

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-52638; File No. SR-NYSE-2005-37)

October 19, 2005

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to Amendments to Certain Sections of the Exchange Constitution Concerning the Exchange's Hearing Board and Related Amendments to Exchange Rule 475 and Rule 476

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on May 23, 2005, 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, II, and III below, which Items have been prepared by the NYSE. On September 9, 2005, NYSE amended the proposed rule change ("Amendment No. 1").³ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The Exchange proposes to amend Article IX of the Exchange's Constitution and NYSE Rules 475 and 476 to modify certain aspects of the Exchange's disciplinary procedures and to provide a structure for a summary suspension hearing and a "call-up" procedure for review by members of the Board of Directors ("Board"), certain members of the Board of Executives listed in NYSE Rule 476(f), any member of the Regulation,

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Amendment No. 1 filed on September 9, 2005. In Amendment No. 1, the Exchange made technical corrections to proposed rule text contained in Exhibit 5 of the original filing.

Enforcement and Listing Standards Committee and either the Division of the Exchange that initiated the proceedings or the respondent. The text of the proposed rule change, as amended, is below. Proposed new language is in italics; proposed deletions are in brackets.⁴

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Disciplinary Rules (Rules 475 - 477)

Rule 475. Prohibition or Limitation with Respect to Access to Services Offered by the Exchange or a Member or Member Organization— Summary Proceedings

(a) Except as provided [is] in subsection (b) of this Rule, the Exchange shall not prohibit or limit any person with respect to access to services offered by the Exchange or any member or member organization thereof unless the Exchange shall have notified such person in writing of, and shall have given such person, upon not less than 15 days prior written notice, an opportunity to be heard upon, the specific grounds for such prohibition or limitation. The Exchange shall keep a record of any proceeding pursuant to this Rule. Any determination by the Exchange to prohibit or limit any person with respect to access to services offered by the Exchange or a member or member organization thereof shall be supported by a statement setting forth the specific grounds on which the prohibition or limitation is based.

(b) The Exchange may summarily—

⁴ The rule text as set forth herein reflects several minor revisions to the proposal's rule text that the Exchange has committed to incorporate in an amendment to the filing. Telephone conversation between Peggy Kuo, Chief Hearing Officer, NYSE and Cyndi N. Rodriguez, Special Counsel, Division of Market Regulation ("Division"), Commission on September 29, 2005.

(i) suspend a member, member organization, allied member, approved person, or registered or non-registered employee of a member or member organization who has been and is expelled or suspended from any other self-regulatory organization, as defined in Section 3(a)(26) of the Securities Exchange Act of 1934, or barred or suspended from being associated with a member or any such self-regulatory organization provided, however, that any such summary suspension imposed by the Exchange shall not exceed the termination of the suspension imposed by such other self-regulatory organization on such member, member organization, allied member, approved person, or registered or non-registered employee;

(ii) suspend a member or member organization who is in such financial or operating difficulty that the Exchange determines and so notifies the Securities and Exchange Commission that the member or member organization cannot be permitted to continue to do business as a member or member organization with safety to investors, creditors, other members or member organizations, or the Exchange;

(iii) limit or prohibit any person with respect to access to services offered by the Exchange if subparagraph (i) or (ii) of this subsection is applicable to such person or, in the case of a person who is not a member or member organization, if the Exchange determines that such person does not meet the qualification requirements or other prerequisites for such access and such person cannot be permitted to continue to have such access with safety to investors, creditors, members, member organizations, or the Exchange.

Any person aggrieved by any such summary action shall be notified in writing of, and shall be promptly afforded an opportunity to be heard by the Exchange upon, the specific

grounds for such summary action. The Exchange shall keep a record of any proceeding pursuant to the Rule. Any determination by the Exchange with respect to such summary action shall be supported by a statement setting forth the specific grounds on which the summary action is based. The Commission, by order, may stay any such summary action in accordance with the provisions of the Securities Exchange Act of 1934.

(c) Hearings and proceedings pursuant to subsections (a) and (b) of this Rule shall be under the jurisdiction of a Hearing Officer, appointed by the Board, acting alone. The Hearing Officer shall schedule and conduct Hearings promptly and, in doing so, provide such discovery to the person whose access or suspension is the subject of the Hearing and to the Exchange officers and employees as provided for under Rule 476(c). The Hearing Officer shall render determinations based upon the record at such Hearings. No determinations by the Hearing Officer shall be effective to modify, reverse or terminate a summary action until and unless (i) ten days have elapsed after the determination has been rendered and (ii) during such ten days, no request for review has been filed with the Secretary of the Exchange pursuant to the next sentence. Any member of the Board, any member of the Board of Executives referred to in Rule 476(f), any member of the Regulation, Enforcement and Listing Standards Committee and either the Division of the Exchange initiating the proceedings or the respondent may require a review by the Board of any determination by the Hearing Officer by filing with the Secretary of the Exchange a written request therefor within ten days following such determination. The Board shall have power to affirm, modify or reverse any such determination, or remand the matter to the Hearing Officer for further proceedings.

[c](d) Whenever a member or member organization fails to perform his or its contracts, becomes insolvent, or is in such financial or operating difficulty that he or it cannot be permitted to continue to do business as a member or member organization with safety to investors, creditors, other members or member organizations, or the Exchange, such member or member organization shall promptly give written notice thereof to the Secretary of the Exchange.

[d](e) If the Board of Directors determines, after not less than ten days written notice to a member described in Section 1(a) of Article II who is suspended under the provisions of this Rule, that the protection of the persons entitled to make claim against the proceeds of the transfer of the membership of such member under Section 11 of Article II of the Constitution requires the transfer of the membership of such member, such membership may be disposed of by the Board of Directors. In any case, if a member suspended under the provisions of this Rule is not reinstated within one year from the time of his suspension, or within such further time as the Board of Directors may grant, his membership shall be disposed of by the Board of Directors; but the Board may, by the affirmative vote of a majority of the Directors then in office, extend the time for settlement for periods not exceeding one year each.

