

ERISA rules and regulations that preclude and/or limit managing broker-dealers of such accounts from trading as principal.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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. 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 NASD.

All submissions should refer to File No. SR-NASD-2003-39 and should be submitted by April 17, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47547; File No. SR-NYSE-2002-41]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 by the New York Stock Exchange, Inc. To Amend the Exchange's Specialist Combination Review Policy

March 20, 2003.

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 August 29, 2002, 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, II, and III below, which Items have been prepared by the Exchange. On January 27, 2003 the NYSE amended the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, 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 Specialist Combination Review Policy ("Policy"), which was recently codified as NYSE Rule 123E. The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets.

#### Rule 123E—Specialist Combination Review Policy

(a) No specialist organization shall complete a "proposed combination" (defined below) with one or more other specialist organizations unless the combination has been approved pursuant to this policy.

(b) *Except as provided below,* [I]n any case where a proposed combination involves or would result in a specialist organization accounting for more than five percent of any of the "concentration measures" (defined below), the Quality of Markets Committee (the "Committee") shall review the proposed combination with the following considerations in mind:

(1) Specialist performance and market quality in the stocks subject to the proposed combination[;], *with a recommendation from the Market Performance Committee on these matters pursuant to paragraph (e) below.*

(2) The effects of the proposed combination in terms of the following criteria:

(i) Strengthening the capital base of the resulting specialist organization;

(ii) Minimizing both the potential for financial failure and the negative consequences of any such failure on the specialist system as a whole; and

(iii) Maintaining or increasing operational efficiencies;

(3) Commitment to the Exchange market, focusing on whether the constituent specialist organizations have worked to support, strengthen and

advance the Exchange, its agency/ auction market and its competitiveness in relation to other markets; and

(4) The effect of the proposed combination on overall concentration of specialist organizations.

The Committee shall approve or disapprove the proposed combination based on its assessment of these considerations. In the case where a combination involves an organization that is not a specialist organization, consideration (b)(3) shall entail an assessment of whether the organization will work to support, strengthen and advance the Exchange, its agency/ auction market and its competitiveness in relation to other markets.

*In any case where a specialist unit currently exceeds five percent of any concentration measure, and then proposes a combination that would not result in increasing its concentration measure by more than two percentage points, or not result in the combined unit moving into a higher tier classification, the Quality of Markets Committee shall not review the proposed combination. The Market Performance Committee shall review the proposed combination from the standpoint of assessing specialist performance and market quality with respect to the securities subject to the proposed combination. The Market Performance Committee will approve, or disapprove in writing, such combination, and may impose such conditions as it deems appropriate with respect to specialist performance and market quality.*

(c) In any case where a proposed combination involves or would result in a specialist organization accounting for more than ten percent (a "Tier 2 combination") of any of the concentration measures, the Committee shall give primary weight to consideration (b)(4). The Committee shall disapprove the proposed combination unless the constituent specialist organizations:

(1)(a) For a proposed combination which involves or would result in a specialist unit accounting for more than ten percent, but less than or equal to 15%, of a concentration measure, prove, by a preponderance of the evidence; or

(b) For a proposed combination that involves or would result in a specialist unit accounting for more than 15% of a concentration measure (a "[15%] Tier 3 combination") present clear and convincing evidence that, if approved, the proposed combination:

(i) Would not create or foster concentration in the specialist business detrimental to the Exchange and its markets;

<sup>3</sup> See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated January 24, 2003 ("Amendment No. 1"). In Amendment No. 1 the Exchange provided a new Exhibit A that completely replaces and supersedes the proposed rule language in the original filing.

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

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

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

(ii) Would foster competition among specialist organizations; [and]

(iii) Would enhance the performance of the constituent specialist organization and the quality of the markets in the stocks involved; [and]

(iv) Demonstrate that, if approved, the proposed combination is otherwise in the public interest.

(d) The Committee may condition any approval under either paragraph 2 or paragraph 3 upon compliance by the resulting specialist organization with any steps the Committee may specify to address any concerns it may have in regard to considerations 2 (a)–(d).

