

Commission received no comments on the proposal.

In addition, on September 25, 2002, NASD submitted a separate proposed rule change relating to the Security Futures Risk Disclosure Statement (File No. SR-NASD-2001-28). At NASD's request, the Commission put that proposed rule change into effect summarily pursuant to section 19(b)(3) of the Act,<sup>4</sup> so that the Security Futures Risk Disclosure Statement would be in effect prior to the start of trading in security futures.<sup>5</sup> Section 19(b)(3) of the Act<sup>6</sup> requires that any proposed rule change put into effect summarily shall be filed promptly thereafter in accordance with the provisions of section 19(b)(1) of the Act.<sup>7</sup> Accordingly, NASD filed this proposed rule change to gain final approval of the Security Futures Risk Disclosure Statement.

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 association.<sup>8</sup> In particular, the Commission finds that the proposal is consistent with the requirements of section 15A(b)(6) of the Act,<sup>9</sup> which requires, among other things, that NASD's rules be designed to prevent fraudulent and manipulative acts and practices, and, in general, to protect investors and the public interest. Under NASD's rules, the Security Futures Risk Disclosure Statement must be provided to customers at or prior to the time the customer's account is approved for trading security futures. Among other things, the statement describes the risks of security futures, how they trade, margin, effects of leverage, settlement procedures, customer account protections, and the tax consequences of trading security futures. Accordingly, the Commission believes that the Security Futures Risk Disclosure Statement should inform customers that trade security futures of the characteristics of security futures and the risks associated with trading them.

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act<sup>10</sup>, that the proposed rule change (File No. SR-

NASD-2002-129) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46858; File No. SR-NYSE-2002-36]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the New York Stock Exchange, Inc. To Adopt Amendments to Exchange Rule 342 ("Offices—Approval, Supervision and Control") and its Interpretation, Rule 401 ("Business Conduct"), Rule 408 ("Discretionary Power in Customers' Accounts"), and Rule 410 ("Records of Orders")

November 20, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934,<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on August 16, 2002, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization.<sup>3</sup> On November 20, 2002, the Exchange submitted Amendment No. 1 to the proposed rule change.<sup>4</sup>

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 proposed rule change is intended to address several issues involving the

establishment, maintenance, and testing of Internal Controls as well as several supervisory issues. Included are amendments to Rule 342 ("Offices—Approval, Supervision and Control") and its Interpretation, 401 ("Business Conduct"), 408 ("Discretionary Power in Customers' Accounts"), and 410 ("Records of Orders"). Additions are in italics; deletions are in brackets.

\* \* \* \* \*

#### Offices—Approval, Supervision and Control

Rule 342. (a) Each office, department or business activity of a member or member organization (including foreign incorporated branch offices) shall be under the supervision and control of the member or member organization establishing it and of the personnel delegated such authority and responsibility.

The person in charge of a group of employees shall reasonably discharge his duties and obligations in connection with supervision and control of the activities of those employees related to the business of their employer and compliance with securities laws and regulations.

(b) The general partners or directors of each member organization shall provide for appropriate supervisory control and shall designate a general partner or principal executive officer to assume overall authority and responsibility for internal supervision and control of the organization and compliance with securities' laws and regulations. This person shall:

(1) delegate to qualified principals or employees responsibility and authority for supervision and control of each office, department or business activity, and provide for appropriate procedures of supervision and control.

(2) establish a separate system of follow-up and review to determine that the delegated authority and responsibility is being properly exercised.

(c) The prior consent of the Exchange shall be obtained for each office established by a member or member organization, other than a main office.

(d) Qualified persons acceptable to the Exchange shall be in charge of:

(1) any office of a member or member organization,

(2) any regional or other group of offices,

(3) any sales department or activity.

(e) The amounts and types of credit extended by a member organization shall be supervised by members or allied members qualified by experience for such control in the types of business

<sup>4</sup> 15 U.S.C. 78s(b)(3).

<sup>5</sup> See Securities Exchange Act Release No. 46612 (October 7, 2002), 67 FR 64151.

<sup>6</sup> 15 U.S.C. 78s(b)(3).

