

# SEC NEWS DIGEST

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## COMMISSION ANNOUNCEMENTS

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### SEC MOURNS PASSING OF FORMER COMMISSIONER A.A. SOMMER, JR.

The Commission today released the following statement:

We are deeply saddened at the passing of former Commissioner A.A. Sommer, Jr. Al Sommer was a giant. Sworn in on August 6, 1973, he served with Chairman Ray Garrett, Jr. and Commissioners Irv Pollack, John Evans and Philip Loomis. Extremely thoughtful, knowledgeable, and hard-working, Commissioner Sommer was instrumental in the SEC's decision to eliminate fixed commissions rates, one of the major events in securities regulation in the last 30 years.

But Al Sommer did more than bring investors competitive rates. He typified integrity. By word and example, he exhorted colleagues, and especially lawyers, to exercise sound professional judgment. After Al left the Commission in 1976, he continued to be influential as a leader of the securities bar. He was the person that the Commission and the public could always look to as the honest broker on any issue. For these reasons and others, Al was chosen to be Chairman of the Public Oversight Board for the accounting profession. Over the course of his illustrious career, he served in many other positions with unique verve and constant excellence.

Samuel Johnson once said of Edmund Burke that if a person should have no more exposure to Burke than sharing a shed with him to get out of the rain, he would afterwards say, "This is an extraordinary man." That is also an accurate description of Al Sommer. He was an extraordinary man. (Press Rel. 2002-10)

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## RULES AND RELATED MATTERS

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### AMENDMENT TO RULE 31-1 UNDER THE SECURITIES EXCHANGE ACT OF 1934

The Commission adopted amendments to Rule 31-1 under the Securities Exchange Act of 1934 to conform Rule 31-1 to H.R. 1088, the Investor and Capital Markets Fee Relief Act. The amendments became effective on January 16, 2002. (Rel. 34-45291)

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## **ENFORCEMENT PROCEEDINGS**

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### **COMMISSION SUSTAINS NASD DISCIPLINARY ACTION AGAINST KEVIN KUNZ AND KUNZ AND CLINE INVESTMENT MANAGEMENT, INC.**

The Commission has sustained NASD disciplinary action against Kevin D. Kunz (Kunz), a formerly registered representative of NASD and principal of Kunz and Cline Investment management, Inc. (K&C), and K&C, a member of the NASD. The NASD censured both of them; fined them \$20,000, jointly and severally; fined Kunz \$5,000, individually; and suspended Kunz from associating with any member firm for 30 calendar days and in a principal capacity for one year, the suspensions to run concurrently. The NASD also ordered Kunz to requalify as a representative within 90 days of the conclusion of his suspension as a representative, or to cease to function in that capacity until he requalified, and to requalify as a principal before functioning in that capacity after conclusion of his suspension as principal. Further, the NASD ordered K&C to retain an independent consultant, and upheld the District Business Conduct Committee's imposition of \$2,597.20 in hearing costs.

The Commission found that Kunz and K&C used private placement memoranda to sell the securities of VesCor Capital Corporation (VesCor) that misrepresented material information about VesCor's largest asset, and omitted disclosure of the financial relationship between VesCor and Kunz and K&C and the litigation history of VesCor's principal.

The Commission found further that Kunz and K&C violated the Securities Act of 1933 by selling securities that were neither registered with the Commission nor exempt from registration, and that Kunz made payments to an unregistered individual for the sale of VesCor securities.

The Commission concluded that Kunz and K&C violated NASD's Conduct Rule 2110 which requires that a member, in conducting business, observe high standards of commercial honor and just and equitable principles of trade. Based on its review of the record, the Commission also concluded that the sanctions imposed by the NASD were not excessive, or an undue burden on competition. (Rel.34-45290; File No. 3-9960)

### **SEC OBTAINS PRELIMINARY INJUNCTION AND APPOINTMENT OF A RECEIVER IN CASE CHARGING HEDGE FUND AND ITS MANAGER WITH "PORTFOLIO PUMPING" AND OTHER FRAUD**

The Commission announced today that it has obtained a preliminary injunction against Burton G. Friedlander, 62, and four related entities, in a case involving "portfolio pumping" and other securities fraud pending in the United States District Court for the Southern District of New York. In a hearing in December, Judge Kimba M. Wood also granted the Commission's request for the appointment of a receiver for the related entities, Friedlander International Limited, Friedlander Management Limited, Friedlander Limited Partnership, and Friedlander Capital Management Corporation. Judge Wood appointed Andrew Irving of the New York City firm Robinson, Silverman, Pearce, Aronsohn & Berman as the receiver for those entities. Friedlander, a securities trader, is a resident of Greenwich, Connecticut. The defendants have filed a notice of appeal of Judge Wood's decision.