[With respect to proposed combinations which involve or would result in specialist units accounting for more than five percent, but less than or equal to 10%, of a concentration measure, the Committee shall not grant approval unless the proponents of the combination agree to maintain 1.5 times the capital requirement specified in Rule 104.20 with respect to each of the combined entity's stocks that are component stocks of the Standard and Poor's Stock Price Index.]

In addition, with respect to proposed combinations which involve or would result in specialist units accounting for more than ten percent of a concentration measure, the Committee shall not grant approval unless the proponents of the combination[:] [(i)] submit an acceptable risk management plan with respect to any line of business in which they engage[:], and [(ii)] submit an operational certification prepared by an independent, nationally recognized management consulting organization with respect to all aspects of the firm's management and operations.[:]

[(iii)] agree to maintain a minimum of 1.5 times (2 times, in the case of a 15 percent combination) the total capital requirement specified in Rule 104.20 with respect to the combined entity's stocks;

(iv) agree to maintain 2 times (2.5 times, in the case of a 15 percent combination) the capital requirement specified in Rule 104.20 with respect to each of the combined entity's stocks that are component stocks of the Standard and Poor's 500 Stock Price Index; and

(v) agree that all capital required to be dedicated to specialist operations be accounted for separate and apart from any other capital of the combined entity, and that such specialist capital may not be used for any other aspect of the combined entity's operations;]

(e)(1) *In all situations involving a proposed combination of specialist units, the Market Performance Committee shall assess the impact of the proposal upon specialist performance*

*and market quality with respect to the subject securities. In making such assessment, the Market Performance Committee shall:*

(a) *review the individual unit's overall performance in various measures of specialist performance, such as ratings on the Specialist Performance Evaluation Questionnaire, SuperDOT turnaround performance and administrative response times, capital utilization, dealer participation rates, stabilization rates, continuity, depth, quote spreads, as well as recent regulatory and disciplinary history; and*

(b) *review performance specifically with respect to each component stock of the Dow Jones Industrial Average, if applicable, if the combination is a Tier 1 combination (more than five percent, but not more than 10 percent of any concentration measure), and, in addition, performance with respect to each component stock of the S&P 100 Stock Price Index, if applicable, if the combination is a Tier 2 or Tier 3 combination.*

(2) *Proponents of a specialist unit combination must make a written submission to the Quality of Markets Committee or the Market Performance Committee, as appropriate, discussing all factors relevant under this policy to that Committee's review of the proposal. In addition to addressing the specialist performance and market quality considerations noted above, the proponents of the combination must discuss:*

(a) *performance in any stocks received through previous combinations or transfers of registrations during the preceding two years; and*

(b) *whether existing levels of clerical support will be maintained or increased.*

(3) *Proponents of any combination subject to a Tier 2 or Tier 3 review by the Quality of Markets Committee must demonstrate that:*

(a) *the combined unit will have a separate corporate relations department fully staffed to maintain appropriate relations with each of its listed companies, and that it is capable of keeping listed company officials apprised of market developments on a daily basis. Each unit involved in the combination must demonstrate full compliance with Rule 106, or must submit to the Committee a plan providing specific, tangible steps to come into full compliance; and*

(b) *the combined units will have a real-time surveillance system that monitors specialist trading and uses exception alerts to detect unusual trades or trading patterns.*

(4) *In addition, the proponents of a Tier 2 or Tier 3 review must discuss*

*whether it has disaster recovery facilities for its computer network and software, whether it has designated specific individuals to handle unusual situations on the Floor (if so, the names of the individuals), whether the combined unit will employ a "zone" or other management system on the Floor (with identification of the names of the individuals and their specific responsibilities, as applicable), and whether the combined unit will designate a senior specialist to be responsible for reviewing specialist performance data, with specific procedures for correcting any deficiencies identified.*

(f) *Proponents of a specialist unit combination subject to review by either the Quality of Markets Committee or the Market Performance Committee under this policy must agree that:*