<sup>7</sup> 15 U.S.C. 78(s)(b)(1).

<sup>8</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>9</sup> 15 U.S.C. 78o-3(b)(6).

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(2).

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

<sup>3</sup> The NASD submitted a proposed rule change addressing internal controls and supervisory issues (SR-NASD-2002-162), which the Commission is publishing in the *Federal Register* for public comment simultaneously with the instant proposed rule change. See Securities Exchange Act Release No. 46859 (November 20, 2002).

<sup>4</sup> See letter to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, from Darla Stuckey, Corporate Secretary, NYSE, dated November 18, 2002 ("Amendment No. 1"). In Amendment No. 1, the Exchange added "customer changes of investment objectives" to the list of enumerated activities with regard to which Exchange members must maintain written policies and procedures.

in which the member organization extends credit.

Supplementary Material:

.18 through .19 unchanged.

.19 *Supervision of Managers.*—

*Members and member organizations whose Branch Office Managers, Sales Managers, Regional/District Sales Managers, or any person performing a similar supervisory function, service customer accounts must develop and implement written policies and procedures reasonably designed to independently supervise each such person's customer account activity.*

.20 through .22 unchanged.

.23 *Internal Controls*—Pursuant to paragraphs (a) and (b) of this Rule, members and member organizations must develop and maintain adequate controls over each of its business activities. Such controls must provide for the establishment of procedures for independent verification and testing of those business activities separate and apart from the day-to-day supervision of such functions. A review of each member's or member organization's efforts with respect to internal controls, including a summary of tests conducted and significant exceptions identified, must be included in the Annual Report required by .30 of this Rule. The independent verification and testing procedures shall not apply to members and member organizations that do not conduct a public business, or that have a capital requirement of \$5,000 or less, or that employ 10 or fewer registered representatives.

(See also Rule 401(b))

.30 *Annual Report.*—By April 1 of each year, each member not associated with a member organization and each member organization shall prepare, and each member organization shall submit to its chief executive officer or managing partner, a report on the member's or member organization's supervision and compliance effort during the preceding year. The report shall include:

(a) A tabulation of the reports pertaining to customer complaints and internal investigations made to the Exchange during the preceding year pursuant to Rules 351(d) and (e)(ii).

(b) Identification and analysis of significant compliance problems, plans for future systems or procedures to prevent and detect violations and problems, and an assessment of the preceding year's efforts of this nature, and

(c) Discussion of the preceding year's compliance efforts, new procedures, educational programs, etc. in each of the following areas:

- (i) Antifraud and trading practices,
- (ii) Investment banking activities,

- (iii) Sales practices,
- (iv) Books and records,
- (v) Finance and operations, [and]
- (vi) Supervision[.], and
- (vii) *Internal Controls.*

If any of these areas do not apply to the member or member organization, the report should so state.

#### **Business Conduct**

Rule 401. (a) Every member, allied member and member organization shall at all times adhere to the principles of good business practice in the conduct of his or its business affairs.

(b) *Each member and member organization shall maintain written policies and procedures, administered pursuant to the internal control requirements prescribed under Rule 342.23, specifically with respect to the following activities:*

(1) *Transmittals of funds (e.g., wires, checks, etc.) or securities:*

(i) *from customer accounts to third party accounts (i.e., a transmittal that would result in a change of beneficial ownership.);*

(ii) *from customer accounts to outside entities (e.g., banks, investment companies, etc.);*

(iii) *from customer accounts to locations other than a customer's primary residence (e.g., post office box, "in care of" accounts, alternate address, etc.); and*

(iv) *between customers and registered representatives (including the hand-delivery of checks).*

(2) *Customer changes of address.*

(3) *Customer changes of investment objectives. The policies and procedures required under (b)(1) and (b)(2) above must include a means/method of customer confirmation, notification, or follow-up that can be documented.*

#### **Discretionary Power in Customers' Accounts**

Rule 408 (a) No member, allied member or employee of a member organization shall exercise any discretionary power in any customer's account or accept orders for an account from a person other than the customer without first obtaining written authorization of the customer.

