The rule change also adds the following terms to NSCC Rule 1 (Definition and Description): ''CNS Position,'' ''New Close Out Position,'' ''RVP/DVP Transaction,'' and ''RVP/DVP Customer.''

b. DVP/RVP Transactions

The rule change adds a new Section 3 to Rule 18, which pertains to CNS or balance order RVP/DVP transactions.[3] The RVP/DVP transactions covered by proposed Section 3 are those in which the RVP/DVP customer[4] (1) has executed an RVP/DVP transaction with the NSCC member for which NSCC has ceased to act or with an introducing broker-dealer which clears through an NSCC member for which NSCC has ceased to act and (2) would have taken delivery of the cash or securities from the broker-dealer for which NSCC has ceased to ace on an RVP/DVP basis at its custodian bank or other depository agent in the absence of the default.

Under the new rule, after NSCC has ceased to act for a member, NSCC will attempt to complete: (1) All open RVP/DVP transactions of which NSCC is aware prior to ceasing to act but only to the extent that the completion of the RVP/DVP transactions would not increase the size of the position in any security that NSCC would have to close-out and (2) any additional open RVP/DVP transactions to the extent deemed appropriate by NSCC's Board of Directors. NSCC's obligation set forth in (1) remains regardless of whether NSCC would gain or lose money by completing such transactions, and any determinations by the NSCC Board to complete any additional RVP/DVP transactions would be made without regard to the potential profit or loss for NSCC in any individual transaction. In either case, NSCC would have no obligation to complete any open RVP/DVP transaction in an issue if: (1) NSCC believed it could not complete all RVP/DVP transactions in such issue that it would be obligated to attempt to complete under this new provision; (2) there were allegations of fraud or other questionable activities with respect to an issue; or (3) NSCC believed that the completion of an RVP/DVP transaction in an issue could not be completed.

[3] The term ''RVP/DVP transaction'' is defined in NSCC Rule 1 to mean any wholly executory receipt-versus-payment or delivery-versus-payment transaction between an NSCC member and an RVP/DVP customer. The term ''RVP/DVP customer'' is defined in Rule 1 to mean a party who has executed a RVP/DVP transaction with an NSCC member for whom NSCC has declined or ceased to act, or with an introducing broker who clears through an NSCC member for whom NSCC has declined or ceased to act.

[4] *Supra* note 3.

The rule change requires NSCC to provide notice of NSCC's intent to complete the RVP/DVP transactions to the trustee or receiver of the member for whom NSCC has ceased to act (if one has been appointed) and to the relevant RVP/DVP customers or the RVP/DVP customers' depository agents or their depository agents' depositories. This notice will alert the RVP/DVP customer that completion of any such transaction with NSCC constitutes a presumed waiver by the RVP/DVP customer of any claim arising out of such transactions against the member for whom NSCC has ceased to act, its receiver or trustee (or any successor trustee), or SIPC.[5]

II. Discussion

Section 17A(b)(3)(F)[6] of the Act requires that the rules of a clearing agency be designed among other things, to protect investors and the public interest. As set forth below, the Commission finds that NSCC's rule change is consistent with this obligation under the Act.

The Commission finds that allowing NSCC to complete RVP/DVP transactions after it ceases to act for an insolvent member could benefit customers, counterparties, and creditors of the insolvent broker-dealer by minimizing the disruptive market effects and the large administrative burdens and costs associated with the insolvency of a broker-dealer. The Commission also finds that the merging within NSCC's rules of the actions NSCC will take when it ceases to act for a member, regardless of whether it ceases to act because of the insolvency of the member or for some other reason, simplifies and makes clearer NSCC rules without effecting any real changes to its rules. As such, the Commission finds that NSCC's proposed rule change is consistent with NSCC's statutory obligation to protect investors and the public interest.

III. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR–NSCC–98–14) be, and hereby is, approved.

[5] This notice would typically be sent via The Depository Trust Company's electronic message dissemination system.

[6] 15 U.S.C. 78q–1(b)(3)(F).

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[7]

Margaret McFarland,

Deputy Secretary.

[FR Doc. 00–11608 Filed 5–9–00; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–42746; File No. SR–NYSE–99–34]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Granting Approval to Proposed Rule Change and Amendment No. 1 Thereto Relating to the Exchange's Allocation Policy and Procedures

May 2, 2000.