(i) *the total amount of capital which each unit had separately prior to the proposed combination shall not be reduced, regardless of whether it would exceed the combined unit's new capital requirement; and*

(ii) *all required specialist capital be accounted for separately from any other capital, and be used solely for the specialist business.*

[(e)](g) For purposes of this policy, a "proposed combination" includes:

(1) A merger of specialist organizations or an acquisition of one organization by another;

(2) The formation of a joint account involving two or more existing organizations;

(3) The "split-up" of an existing organization (including an organization operating under a joint account) and recombination with another organization;

(4) An individual specialist leaving an existing organization and proposing to take stocks with him to join another existing organization; and

(5) Any other arrangement that would result in previously separate organizations operating under common control.

[(f)](h) For purposes of this policy, the "concentration measures" are:

(1) The common stocks listed on the Exchange;

(2) The 250 most active common stocks listed on the Exchange;

(3) The total share volume of trading in common stocks on the Exchange; and

(1) The total dollar value of trading in common stocks on the Exchange.

Supplementary Material:

.10 Guidelines for Applying Consideration (b)(3)

Consideration (b)(3) entails the Committee's review of the constituent

units' past conduct. For example, the Committee shall assess each constituent unit's:

(a) Participation upon request in the Exchange's FACTS program, in its marketing seminars, in sales calls and in other of its marketing initiatives seeking to attract order flow and new listings.

(b) Acceptance of innovations in order-routing and other trade-support systems and willingness to make optimal use of the systems once they become fully operational.

(c) Willingness to apply for a *broad range of new listings and for allocations of stocks that are less lucrative from the standpoint of profitability to the specialist.*

(d) Assistance to other units by providing capital and personnel in unusual market situations, such as "breakouts" and difficult openings.

(e) Efforts at customer relations with both listed companies and order providers, as evidenced by personal contact, return of telephone calls, prompt resolution of complaints, assessment of customer needs and anticipation of customer problems.

(f) Efforts to streamline the efficiency of its own operations and its competitive posture.

*.20 Guidelines for Applying Consideration (c)(1)(a)(iv)*

*Consideration (c)(1)(a)(iv) requires review of whether a proposed combination is in the public interest. For example, the Committee may consider the unit's efforts to enhance market quality, its capabilities for maintaining ongoing communications with its listed companies and customers in compliance with Rule 106, and its commitment to applying for new listings and other activities.*

**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 IV below. The Exchange 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**

The purpose of this filing is to amend the Policy, which was formally codified as NYSE Rule 123E.<sup>4</sup> It has been previously filed with, and approved by, the Commission pursuant to Rule 19b-4.<sup>5</sup>

The Policy requires Exchange approval of proposed specialist unit combinations exceeding five, ten, or fifteen percent of any one of four concentration measures.<sup>6</sup> The Policy provides that the Quality of Markets Committee ("QOMC") review proposed combinations which, by virtue of the size of the resulting unit (as defined by the four concentration measures), may raise concerns as to: (1) Overall concentration in the specialist community and reduced competition among specialist units as an incentive for allocations of newly-listed stocks; (2) the maintenance of market quality in the unit's stocks; and (3) the maintenance of the financial stability of the specialist system.

The QOMC has conducted 40 concentration reviews under the Policy since its adoption in 1987. This includes 24 Tier 1 reviews (any concentration measure exceeding 5%, but less than or equal to 10%), eight Tier 2 reviews (any concentration measure exceeding 10%, but less than or equal to 15%) and eight Tier 3 review (any concentration measure exceeding 15%). 32 of the 40 reviews (and seven of the eight Tier 2 reviews) occurred after 1993. In the concentration reviews, the QOMC examined the proposals on their own merits, and focused principally on whether the combinations would adversely impact market quality (with input from the Market Performance Committee) and the prospects for financial and operational success of the combined entities.

