

**SECURITIES AND EXCHANGE COMMISSION**  
**(Release No. 34-49915; File No. SR-NYSE-2004-28)**

June 25, 2004

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc. to Extend a Pilot Relating to Voluntary Supplemental Procedures for Selecting Arbitrators

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 June 14, 2004, the New York Stock Exchange, Inc. (“NYSE” or “the Exchange”) filed with the Securities and Exchange Commission the proposed rule change as described in Items I and II below, which items have been prepared by the Exchange. The Exchange 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 until January 31, 2005, of a pilot regarding Voluntary Supplemental Procedures for Selecting Arbitrators (“Supplemental Procedures” or “pilot program”).

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

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

<sup>2</sup> 17 CFR 240.19b-4.

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

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

examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B and C below.

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 January 31, 2005, the pilot period of the Supplemental Procedures, which were approved by the Commission most recently for a two-year period ending July 31, 2004.<sup>5</sup>

The Exchange currently offers four alternative methods by which arbitrators are assigned to cases. The first is the traditional method pursuant to NYSE Rule 607, in which the staff of the Exchange appoints arbitrators to cases. Three additional methods were introduced in 2000 under the Supplemental Procedures to allow parties to select arbitrators: Random List Selection, Enhanced List Selection and any reasonable alternative method of the parties' own design and agreement.<sup>6</sup>

Under Random List Selection, the parties are provided randomly generated lists of public and securities classified arbitrators. The parties have ten days to strike and rank the names on the lists. Based on mutual ranking of the lists, the highest-ranking arbitrators are invited to serve on the case. If a panel cannot be generated from the first list, a second list is generated, with three potential arbitrators for each vacancy, and one peremptory challenge available to each

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<sup>5</sup> Exchange Act Release No. 46372 (August 16, 2002), 67 FR 54521 (August 22, 2002) (SR-NYSE-2002-30).

<sup>6</sup> The pilot program was implemented originally for a two-year period. Exchange Act Release No. 43214 (August 28, 2000), 65 FR 53247 (September 1, 2000) (SR-NYSE-00-34). Upon expiration of the first two-year period, the Exchange renewed the pilot program for two additional years, ending on July 31, 2004. Exchange Act Release No. 46372. See also Exchange Act Release No. 47929 (May 27, 2003), 68 FR 32791 (June 2, 2003) (SR-NYSE-2003-15) (amending the Supplemental Procedures to conform with NYSE Rule 601, which provides that a claim with an amount in dispute of \$25,000 or less will be decided by a single arbitrator, instead of a panel of three).

party for each vacancy. If vacancies remain after the second list has been processed, arbitrators are then randomly assigned to serve, subject only to challenges for cause.

Under Enhanced List Selection, six public and three securities classified arbitrators are selected by Exchange staff, based on their qualifications and expertise. The lists are then sent to the parties. The parties have a limited number of strikes to use and are required to rank the arbitrators not stricken. Based on the mutual ranking of the lists, the highest-ranking arbitrators are invited to serve on the case.

Finally, the Supplemental Procedures provide that the Exchange will accommodate the use of any reasonable alternative method of selecting arbitrators that the parties decide upon, provided that the parties agree. Absent agreement to the use of Random List Selection, Enhanced List Selection, or any other reasonable alternative method, the traditional method is used.

The Exchange, pursuant to a separate filing (SR-NYSE-2004-29)<sup>7</sup>, is proposing amendments to Rule 607 which would, in effect, make permanent a variation of the pilot program described herein. Pending approval of those amendments, the Exchange proposes to extend the pilot period for the Supplemental Procedures for an additional six months.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)(5) of the Act<sup>8</sup> in that it promotes 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

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<sup>7</sup> Filed with the Commission on June 14, 2004.

<sup>8</sup> 15 U.S.C. 78f(b)(5).

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 Exchange has designated the proposed rule change as one that: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate. Therefore, the foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6) thereunder. 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 Act.

Pursuant to Rule 19b-4(f)(6)(iii) under the Act<sup>9</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 Exchange 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 rule change will become immediately effective upon

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<sup>9</sup> 17 CFR 240.19b-4(f)(6)(iii).

filing.

The Commission is exercising its authority to waive the five-day pre-filing requirement and believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest.<sup>10</sup> In this regard, the Commission notes that the proposal is the extension of a pilot program that has been in effect at the Exchange since August 2000. Nothing in the current notice should be interpreted as suggesting the Commission is predisposed to approving the pilot program on a permanent basis.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change 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 an E-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2004-28 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-NYSE-2004-28. 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>).

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<sup>10</sup> For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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 Section, 450 Fifth Street, NW, Washington, DC 20549. 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-2004-28 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>11</sup> 17 CFR 200.30-3(a)(12).