(b) No member, allied member or employee of a member organization shall exercise any discretionary power in any customer's account, without first notifying and obtaining the approval of another person delegated under Rule 342(b)(1) with authority to approve the handling of such accounts. Every order entered on a discretionary basis by a member, allied member or employee of a member organization must be identified as discretionary on the order

at the time of entry. Such discretionary accounts shall receive frequent appropriate supervisory review by a person delegated such responsibility under Rule 342(b)(1), who is not exercising the discretionary authority. A written statement of the supervisory procedures governing such accounts must be maintained.

(c) No member or allied member or employee of a member organization exercising discretionary power in any customer's account shall (and no member organization shall permit any member, allied member, or employee thereof exercising discretionary power in any customer's account to) effect purchases or sales of securities which are excessive in size or frequency in view of the financial resources of such customer.

(d) The provisions of this rule shall not apply to discretion as to the price at which or the time when an order given by a customer for the purchase or sale of a definite amount of a specified security shall be executed. *The authority to exercise time and price discretion will be considered to be in effect only until the end of the business day on which the customer granted such discretion, absent a specific, written, contrary indication signed and dated by the customer. Any exercise of time and price discretion must be reflected on the order ticket.*

#### **Records of Orders**

Rule 410. (a) Every member or [his] member organization must [shall] preserve for at least three years the first two years in an easily accessible place, a record of:

[Transmitted to Floor]

(1) Every order transmitted directly or indirectly by such member or organization to the Floor, which record shall include the name and amount of the security, the terms of the order, the time when it was so transmitted, and the time at which a report of execution was received. Carried to the Floor]

[(2)] (1) every order received by such member or member organization, either orally or in writing, [and carried by such member to the Floor,] which record must [shall] include the name and amount of the security, the terms of the order, the time when it was so received and the time at [as] which a report of execution was received.

[Entered Off Hours]

[(3)] (2) every order entered by such member or member organization into the Off-Hours Trading Facility (as Rule 900 (Off-Hours Trading: Applicability and Definitions) defines that term), which record must [shall] include the name and amount of the security, the

terms of the order, the time when it was so entered, and the time at which a report of execution was received.

[Cancellation]

[(4)] (3) the time of the entry of every cancellation of an order covered by (1)[,] and (2) [and (3)] above.

[By Accounts] Changes In Account Name or Designation

Before any order covered by (1)[,] or (2) [or (3)] above is executed, there *must* [shall] be placed upon the order slip or other *similar* record of the member[, ] or [his] *member* organization the name or designation of the account for which such order is to be executed. No change in such account name (*including related accounts*) or designation (*including error accounts*) shall be made unless the change has been authorized by [the] a member, [or another member,] allied member, or a person or persons designated under the provisions of Rule 342(b)(1). [in his organization who shall,] *Such person must*, prior to giving his or her approval of [such] the *account designation* change, be personally informed of the essential facts relative thereto and [shall] indicate his or her approval of such change in writing on the order or other *similar record of the member or member organization*. The *essential facts relied upon by the person approving the change must be documented in writing and maintained in a central location*.

### Exceptions

Under exceptional circumstances, the Exchange may upon written request waive the requirements contained in (1), (2) and (3) above.

(b) Every order *in any manner transmitted or carried to the Floor* and [covered by (1) or (2) above to be] executed pursuant to Section 11(a)(1)(G) of the Act and Rule 11a1-1(T) thereunder *must* [shall] be identified in a manner that will enable the executing member to disclose to other members that the order is subject to those provisions.

(See also Rules 112A.10 and 123A.45.)

.10 *For purposes of this Rule, a person designated under the provisions of Rule 342(b)(1) to approve account name or designation changes must pass an examination acceptable to the Exchange.*

### INTERPRETATION

Rule 342 OFFICES—APPROVAL, SUPERVISION AND CONTROL

(a)(b)

.03 Annual Branch Office Inspection

[At least annual b]Branch office inspections by *members and member*

organizations are expected to *be conducted at least annually* pursuant to this Rule, unless *it has been* demonstrated to the satisfaction of the Exchange that because of proximity, special reporting or supervisory *practice, other arrangements[,] may satisfy the Rule's requirements*. [certain offices may not warrant an annual inspection.] *All required inspections must be conducted by a person who is independent of the ongoing supervision, control, or performance evaluation of the branch office (i.e., not the Branch Office Manager, Sales Manager, District/Regional Manager assigned to the office, or any other person performing a similar supervisory function)*. Written reports of these inspections, *or the written authorization of an alternative arrangement*, are to be kept on file by the organization for a minimum period of three years.

