

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47836; File No. SR-NYSE-2003-16]

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

May 12, 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 May 9, 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. NYSE filed the proposed rule change pursuant to section 19(b)(3)(A) of the Act<sup>3</sup> and rule 19b-4(f)(6) thereunder,<sup>4</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 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 September 30, 2003,<sup>5</sup> rule 600(g) that was approved by the Commission for a six-month period ending May 12, 2003.<sup>6</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>7</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>8</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>9</sup> The 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.

<sup>5</sup> The Commission recently approved an extension of a similar pilot rule of the National Association of Securities Dealers, Inc. ("NASD"), contained in its Code of Arbitration Procedure, until September 30, 2003. Release No. 34-47631 (April 3, 2003), 68 FR 17713 (April 10, 2003). By proposing to extend its own pilot rule until September 30, 2003, the Exchange seeks to conform the duration of the NASD and Exchange pilot programs.

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

<sup>7</sup> *Id.* at 69794.

<sup>8</sup> *NASD Dispute Resolution, Inc. v. Judicial Council of California*, 232 F. Supp. 2d 1055 (N.D. Cal. 2002).

<sup>9</sup> In another case, *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 recently 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.

##### 2. Statutory Basis

The Exchange states that the proposed changes are consistent with section 6(b)(5) of the Act<sup>10</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>11</sup> and rule 19b-4(f)(6) thereunder.<sup>12</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 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>13</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

<sup>9</sup> 17 CFR 200.30-3(a)(12).

<sup>11</sup> 15 U.S.C. 78s(b)(1).

<sup>12</sup> 17 CFR 240.19b-4.

<sup>13</sup> 15 U.S.C. 78s(b)(3)(A).

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

<sup>10</sup> 15 U.S.C. 78f(b)(5).

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>12</sup> 17 CFR 240.19b-4(f)(6).

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