

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58363; File No. SR-NYSE-2008-52)

August 14, 2008

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by New York Stock Exchange LLC to Modify the Method by which it Allocates and Reallocates Securities to Specialist Units and to Establish an Allocation System Based on a Single Objective Measure to Determine a Specialist Unit's Eligibility to Participate in the Allocation Process

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the "Act")² and Rule 19b-4 thereunder,³ notice is hereby given that on August 11, 2008, New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. On August 13, 2008, NYSE filed Amendment No. 1 to the proposed rule change.⁴ The Commission is publishing this notice, as amended, to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to establish an allocation system based on a single objective measure to determine a specialist unit's eligibility to participate in the allocation process.

The text of the proposed rule change is available at <http://www.nyse.com>, the NYSE, and the Commission's Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ Amendment No. 1 removes several references to NYSE Rule 750A in the purpose section and Exhibit 1 of the filing and corrects a mislabeled heading in Exhibit 1 of the filing.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts 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 NYSE Rule 103A (Specialist Stock Reallocation and Member Education and Performance) and 103B (Specialist Stock Allocation) to create an Allocation Policy that is more closely reflective of the Exchange's increased electronic trading environment. The proposed changes to the Allocation Policy would establish a quantifiable measure that adds more objectivity to the specialist unit selection process and provides issuers with more choice in the selection of its specialist unit. The Exchange further proposes to allow the issuer to select the specialist units it chooses to interview directly. The Exchange therefore seeks to eliminate the Allocation Committee as the overseer of the allocation process, the Allocation Panel from which the Allocation Committee members are selected, as well as eliminate allocation decision criteria that are in part based on subjective measures of specialist performance included in the current process by discontinuing the use of the Specialist Performance Evaluation Questionnaire ("SPEQ").

In doing so, the Exchange seeks to replace the SPEQ with an objective measure designed to set a minimum standard to determine a specialist unit's eligibility to participate in the new allocation process of a security.

With the amendment of NYSE Rule 103A, the Exchange also proposes to eliminate the Market Performance Committee ("MPC") as the entity that is responsible for reallocating securities as well as eliminate performance improvement actions in light of the proposed Allocation Policy. NYSE Regulation, Inc. ("NYSER") will replace the MPC as the entity responsible for developing procedures and standards for qualification and performance of members active on the Floor of the Exchange. Current sections of NYSE Rule 103A that address specialist security reallocation are amended and incorporated into NYSE Rule 103B.

I. CURRENT ALLOCATION PROCESS

A. NYSE Rule 103A

NYSE Rule 103A currently addresses the MPC's duties and responsibilities with specialist security reassignments, performance improvement actions and member education.

The MPC is the entity responsible for developing systems and procedures, including the determination of specific kinds of data to be reviewed and the establishment of standards to measure specialist performance and market quality. The MPC reviews the performance of specialist units on a periodic basis to determine if performance improvement measures are required to improve or sustain market quality.

The MPC is authorized to review and approve security assignments and reassignments, assignments in special security situations and organizational changes of specialist units.

In situations where the MPC determines that a specialist unit's performance has fallen below the standards established by the Exchange,⁵ the MPC may initiate a performance improvement action to improve a specialist unit's performance. This performance improvement action informs the specialist unit, in writing, that performance improvement is required, identifies the particular areas of weak performance and proposes measurable goals for the specialist unit to achieve. The MPC appoints a Performance Improvement Monitoring Team ("Monitoring Team") to monitor the progress of the specialist unit. At the conclusion of the Performance Improvement Action, the MPC receives a report detailing the specialist unit's performance. If the specialist unit did not adequately satisfy the goals enumerated in the Performance Improvement Action, the Monitoring Team may recommend that a particular security or securities be considered for reallocation. If the MPC concurs with the recommendation of the Monitoring Team, it shall initiate a reallocation proceeding to determine which of the specialist unit's securities should be reallocated.

NYSE Rule 103A further vests the MPC with the authority to develop procedures and standards for qualification and performance of members active on the Floor of the Exchange. The day to day administration of these responsibilities is carried out by the Market Surveillance Division ("MKS") of NYSE.⁶

⁵ NYSE Rule 103A, Supplementary Material .01 states that a Performance Improvement Action shall be initiated if a specialist unit does not meet the standard of acceptable performance for the following criteria: (1) the SPEQ; (2) Use of Order Reports/Administrative Responses; and (3) Timely Openings.