[e](f) Any person suspended under the provisions of this Rule shall, at the request of the Exchange, submit to the Exchange his or its books and records (including those books and records with respect to which such person has access or control) or the books and records of any employee thereof and furnish information to or to appear or testify before or cause any such employee to appear or testify before the Exchange.

[f](g) Any person suspended under the provisions of this Rule may, at any time, be reinstated by the Board of Directors.

[g](h) Any person suspended under the provisions of this Rule may be disciplined in accordance with the Rules of the Exchange for any offense committed by him or it either before or after his or its suspension in all respects as if he or it were not under such suspension.

[h](i) A member suspended under the provisions of this Rule shall be deprived during the term of his suspension of all rights and privileges of membership, but such suspension shall not operate to bar or affect the payments provided for by Article XV of the Constitution in the event of his death. Any suspension under the provisions of this Rule of a member or allied member shall create a vacancy in any office or position held by such member or allied member.

(j) The limitations on the Chief Executive Officer contained in Rule 476(l) shall apply to all matters under this Rule.

Rule 476. Disciplinary Proceedings Involving Charges Against Members, Member Organizations, Allied Members, Approved Persons, Employees, or Others

(a) If a member, member organization, allied member, approved person, registered or non-registered employee of a member or member organization or person otherwise subject to the jurisdiction of the Exchange is adjudged guilty in a proceeding under this Rule of any of the following offenses-

[1.](1) violating any provision of the Securities Exchange Act of 1934 or any rule or regulation thereunder;

[2.](2) violating any of his or its agreements with the Exchange;

[3.](3) violating any provision of the Constitution or any Rule adopted by the Board of Directors of the Exchange;

[4.](4) making a material misstatement to the Exchange;

[5.](5) fraud or fraudulent acts;

[6.](6) conduct or proceeding inconsistent with just and equitable principles of trade;

[7.](7) acts detrimental to the interest or welfare of the Exchange;

[8.](8) making a fictitious bid, offer or transaction or giving an order for the purchase or sale of securities the execution of which would involve no change of beneficial ownership or executing such an order with knowledge of its character;

[9.](9) making any purchases or sales or offers of purchase or sale of securities for the purpose of upsetting the equilibrium of the market or bringing about a condition in which prices will not fairly reflect market values, or assisting in making any such purchases or sales with knowledge of such purpose, or being, with such knowledge, a party to or assisting in carrying out any plan or scheme for the making of such purchases or sales or offers of purchase or sale;

[10.](10) having made a misstatement or omission of fact on his or its application for membership or approval, or on any financial statement, report, or other submission filed with the Exchange; or

[11.](11) refusing or failing to comply with a request of the Exchange to submit his or its books and records (including those books and records with respect to which such member, member organization, allied member, approved person, registered or non-registered employee or person otherwise subject to the jurisdiction of the Exchange has

access and control) to the Exchange, any other self-regulatory organization, as defined in Section 3(a)(26) of the Securities Exchange Act of 1934, any contract market, as referenced in Section 6(a) of the Commodities Exchange Act, any registered futures association, as referenced in Section 17 of the Commodities Exchange Act, or any foreign self-regulatory organization or association with which the Exchange has entered into an agreement or to furnish information to or to appear or testify before the Exchange or such other organization or association, as specified above, or failing to take any of the foregoing actions on the date or within the time period that the Exchange requires; or if a member who is registered as a specialist is adjudged guilty in a proceeding under this Rule of substantial or continued failure to engage in a course of dealings for his own account to assist in the maintenance, so far as practicable, of a fair and orderly market in any security in which he is registered; then, in any such event, the Hearing Panel or, when authorized by this Rule, a Hearing Officer shall, in accordance with the procedures set forth in this Rule, impose one or more of the following disciplinary sanctions on such member, member organization, allied member, approved person, registered or non-registered employee or person otherwise subject to the jurisdiction of the Exchange: expulsion; suspension; limitation as to activities, functions, and operations, including the suspension or cancellation of a registration in, or assignment of, one or more stocks; fine⁶; censure; suspension or bar from being associated with any member or member organization; or any other fitting sanction. [In any proceeding under this Rule, any sanction imposed may be remitted or reduced by the Hearing Panel on such terms and conditions as it deems fair and equitable.]

(b) All proceedings under this Rule, except as to matters [referred to in paragraph (c),] which are resolved by a Hearing Officer when authorized by this Rule, shall be conducted at a Hearing in accordance with the provisions of this Rule and shall be held before a Hearing Panel consisting of at least three persons of integrity and judgment: a Hearing Officer, who shall [be Chairman of] chair the Panel, [with the remainder of the Panel being] and at least two members of the Hearing Board, at least one of whom shall be engaged in securities activities differing from that of the respondent or, if retired, was so engaged in differing activities at the time of retirement. In any disciplinary proceeding involving activities on the Floor of the Exchange, no more than one of the persons serving on the Hearing Panel shall be, or if retired, shall have been, active on the Floor of the Exchange. A Hearing Panel can include only one retired person.

The Chairman, subject to the approval of the Board [of Directors], shall from time to time appoint a Hearing Board to be composed of such number of members and allied members of the Exchange who are not members of the Board of [Directors] Executives, and registered employees and non-registered employees of members and member organizations, and such other persons as set forth in the rules as the Chairman shall deem necessary. Former members, allied members, or registered and non-registered employees of members and member organizations who have retired from the securities industry can be appointed to the Hearing Board within five years of their retirement. The members of the Hearing Board shall be appointed annually and shall serve at the pleasure of the Board [of Directors]. The Chairman, subject to the approval of the Board [of Directors], shall also designate [from among the officers and employees of the Exchange] a Chief Hearing Officer and one or more other Hearing Officers who shall have no Exchange

duties or functions relating to the investigation or preparation of disciplinary matters and who shall be appointed annually and shall serve as Hearing Officers at the pleasure of the Board [of Directors]. An individual cannot be a Hearing Officer (including the Chief Hearing Officer) if he or she is, or within the last three years was, a member, allied member, or registered or non-registered employee of a member or member organization.