The NYSE believes that the environmental factors that prompted the adoption of the Policy in December 1986 are even more significant today. The Exchange faces increasing

competitive pressures in several areas. In addition, market volatility has increased substantially in the last half dozen years. Daily movements in the S&P 500 Stock Price Index of two percent or more are now as frequent as one percent movements were in 1993. This has required specialists to maintain more capital to cushion price movements and to contribute to the maintenance of fair and orderly markets. The Exchange believes that there is general agreement on the need for a policy to review specialist combinations which, on the one hand, enhances competition among specialists, maximizes the quality of Exchange markets and the services provided by specialists, and minimizes the risk of financial failure, while on the other hand, contributes to improved operational efficiencies, enhances risk management capabilities, and ensures that the specialist units are adequately capitalized and staffed to be better equipped to handle active and volatile markets. To this end, the Exchange believes that the current Policy has worked well, and that the combinations reviewed by the QOMC have enhanced the performance of the specialist organizations and the market quality in the stocks involved. However, the Exchange is continuing to evolve toward a smaller community of specialists. Therefore, it is important that the Policy contain specific guidelines to assist the QOMC in determining whether future combinations will strengthen the Exchange market and specialist system.

The Exchange proposes the following amendments to the Policy.

**Scope of Quality of Markets Committee Reviews**

*De Minimis Increase in Concentration Measure*

The filing proposes that when a combination of specialist firms results in an increase in any concentration measure of less than two points within a tier level, no review by the QOMC would be required. A review by the QOMC would still be required if a percentage change of less than two points nonetheless resulted in a unit moving into a higher tier classification (e.g., from Tier 1 to Tier 2). If a combination results in a specialist firm's percentage in any of the concentration measures moving from below 5% (where no QOMC review is required) to over 5% (e.g., moving from 4.5% to 6.3%), a QOMC review will be required, regardless of whether the percentage increase is above or below two points.

The Exchange believes that a 2% or more increase is an acceptable level to

<sup>4</sup> See Securities Exchange Act Release No. 46579 (October 1, 2002), 67 FR 63004 (October 9, 2002) (SR-NYSE-2002-31).

<sup>5</sup> It was last approved in Securities Exchange Act Release No. 35343 (February 8, 1995), 60 FR 8437 (February 14, 1995) (SR-NYSE-94-46).

<sup>6</sup> The concentration measures include a specialist unit's share of: (1) common stocks listed on the Exchange; (2) the 250 most active listed common stocks for the last 12 months; (3) total listed common stock share volume for the last 12 months; and (4) total listed common stock dollar volume for the last 12 months.

establish the need for QOMC review of a combination. Combinations below this figure do not usually have a significant impact on specialist operations in terms of capital or manpower. Combinations less than 2% will still require Market Performance Committee review and approval with respect to an assessment of the impact of the proposal on specialist performance and market quality. Requiring QOMC review for combinations greater than 2% is desirable initially to gauge the impact these have on specialist concentration. The Exchange may consider a different *de minimis* level after it gains experience with the 2% level.

The Exchange will explain how the *de minimis* provision of the Concentration Policy will be applied as part of the Information Memo that will be distributed to all members when the proposed rule change is made effective.

#### Combinations Not Approved

The QOMC has approved each of the proposed combinations presented to the Committee since the adoption of the Policy. The Market Performance Committee has approved all but one of the combinations it has reviewed.

#### Capital

The Policy currently requires units subject to Tier 1 reviews to maintain a minimum of 1½ times the Rule 104.20 position requirement for each stock that is included in the S&P 500 Stock Price Index ("S&P500"); units subject to Tier 2 reviews to maintain 2 times the position requirement for all S&P 500 stocks, and 1½ times the requirement for all other stocks; and units subject to Tier 3 reviews to maintain 2½ times the requirement for S&P 500 stocks, and 2 times the requirement for all other stocks. These requirements are proposed to be removed from the Policy in light of proposed amendments of other Exchange requirements.

In connection with maintaining more stringent capital requirements for the larger specialist organizations, the formula shown below was approved in changes to Exchange Rule 104.21.<sup>7</sup> In addition, Exchange Rule 104.22 requires any new specialist entities that result from merger, acquisition, consolidation, or other combination of specialist assets to maintain net liquid assets (NLA) equivalent to the greater of either: (1) The aggregate of the NLA of the specialist entities prior to their combination, or (2) the capital requirement prescribed by Rule 104.