*An annual branch office inspection program must include, but is not limited to, testing and independent verification of internal controls related to the following areas:*

- (1) *Safeguarding of customer funds and securities,*
- (2) *Maintaining books and records,*
- (3) *Supervision of customer accounts serviced by Branch Office Managers,*
- (4) *Transmittal of funds between customers and registered representatives and between customers and third parties,*
- (5) *Validation of customer address changes, and*
- (6) *Validation of changes in customer account information.*

For purposes of this interpretation, "annual" means once in a calendar year.

\* \* \* \* \*

### 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. 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 Changes*

#### 1. Purpose

Cases involving misappropriation of funds and securities have highlighted the need to re-examine issues related to

both supervision and internal controls, including the appropriate application of such controls and the independent testing of their efficiency. In the course of reviewing the issues raised by these cases, Exchange staff has met with management of several member organizations, undertaken special sales practice examinations of potential problem areas, and conducted surveys of members' and member organizations' existing policies and procedures. As a result, the Exchange is proposing a number of initiatives intended to generally bolster the overall internal controls and procedures of members and member organizations and to specifically require such controls and procedures in certain areas that have been identified as particularly problematic. It is expected that the proposed amendments will help to focus and reinforce members' and member organizations' internal control policies. The proposals include the addition of paragraph .23 to NYSE Rule 342 ("Offices—Approval, Supervision and Control") which addresses internal control requirements generally, as well as amendments to Rule 401 ("Business Conduct") which identify and require specific internal control safeguards related to the transmission of customer funds and securities, and changes of customer address.

The proposals also address related supervision and/or control issues that were encompassed in the Exchange's review including amendments to: NYSE Rule 342 ("Offices—Approval, Supervision and Control") that would require systems and procedures to independently supervise sales managers who handle customer accounts; NYSE Rule 408 ("Discretionary Power in Customers' Accounts") that would clarify time limits on time-and-price discretionary authority; NYSE Rule 410 ("Records of Orders") that would expand the Rule's application and clarify its supervisory and recordkeeping provisions; and to the Interpretation of NYSE Rule 342 that would require persons who conduct branch office inspections to be independent of such office's ongoing supervision, control, or performance evaluation.

#### Supervision and Control

NYSE Rule 342 prescribes the general requirement that "[e]ach office, department or business activity of a member or member organization (including foreign incorporated branch offices) shall be under the supervision and control of the member organization establishing it and of the personnel

delegated such authority and responsibility." In this context, "supervision" refers to the ongoing, day-to-day review of each business activity to ensure overall compliance with applicable rules and regulations. A member organization's supervisory structure is reflected in its policy and the manner in which personnel implement the systems and procedures designed to enforce that policy.

"Control," on the other hand, refers to the development of these systems and procedures and to the independent oversight and testing of them in order to measure and maintain their effectiveness. Such internal controls typically involve random sampling of supervisory functions to identify shortcomings, gaps, or other inefficiencies. Internal controls also involve ongoing reassessment of these functions to determine whether they are serving their intended purpose (*i.e.*, have they been updated to address new or modified means of doing business?). Internal controls should, therefore, be considered a means by which the process of supervision is analyzed, tested, and refined. The following sets forth proposed internal control requirements, both general and specific, designed to highlight the importance of such controls, identify those areas where they can be most effectively implemented, and provide minimum standards for their application.

#### Internal Controls—General Requirement

Proposed paragraph .23 of NYSE Rule 342 elaborates upon the general requirement that members and member organizations develop and maintain adequate controls over each of their business activities. Paragraph .23 further requires that such controls must provide for the establishment of procedures for independent verification and testing of those business activities separate and apart from the day-to-day supervision of such functions. A summary of these actions is required to be included in the required Annual Report to a member organization's chief executive officer or managing partner per NYSE Rule 342.30.

