

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-53124; File No. SR-NYSE-2005-37)

January 13, 2006

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Approving a Proposed Rule Change and Amendments No. 1 and 2 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 3 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

I. Introduction

On May 23, 2005, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend Article IX of the Exchange's Constitution and Exchange 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, Enforcement and Listing Standards Committee, and either the Division of the Exchange that initiated the proceedings or the respondent. On September 9, 2005, the NYSE filed Amendment No. 1 to the proposed rule change. The proposed rule change, as amended by Amendment No. 1, was published for comment in the Federal Register on October 26, 2005.³ The Commission received no comments regarding the proposal, as amended. On

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 52638 (October 19, 2005), 70 FR 61866.

November 28, 2005 and December 2, 2005, the NYSE filed Amendments No. 2⁴ and 3,⁵ respectively, to the proposed rule change. This order approves the proposed rule change, as amended by Amendments No. 1 and 2, grants accelerated approval to Amendment No. 3, and solicits comments from interested persons on Amendment No. 3 to the proposed rule change.

II. Description of the Proposal

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, 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. 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

⁴ In Amendment No. 2, the Exchange makes minor, non-substantive changes to the rule text contained in Exhibit 5 of the proposed rule change. This was a technical amendment and is not subject to notice and comment.

⁵ In Amendment No. 3, the Exchange proposes that the proposed rule change, as amended, be implemented on or about April 1, 2006 and attaches a revised Exhibit 5 to reflect changes made to the rule text in Amendments No. 1 and 2.

certain members of the Board of Executives,⁶ 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 Article IX of the Constitution and NYSE Rule 476

Composition of the Hearing Panel

The Exchange currently requires that disciplinary hearings be conducted before a Hearing Panel consisting of a Hearing Officer (an Exchange staff member) and two peer panelists. The Exchange believes that this “trial by peers” requirement raises a concern about bias and perception of bias, especially in cases involving charges against individuals on the trading floor because of the relatively small floor community.

Accordingly, the Exchange proposes that a Hearing Panel consist of at least one member who is engaged in securities activities differing from that of the respondent. In any disciplinary proceeding involving activities on the floor of the Exchange, the Exchange also proposes that no more than one of the persons serving on the Hearing Panel be, or if retired, has been, active on the floor. For example, 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. In addition, the Exchange proposes that a Hearing Panel could include only one retired person.

⁶ These are members of the Board of Executives representing the groups referenced in clauses (ii) and (iii) of Article V, Section 2(b) of the Exchange’s Constitution, namely, members who spend a substantial part of their time on the trading floor.

Composition of the Hearing Board and Hearing Officers

The Exchange also proposes to 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. However, under the amendments to the Exchange's Constitution and 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 registered and non-registered employees of members and member organizations to be appointed to the Hearing Board within five years of their retirement.⁷

Hearing Officer's Authority

The Exchange also proposes to permit Hearing Officers to handle stipulations and uncontested cases without the full Hearing Panel. 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 full Hearing Panel. The Exchange proposes to confer authority on an Exchange Hearing Officer to act alone in considering such uncontested and settled cases and impose penalties, without a hearing, in order to expedite resolution of such matters. Under the proposal, the Hearing Officer would convene a 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,

⁷ The Exchange also proposes to amend NYSE Rule 476 to conform this rule with language in Article IX, Section 3 of the Exchange's Constitution prohibiting members of the Board or the Board of Executives from serving on the Hearing Board. Members of the Hearing Panel, other than the Hearing Officer, are selected from members of the Hearing Board. See Article 14, Secs. 2-4 of the Exchange's Constitution.

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.

Furthermore, the proposed rule change would permit the Hearing Officer 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. The proposed rule change also would clarify the Hearing Officer's authority to order pre-hearing discovery of documents from the Division of Enforcement and from the respondent.

Finally, the proposal would clarify the Hearing Officer's authority to penalize contemptuous participants 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 exclude, in extreme situations, any such persons from further participation in the proceeding.

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 change 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.

“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 proposes amendments to its Constitution and NYSE Rule 476 to reallocate this responsibility to members of the Board, Board of Executives’ members representing the trading floor, members of the Regulation, Enforcement and Listing Standards Committee, the Exchange Division that initiated the proceedings or the respondent, but would preserve the Board’s right to designate, by rule, categories of members of the Board of Executives with this responsibility, if warranted.

Amendment No. 3

In Amendment No. 3, the Exchange proposes to implement the proposed rule change, as amended, on or about April 1, 2006 and attached an Exhibit 5 to reflect changes made to the rule text in Amendments No.1 and 2.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 3, including whether Amendment No. 3 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 No. SR-NYSE-2005-37 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NYSE-2005-37. 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 Room. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to

File Number SR-NYSE-2005-37 and should be submitted on or before [insert date 21 days from the date of publication in the Federal Register].

IV. Discussion

After careful consideration, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.⁸ In particular, the Commission finds that, the proposed rule change, as amended, is consistent with Section 6(b)(1) of the Act⁹ which requires that the exchange be “so organized and [have] the capacity to carry out the purposes of [the Act]” and to “enforce compliance by its members and persons associated with its members with the provisions of [the Act].” The Commission also finds that the proposed amendments relating to the composition of the Hearing Panel comport with the requirements of Section 6(b)(3) of the Act,¹⁰ which requires that the rules of a national securities exchange assure the fair representation of its members in the selection of its directors and administration of its affairs, and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer. The Commission also finds that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Act¹¹ in that it is designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and

⁸ In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁹ 15 U.S.C. 78f(b)(1).