<sup>7</sup> See Securities Exchange Act Release No. 43098 (July 31, 2000), 65 FR 49044 (August 10, 2000) (SR-NYSE-99-46).

Below is a chart that shows the current NLA requirement.<sup>8</sup>

Dow Jones Stocks	\$4.0 million per stock
S&P 100 Stocks	\$2.0 million per stock
S&P 500 Stocks	\$1.0 million per stock
Non-S&P Stocks	\$0.5 million per stock
Bond Funds	\$0.1 million per stock
Preferred Stocks and Structured Products	\$0.1 million per stock
Investment Company Units (Exchange-Traded Funds) ("ETFs")	\$0.5 million per ETF <sup>9</sup>

The Exchange also proposes to require that a unit subject to a concentration review must agree that all required specialist unit capital be accounted for separately from any other capital, and be used solely for the specialist business.

#### Market Performance Committee Assessment

The Market Performance Committee ("MPC" or the "Committee") is charged with the responsibility of reviewing and approving, or disapproving in writing, a specialist combination to see what effect it will have on market quality.<sup>10</sup> The MPC has reviewed specialist combinations since its inception. The Committee receives a summary of the proposal, letters from the specialist firms or individuals involved, information with respect to the stocks involved, historic and proposed capital of the combined units, capital requirements, personnel information, clearing arrangements and operational statistics of the units (e.g., SPEQ ratings, dealer participation rates, stabilization rates, etc.).<sup>11</sup> The proponents of a combination may be asked to appear before the MPC to answer any questions it may have. The MPC then utilizes its expertise and judgment to decide what effect a proposed combination will have on market quality in the stocks involved. If the MPC determines that a proposed combination will significantly erode market quality, it would be required to inform the units of its concerns. If the parties persist in their

<sup>8</sup> The NYSE requested that the Commission insert this sentence for clarification. Telephone discussion between Jeff Rosenstock, Senior Special Counsel, NYSE and Mia C. Zur, Attorney, Division, Commission (March 5, 2003).

<sup>9</sup> A unit registered in only one ETF would be subject to the \$1m minimum capital requirement of Rule 104.20. See SR-NYSE-2001-08 (approved in Securities Exchange Act Release No. 44616) (July 30, 2001), 66 FR 40761 (August 3, 2001).

<sup>10</sup> In Amendment No. 1, the Exchange added rule language to require that disapprovals be made in writing. The NYSE requested that the Commission modify this sentence to indicate this change. Telephone discussion between Jeff Rosenstock, Senior Special Counsel, NYSE and Mia C. Zur, Attorney, Division, Commission (March 5, 2003).

<sup>11</sup> See Section 5 of the Policy.

plans, the MPC can inform them that some or all of the affected stocks will be put up for reallocation.

The MPC's assessment of the impact on market quality in the stocks would include a specific assessment of the performance of each specialist who will be designated to trade a component stock of the Dow Jones Industrial Average (DJIA), if a Tier 1 review; and any S&P 100 stock if a Tier 2 or Tier 3 review. The unit under review must discuss in particular the performance statistics for stocks it received through previous combinations or transfers of registration within the last two years.

#### Personnel

The Policy is proposed to be amended to require the proponents of the combined units to disclose whether the existing clerical support of the combined units will be maintained or increased. The Policy is also proposed to be amended to provide that specialist units involved in a Tier 2 or Tier 3 combination must have a separate corporate relations department fully staffed to maintain good relations with each listed company and major member organizations, and be capable of keeping listed company officials apprised of market developments on a daily basis. Each unit must show that they have satisfied the listed company and member firm contact requirements of Rule 106, and, if they have not, they must present an acceptable plan to the QOMC that provides specific, tangible steps to improve such contact.

