

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50090; File No. SR-NYSE-2004-06)

July 27, 2004

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the New York Stock Exchange, Inc. Relating to Amendments to Exchange Rule 104 and Rule 123

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Act”) and Rule 19b-4 thereunder,² notice is hereby given that on February 6, 2004, 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 Exchange. On April 5, 2004, the Exchange amended the proposed rule change.³ On July 14, 2004, the Exchange again amended the proposed rule change.⁴ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation (“Division”), Commission, dated April 2, 2004 and accompanying Form 19b-4 (“Amendment No. 1”). In Amendment No. 1, the NYSE clarified that, under the proposed rule change, customers may limit specialists from trading along with their orders and from invoking precedence based on size.

⁴ See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division, Commission, dated July 13, 2004 and accompanying Form 19b-4 (“Amendment No. 2”). In Amendment No. 2, NYSE amended the proposed rule text and added additional explanatory material to clarify the proposal. Amendment No. 2 replaced the Exchange’s original filing and Amendment No. 1 thereto in their entirety.

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

The Exchange proposes to amend NYSE Rule 104.10 (Dealings by Specialists) to provide that customers may limit the ability of specialists to trade along with their orders or to invoke precedence based on size when the specialist is liquidating a position in a specialty security for its dealer account. Exchange Rule 123 (Records of Orders) is also proposed to be amended to require a record of any such request to the specialist to yield.

The text of the proposed rule change is below. Proposed new language is italicized; proposed deletions are in brackets.

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Rule 104.

Dealings by Specialists

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Supplementary Material:

Functions of Specialists

.10 Regular Specialists. –Any member who expects to act regularly as specialist in any listed stock and to solicit orders therein must be registered as a regular specialist.

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(6)(i) Transactions on the Exchange by a specialist for his own account in liquidating or decreasing his position in a specialty stock are to be effected in a reasonable and orderly manner in relation to the condition of the general market, the market in the particular stock and the adequacy of the specialist's positions to the immediate and reasonably anticipated needs of the round-lot and the odd-lot market and in this connection:

* * * * *

(B) the specialist should maintain a fair and orderly market during liquidation and, after reliquifying, should re-enter the market to offset imbalances between supply and demand. The selling of stock on a direct minus tick or a zero minus tick, or the purchasing of stock on a direct plus tick or a zero plus tick should be effected in conjunction with the specialist's re-entry in the market on the opposite side of the market from the liquidating transaction where the imbalance of supply and demand indicates that immediately succeeding transactions may result in a lower price (following the specialist's sale of stock on a direct minus tick or a zero minus tick) or a higher price (following the specialist's purchase of stock on a direct plus tick or a zero plus tick). During any period of volatile or unusual market conditions resulting in a significant price movement in the subject security, the specialist's transactions in re-entering the market following a liquidating transaction effected by selling stock on a direct minus tick or zero minus tick, or purchasing stock on a direct plus tick or zero plus tick, should, at a minimum, reflect the specialist's usual level of dealer participation in the subject security. During such periods of unusual price movement in a security, any series of such transactions which may be effected in a brief period of time should be accompanied by the specialist's re-entry in the market and effecting transactions which reflect a significant degree of dealer participation[.];

(C) transactions by a specialist for his or her dealer account in liquidating or decreasing a position in a specialty security must yield parity to and may not claim precedence based on size over a customer order in the crowd upon the request of the member representing such order, where such request has been documented as a term of the order, to the extent of the volume of such order that has been included in the quote prior to the transaction.

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Rule 123.**Record of Orders**

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(g) Requests to Yield

A request to a specialist to yield to a customer order in accordance with Rule 104.10(6)(C) is a condition of that order and must be documented in accordance with applicable books and records requirements.

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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 and is set forth in Sections A, B, and C below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**1. Purpose**

The Exchange proposes to amend Exchange Rules 104.10(6)(i) (Dealings by Specialists) and 123 (Records of Orders) to provide that customers may limit the ability of specialists to trade along with their orders or to invoke precedence based on size when the specialist is liquidating a position in a specialty security for its dealer account.

It is well established that specialists must always yield to customer orders on the book when trading in their specialty securities for their dealer accounts. However, when liquidating a position in a specialty security for its dealer account, a specialist is

permitted to trade along with customer orders represented in the crowd and is entitled to invoke precedence based on size. The proposed amendment to NYSE Rule 104.10(6)(i) will give the crowd broker the right to require that the specialist yield to his or her customer's order. The proposed amendment will create more similarity in the way orders on the book and in the crowd are handled and will help diminish the perception that specialists have an advantage in trading for their dealer accounts.

NYSE Rule 104 requires that specialists' proprietary dealings be reasonably necessary to permit the specialist to maintain a fair and orderly market. Specialist dealer transactions when liquidating a position must meet this standard. In addition, specialists are required to obtain Floor Official approval for any liquidations that are conducted on a direct plus or minus tick. Thus, specialists' transactions when liquidating proprietary positions are subject to specific affirmative market-making standards and review. Nevertheless, there may be circumstances in which a customer will wish to preclude a specialist from participating with a specific trade. The proposed rule change will provide the mechanism for the customer to effect this restriction.

Specifically, Exchange Rule 104.10(6)(i) will be amended to include new paragraph (C) to provide that transactions by a specialist for his or her dealer account in liquidating or decreasing a position in a specialty security must yield to a customer's order in the crowd upon the request of the member representing such order, where such request has been documented as a term of the order, to the extent of the volume of such order included in the quote prior to the transaction. The customer's order will then participate in the transaction to the extent that priority, parity and precedence rules permit.

Exchange Rule 123 will be amended to add new paragraph (g) to provide that a request to a specialist to yield to a customer order is a condition of that order and must be documented in accordance with applicable books and records requirements (Exchange Rules 123 and 410; Rules 17(a)-3 and (a)-4⁵ under the Act).

2. Statutory Basis

The Exchange believes that the basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)⁶ that an exchange have rules that are designed to promote just and equitable principles of trade, 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. The proposed rule change also is designed to support the principles of Section 11A(a)(1) of the Act⁷ in that it seeks to assure economically efficient execution of securities transactions, make it practicable for brokers to execute investors' orders in the best market and provide an opportunity for investors' orders to be executed without the participation of a dealer.

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.

⁵ 17 CFR 240.17a-3 and 240.17a-4.

⁶ 15 U.S.C. 78f(b)(5).

⁷ 15 U.S.C. 78k-1(a)(1).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. 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

(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-2004-06 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-NYSE-2004-06. 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, 450 Fifth Street, NW, Washington, DC 20549. 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-2004-06 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.⁸

Margaret H. McFarland
Deputy Secretary

⁸ 17 CFR 200.30-3(a)(12).