The Commission filed its complaint in May of this year, alleging fraud in connection with

Friedlander's management of the assets of Friedlander International Limited, an overseas hedge fund. The Commission contended that Friedlander inflated the Hedge Fund's net asset value by improperly and arbitrarily valuing certain unlisted securities of a company in which Friedlander and entities he controlled had heavily invested. The Commission's complaint also alleged that, between at least August 2000 and December 2000, Friedlander engaged in purchases of a thinly traded common stock as part of a manipulative scheme to inflate the value of that stock and to inflate the Hedge Fund's net asset value. SEC Litigation Release No. 17021 (June 1, 2001)

In granting the preliminary injunction, Judge Wood determined that Friedlander had disregarded a court-ordered process for obtaining input from the investors and had attempted to withdraw money from a Hedge Fund account despite a prior commitment not to do so without obtaining a court order. Judge Wood cited Friedlander's past conduct, the danger of wasting investor assets, and the need to determine the Hedge Fund's activities as the bases for ordering the preliminary injunction. Judge Wood also found that a receiver should be in place because the costs of a receiver were outweighed by the likelihood of future harm to the investors.

In addition to the relief granted, the Commission seeks permanent injunctive relief against Friedlander and the other defendants, accountings, disgorgement of ill-gotten gains, civil monetary penalties, and other relief. [SEC v. Burton Friedlander, Friedlander International Limited, Friedlander Management Limited, Friedlander Capital Management, Friedlander Limited Partnership, and Opal International Fund, Civil Action No. 01 Civ. 4658, SDNY] (LR-17315)

### **CIVIL CONTEMPT HEARING SCHEDULED AGAINST PHILIP YODER FOR FAILURE TO COMPLY WITH SEC SUBPOENAS**

The Commission announced that on January 8 the Honorable Suzanne B. Conlon of the United States District Court for the Northern District of Illinois ordered Philip J. Yoder (Yoder) to appear and show cause why he should not be held in civil contempt for failing to produce documents and give testimony pursuant to the court's December 13, 2001 order. The December 13, 2001 order arises out of a subpoena enforcement action the Commission filed against Yoder, a resident of Goshen, Indiana, for his failure to comply with two Commission investigative subpoenas requiring the production of documents and testimony. Pursuant to the court's order and agreement of the parties, Yoder was required to produce documents by December 19, 2001 and appear for testimony on December 27, 2001. Yoder failed, however, to appear for testimony or produce documents pursuant to the order. Consequently, the Commission filed a motion for entry of an order to show cause why Yoder should not be held in civil contempt for failing to obey the court order.

The subpoenas were issued in a non-public investigation into whether Yoder and others participated in one or more fraudulent investment schemes. According to papers filed with the court, the Commission is investigating whether Yoder, through an entity called All the Way to the Top (ATWTTT), may have fraudulently raised over \$700,000 from approximately 160 investors by misrepresenting the nature and risk of the investment. In addition, the court papers alleged that Yoder may be involved in a prime bank scheme by selling mid-term notes trading on overseas markets which allegedly generate huge returns for the investor. These instruments, however, do not exist. The Commission's investigation will seek to determine whether Yoder may have fraudulently raised over \$1.2 million and made over \$18 million in connection with such trades. The judge has set the show cause hearing for January 29, 2002. [SEC v. Philip J. Yoder, USDC, ND Ill., No. 01-C-9426] (LR-17318)

## **CIVIL ACTION AGAINST LEWIS MCCONNELL, JR., NED HUGGINS AND GREGORY WOOD**

On January 16, the Commission filed a complaint in the United States District Court for the District of Columbia, charging three individuals with conducting a fraudulent "prime bank note" scheme that raised over \$7 million from at least 21 investors. According to the Commission's complaint, Lewis J. McConnell, Jr., of Los Angeles California, and Ned L. Huggins and Gregory T. Wood, both residents of South Carolina, sold interests in what were, in truth, fictitious financial instruments. The defendants promised investors rates of return as high as 25% per week, with little or no investment risk.