[In any hearing under this Rule involving as a respondent therein a member, member organization, allied member, or approved person, the members of the Hearing Board serving on the Panel shall be members or allied members and at least one of whom, to the extent reasonably possible, is engaged in similar activities as the respondent. In any such proceeding relating to activities on the Floor of the Exchange, at least one of the persons serving on the Panel shall be a member active on the Floor of the Exchange. In any such proceeding relating to any other activities, at least one of the persons serving on the Panel shall work in the office of a member or member organization which engages in a business involving substantial direct contact with securities customers.]

[In any hearing under this Rule involving as a respondent therein a registered or non-registered employee of a member or member organization who is not a member or allied member, the members of the Hearing Board serving on the Panel shall be registered employees or non-registered employees of members and member organizations who are not members or allied members and at least one of whom, to the extent reasonably possible, is engaged in similar activities as the respondent. In any such proceeding relating to such employee's activities on the Floor of the Exchange, at least one of the persons serving on the Panel shall be a registered or non-registered employee of a member or member organization active on the Floor of the Exchange who is not a

member or allied member. In any such proceeding relating to any other activities at least one of the persons serving on the Panel shall work in the office of a member or member organization which engages in a business involving substantial direct contact with securities customers.]

[In any hearing under this Rule involving as joint respondents therein one or more members or member organizations, allied members or approved persons, together with one or more registered or non-registered employees of a member or member organization who are not members or allied members, at least one of the persons serving on the Panel shall be a member or allied member and at least one other person serving on the Panel shall be a registered or non-registered employee of a member or member organization who is not a member or allied member, and the functional qualifications required of Hearing Panel members as stated above shall be satisfied.]

For all purposes of this Rule, the decision of a majority of the Panel shall be the decision of the Panel and shall be final and conclusive, unless a request to the Board [of Directors] for review is filed as provided in this Rule.

(c) Upon application to the Chief Hearing Officer [of the Exchange] by either party to a proceeding, the Chief Hearing Officer, or any Hearing Officer designated by the Chief Hearing Officer, shall resolve any and all procedural and evidentiary matters and substantive legal motions, and may require the Exchange to permit the respondent to inspect and copy documents or records in the possession of the Exchange which are material to the preparation of the defense or are intended for use by the [d]Division [or department] of the Exchange initiating the proceeding as evidence in chief at the [h]Hearing. The respondent may be required to provide discovery of non-privileged

documents and records to the Exchange. This provision does not authorize the discovery or inspection of reports, memoranda, or other internal Exchange documents prepared by the Exchange in connection with the proceeding. There shall be no interlocutory appeal to the Board [of Directors] of any determination as to which this provision applies.

(d) Except as provided in paragraph (g), in any proceeding under this Rule before a Hearing Panel, or Hearing Officer as provided by this rule, the specific charges against the respondent shall be in the form of a written statement (Charge Memorandum) and shall be signed by an authorized officer or employee of the Exchange on behalf of the [d]Division [or department] of the Exchange bringing the charges. A copy of such Charge Memorandum (including any exhibits attached thereto) shall be filed with the Hearing Board at the same time it is served upon the respondent. Service shall be deemed effective by personal service of such Charge Memorandum, or by leaving same either at the respondent's last known office address during business hours or respondent's last place of residence as reflected in Exchange records, or upon mailing same to the respondent at the aforesaid office address or place of residence. The Hearing Board shall assume jurisdiction upon receipt of the Charge Memorandum.

An Answer to the Charge Memorandum shall be filed not later than twenty five days from the date of service or within such longer period of time as the [Exchange] Hearing Officer may deem proper.

The Answer shall be in writing, signed by or on behalf of the respondent and filed with the Hearing Board, with a copy served on the [d]Division [or department] of the Exchange bringing the charges. The Answer shall indicate specifically which assertions of fact and charges in the Charge Memorandum are denied and which are admitted; and

shall also contain any specific facts in contradiction of the charges and any affirmative defenses. A general denial without more shall not be deemed to satisfy this requirement. Any assertions of fact not specifically denied in the Answer may be deemed admitted and failure to file an Answer may be deemed an admission of any facts asserted in the Charge Memorandum.

The Hearing Board shall set a schedule for filing of motions and shall establish Hearing dates. If the respondent has failed to file an Answer, the Division of the Exchange bringing the charges, by motion, accompanied by proof of notice to the respondent, may request a determination of guilt by default, and may recommend a penalty to be imposed. If the respondent opposes the motion, the Hearing Officer, on a determination that respondent had adequate reason to fail to file an Answer, may adjourn the Hearing date and direct the respondent to promptly file an Answer. If the default motion is unopposed, or respondent did not have adequate reason to fail to file an Answer, or respondent failed to file an Answer after being given an opportunity to do so, the Hearing Officer, on a determination that respondent has had notice of the charges and that the Exchange has jurisdiction in the matter, may find guilt and determine penalty.

