

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

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48552; File No. SR-NYSE-2003-28]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Arbitration

September 26, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 25, 2003, 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 NYSE.<sup>3</sup> NYSE filed the proposed rule change pursuant to section 19(b)(3)(A) of the Act<sup>4</sup> and Rule 19b-4(f)(6) thereunder,<sup>5</sup> which renders the proposal effective upon filing with the Commission. 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 consists of an extension, until March 31, 2004, of Rule 600(g).

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the

proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NYSE has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

##### 1. Purpose

The proposed rule change is intended to extend until March 31, 2004, Rule 600(g), a pilot program that was initially approved by the Commission on November 12, 2002<sup>6</sup> for a six-month period, and which was then extended until September 30, 2003.<sup>7</sup>

The Exchange's statement of purpose is contained in the Commission's Approval Order. In that Approval Order the Commission stated:

The Exchange's Director of Arbitration will monitor the progress of the above described litigation [*NASD Dispute Resolution, Inc. and New York Stock Exchange, Inc. v. Judicial Council of California*, No. C 02 3485 (N.D. Cal.)] and determine whether there is a continuing need for the waiver option.<sup>8</sup>

The above litigation, in which the Exchange and NASD Dispute Resolution, Inc. sought a declaratory judgment that the Ethics Standards for Neutral Arbitrators in Contractual Arbitrations (the "California Standards") are preempted by federal law, has not been concluded. On November 12, 2002, Judge Samuel Conti dismissed the action on Eleventh Amendment grounds.<sup>9</sup> A Notice of Appeal from Judge Conti's decision has been filed with the United States Court of Appeals for the Ninth Circuit.<sup>10</sup> The

<sup>6</sup> Release No. 34-46816 (November 12, 2002), 67 FR 69793 (November 19, 2002) (SR-NYSE-2002-56).

<sup>7</sup> Release No. 34-47836 (May 12, 2003), 68 FR 27608 (May 20, 2003) (SR-NYSE-2003-16).

<sup>8</sup> Release No. 34-46816 (November 12, 2002), 67 FR 69793, 69794 (November 19, 2002) (SR-NYSE-2002-56).

<sup>9</sup> *NASD Dispute Resolution, Inc. and New York Stock Exchange, Inc. v. Judicial Council of California*, No. C 02 3485 (N.D. Cal.).

<sup>10</sup> In another district court decision, *Mayo v. Dean Witter Reynolds, Inc., Morgan Stanley Dean Witter & Co. dba Morgan Stanley Dean Witter, and Does 1-50*, No. C-01-20336 JF, 2003 WL 1922963 (N.D. Cal., April 22, 2003), Judge Jeremy Fogel held that application of the California Standards to the Exchange and other self-regulatory organizations is preempted by the Act, the comprehensive system of federal regulation of the securities industry established pursuant to the Act, and the Federal Arbitration Act. The Mayo decision was not appealed. Since the decision in Mayo, the question of the applicability of the California Standards to SROs has been presented in another case in federal court in California, *Credit Suisse First Boston Corp. v. Grunwald*, No. C 02-2051 SBA (N.D. Cal. Mar.

Exchange's Director of Arbitration has determined that, in the absence of a final judicial determination or legislative resolution of the preemption issue, there is a continuing need for the waiver option.

##### 2. Statutory Basis

The Exchange states that the proposed changes are consistent with section 6(b)(5) of the Act<sup>11</sup> in that they promote just and equitable principles of trade by ensuring that members and member organizations and the public have a fair and impartial forum for the resolution of their disputes.

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

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

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

The Exchange has neither solicited nor received written comments on the proposed rule change.

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

The NYSE has stated that because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days (or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest), it has become effective pursuant to section 19(b)(3)(A) of the Act<sup>12</sup> and Rule 19b-4(f)(6) thereunder.<sup>13</sup> At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that the action is necessary or appropriate in the public

31, 2003). The *Grunwald* court concluded that the California Standards cannot apply to SRO-appointed arbitrators because such arbitrators do not fall within the statutory definition of "neutral arbitrators." The appeal in *Grunwald* is fully briefed, and the Ninth Circuit is considering it on an expedited basis. The Commission and the Judicial Council submitted *amicus* briefs in the Ninth Circuit, and NASD Dispute Resolution and NYSE have moved to intervene on appeal. The appeal from Judge Conti's decision in *NASD Dispute Resolution, Inc. and New York Stock Exchange, Inc. v. Judicial Council of California* is currently stayed pending a decision in *Grunwald*.