Huggins and Wood consented to the entry of a final judgment permanently enjoining them from violating the anti-fraud and registration provisions of the federal securities laws, and waiving payment of civil monetary penalties based on their inability to pay. The Commission's action against McConnell, seeking a permanent injunction against violations of the same provisions and civil monetary penalties, is pending. All funds obtained by the defendants as a result of their illegal scheme have been returned to investors. [SEC v. Lewis J. McConnell, Jr., Ned L. Huggins and Gregory T. Wood, USDC, D.D.C., Civil Action No. 02 0075 RCL] (LR-17322)

## **SEC SETTLES FRAUD CLAIMS AGAINST INSURANCE AGENTS**

The Commission announced today that it has accepted offers of settlement from defendants Woody Keith Lowe, Kurtis Keith Lowe, Jerry Lynn Ruyle and Robert Alen Blackburn, to resolve a civil action alleging violations of the registration, anti-fraud and broker-dealer registration provisions of the federal securities laws.

The Commission alleged that defendants sold promissory notes issued by Chemical Trust, a purported business trust, which proved to be instruments of a nationwide Ponzi scheme. The promissory notes were claimed to be secured by surety bonds issued by United States Guarantee Corporation, an Arizona based surety company. In reality, the control persons behind Chemical Trust were diverting investor funds to their own use and the surety company held no assets with which to secure the promissory notes. The Commission alleged that the defendants were in a position to learn of the issuer's fraudulent scheme, but failed to conduct any meaningful due diligence before selling the securities to their insurance clients. The Commission further alleged the defendants made fraudulent statements in connection with the sale of the Chemical Trust promissory notes and acted as unregistered brokers. The defendants consented, without admitting or denying the allegations in the complaint, to the entry of a final judgment permanently enjoining each from future violations of Section 17(a) of the Securities Act of 1933 and Sections 10(b) and 15(a) of the Securities and Exchange Act of 1934 and Rule 10b-5 thereunder. In addition, each defendant consented to the entry of an administrative order barring him from association with any broker or dealer. [SEC v. Kurtis Keith Lowe, Woody Keith Lowe, Jerry Lynn Ruyle and Donald Alen Blackburn, USDC ND/TX, 400-CV-0467-A] (LR-17323); (Administrative Proceedings: In the Matter of Robert Blackburn - 34-45292, File No. 3-10681; In the Matter of Kurtis Keith Lowe - 34-45293, File No. 3-10682; In the Matter of Woody Keith Lowe - 34-45294, File No. 3-10683; In the Matter of Jerry Lynn Ruyle - 34-45296, File No. 3-10684)

## **SEC FILES ACTION IN FEDERAL DISTRICT COURT AGAINST W.J. NOLAN TO ENFORCE THE COMMISSION'S ADMINISTRATIVE ORDER**

The Commission announced that on January 8 it filed an Application for an Order Directing Compliance with an Order of the Securities and Exchange Commission Under Section 21(e)(1) of the Securities Exchange Act of 1934. The Commission's Application alleges that W.J. Nolan has failed to comply with the terms of the Commission's September 24, 2001 Order Instituting Proceedings, Making Findings and Imposing Remedial Sanctions, which among other things, required W.J. Nolan to pay disgorgement and prejudgment interest in the amount of \$192,028.29 within 30 days of the entry of the Order. As part of W.J. Nolan's settlement with the Commission regarding its alleged violations of the federal securities laws, W.J. Nolan consented to the entry of the Order without admitting or denying the Commission's findings.