Notice of the [h]Hearing to be held for the purpose of considering the charges shall be served upon the Division of the Exchange and the respondent as provided above[, who shall be]. The respondent shall be entitled to be personally present thereat if a natural person, and if other than a natural person, by a designee. The Hearing Officer shall determine the specific facts [put into] in issue [by the Charge Memorandum and the Answer], and with respect to those facts only, both the [d]Division [or department] of the Exchange bringing the charges and the respondent may produce witnesses and any other

evidence and they may examine and cross-examine any witnesses so produced. [If the respondent has failed to file an Answer or if the facts and charges in the Charge Memorandum are not specifically denied, any witnesses or other evidence may be limited to the determination of the penalty to be imposed. In the event a respondent who has failed to file an Answer appears at the hearing, such respondent shall not be entitled to produce witnesses or other evidence or testify in defense of the facts or charges contained in the Charge Memorandum unless the Hearing Panel determines that such respondent had adequate reason to excuse his failure to file an Answer. Upon such determination by the Hearing Panel, the hearing may be adjourned and the respondent may be directed to promptly file a written Answer.] After hearing all the witnesses and considering all the evidence, the Hearing Panel shall determine whether the respondent is guilty of the charges. If the Hearing Panel determines that the respondent is guilty, it shall fix and impose the penalty or penalties.

(e) The Exchange shall keep a record of any [h]Hearing conducted under this Rule and a written notice of the result setting forth the requirements contained in Section 6(d)(1) of the Securities Exchange Act of 1934 shall be served upon the respondent and the [d]Division [or department] of the Exchange which brought the charges.

The determination of the Hearing Panel, or of the Hearing Officer on a determination of default, and any penalty imposed, shall be final and conclusive twenty five days after notice thereof has been served upon the respondent in the manner provided in paragraph (d) above, unless a request to the Board [of Directors] for review of such determination and/or penalty is filed as hereinafter provided. If such a request to the Board [of

Directors] for review is filed as hereinafter provided, any penalty imposed shall be stayed pending the outcome of such review.

(f) The Division [or department] of the Exchange which brought the charges, the respondent, [or] and any member of the Board, [of Directors or] any member of the Board of Executives [of the Exchange] representing the groups referenced in clauses (ii) and (iii) of Article V, Section 2(b) of the Exchange Constitution, any member of the Board of Executives in such other categories as the Board, by rule, shall designate, and any member of the Regulation, Enforcement and Listing Standards Committee may require a review by the Board of any determination or penalty, or both, imposed by a Hearing Panel or Hearing Officer. A request for review shall be made by filing with the Secretary of the Exchange a written request therefore, which states the basis and reasons for such review, within twenty-five days after notice of the determination and/or penalty is served upon the respondent. The Secretary of the Exchange shall give notice of any such request for review to the [d]Division [or department] of the Exchange which brought the charges and any respondent affected thereby.

Any review by the Board [of Directors] shall be based on oral arguments and written briefs and shall be limited to consideration of the record before the Hearing Panel or Hearing Officer. Upon review, the Board [of Directors], by the affirmative vote of a majority of the Directors then in office, may sustain any determination or penalty imposed, or both, may modify or reverse any such determination, and may increase, decrease or eliminate any such penalty, or impose any penalty permitted under the provisions of this Rule, as it deems appropriate. Unless the Board [of Directors] otherwise specifically directs, the determination and penalty, if any, of the Board [of

Directors] after review shall be final and conclusive subject to the provisions for review of the Securities Exchange Act of 1934.

Notwithstanding the foregoing, if either party upon review applies to the Board [of Directors] for leave to adduce additional evidence, and shows to the satisfaction of the Board [of Directors] that the additional evidence is material and that there was reasonable ground for failure to adduce it before the Hearing Panel or Hearing Officer, the Board [of Directors] may remand the case [to a Hearing Panel] for further proceedings, in whatever manner and on whatever conditions the Board [of Directors] considers appropriate.

(g) In lieu of the procedures set forth in paragraph (d) above, a Hearing [Panel] Officer acting alone [,at a hearing called for that purpose,] shall also determine whether a member, member organization, allied member, approved person, or registered or non-registered employee of a member or member organization has committed any one or more of the offenses specified in paragraph (a) above, on the basis of a written Stipulation and Consent entered into between the respondent and any authorized officer or employee of the Exchange. Any such Stipulation and Consent shall contain a stipulation with respect to the facts, or the basis for findings of fact by the Hearing [Panel] Officer; a consent to findings of fact by the Hearing [Panel] Officer, including a finding that a specified offense had been committed; and a consent to the imposition of a specified penalty.

A Hearing Officer shall convene a Hearing Panel, if the Hearing Officer requires clarification or further information on the Stipulation and Consent, or if either party requests a Hearing before a Hearing Panel. A Hearing Officer, acting alone, may not reject a Stipulation or Consent, but shall convene a Hearing Panel to consider such action.

Notice of any Hearing held for the purpose of considering a Stipulation and Consent shall be served upon the respondent as provided in paragraph (d) above. In any such [h]Hearing, if the Hearing Panel determines that the respondent has committed an offense, it may impose the penalty agreed to in such Stipulation and Consent [or any penalty which is less severe than the stipulated penalty, as it deems appropriate]. In addition, a Hearing Panel may reject such Stipulation and Consent.

Such rejection shall not preclude the parties to the proceeding from entering into a modified Stipulation and Consent which shall be presented to a Hearing Panel in accordance with the provisions of this subsection, nor shall such rejection preclude the Exchange from bringing or presenting the same or different charges to a Hearing Panel in accordance with the provisions of paragraph (d) above. The Exchange shall keep a record of any Hearing conducted under this Rule and a written notice of the result setting forth the requirements contained in Section 6(d)(1) of the Securities Exchange Act of 1934 shall be served on the parties to the proceeding.

The determination of the Hearing Panel or Hearing Officer and any penalty imposed shall be final and conclusive, twenty five days after notice thereof has been served upon the respondent in the manner provided in paragraph (d) above, unless a request to the Board [of Directors] for review of such determination and/or penalty is filed as hereinafter provided. If such a request to the Board [of Directors] for review is filed as hereinafter provided, any penalty imposed shall be stayed pending the outcome of such review.