⁶ MKS administers the New Member Orientation Program in conjunction with the NYSE Specialist and Floor Broker Training Department. It administers the Floor Member Continuing Education classes and the New Floor Official Education Program. MKS also develops testing instruments and administers the "Series 15" examination for general membership on the Exchange, the Specialist Examination, the Floor Official Examination and the Registered Competitive Market Maker Examination. All Floor members are

B. NYSE Rule 103B

NYSE Rule 103B sets forth the current allocation policy and process. The intent of the Allocation Policy is: (1) to ensure that securities are allocated in an equitable and fair manner and that all specialist units have a fair opportunity for allocations based on established criteria and procedures; (2) to provide an incentive for ongoing enhancement of performance by specialist units; (3) to provide the best possible match between specialist unit and security; and (4) to contribute to the strength of the specialist system.⁷ The Allocation Policy applies to original listings and reallocations of already listed companies.

Currently, the duties and responsibilities of the Allocation Committee which currently oversees the allocation of a security to the specialist units are set forth in NYSE Rule 103B, Section II. The Committee is comprised of nine members consisting of six institutional members who are Floor brokers, two allied members and one representative of an institutional investor organization and is selected from an Allocation Panel. These market professionals use their business judgment and the criteria specified in NYSE Rule 103B to identify specialist units most suitable to interview with an issuer. The Allocation Committee's role in making allocation decisions is based primarily on the expert professional judgment of its members. While the Allocation Committee is supplied with information that relates to specialist performance, including the objective performance measures outlined above, there is still a reliance on the subjective judgment of the committee members in interpreting and applying this data in making allocation decisions.

required to complete these educational programs and pass qualification tests before they are permitted to act as members on the Exchange or serve as a Floor Official. MKS is also responsible for maintaining records of the aforementioned examinations.

⁷ NYSE Rule 103B, Section I.

Once a company has been approved to list on the Exchange, specialist units are invited to submit applications to become the assigned specialist of the listing company. This application describes how the specialist unit will allocate resources to accommodate this new issue, what new resources, if any, are needed to service the security and the identity of the individual specialist proposed to trade the security. These applications seeking allocation of securities are reviewed by the Allocation Committee.⁸ Pursuant to NYSE Rule 103B, the Allocation Committee makes the selection of a specialist unit, either directly for allocation of a listing company, or creates a pool of specialist units to be interviewed by a listing company based on

⁸ As an administrative matter, NYSE Rule 103B provides that all specialist units are deemed to have filed with the Exchange a blanket application pursuant to which the specialist unit agrees to accept the allocation of any security. This allows the Exchange the necessary flexibility to see that allocation decisions are still fairly made in instances where few or no applications are received for a particular listing company.

the following criteria: (i) the SPEQ,⁹ (ii) objective performance measures,¹⁰ (iii) listing company input, (iv) allocations received, (v) capital deficiency, disciplinary history and justifiable complaints, and (vi) foreign listing considerations. The objective measures are reported to the Allocation Committee on a “pass/fail” basis.

A listing company has two options in choosing its specialist unit. Under the first option, it may choose to have the Allocation Committee select the specialist unit to make a market in the listing company’s security. Under the second option, the listing company may request that the

⁹ The SPEQ is a survey that the Exchange distributes to the Floor brokers in order to evaluate specialist performance. Floor brokers are required to rate and may provide written comments on the performance of specialist units with whom they deal regularly on the Floor. The Allocation Committee, in its professional judgment, determines how much weight to afford each of the facets of the SPEQ. The results of the SPEQ are to be given 25% weight to the overall evaluation of the specialist unit.

The Exchange filed with the Commission to impose a moratorium on the administration of the SPEQ (“Moratorium”). The Moratorium commenced on June 4, 2007, and was scheduled to end no later than December 31, 2007. Pursuant to the Moratorium, the results of the SPEQ, among other things, no longer serve as criteria in the decision to allocate a security to a specialist unit. See Securities Exchange Act Release No. 55852 (June 4, 2007), 72 FR 31868 (June 8, 2007) (SR-NYSE-2007-47). The Exchange filed to extend the operation of the Moratorium until March 31, 2008. See Securities Exchange Act Release No. 57184 (January 22, 2008), 73 FR 5254 (January 9, 2008) (SR-NYSE-2008-02). [sic] The Exchange filed to extend the operation of the Moratorium until June 30, 2008. See Securities Exchange Act Release No. 57591 (April 1, 2008), 73 FR 18838 (April 7, 2008) (SR-NYSE-2008-21). The Exchange filed to extend the operation of the Moratorium until September 30, 2008. See Securities Exchange Act Release No. 58036 (June 26, 2008), 73 FR 38267 (July 3, 2008) (SR-NYSE-2008-51).