In its September 24, 2001 Order, the Commission found, among other things, that between April and November 1997, ten registered representatives at W.J. Nolan's offices located in Chicago, Illinois and on Park Avenue in New York engaged in a pattern of sales practice abuses, including churning customer accounts and making unauthorized and unsuitable trades in microcap and penny stocks. In addition, the Commission found that W.J. Nolan did not have in place a system of supervision reasonably designed to prevent and detect sales practices violations by the registered representatives in its Chicago and Park Avenue offices. As a result of this conduct, the Commission Order found that Defendant W.J. Nolan failed reasonably to supervise individuals subject to its supervision with the meaning of Section 15(b)(4) of the Exchange Act and willfully violated Sections 15(b)(7) and 15(g) of the Exchange Act and Rules 15b7-1, 15g-2, 15g-3 and 15g-6 promulgated thereunder. [SEC v. W.J. Nolan & Co., Inc., USDC, D.C., Case Number 1: 02CV00044] (LR-17324)

## **SEC INSTITUTES BROKER-DEALER BAR AGAINST FORMER STOCKBROKER**

The Commission announced today that it has barred San Francisco stockbroker Daniel Patrick O'Connell, 37, from associating with any broker or dealer. The Commission entered its order in a settled administrative proceeding against O'Connell.

The order followed both criminal and civil proceedings against O'Connell in United States District Court in San Francisco. In the criminal case, O'Connell pleaded guilty to three counts of wire fraud for misappropriating \$6 million in client funds. Separately, the Commission brought a civil proceeding against O'Connell for securities fraud which was settled by the entry of a permanent injunction against future violations. In its civil case, the Commission alleged O'Connell fraudulently transferred \$6 million from his clients' accounts into his own trading account in the hopes of generating a quick personal profit, but instead lost approximately \$4.3 million in a four-week spree of securities speculation.

O'Connell consented to the Commission's order without either admitting or denying the Commission's findings. The administrative proceeding against O'Connell was instituted based on entry of an injunction against future violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. (Rel. 34-45298; File No. 3-10685)

## **COMMISSION FILES SUBPOENA ENFORCEMENT ACTION AGAINST DENNIS HERULA**

On January 14, the Commission filed an action to enforce a "forthwith" subpoena against Dennis S. Herula, a former broker at the Cranston, Rhode Island branch of Raymond James

Financial Services, Inc. The Commission served the subpoena on Herula at the San Francisco Airport on January 9, 2002, requiring him to immediately turn over financial account records and other documents he was carrying into the U.S. from Bermuda. When served with the subpoena, however, Herula refused to comply, claiming he did not have any such documents in his possession. The Commission alleges in its papers that, contrary to his representations, Herula did have responsive financial account records with him when he was served with the subpoena. Accordingly, the Commission filed its Application for an Order to Show Cause and For an Order Requiring Compliance with Administrative Subpoena Against Dennis S. Herula. The action was filed in Rhode Island federal district court.

In its Application and supporting papers, the Commission alleges that, on December 26, 2001, the Commission issued an Order Directing Private Investigation and Designating Officers to Take Testimony (Formal Order) in the matter of Brite Business Corporation. The Formal Order authorizes the staff to conduct an investigation into whether Brite Business or others violated the federal securities laws in connection with the solicitation of investments, and whether investor funds subsequently were misappropriated. According to the Commission, Herula, who was terminated by Raymond James in January 2001, served as the broker for at least two Raymond James accounts that may have held millions of dollars in investor funds raised by Brite Business. The Commission staff has been investigating Herula's activities to determine, among other things, what happened to Brite Business investor funds.

The Commission alleges that Herula was arrested in Bermuda in December 2001 after he purportedly submitted false documents to a Bermuda bank in connection with an attempt to transfer \$10 million from banks in Europe and South America. When Herula was arrested, the Bermuda police seized from him two laptop computers and numerous documents. According to the Commission, the Bermuda police confirmed that the documents and laptops they seized contained financial account information that would have been responsive to the Commission's January 9 subpoena. Herula subsequently pled guilty to the offense of "uttering a forged document" and was given a one month prison sentence in Bermuda. According to the Commission, upon Herula's release from jail on January 9, 2002, the Bermuda Police returned to him the documents and laptops they had seized, and Herula subsequently boarded a flight to the United States carrying the materials with him. The Commission alleges that, when Herula arrived at his final destination in San Francisco on the evening of January 9, he was carrying a black bag similar to the one that had contained the laptops earlier that day. According to the Commission, the Bermuda police also confirmed that there was enough room in the black bag for Herula to have fit the documents that were returned to him as well. Despite this evidence, the Commission alleges that Herula claimed, first to the process server and subsequently to the Commission staff in a telephone call the next day, that he did not have any responsive materials in his possession when he was served with the subpoena. According to the Commission, Herula told the process server that the documents were in Boston, and then contradicted himself the next day when he told the Commission staff the documents were in Rhode Island.