In recognition of the fact that the "independent verification and testing" requirement may not be practical or reasonable for certain business models, an exemption from this requirement is available to members or member organizations that do not conduct a public business, or have a capital requirement of \$5,000 or less, or employ 10 or fewer registered representatives. This exemption does not, however, provide relief from the general requirement that internal controls be

developed, established, and effectively maintained.

#### Internal Controls—Specific Requirements

The following proposed amendments require that internal control policies and procedures be adopted that address specific areas identified to be particularly susceptible to potential abuse. These include the transmission of customer funds and securities and changes of customer address.

The Exchange states that it is recognized that no single approach to internal controls can be appropriate for all business models given differences in organizational size, supervisory structure, scope of business activities, products offered, location of branch offices, etc. Therefore, the controls established and implemented should reasonably conform to the nature of the business conducted.

#### Business Conduct: Transmission of Customers' Funds and Securities/ Customer Changes of Address

Proposed NYSE Rule 401(b)(1) clarifies that, consistent with their duty to adhere to principles of good business practice, members and member organizations must maintain written policies, procedures, and controls over the transmission of customer funds and securities. The proposed amendments specify certain types of transmission based on their potential for abuse. These include transmission of funds (*e.g.*, wires, checks, etc.) or securities:

- From customer accounts to third party accounts (*i.e.*, a transmittal that would result in a change of beneficial ownership);
- From customer accounts to outside entities (*e.g.*, banks, investment companies, etc.);
- From customer accounts to locations other than a customer's primary residence (*e.g.*, post office box, "in care of" account, alternate address, etc.); and
- Between customers and registered representatives (including the hand delivery of checks).

Proposed NYSE Rule 401(b)(2) requires written policies and controls to monitor customer changes of address, including a reasonable method of customer notification that can be documented. The purpose of this amendment is to prevent the delivery of confirmations, statements, and other account-related documentation to other than the beneficial owner of the account or their duly authorized agent. Proposed NYSE Rule 401(b)(3) requires written policies and controls to monitor

customer changes of investment objectives.

#### Additional Amendments

The following proposed amendments address additional specific supervision and/or control issues identified by Exchange staff during the course of their review:

#### Supervision of Sales Managers

Proposed NYSE Rule 342.19 requires the development and implementation of written policies and procedures to independently supervise sales managers and other supervisory personnel who handle customer accounts. This requirement applies to Branch Office Managers, Regional/District Sales Managers, or any person performing a similar supervisory function. Such policies and procedures are expected to encompass all sales-related activities to include, at a minimum, new account approval, the monitoring of customer account activity (for suitability, unauthorized transactions, etc.), and prior approval of account designation changes (both "cancel and re-bills" and "order errors") pursuant to NYSE Rule 410. This provision is intended to ensure all sales activity is monitored for compliance with applicable regulatory requirements by persons who do not have a personal interest in such activity and to remove doubt with respect to whether managers may "self-approve" their sales-related activities.

#### Time-and-Price Discretionary Power in Customers' Accounts

Proposed Amendment to NYSE Rule 408(d) limits the authority of registered representatives to exercise time-and-price discretion<sup>5</sup> over customer orders, absent a signed authorization from the customer, to the end of the business day on which the customer granted such discretion. NYSE Rule 408(d) currently allows the exercise of time-and-price discretion, without written authorization, on orders for the purchase or sale of a definite amount of a specified security, but is silent on such authority's length of effectiveness. The absence of clear guidance on this point has been the source of interpretive uncertainty. The proposed amendment's establishment of a specific time limitation will eliminate uncertainty in this regard.

<sup>5</sup> Time-and-price discretion is authority granted (usually informally) by a customer to a registered representative that allows the representative to exercise judgment, based on prevailing market conditions, as to when and at what price to execute a customer order.