¹⁰ The current objective measures are: (1) timeliness of regular openings; (2) promptness in seeking Floor Official approval of a non-regulatory delayed opening; (3) timeliness of DOT turnaround; and (4) response to administrative messages. Pursuant to the Moratorium, timeliness of DOT turnaround and response to administrative measures are not included in the assessment of allocations or performance improvement actions. See Securities Exchange Act Release No. 55852 (June 4, 2007), 72 FR 31868 (June 8, 2007) (SR-NYSE-2007-47); Securities Exchange Act Release No. 57184 (January 22, 2008), 73 FR 5254 (January 9, 2008) (SR-NYSE-2008-02) [sic]; Securities Exchange Act Release No. 57591 (April 1, 2008), 73 FR 18838 (April 7, 2008) (SR-NYSE-2008- 21); Securities Exchange Act Release No. 58036 (June 26, 2008), 73 FR 38267 (July 3, 2008) (SR-NYSE-2008-51).

Allocation Committee provide the listing company with a group of specialist units that the Committee deems appropriate to trade the listing company's security. A listing company may supply a letter to the Allocation Committee indicating that a particular specialist unit has been instrumental in its decision to list on the Exchange and if the specialist unit is otherwise eligible to receive listings, the Allocation Committee will include the specialist unit identified by the listing company in the group. Following an interview process, the listing company will then select its specialist unit from the group provided by the Allocation Committee. While the Allocation Committee must use the criteria specified in NYSE Rule 103B in reaching a decision under either option, it does so through the filter of its own judgment as to which specialist unit (first option) or units (second option) may be appropriate matches for the listing company.

II. PROPOSED ALLOCATION PROCESS

Securities are allocated to a qualified specialist unit when: (1) a security is to be initially listed on the Exchange; and (2) a security previously assigned to a specialist member organization must be re-assigned pursuant to this rule or the NYSE Listing Company Manual Section 806.01. The Exchange proposes to modify the current Allocation Policy to create a process based on an objective measure to determine a specialist unit's eligibility to participate in the allocation process. As such, the Exchange proposes to permanently discontinue the use of the SPEQ and to allow issuers to directly select the specialist units the issuer seeks to interview, thus obviating the need for an Allocation Committee.

A. Amendments to NYSE Rule 103A

The Exchange seeks to amend NYSE Rule 103A to eliminate the concept of a performance improvement action. The Exchange has recently amended its system of variable payments to specialist units to create a liquidity provision payment ("LPP") to incent specialist

unit performance. The payment is based, in part, on the specialist unit's trading performance by measuring its liquidity enhancing behavior. LPPs are based on two revenue sources in NYSE-listed securities: (1) the Exchange's share of market data revenue derived from quoting share and (2) the Exchange's transaction fee revenue.¹¹ The Exchange believes that payments derived from market data incent specialist units to post quotes more frequently at the National Best Bid or Offer ("NBBO"). The payments derived from transaction revenue are based on Exchange reviews of the specialist unit's executed volume in four categories: (1) price improvement; (2) size improvement; (3) providing liquidity from posting bids or offers on the book; and (4) matching better bids or offers published by other market centers to reduce client routing cost.¹² The Exchange believes that specialist units will be incented to engage in trading activity that provides liquidity and results in a better execution experience for the customer. Additionally, the Exchange believes that this positive incentive acts as a more powerful mechanism to encourage specialist unit performance. As such, the Exchange seeks to eliminate the performance improvement action in NYSE Rule 103A.

Moreover, the Exchange proposes to amend NYSE Rule 103A to vest the overview of member education programs with NYSER.¹³ The day to day administration of member education is currently performed by MKS staff. The Exchange, therefore, believes that it is more appropriate to have NYSER completely responsible for this function.

¹¹ See Securities Exchange Act Release No. 56591 (October 1, 2007), 72 FR 57371 (October 9, 2007) (SR-NYSE-2007- 89).

¹² NYSE Rule 104 sets forth quoting messages that specialists are permitted to send as part of their quoting functionality.

¹³ NYSE Rule 103A, Section I.

B. Amendments to NYSE Rule 103B

The Exchange believes that the current allocation policy contained in NYSE Rule 103B is no longer consistent with the current more electronic trading environment. The Exchange believes that a clear single objective standard to determine specialist unit eligibility to participate in the allocation process will create a more efficient process that is consistent with its current trading environment. As such, the SPEQ (discussed more fully below), along with several objective performance measures, namely SuperDOT turnaround and responses to administrative messages, are no longer relevant.

Moreover, the Exchange's move to a single objective measure for eligibility in the allocation process simplifies the process by allowing an issuer to directly select the specialist units it seeks to interview in order to determine the ultimate specialist unit to be assigned to trade the security. As such, the Exchange proposes to eliminate the Allocation Committee. Furthermore, because the Exchange seeks to eliminate the Allocation Committee, such elimination would obviate the necessity for an Allocation Panel. Accordingly, the Exchange seeks to also eliminate the Allocation Panel.

