

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-56895; File No. SR-NYSE-2007-109)

December 4, 2007

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the NYSE Rule 98 Guidelines for Approved Persons Associated with a Specialist's Member Organization

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 November 28, 2007, the New York Stock Exchange LLC ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared substantially by the Exchange. The Exchange has filed the proposal pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6) thereunder,⁴ 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 Exchange is proposing to amend the NYSE Rule 98 Guidelines for Approved Persons Associated with a Specialist's Member Organization ("Rule 98 Guidelines") to provide NYSE Regulation, Inc. ("NYSE Regulation") with the authority to grant a prospective specialist member organization a temporary exemption from section (b)(i) of the NYSE Rule 98 Guidelines. The text of the proposed rule change is available at <http://www.nyse.com>, NYSE and the Commission's Public Reference Room.

¹ 15 U.S.C.78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

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. 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

For purposes of seeking NYSE Rule 98 exemptive relief, the NYSE is proposing to amend the Rule 98 Guidelines to allow NYSE Regulation⁵ to grant prospective specialist firms with a temporary exemption from section (b)(i) of such guidelines, which currently require a specialist member organization and its approved person be separate and distinct organizations. The Exchange has consistently interpreted this provision to require that the specialist and the approved person be in separate, registered broker-dealer organizations. Pursuant to the proposed rule change, while NYSE Regulation would be permitted to grant a temporary exemption from section (b)(i), specialist firms and their approved persons would still be required to comply with sections (b)(ii) through (b)(x) of the Rule 98 Guidelines and thus maintain the functional separation contemplated by the rule.

Recent changes among the specialist firms, including the recent decisions by Van der Moolen Specialists USA, LLC and SIG Specialists, Inc. to close their respective specialist

⁵ Rule 98(b) requires an approved person seeking a Rule 98 exemption to obtain the prior written agreement of the Exchange. Pursuant to a Delegation Agreement, the Exchange has delegated to NYSE Regulation the authority to review and approve such Rule 98 exemption requests.

businesses at the Exchange,⁶ have warranted the need for greater flexibility to permit new firms to qualify as specialist member organizations. NYSE Rule 98, which requires certain barriers between a specialist member organization and an approved person, has the potential to impede the approval process for a prospective specialist firm. In particular, because of the time delay necessary for an NYSE member organization to form a separate NYSE member organization from which to run a specialist business, the requirement to maintain a separate and distinct organization could impact the ability of a current member organization to expeditiously begin operating as a specialist organization.

The NYSE is in the process of reviewing Rule 98 and, in particular, whether revising the Rule 98 Guidelines would provide sufficient protection to meet the stated goals of Rule 98. Nevertheless, the NYSE is not seeking to amend Rule 98 comprehensively at this time. Rather, pending further review by the NYSE of the continued applicability of Rule 98 in its current form, the NYSE proposes to grant NYSE Regulation exemptive authority to allow prospective specialist firms and their approved persons to temporarily operate without having to be separate and distinct organizations. The NYSE proposes granting this exemptive authority to expedite the process for new entrants to apply for and be approved as specialist organizations at the NYSE.

The NYSE notes that prospective specialist organizations and their approved persons would continue to be subject to sections (b)(ii) through (b)(x) of the Rule 98 Guidelines, which set forth the information barriers that a specialist firm and approved person must implement in order to meet the “functional regulation” requirements contemplated by the rule. The NYSE

⁶ See Press Release, NYSE, NYSE to Reallocate Certain Specialist Rights to Kellogg Specialist Group (Nov. 14, 2007), [available at http://www.nyse.com/press/1195039877990.html](http://www.nyse.com/press/1195039877990.html); Press Release, Van der Moolen, Van der Moolen to terminate US specialist activities (Nov. 15, 2007), [available at http://www.vandermoolen.com/?sid=17&press=151](http://www.vandermoolen.com/?sid=17&press=151).

believes that a firm that meets those Rule 98 Guidelines would meet the stated goals of NYSE Rule 98 to ensure that an approved person does not have undue control over or access to privileged information of the specialist organization, and vice versa.

a. Background

Approved persons of specialist organizations generally are subject to the same trading restrictions that govern specialist organizations, including, among others, restrictions on the ability to engage in transactions for their own accounts in such specialty stocks, prohibitions on trading in specialty stock options, and prohibitions on engaging in business transactions with the issuer of the specialty stock. As defined by NYSE Rule 2, an “approved person” is a person (other than a member, allied member, or employee of a member organization), who (i) controls a member organization, or (ii) is engaged in a securities or kindred business and is controlled by or under common control with a member organization.⁷

NYSE Rule 98 and the related Rule 98 Guidelines provide a mechanism for approved persons of specialist organizations to seek an exemption from certain specialist trading restrictions. Under NYSE Rule 98(b), to obtain such an exemption, an approved person must obtain the prior written agreement of the NYSE that the approved person and the associated specialist organization are in compliance with the Rule 98 Guidelines.