I. Introduction

On July 20, 1999, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange''), filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change amending the Exchange's Allocation Policy and Procedures (''Policy''). On February 7, 2000, the Exchange submitted Amendment No. 1 to the proposed rule change.[3] The proposed rule change, as amended, was published for comment in the **Federal Register** on March 9, 2000.[4] This order approves the NYSE proposal, as amended.

II. Description of the Proposal

According to the Exchange, its Policy is intended to: (1) Ensure that the allocation process for securities is based on fairness and consistency and that all specialist units have a fair opportunity for allocations based on established criteria and procedures; (2) provide an incentive for ongoing enhancement of performance by specialist units; (3) provide the best possible match between a specialist unit and security; and (4) contribute to the strength of the specialist system.

Since 1987, the Exchange's Quality of Markets Committee has appointed a number of Allocation Review Committees (''ARCs'') to review the

[7] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240. 19b–4.

[3] *See* Letter from James E. Buck, Senior Vice President and Secretary, NYSE, to Terri Evans, Attorney, Division of Market Regulation (''Division''), Commission, dated February 4, 2000 (''Amendment No. 1'').

[4] Securities Exchange Act Release No. 42487 (March. 2, 2000), 65 FR 12603.

Policy and make recommendations with respect to changes.[5] In February 1999, the Quality of Markets Committee again appointed an ARC, ARC V, to review the Policy and make recommendations with respect to improvements in the allocation process. Those recommendations, which the Exchange is proposing as changes to the Policy, are discussed below.

A. Composition of Allocation Committee

Currently, the Allocation Committee is composed of nine members, consisting of seven floor brokers (including (1) three broker Governors (one of whom may be an independent/two dollar broker) and (2) four other floor brokers from the Allocation Panel) (''Panel'') (one of whom must be an independent/two dollar broker)) and two allied members from the Market Performance Committee or the Panel. The Allocation Committee presently does not have representation from institutional investor organizations. The proposal would add one institutional investor representative member to the Allocation Committee, drawn from the Panel or from the institutional investor members of the Market Performance Committee. The Exchange does not believe that it is necessary to expand the size of the Allocation Committee. Therefore, the Exchange proposes to decrease the number of floor brokers on the Committee from seven to six by decreasing the number of other floor brokers from the Panel to three (one of whom must be an independent/two dollar broker).

B. Composition of Allocation Panel

According to the NYSE, the Panel is the resource from which the Allocation Committee is assembled. A Panel is appointed by the Exchange's Quality of Markets Committee from individuals nominated by the Exchange's membership. The Panel consists of 28 floor brokers; twelve allied members (including the four allied members serving on the Market Performance Committee); eight floor broker Governors, who are part of the Panel by virtue of their appointment as Governors; and a minimum of five Senior Floor Official brokers.

The Exchange proposes three changes to the composition of the Panel. First, the Exchange proposes to expand the Panel to add nine institutional investor organization representatives, including the five serving on the Market Performance Committee, to be consistent with the proposal to add institutional investor representatives to the Allocation Committee. Representatives from institutional investor organizations would be chosen in the same manner as other Panel members, (*i.e.,* through nominations from the membership and appointment by the Quality Markets Committee). Second, the Exchange is proposing to increase the number of floor broker Governors on the Panel from eight to ten to reflect the increased number of floor Governors appointed under Exchange Rule 46.[6] Finally, at the time the number of floor Governors was increased, the number of allied member representatives on the Market Performance Committee was increased from four to five. Therefore, the Exchange proposes to amend the composition of the Panel to reflect this increase.

Under these proposed revisions to the Policy, the new composition of the Panel would be 28 floor brokers; 13 allied members (including the five allied members serving on the Market Performance Committee); nine institutional members (including the five representatives of institutional investor organizations serving on the Market Performance Committee); then floor broker Governors, who are part of the Panel by virtue of their appointment as Governors; and a minimum of five Senior Floor Official brokers.

C. Allocation Committee Quorum Requirement

The proposal would not alter the Allocation Committee's existing quorum requirement that there be at least six floor brokers, at least two of whom are Governors, and one allied member. According to the Exchange, the presence of the instutional representative would not be required for a quorum because, at times, it may be difficult to obtain the participation of a representative of an institutional investor organization.