Any member of the Board, [of Directors or of] the Board of Executives [of the Exchange] specified in or designated pursuant to paragraph (f) above and any member of the Regulation, Enforcement & Listing Standards Committee may require a review by the

Board of any determination or penalty, or both, imposed by a Hearing Panel or Hearing Officer in connection with a Stipulation and Consent. [In addition, the division or department of the Exchange which entered into the written consent may require a review by the Board of Directors of any penalty which is less severe than the stipulated penalty.] The respondent or the [d]Division [or department] which entered into the written consent may require a review by the Board [of Directors] of any rejection of a Stipulation and Consent by the Hearing Panel.

A request for review shall be made by filing with the Secretary of the Exchange a written request therefor, which states the basis and reasons for such review, within twenty-five days after notice of the determination and/or penalty is served on the respondent. The Secretary of the Exchange shall give notice of any such request for review to the [d]Division [or department] of the Exchange involved in the proceeding and any respondent affected thereby.

Any review by the Board [of Directors] shall consist of oral arguments and written briefs and shall be limited to consideration of the record before the Hearing Panel or Hearing Officer. Upon review, the Board [of Directors], by the affirmative vote of a majority of the Directors then in office, may fix and impose the penalty agreed to in such Stipulation and Consent or any penalty which is less severe than the stipulated penalty, or may remand for further proceedings. Unless the Board [of Directors] otherwise specifically directs, the determination and penalty, if any, of the Board [of Directors] after review shall be final and conclusive subject to the provisions for review of the Securities Exchange Act of 1934.

(h) A member, member organization, allied member, approved person, or registered or non-registered employee of a member or member organization, or any other person shall have the right to be represented by legal counsel or other representative in any [h]Hearing or review held pursuant to the provisions of this Rule and in any investigation before any committee, officer, or employee of the Exchange. A Hearing Officer may impose a fine or any other appropriate sanction on any party or the party's representative for improper conduct in connection with a matter before the Hearing Board, and may, if appropriate, exclude any participant, including any party, witness, attorney or representative from a Hearing on the basis of such conduct.

(i) A member or allied member of the Exchange who is associated with a member organization is liable to the same discipline and penalties for any act or omission of such member organization as for his own personal act or omission. The Hearing Panel which considers the charges against such member or allied member or the Board [of Directors] upon any review thereof, may relieve him from the penalty therefor or may remit or reduce such penalty on such terms and conditions as the Panel or the Board shall deem fair and equitable.

(j) When a member is suspended under the provisions of this Rule, such member shall be deprived during the term of his suspension of all rights and privileges of membership. No such suspension shall operate to bar or affect the payments provided for by Article XV of the Constitution of the Exchange in the event of the death of the suspended member. The expulsion of a member shall terminate all rights and privileges arising out of his membership except such rights as he may have under the provisions of Sections 11 and 14 of Article II of the Constitution.

(k) Any approved person or registered or non-registered employee who shall neglect to pay any fine within forty five days after the same shall become payable may, after written notice mailed to such person at either his office or last place of residence as reflected in Exchange records, be summarily suspended from association in any capacity with a member organization or have his approval withdrawn until such fine is paid. (See Art. X, Sec. 6 for penalties imposed upon members, allied members and member organizations for failure to pay fines or other sums due the Exchange.)

Whenever a member, member organization, allied member, approved person or registered or non-registered employee of a member or member organization is suspended under the provisions of this Rule, [he or it] that person or organization may be proceeded against for any offense other than that for which such member, member organization, allied member, approved person or registered or non-registered employee was suspended. The suspension or expulsion of a member or allied member under the provisions of this Rule shall create a vacancy in any office or position held by him.

(l) Notwithstanding any other provisions of this Rule, the Chief Executive Officer (a) may not require a review by the Board under this Rule and (b) shall be recused from deliberations and actions of the Board with respect to matters to be reviewed by the Board under this Rule.

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NYSE Constitution

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ARTICLE IX Disciplinary Proceedings

Sec. 1. Disciplinary Rules. The Board shall adopt such rules as it deems necessary or appropriate for the discipline of members, member organizations, allied members, approved persons, and registered and non-registered employees of members and member organizations for the violation of the Act, the rules of the Exchange and for such other offenses as may be set forth in the rules of the Exchange. The Board shall also adopt such rules as it deems necessary or appropriate governing the conduct of disciplinary proceedings including disciplinary hearings and reviews thereof. The determination and penalty, if any, of the Board after review shall be final and conclusive, subject to the provisions of the Act.

Sec. 2. Hearing Panel. All proceedings relating to disciplinary matters, except as otherwise specifically set forth in the rules of the Exchange [with respect to procedural and evidentiary matters,] shall be conducted before a hearing panel consisting of at least three persons[;]: a hearing officer, who shall [be chairman of] chair the panel, [with the remainder of the panel being] and at least two members of the hearing board.

Sec. 3. Hearing Board. The Chairman of the Board, subject to the approval of the Board, shall from time to time appoint a hearing board to be composed of such number of members and allied members of the Exchange who are not members of the Board or of the Board of Executives, and registered employees and non-registered employees of members and member organizations, and such other persons as set forth in the rules, as the Chairman of the Board shall deem necessary. The members of the hearing board shall be appointed annually and serve at the pleasure of the Board. The Chairman of the Board, subject to the approval of the Board, shall also designate [from among the officers and employees of the Exchange] a chief hearing officer and one or more other hearing officers who shall have no

Exchange duties or functions relating to the investigation or preparation of disciplinary matters and who shall be appointed annually and shall serve as hearing officers at the pleasure of the Board. An individual cannot be a hearing officer (including the chief hearing officer) if he or she is, or within the last three years was, a member, allied member, or registered or non-registered employee of a member or member organization.