Rule 98 sets forth a “functional regulation” concept that permits an approved person to obtain a Rule 98 exemption so long as such approved person and associated specialist organization maintain an arms-length relationship. To obtain such approval, the two entities must establish procedures sufficient to restrict the flow of privileged information between them. Such procedures should be designed to preclude the possibility that privileged information will

⁷ See section (a) of Rule 98 Guidelines.

be used by either the approved person or the associated specialist organization to influence a particular trading decision. Once approved, an approved person of a specialist member organization would not be subject to certain trading restrictions that govern a specialist member organization.

The Rule 98 Guidelines provide guidance regarding how approved persons and associated specialist organizations should establish their respective operational structures. As enumerated in section (b)(i) of the Rule 98 Guidelines, an approved person and the associated specialist member organization should be organized as separate and distinct organizations. In particular, the specialist member organization should not in any manner function as a “downstairs” extension of an “upstairs” trading desk.

Sections (b)(ii) through (b)(x) of the Rule 98 Guidelines enumerate further operational structures that an approved person and its associated specialist firm should implement, including a management structure designed to prevent the influence of approved person on specialists, and vice versa, and various information barriers concerning confidentiality of information, separate books and records, separate financial accounting, separate capital requirements, confidentiality of the specialist’s Book, confidentiality of information derived from business activities with the issuer, and confidentiality of draft research reports.

b. Proposed Temporary Exemption from Rule 98 Guidelines

As noted above, within the space of two days, two of the NYSE’s seven specialist organizations announced their intent to close their Floor-based specialist business. In order to ensure the continuity of a fair and orderly market, the NYSE is committed to working with firms that are interested in seeking approval to become a specialist member organization and be eligible for allocations of stocks listed at the NYSE. In the event that an existing NYSE member

organization is interested in qualifying as a specialist firm, the NYSE is committed to working with such a prospective specialist organization to meet the requisite operational and regulatory requirements.

For the most part, assuming a current NYSE member organization takes over the book of business of a departing specialist organization, including the algorithms and Specialist Application Program Interface (“SAPI”)⁸ of the departing specialist organization, the transfer of the Book can be seamless and expedited. However, if in addition to acting as a specialist firm, such member organization is interested in maintaining its “upstairs” or floor brokerage business, that member organization would be considered an approved person of the specialist organization, i.e., it is in the securities business and under common control with the specialist organization. If such approved person does not have an existing separate broker-dealer that is already an NYSE member organization from which to operate its associated specialist operations, the Rule 98 Guideline requirement that an approved person be a separate and distinct organization from an associated specialist member organization acts as a gating item to the speedy transfer of a specialist’s book to another member organization.

Accordingly, to enable the NYSE to respond to the dynamic changes in the marketplace and expeditiously approve, where appropriate, a current NYSE member organization as a new specialist organization, the NYSE proposes that NYSE Regulation have exemptive authority to grant prospective specialist firms with a temporary exemption from the requirement in section (b)(i) of the Rule 98 Guidelines that a specialist member organization and its approved person be

⁸ The SAPI is the electronic link between specialist trading algorithms and the NYSE Display Book. Via this interface, specialist organization trading algorithms send quoting and trading messages to the Exchange for implementation in the Display Book, and the Exchange transmits information necessary to acting as a specialist to specialist organizations.

separate and distinct organizations, i.e., maintain separate NYSE member organizations. Obtaining such a temporary exemption would be subject to the specialist organization and the approved person both maintaining the functional divisions and information barriers as enumerated in sections (b)(ii) through (b)(x) of the Rule 98 Guidelines, and promptly seeking to form a separate member organization. The NYSE believes that by meeting these conditions there will be sufficient functional regulation during the period while the prospective specialist firm is exempt from section (b)(i) of the Rule 98 Guidelines.

The NYSE notes that the Commission recently approved an amendment to NYSE Rule 103B that implemented the same type of change as proposed by this filing.⁹ NYSE Rule 103B previously prohibited specialist organizations from being registered in a specialist capacity in both an Exchange Traded Fund (“ETF”) and in a component security of such ETF. To avoid this prohibition, firms were required to have separate member organizations for its specialty stocks and for its ETF securities. As amended, NYSE Rule 103B now permits a member organization to register as a specialist in both an ETF and a component security of such ETF without having to form a separate member organization.