D. Contact Between Listing Companies and Specialist Units

Under the Policy, specialist units or any individual acting on their behalf are prohibited from having any contact with a company that has applied for listing from the date applications (known as ''green sheets'') are solicited from specialists for the purpose of allocating the stock to a specialist organization. The Exchange proposes to change this non-contact period to the earlier of the date written notice is given that the listing company filed its listing application with the Exchange or the date allocation applications are solicited, (*i.e.,* the date the ''green sheet'' is posted). The Exchange presently publishes this notice of listing applications in its Weekly Bulletin. This proposal would move the start of the period as to when contact is prohibited to an earlier date in those cases where the ''green sheet'' is issued after the Weekly Bulletin notice of an application to list has been published.

E. Listing Company Request for Additional Specialist Information Following Interviews

The Policy currently permits a listing company to pick its specialist unit after interviewing a pool of three, four, or five units selected by the Allocation Committee. Furthermore, any follow-up questions conveyed to the Exchange from a listing company regarding specialist unit(s) it interviewed are restricted to questions regarding publicly-available information. The Exchange must approve the request and all units in the group of units interviewed must be notified by the Exchange of the request.

The NYSE proposes that if a listing company has a follow-up question for any specialist unit(s) it interviewed, it must be conveyed to the Exchange. The Exchange would contact the unit(s) to which the question pertains and would provide any information received from the unit(s) to the listing company. The NYSE further proposes to eliminate the requirement that only publicly-available information be provided and the language requiring Exchange approval, as well as the requirement that the Exchange notify the other units interviewed of the company's request.

F. Common Stock Listing After Preferred

Currently, the Policy does not address the situation involving a common stock being listed after its preferred stock has been allocated. Accordingly, the Exchange is proposing that the allocation of the common stock of a company listing after its preferred stock has been listed would be open to all specialist units. Under the terms of the proposal, the company may select Option 1 (in which the Allocation Committee selects the specialist unit to be allocated the company's stock) or Option 2 (in which the company selects a specialist unit from among a group of units chosen by the Allcoation Committee). If Option 2 is selected, the specialist unit that trades the preferred stock must be included in the group of units comprising the interview pool. The company would not be able to

[5] *See* Securities Exchange Act Release No. 38372 (March 7, 1997), 62 FR 13421 (March 20, 1997) (containing recommendations made by ARCs I through IV).

[6] The floor broker Governors are automatically members of the Market Performance Committee and the Panel.

select the specialist unit trading the preferred stock without going through the allocation process.

G. Listed Company Mergers

Currently, when two listed companies merge, the merged entity is assigned to the specialist in the company that is determined to be the survivor-in-fact. Where no surviving entity can be identified, the matter is referred to the Allocation Committee and all specialists are invited to apply. The merged company may request either Option 1 or Option 2, with no provisions to include or exclude any unit from consideration by the Allocation Committee. The Exchange notes that there is no provision for the merged company to select a unit that trades one of the listed companies, which is merging, without going through the allocation interview process.

The Exchange is proposing several changes to the Policy relating to listed company mergers. The Exchange is proposing that in cases where no surviving entity can be identified, the listing company would be permitted to select one of the units trading the merging companies without going through the allocation process. If the listing company determines to go to allocation, it may select Option 1 or Option 2. Under Option 1, the company would not be able to request that the Allocation Committee not allocate the stock to one of the units trading the merging companies. If the company chooses Option 2, the interview pool would consist of the specialist units of the merging companies and must include additional units. The number of additional units must be consistent with the Policy requirement that each pool consists of three to five units. Under Option 2, the company would not be permitted to request that any of the units trading the merging companies be excluded from the interview pool.

H. Listed/Unlisted Company Mergers

Currently, if the unlisted company is the survivor-in-fact, the company may choose to remain registered with the unit that traded the listed company involved in the merger or may request that the matter be referred to allocation, with applications invited from all units. The company may request that the unit trading the listed company not be allocated the stock (and, as a result, not be included in the pool of units under Option 2) and the Allocation Committee must honor that request.

The Exchange is proposing to conform this Policy to the proposed Policy involving listed company mergers with no survivor-in-fact. Therefore, the Policy would be amended to preclude the unlisted company from excluding from consideration by the Allocation Committee the specialist unit that trades the listed company. Further, the Policy would require that if the unlisted company chooses Option 2, the unit trading the listed company must be included in the allocation pool.

