

participants the ability to execute CNS buy-ins in a more efficient manner.

## II. Discussion

Section 17A(b)(3)(F)<sup>3</sup> of the Act requires that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions. By allowing NSCC to establish an earlier and standard timeframe for CNS buy-ins, the proposed rule change provides NSCC members with a longer and consistent time period in which to execute CNS buy-ins to satisfy their CNS long-positions. As such, the proposed rule change is consistent with NSCC's obligation to facilitate the prompt and accurate clearance and settlement of securities transactions. Therefore, the Commission finds that NSCC's proposed rule change is consistent with its obligations under section 17A(b)(3)(F) of the Act.

## III. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular section 17A of the Act and the rules and regulations thereunder.

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act,<sup>4</sup> that the proposed rule change (File No. SR-NSCC-2003-03) be and hereby is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>5</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49345; File No. SR-NYSE-2004-02]

### Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Follow-up Amendments to Its Constitution and Rules in Connection With Its New Governance and Management Architecture

March 1, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, (the

“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 16, 2004, the New York Stock Exchange, Inc. (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend its Constitution and Rules. The changes to the NYSE Constitution and Rules constitute follow-up amendments related to the Exchange's new governance and management architecture, which was approved by the Securities and Exchange Commission on December 17, 2003.<sup>3</sup>

#### 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 Exchange 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 III below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

The amended and restated Constitutional provisions and revised Rules, marked to show changes from the Exchange's existing Constitution and Rules, are set forth in Exhibit A hereto.

##### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

By order dated December 17, 2003, the Commission approved a proposed rule change submitted by the Exchange to amend and restate the Exchange's Constitution to reform the governance and management architecture of the Exchange.<sup>4</sup> The Commission's approval order noted that the Exchange

contemplated adopting several further amendments to the Constitution.<sup>5</sup> This filing proposes those additional amendments.

The proposed amendments to the Exchange's Constitution will accomplish the following:

- Amend Article IV, section 12(a) to codify that each of the Standing Committees of the Board of Directors shall have the authority to engage independent legal counsel and other advisors as it determines necessary to carry out its duties, specifying that they should be other than the counsel or other advisors who advise Exchange officers or employees.<sup>6</sup>
- Amend Article IV, section 12(a) to clarify that the Chief Executive Officer (“CEO”) is recused from Board deliberations on the activities of the Standing Committees specified in that paragraph.<sup>7</sup>
- Amend Article IV, section 14(a) to clarify that rulemaking on the subjects described in that paragraph as normally confined to the Board or its committees may, if necessary, be authorized by an officer of the Exchange between board meetings, subject to informing the Board at its next meeting, and to the prior approval of the Chief Regulatory Officer if on a regulatory matter.<sup>8</sup>
- Amend Article VI, section 1 to clarify that it is the Chief Regulatory Officer who appoints regulatory officers, and amend section 3 of that Article to clarify that the CEO's responsibilities are subject to the specific provisions elsewhere in the Constitution regarding the separation of the regulatory functions.
- Modify Article V, section 2(b) to add an individual investor

<sup>5</sup> *Id.*, at note 4.

<sup>6</sup> This was first proposed with respect to the Audit Committee only, but was later expanded to cover any Standing Committee and to add the caveat regarding use of different advisors.

<sup>7</sup> These are the Nomination & Governance, Human Resources & Compensation, Audit, and Regulatory Oversight & Regulatory Budget Committees.

<sup>8</sup> As originally provided to the membership in a Special Membership Bulletin regarding Additional Amendments to the Constitution (“Special Membership Bulletin”), dated November 26, 2003, this language would have authorized an officer to “adopt rules or otherwise act as aforesaid.” The Exchange notes that, at the suggestion of Commission staff, the “otherwise act” language was deleted to avoid ambiguity. The Exchange further indicates that in the same section, again at the suggestion of Commission staff, language was added to clarify that a “committee consisting solely of directors” means a committee consisting solely of independent directors, *i.e.*, excluding the Chief Executive Officer. Under Article XIV, section 1 of the Constitution, minor, clarifying changes such as these may be made by the Board of the Exchange without the need for a further notice to the members or a waiting period.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 48946 (December 17, 2003), 68 FR 74678 (December 24, 2003) (“Approval Order”).

<sup>4</sup> See Securities Exchange Act Release No. 48946 (December 17, 2003); 68 FR 74678 (December 24, 2003).

<sup>3</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> 17 CFR 200.30-3(a)(12).

representative to the Board of Executives.

- Modify Article V, section 2(b)(ii) to remove the requirement that Specialist representatives on the Board of Executives be the chief or a principal executive officer of the specialist firm, thereby increasing the pool of potential candidates, while adding a requirement that each person in this category be registered as a specialist and spend substantial time on the floor of the Exchange.

In addition to the foregoing Constitutional amendments, the proposed rule change also includes several amendments to the Exchange's Rules. In general, each of these changes is intended to conform the Exchange's Rules to its new Constitution.

More specifically, the proposed amendments to the Exchange's Rules will accomplish the following:

- Accommodate the separation of the offices of the Chairman of the Board of Directors and the CEO by, among other things, differentiating the authority and responsibilities of the Chairman and CEO.

- Eliminate the office, authority and responsibilities of the Vice Chairman.
- Provide generally that the various administrative duties and responsibilities exercised under the Rules by the Floor Directors will now be exercised by the Floor representatives serving on the new Board of Executives.

- Specify under Rule 103C (Listed Company Relations Proceedings) that the Listed Company Relations Subcommittee of the Quality of Markets Committee, previously consisting of two listed company members of the committee and two Vice Chairmen of the Exchange, will instead consist of four members of the Board of Executives, two of whom shall be representatives of listed companies.

- Amend Rule 476 (Disciplinary Proceedings) to specify that a review by the Board may be required by any member of the Board of Executives, as well as by any member of the Board of Directors.

- Amend Rule 499, Commentary .70 (as well as the identical provision found in section 804 of the Listed Company Manual) to cross reference specifically to the Committee specified in section 12(b)(1) of Article IV of the Exchange's Constitution.

#### 1. Statutory Basis

The basis for this proposed rule change is the requirement under section 6(b)(1)<sup>9</sup> of the Act that an exchange be organized and have the capacity to be

able to carry out the purposes of the Act; the requirement under section 6(b)(3)<sup>10</sup> that the rules of an exchange assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors; and the requirement under section 6(b)(5)<sup>11</sup> that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest.

#### B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is 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 Exchange has neither solicited nor received written comments on the proposed rule change.

#### III. 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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Comments may also be submitted electronically at the following e-mail address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-NYSE-2004-02. 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, comments should be sent in hardcopy or by e-mail but not by both methods. 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 Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-NYSE-2004-02 and should be submitted by March 29, 2004.

#### IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>12</sup> In particular, the Commission finds that the proposed rule change is consistent with section 6(b)(1)<sup>13</sup> of the Act, which requires that the exchange be so organized and have the capacity to be able to carry out the purposes of the Act. The Commission also finds that the proposed rule change is consistent with section 6(b)(3)<sup>14</sup> of the Act, which requires that one or more directors of an exchange be representative of issuers and investors, and section 6(b)(5)<sup>15</sup> of the Act, which requires 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 a national market system, and in general, to protect investors and the public interest.

The Commission believes that the proposed rule change should help facilitate the implementation of the NYSE's new governance structure, to the benefit of the Exchange, its constituencies, investors and the public generally.<sup>16</sup> The Commission believes that the proposed Constitutional changes relating to the operation of the Exchange's Standing Committees, namely the authority of the Standing Committees to engage independent legal counsel and other advisors, and the

<sup>12</sup> In approving this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>13</sup> 15 U.S.C. 78f(b)(1).

<sup>14</sup> 15 U.S.C. 78f(b)(3).

<sup>15</sup> 15 U.S.C. 78f(b)(5).

<sup>16</sup> The Commission notes that the NYSE expressed its intention to pursue these Constitutional changes in the Special Membership Bulletin, and in a letter to the Director, Division of Market Regulation, which outlined the proposed additional changes to the Constitution. See Special Membership Bulletin, *supra note 8*, and letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Annette L. Nazareth, Director, Division of Market Regulation, Commission, dated December 4, 2003. The Commission also referred to these prospective Constitutional changes in the Approval Order, at notes 14, 22, 23, 35, 36, 39, 40, and 88.