### Records of Orders: Record Preservation/ Account Designation Changes

NYSE Rule 410, as currently written, applies only to orders transmitted or carried to the Floor of the Exchange. It requires members and member organizations to preserve a record of certain specified terms of each order, and it prescribes procedures for administering changes in account name or designation on previously executed orders. The proposed amendments would:

- Expand the application of the Rule to all orders (sent to any market-place), not just those carried or transmitted to the Floor. The Exchange states that the expansion of the Rule to include all orders sent to any marketplace is necessary for effective regulatory oversight and enforcement proceedings. The Exchange also states that the information requested is not duplicative of existing NASD recordkeeping requirements.<sup>6</sup>

- Require that a person designated to approve account name or designation changes be qualified by passing an examination acceptable to the Exchange. Currently, the Rule reads that such changes shall be approved by a person or persons designated under the provisions of NYSE Rule 342(b)(1). While this provision requires that the designated person be "qualified," it does not specifically prescribe an examination requirement. Given that account name and designation changes can be indicative of serious sales practice violations such as unauthorized or unsuitable trading, the Exchange has long held that this exceptionally important and sensitive area be subject to heightened supervisory scrutiny. Accordingly, proposed paragraph .10 would specify that, for purposes of NYSE Rule 410, a person designated under the provisions of NYSE Rule 342(b)(1) would be required to pass a qualifying examination such as the General Securities Sales Supervisor Qualification Examination ("Series 9/10"), the Compliance Official Examination ("Series 14"), or other sales supervisory examination acceptable to the Exchange.

- Clarify that the Rule applies to all account name and designation changes, including related accounts and order errors. Some have read the current Rule to apply only to "Cancel-and-Rebills" in which a trade is moved from one customer account to another unrelated

account. The proposed amendments make clear that the provisions of the Rule also apply to designation changes to related accounts (e.g., "Smith Trading Account" to "Smith IRA") and to orders cancelled and moved into an error account.

- Require documentation of the essential facts relied upon when approving such account name or designation changes in order to maintain a record, available for review, of the basis for the change.

### Annual Branch Office Inspection

The proposed amendments also include changes to the written Interpretation of NYSE Rule 342, clarifying that persons who conduct a member organization's annual branch office inspection must be independent of any ongoing supervision, control, or performance evaluation in connection with the particular office. This clarification recognizes that, with regard to such persons, an objective perspective is best maintained by having no interest in a branch's "bottom line" and by being outside of the branch's supervisory structure. In addition, the Interpretation requires that annual branch office inspection programs include, at minimum, testing and verification of specified internal controls including:

- Safeguarding of customer funds and securities,
- Maintaining books and records,
- Supervision of customer accounts serviced by Branch Office Managers,
- Transmittal of funds between customers and registered representatives and between customers and third parties,
- Validation of customer address changes, and
- Validation of changes in customer account designation.

### 2. Statutory Basis

The basis for the proposed rule change is the requirement under section 6(b)(5) of the Act<sup>7</sup> that an Exchange have rules that are designed to promote just and equitable principles of trade, to remove impediments to and to perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed rule change is intended to foster the strengthening of NYSE members' and member organizations' internal controls and supervisory systems.

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

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

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

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

Within 35 days of the 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 self-regulatory organization consents, the Commission will:

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

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

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. 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 filed with the Commission and all written communications relating to the proposed rule changes 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 No. SR-NYSE-2002-36 and should be submitted by December 18, 2002.

<sup>6</sup> Telephone call with Donald Van Weezel, Vice President, Regulatory Affairs, NYSE, and Florence Harmon, Senior Special Counsel, Division of Market Regulation, Commission, October 25, 2002.

<sup>7</sup> 15 U.S.C. 78f(b)(5).

For the Commission, by the Division of Market Regulation, pursuant to the delegated authority.<sup>8</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 02-30040 Filed 11-26-02; 8:45 am]

BILLING CODE 8010-01-P

## UNITED STATES SENTENCING COMMISSION

### Sentencing Guidelines for United States Courts

**AGENCY:** United States Sentencing Commission.

**ACTION:** Notice of proposed temporary, emergency amendments to sentencing guidelines, policy statements, and commentary. Notice of intent to repromulgate temporary, emergency amendments as permanent, non-emergency amendments. Request for public comment.

