

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

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD.

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

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

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

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

March 20, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on August 29, 2002, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the

proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On January 27, 2003 the NYSE amended the proposed rule change.³ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The Exchange proposes to amend its Specialist Combination Review Policy ("Policy"), which was recently codified as NYSE Rule 123E. The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets.

Rule 123E—Specialist Combination Review Policy

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

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

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

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

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

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

(iii) Maintaining or increasing operational efficiencies;

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

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

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

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

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

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

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

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

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

¹² 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 Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated January 24, 2003 ("Amendment No. 1"). In Amendment No. 1 the Exchange provided a new Exhibit A that completely replaces and supersedes the proposed rule language in the original filing.