<sup>9</sup> 15 U.S.C. 78f(b)(1).

<sup>10</sup> 15 U.S.C. 78f(b)(3).

<sup>11</sup> 15 U.S.C. 78f(b)(5).

limitation on the involvement of the Exchange's CEO in the deliberations of the Standing Committees, should help ensure the independence of these key committees, which are charged with overseeing critical Exchange operations. The Commission also believes that the proposed Constitutional changes relating to the NYSE's Chief Regulatory Officer, including the explicit authority of the Chief Regulatory Officer to appoint other regulatory officers, and the clarification of the authority of the Exchange's CEO regarding regulatory matters, are designed to further insulate the Exchange's regulatory function from undue management pressures.

In addition, the Commission believes that the NYSE's proposals to remove the requirement that specialist representatives on the Board of Executives be the chief or a principal officer of the specialist firm, and to add the requirement that the specialist representative spend a substantial amount of time on the floor of the Exchange, should broaden the pool of qualified specialist candidates for the Board of Executives. The Commission also believes that the Exchange's proposal to allow the Board to delegate the rulemaking authority referenced in section 14(a) of the Constitution to an Exchange officer between Board meetings (subject to appropriate notice and approval, where appropriate, from the Chief Regulatory Officer) should provide adequate flexibility for the Exchange to effect necessary changes during the periods between Board meetings, while maintaining the Board's and the Chief Regulatory Officer's oversight and control.

The Commission also believes that the Exchange's proposal to require that at least one member of the Board of Executives represent individual investors in equity securities furthers the objective of section 6(b)(3)<sup>17</sup> of the Act that investors be represented in the governance of an exchange. The Commission notes that in order to fulfill the requirements of section 6(b)(3) of the Act, the NYSE Constitution now requires that the Nominating & Governance Committee recommend at least one candidate representing issuers and one candidate representing investors for membership on the Board of Directors.<sup>18</sup> The Commission believes that the current proposal to reserve a specific slot for an individual investor representative to the Board of Executives advances the goal of ensuring that the various Exchange constituencies are represented and

given an opportunity to provide their input in the Exchange's governance.

The Commission finds that the proposed amendments to the Exchange's Rules conform these Rules to recent changes to the Constitution. The Commission notes, for example, that the proposed changes to Exchange Rules that further delineate the authority and responsibilities of the NYSE Chairman and CEO are consistent with the Exchange's goal to clarify the roles of these two positions. The Commission also notes that the Exchange has proposed other changes to the Exchange's Rules to reflect its new governance and management structure. For example, by replacing references to "Floor Directors" in the Exchange's Rules with "Board of Executive Floor Representatives," the Exchange simply reflects the fact that, under the new governance structure, the position of "Floor Director" no longer exists. The Commission also believes that revising the composition of the Listed Company Relations Subcommittee of the Quality of Markets Committee to consist of four Board of Executive members, two of whom represent listed companies, and a senior officer of the Exchange reflects the recent Constitutional changes. Similarly, in the Commission's view the rule revisions to permit a member of the Board of Executives to call for Board review of a determination or penalty imposed by a Hearing Panel comports with the recent change to Article IX of the Constitution. Finally, the Commission believes that other proposed changes to the Exchange's Rules to delete references to obsolete terms and offices conform the Rules to the Constitution.

Accordingly, the Commission finds good cause, pursuant to section 19(b)(2)<sup>19</sup> of the Act, for approving the proposed rule change prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. The Commission believes that granting accelerated approval to the proposal should help the Exchange to implement the recent changes to the NYSE's governance and management structure, clarify certain Constitution provisions, and conform various Exchange rules to the new Constitution.

## V. Conclusion

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act,<sup>20</sup> that the proposed rule change (SR-NYSE-2004-

02), is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>21</sup>

**Jill M. Peterson,**  
*Assistant Secretary.*

## Exhibit A

Text of the Proposed Rule Change (Changes are *italicized*; deleted material is in [brackets].)

New York Stock Exchange, Inc.

Constitution

Article IV

Board of Directors

\* \* \* \* \*

Sec. 12. Standing Committees. The Standing Committees and their respective Chairmen shall be appointed by the Board at its annual organizational meeting. The Board shall adopt for each Standing Committee a charter consistent with the duties prescribed in the subsections below, and including such additional duties as may be considered appropriate and not inconsistent with this Constitution. *Each Standing Committee shall have the authority to engage independent legal counsel and other advisors as it determines necessary to carry out its duties, but may not use counsel or other advisors who advise Exchange officers or employees.*

(a) Committees Consisting Solely of Directors. The Standing Committees described in Section 12(a)(1)-(4) shall consist solely of directors, other than the Chief Executive Officer, and shall report to the Board. Such Standing Committees may be combined with any other such Standing Committee, be subdivided into one or more such Standing Committees, or the Board may constitute itself as a committee of the whole in respect of such a Standing Committee. [; provided, however, that if the Board constitutes itself] *The Chief Executive Officer shall be recused from deliberations of the Board, whether it is acting as the Board or as a committee of the whole, with respect to the activities of the Nominating & Governance Committee, the Human Resources & Compensation Committee, the Audit Committee or the Regulatory Oversight & Regulatory Budget Committee [ , the Chief Executive Officer shall be recused from such Board deliberations].*

(1) Nominating & Governance Committee. The Nominating & Governance Committee shall be

<sup>17</sup> 15 U.S.C. 78f(b)(3).

<sup>18</sup> NYSE Constitution, Article IV, section 12(a)(1).

<sup>19</sup> 15 U.S.C. 78s(b)(2).

<sup>20</sup> *Id.*

<sup>21</sup> 17 CFR 200.30-3(a)(12).

responsible for (i) recommending to the Board candidates for Board membership in accordance with Article IV, Section 2 and candidates for Trustees of the Gratuity Fund, (ii) recommending to the Board candidates for Board of Executives membership, (iii) conducting the Board's annual governance review, (iv) reviewing and recommending the Exchange's corporate governance guidelines, (v) establishing an appropriate process for, and overseeing implementation of, the Board's self-assessments (including Board self-assessment, committee self-assessments and director assessments) and the Board of Executives' self-assessments, (vi) recommending director compensation, and (vii) succession planning for the Chairman and Chief Executive Officer of the Exchange. In discharging its responsibilities under clause (i) of the immediately preceding sentence, the Nominating & Governance Committee shall propose persons as candidates for the Board who, in the opinion of the Committee, (a) are committed to serving the interests of the public and strengthening the Exchange as a public securities market; and (b) include among their number individuals at least one of whom is intended to allow the Exchange to meet the requirements of section 6(b)(3) of the Act concerning issuers and at least one of whom is intended to allow the Exchange to meet the requirements of section 6(b)(3) of the Act concerning investors. In addition, the Nominating & Governance Committee shall establish procedures to solicit the input of investors in equity securities and members regarding Board candidates. The Nominating & Governance Committee shall also solicit input from the various Exchange communities regarding candidates for appointment by the Board to the Board of Executives. Consensus recommendations for candidates to represent the groups referenced in clauses (ii), (iii) and (iv) of Article V, Section 2(b) put forward by the respective representatives of those groups shall be forwarded to the Board as the recommendations of the Nominating & Governance Committee unless and to the extent such Committee determines that a candidate does not qualify for the position.

(2) Human Resources & Compensation Committee. The Human Resources & Compensation Committee shall be responsible for (i) reviewing and approving corporate goals and objectives relevant to Chief Executive Officer compensation, evaluating the Chief Executive Officer's performance in light of those goals and objectives, and,

together with the other directors elected by the members, determining and approving such compensation, (ii) reviewing and approving recommendations regarding compensation and personnel actions involving senior Exchange personnel, including such recommendations involving senior regulatory personnel received from the Regulatory Oversight & Regulatory Budget Committee, and (iii) reporting annually to the members and the public on the compensation of the five most highly compensated officers of the Exchange (as well as director compensation) and on the compensation philosophy and methodology used to award that compensation (including information relating to appropriate comparisons, benchmarks, performance measures and evaluation processes consistent with the mission of the Exchange).

