

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-52468; File No. SR-NYSE-2005-48)

September 19, 2005

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change to Provide for a 10-Day Notice Requirement Before a Party Issues a Subpoena to a Non-Party for Pre-Hearing Discovery

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”)<sup>1</sup> and Rule 19b-4<sup>2</sup> thereunder, notice is hereby given that on July 13, 2005, the New York Stock Exchange, Inc. (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. 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 NYSE is proposing to amend Rule 619 (“General Provision Governing Subpoenas, Production of Documents, etc.”) primarily to provide for a 10-day notice period requirement before a party issues a subpoena to a non-party for pre-hearing discovery. Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

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**Rule 619: General Provision Governing Subpoenas, Production of Documents, etc.**

(a) to (e) no change

(f) Subpoenas

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

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

(1) The arbitrator(s) and any counsel of record to the proceedings [shall have the power of the subpoena process] may issue subpoenas as provided by law. [All parties shall be given a copy of the subpoena upon its issuance.] The party who requests or issues a subpoena must send a copy of the request or subpoena to all parties and the entity receiving the subpoena in a manner that is reasonably expected to cause the request or subpoena to be delivered to all parties and the entity receiving the subpoena on the same day. The parties shall produce witnesses and present [proofs to the fullest extent possible without resort to the subpoena process] proof at the hearing whenever possible without using subpoenas.

(2) No subpoenas seeking discovery shall be issued to or served upon non-parties to an arbitration unless, at least 10 days prior to the issuance or service of the subpoena, the party seeking to issue or serve the subpoena sends notice of intention to serve the subpoena, together with a copy of the subpoena, to all parties to the arbitration.

(3) In the event a party receiving such a notice objects to the scope or propriety of the subpoena, that party shall, within the 10 days prior to the issuance or service of the subpoena, file with the Director of Arbitration, with copies to all other parties, written objections. The party seeking to issue or serve the subpoena may respond thereto. The arbitrator(s) appointed shall rule promptly on the issuance and scope of the subpoena.

(4) In the event an objection to a subpoena is filed under paragraph (f)(3), the subpoena may only be issued or served prior to the arbitrator's(s') ruling if the party seeking to issue or serve the subpoena advises the subpoenaed party of the existence of the objection at the time the subpoena is served, and instructs the subpoenaed party that it should preserve the subpoenaed documents, but not deliver them until a ruling is made by the arbitrator(s).

(5) Rule 619(f)(2) and (3) do not apply to subpoenas addressed to parties or non-parties to appear at a hearing before the arbitrator(s).

(6) The arbitrator(s) shall have the power to quash or limit the scope of any subpoena.

(g) No change

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## 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 changes. 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

Parties in arbitration often seek the production of documents from third parties as part of pre-hearing discovery. Exchange Rule 619 sets forth procedures for the issuance of subpoenas and for the production of documents. The rule provides that arbitrators and

attorneys for the parties have subpoena powers as provided by law, and that all parties are to be given copies of subpoenas when issued.

Under the current procedures, the opposing attorney may not receive notice of the subpoena until after it has been served on a non-party. In such situations, non-parties may produce documents that are the subject of dispute as to whether they should be produced at all. This has led to court action to have subpoenas quashed, which adds expense and delay to the arbitration process. Under the proposed amendments, the arbitrators, rather the courts, would rule on these discovery disputes.

Under the proposed rule, the party who requests or issues a subpoena must send a copy of the request or subpoena to all parties to the arbitration, and to non-parties, if applicable, in a manner reasonably expected to result in delivery to everyone on the same day.

As amended, the rule provides that subpoenas can be issued to non-parties only after all parties have ten days advance notice and the opportunity to file objections. If a party has an objection to the propriety or scope of the subpoena, that party may file objections in writing with the Director of Arbitration and send copies to all other parties within the ten-day period prior to the issuance or service of the subpoena. The party requesting the subpoena may file a reply to objections. The arbitrator(s) shall determine the propriety and scope of the requested subpoena(s).

Additionally, as amended, the rule provides that non-parties must be advised that documents subpoenaed are to be preserved but not delivered pending any determination that may be required by the arbitrator(s). Furthermore, the proposed rule does not apply to subpoenas addressed to parties or non-parties to appear at a hearing before the

arbitrator(s).<sup>3</sup> The proposed rule also provides that the arbitrator(s) may quash or limit the scope of subpoena(s).

The proposed amendments are based on the Securities Industry Conference on Arbitration's Uniform Code of Arbitration.

## 2. Statutory Basis

The proposed changes are consistent with Section 6(b)(5)<sup>4</sup> of the Act in that they promote 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 comments on the proposed rule change.

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

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

### A. by order approve the proposed rule change, or

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<sup>3</sup> Telephone conversation between Karen Kupersmith, Director of Arbitration, NYSE, and Michael Hershaft, Attorney Adviser, Division of Market Regulation, Commission (Sept. 15, 2005).

<sup>4</sup> 15 U.S.C. 78f(b)(5).

B. institute proceedings to determine whether the proposed rule change should be disapproved.

#### 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](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2005-48 on the subject line.

##### Paper Comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303.

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 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. Copies of such

filing will also 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-2005-48 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>5</sup>

Jonathan G. Katz  
Secretary

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<sup>5</sup> 17 CFR 200.30-3(a)(12).