#### Commitment to the Exchange

Section b(3) of the Policy is proposed to be amended to require that the QOMC assess each constituent unit's willingness to apply for a broad range of new listings and for allocations of stocks that are less lucrative from the standpoint of profitability to the specialist.

#### Management and Operations

As proposed, the Policy will require that the unit under review in a Tier 2 or Tier 3 review must discuss whether it will:

- Designate a senior specialist to be responsible for reviewing specialist performance data;
- Have procedures for correcting any deficiencies identified;
- Designate specific individuals to handle unusual situations on the Floor and, if so, the names of the individuals;
- Employ a "zone management" system on the Floor and, if so, who will be responsible for overseeing each

zone throughout the trading day; and

—Have disaster recovery facilities for its computer network and software.

The Committee will assess these responses in considering the proposed combination.

The Policy is proposed to be amended to require that the unit in a Tier 2 or Tier 3 review must have a real-time surveillance system that monitors specialist trading and uses exception alerts to detect unusual trades or trading patterns.

#### Public Interest

The Policy (section c(1)(a)(iv)) provides that specialist units that are involved in a Tier 2 or Tier 3 review must “demonstrate that, if approved, the proposed combination is otherwise in the public interest.” The Exchange proposes to add to the Policy a guideline outlining what the QOMC may consider under this provision. This includes: (a) The unit’s efforts to enhance market quality; (b) its capability of maintaining ongoing communications with their listed companies and customers in compliance with Rule 106; and (c) the unit’s commitment to applying for new listings and other activities.

#### Reasons for a Specialist Combination Review Policy

The Exchange views the Policy as a necessary mechanism for the review of proposed specialist combinations that may lead to a level of concentration within the specialist community that may be of concern to the Exchange and the quality of its markets. The Exchange recognizes that some specialist organizations seek to grow or attract capital through mergers or acquisitions. The Policy offers a structured approach for reviewing proposed combinations that may raise concentration-related issues. The amendments to the Policy proposed in this filing are part of the Exchange’s continued effort to see that the Policy addresses these issues. As the Commission noted in its approval of the Exchange’s filing first proposing the Policy, “the Commission believes it is appropriate for the NYSE to adopt a policy that authorizes it to monitor specialist combinations to determine their impact upon the competitive environment necessary to maintain an orderly market.”<sup>12</sup>

#### Other Matters

##### *Specialists Ability to Monitor Real Time Trading*

The larger specialist units, representing a significant portion of listed stocks and trading volume, have the capability to monitor the unit’s trading on a real-time basis, and use exception alerts to identify unusual trading patterns.

##### *Statistical Information*

- There are currently 10 specialist firms, including 3 firms that are registered solely in Exchange-Traded Funds (“ETFs”).
- There are currently 460 members registered as specialists.
- At the end of June 2002, there were 2,796 companies that had common and preferred issues listed on the NYSE.

##### 1. Statutory Basis

The NYSE believes the proposed rule change is consistent with section 6(b)(5)<sup>13</sup> of the Act, which requires that an Exchange have rules that are 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 NYSE believes the proposed amendments are consistent with these objectives in that they address concerns about capitalization, and operational efficiency where proposed combinations would result in large-sized specialist units.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such

longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, or

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

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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. 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 NYSE. All submissions should refer to file number SR-NYSE-2002-41 and should be submitted by April 17, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>14</sup>

**Margaret H. McFarland,**  
*Deputy Secretary.*

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#### SMALL BUSINESS ADMINISTRATION

[License No. 03/73-0228]

#### Toucan Capital Fund II, L.P.; Notice Seeking Exemption Under Section 312 of the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that Toucan Capital Fund II, L.P., 7600 Wisconsin Ave, 7th Floor, Bethesda, MD 20814, a Federal Licensee under the Small Business Investment Act of 1958, as amended (“the Act”), in connection with the financing of a small concern, has sought an exemption under section 312 of the Act and § 107.730, Financings

<sup>12</sup> See Securities Exchange Act Release No. 24411 (April 29, 1987), 52 FR 17870 (May 12, 1987).

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

<sup>14</sup> 17 CFR 200.30-3(a)(12).