(3) Audit Committee. The Audit Committee shall be responsible for assisting the board in its oversight of the integrity of the Exchange's financial statements, the Exchange's compliance with legal and regulatory requirements, and the independent auditor's qualifications and independence, including the direct responsibility for (i) the hiring, firing and compensation of the independent auditor, (ii) overseeing the independent auditor's engagement, (iii) meeting regularly in executive session with the auditor, (iv) reviewing the auditor's reports with respect to the Exchange's internal controls, (v) pre-approving all audit and non-audit services performed by the auditor and (vi) determining the budget and staffing for the Internal Audit Unit. The Audit Committee charter shall contain additional duties and responsibilities comparable to those required of issuers listed on the Exchange.

(4) The Regulatory Oversight & Regulatory Budget Committee. The Regulatory Oversight & Regulatory Budget Committee shall be responsible for (i) assuring the effectiveness, vigor and professionalism of the Exchange's regulatory program, (ii) determining the budget for the Regulatory Group, the Listings and Compliance Unit, the Hearing Board, the Arbitration Unit and the Regulatory Quality Review Unit and (iii) oversight of the Regulation, Enforcement & Listing Standards Committee and the Regulatory Quality Review Unit. This Committee shall determine the Exchange's regulatory plan, budget and staffing proposals annually and shall be responsible for assessing the Exchange's regulatory performance and recommending compensation and personnel actions involving senior regulatory personnel to

the Board's Human Resources & Compensation Committee for action.

#### (b) Joint Committees

(1) The Regulation, Enforcement & Listing Standards Committee shall be composed of both directors (other than the Chief Executive Officer) and Board of Executives members (including at least one Industry Member of the Board of Executives) as selected by the Board; provided, however, that a majority of the members of such committees voting on a matter subject to a vote of such Committee shall be directors. Such committee shall report to the Regulatory Oversight & Regulatory Budget Committee and shall (i) review and provide general advice with respect to the Exchange's programs for market surveillance, member and member organization regulation and enforcement, and the listing and de-listing of securities, and (ii) hear appeals of disciplinary determinations and determinations to de-list a listed company.

(2) Additional joint committees may be appointed by the Board from time to time in its discretion; provided that each shall consist of at least one director (other than the Chief Executive Officer). All such committees shall report to the Board.

Sec. 13. Special Committees, Advisory Committees, Etc. Special committees, subcommittees, advisory committees, boards or councils may be appointed from time to time in the Board's discretion and may be comprised of individuals who are not directors or members of the Board of Executives.

#### Sec. 14. Delegation.

(a) Delegation Authority. The Board may delegate such of its powers as it may from time to time determine, subject to the provisions of the Constitution and applicable law, to the Board of Executives, to such officers and employees of the Exchange, and to such committees, composed either of directors or otherwise, as the Board may from time to time authorize; provided, however, that, except as this Constitution otherwise provides, the Board may not delegate, and no committee may re-delegate, to the Board of Executives, to officers and employees of the Exchange or to any committee other than a committee consisting solely of directors (*other than the Chief Executive Officer*), authority either to adopt rules under Article VIII, Section 1 or Article IX, Section 1, or to act on any subject matter described in Article IV, Section 12(a) or (b)(1), except by effecting a rule change within the meaning of Section 19(b)(1) of the Act.

Notwithstanding the foregoing, the Board may authorize an officer or officers of the Exchange to adopt rules as aforesaid, so long as the Board is informed of any such action at its next meeting, and the prior approval of the Chief Regulatory Officer is obtained for any regulatory matter. Any committee of directors to which authority is delegated to adopt rules under Article VII, Section 1 or Article IX, Section 1 shall include thereon at least one director nominated by the Industry Members of the Board of Executives, as provided in Article IV, Section 2. The Board shall diligently oversee the activities of the Board of Executives, the officers and employees of the Exchange, and any committees to which the Board has delegated authority pursuant hereto.

(b) Limitation of Delegation Authority. A member, member organization, allied member or approved person affected by a decision of any officer, employee or committee acting under powers delegated by the Board may require a review by the Board of such decision, by filing with the Secretary of the Exchange a written demand therefore within 10 days after the decision has been rendered, except as otherwise provided in Article IX, Section 6. Any and all powers delegated by the Board may continue to be exercised by the Board notwithstanding such delegation, and the Board may exercise such review and oversight over the exercise of (or omission to exercise) any delegated authority as it shall at any time determine.

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#### Article V

##### Board of Executives

Sec. 1. Powers and Authority of the Board of Executives. The Board shall establish a Board of Executives. Subject to the Board's ultimate authority, review and oversight and except with respect to the responsibilities delegated to the Standing Committees, pursuant to Article IV, Section 12, the Board of Executives shall advise the Chief Executive Officer in his or her management of the operations of the Exchange. Copies of any materials, documents or reports prepared or received by the Board of Executives shall be furnished to the Board of Directors. Industry Members of the Board of Executives (as defined in Section 2 of this Article) shall also be responsible for recommending to the Board candidates for Board membership in accordance with, and who meet the criteria provided for in, Article IV, Section 2 of this Constitution. In discharging this responsibility, the

Industry Members of the Board of Executives shall propose persons who, in their opinion, (i) are committed to serving the interests of the public and strengthening the Exchange as a public market, and (ii) will allow the Exchange to meet the requirements of section 6(b)(3) of the Act concerning members of the Exchange.

##### Sec. 2. Composition of Board of Executives.

(a) The Board of Executives shall provide a reasonably balanced representation of the many communities that come together in the Exchange: listed companies, investors, members and member organizations, and lessor members.

(b) The Board of Executives shall consist of the Chairman of the Board (who shall be the Chairman of the Board of Executives), the Chief Executive Officer (if such individual is not also the Chairman), and at least 20 but no more than 25 members ("Board of Executives members"). The Board of Executives members (other than the Chairman and Chief Executive Officer) shall be appointed by the Board at its annual organizational meeting and shall consist of (i) at least six individuals who are either the chief executive or a principal executive officer of a member organization that engages in a business involving substantial direct contact with securities customers, (ii) at least two individuals, each of whom is registered as a specialist and spends a substantial part of his or her time on the Floor of the Exchange, [who are either the chief executive or a principal executive officer of a specialist member organization,] (iii) at least two individuals, each of whom spends a majority of his or her time on the Floor of the Exchange, and has as a substantial part of his or her business the execution of transactions on the Floor of the Exchange for other than his or her own account or the account of his or her member organization, but who shall not be registered as a specialist, (iv) at least two individuals who are lessor members who are not affiliated with a broker or dealer in securities, (v) at least four individuals who are either the chief executive or a principal executive officer of an institution that is a significant investor in equity securities, as least one of whom shall be a fiduciary of a public pension fund; (vi) at least one individual intended to represent individuals who invest in equity securities and are retail clients of member organizations, and (vii) at least four individuals who are either the chief executive or a principal executive officer of a listed company (the members of the Board of Executives

referenced in subsections (i), (ii), and (iii) herein collectively shall be called "Industry Members of the Board of Executives"). If the Board increases the size of the Board of Executives it shall strive to maintain approximately the same balance between Industry Members of the Board of Executives and other members of the Board of Executives as is represented above. If the Board increases the size of the Board of Executives, it shall also be free to add members to the Board of Executives who represent other elements of the Exchange community. Each person who is not a member of the Exchange and is appointed to the Board of Executives shall, by the acceptance of such position, be deemed to have agreed to uphold this Constitution.

\* \* \* \* \*

#### Article VI

##### Officers

Sec. 1. Officers. The officers of the Exchange shall include the Chairman of the Board, the Chief Executive Officer, the President, if there be one, the Chief Regulatory Officer, one or more Vice Presidents (one or more of whom may be designated as Executive Vice Presidents or as Senior Vice Presidents or by other designations), a Secretary, a Treasurer, a Controller and such other officers as the Chief Executive Officer may propose, subject to the approval of the Board. Any office may be occupied by more than one individual. An officer, if a member of the Exchange at the time of election, shall promptly thereafter dispose of his or her membership by sale or lease, and if by lease, the power to vote must be disposed of by the lease. The Board shall appoint the Chairman, the Chief Executive Officer, and the Chief Regulatory Officer. If the Chairman is neither the Chief Executive Officer nor chosen from among the directors elected by the members, he or she must satisfy the independence criteria for Board membership set forth in Article IV, Section 2 of this Constitution. The President and the non-regulatory officers of the Exchange shall be appointed by the Chief Executive Officer, subject to approval of the Board. The Chief Regulatory Officer shall appoint the officers reporting to him or her, subject to approval of the Board. Each officer of the Exchange, by his or her acceptance of such office, shall be deemed to have agreed to uphold this Constitution. While no officer of the Exchange shall have any authority to recommend candidates for election to the Board or for appointment by the Board to any committee, the Board or the Nominating & Governance

Committee may solicit the input of any Exchange officer at its own initiative and discretion.