1. Proposed Objective Measure for Eligibility for Allocation Process

The Exchange proposes to establish a single objective measure which will determine a specialist unit's eligibility to participate in the allocation process.¹⁴ Proposed NYSE Rule 103B, Section II sets forth the objective measure that a specialist unit must meet in order to be eligible to participate in the allocation process.

¹⁴ Proposed Rule Text, NYSE Rule 103B, Section II(A).

A specialist unit is eligible to participate in the allocation process of a listed security when the specialist unit meets the quoting requirements for “Less Active” and “More Active” securities.¹⁵

A “Less Active Security” is defined as any listed security that has a consolidated average daily volume of less than one million shares per calendar month.¹⁶ A “More Active Security” is defined as any listed security that has a consolidated average daily volume equal to or greater than one million shares per calendar month.¹⁷

For Less Active Securities, a specialist unit must maintain a bid and an offer at the National Best Bid (“NBB”) and National Best Offer (“NBO”) (collectively herein “NBBO”) for an aggregate average monthly NBBO of 10% or more during a calendar month.¹⁸ For More Active Securities, a specialist unit must maintain a bid and an offer at the NBBO for an aggregate average monthly NBBO of 5% or more during a calendar month.¹⁹

Specialist units must satisfy the quoting requirement for both categories (Less Active and More Active) of their assigned securities.²⁰ The Exchange will determine whether a specialist unit has met its quoting requirements for Less Active and More Active securities for the “Trading Days”²¹ in a calendar month by calculating:

¹⁵ Proposed Rule Text, NYSE Rule 103B, Section II(A).

¹⁶ Proposed Rule Text, NYSE Rule 103B, Section II(B).

¹⁷ Proposed Rule Text, NYSE Rule 103B, Section II(C).

¹⁸ Proposed Rule Text, NYSE Rule 103B, Section II(D).

¹⁹ Proposed Rule Text, NYSE Rule 103B, Section II(E).

²⁰ The Exchange Strategic Analysis Department will be responsible for generating and monitoring the specialist units’ performance data in order to determine which specialist units are eligible for security allocation.

²¹ For purposes of Section II of NYSE Rule 103B, “Trading Day” shall mean any day on which the Exchange is scheduled to be open for business. Days on which the Exchange

- (1) the “Daily NBB Quoting Percentage” by determining the percentage of time a specialist unit has at least one round lot of displayed interest in an Exchange bid at the National Best Bid during each Trading Day for a calendar month;
- (2) the “Daily NBO Quoting Percentage” by determining the percentage of time a specialist unit has at least one round lot of displayed interest in an Exchange offer at the National Best Offer during each Trading Day for a calendar month;
- (3) the “Average Daily NBBO Quoting Percentage” for each Trading Day by summing the “Daily NBB Quoting Percentage” and the “Daily NBO Quoting Percentage” then dividing such sum by two;
- (4) the “Monthly Average NBBO Quoting Percentage” for each security by summing the security’s “Average Daily NBBO Quoting Percentages” for each Trading Day in a calendar month then dividing the resulting sum by the total number of Trading Days in such calendar month; and
- (5) for the total Less Active Securities (More Active Securities) assigned to a specialist unit, the Exchange will determine the “Aggregate Monthly Average NBBO Quoting Percentage” by summing the Monthly Average NBBO Quoting Percentages for each Less Active Security (More Active Security) assigned to a specialist unit, then dividing such sum by the total number of Less Active Securities (More Active Securities) assigned to such specialist unit.²²

closes prior to 4:00 p.m. (Eastern Time) for any reason, which may include any regulatory halt or trading halt, shall be considered a Trading Day.

²² Proposed Rule Text, NYSE Rule 103B, Section II(F) and II(H)(1)-(5).

Example of Quoting Requirement Calculation

Below is an example of a quoting requirement calculation. For purposes of this example, it is assumed that Specialist Unit 1 has two assigned securities, A and B, and that there were 5 trading days in the selected calendar month.