Sec. 4. Composition of Hearing Panel. [In any disciplinary proceeding involving as a respondent therein a member, member organization, allied member, or approved person, the members of the hearing board serving on the panel shall be members or allied members. In any such proceeding relating to activities on the floor of the Exchange, at least one of the persons serving on the panel shall be a member active on the floor of the Exchange. In any such proceeding relating to any other activities, at least one of the persons serving on the panel shall work in the office of a member or member organization which engages in a business involving substantial direct contact with securities customers.]

[In any disciplinary proceeding involving as a respondent therein a registered or non-registered employee of a member or member organization who is not a member or allied member, the members of the hearing board serving on the panel shall be registered employees or non-registered employees of members or member organizations who are not members or allied members. In any such proceeding relating to such employee's activities on the floor of the Exchange, at least one of the persons serving on the panel shall be a registered or non-registered employee of a member or member organization active on the floor of the Exchange who is not a member or allied member. In any such proceeding relating to any other activities, at least one of the persons serving on the panel shall work in

the office of a member or member organization which engages in a business involving substantial direct contact with securities customers.]

[In any disciplinary proceeding involving as joint respondents therein one or more members or member organizations, allied members or approved persons, together with one or more registered or non-registered employees of a member or member organization who are not members or allied members, at least one of the persons serving on the panel shall be a member or allied member and at least one other person serving on the panel shall be a registered or non-registered employee of a member or member organization who is not a member or allied member, and the functional qualifications required of hearing panel members as stated in this Section shall be satisfied.]

A hearing panel shall be composed of a hearing officer, who shall chair the panel, and at least two members of the hearing board, at least one of whom shall be engaged in securities activities differing from that of the respondent. In any disciplinary proceeding involving activities on the Floor of the Exchange, no more than one of the persons serving on the hearing panel shall be active on the Floor of the Exchange. The decision of a majority of the panel shall be the decision of the panel and shall be final and conclusive, unless a request to the Board for review is filed as provided in this Article and in the rules of the Exchange.

Sec. 5. Penalties. If a member, member organization, allied member, approved person or registered or non-registered employee of a member or member organization is adjudged guilty in any disciplinary proceeding, the hearing panel, or, to the extent provided in the rules, the hearing officer, shall impose one or more of the following disciplinary sanctions: expulsion, suspension; limitation as to activities, functions, and operations,

including the suspension or cancellation of a registration in, or assignment of, one or more stocks, fine, censure, suspension or bar from being associated with any member or member organization, or any other fitting sanction. [In any disciplinary proceeding, any sanction imposed may be remitted or reduced by the hearing panel on such terms and conditions as it shall deem fair and equitable. In a disciplinary proceeding involving a written consent to the imposition of a specified penalty, the hearing panel in imposing a penalty, may impose the penalty agreed to or any penalty which is less severe than the stipulated penalty as it deems appropriate or the hearing panel may reject such consent.]

Sec. 6. Review. In a disciplinary proceeding not involving a written consent to the imposition of a specified penalty, any member, member organization, allied member, approved person, or registered or non-registered employee of a member or member organization, adjudged guilty of any charge, or the division [or department] of the Exchange which brought the charges, [or] and any member of the Board, [or] any member of the Board of Executives representing the groups referenced in clauses (ii) and (iii) of Article V, Section 2(b), any member of the Board of Executives in such other categories as the Board, by rule, shall designate, and any member of the Regulation, Enforcement & Listing Standards Committee, may, in accordance with procedures set forth in the rules of the Exchange, require a review by the Board, of any determination or penalty, or both [, imposed by the hearing panel]. Upon review, the Board, by the affirmative vote of a majority of the entire Board, may sustain any determination or penalty imposed, may modify or reverse any such determination, and may increase, decrease or eliminate any such penalty, or impose any penalty permitted under this Article as it deems appropriate.

In a disciplinary proceeding involving a written consent to the imposition of a specified penalty, any member of the Board, or the Board of Executives specified in or designated pursuant to the preceding paragraph, and any member of the Regulation, Enforcement & Listing Standards Committee may require a review by the Board of any determination or penalty, or both[, imposed by the hearing panel. In any such proceeding, the division or department which entered into the written consent, may require a review by the Board of any penalty, including any determination related thereto, imposed by the hearing panel, which is less severe than the stipulated penalty]. The respondent or the division or department which entered into the written consent may require a review by the Board of any rejection of the written consent by the hearing panel. Any review provided in this paragraph shall be conducted in accordance with procedures set forth in the rules of the Exchange. Upon review, the Board, by the affirmative vote of a majority of the entire Board, may fix and impose the penalty agreed to in such written consent or any penalty which is less severe than the stipulated penalty, or remand the case for further proceedings.

Notwithstanding any other provisions of this Section, the Chief Executive Officer (a) may not require a review by the Board under this Section and (b) shall be recused from deliberations and actions of the Board with respect to matters to be reviewed by the Board under this Section.

* * * * *

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 NYSE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at

the places specified in Item IV below. The NYSE 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

The Exchange proposes to amend Article IX of the Exchange's Constitution and NYSE Rules 475 and 476 to modify certain aspects of the Exchange's disciplinary procedures and to provide a structure for a summary suspension hearing to prohibit or limit a person's access to services and a "call-up" procedure for review by members of the Board, certain members of the Board of Executives listed in NYSE Rule 476(f), any member of the Regulation, Enforcement and Listing Standards Committee and either the Division of the Exchange that initiated the proceedings or the respondent.

Amendment to NYSE Rule 475

NYSE Rule 475 currently provides a process for the Exchange: (i) to prohibit or limit a person with respect to access of services offered by the Exchange, or (ii) to summarily suspend an Exchange member or member organization facing certain circumstances, such as financial or operating difficulties, or expulsion or suspension by another self-regulatory organization ("SRO"). NYSE Rule 475 permits the subject individual or organization to request and obtain a hearing. The proposed rule change would provide a structure for such a hearing and for a "call-up" procedure for review by members of the Board and certain members of the Board of Executives, any member of the Regulation, Enforcement and Listing Standards Committee and either the Division of the Exchange that initiated the proceedings or the respondent.