I. Issuance of Tracking (''Target'') Stock

These securities (also known as ''letter stock'') typically are ''targeted'' to a specific aspect of an issuer's overall business. There are two instances in which ''target'' stocks are being listed. The first involves situations in which the ''target'' stock is being ''uncoupled'' from the listed company, and itself listing on the Exchange. Under the current Policy, when such a security is ''uncoupled'' and becomes an independent listing, it remains with the specialist registered in the stock prior to its separate listing (''original stock''), unless the listing company requests that the new stock be referred to the Allocation Committee. The second type of ''target'' stock involves a listed company issuing a ''target'' stock to track a separate business line. In these instances, the issue is assigned by Exchange staff to the specialist in the listed company issuing the ''target'' stock. As a result, the new listing company (the ''target'' stock) has no input in the allocation decision. As a result, the Exchange proposes to amend the Policy to conform to the spin off/related company policy.

Target stocks, whether the target stock itself is joining the Exchange as a separate listing (*e.g.,* Con Edison Inc. issuing distinct securities in Con Edison of New York) or where the target stock represents a tracking of a business line of the current listed company (*e.g.,* GM and GMH), will be treated in the same manner as spin-offs and listing of related companies. According to the exchange, the Policy allows the listed/listing company to choose to stay with the specialist unit registered in the related listed company or be referred to the Allocation Committee. In the latter case, the company may request not to be allocated to the parent's specialist and the Allocation Committee will honor such request. Alternatively, the company may request the exclusion or inclusion of the parent's specialist in the allocation pool under Option 2.

J. Allocation Sunset Policy

When the Exchange allocates a company that is listing its shares from its initial public offering, that allocation decision remains effective for three months. If the company does not list within that time, the matter is referred again to the Allocation Committee. However, the Exchange is proposing to amend the Policy to permit a listing company to choose whether to stay with the merged specialist unit, or be referred to allocation if the selected specialist unit mergers or is involved in a combination within the three-month period.

K. Listing Company Attendees at Specialist Interviews

The current Policy requires that a senior official of the listing company of the rank of Corporate Secretary or above be present at the interviews with specialists under Option 2. In the case of structured products' listings,[7] the corporate makeup contemplated by the existing requirement often does not exist. The Exchange proposes to amend the Policy to clarify that any senior officer[8] of the issuer may be present at the interview to satisfy the requirement.

III. Discussion

The Commission finds that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[9] Specifically, the Commission believes that the proposal is consistent with the requirements of Section 6(b)(5) of the Act,[10] because it is designed to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest. Further, the Commission finds that the proposal also is consistent with Section 11(b) of the Act[11] and Rule 11b–1[12] thereunder, which allow exchanges t promulgate rules relating to specialists to ensure fair and orderly markets.

Specialists play a crucial role in providing stability, liquidity, and continuity to the trading of securities. Among the obligations imposed upon the specialists by the Exchange, and by the Act and the rules thereunder, is the maintenance of fair and orderly markets in their designated securities.[13] To ensure that specialists fulfill these obligations, it is important that the Exchange develop and maintain stock

[7] A structured product is a security, which is based on the value of another security.

[8] The structured product company would designate which of its officers is a senior officer.

[9] In approving this rule, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78k(b).

[12] 17 CFR 240.11b–1.

[13] *See* 17 CFR 240.11b–1; NYSE Rule 104.

allocation procedures and policies that provide specialists an initiative to strive for optimal performance.

A. Composition of Allocation Committee

The Exchange first proposes to add one institutional investor representative member to the Allocation Committee drawn from the Panel or from the institutional investor members of the Market Performance Committee. In conjunction with this proposed change, the Exchange proposes to decrease the number of floor brokers on the Allocation Committee from seven to six by decreasing the number of other floor brokers from the Panel to three. The Commission believes that institutional investors are significant participants in the securities markets, including the Exchange and, therefore, that such representation enhances the expertise and objectivity of the allocation process. The Commission further believes that it is reasonable for the Exchange to determine not to increase the size of the Allocation Committee with the addition of an institutional investor.