Sec. 2. The Chairman. The Chairman shall preside at all meetings of the Board and of the Board of Executives and shall decide all questions of order, subject, however, to an appeal to the Board; provided, however, that if the Chairman is also the Chief Executive Officer, he or she shall not participate in executive sessions of the Board. If the Chairman is not the Chief Executive Officer, he or she shall act as liaison officer between the Board and the Chief Executive Officer. In addition to his or her usual duties, the Chairman shall make an Annual Report on the Exchange's activities to a Plenary Session.

Sec. 3. The Chief Executive Officer. Subject to the authority of the Board, and to the functional separation of the regulatory functions of the Exchange as described in this Constitution, the Chief Executive Officer of the Exchange shall be responsible for the management and administration of the affairs of the Exchange.

Sec. 4. Chief Regulatory Officer and Other Officers.

(a) Chief Regulatory Officer. Subject to the authority of the Board and the Regulatory Oversight & Regulatory Budget Committee, and to the administrative standards and policies established by the Chief Executive Officer made applicable to the Chief Regulatory Officer by the Regulatory Oversight & Regulatory Budget Committee, the Chief Regulatory Officer shall be responsible for the management and administration of the regulatory functions of the Exchange.

(b) Other Officers. The President and other officers shall have such functions and responsibilities as the Chief Executive Officer may from time to time assign, subject to the approval of the Board, and, in the case of senior regulatory personnel, subject to the specific oversight and control of the Regulatory Oversight & Regulatory Budget Committee.

Sec. 5. Absence, Inability to Act or Vacancy in Office of the Chairman. In case of the absence, inability to act or vacancy in office of the Chairman of the Board, such other person or persons as the Board, by the affirmative vote of a majority of the entire Board, may designate shall assume all the functions and discharge all the duties of the Chairman.

Sec. 6. Removal. Any officer of the Exchange may be removed, either with or without cause, by the affirmative vote of a majority of the entire Board.

New York Stock Exchange, Inc.

Rules

Rule 16

Liability of Exchange Relating to Operation of ITS and Pre-Opening Application

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(B)(a) For the convenience of members on the Floor, the Exchange shall furnish employees, known as "ITS clerks", who will, on behalf of such members, send and receive through the System commitments and obligation to trade, pre-opening notifications and responses thereto. All errors and omissions made by one or more ITS clerks with respect to any single System Transaction or proposed System Transaction shall give rise to a single claim against the Exchange by the on-Floor member who instructed the ITS clerk or clerks who made the errors or omissions for all loss, cost, damage or expense (hereinafter called "loss") suffered by such member, or any other member or member organization for which he acted, as a result of such error and omissions, but only to the extent and as provided in this paragraph (B), and the Exchange shall be free to assert any defense to such claim it may have. No claim shall arise as to errors or omissions which are found to have resulted from any failure by a member (whether or not such member is a party to the claim against the Exchange pursuant to this paragraph (B)) to place or cancel an instruction clearly and accurately with the ITS clerk on a timely basis, in writing on such form or forms as the Exchange may provide for such purpose, and containing such information as may be required by the Exchange from time to time in connection with such instruction.

In addition, no claim shall be allowed if, in the opinion of the arbitration panel provided for in subparagraph (c) of this paragraph (B), the member making such claim did not take promptly, upon discovery of the error or omission, all proper steps to correct such error or omission and to establish and mitigate the loss resulting therefrom.

Further, it shall be the responsibility of the member on the Floor who places an instruction with an ITS clerk to keep abreast of the status of that instruction. The ITS clerk shall only be responsible to respond, as promptly as possible, to the member's inquiry concerning the status of his instruction. No claim shall be allowed which is based on a member's assertion that he was not made aware of the status of his instruction and thus failed to take further appropriate action.

(b) Any claim for loss arising from errors or omissions of an ITS clerk or clerks shall be presented in writing to the Exchange no later than the opening of trading on the next business day following the day on which the error or omission giving rise to the loss occurred or within such longer period as the Exchange shall consider equitable under the circumstances.

(c) All disputed claims shall be referred for binding arbitration to an arbitration panel and the decision of a majority of the arbitrators selected to hear and determine the controversy shall be final and there shall be no appeal to the Board of Directors from the decision of such panel. The arbitration panel shall be composed of an odd number of panelists. Each of the parties to the dispute shall select one member or allied member to serve as panelist on the arbitration panel. The panelists so selected shall then select one or more additional panelist(s); provided that the additional panelist(s) so selected are either members or allied members of the Exchange, and provided further that no member of the arbitration panel may be a person with a direct or indirect financial interest in the claim. In the event that the initial panelists selected by the parties to the dispute cannot agree on the selection of the additional panelist or panelists, as the case may be, then in that event such additional panelist(s) shall be appointed by a [Floor Director] *BOE Floor Representative* who has no direct or indirect financial interest in the claim. Each party to the dispute may make oral and written submissions and present witnesses to the arbitration panel.

Rule 22

Disqualification Because of Personal Interest

(a) No member of the Board of Directors or of the Board of Executives or of any committee authorized by the Board shall participate (except to the extent of testifying at the request of such Board or of such committee) in the investigation or consideration of any matter relating to any member, allied member, approved person, or member organization with knowledge that such member, allied member, approved person, or member organization is indebted to such director or committee member, or to their member organization or any participant therein, or that they, their member organization or any participant therein is indebted to such member, allied member, approved person, or member organization, excluding, however, any indebtedness arising in the ordinary course of

business out of transactions on any exchange, out of transactions in the over-the-counter markets, or out of the lending and borrowing of securities.

(b) No person shall participate in the adjudication of any matter in which they are personally interested.

#### Rule 37

##### Visitors

Visitors shall not be admitted to the Floor of the Exchange except by permission of an Officer of the Exchange, a Senior Floor Official, Executive Floor Official, a Floor Governor, or a [Floor Director] *BOE Floor Representative* between the hours of 10:00 a.m. and 3:30 p.m. Approval of an Exchange Officer or a [Floor Director] *BOE Floor Representative* (or Senior Floor Official, Executive Floor Official, or Floor Governor in the absence of the [Floor Directors] *BOE Floor Representatives*) is required to bring visitors onto the Floor 30 minutes before or after the opening and 30 minutes prior to closing.

#### Rule 38

##### Communications

Communications or announcements shall not be posted on the bulletin board without the consent of the [Chairman of the Board] *Chief Executive Officer*, or a person authorized by the Exchange to give such consent.

#### Rule 46

##### Floor Officials—Appointment

(a) Each [Director who is active on the Floor] *member of the Board of Executives who represents the groups referenced in clauses (ii) and (iii) of Article V, Section 2(b) of the Constitution shall be a BOE Floor Representative and shall be [appointed] approved as a Floor Official.*

(b) The Chairman, in consultation with the [Floor Directors] *BOE Floor Representatives* and with the approval of the Board, shall, at the annual meeting of the Board of Directors or at such other time as may be deemed necessary:

(i) designate as Floor Officials such other members as he may determine, who shall perform such duties as are prescribed by the Rules of the Board to serve at the pleasure of the Board of Directors or until the next annual election of the Exchange and their successors are appointed and take office.

(ii) designate twenty such other members as Floor Governors, who shall be empowered to perform any duty, make any decision or take any action assigned to or required of a [Floor

Director] *BOE Floor Representative* as are prescribed by the Rules of the Board or as may be designated by the Board.

For purposes of this rule, a Floor Governor, by virtue of his appointment as such, shall also be deemed to be a Floor Official, and, therefore empowered to perform such duties as are specifically prescribed by the Rules of the Board or as may be designated by the Board regarding Floor Officials.

\* \* \* \* \*

#### Rule 51

##### Hours for Business

Except as may be otherwise determined by the Board of Directors as to particular days, the Exchange shall be open for the transaction of business on every business day, excluding Saturdays, (a) for a 9:30 a.m. to 4:00 p.m. trading session and (b) for the purposes of "Off-Hours Trading" (as Rule 900 (Off-Hours Trading: Applicability and Definitions) defines that term), during such hours as the Exchange may from time to time specify.

