

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-56158; File No. SR-NYSE-2005-48)

July 27, 2007

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change as Modified by Amendment Nos. 1, 2, 3, and 4 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 5 to Revise Rule 619 Pertaining to Subpoenas for the Production of Documents and Appearances of Witnesses

I. Introduction

On July 13, 2005, the New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change amending NYSE Rule 619, which pertains to subpoenas for the production of documents and the appearance of witnesses. On September 26, 2005, the Commission published for comment the proposed rule change in the Federal Register.³ The Commission received no comments on the proposal. On April 18, 2006, November 2, 2006, December 22, 2006, and February 8, 2007, the NYSE submitted Amendment Nos. 1, 2, 3, and 4, respectively, to the proposed rule change.⁴ On April 13, 2007, the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 52468 (Sept. 19, 2005), 70 FR 56201 (Sept. 26, 2005).

⁴ Amendment No. 1 clarified that only the arbitrator(s) may issue subpoenas and delineated the manner in which a party may request the issuance of a subpoena. Amendment No. 2 established a time frame for the parties to make and respond to objections to the requested subpoena and clarified that the arbitrator(s) may not rule on such a request until this time period has elapsed. Amendment No. 3 made technical changes to the rule and clarified that the arbitrator(s) must receive copies of any objections to the issuance of a subpoena. Amendment No. 4 clarified that a party requesting a subpoena may not serve the request or the draft subpoena on a non-party.

Commission published for comment the proposed rule change, as amended, in the Federal Register.⁵ The Commission received two comments on the proposal.⁶ On July 13, 2007, NYSE submitted Amendment No. 5 to the proposed rule change.

This notice and order solicits comment from interested persons on Amendment No. 5 and approves the proposal, as amended, on an accelerated basis. The text of the proposed rule change is available at www.nyse.com, the principal offices of the NYSE, and the Commission's Public Reference Room.

II. Description of the Proposed Rule Change

In its amended filing, the NYSE proposed to revise Rule 619 to provide that only the arbitrator(s) may issue subpoenas for the production of documents and the appearance of witnesses. The rule also provides that the arbitrator(s), and not the courts, will rule on discovery disputes concerning the issuance of subpoenas. Under the rules, the party who requests a subpoena must make a written request asking the arbitrator(s) to issue the subpoena and send a copy of the request and the requested draft subpoena to the Director of Arbitration, each arbitrator, and all parties to the arbitration in a manner reasonably expected to result in delivery to everyone on the same day. The requesting party may not serve the request or the requested draft subpoena on any non-party.

⁵ See Securities Exchange Act Release No. 55594 (April 6, 2007), 72 FR 18710 (April 13, 2007).

⁶ See letters from Steven B. Caruso, President, Public Investors Arbitration Bar Association ("PIABA"), dated April 17, 2007; and Martin L. Feinberg, dated May 4, 2007 ("Feinberg"). The NYSE responded to these comments in telephone conversations with Commission staff. Telephone conversations among Karen Kupersmith, Director of Arbitration, NYSE; Lourdes Gonzalez, Assistant Chief Counsel--Sales Practices, Commission; and Michael Hershaft, Special Counsel, Commission (July 11, 2007 and July 27, 2007) ("NYSE Response").

If a party has an objection to the propriety or scope of the subpoena, that party must file objections in writing with the Director of Arbitration and send copies to all other parties, including each arbitrator, within 10 days of service of the request and draft subpoena. The party requesting the subpoena could file a reply to the objection within five days of receipt of the objection. The arbitrator(s) then determine the propriety and scope of the requested subpoena after the time period for filing objections or replies had elapsed. If a subpoena is issued by the arbitrator(s), the party that requested the subpoena must serve the subpoena at the same time and in the same manner on all parties, and, if applicable, on any non-party receiving the subpoena.