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

<sup>12</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>13</sup> 17 CFR 240.19b-4(f)(6).

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

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

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

<sup>3</sup> Commission staff made non-substantive changes to the description of the proposed rule change with the permission of the NYSE. Telephone conversation between Robert Clemente, Director—Arbitration, NYSE, and Andrew Shipe, Special Counsel, Division of Market Regulation, Commission, September 26, 2003.

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

<sup>5</sup> 17 CFR 240.19b-4(f)(6).

interest, for the protection of investors, or would otherwise further the purposes of the Act.

Pursuant to Rule 19b-4(f)(6)(iii) under the Act,<sup>14</sup> the proposal may not become operative for 30 days after the date of its filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, and the self-regulatory organization must file notice of its intent to file the proposed rule change at least five business days beforehand. The Exchange has requested that the Commission waive the five-day pre-filing requirement and the 30-day operative delay so that the proposed rule change will become immediately effective upon filing.

The Commission believes that waiving the five-day pre-filing provision and the 30-day operative delay is consistent with the protection of investors and the public interest.<sup>15</sup> Waiving the pre-filing requirement and accelerating the operative date will merely extend a pilot program 1 that is designed to provide investors with a mechanism to resolve disputes with broker-dealers. During the period of this extension, the Commission and NYSE will continue to monitor the status of the previously discussed litigation. For these reasons, the Commission designates the proposed rule change as effective and operative immediately.

#### 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 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. NYSE-2003-28 and should be submitted by October 24, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>16</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48547; File No. SR-NYSE-2003-24]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc. to Reduce Initial and Annual Branch Office Registration Fees, Retroactive to January 1, 2003, Charged to Member Organizations With More Than One Thousand Branch Offices

September 25, 2003.

Pursuant to section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 19b-4<sup>2</sup> thereunder, notice is hereby given that on August 21, 2003, the New York Stock Exchange, Inc. ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. On September 8, 2003, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The Exchange proposes to amend its 2003 Price List to reduce its branch office registration fees for member organizations with more than one thousand branch offices.

<sup>16</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> See letter from Darla C. Stuckey, Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated September 5, 2003 ("Amendment No. 1"). In Amendment No. 1, the Exchange replaced the original rule filing in its entirety, converted it from a 19(b)(3)(A) filing to a 19(b)(2) filing, and requested accelerated approval.

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

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 Change

###### 1. Purpose

The Exchange increased its registration and maintenance fees applicable to member organization branch offices, effective January 1, 2003.<sup>4</sup> The Exchange charges an initial fee upon the opening of a new branch office and an annual maintenance fee for each active branch office. A three-tiered fee structure is used for assessment of such fees in which a stepped-down rate is charged based on the applicable tier level. This structure provides an incremental reduction in fees for those branch offices that exceed the level of each breakpoint.

Prior to the January 1, 2003 increases, the following fee schedule was in effect for both initial and annual maintenance fees:

- \$250 for each of the first 250 branch offices;
- \$150 for each of the next 250 branch offices;
- \$125 for each branch office over 500.

The January 1, 2003 fee structure amendments resulted in the following schedule, which is currently in effect:

- \$350 for each of the first 1,000 branch offices;
- \$250 for each of the next 2,000 branch offices;
- \$225 for each branch office over 3,000.

Some member organizations have raised concerns regarding the current branch office fee schedule, contending it is unduly burdensome for certain business models, which have more offices than the average member firm but only one or two persons staffing each office.<sup>5</sup>

<sup>4</sup> See Securities Exchange Act Release No. 47174; 68 FR 2606 (January 17, 2003) (SR-NYSE-2002-66).

<sup>5</sup> Telephone call between Leah Mesfin, Attorney, Division of Market Regulation, Commission, and Mary Ann Furlong, Director, Rule and Interpretive Standards, NYSE on September 24, 2003.

<sup>14</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>15</sup> For purposes of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).