Except as may be otherwise determined by the Board of Directors, the [Chairman of the Board] *Chief Executive Officer* shall have the power to halt or suspend trading in some or all securities traded on the Exchange, to close some or all Exchange facilities, and to determine the duration of any such halt, suspension or closing, when he deems such action to be necessary or appropriate for the maintenance of a fair and orderly market or the protection of investors, or otherwise in the public interest, due to extraordinary circumstances, such as (1) actual or threatened physical danger, severe climatic conditions, civil unrest, terrorism, acts of war, or loss or interruption of facilities utilized by the Exchange, or (2) a request by a governmental agency or official, or (3) a period of mourning or recognition for a person or event. In considering such action, the [Chairman of the Board] *Chief Executive Officer* shall consult with [the Vice Chairman, if available, and] such available [Floor Directors] *BOE Floor Representatives* as he deems appropriate under the circumstances. The [Chairman of the Board] *Chief Executive Officer* shall notify the Board of actions taken pursuant to this Rule, except for a period of mourning or recognition for a person or event, as soon thereafter as is feasible.

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#### Rule 103

##### Registration of Specialists

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##### Supplementary Material:

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.11 Temporary Reallocation of Stocks.—The [Chairman, Vice Chairman] *Chief Executive Officer* and the [Senior Floor Director] *two most senior BOE Floor Representatives*, or in the absence from the Floor of [any] *either of them*, the next senior [Floor Director] *BOE Floor Representative* present on the Floor, acting by a majority shall have the power to reallocate temporarily any stock on an emergency basis to another location on the Floor whenever in their opinion such reallocation would be in the public interest.

The member to whom a stock has been temporarily reallocated under the provisions of this Rule will be registered as the regular specialist therein until the Board of Directors determines the ultimate location of the security.

#### Rule 103B

##### Specialist Stock Allocation

##### Allocation Policy and Procedures

##### III. Allocation Panel

##### Selection

Panel members are nominated by the membership. A selection committee, appointed by the [Floor Directors] *BOE Floor Representatives*, reviews the nominations and recommends panel appointments to the [Floor Directors] *BOE Floor Representatives*, who finalize recommendations for presentation to the QOMC. The selection committee operates in accordance with such guidelines as are established and made known to the membership from time to time. The selection committee and, in turn, the [Floor Directors] *BOE Floor Representatives* seek to develop a representative panel that maximizes professional expertise and broad exposure on the Floor by including members from various types of firms and from diverse locations on the Floor. To the maximum extent possible, the Floor members on the panel are expected to be a core group of experienced, senior professionals, such as former Allocation Committee chairmen, Senior Floor Officials, Executive Floor Officials, and current and former Floor Governors.

In the case of allied members and representatives of institutional investor organizations, the allied member organization and the institutional investor organization are appointed to the panel. The individual representative is then selected by the organization. A [Floor Director] *BOE Floor Representative* gives guidance to the

organization in selecting an appropriate representative.

Eligibility

Professional expertise and experience are essential to the excellence of the allocation system. Therefore, a Floor member must have a minimum of 5 years experience as a member on the Floor in order to be eligible for appointment to the Allocation Panel. In the case of allied members and representatives of institutional investor organizations, the organization shall select a representative with at least 5 years of trading experience in listed equities and a senior position on the trading desk, and each may designate one alternate who meets the Panel qualifications, subject to approval by the [Floor Directors] BOE Floor Representatives.

\* \* \* \* \*

V. Policy Notes

Allocation Freeze Policy

In the event that a specialist unit: (i) loses its registration in a specialty stock as a result of proceedings under Exchange Rules 103A, 475 or 476; or (ii) voluntarily withdraws its registration in a specialty stock as a result of possible proceedings under those rules, the unit will be ineligible to apply for future allocations for the six month period immediately following the reassignment of the security ("Allocation Prohibition").

Following the Allocation Prohibition, a second six month period will begin during which a specialist unit may apply for new listings, provided that the unit demonstrates to the Exchange relevant efforts taken to resolve the circumstances that triggered the Allocation Prohibition. The determination as to whether a unit may apply for new listings will be made by Exchange staff, in consultation with the [Floor Directors] BOE Floor Representatives. The factors the Exchange will consider will vary depending on the unit's particular situation, but may include one or more steps such as:

- Supplying additional manpower/experience;
- Changes in professional staff;
- Attaining appropriate dealer participation;
- Enhancing back-office staff; and
- Implementing more stringent supervision/new procedures.

\* \* \* \* \*

Rule 103C

Listed Company Relations Proceedings

(a) A listed company may file with the New Listings & Client Service Division a written notification ("Issuer Notice"), signed by the company's chief executive officer, that it wishes to commence a proceeding whereby the Quality of Markets Committee ("QOMC") shall attempt to mediate and resolve non-regulatory issues that have arisen between the company and its assigned specialist unit. The Issuer Notice shall indicate the specific issues sought to be mediated and resolved, and what steps, if any, have been taken to try to address them before the filing of the Notice.

(b) The QOMC shall refer the Issuer Notice to its Listed Company Relations Subcommittee (the "Subcommittee") which shall consist of [two listed company members of the QOMC, as well as a senior officer and two vice chairman of the Exchange, provided these individuals are also members of the QOMC] four Board of Executives members (two of whom are representatives of listed companies) and a senior officer of the Exchange. The Subcommittee shall review the Issuer Notice and shall notify the subject specialist unit that a Listed Company Relations Proceeding ("LCRP") is being commenced pursuant to this rule, and that the LCRP shall run for one year from the date of notice to the specialist unit, unless concluded earlier by the listed company. The specialist unit shall be provided with a copy of the Issuer Notice, and shall be given two weeks within which to submit a written response to the Subcommittee.

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Rule 123A

Miscellaneous Requirements

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Broker's Obligation In the Handling of Certain Orders

.45 Members' off-floor orders.—Two persons consisting of two [Floor Directors] BOE Floor Representatives, or in the absence of any of them, Floor Governors, Senior Floor Officials, or Executive Floor Officials in the order of seniority, have the authority to limit or ban the execution of off-Floor orders for accounts in which members or member organizations have an interest.

\* \* \* \* \*

Rule 123D

Openings and Halts in Trading

(1) Delayed Openings/Halts in Trading—

\* \* \* \* \*

All indications require the supervision and approval of a Floor Official. If it involves a bank or brokerage stock, a [Floor Director] BOE Floor Representative's approval is required. If a [Floor Director] BOE Floor Representative is unavailable, a Floor Governor's or Senior Floor Official's approval must be obtained. In addition to the mandatory criteria, specialists should use their judgment as to when it is appropriate to seek Floor Official approval for disseminating a price indication.

Mandatory indication policy applies to a foreign-listed security only if the opening price will be at a significant price change (see chart above) from its closing price in the foreign market or the current price in the foreign market.

Mandatory indications for convertible preferred stocks are only required if an indication was disseminated in the underlying common stock.

In this regard the following procedures should be followed for delayed opening and trading halt indications:

The length of time for the dissemination of indications should be in proportion to the anticipated disparity of the opening or reopening price from the prior sale.

The number of indications should increase in proportion to the anticipated disparity in the opening or reopening price, with increasingly definitive, "telescoped" indications when an initial narrow indication spread is impractical.

An indication should be published immediately when trading is halted for a non-regulatory order imbalance. Such indications should be broad enough to allow flexibility, but narrow enough to convey as accurate a picture of supply and demand as possible at the time. In most cases, a final indication with a one point spread would be appropriate. Further telescoping to one-half point could result in unnecessary delay due to a change in the terms of a pivotal order. Even if an indication is not disseminated, specialists should endeavor to provide brokers with an approximate range within which they believe a stock will open.

Tape indications before the opening should be disseminated at 9:15 a.m., if possible, but any tape indications disseminated prior to 9:30 a.m. require the approval of a [Floor Director] BOE Floor Representative or Floor Governor, or the approval of a Floor Official if it relates to a spin-off or if trading had been halted and not resumed the prior day.