The “Average Daily NBBO Quoting Percentage” for Specialist Unit 1 is calculated for each security by summing the daily NBB and NBO of each security for that day and dividing that number by two:

| Security A | | | | |
|-------------------|-----|-----|--|---|
| Trading Days | NBB | NBO | Calculation of “Average Daily NBBO Quoting Percentage” for Specialist Unit 1 | “Average Daily NBBO Quoting Percentage” |
| T1 | 4% | 6% | $4\% + 6\% = 10\%$ divided by 2 = 5% | 5% |
| T2 | 3% | 5% | $3\% + 5\% = 8\%$ divided by 2 = 4% | 4% |
| T3 | 4% | 4% | $4\% + 4\% = 8\%$ divided by 2 = 4% | 4% |
| T4 | 6% | 8% | $6\% + 8\% = 14\%$ divided by 2 = 7% | 7% |
| T5 | 5% | 5% | $5\% + 5\% = 10\%$ divided by 2 = 5% | 5% |

| Security B | | | | |
|-------------------|-----|-----|--|---|
| Trading Days | NBB | NBO | Calculation of “Average Daily NBBO Quoting Percentage” for Specialist Unit 1 | “Average Daily NBBO Quoting Percentage” |
| T1 | 5% | 7% | $5\% + 7\% = 12\%$ divided by 2 = 6% | 6% |
| T2 | 4% | 6% | $4\% + 6\% = 10\%$ divided by 2 = 5% | 5% |
| T3 | 6% | 8% | $6\% + 8\% = 14\%$ divided by 2 = 7% | 7% |
| T4 | 7% | 9% | $7\% + 9\% = 16\%$ divided by 2 = 8% | 8% |
| T5 | 9% | 9% | $9\% + 9\% = 18\%$ divided by 2 = 9% | 9% |

The “Monthly Average NBBO Quoting Percentage” for each security is then calculated by summing the security’s “Average Daily NBBO Quoting Percentages” for all five Trading Days of the calendar month and then dividing the resulting total by the number of Trading Days in the calendar month (in this instance 5).

| Security A | | | | | | |
|---|----|----|----|----|--|---|
| “Average Daily NBBO Quoting Percentage” | | | | | Calculation of “Monthly Average NBBO Quoting Percentage” for Specialist Unit 1 | “Monthly Average NBBO Quoting Percentage” |
| T1 | T2 | T3 | T4 | T5 | | |
| 5% | 4% | 4% | 7% | 5% | $5\%+4\%+4\%+7\%+5\% = 25\%$ divided by 5= 5% | 5% |

| Security B | | | | | | |
|---|----|----|----|----|--|---|
| “Average Daily NBBO Quoting Percentage” | | | | | Calculation of “Monthly Average NBBO Quoting Percentage” for Specialist Unit 1 | “Monthly Average NBBO Quoting Percentage” |
| T1 | T2 | T3 | T4 | T5 | | |
| 6% | 5% | 7% | 8% | 9% | $6\%+5\%+7\%+8\%+9\% = 35\%$ divided by 5= 7% | 7% |

The “Aggregate Monthly Average NBBO Quoting Percentage” is determined by summing the “Monthly Average NBBO Quoting Percentage” for each security and then dividing such sum by two, the total number of securities in this example.

| “Aggregate Monthly Average NBBO Quoting Percentage” for Specialist Unit 1 |
|---|
| Monthly Average NBBO Security A + Monthly Average NBBO Security B divided by 2 $5\%+7\% = 12\%$ divided by 2 = 6% Aggregate Monthly Average |

If a specialist unit fails to satisfy the requirements of proposed NYSE Rule 103B, Section II(D) and (E) for a one-month period, the Exchange will issue an initial warning letter to the specialist unit, advising it of its deficiency.²³ The specialist unit shall provide in writing an explanation and articulation of corrective action.²⁴ If the specialist unit fails to meet the requirement of proposed NYSE Rule 103B, Section II(D) and (E) for a second consecutive month, the specialist unit will be ineligible to participate in the allocation process for a minimum

²³ Proposed Rule Text, NYSE Rule 103B, Section II(J)(1). The Exchange Specialist Liaison Department will be responsible for issuing the warning letter to a special unit that fails to meet its requirement. It will also be responsible for advising a specialist unit of its eligibility or ineligibility to participate in the allocation process.

²⁴ Proposed Rule Text, NYSE Rule 103B, Section II(J)(1).

of two months following the second consecutive month of its failure to meet its quoting requirement (“Penalty Period”).²⁵

The specialist unit must satisfy the quoting requirement for the two consecutive months of the Penalty Period. In the event a specialist unit fails to satisfy its quoting requirements for the two consecutive months of the Penalty Period, the specialist unit will remain ineligible to participate in the allocation process until it has met the quoting requirement for a consecutive two calendar month period.²⁶ The Exchange will review each specialist unit’s trading on a monthly basis to determine whether the specialist unit has satisfied its quoting requirement.²⁷

2. Elimination of the SPEQ

The Exchange submits that the establishment of a single objective measure to determine a specialist unit’s ability to participate in the allocation process obviates the need to use subjective criteria in the allocation process and therefore proposes to permanently eliminate the use of the SPEQ. Initially, the SPEQ provided critical information to the Exchange to maintain the quality of its market when the Exchange’s market model was primarily dependent on transactions involving the specialist handling orders directly. As such, the specialist and Floor brokers were in contact on a more or less continual basis, as both sought and gave information on orders, trade executions and market conditions. The SPEQ was designed to reflect that relationship by seeking Floor broker input on the relationship the Floor broker had with the specialists he or she came in contact with most frequently.

