pursuant to the original notice of “buy-in,” pursuant to Rule 285. If a re-transmitted "buy-in" is executed, it will operate to close-out all contracts covered under the re-transmitted notice. A “buy-in” may be executed by the initiating member organization from its long position and/or from customers’ accounts maintained with such member organization.

(g) [The member of or a representative designated by the member organization in default shall render a report of execution to the member organization initiating the buy-in ORDER or return the original ORDER indicating the reason for its non-execution. When a Floor Governor, Senior Floor Official, or Executive Floor Official has deferred execution, his signature should appear on the ORDER form. (A Floor report covering any execution should be submitted to the Information Desk on the Floor together with the ORDER form.)] Prior to the closing of a contract on which a "buy-in" notice has been given, the initiating member organization shall accept any portion of the securities called for by the contract, provided the portion remaining undelivered at the time the initiating member organization proposes to execute the "buy-in" is not an amount which includes an odd-lot which was not part of the original transaction.

(h) [The member organization which initiated the ORDER shall take into consideration the Floor brokerage, in adjusting any money difference as set forth in Rule 287.] The initiating member organization executing the "buy-in" shall immediately upon execution, but no later than 5:00 p.m. ET, notify the defaulting member organization as to the quantity purchased and the price paid. Such notification shall be in written or electronic form having contemporaneous receipt capabilities, or if not available, the telephone shall be used for the purpose of same day notification, provided that written or similar electronic notification having next day receipt capabilities must also be sent out simultaneously. In either case, formal confirmation of purchase along with a billing or payment, as appropriate, should be forwarded as promptly as possible after the execution of the "buy-in."

(i) In situations where securities have been delivered by the defaulting member organization after the "buy-in" [ORDER] order was [filed] placed, the securities may be returned if the "buy-in" [ORDER were] was executed before it could reasonably be cancelled by the initiating member organization.

(j) For purposes of this Rule, written notice shall include an electronic notice through a medium that provides contemporaneous return receipt capability. Such electronic media shall include but not be limited to facsimile transmission, a computerized network facility, or the electronic functionality of a Qualified Clearing Agency, etc.

[Every reasonable means to borrow securities in order to make delivery on open contracts shall be employed by member organizations. If, however, unusual circumstances exist whereby securities cannot be borrowed, application for suspension of this rule with respect to a specific contract may be made to The Market Surveillance Division of the Exchange by the twenty-fifth calendar day after the due date for delivery. Such application shall set forth the unusual circumstances as well as the unsuccessful efforts made by the member organization to borrow securities in order to effect delivery.]

[If, in the opinion of the Exchange, unusual circumstances exist, the Exchange may direct that the operation of this Rule be temporarily suspended for such period of time as it may determine, either with respect to the market generally, with respect to a specific security or securities or with respect to a specific contract or contracts, but no such suspension shall relieve the party in default of any resulting damages.]

Supplementary Material:

.10 [Paragraph (a) in Rule 282 above requires that the NOTICE of intention be filed with the defaulting member organization in triplicate. Copy III should be stamped by the member organization to whom it is addressed to acknowledge receipt and then returned to and retained by the initiating party for its own records. When the defaulting member organization has completed Copy I and Copy II of the NOTICE, both copies should be returned to the initiating member organization. Copy II should be stamped by the initiating member organization to acknowledge receipt and then returned to and retained by the defaulting party for its own records.

A defaulted contract shall not be "bought-in" by the initiating party when the defaulting member organization indicates on the returned form that it has applied for and evidences an Exchange approved EXEMPTION.]

Members and member organizations are obligated to comply with the close-out provisions of Regulation SHO, promulgated under the Securities Exchange Act of 1934. Specifically, Exchange "buy-in" rules (i.e., Rules 282, 283, 285, 286, 287, 288, 289, 290, 291, 292, 293, and 294) do not abrogate a member's or a member organization's responsibilities or obligations to comply with Regulation SHO, and the close-out provisions of Rule 203(b)(3).

Rule 284 – [Procedure for Closing Defaulted Contract] Reserved

[A contract in securities other than a contract, the close-out of which is governed by the rules of a Qualified Clearing Agency which has not been fulfilled according to the terms thereof may be closed pursuant to the following procedures.]

[The ORDER to close-out such contract shall be delivered in duplicate to the member organization in default and a NOTICE of intention to make such closing. Every such ORDER and every such NOTICE shall be in writing, and shall state the name of the member organization giving the ORDER, the date of the original contract to be closed, the maturity date of such contract, the quantity and contract price of the securities covered by said contract, and the name of the other party thereto.]

[With respect to contracts, other than "cash" contracts to be closed on the day of the contract, such NOTICE shall be delivered to the member organization in default prior to forty-five minutes after delivery time. Unless the Exchange directs otherwise, such ORDER shall be delivered to the member organization in default between 2:15 and 2:30 p.m. and the contract shall not be closed before 2:35 p.m.]

