

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-50133; File No. SR-NYSE-2004-36)

August 2, 2004

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc. Amending the NYSE Constitution to Permit Certain Individuals to Serve on the Regulation, Enforcement & Listing Standards Committee

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 July 2, 2004, the New York Stock Exchange, Inc. (“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 by the NYSE. The Exchange filed Amendment No. 1 to the proposed rule change on July 27, 2004.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons and is approving the proposal on an accelerated basis.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is amending Article IV, Section 12(b)(1) of its Constitution (“NYSE Constitution”). The proposed amendment will permit the Board to appoint individuals to serve on the Regulation, Enforcement & Listing Standards Committee (“RELS Committee”) who have

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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> See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation (“Division”), Commission, dated July 26, 2004 (“Amendment No. 1”). In Amendment No. 1, NYSE marked the proposed rule text to show changes to its Constitution that it failed to reflect in the original proposal.

served previously on either the RELS Committee or the Committee for Review but who are neither Directors nor members of the Board of Executives.

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, as amended, and discussed any comments it received on the proposed rule change, as amended. The text of these statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

The text of the proposed rule change, as amended, is below. Proposed new language is in italics; proposed deletions are in [brackets].

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Article IV. Board of Directors

Sec. 12. Standing Committees. The Standing Committees and their respective Chairmen shall be appointed by the Board at its annual organizational meeting. The Board shall adopt for each Standing Committee a charter consistent with the duties prescribed in the subsections below, and including such additional duties as may be considered appropriate and not inconsistent with this Constitution. Each Standing Committee shall have the authority to engage independent legal counsel and other advisors as it determines necessary to carry out its duties, but may not use counsel or other advisors who advise Exchange officers or employees.

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(b) Joint Committees

(1) The Regulation, Enforcement & Listing Standards Committee shall be composed of both directors (other than the Chief Executive Officer) and Board of Executives members (including at

least one Industry Member of the Board of Executives), as selected by the Board and, to assure continuity, may also include prior members of either this Committee or the Committee for Review (as hereinafter defined) who are neither directors nor members of the Board of Executives, also as selected by the Board; provided, however, that a majority of the members of [such] this [c]Committee[s] voting on a matter subject to a vote of [such] this Committee shall be directors. The [Such] [c]Committee shall report to the Regulatory Oversight & Regulatory Budget Committee and shall (i) review and provide general advice with respect to the Exchange’s programs for market surveillance, member and member organization regulation and enforcement, and the listing and delisting of securities, and (ii) hear appeals of disciplinary determinations and determinations to delist a listed company. The term “Committee for Review” shall refer to the predecessor of this Committee under the Exchange’s governance structure in effect prior to December 17, 2004.

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A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

On December 17, 2003, the Commission approved changes to the NYSE Constitution that restructured the Exchange’s governance architecture to separate the regulatory and marketplace functions, among other changes.<sup>4</sup> As part of the new architecture, the Exchange now has both a Board of Directors (“Board”), which includes six to twelve independent directors elected by the membership, and a Board of Executives, which consists of constituent representatives. The directors are elected annually and the members of the Board of Executives

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<sup>4</sup> See Securities Exchange Act Release No. 48946 (December 17, 2003), 68 FR 74678 (December 24, 2003).

are appointed annually. Under the Exchange's previous governance structure, directors had two-year, staggered terms.

Among the committees constituted under the new architecture is the RELS Committee, which, among other duties, hears appeals from disciplinary decisions by the Exchange's Hearing Panels and delisting determinations by the Exchange's Listings & Compliance unit. The new annual election and appointment cycle allows for the possibility of a complete or significant turnover in the membership of the RELS Committee. Yet, the appellate work of the committee requires knowledge of the Exchange's procedures and an understanding of precedents that make some continuity from year to year highly desirable.

The Exchange advises that it recognized this turnover issue in the context of last year's revisions to its governance structure and included as Article XVI of the NYSE Constitution a transition period that permitted the Board to appoint to the RELS Committee former members of the Board who had served on the predecessor Committee for Review.<sup>5</sup> This transitional authority expired at this year's annual meeting on June 3, 2004.