²⁵ Proposed Rule Text, NYSE Rule 103B, Section II(J)(2).

²⁶ Proposed Rule Text, NYSE Rule 103B, Section II(J)(3).

²⁷ Proposed Rule Text, NYSE Rule 103B, Section II(J)(4).

While the SPEQ has been an important mechanism to evaluate specialist performance for allocation and performance improvement action purposes, current trends in the Exchange market have rendered the SPEQ less reliable as an assessment tool. SPEQ evaluations are subjective, with ratings based on personal experiences rather than comparisons with accepted objective standards. Further, except for the written comments, which are not incorporated into the formula for SPEQ tier classifications, SPEQ does not focus on market-making by individual specialists. Importantly, as the number of specialist units has decreased, SPEQ tier classifications have become tightly clustered with statistically insignificant differences among the specialist units. Also, SPEQ participants recognize the limitations of SPEQ and have requested a more meaningful process for evaluating specialist performance.

More significantly, the introduction of the Hybrid Market further diminished the effectiveness of the SPEQ to assess adequately specialist performance by Floor brokers. Floor brokers and specialists are now provided with electronic trading tools which effectively replace much of the necessity for continual personal and verbal contact between them. Furthermore, the increased transparency with respect to the Display Book through conduits like Exchange OPENBOOK (“OPENBOOK”) has also decreased the need for a Floor broker to obtain state of the book and market information verbally from a specialist. The SPEQ does not account for the operation of the electronic tools available in the current more electronic trading environment. As such, the Exchange seeks to permanently eliminate its use.

3. Elimination of the Allocation Committee

The Exchange further submits that the more efficient and streamlined process for allocation obviates the need for the Allocation Committee. The Exchange proposes to allow an issuer to select the specialist units it chooses to interview directly from the specialist units that

are eligible to participate in the allocation process.²⁸ In this manner, the Exchange believes that issuers will no longer be required to submit letters outlining a specialist unit that was pivotal in the issuer's decision to list on the Exchange because the issuer will now have the ability to directly select specialist units to interview.

C. Administration of the New Allocation Policy

Once the list of specialist units that meet the objective standard established by the Exchange is generated, it will be provided to the listing company and the listing company may proceed under one of two options. Under the first option, the listing company selects the specialist units it wishes to interview. The issuer will then proceed to conduct interviews of the selected units. A specialist unit's eligibility to participate in the allocation process is determined at the time the interview is scheduled, i.e., if it has met the quoting requirements set forth above at the time of the interview, it is eligible to be considered for allocation.²⁹

If the issuer selects the specialist unit, the issuer shall select a minimum of three specialist units to interview from the pool of specialist units eligible to participate in the allocation process.³⁰ Specialist units selected for an interview may provide material to the Exchange which will be given to the issuer the day before the scheduled interview. Such material may include a corporate overview of the specialist unit and the trading experience of the designated specialist. Specialist units are prohibited from giving issuers information about other specialist units or any additional market performance data.³¹

²⁸ Proposed Rule Text, NYSE Rule 103B, Section III(A)(1)-(3).

²⁹ Proposed Rule Text, NYSE Rule 103B, Section II(I).

³⁰ Proposed Rule Text, NYSE Rule 103B, Section III(A)(1).

³¹ Proposed Rule Text, NYSE Rule 103B, Section III(A)(2)(a).

Within five business days after the issuer selects the specialist units to be interviewed (unless the Exchange has determined to permit a longer time period in a particular case), the issuer shall meet with representatives of each of the specialist units. At least one representative of the listing company must be a senior official of the rank of Corporate Secretary or above of that company. In the case of the listing of a structured product, a senior officer of the issuer may be present in lieu of the Corporate Secretary. No more than three representatives of each specialist unit may participate in the meeting, each of whom must be employees of the specialist unit, and one of whom must be the individual specialist who is proposed to trade the company's security, unless that specialist is unavailable to appear, in which case a telephone interview is permitted. Meetings shall normally be held at the Exchange, unless the Exchange has agreed that they may be held elsewhere.³²

Following its interview, a specialist unit may not have any contact with an issuer. If an issuer has a follow-up question regarding any specialist unit(s) it interviewed, it must be conveyed to the Exchange. The Exchange will contact the unit(s) to which the question pertains and will provide any available information received from the unit(s) to the listing company.³³

Within two business days of the issuer's interviews with the specialist units, the issuer shall select its specialist unit in writing, signed by a senior official of the rank of Corporate Secretary or higher, or in the case of a structured product listing, a senior officer of the issuer, duly authorized to so act on behalf of the company. The Exchange shall then confirm the allocation of the security to that specialist unit, at which time the security shall be deemed to

³² Proposed Rule Text, NYSE Rule 103B, Section III(A)(2)(b).