[When a contract made for "cash" is to be closed on the day of the contract, the time of the transaction shall be stated on the NOTICE and the ORDER. Such NOTICE shall be delivered to the member organization in default prior to the delivery of the ORDER. Such ORDER shall be delivered to the member organization in default between 2:30 and 2:45 p.m. in the case of transactions effected at or before 2:00 p.m. and within forty-five minutes after the transaction in the case of transactions effected after 2:00 p.m. No "cash" contract to be closed on the day of the contract shall be closed prior to five minutes after the delivery time for such contract.]

[The procedure for execution of buy-in orders and rendering reports shall be the same as set forth in Rule 282(f), (g) and (h).]

[The closing of a contract may be deferred by order of a Floor Official whenever in his opinion a fair market in which to close the contract is not available, and the Exchange may defer the closing of a contract if it determines that the default is due to the existence of a general

emergency situation, but no such deferment shall relieve the party in default of any resulting damages.]

Rule 289 – Must Receive Delivery

When a member or member organization has [given notice of intention to close a contract for non-delivery] delivered a buy-in notice pursuant to Rule 282, or has re-transmitted notice thereof as provided in Rule 285, [he or it] the initiating member organization must receive and pay for those securities [due upon such contract] subject to the buy-in notice if tendered [at his or its office] prior to the [closing of] buy-in of such contract.

If the person who, pursuant to Rule[s] 282 [or 284], [has in hand the order to close] is notified prior to the [closing] buy-in by a defaulting member or member organization that some or all of the securities (but not less than one trading unit) are in his or its physical possession and will be promptly delivered, then the order to [close] buy-in shall not be executed with respect to such securities, and the initiating member or member organization who has given the original order to [close] buy-in shall accept and pay for such securities, if tendered promptly.

Damages for non-delivery

If such securities [be] are not promptly tendered, the defaulting member or member organization who has stated that they would be promptly delivered shall be liable for any resulting damages.

Supplementary Material:

.10 [Notices.- Notices by the party giving the order, of cancellations or changes in quantity must be given to the member organization in default, when given in connection with buy-ins under Rule 282 at or before 9:30 a.m. or under Rule 284

at or before 2:30 p.m. After the aforementioned times such notices must be given to the person handling the order on the Floor.

The member or representative designated by the member organization in default should turn over the ORDER together with the cancellation or changes in quantity of such ORDER to the party giving the order.

Notices by the party in default of physical possession of the securities and intention to make immediate delivery must be given to the initiating member organization, when given in connection with buy-ins under Rule 282 at or before 9:30 a.m. or under Rule 284 at or before 2:30 p.m. After the aforementioned times such notices must be given to the person handling the order on the Floor.]

Reserved.

Rule 290 – Defaulting Party May Deliver After “Buy-In” Notice [of Intention to Close]

A defaulting member or member organization (seller) who has received a “buy-in” notice, pursuant to Rule 282 [of intention to close a contract], or re-transmitted notice thereof, may deliver the securities [at the office of] to the initiating member or member organization (buyer) issuing such notice up to [2:30] 3:00 p.m. ET. [He or it] The defaulting member organization may deliver such securities after [2:30] 3:00 p.m. ET on the “effective date” of the buy-in notice if: [notice is given to the Exchange] (i) agreed to by the initiating member organization, (ii) before the execution of the order [that he or it] and (iii) when the defaulting member organization has physical possession of the securities.

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II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NYSE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NYSE has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.²

(A) Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The NYSE proposes to amend NYSE Rules 282, 284, 289, and 290 to permit Member and Member Organizations (collectively referred to as “member”) to initiate buy-ins, reduce the waiting period to initiate a buy-in from thirty days to three days, and to otherwise provide more standardized and consistent industry buy-in rules and procedures.

Current Requirements

NYSE Rule 282 sets forth the “mandatory buy-in” process by which member acting as a buyer (“initiating member”) is required to close-out a contract that has not been completed by the member acting as the seller (“defaulting member”) for a period of thirty calendar days. A mandatory buy-in requires that a buy-in notice be delivered in triplicate by the initiating member (buyer) to the defaulting member (seller). The defaulting member receiving the buy-in notice must indicate on the buy-in notice its position with respect to the resolution of the failed trade (e.g., doesn’t know the trade, knows the trade but cannot deliver, will deliver) and return the buy-in notice to the initiating member. If the buy-in notice is not returned when due or is

² The Commission has modified the text of the summaries prepared by the NYSE.

returned with the indication that the contract is known but that delivery cannot be made, a “buy-in order” in duplicate is sent to the defaulting member for execution.

NYSE Rule 284 sets forth a procedure by which an initiating member may close-out a contract that has not been completed by the defaulting member but that is not required to be closed-out. The initiating member must deliver a buy-in notice to the defaulting member prior to forty-five minutes after delivery time. Then the initiating member (buyer) must deliver a buy-in order to the defaulting member between 2:15 and 2:30 p.m. for execution after 2:35 p.m.