ITS Pre-Opening Applications must be followed when necessary based upon



the anticipated opening price. For example, a Pre-Opening Notification must be issued if a stock is going to open more than .10 of a point from a composite last sale under \$15 or more than .25 of a point from a composite last sale of \$15 or higher. The spread in the Pre-Opening Application may not exceed .50 of a point if the consolidated close is under \$50 or one point if the consolidated close is \$50 or higher with limited exception. If a Pre-Opening Application is required on an opening or any reopening and a tape indication is also issued, the indication satisfies the Pre-Opening Application requirement if it is also sent to the ITS participants by the specialist in the form of Pre-Opening Notification. In that case, the maximum ITS spread would not apply. Three minutes must elapse from the time a Pre-Opening Application is issued, and an additional one minute if subsequent notifications are required, before a stock should open.

As with other openings, tape indications are discretionary for IPO's with the approval of a [Floor Director] *BOE Floor Representative* or Floor Governor except that it is mandatory if the opening price change as measured from the offering price meets the requirements for a mandatory indication.

If an indication is disseminated after the opening bell, it must be considered a delayed opening. In addition, any stock that is not opened with a trade or reasonable quotation within 30 minutes after the opening of business must be considered a delayed opening (except for IPO's) and requires Floor Official supervision, as well as an indication. That 30-minute time frame may only be extended by a [Floor Director] *BOE Floor Representative* on a Floor-wide basis.

More than one indication should be disseminated if an opening will be outside the first indication or if the first indication had a wide spread, especially if the time frame for delayed openings has been extended by the [Floor Director] *BOE Floor Representative*. A reduction in time between indications can be used when multiple indications are disseminated. Generally, a minimum of 10 minutes must elapse between the first indication and a stock's opening as measured by the time the indication appears on the PDU. However, when more than one indication is disseminated, a stock may open five minutes after the last indication provided that at least 10 minutes must have elapsed from the dissemination of the first indication.

With respect to a post-opening trading halt, a minimum of five minutes must

elapse between the first indication and a stock's reopening. However, where more than one indication is disseminated, a stock may re-open three minutes after the last indication, provided that at least five minutes must have elapsed from the dissemination of the first indication.

Tape indications must be disseminated with the approval of a Floor Official prior to the opening or reopening in a stock subject to a regulatory or nonregulatory halt in trading or a delayed opening. A Floor Governor should be consulted if a significant price change is anticipated.

A [Floor Director] *BOE Floor Representative* or Floor Governor should be consulted in any case where there is not complete agreement among the Floor Officials participating in the discussion.

Floor Governors should keep apprised of developments when consulted, and should seek the assistance of [Floor Director] *BOE Floor Representatives*, when appropriate, as soon as possible. Floor Governors should be prepared to balance the opportunity for brokers to participate in the opening with the need for timeliness, and should assist in identifying opportunities for opening the security, based upon the shifting supply and demand in conjunction with appropriate specialist participation.

Specialists should make every effort to balance timeliness with the opportunity for customer reaction and participation. Although the correct price based on information available at the time is always the goal, specialists and supervising Floor Governors should recognize customers' desires for a timely opening. When the specialist and Floor Governor agree that all participants have had a reasonable opportunity to participate, the specialist should open the stock.

Once trading has commenced, trading may only be halted with the approval of a Floor Governor or two Floor Officials. A [Floor Director] *BOE Floor Representative*, or in their absence a Senior Floor Governor, should be consulted if it is felt that trading should be halted in a bank or brokerage stock due to a potential misperception regarding the company's financial viability.

Sometimes the Client Service Division is notified by a listed company in advance of publication concerning news which might have a substantial market impact. That Division will immediately notify the Floor Operations Division, which will advise a [Floor Director] *BOE Floor Representative* or Floor Governor, or in their absence a Floor Official.

If Client Service Division makes a recommendation that trading should be halted in a stock pending a public announcement by the company and the [Floor Director] *BOE Floor Representative* or Floor Governor disagrees, he or she should seek the opinion of another [Floor Director] *BOE Floor Representative* or Floor Governor. If the [Floor Director] *BOE Floor Representatives* or Floor Governors are in agreement that trading should not be halted, trading should continue. If one of the two is in agreement with the recommendation to halt trading, then trading should be halted. While the time period may vary from case-to-case as a result of the particular circumstances involved, normally if the announcement is not made within approximately 30 minutes after the delay or halt is implemented, the Exchange may commence the opening or reopening of trading in the stock. Special care is taken to ensure that material non-public information is not disclosed, even inadvertently, as a result of someone overhearing details relating to trading halts or delayed opening situations.

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#### Rule 304

Allied Members and Approved Persons

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(f) When an allied member is elected Chairman of the Board [of Directors] or *Chief Executive Officer* or is elected to membership in the Exchange, his allied membership shall terminate.

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#### Rule 308

Acceptability Proceedings

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(g) Any person whose application has been disapproved by an Acceptability Committee, or any member of the Board of Directors or of the Board of Executives of the Exchange may require a review by the Board of any determination of an Acceptability Committee. A request for review shall be made by filing with the Secretary of the Exchange a written request therefore, within twenty days after notification of the determination of the Acceptability Committee. Upon review, the Board of Directors may sustain any determination, or may modify or reverse any such determination as it deems appropriate. The determination of the Board of Directors shall be final and conclusive action by the Exchange.

Rule 422

Loans of and to Directors, etc.

Without the prior consent of the Board of Directors no member of the Board of Directors or of the Board of Executives or of any committee of the Exchange, and no officer or employee of the Exchange shall directly or indirectly make any loan of money or securities to or obtain any such loan from any member organization member, allied member, approved person, employee or any employee pension, retirement or similar plan of any member organization unless such loan be (a) fully secured by readily marketable collateral, or (b) made by a director or committee member to or obtained by a director or committee member from the member organization of which he is a member, allied member or employee or from a member, allied member or employee therein.

Rule 440B

Short Sales

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Supplementary Material:

Interpretations of Securities and Exchange Commission and New York Stock Exchange Rules

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.19 Exemptions from the requirements of Regulation §-240.10a-2(a). Under amended Regulation §-240.10a-2, if a broker discovers prior to delivery date that a sale was effected pursuant to an order which through error was incorrectly marked "long," the requirements of Regulation §-240.10a-2(a) will not apply provided the exchange on which the transaction took place or the NASD as to a sale which took place in the over-the-counter market is satisfied as to the existence of the conditions described in (i), (ii) and (iii) of Regulation §-240.10a-2(b)(2).

Members should submit all requests to the Exchange for exemptions to the [Floor Directors] BOE Floor Representatives as promptly as possible after discovery of the errors involved. Such requests may be made in writing, or by telephone or telegraph provided they are promptly confirmed in writing by the member or member organization. Out-of-town organizations may submit their requests through their New York correspondents.

In order that the Exchange may make a proper determination in each case, it is imperative that all requests contain sufficient information to indicate clearly that the conditions described in (i), (ii) and (iii) of Regulation §-240.10a-2(b)(2) actually obtain.

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Rule 476

Disciplinary Proceedings Involving Charges Against Members, Member Organizations, Allied Members, Approved Persons, Employees, or Others

\* \* \* \* \*

(b) All proceedings under this Rule, except as to matters referred to in paragraph (c), shall be conducted at a Hearing in accordance with the provisions of this Rule and shall be held before a Hearing Panel consisting of at least three persons: A Hearing Officer, who shall be Chairman of the Panel, with the remainder of the Panel being members of the Hearing Board.

The Chairman [of the Board of the Exchange], subject to the approval of the Board of Directors, shall from time to time appoint a Hearing Board to be composed of such number of members and allied members of the Exchange who are not members of the Board of Directors, and registered employees and non-registered employees of members and member organizations, as the Chairman [of the Board of the Exchange] shall deem necessary. The members of the Hearing Board shall be appointed annually and shall serve at the pleasure of the Board of Directors. The Chairman [of the Board of the Exchange], subject to the approval of the Board of Directors, shall also designate from among the officers and employees of the Exchange a Chief Hearing Officer and one or more other Hearing Officers who shall have no Exchange duties or functions relating to the investigation or preparation of disciplinary matters and who shall be appointed annually and shall serve as Hearing Officers at the pleasure of the Board of Directors.

