

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-52688; File No. SR-NYSE-2005-66)

October 27, 2005

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto to Amend Rule 460 (Specialists Participating in Contests)

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 September 29, 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 October 25, 2005, the Exchange filed Amendment No. 1 to the proposed rule change.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 Substance of the Proposed Rule Change

The proposed rule change is an amendment to NYSE Rule 460 (Specialists Participating in Contests). The text of the proposed rule change is set forth below. Additions are underlined.

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Rule 460. Specialists Participating in Contests

(a) No member or his member organization or any other member, allied member, or approved person or officer or employee of the member organization shall participate in a proxy contest or a company if such member specializes in the stock of that company.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ In Amendment No. 1, the Exchange made clarifying changes to the text of the proposed rule change and non-substantive changes to the purpose section.

Specialists as Directors

(b) No member or his member organization or any other member, allied member, or approved person in such member organization or officer or employee of the member organization shall be a director of a company if such member specializes in the stock of that company.

••• Supplementary Material: -----

.10 Control relationships—Business transactions—Finder’s Fees—No specialist or his member organization or any other member, allied member or approved person in such member organization or officer or employee thereof, individually or in the aggregate shall acquire directly or indirectly the beneficial ownership of more than 10% of the outstanding shares of any equity security in which the specialist is registered, unless such security is (i) a convertible or derivative security, American Depositary Receipt, Global Depositary Receipt, or similar instrument, the conversion of which into common stock of the issuer would not result in a position in the common stock exceeding the 10% threshold; (ii) an investment company unit or Trust Issued Receipt, the redemption of which would not result in a position, directly or indirectly, in any equity security in which the specialist is registered exceeding the 10% threshold; or (iii) a security such as a currency warrant which trades in relationship to the value of that underlying currency or a security such as an index warrant which trades in relationship to the value of that underlying index. With respect to the securities specified in (iii), the specialist must obtain the permission of the Exchange to exceed the 10% threshold, and in no event may the specialist acquire directly or indirectly the beneficial ownership of more than 25% of the issue. This provision applies regardless of whether the beneficial ownership is acquired for investment, trading, or any other purpose. If the beneficial ownership of any or all of such persons reaches or exceeds 5% of the outstanding shares of any such security, the specialist or his organization shall

promptly report this fact to the Market Surveillance Division. Any such person shall, at the request of the Market Surveillance Division, promptly take appropriate action either to dispose of such beneficial ownership or reduce or eliminate his interest in the specialist organization, as may be acceptable to the Exchange. No specialist or his member organization or any other member, allied member or approved person in such member organization or officer or employee thereof shall engage in any business transaction (including loans, etc.) with any company in whose stock the specialist is registered, or accept a finder's fee from such company; provided, however, that a specialist registered in a security issued by an investment company may purchase and redeem the listed security, or securities that can be subdivided or converted into the listed security, from the issuer as appropriate to facilitate the maintenance of a fair and orderly market in the subject security. This prohibition on business transactions shall not apply, however, to the receipt of routine business services, goods, materials, or insurance, on terms that would be generally available.

.11 Definition of an Investment Company Unit— The term “Investment Company Unit” in paragraph .10 above shall be the same as that in Section 703.16 of the Listed Company Manual.

.12 Definition of a Trust Issued Receipt—The term “Trust Issued Receipt” in paragraph .10 above shall be the same as that in Rule 1200.

.20 The restrictions in paragraphs (a) and .10 above shall not apply, except as provided herein, to an approved person entitled to an exemption from this Rule pursuant to Rule 98. The restriction on acquisition of 10% or more of the outstanding shares of any equity security in which an associated specialist is registered, as provided in Rule 460.10, shall apply to such approved person separate and distinct from the restriction as applied to any or all other persons specified in Rule 460.10, and positions of the approved person shall not be aggregated with the

positions of any one or more other persons specified in Rule 460.10. The same principle applies with respect to the reporting of positions specified in Rule 460.10. An approved person entitled to an exemption from this Rule may engage in business transactions with a company in whose stock an associated specialist is registered, may accept a finder's fee from such company, and may act as an underwriter in any capacity for a distribution of securities issued by such company.

.25 The restrictions in paragraph .10 above relating to business transactions between a specialist or his member organization or any other member, allied member or approved person in such member organization or officer or employee thereof shall not apply to Investment Company Units (as defined in paragraph 703.16 of the Exchange's Listed Company Manual), Trust Issued Receipts (defined in NYSE Rule 1200), and derivative instruments based on one or more securities, currencies or commodities (collectively referred to as Exchange-Traded Funds or "ETFs"), if the following conditions are met:

- (i) the specialist or his member organization or any other member, allied member or approved person in such member organization or officer or employee thereof only enters into the business transaction with the sponsor of the ETF and the sponsor is not involved in the day-to-day administration of the ETF; and
- (ii) any fee or other compensation in connection with the business transaction paid to the specialist or his member organization or any other member, allied member or approved person in such member organization or officer or employee thereof must not be dependent on the trading price or daily trading volume of the ETF; and
- (iii) the specialist or his member organization or any other member, allied member or approved person in such member organization or officer or employee thereof must notify and provide a full description to the Exchange of any business transaction or relationship,

except those of a routine and generally available nature as described in paragraph .10 above, it may have with any sponsor of an ETF that he or it is registered as specialist in.