³³ Proposed Rule Text, NYSE Rule 103B, Section III(A)(2)(d).

have been so allocated. An issuer may request an extension from the Exchange if the issuer is unable to complete its selection within the specified period.³⁴

If the issuer delegates authority to the Exchange to select its specialist unit, three members of the Exchange's Senior Management, as designated by the Chief Executive Officer ("CEO") of the Exchange or his or her designee, one non-specialist Executive Floor Governor ("EFG") and two non-specialist Floor Governors ("FGs") ("Exchange Selection Panel"), shall select a specialist unit based on a review of all information that would be available to the issuer. The non-specialist EFG and non-specialist FGs shall be designated on a rotating basis.

The Exchange Selection Panel shall select the specialist unit pursuant to the provisions of 103B Section III (A) ("Specialist Unit Selected by the Issuer") with the Exchange Selection Panel acting on behalf of the issuer. The Exchange Selection Panel will be responsible for informing the issuer of the specialist unit it selects.

The selection of the specialist unit shall be made by majority vote with any tie votes being decided by the CEO of the Exchange or his/her designee. The Exchange shall notify the specialist unit and the issuer immediately of its decision. The specialist unit shall then be responsible for providing the issuer with the name of the specialist with the requisite experience and skill it believes is appropriate to trade the issuer's security.³⁵

Whether the issuer or the Exchange selects the specialist unit to receive the security allocation, the individual specialist ultimately assigned the proposed security shall be required to remain the assigned specialist for one year from the date that the issuer begins trading on the Exchange. The specialist unit may designate a different individual specialist within the year by

³⁴ Proposed Rule Text, NYSE Rule 103B, Section III(A)(3)(a).

³⁵ Proposed Rule Text, NYSE Rule 103B, Section III(B)(1).

notifying the Exchange of the change in specialist and setting forth the reasons for the change with the consent and approval of the issuer.³⁶

D. Reallocation

When an issuer has requested and confirmed a change of specialist unit pursuant to Section 806.01 of the Exchange Listed Company Manual, the security will be put up for reallocation as soon as practicable, in accordance with the allocation process set forth in proposed NYSE Rule 103B, Section III.³⁷

E. Egregious Situations

The Exchange seeks to move current provisions codified in NYSE Rule 103A that outline the reallocation of a security when a specialist unit's performance is so egregiously deficient as to call into question the Exchange's integrity or impair the Exchange's reputation for maintaining an efficient, fair and orderly market to proposed NYSE Rule 103B. Currently, NYSE Rule 103A provides that in such an instance, the MPC may immediately initiate a reallocation proceeding upon written notice to the specialist unit, specifying the reasons for the initiation of the proceeding. The Exchange proposes to incorporate this concept to NYSE Rule 103B and transfer the authority to initiate a reallocation proceeding upon written notice to the specialist unit from the MPC to the CEO or his/her designee.³⁸ As previously discussed above in Section A of the Proposed Allocation Process, the MPC shall no longer retain responsibility for security reassignments. The Exchange believes that in these instances in which the specialist unit's performance is so egregiously deficient as to call into question the Exchange's integrity or

³⁶ Proposed Rule Text, NYSE Rule 103B, Section III(B)(2).

³⁷ Proposed Rule Text, NYSE Rule 103B, Section IV.

³⁸ Proposed Rule Text, NYSE Rule 103B, Section V, extracted from Exchange Rule 103A(f).

impair the Exchange's reputation in maintaining an efficient, fair and orderly market, the Exchange's CEO, as the most Senior Member of the Exchange, or his/her designee, is the appropriate entity to initiate reallocation proceedings upon written notice to the specialist unit.

Following this decision, if the CEO or his/her designee makes a final determination that a security should be referred for reallocation, the Exchange proposes that the CEO or his/her designee will, in their expert business judgment, be responsible for distributing the security to the eligible specialist units. The CEO or his/her designee shall then make a final determination as to which one or more of the specialist unit's securities shall be referred for reallocation. All determinations made by the CEO or his/her designee shall be communicated in writing to the specialist unit, with a statement of the reasons for such determinations. In order to preserve due process, specialist units have a right to have this decision reviewed by the Exchange Board of Directors.