¹⁰ 15 U.S.C. 78f(b)(3).

¹¹ 15 U.S.C. 78f(b)(5).

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. Further, the Commission finds that the proposed rule change is consistent with Section 6(b)(7) of the Act,¹² which, among other things, requires that the rules of a national securities exchange provide a fair procedure for the disciplining of members and persons associated with members.

Specifically, the Commission believes that the proposed changes to the Exchange's disciplinary procedures should help strengthen the Exchange's ability to carry out its oversight and enforcement responsibilities as a self-regulatory organization. The Commission also believes that the proposal is reasonably designed to improve the timeliness, fairness, and efficiency of the disciplinary process to address violations of the Exchange's rules and the federal securities laws by the Exchange's members and persons associated with members.

In particular, the Commission believes that it is appropriate for the Exchange to provide a structure in NYSE Rule 475 for a summary suspension hearing to prohibit or limit a person's access to services and to provide a "call-up" procedure for Board review of such proceedings by members of the Board, certain specified 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 proceeding or the respondent. In addition, the Commission believes that it is appropriate for the Exchange to revise Article

¹² 15 U.S.C. 78f(b)(7).

IX of its Constitution to permit the “call up” for Board review of any disciplinary determination or penalty (other than a proceeding involving a written consent to a specified penalty) by any member of the Board, certain specified members of the Board of Executives, any member of the Regulation, Enforcement and Listing Standards Committee, as well as the Exchange Division that brought the charges or the respondent. The Commission notes, however, that the proposed revision to this “call up” procedure contained in the Exchange’s Constitution would preserve the Board’s right to designate, by rule, other categories of members of the Board of Executives that can require such review by the Board.

In addition, the Commission believes that the proposed changes to Article IX of the Exchange’s Constitution and NYSE Rule 476 with respect to the composition of the Hearing Panel should expand the available pool of panelists with the requisite knowledge of the securities industry to serve on the Hearing Panel. At the same time, the Commission believes that the proposed requirement that a Hearing Panel have at least one member who is engaged in securities activities differing from that of the respondent is designed to mitigate the perception of bias that may have occurred when a majority of the panel members in the same line of business as the respondent was not precluded from serving on such panel. Similarly, the Commission believes that the proposed changes to allow recently retired members and employees of members to serve on the Hearing Board and to allow non-NYSE employees to serve as Hearing Officers should enlarge the pool of individuals with the requisite expertise to hear and adjudicate cases and with the ability to readily serve during regular business hours, thereby potentially allowing cases to be resolved more expeditiously. Moreover, the Commission notes that the proposal specifies

that, in any disciplinary proceeding involving activities on the floor of the Exchange, no more than one person on the Hearing Panel shall have been active on the floor of the Exchange, which also is intended to reduce the perception of bias in the Exchange's disciplinary process.

In addition, the Commission believes that the Exchange's proposal to expand the Hearing Officer's authority to handle stipulations and uncontested cases, procedural and evidentiary matters, and substantive legal motions is designed to expedite the hearing process by allowing the Hearing Officer to resolve efficiently certain matters that currently require action by the full Hearing Panel. The Commission notes that, according to the Exchange, these motions often involve legal issues that the Hearing Officer is best suited to resolve.

Finally, the Commission believes that the Exchange's proposal to require that the filing of charges be made with the Hearing Board at the time they are served on the respondent will allow the Hearing Board to immediately assume jurisdiction of the matter and to be able to expeditiously schedule hearings, as well as rule on pre-hearing motions.

Accelerated Approval of Amendment No. 3

The Commission finds good cause to approve Amendment No. 3 to the proposed rule change, as amended, prior to the thirtieth day after the amendment is published for comment in the Federal Register pursuant to Section 19(b)(2) of the Act.¹³ Amendment No. 3 clarifies that the Exchange intends to implement the proposed rule change, as amended, on or about April 1, 2006. The Commission notes that the Exchange has represented that it will issue an Information Memo to alert its members of the proposed rule

¹³ 15 U.S.C 78s(b)(2).

change and its implementation date which is scheduled to occur on or about April 1, 2006.¹⁴

Specifically, the Commission finds that Amendment No. 3 provides clarification to members and other appropriate parties of the intended implementation date of the proposed changes to the Exchange's disciplinary procedures that are contained in Article IX of the Exchange's Constitution and NYSE Rules 475 and 476 and raises no new issues of regulatory concern. For these reasons, the Commission believes that good cause exists to accelerate approval of Amendment No. 3.

IV. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change, as amended, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with Sections 6(b)(1), 6(b)(5), and 6(b)(7) of the Act.¹⁵

¹⁴ Telephone conversation between Peggy Kuo, Chief Hearing Officer, NYSE, and Cyndi N. Rodriguez, Special Counsel, Division of Market Regulation, Commission, on January 11, 2006.

¹⁵ 15 U.S.C. 78f(b)(1), 15 U.S.C. 78f(b)(5), and 15 U.S.C. 78f(b)(7).

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁶ that the proposed rule change (SR-NYSE-2005-37) and Amendments No. 1 and 2 thereto are approved, and that Amendment No. 3 thereto is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁷

Nancy M. Morris
Secretary

¹⁶ 15 U.S.C. 78s(b)(2).

¹⁷ 17 CFR 200.30-3(a)(12).