NYSE Rule 289 requires an initiating member to accept physical delivery of some or all of the securities that are the subject of a buy-in, thereby halting the mandatory buy-in execution for those securities, if the defaulting member tenders the securities prior to the mandatory buy-in deadlines. NYSE Rule 290 permits a defaulting member to deliver securities subject to a notice of buy-in until 2:30 p.m. on the day of the execution of the buy-in.

Discussion

The NYSE buy-in rules apply to transactions that are not subject to the rules of a qualified clearing agency such as The Depository Trust Company (“DTC”) and the National Securities Clearing Corporation (“NSCC”). In the event that a buy-in is sent to the NYSE floor for execution, then NYSE buy-in rules apply.

However, under the current NYSE rules, there are inherent conflicts of interest by permitting the defaulting member to execute the buy-in. For example, the defaulting member could manipulate the extent to which it has market exposure by timing its purchase of the necessary securities to benefit itself. The initiating member may receive negative customer reaction if the customer learns that its trade has not settled and their securities unavailable

because a buy-in has not been executed by the defaulting member or has not been executed in a timely manner.

Other self-regulatory organizations (“SROs”) have recognized this potential conflict and have adopted buy-in rules that assign responsibility to the initiating member to execute the buy-in. By allowing initiating members to execute their own buy-ins, any potential conflict of interest involving the defaulting member is avoided and the process is expedited.

In the course of reviewing the operation of its buy-in rules, the NYSE and other regulators met with the Securities Industry Association’s Securities Operations Division Buy-In Committee (“Committee”), which is comprised of regulators, broker-dealers, and industry groups, to identify and standardize various buy-in rules and procedures regarding the close-out process related to street-side contracts. The Committee requested that the NYSE amend the buy-in rules to eliminate the “Notice” procedures described above and to allow the initiating member (buyer) to execute buy-ins to close out a contract.

Proposed Amendments

The NYSE is proposing five amendments to its buy-in rules. First, the NYSE is proposing to amend Rule 282 to allow the initiating member to execute a mandatory buy-in and to reduce the waiting period to initiate a mandatory buy-in from thirty days to three days after delivery on the contract was due. The NYSE believes once the responsibility is shifted to the initiating member, the buy-in process will work more efficiently.

Second, the NYSE is proposing to eliminate the requirement for duplicate and triplicate paper notices and to permit electronic notices, including notices from a computerized network facility or from the electronic functionality of a qualified clearing agency, such as DTC and NSCC. The proposed amendments would also amend existing time deadlines for delivering

notices, securities, and executions and substitute those used by other self-regulatory organizations (i.e., DTC and NSCC).

Third, the NYSE is proposing to add a section to Rule 282's Supplementary Material to ensure that members comply with the closeout requirements of Regulation SHO.³ Members are obligated to comply with the marking, locate, and delivery requirements of Regulation SHO for short sales of equity securities. As a result, members should have policies and procedures in place to comply with these rules, including closeout procedures.

Fourth, the NYSE is proposing to rescind Rule 284 and incorporate those "buy-in" procedures into Rule 282. The NYSE is also proposing to amend Rules 289 and 290 to clarify the requirements and timeframes upon which a defaulting member may deliver against a "buy-in" notice. Fifth, the NYSE proposes technical amendments to Rules 282, 289, and 290 to better coordinate the rules with industry practice.

The NYSE believes the proposed amendments to its buy-in rules, Rules 282, 284, 289 and 290, should aid members in the clearance and settlement of transactions. In addition, the proposed amendments should help employ industry practice to allow members to clean-up fails and to deliver more quickly by instituting buy-ins in NYSE listed securities. The NYSE states it is optimistic that members will seize the opportunity to better manage their operational and market risks and buy-in these positions at the earliest opportunity.

The statutory basis for the proposed rule change is Section 6(b)(5) of the Act.⁴ The proposed amendments to NYSE Rules 282, 284, 289 and 290 are consistent with the requirements of Section 6(b)(5) which requires, among other things, that the rules of an exchange

³ Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (August 6, 2004), [File No. S7-23-03] (adoption of Regulation SHO).

⁴ 15 U.S.C. 78f(b)(5).

are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The NYSE believes that the proposed amendments are consistent with its obligations under Section 6(b)(5) of the Act because the NYSE thinks that by amending its buy-in rules to permit the initiating members to execute a buy-in, members should find it easier to execute buy-ins of NYSE-listed securities and therefore buy-in such transactions sooner. In addition, the rule amendments should remove unnecessary paperwork and amend time deadlines to conform to current industry practice.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The NYSE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The NYSE has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five days of the date of publication of this notice in the Federal Register or within such longer period: (i) as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding; or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve such proposed rule change or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>) or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSE-2005-50 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number SR-NYSE-2005-50. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE, Washington, DC 20549. Copies of such filings also will be available for inspection

and copying at the principal office of the NYSE and on the NYSE's Web site, www.nyse.com. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2005-50 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission by the Division of Market Regulation, pursuant to delegated authority.⁵

Jonathan G. Katz
Secretary

⁵ 17 CFR 200.30-3(a)(12).