Pursuant to its Application, the Commission is seeking an order directing Herula to show cause why the Court should not enter an order requiring Herula to comply with the Commission's subpoena for documents, and an order compelling Herula to immediately produce the subpoenaed documents. [SEC v. Herula, Misc No. 2-008ML, D. RI] (LR-17325)

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## INVESTMENT COMPANY ACT RELEASES

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### **MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, ET AL.**

A notice has been issued giving interested persons until February 7 to request a hearing on an application filed by Massachusetts Mutual Life Insurance Company and Massachusetts Mutual Variable Life Separate Account I (collectively, Applicants). The Applicants seek an order pursuant to Section 26(c) of the Investment Company Act approving the substitution of Class II shares of MML Equity Index Fund (Substituted Portfolio) for shares of Dreyfus Life and Annuity Index Fund d/b/a Dreyfus Stock Index Fund (Removed Portfolio). In addition, the Applicants request an order pursuant to Section 17(b) of the Act to permit in-kind transactions in connection with the substitution. (Rel. IC-25365 - January 15)

### **WELLS FARGO FUNDS TRUST, ET AL.**

A notice has been issued giving interested persons until February 11, 2002, to request a hearing on an application filed by Wells Fargo Funds Trust, et al. for an order exempting applicants from Section 15(f)(1)(A) of the Investment Company Act. The order would permit a registered investment company not to reconstitute its board of directors following an acquisition of substantially all of the assets of another registered investment company. (Rel. IC-25366 - January 15)

### **GREENWICH STREET EMPLOYEES FUND, L.P., ET AL.**

An order has been issued on an application filed by Greenwich Street Employees Fund, L.P., et al. under Sections 6(b) and 6(e) of the Investment Company Act. The order exempts certain employees' securities companies formed for the benefit of key employees of Citigroup Inc. and its affiliates from certain provisions of the Act. (Rel. IC-25367 - January 16)

### **ONE FUND, INC., OHIO NATIONAL FUND, INC., DOW TARGET VARIABLE FUND LLC, AND OHIO NATIONAL INVESTMENTS, INC.**

An order has been issued on an application filed by One Fund, Inc., Ohio National Fund, Inc., Dow Target Variable Fund LLC, and Ohio National Investments, Inc. under Section 6(c) of the Investment Company Act granting an exemption from Section 15(a) of the Act and Rule 18f-2 under the Act. The order permits applicants to enter into and materially amend sub-advisory agreements without shareholder approval. (Rel. IC-25368 - January 16)

### **AXA PREMIER FUNDS TRUST, ET AL.**

An order has been issued on an application filed by AXA Premier Funds Trust, et al. granting relief from Sections 10(f), 12(d)(3), 17(a) and 17(e) of the Investment Company Act and from Rule 17e-1 under the Act. The order permits certain registered open-end management investment companies advised by several investment advisers to engage in principal and brokerage transactions with a broker-dealer affiliated with one of the investment advisers and to purchase securities in certain underwritings. The transactions would be between the broker-dealer and a portion of the investment company's portfolio not advised by the

adviser affiliated with the broker-dealer. The order also permits these investment companies not to aggregate certain purchases from an underwriting syndicate in which an affiliated person of one of the investment advisers is a principal underwriter. Further, the order permits a portion of an investment company's portfolio to purchase securities issued by a broker-dealer, which is an affiliated person of an investment adviser to another portion, subject to the limits in Rule 12d3-1 under the Act. (Rel. IC-25369 - January 16)