So that the Board may continue to have this authority, the proposed rule change in effect eliminates the sunset date and moves this authority to Article IV, Section 12(b)(1) of the NYSE Constitution, which is where the Constitution constitutes the RELS Committee. According to the Exchange, the proposed rule change also recognizes that the requisite knowledge, experience and understanding will in due course reside not simply in former members of the predecessor Committee for Review, but also in former members of the RELS Committee itself. In addition,

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<sup>5</sup> See NYSE Constitution, Article XVI.

the Exchange proposes to revise a provision in Article IV, Section 12(b)(1) of the NYSE Constitution to refer to “this Committee” rather than “such Committees.”<sup>6</sup>

2. Statutory Basis

The basis under the Exchange Act for this proposed rule change is the requirement under Section 6(b)(1)<sup>7</sup> that an exchange be organized and have the capacity to be able to carry out the purposes of the Act, under Section 6(b)(5)<sup>8</sup> that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote 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, and under Section 6(b)(7)<sup>9</sup> that the rules of the exchange provide a fair procedure for the disciplining of members and persons associated with members.

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.

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<sup>6</sup> The Commission notes that this provision expressly requires that the majority of the members of the RELS Committee voting on a matter subject to a Committee vote must be members of the Board, *i.e.*, independent directors. Moreover, the Commission points out that Article IV, Section 14 of the NYSE Constitution, among other things, expressly provides that the Board may not delegate, and no committee may re-delegate, to the Board of Executives or to any committee not consisting solely of directors authority to act on any subject matter described in Article IV, Section 12(a) (*i.e.*, Standing Committee duties) or (b)(1) (*i.e.*, RELS Committee duties), except by effecting a rule change within the meaning of Section 19(b)(1) of the Act.

<sup>7</sup> 15 U.S.C. 78f(b)(1).

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

<sup>9</sup> 15 U.S.C. 78f(b)(7).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Written comments were neither solicited nor received. However, members of the exchange were given notice of the proposed change in a Proxy Statement issued on April 30, 2004.

III. 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-2004-36 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-2004-36. 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 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-2004-36 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

NYSE has asked the Commission to approve the proposal on an accelerated basis to make the proposal effective on or before August 2, 2004, in order that the existing transitional committee members can participate in the appeals scheduled for that day. The Commission notes that it previously approved a proposal for former members of the Committee for Review where neither directors or members of the Board of Executives to serve on the RELS Committee during the transition period,<sup>10</sup> and that the current proposed rule change seeks an extension of that policy to former members of the RELS Committee, as well as members of the Committee for Review.

After careful consideration, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations

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<sup>10</sup> See supra note 4.

thereunder,<sup>11</sup> applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b)(5)<sup>12</sup> that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote 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, and with the requirements of Section 6(b)(7)<sup>13</sup> that the rules of the exchange provide a fair procedure for the disciplining of members and persons associated with members. The Commission notes that the RELS Committee's responsibility for hearing appeals from disciplinary panels and delisting determinations can foster the need for the Committee to have members who are knowledgeable about the Committee's procedures and familiar with its precedents and deliberations. The Commission notes that the new annual election and appointment cycle for members of the Board and the Board of Executives, respectively, could hinder the RELS Committee from retaining experienced and knowledgeable members. The Commission believes that allowing former members of the Committee for Review and RELS Committee to participate on future RELS Committees should help ensure the continuity of the RELS Committee by ameliorating the effect that the annual turnover of members of the Board and Board of Executives otherwise could have on the RELS Committee.

The Commission finds good cause for approving the proposed rule change, as amended, prior to the thirtieth day after the date of publication of notice of filing thereof in the Federal

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<sup>11</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>12</sup> 15 U.S.C. 78f(b)(5).

<sup>13</sup> 15 U.S.C. 78f(b)(7)

Register. The Commission notes that the next RELS Committee meeting to hear appeals is on August 2, 2004. The Exchange has requested accelerated approval in order to allow prior Committee for Review Members and RELS Committee members to serve on the current RELS Committee and hear appeals scheduled for that day. Accordingly, the Commission believes that there is good cause, consistent with Sections 6(b)(5) and 19(b)(2) of the Act,<sup>14</sup> to approve the proposal, on an accelerated basis.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>15</sup> that the proposed rule change (SR-NYSE-2004-36), as amended, is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>16</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>14</sup> 15 U.S.C. 78f(b)(5) and 78s(b)(2).

<sup>15</sup> 15 U.S.C. 78s(b)(2).

<sup>16</sup> 17 CFR 200.30-3(a)(12).