B. Composition of Allocation Panel

The Exchange also proposes three changes to the composition of the Panel. First, in order to be consistent with the proposal to add institutional investor representatives to the Allocation Committee, the Exchange proposes to expand the Panel to add nine institutional investor organization representatives, including the five serving on the Market Performance Committee. Second, the Exchange proposes to increase the number of floor broker Governors on the Panel from eight to ten to reflect the increased number of floor Governors appointed under Exchange Rule 46. Third, the Exchange proposes to amend the composition of the Panel to reflect the increase in the number of allied member representatives on the Market Performance Committee from four to five. The Commission believes that these changes to the composition of the Panel are reasonable and consistent with the Act, and merely reflect the proposed inclusion of institutional investor representatives in the allocation process or incorporate prior changes made by the Exchange.

C. Quorum

The Exchange believes that it may be difficult at times to obtain the participation of an institutional investor representative and therefore has decided not to change the Allocation Committee's existing quorum requirement. The Commission recognizes that while institutional investor participation may be preferred, it may be difficult to have such participation at all times without delaying the allocation process. Therefore, the Commission believes that it is reasonable not to change the quorum requirement to reflect the addition of institutional investor representatives on the Allocation Committee.

D. Contact Between Listing Companies and Specialist Units

The proposal also changes the non-contact period between listing companies and specialist units to the earlier of the date written notice is given that the listing company filed its listing application with the Exchange or the date allocation applications are solicited. The Commission believes that once the listing process has begun, the Exchange may want to limit contacts between specialists and the listing company to avoid the appearance of impropriety and, therefore, it is appropriate to extend the limitation on contact to reflect the earliest notification to the specialist units of the company's intent to apply.

E. Requests for Additional Specialist Information

The proposal further amends the Policy with respect to requests by a listing company for additional specialist information following interviews. Specifically, the proposal provides that if a listing company has a follow-up question for any specialist unit(s) it interviewed, it must be conveyed to the Exchange, which would then contact the unit(s) to which the question pertains and provide any information received from the unit(s) to the listing company. The proposal also eliminates the requirement that only publicly-available information be provided and the language requiring Exchange approval, as well as the requirement that the Exchange notify other units of the company's request.

The Commission believes that these changes should allow listing companies greater latitude in obtaining information from specialist, as well as reduce the burden on both the listing company and prospective specialist units. For example, in some cases, the listing company may have received information during the interview from one specialist and desires to obtain similar information about the other specialists to better compare the specialists. In other cases, the listing company may only be interested in one or more of the specialists in the pool and consequently, only desire information on those specific specialists. Therefore, the proposed changes should reduce the burden on listing companies because the companies would only have to review responses from selected specialist. In addition, it should also reduce the burden on specialists to provide information that the listing company may not be interested in receiving from that particular specialist.

F. Common Stock Listing After Preferred

With respect to situations where a common stock is to be listed after its preferred stock has been allocated, the proposal provides that the allocation of the common stock would be open to all units. As a result, a company would not be able to select the specialist unit trading the preferred stock without going through the allocation process. The Commission notes that because of the potential greater volume associated with trading a common stock listing, a listing company may have different criteria for selecting a specialist for its common stock. Therefore, the Commission believes that the proposed change would ensure that all special units would be allowed to compete for the common stock listing on an equal basis and is, accordingly, appropriate.

G. Listed Company Mergers

With respect to listed company mergers, the proposal provides for several changes. First, where no surviving entity of a merger can be identified, the listing company would be allowed to select one of the units trading the merging companies without going through the allocation interview process. The Commission believes that this would make the allocation process more efficient and less time-consuming for the listing company in those instances in which the company ultimately may have decided that it would select one of the units trading the merging companies.

Under the proposal, a listing company may also request that the listing go to the Allocation Committee under Option 1 or Option 2. Under Option 1, the company would not be able to request that the Allocation Committee not allocate the stock to one of the units trading the merging companies. If the company chooses Option 2, the interview pool would consist of the specialist units of the merging companies and must include additional units. Under Option 2, the company would not be permitted to request that any of the units trading the merging companies be excluded from the interview pool. The Commission believes that this approach strikes an appropriate balance between the

interests of specialist units, who have developed a relationship and a history of market-making performance with a listed company, and the interests of listed companies in choosing the most appropriate unit to be their specialist. The Commission also believes that this proposal provides the current specialist(s) with a reasonable opportunity to present their case to the merged company's new management without, of course, any guarantee of receiving the allocation. Accordingly, the Commission believes that the proposed changes would assist in providing the opportunity for input and choice on the part of the listing company, and as such, are appropriate and consistent with the Act.