Amendments to Constitution and NYSE Rule 476

Amendments to Constitution

At the Exchange's annual members' meeting on April 7, 2005, the members voted to amend the Exchange's Constitution to modify certain aspects of the Exchange's disciplinary process. The Exchange had engaged former federal judge Stanley Sporkin to review and make recommendations regarding the Exchange's disciplinary process. The amendments adopted at the member's meeting were proposed by the Exchange's Board, in part, in response to Judge Sporkin's recommendations. The amendments would:

- require that at least one member of any hearing panel be employed in a field of activity other than that in which the charged person is employed;
- remove the constitutional requirement that full panels handle stipulations and uncontested cases;
- permit individuals who are not employees of the Exchange to serve as hearing officers;
- in conjunction with the proposed amendments to the Exchange's principal disciplinary rule, NYSE Rule 476, permit former members and allied members, and former registered and non-registered employees of members and member organizations to be appointed to the Hearing Board within five years of their retirement;
- remove the constitutional requirement that a hearing panel decide all matters except procedural and evidentiary matters; and
- relieve members of the Board of Executives (other than those representing the trading floor) from the responsibility for "calling up" disciplinary decisions for

review, and extend that responsibility to all members of the Regulation, Enforcement and Listing Standards Committee.

A collateral effect of the changes would be to reduce the overlap between the Constitutional text and NYSE Rule 476 by removing some of the detail that is currently in the Constitution. The Exchange believes that this would enable the Board to effect further refinements to the Exchange's disciplinary process without a vote of the membership, so long as those changes are consistent with the revised Constitutional text.

Composition of Hearing Panels in Disciplinary Proceedings

The Exchange's Constitution currently requires that disciplinary hearings be conducted before a hearing panel consisting of a hearing officer (an Exchange staff member) and two peer panelists. Charges against a member must be heard by a panel including two members; charges against member firm employees must be heard by a panel including other member firm employees; and cases involving activity on the Exchange floor must include at least one panelist engaged in floor activities. The Exchange believes that this "trial by peers" requirement raises a concern about bias and perception of bias. In cases involving charges against individuals on the trading floor, the perception of bias is potentially heightened because of the relatively small floor community. Although the Exchange has found no empirical evidence to indicate that bias exists in the Exchange's disciplinary proceedings, the Exchange believes that any perception of bias would be reduced if at least one member of a hearing panel were required to be employed in a field of activity other than that in which the charged person is employed.

For example, in a case involving the trading floor, charges against a specialist or floor broker would be heard before a hearing panel consisting of no more than one

individual employed on the trading floor. In effect, the available pool of panelists to hear a particular matter would be expanded, and any possible perceptions of bias in having a majority of the panel members in the same line of business as the respondent would be avoided. The amendments would, nevertheless, allow individuals with extensive knowledge of the securities industry, in general, and the particular business of the respondent to serve on hearing panels.

Furthermore, the proposed rule change would permit hearing officers to handle stipulations and uncontested cases without the full hearing panel. Currently, all disciplinary hearings (including settled cases, in which a respondent consents to a penalty, and uncontested cases, in which a respondent does not file an answer to the charges) must be heard before a full hearing panel. Under the constitutional amendments, in conjunction with the proposed amendments to NYSE Rule 476, a hearing officer of the Exchange, acting alone, could consider such uncontested cases and settled cases and impose penalties, without a hearing, in order to expedite resolution of such matters. The hearing officer would convene a hearing panel and hold a hearing if either the Enforcement Division or the respondent requests a hearing before a full panel, or if the hearing officer on his or her own initiative calls for a hearing. Moreover, the hearing officer could not reject a stipulated penalty without convening a hearing panel.

The Amendments to the Constitution, in Conjunction with the Proposed Amendments to NYSE Rule 476, Would Allow Non-NYSE Employees to Serve as Hearing Officers and Certain Recently Retired Individuals to be Appointed to the Hearing Board

The amendments to the Constitution would eliminate the requirement that Exchange hearing officers be employees or officers of the Exchange, thereby enabling the

Exchange to retain outside professionals to serve as hearing officers if needed. For example, if the Exchange experienced a sudden increase in disciplinary cases, it could retain part-time hearing officers to manage the increased caseload. However, under the amendments to the Constitution and the proposed amendments to NYSE Rule 476, an individual who is, or was within the last three years, a member, allied member, or registered or non-registered employee of a member or member organization would not be eligible to serve as a hearing officer.

The proposed rule change also would allow former members, allied members, and former registered and non-registered employees of members and member organizations to be appointed to the Hearing Board within five years of their retirement.⁵ This would enlarge the pool of individuals with the requisite expertise to adjudicate cases. In addition, these individuals could more readily serve during normal business hours, potentially allowing cases to be resolved more expeditiously. However, a hearing panel could include only one retired person.

Hearing Officer Authority to Resolve Substantive Legal Motions

The proposed rule change would permit hearing officers to resolve substantive legal motions, such as motions to dismiss and motions for summary judgment, by no longer requiring that a hearing panel resolve such motions. This authority could serve to expedite

⁵ The proposed rule change would amend NYSE Rule 476 to state that members of its Board of Executives may not serve on the Hearing Board. The Exchange, however, has advised that it intends to submit an amendment to the proposed rule change to conform the text of NYSE Rule 476 regarding the composition of the Hearing Board with the language contained in Article IX, Section 3 of the Exchange's Constitution. In this regard, NYSE Rule 476 will be amended to state that Hearing Board members may not be members of the Exchange's Board or of its Board of Executives. Telephone conversation between Peggy Kuo, Chief Hearing Officer, NYSE and Cyndi N. Rodriguez, Special Counsel, Division, Commission on October 17, 2005.

the hearing process by allowing the hearing officer to resolve motions that currently require action by the full panel. In addition, these motions often involve legal issues that the hearing officer, who historically has been an attorney, is best suited to resolve.

