

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

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Deputy Secretary.

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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"),¹ and Rule 19b-4 thereunder,² 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.³ NYSE filed the proposed rule change pursuant to section 19(b)(3)(A) of the Act⁴ and Rule 19b-4(f)(6) thereunder,⁵ 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, 2002⁶ for a six-month period, and which was then extended until September 30, 2003.⁷

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.⁸

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.⁹ A Notice of Appeal from Judge Conti's decision has been filed with the United States Court of Appeals for the Ninth Circuit.¹⁰ The

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

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

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

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

¹⁰ 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 Act¹¹ 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 Act¹² and Rule 19b-4(f)(6) thereunder.¹³ 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*.

¹¹ 15 U.S.C. 78f(b)(5).

¹² 15 U.S.C. 78s(b)(3)(A).

¹³ 17 CFR 240.19b-4(f)(6).

¹⁴ 17 CFR 200.30-3(a)(12).

¹⁵ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 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.

⁴ 15 U.S.C. 78s(b)(3)(A).

⁵ 17 CFR 240.19b-4(f)(6).