

**SECURITIES AND EXCHANGE COMMISSION**  
**(Release No. 34-51395; File No. SR-NYSE-2005-14)**

**March 18, 2005**

**Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment No. 1 Thereto of the New York Stock Exchange, Inc. Relating to Arbitration**

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 February 7, 2005, the New York Stock Exchange, Inc. (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed amendment to its arbitration rules as described in Items I and II below, which Items have been prepared by the Exchange. On March 10, 2005, the Exchange filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change 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 proposed rule change consists of an extension, until September 30, 2005, of Exchange Rule 600(g), relating to arbitration.

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

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

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

proposed rule change. The text of these statements may be examined at the places specified in Item III below and is 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 September 30, 2005, Exchange Rule 600(g), a pilot program that was most recently extended for a six-month period ending March 31, 2005.<sup>3</sup>

Exchange Rule 600(g) states:

This paragraph applies to the Ethics Standards for Neutral Arbitrators in Contractual Arbitrations promulgated by the Judicial Council of California (the "California Standards"), which, were they to have effect in connection with arbitrations conducted pursuant to this Code, would conflict with this Code. In light of this conflict, the affected customer(s) or an associated person of a member or member organization who asserts a claim against the member or member organization with which she or he is associated may:

- Request the Director to appoint arbitrators and schedule a hearing outside California, or
- Waive the California Standards and request the Director to appoint arbitrators and schedule a hearing in California. A written waiver by a customer or associated person who asserts a claim against the member or member organization with which he or she is associated on a form

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<sup>3</sup> See Securities Exchange Act Release No. 50449 (September 24, 2004), 69 FR 58985 (October 1, 2004) (SR-NYSE-2004-50).

provided by the Director of Arbitration under this Code shall also constitute and operate as a waiver for all other parties to the arbitration who are members, allied members, member organizations, and/or associated persons of a member or member organization.

According to the NYSE, Exchange Rule 600(g) was adopted by the Exchange in response to the purported imposition of California state law on arbitrations conducted under the auspices of the Exchange and pursuant to a set of nationally-applied rules approved by the Commission.<sup>4</sup> The Exchange states that on July 1, 2002, as a result of the purported application of the Ethics Standards for Neutral Arbitrators in Contractual Arbitrations (the “California Standards”) to Exchange arbitrations and arbitrators, the Exchange suspended the appointment of arbitrators for cases pending in California. The Exchange and NASD Dispute Resolution, Inc. sought a declaratory judgment that the California Standards are preempted by federal law. On November 12, 2002, Judge Samuel Conti dismissed the action on Eleventh Amendment grounds.<sup>5</sup> A Notice of Appeal from Judge Conti’s decision has been filed with the United States Court of Appeals for the Ninth Circuit.<sup>6</sup> The Exchange has determined that, in the absence of a final judicial

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<sup>4</sup> See Securities Exchange Act Release No. 46816 (November 12, 2002), 67 FR 69793 (November 19, 2002) (SR-NYSE-2002-56).

<sup>5</sup> NASD Dispute Resolution, Inc. and New York Stock Exchange, Inc. v. Judicial Council of California, No. C 02 3485 (N.D. Cal.).

<sup>6</sup> 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. 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. Apr. 22, 2003), Judge Jeremy Fogel held that application of the California Standards to the Exchange and other self-regulatory organizations (“SROs”) 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 (“FAA”). 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. 31, 2003). The District Court in Grunwald concluded that the California Standards cannot apply to SRO-appointed arbitrators because such arbitrators do not fall within the statutory definition of “neutral arbitrators.” On appeal, the Ninth Circuit disagreed that SRO-appointed arbitrators did not fall within the statutory definition of “neutral arbitrators” but held that the California

determination or legislative resolution of the preemption issue, there is a continuing need for the waiver option provided by Exchange Rule 600(g).

## 2. Statutory Basis

The Exchange states that the proposed change is consistent with Section 6(b)(5) of the Act<sup>7</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

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. 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:

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Standards are preempted by the Act. See Credit Suisse First Boston Corp. v. Grunwald, No. 03-15695 (9th Cir. Mar. 1, 2005). NASD Dispute Resolution and the Exchange also submitted an amicus brief in Jevne v. Superior Court, 6 Cal. Rptr. 3d 542, 113 Cal. App. 4th 486 (2d Dist. 2003), in which the California Court of Appeal, Second District held that the Judicial Council acted within its authority in drafting the California Standards, that the California Standards are not preempted by the FAA, but that they are preempted by the Act. On March 17, 2004, the California Supreme Court granted review in Jevne. NASD Dispute Resolution and the Exchange were allowed to intervene on appeal before the California Supreme Court. The Jevne appeal has been fully briefed and was argued before the California Supreme Court on March 8, 2005.

<sup>7</sup> 15 U.S.C. 78f(b)(5).

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-2005-14 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-2005-14. 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, 450 Fifth Street, NW, Washington, DC 20549-0609. 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-2005-14 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

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder, applicable to a national securities exchange.<sup>8</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act<sup>9</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.

The Commission also believes that the proposed rule change raises no issues that have not been previously considered by the Commission. Granting accelerated approval here will merely extend a pilot program that is designed to inform aggrieved parties about their options regarding mechanisms that are available for resolving disputes with broker-dealers. The NYSE adopted the pilot program under Rule 600(g) in response to the purported imposition of the California Standards on Exchange arbitrations and arbitrators. The pilot rule is currently extended until March 31, 2005, and must be extended in order to continue to provide the waiver option until a final judicial determination is reached. During the period of this extension, the Commission and NYSE will continue to monitor the status of the previously discussed litigation.

After careful consideration, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>10</sup> for approving the proposed rule change prior to the thirtieth day after the date of publication of notice in the Federal Register. The Commission notes that the current extension of the pilot program under Exchange Rule 600(g) expires on March 31, 2005.

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<sup>8</sup> In approving this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>9</sup> 15 U.S.C. 78f(b)(5).

<sup>10</sup> 15 U.S.C. 78s(b)(2).

Accordingly, the Commission believes that there is good cause, consistent with Section 6(b)(5) of the Act,<sup>11</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>12</sup> that the proposed rule change (SR-NYSE-2005-14), as amended, is hereby approved on an accelerated basis, and Exchange Rule 600(g) is extended until September 30, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>11</sup> 15 U.S.C. 78f(b)(5).

<sup>12</sup> 15 U.S.C. 78s(b)(2).

<sup>13</sup> 17 CFR 200.30-3(a)(12)