\* \* \* \* \*

(f) The Division or Department of the Exchange which brought the charges, the respondent, or any member of the Board of Directors or of the Board of Executives of the Exchange may require a review by the Board of any determination or penalty, or both, imposed by a Hearing Panel. A request for review shall be made by filing with the Secretary of the Exchange a written request therefor, which states the basis and reasons for such review, within twenty-five days after notice of the determination and/or penalty is served upon the respondent. The Secretary of the Exchange shall give notice of any such request for review to the Division or Department of the Exchange which brought the charges and any respondent affected thereby.

Any review by the Board of Directors shall be based on oral arguments and written briefs and shall be limited to

consideration of the record before the Hearing Panel. Upon review, the Board of Directors, by the affirmative vote of a majority of the Directors then in office, may sustain any determination or penalty imposed, or both, may modify or reverse any such determination, and may increase, decrease or eliminate any such penalty, or impose any penalty permitted under the provisions of this Rule, as it deems appropriate. Unless the Board of Directors otherwise specifically directs, the determination and penalty, if any, of the Board of Directors after review shall be final and conclusive subject to the provisions for review of the Securities Exchange Act of 1934.

Notwithstanding the foregoing, if either party upon review applies to the Board of Directors for leave to adduce additional evidence, and shows to the satisfaction of the Board of Directors that the additional evidence is material and that there was reasonable ground for failure to adduce it before the Hearing Panel, the Board of Directors may remand the case to a Hearing Panel for further proceedings, in whatever manner and on whatever conditions the Board of Directors considers appropriate.

(g) In lieu of the procedures set forth in paragraph (d) above, a Hearing Panel, at a Hearing called for that purpose, shall also determine whether a member, member organization, allied member, approved person, or registered or non-registered employee of a member or member organization has committed any one or more of the offenses specified in paragraph (a) above, on the basis of a written Stipulation and Consent entered into between the respondent and any authorized officer or employee of the Exchange. Any such Stipulation and Consent shall contain a stipulation with respect to the facts, or the basis for findings of fact by the Hearing Panel; a consent to findings of fact by the Hearing Panel, including a finding that a specified offense had been committed; and a consent to the imposition of a specified penalty.

Notice of any Hearing held for the purpose of considering a Stipulation and Consent shall be served upon the respondent as provided in paragraph (d) above. In any such Hearing, if the Hearing Panel determines that the respondent has committed an offense, it may impose the penalty agreed to in such Stipulation and Consent or any penalty which is less severe than the stipulated penalty, as it deems appropriate. In addition, a Hearing Panel may reject such Stipulation and Consent.

Such rejection shall not preclude the parties to the proceeding from entering into a modified Stipulation and Consent which shall be presented to a Hearing Panel in accordance with the provisions of this subsection, nor shall such rejection preclude the Exchange from bringing or presenting the same or different charges to a Hearing Panel in accordance with the provisions of paragraph (d) above. The Exchange shall keep a record of any Hearing conducted under this Rule and a written notice of the result setting forth the requirements contained in Section 6(d)(1) of the Securities Exchange Act of 1934 shall be served on the parties to the proceeding.

The determination of the Hearing Panel and any penalty imposed shall be final and conclusive, twenty-five days after notice thereof has been served upon the respondent in the manner provided in paragraph (d) above, unless a request to the Board of Directors for review of such determination and/or penalty is filed as hereinafter provided. If such a request to the Board of Directors for review is filed as hereinafter provided, any penalty imposed shall be stayed pending the outcome of such review.

Any member of the Board of Directors or of the Board of Executives of the Exchange may require a review by the Board of any determination or penalty, or both, imposed by a Hearing Panel in connection with a Stipulation and Consent. In addition, the Division or Department of the Exchange which entered into the written consent may require a review by the Board of Directors of any penalty which is less severe than the stipulated penalty. The respondent or the Division or Department which entered into the written consent may require a review by the Board of Directors of any rejection of a Stipulation and Consent by the Hearing Panel.

A request for review shall be made by filing with the Secretary of the Exchange a written request therefor, which states the basis and reasons for such review, within twenty-five days after notice of the determination and/or penalty is served on the respondent. The Secretary of the Exchange shall give notice of any such request for review to the Division or Department of the Exchange involved in the proceeding and any respondent affected thereby.

Any review by the Board of Directors shall consist of oral arguments and written briefs and shall be limited to consideration of the record before the Hearing Panel. Upon review, the Board of Directors, by the affirmative vote of a majority of the Directors then in office, may fix and impose the penalty agreed

to in such Stipulation and Consent or any penalty which is less severe than the stipulated penalty, or may remand for further proceedings. Unless the Board of Directors otherwise specifically directs, the determination and penalty, if any, of the Board of Directors after review shall be final and conclusive subject to the provisions for review of the Securities Exchange Act of 1934.

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#### Rule 476A

##### Imposition of Fines for Minor Violation of Rules

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(d) Any person against whom a fine is imposed pursuant to this Rule may contest the Exchange's determination by filing with the Division or Department of the Exchange taking the action not later than the date by which such determination must be contested, a written response meeting the requirements of an "Answer" as provided in Rule 476(d), at which point the matter shall become a "disciplinary proceeding" subject to the provisions of Rule 476. In any such disciplinary proceeding, if the Hearing Panel determines that the person charged is guilty of the rule violation(s) charged, the Panel shall (i) be free to impose any one or more of the disciplinary sanctions provided in Rule 476 and (ii) determine whether the rule violation(s) is minor in nature. The Division or Department of the Exchange which commenced the action under this Rule, the person charged, and any member of the Board of Directors or of the Board of Executives of the Exchange may require a review by the Board of any determination by the Hearing Panel by proceeding in the manner described in Rule 476(f).

\* \* \* \* \*

#### Rule 499

##### Suspension From Dealings or Removal From List by Action of the Exchange

The aim of the New York Stock Exchange is to provide the foremost auction market for securities of well-established companies in which there is a broad public interest and ownership.

Securities admitted to the list may be suspended from dealings or removed from the list at any time.

##### Supplementary Material:

##### .70 Procedure for Delisting.—

a. If the Exchange staff should determine that a security be removed from the list, it will so notify the issuer in writing, describing the basis for such decision and the specific policy or criterion under which such action is to be taken. The Exchange will

simultaneously (1) issue a press release disclosing the company's status and basis for the Exchange's determination and (2) begin daily dissemination of ticker and information notices identifying the security's status, and include similar information on the Exchange's web site. The notice to the issuer shall also inform the issuer of its right to a review of the determination by the Committee specified in Section 12(b)(1) of Article IV of the Exchange's Constitution [a Committee of the Board of Directors of the Exchange (a majority of the members of such Committee voting on each determination must be public Directors)], provided a written request for such review is filed with the Secretary of the Exchange within ten business days after receiving the aforementioned notice.

\* \* \* \* \*

c. If a review is requested, the review will be scheduled for the first Review Day which is at least 25 business days from the date the request for review is filed with the Secretary of the Exchange, unless the next subsequent Review Day must be selected to accommodate the Committee's schedule. *Because Section 12(b)(1) of Article IV of the Constitution specifies that a majority of the members of the Committee voting on a matter shall be members of the Exchange's Board of Directors, the [The] Chairman of the Committee will disclose to the company and the staff at the commencement of the review which of the Committee members [industry Directors present] will be voting on the matter, although all Committee members [directors] will be entitled to participate in the discussion. The Committee's review and final decision shall be based on oral argument (if any) and the written briefs and accompanying materials submitted by the parties.*

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#### Listed Company Manual

##### Section 804.00 Procedure for Delisting

- If the Exchange staff should determine that a security be removed from the list, it will so notify the issuer in writing, describing the basis for such decision and the specific policy or criterion under which such action is to be taken. The Exchange will simultaneously (1) issue a press release disclosing the company's status and basis for the Exchange's determination and (2) begin daily dissemination of ticker and information notices identifying the security's status, and include similar information on the Exchange's Web site.

- The notice to the issuer shall also inform the issuer of its right to a review of the determination by the *Committee specified in Section 12(b)(1) of Article IV of the Exchange's Constitution* [a Committee of the Board of Directors of the Exchange (a majority of the members of such Committee voting on each determination must be public Directors)], provided a written request for such a review is filed with the Secretary of the Exchange within ten business days after receiving the aforementioned notice.