Under NYSE Rule 103B, a specialist member organization must have policies and procedures to separate the activities of such member organization in the trading of ETFs and any component securities in which the member organization is also registered as specialist. At a minimum, such policies and procedures must include information barriers that prevent the flow of non-public information between a member organization’s ETF specialist and the member organization’s specialist in an associated component security. As with the Rule 98 Guidelines, a specialist firm must submit its policies and procedures relating to such information barriers

⁹ See Securities Exchange Act Release No. 56392 (Sept. 12, 2007), 72 FR 53615 (Sept. 19, 2007) (SR-NYSE-2007-42) (“Rule 103B Rule Filing”).

before being approved for an allocation of an ETF for which the specialist is already registered for a component security. As noted in the Rule 103B Rule Filing, after an ETF has been allocated to a specialist member organization, the Exchange will continue to examine for compliance with these Rule 103B requirements, including testing and reviewing on-site for breaches and weaknesses.

The NYSE believes that the same rationale for amending Rule 103B is applicable here; namely, so long as the firm meets the other requirements of Rule 98, there should be sufficient functional regulation to create information barriers to restrict the flow of information while the firm is working toward a formal structural separation. In the context of Rule 98, because firms would still be required to comply with sections (b)(ii) through (b)(x) of the Rule 98 Guidelines, which set forth the information barriers required between a specialist firm and its approved person, the functional regulation contemplated by the current rule would be met, even in the temporary absence of a formal separation between two operating divisions.

The Exchange proposes that a temporary exemption from section (b)(i) of the Rule 98 Guidelines may be granted only to those current NYSE member organizations that are not already approved persons of a specialist organization and are seeking to both become a specialist organization and apply to be a Rule 98-exempt approved person. The Exchange further proposes that the temporary exemption is contingent upon (i) the Exchange approving the member organization as a specialist organization and that the non-specialist division of the firm qualifies both as an approved person and for an exemption under Rule 98, as set forth in the Rule 98 Guidelines and other applicable NYSE rules, and (ii) the member organization promptly seeks to create, in a time frame acceptable to NYSE Regulation, a separate NYSE member organization from which the specialist organization would eventually be run.

The NYSE will closely monitor the application process of any prospective member organization and will require a broker-dealer seeking such approval to be diligent in working through the application process. In addition, before operating as a specialist firm, prospective specialist firms must provide NYSE Regulation with its Rule 98 policies and procedures so that NYSE Regulation can assess whether the firm's information barriers meet requirements of the Rule 98 Guidelines. As it does for other specialist firms and their approved persons, NYSE Regulation will examine such prospective specialist organizations for compliance with these Rule 98 Guidelines.

2. Statutory Basis

The basis for this proposed rule change is the requirement under Section 6(b)(5) of the Act¹⁰ that an Exchange have rules that are designed to promote the just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

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.

¹⁰ 15 U.S.C. 78(f)(b)(5).

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

Because the foregoing 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 from the date on which it was filed, or such shorter time as the Commission may designate, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹¹ and Rule 19b-4(f)(6) thereunder.¹²

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

NYSE has asked that the Commission waive the 30-day operative delay.¹³ The proposal is similar to recent amendments to NYSE Rule 103B that were approved by the Commission, which removed the requirement that an ETF specialist be a separate member organization from a specialist registered in component securities of the ETF.¹⁴ The Commission notes that the proposed rule change would only permit on a temporary basis an exemption for prospective specialist organizations from the NYSE Rule 98 Guidelines requirement that a specialist and its approved person maintain a formal structural separation. The Commission also notes that, pursuant to the proposed rule change, prospective specialist organizations seeking such an

¹¹ 15 U.S.C. 78s(b)(3)(A).

¹² 17 CFR 240.19b-4(f)(6).

¹³ Rule 19b-4(f)(6) also requires the self-regulatory organization to give the Commission notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied the five-day pre-filing requirement.

¹⁴ See supra note 9 and accompanying text.

exemption would be required to satisfy the other requirements of the Rule 98 Guidelines, including specifically satisfying the Exchange that adequate information barriers will be maintained notwithstanding the fact that separate entities are not employed,¹⁵ and must promptly seek to create a separate NYSE member organization from which the specialist organization would eventually be run. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because it will enable the Exchange to immediately implement the proposal so that prospective specialist member organizations may be approved on a timely basis. For this reason, the Commission designates the proposed rule change to be effective and operative upon filing with the Commission.¹⁶

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. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send e-mail to rule-comments@sec.gov. Please include File Number SR-NYSE-2007-109 on the subject line.

Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

¹⁵ See section (b)(i) of proposed NYSE Rule 98 Guidelines.

¹⁶ For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

All submissions should refer to File Number SR-NYSE-2007-109. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro/shtml>). 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, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm.. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only

information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2007-109 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁷

Florence E. Harmon
Deputy Secretary

¹⁷ 17 CFR 200.30-3(a)(12).