H. Listed/Unlisted Company Mergers

The Exchange's proposal under Options 1 and 2 to preclude a company resulting from a merger between a listed company and an unlisted company from excluding from consideration by the Allocation Committee the specialist unit that trades the listed company is appropriate because it ensures that all specialist units would be allowed to compete to the allocation on an equal basis.

I. Issuance of Tracking Stock

The Commission notes that the Exchange is conforming its treatment of target stocks to its treatment of spin-offs and the listing of related companies. In this situation, the Commission believes that this is appropriate since target stocks may have a similar relationship with the parent's specialist. If the patent company is unsatisfied with the specialist's performance to date, the Commission believes it is unnecessary to include this unit in the pool if the company so requests. In the same vein, if the parent company is satisfied with the specialist's performance but wishes to avail itself of the opportunity to interview other units, the company should have the option of including such specialist in the interview pool along with other specialists selected by the Allocation Committee. Finally, it is important to bear in mind that senior management of the subject companies is often the same as that of the parent (or there is substantial overlap), and, therefore, the choice of a specialist would be influenced by an assessment of the current relationship and market-making performance.

J. Allocation Sunset Policy

With respect to the Exchange's three-month allocation sunset policy, the Commission believes that in a situation where the selected specialist unit merges or is involved in a combination within the three-month period, the proposal to permit the listing company to choose whether to stay with the merged specialist unit or be referred to allocation, is appropriate. In this regard, the Commission recognizes that the listing company should have an ability to reconsider its choice given the changed circumstances.

K. Listing Company Attendees at Specialist Interviews

Finally, with respect to the current Policy, whereby a senior official of the listing company of the rank of Corporate Secretary or above must be present at interviews with specialist units under Option 2, the Commission believes that the proposal to accommodate the listing of a structured product company by clarifying that any officer designated as senior by the company may be allowed to satisfy the requirement is appropriate, as the corporate makeup of such a company does not always exist in a manner contemplated by the current Policy.

In summary, the Commission believes that the Exchange's Policy can serve as an effective incentive for specialist units to maintain high levels of performance and market quality to be considered for, and ultimately awarded, additional listings. This in turn may benefit the execution of public orders and promote competition among specialist units.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[14] that the proposed rule change (SR–NYSE–99–34), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Margaret H. McFarland,

Deputy Secretary.

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[14] 15 U.S.C. 78s(b)(2).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–42758; File No. SR–NYSE–99–48]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Approving Proposed Change To Rescind Exchange Rule 390

On December 10, 1999, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to rescind Exchange rule 390. The proposed rule change was published for comment in the **Federal Register** on February 28, 2000.[3] The release publishing notice of the proposed rule change also included a Commission request for comment on issues relating to market fragmentation. The comment period relating to the rescission of Exchange rule 390 expired on March 20, 2000. The Commission has received twelve comments letters explicitly addressing whether Rule 390 should be rescinded. These comments are summarized in section II below. The comment period on issues related to market fragmentation has been extended for two weeks and now expires on May 12, 2000.[4]

Off-board trading restrictions such as Rule 390 have long been questioned as attempts by exchanges with dominant market shares to prohibit competition from other market centers. On their face, such restrictions run contrary to the Exchange Act's objectives to assure fair competition among market centers and to eliminate unnecessary burdens on competition. The NYSE has defended Rule 390 on the basis that it was intended to address market fragmentation by promoting interaction of investor orders without the participation of a dealer, which also is a principal objective of the Exchange Act. Even granting the importance of this objective, however, Rule 390 is overbroad as a tool to address market fragmentation—it applies in many situations that do nothing to promote investor order interaction. In the after-hours context, for example, it creates an artificial incentive for trades to be routed to foreign markets. Rule 390 also effectively restricts the competitive opportunities of electronic communications networks (''ECNs''), which use innovative technology to operate agency markets that offer investors a high degree of order interaction. To avoid the anticompetitive effect of the Rule, some ECONs even have indicated that they would accept the very substantial regulatory responsibilities associated with registering as a national securities exchange, thereby foregoing the streamlined requirements available

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 42450 (February 23, 2000), 65 FR 10577 (''Concept Release'').

[4] Securities Exchange Act Release No. 42723 (April 26, 2000).