In addition, the proposed rule change provides that any party that receives documents in response to a subpoena served upon a non-party must provide notice to all other parties within five days of receipt of the documents. Thereafter, any party may request copies of those documents and, if such a request is made, the documents must be provided within 10 days following receipt of the request. The party requesting the documents is responsible for the reasonable costs associated with the production of the copies, unless the panel determines otherwise.

Amendment No. 5 clarified that calendar days, and not business days, apply to (1) the 10-day period to object to the scope or propriety of subpoenas, (2) the five-day period to respond to an objection, (3) the five-day period to notify all other parties of receipt of documents from a third party, and (4) the 10-day period to request copies of these documents.

III. Summary of Comments Received and NYSE Response

One commenter⁷ noted that the proposed rule does not expressly state whether calendar or business days apply to various filing deadlines, and urged the NYSE to clarify in the rule specify that calendar days govern the applicable time periods. In response to this comment, the NYSE filed Amendment No. 5, which clarified that calendar days apply to all deadlines under the proposed rule. Both commenters criticized the proposed rule’s requirement that the party receiving documents in response to a subpoena will be responsible for the reasonable costs associated with the production, unless the panel determines otherwise. PIABA stated that this “cost-shifting” will increase arbitration expenses associated with the initiation and prosecution of every arbitration proceeding, while Feinberg maintained that the rule should not require payment for subpoenaed documents.

The NYSE responded that although the proposed rule is ambiguous, this provision only applies to the receipt of documents from a third-party, and does not apply more broadly to all subpoenas, as the commenters suggest. The arbitration panel still may allocate fees among the parties pursuant to NYSE Rule 629(c)(2), which permits arbitrators to determine in the award the amount of costs incurred pursuant to Rule 619 (among other rules) and, unless applicable law directs otherwise, other costs and expenses of the parties.⁸

One commenter⁹ contended that under the proposed rule, read in light of the subpoena service requirements of the Federal Arbitration Act, would require personal

⁷ PIABA.

⁸ NYSE Response.

⁹ Feinberg.

service of subpoenas and copies of subpoenas. In the commenter's view, this would be expensive, burdensome and unnecessary. The NYSE responded that neither the proposed rule nor its other rules require personal service.¹⁰ In particular, NYSE stated that Rule 612 provides that "[s]ervice and filing are accomplished on the date of mailing either by first-class postage prepaid or by means of overnight mail service or, in the case of other means of service, on the date of delivery."¹¹

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 5, including whether Amendment No. 5 is consistent with the Exchange 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 an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSE 2005-48 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.

All submissions should refer to File Number SR-NYSE-2005-48. This file number should be included on the subject line if e-mail is used. To help the Commission process

¹⁰ NYSE Response.

¹¹ Id.

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 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-2005-48 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the NYSE, and, in particular, with Section 6(b)(5) of the Act.¹² Section 6(b)(5) requires, among other things, that the NYSE's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to

¹² 15 U.S.C. 78f(b)(5).

protect investors and the public interest.¹³ The Commission believes that the proposed rule change is designed to accomplish these ends by permitting only arbitrators to issue subpoenas and by making the arbitration subpoena process more orderly and efficient.

Accelerated Approval of Amendment No. 5

The Commission finds good cause for approving Amendment No. 5 to the proposed rule change prior to the thirtieth day after the amendment is published for comment in the Federal Register pursuant to Section 19(b)(2) of the Act. Amendment No. 5 clarifies that calendar days, and not business days, apply to various filing deadlines under the proposed rule. The Commission anticipates that these changes will provide for greater clarity with respect to the subpoena process. Accordingly, the Commission finds that accelerated approval of Amendment No. 5 is appropriate.

¹³

Id.

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act¹⁴ that the proposed rule change, as modified by Amendment Nos. 1, 2, 3, 4, and 5, (SR-NYSE-2005-48), be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁵

Florence E. Harmon
Deputy Secretary

¹⁴ 15 U.S.C. 78s(b)(2).

¹⁵ 17 CFR 200.30-3(a)(12).