"Call Up" Authority Reallocated

At present, all members of the Board of Executives (as well as all Directors other than the Chief Executive Officer) have the right and the responsibility to "call up" disciplinary decisions for review. The Exchange believes that the Board of Executives' members who represent investors, listed companies, "upstairs" firms, and others do not ordinarily have the requisite experience to discharge this responsibility well. On the other hand, the Exchange believes that the Board of Executives' members representing the trading floor and members of the Regulation, Enforcement and Listing Standards Committee are well suited to discharge this responsibility. The amendments to the Constitution and NYSE Rule 476 would reallocate this responsibility accordingly, but would preserve the Board of Directors' right to charge other classes of members of the Board of Executives with this responsibility if warranted.

Amendment to NYSE Rule 476

Composition of Hearing Panels in Disciplinary Proceedings

The Exchange's Constitution and Rules currently require that disciplinary hearings be conducted before a Hearing Panel consisting of a Hearing Officer (an Exchange staff member) and two peer panelists. Charges against a member must be heard by a panel including two members; charges against member firm employees must be heard by a panel including other member firm employees; and cases involving activity on the Exchange floor must include at least one panelist engaged in floor activities. The Exchange believes

that the requirement of “trial by peers” raises a concern about bias and perception of bias, particularly with respect to charges against individuals on the trading floor, given the relatively small floor community.

The proposed rule changes would reverse these requirements, in effect, requiring that at least one panelist in every case be employed in an area of responsibility other than that of the person facing charges. With respect to cases involving the trading floor, the intent of the proposal is such that charges against a specialist or floor broker would be heard before a panel consisting of no more than one individual employed on the trading floor. By doing so, the available pool of panelists to hear a particular matter would be expanded, and the perception of bias in having a majority of the panel members in the same line of business as the respondent would be avoided. The proposals would, nevertheless, allow individuals with extensive knowledge of the securities industry in general, and the particular business of the respondent, to serve on Hearing Panels.

Furthermore, at present, all disciplinary hearings (including settled cases, in which a respondent consents to a penalty, and uncontested cases, in which a respondent does not file an answer to the charges) must be heard before a Hearing Panel. The proposal would confer authority on an Exchange Hearing Officer alone to consider consents and uncontested cases, without a hearing, in order to expedite resolution of such matters. The Hearing Officer would convene a panel and hold a hearing if either Enforcement or the respondent requests a hearing before a full panel, or if the Hearing Officer, on his or her own initiative, calls for a hearing. Moreover, the Hearing Officer could not reject a stipulated penalty without convening a Hearing Panel.

Conferring Jurisdiction on the Hearing Board Upon Filing of the Charge Memorandum

Under current procedures, the hearing in a disciplinary matter is scheduled only upon request of the Division of Enforcement, after a respondent's answer is received or the time to file an answer has expired. The Hearing Board has no jurisdiction to resolve any issues that arise until the Division of Enforcement requests a hearing, and a respondent has no avenue of recourse if the respondent believes there has been an unreasonable or prejudicial delay. The proposed rule changes would require the filing of charges with the Hearing Board at the time they are served on the respondent. The Hearing Board would assume jurisdiction of the matter at that juncture and be able to schedule expeditiously hearings, as well as rule on pre-hearing motions.

Hearing Officer Authority to Order Pre-Hearing Discovery and Resolve Substantive Legal Motions

Today, a Hearing Officer has clear authority to order pre-hearing discovery of documents from the Division of Enforcement. The proposed rule change would clarify the Hearing Officer's authority to order discovery from the respondent as well. In addition, the proposal would permit the Hearing Officer to resolve substantive legal motions, such as motions to dismiss and motions for summary judgment.

Hearing Officer Authority to Penalize Contemptuous Participants

A Hearing Officer must necessarily have the authority to control the proceedings, including dealing with obstreperous and disruptive participants. The proposal would make this authority clear, and permit the Hearing Officer to impose fines on a party for inappropriate behavior of either the party or the party's representative. This authority would not be limited to dealing with such behavior during a hearing, but would allow for

sanctions to be imposed at any time during the course of proceedings. The Hearing Officer could also, in extreme situations, exclude any such persons from further participation in the proceeding.

Allowing Non-NYSE Employees to Serve as Hearing Officers, and Allowing Certain Recently Retired Individuals to be Appointed to the Hearing Board

The proposed rule changes would eliminate the requirement that Exchange Hearing Officers be employees or officers of the Exchange, thereby enabling the Exchange to retain outside consultants to serve as Hearing Officers, if and when needed. The proposals also would allow recently retired members, allied members, registered and non-registered employees of members and member organizations to be appointed to the Hearing Board within five years of their retirement.

“Call Up” Authority Reallocated

At present, all members of the Board of Executives (as well as all Directors other than the Chief Executive Officer) have the right to “call up” disciplinary decisions for review. This authority would be reallocated to members of the Board, Board of Executives’ members representing the trading floor, and members of the Regulation, Enforcement and Listing Standards Committee.

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with Section 6(b)(5)⁶ of the Act 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.

⁶ 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, would 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

No written comments were solicited or received with respect to the proposed rule change, as amended.

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 such proposed rule change; or

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 an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSE-2005-37 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-2005-37. 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, 100 F Street, NE, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE and on the NYSE's Web site, www.nyse.com. 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-2005-37 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.⁷

Jonathan G. Katz
Secretary

⁷ 17 CFR 200.30-3(a)(12).