\* \* \* \* \*

- If a review is requested, the review will be scheduled for the first Review Day which is at least 25 business days from the date the request for review is filed with the Secretary of the Exchange, unless the next subsequent Review Day must be selected to accommodate the Committee's schedule. *Because Section 12(b)(1) of Article IV of the Constitution specifies that a majority of the members of the Committee voting on a matter shall be members of the Exchange's Board of Directors, the [The] Chairman of the Committee will disclose to the company and the staff at the commencement of the review which of the Committee members [industry Directors present] will be voting on the matter, although all Committee members [directors] will be entitled to participate in the discussion. The Committee's review and final decision shall be based on oral argument (if any) and the written briefs and accompanying materials submitted by the parties.*

\* \* \* \* \*

Rule 792

Days and Hours for Options Trading

\* \* \* \* \*

(c) The [Chairman, Vice Chairman and the Senior Floor Director or, in the absence from the Floor of any of them, the next senior Floor Director] *Chief Executive Officer and the two most senior BOE Floor Representatives, or in the absence from the Floor of any of them, the next senior BOE Floor Representative* present on the Floor, acting by a majority shall have the power to suspend trading in all option contracts whenever in their opinion such suspension would be in the public interest. A special meeting of the Board of Directors to consider the continuation or termination of such suspension or closing the market shall be held as soon thereafter as a quorum of Directors can be assembled.

\* \* \* \* \*

Rule 800

Basket Trading: Applicability and Definitions

Applicability of 800 Series

The Rules in this 800 series (Rules 800 through 817) shall apply to (i) all Exchange contracts made on the Exchange through the "ESP Service" (as this Rule defines that term) and (ii) the handling of orders, and the conduct of accounts and other matters, relating to baskets executed through the ESP Service by any member or member organization. As modified by this Rule 800, all other Exchange Rules shall also so apply, except that the following shall not so apply:

\* \* \* \* \*

(F) references in incorporated Rules to "Floor Officials" shall refer solely to "Floor Governors" and "[Floor Directors] *BOE Floor Representatives*".

\* \* \* \* \*

Rule 808

Basket Book Dealers

\* \* \* \* \*

Supplementary Material:

Temporary Reallocation of Baskets

.10 The [Chairman] *Chief Executive Officer* or, in his absence, such Exchange Officer(s), as the [Chairman] *Chief Executive Officer* may designate, or, alternatively, a majority, but not fewer than two, of the [Floor Directors] *BOE Floor Representatives* then available on the Floor, may determine to reallocate temporarily any basket on an emergency basis to another member or member organization on the Floor whenever in their opinion such reallocation would be in the public interest.

\* \* \* \* \*

Rule 816

Discontinuous Auction Markets; Basket Trading Halts

Discontinuous Auction Markets

(a) Whenever such market conditions as the Exchange may from time to time specify are present, the Exchange shall declare a discontinuous auction market. Whenever the [Chairman] *Chief Executive Officer* or, in his absence, such other Exchange Officer(s) as the [Chairman] *Chief Executive Officer* may designate, or, alternatively, a majority, but not fewer than two, of the [Floor Directors] *BOE Floor Representatives* then available on the Floor, determine that market conditions make it unreasonable to conduct basket trading pursuant to regular auction procedures, or, pursuant to such guidelines as the

Exchange may from time to time prescribe, whenever two Floor Governors make such a determination, a discontinuous auction market shall be declared. The Basket Book Dealer shall monitor market conditions and adherence to the guidelines and shall conduct the discontinuous auction market as follows:

(i) Within five minutes from the time at which the discontinuous auction market is declared, the Basket Book Dealer will disseminate an initial indication of interest.

(ii) The Basket Book Dealer will periodically disseminate any change in any indication of interest or any superior indication of interest, and, if he has not updated an indication of interest within 15 minutes from the previous update, he will indicate that no change has occurred.

The [Chairman] *Chief Executive Officer*, the [Chairman] *Chief Executive Officer*-designated Officer(s), two [Floor Directors] *BOE Floor Representatives* or two Floor Governors may terminate the discontinuous auction market after determining that the conditions that precipitated the discontinuous auction market no longer exist.

The Basket Book Dealer may open or reopen the regular auction market in the basket only upon the later of:

(i) 15 minutes after the initial indication of interests, and

(ii) Five minutes after he disseminates a revised or updated indication of interest.

The Exchange may from time to time prescribe different discontinuous auction market time parameters. The existence of a discontinuous auction market suspends the obligations of specialists, Basket Book Dealers and Competitive Basket Market-Makers to establish, maintain and communicate component stock, mini-basket and basket quotations.

Basket Trading Halts

(b) In addition to any halt in basket trading pursuant to Rule 80B (Trading Halts Due to Extraordinary Market Volatility) as Rule 800 incorporates that Rule into these Basket Rules, basket trading through the ESP Service shall halt whenever the [Chairman] *Chief Executive Officer* or, in his absence, such other Exchange Officer(s) as the [Chairman] *Chief Executive Officer* may designate, or, alternatively, a majority, but not fewer than two, of the [Floor Directors] *BOE Floor Representatives* then available on the Floor, determines that market conditions warrant such a halt.

Supplementary Material:

.10 Prior to disseminating any change in an indication of interest or superior indication of interest, or indicating that no change has occurred, pursuant to paragraph (a)(ii) of this Rule, the Basket Book Dealer may execute paired-off buy and sell basket orders at a price that a Floor Governor has approved.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49342; File No. SR-PCX-2004-09]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by the Pacific Exchange, Inc. To Allow Ratio Orders to be Executed at the Exchange

March 1, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on February 19, 2004, the Pacific Exchange, Inc. ("PCX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in items I, II and III below, which items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange is proposing amend its rules to allow ratio orders to be executed at the Exchange. The text of the proposed rule change is available at the PCX and at the Commission.

#### 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 PCX 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 PCX has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

#### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

PCX Rule 6.62 lists and defines several types of orders that are permissible at the PCX. Of the several types of orders defined, three are complex orders: spread, straddle and combination orders.<sup>3</sup> The PCX proposes to add another type of complex order, ratio orders, to the list of orders included in Rule 6.62.<sup>4</sup> A ratio order is either a spread, straddle, or combination order in which the stated number of option contracts to buy (sell) is not equal to the stated number of option contracts to sell (buy), provided that the number of contracts differs by a permissible ratio. Under the PCX proposal, a permissible ratio is any ratio that is equal to or greater than one to three (.333) or less than or equal to three to one (3.0). For example, a one to two (.5) ratio, a two to three (.667) ratio, or a two to one (2.0) ratio is permissible, whereas a one to four (.25) or four to one (4.0) ratio is not.

The PCX believes that ratio orders are merely slight variations on the types of complex orders currently permitted at the PCX. For this reason, the PCX believes that it is appropriate to treat ratio orders in a manner similar to the existing complex orders that currently permitted to trade at the PCX. Accordingly, the PCX proposes to have ratio orders within the permissible ratio follow the current priority rules under PCX Rule 6.75(h) Commentary .04.

Specifically, PCX Rule 6.75(h) Commentary .04 sets forth the proper trading procedures for combination, spread and straddle orders. Under the PCX proposal, ratio orders that are equal to or greater than one to three (.333) or less than or equal to three to one (3.0) will be treated the same as combination, spread and straddle orders.

##### 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with section 6(b) of the Act,<sup>5</sup> in general, and furthers the objectives of section 6(b)(5) of the Act,<sup>6</sup> in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of change, to foster cooperation and

<sup>3</sup> These types of orders are defined in PCX Rule 6.62(d), (g), and (h), respectively.

<sup>4</sup> The proposed rule change is based on the rules of the Chicago Board Options Exchange, Inc., Rules 6.45 and 6.53.

<sup>5</sup> 15 U.S.C. 78f(b).

<sup>6</sup> 15 U.S.C. 78f(b)(5).

coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

#### B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is 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

Written comments on the proposed rule change were neither solicited nor received.

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

The foregoing proposed rule change, as amended, has become effective pursuant to section 19(b)(3)(A) of the Act<sup>7</sup> and Rule 19b-4(f)(6)<sup>8</sup> thereunder, because it (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. The PCX provided the Commission with written notice of its intent to file this proposed rule change at least five business days prior to the date of filing the proposed rule change.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Comments may also be submitted electronically at the following

<sup>7</sup> 15 U.S.C. 78(s)(b)(3)(A).

<sup>8</sup> 17 CFR 240.19b-4(f)(6).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> CFR 240.19b-4.