#### **HARBOR FUND AND HARBOR CAPITAL ADVISORS, INC.**

A notice has been issued giving interested persons until February 11, 2002, to request a hearing on an application filed by Harbor Fund and Harbor Capital Advisors, Inc. (Applicants) for an order granting an exemption from Section 15(a) of the Investment Company Act and Rule 18f-2 under the Act to permit the Applicants to enter into and materially amend subadvisory agreements without shareholder approval. The order would amend a prior order. (Rel. IC-25370 - January 16)

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### **HOLDING COMPANY ACT RELEASES**

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#### **NATIONAL GRID GROUP PLC, ET AL.**

An order has been issued granting a proposal by National Grid Group plc (National Grid), a registered holding company, New National Grid plc, its nonutility subsidiary, National Grid (US) Holdings Limited, National Grid (US) Investments, National Grid Luxembourg 1 SARL, National Grid Luxembourg 2 SARL, National Grid General Partnership, National Grid Holdings Inc., National Grid USA, all registered holding company subsidiaries of National Grid, and their direct or indirect public-utility company and nonutility subsidiaries, and by Niagara Mohawk Holdings, Inc. (NiMo), a holding company exempt from regulation under section 3(a)(1) of the Act, and its direct and indirect public-utility company and nonutility subsidiaries. The order, among other things, authorized (1) a reorganization of the National Grid system, by organizing New National Grid as the holding company over National Grid; (2) New National Grid to acquire indirectly NiMo, by effecting a merger of NiMo with Grid Delaware, Inc., a wholly owned direct subsidiary of New National Grid plc; (3) the issuance and sale of securities to finance the proposed acquisition and for other corporate business; and (4) related transactions. (Rel. 35-27490; International Series Rel. 1255)

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### **SELF-REGULATORY ORGANIZATIONS**

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#### **PROPOSED RULE CHANGE**

A proposed rule change (SR-NASD-2001-85) has been filed by the National Association of Securities Dealers applying affirmative determination requirements to short sale orders received by members from non-member broker/dealers. Publication of the proposal is expected in the Federal Register during the week of January 21. (Rel. 34-45257)



## **EXTENSION OF COMMENT PERIOD**

The Commission has decided, pursuant to Section 19(b)(2) of the Securities Exchange Act of 1934, to extend the comment period for a proposed rule change filed by the National Association of Securities Dealers (Rel. 34-45156, January 3, 2002, SR-NASD-2001-90) relating to Nasdaq's proposed separation from the NASD and the establishment of the NASD Alternative Display Facility. (Rel. 34-45278)

## **IMMEDIATE EFFECTIVENESS OF PROPOSED RULE CHANGES**

A proposed rule change filed by the Philadelphia Stock Exchange extending a PACE Automatic Price Improvement Pilot Program (SR-Phlx 2002-01) has become effective under Section 19(b)(3)(A) of the Securities Exchange Act of 1934. Publication of the proposal is expected in the Federal Register during the week of January 21. (Rel. 34-45284)

The National Association of Securities Dealers filed a notice of filing and immediate effectiveness of a proposed rule change under Section 19(b)(3)(A) of the Securities Exchange Act of 1934 (SR-NASD-2001-93) establishing a fee schedule for Nasdaq's application of the Primex Auction System. Publication of the notice in the Federal Register is expected during the week of January 21. (Rel. 34-45285)

A proposed rule change filed by the National Association of Securities Dealers to extend the Pilot for Limit Order Protection of securities priced in decimals (SR-NASD-2002-07) has become effective under Section 19(b)(3)(A) of the Securities Exchange Act of 1934. Publication of the proposal is expected in the Federal Register during the week of January 21. (Rel. 34-45286)

A proposed rule change filed by the Philadelphia Stock Exchange (SR-Phlx-2001-117) relating to an increase to the Exchange's technology fee has become effective under Section 19(b)(3)(A) of the Securities Exchange Act of 1934. Publication of the proposal is expected in the Federal Register during the week of January 21. (Rel. 34-45289)

## **DELISTING GRANTED**

An order has been issued granting the application of the American Stock Exchange to strike from listing and registration the Common Stock, \$1.00 par value, of Hampton Industries, Inc., effective at the opening of business on January 16, 2002.