(Remainder of rule unchanged.)

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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 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

NYSE Rule 460.10, in part, restricts a specialist or his member organization or any other member, allied member or approved person in such member organization or officer or employee thereof, not entitled to a NYSE Rule 98 exemption, from engaging in:

“any business transaction (including loans, etc.) with any company in whose stock the specialist is registered.... This prohibition on business transactions shall not apply, however, to the receipt of routine business services, goods, materials, or insurance, on terms that would be generally available.”

The rule is intended to ensure that specialists and their affiliates do not enter into a material business relationship with an issuer in whose security the specialist is registered, such that the specialist's or affiliate's status may create conflicts of interest with respect to the specialist's affirmative and negative obligations to maintain a fair and orderly market in the security.

Currently, NYSE Rule 460.20 provides exemptions from NYSE Rule 460(a) and .10 to an approved person entitled to a NYSE Rule 98 exemption with respect to business transactions with issuers. This is because the functional separation required by NYSE Rule 98 eliminates the conflict of interest concern. The Exchange proposes to add an exemption, in a new section, .25, from the restriction on business transactions between a specialist or his member organization or any other member, allied member or approved person in such member organization or officer or employee thereof and the sponsor of any Exchange Traded Funds (“ETFs”) in which the specialist is registered.

For purposes of the proposed rule, ETFs are Investment Company Units (defined in paragraph 703.16 of the Exchange’s Listed Company Manual), Trust Issued Receipts, such as HOLDRs (defined in NYSE Rule 1200), and derivative instruments based on one or more securities, currencies or commodities. Since ETFs are based on derivatives or indices representing multiple securities, or a single commodity or currency, and the specialist registered to that ETF is not a market maker in any of the underlying component securities, commodities or currencies,⁴ the Exchange believes that any potential for conflicts which might have an undue influence or impact on the ETF trading price is removed. The ETF trading price is generally only a reflection of the price changes of the different base vehicle or vehicles trading elsewhere and perhaps trading on a different exchange or market.

⁴ Exchange member organizations registered as specialists in ETFs are separate member organizations from those registered as specialists in underlying equities. (NYSE Rule 103B.VIII). The word “underlying” and the rule citation appearing in the preceding sentence were added by telephone conference between David Matta, Principal Rule Counsel, N, and David L. Orlic, Attorney, Division of Market Regulation, Commission, on October 27, 2005.

The proposed rule would allow business transactions between a specialist or his member organization or any other member, allied member or approved person in such member organization or officer or employee thereof and the sponsor of the ETF. Generally, the sponsor of an ETF is responsible for establishing the trust that issues the ETF shares, the registration of the ETF shares with the Commission, and the filing of required periodic reports. The trustee is responsible for the day-to-day administration of the trust, including keeping the trust's operational records. While the sponsor generally oversees the performance of the trustee and the trust's principal service providers, it does not exercise day-to-day oversight over the trustee or such service providers.

The amended rule will provide that any fee or other compensation paid in connection with the business transaction to a specialist or his member organization or any other member, allied member or approved person in such member organization or officer or employee thereof not have any relationship to the trading price or daily trading volume of the ETF. This will further diminish any potential ability for a specialist or his member organization or any other member, allied member or approved person in such member organization or officer or employee thereof to unduly influence trading for its own benefit, and further diminish any incentive for any such person to compromise its specialist obligations in maintaining fair and orderly markets. It is also designed to prevent the ETF sponsor from unduly influencing its specialist or his member organization or any other member, allied member or approved person in such member organization or officer or employee thereof.

Finally, a specialist or his member organization or any other member, allied member or approved person in such member organization or officer or employee thereof must notify and provide a full description to the Exchange of any business transaction or relationship, except

those of a routine and generally available nature as described in NYSE Rule 460.10, it may have with any sponsor of an ETF in which it is registered as a specialist.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b)⁵ of the Act, in general, and Section 6(b)(5)⁶ of the Act, in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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.

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 did not solicit or receive any written comments with respect to 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

⁵ 15 U.S.C. 78f(b).

⁶ 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 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-2005-66 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NYSE-2005-66. 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 also will be available for inspection and copying at the principal office of the Exchange. 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-2005-66 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).