**SUMMARY:** Pursuant to section 994(a), (o), and (p) of title 28, United States Code, sections 805, 905, and 1104 of the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, and section 314 of the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, the Commission is considering promulgating certain amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. Issues for comment follow each proposed amendment.

**DATES:** Written public comment on these proposed emergency amendments should be received by the Commission not later than December 18, 2002, in anticipation of a vote to promulgate these emergency amendments at the Commission's January 2003 public meeting. Thereafter, written public comment on whether to repromulgate the emergency amendments as permanent, non-emergency amendments should be received by the Commission not later than February 18, 2003.

**ADDRESSES:** Public comment should be sent to: United States Sentencing Commission, One Columbus Circle, NE., Suite 2-500, Washington, DC 20002-8002, Attention: Public Information.

**FOR FURTHER INFORMATION CONTACT:** Michael Courlander, Public Affairs Officer, Telephone: (202) 502-4590.

**SUPPLEMENTARY INFORMATION:** The United States Sentencing Commission is

an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. § 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. § 994(o) and submits guideline amendments to the Congress not later than the first day of May of each year pursuant to 28 U.S.C. § 994(p).

The Commission seeks comment on the proposed amendments, issues for comment, and any other aspect of the sentencing guidelines, policy statements, and commentary.

The proposed amendments are presented in this notice in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part for comment and suggestions for alternative policy choices; for example, a proposed enhancement of [2] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

Additional information pertaining to the proposed amendments described in this notice may be accessed through the Commission's Web site at <http://www.ussc.gov>.

**Authority:** 28 U.S.C. § 994(a), (o), (p), (x); sections 805, 905, and 1104 of Pub. L. 107-204; section 314 of Pub. L. 107-155; USSC Rules of Practice and Procedure, Rule 4.4.

**Diana E. Murphy,**

*Chair.*

#### 1. Corporate Fraud

*Synopsis of Proposed Amendment:* This proposed amendment implements the Sarbanes-Oxley Act of 2002, Pub. L. 107-204 (the "Act"). The Act requires the Commission to promulgate guideline amendments under emergency amendment authority not later than January 25, 2003. In addition to several general directives regarding fraud and obstruction of justice offenses, the Act also sets forth specific directives that require the Commission to promulgate amendments addressing,

among other things, officers and directors of publicly traded companies who commit fraud and related offenses, offenses that endanger the solvency or financial security of a substantial number of victims, fraud offenses that involve significantly greater than 50 victims, and obstruction of justice offenses that involve the destruction of evidence.

First, the proposed amendment sets forth two options for amending § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) to address the directive contained in section 1104 of the Act pertaining to fraud offenses involving significantly greater than 50 victims. Option One expands the victims table in § 2B1.1(b)(2). Currently, subsection (b)(2) provides a two level enhancement if the offense involved more than 10, but less than 50, victims or was committed through mass-marketing, or a four level enhancement if the offense involved 50 or more victims. Option One provides an additional two levels, for a total of six levels, if the offense involved 250 victims or more. Alternatively, Option Two provides an encouraged upward departure provision if the offense involved substantially more than 50 victims.

Second, the proposed amendment modifies subsection § 2B1.1(b)(12)(B) to address directives contained in sections 805 and 1104 of the Act pertaining to securities and accounting fraud offenses and fraud offenses that endanger the solvency or financial security of a substantial number of victims. Subsection (b)(12)(B) currently provides a four level enhancement and a minimum offense level of 24 if the offense substantially jeopardized the safety and soundness of a financial institution. The proposed amendment expands the scope of this enhancement to apply to offenses that substantially endanger the solvency or financial security of a publicly traded company. The enhancement does not require the court to determine whether the offense endangered the solvency or financial security of each individual victim. Such a determination likely would unduly complicate the sentencing process. Instead the enhancement is based on a presumption that if the offense conduct endangered the solvency or financial security of a publicly traded company, the offense similarly affected a substantial number of individual victims. The proposed amendment also

<sup>8</sup> 17 CFR 200.30-3(a)(12).