F. Specialist Unit Communication Policies and Procedures with Listing Company

Currently, NYSE Rule 106 requires, among other things, that specialist units make themselves available for contact with their listing companies periodically throughout the year. NYSE Rule 106 was adopted in 1989 at a time when orders entered with the specialist were handled manually and contact between a specialist unit and its listed companies was necessary to ensure that listed companies were informed about the trading in its listed security on the Floor.³⁹ The Exchange believes that the management of the business relationship between the specialist

³⁹ See Securities Exchange Act Release No. 27292 (September 26, 1989), 54 FR 41193 (October 5, 1989) (SR-NYSE-89-13). As a result, NYSE Rule 106 mandates interaction between a specialist unit and representatives of listed companies. The rule requires that one or more senior officials of the rank of Corporate Secretary or higher at the listing company have an opportunity to have contact with the specialist unit on a quarterly basis. Further, the rule mandates that at least one of the quarterly meetings be in-person.

unit and its listed company is more appropriately left to direct communications between the specialist unit and the listed company.

In today's world of electronic messaging, internet connectivity and automated trading, the entities described above may not need the contact with a specialist unit specified in NYSE Rule 106. In addition to the entities' ability to access public information, specialist units have internal departments that are responsible for communicating with these entities during the trading day. Specifically, specialist units have corporate relations groups that serve to provide information and are available to answer questions from the aforementioned entities during the trading day. The Exchange therefore believes that the requirements of NYSE Rule 106 are unnecessary.⁴⁰ As such, the Exchange seeks to rescind NYSE Rule 106 which sets forth the specialist unit's obligation to communicate with the aforementioned entities.

G. Right to Review

A decision by the Exchange that one or more securities should be reallocated shall be final, subject to the specialist unit's right to have that decision reviewed by the Exchange's Board of Directors.⁴¹ In the event that a specialist unit asserts its right to review, no reallocation may occur until the Board of Directors completes its review.⁴²

⁴⁰ NYSE Rule 106 further mandates that the specialist unit makes itself available to the Exchange's fifteen (15) largest member organizations through required semi-annual "off the Exchange Floor" contact. The interpersonal relationship between specialist units and member organizations that once took front stage in the marketplace has been significantly replaced by automated trading initiatives and computerized market data reports. Specialist units are generally in contact with member organizations, either through electronic and/or telephonic means on a regular basis, which similarly renders the requirements of NYSE Rule 106(b) unnecessary.

⁴¹ Proposed Rule Text, NYSE Rule 103B, Section V(D).

⁴² Proposed Rule Text, NYSE Rule 103B, Section V(E).

H. Exchange-Traded Funds

The Exchange proposes to delete from NYSE Rule 103B the section related to the allocation of Exchange-Traded Funds (“ETFs”) admitted to trading on the Exchange on an Unlisted Trading Privileges (“UTP”) basis. On October 19, 2007, the Exchange completed a transfer of all ETFs admitted to trading on the Exchange on an UTP basis to NYSE ArcaSM NYSE Euronext’s fully electronic U.S. listing and trading platform.⁴³ The Exchange believes that a single, harmonized platform for listing and trading ETFs on NYSE Arca further improves efficiencies and market quality. The transfer of all ETFs trading on the NYSE to NYSE Arca obviates the necessity for this section in the rule. Accordingly, the Exchange proposes to delete it from the rule.

I. Closed-End Management Investment Companies (“Funds”)

The Exchange further proposes that Funds listing on the Exchange pursuant to this policy will be subject to the allocation process pursuant to proposed NYSE Rule 103B, Section III. If the issuer of an initial Fund lists additional funds within nine months from the date of its initial listing, the issuer may choose to maintain the same specialist unit for those subsequently listed funds or it may select a different specialist unit from the group of eligible specialist units that the issuer interviewed in the allocation process for its initial fund. The fund may also delegate the selection of its specialist unit to the Exchange if it so chooses pursuant to proposed NYSE Rule 103B, Section III(B).⁴⁴

If a specialist unit is ineligible from participating in an allocation as set forth in proposed NYSE Rule 103B, Section III, at the time of a subsequent new Fund listing (within the

⁴³ On December 31, 2007, the Exchange completed a transfer of all ETF trading to NYSE Arca.

⁴⁴ Proposed Rule Text, NYSE Rule 103B, Section VI(F).

designated nine-month period), that specialist unit will not be included for consideration for subsequent listings.⁴⁵

J. Spin-offs, Relistings, Common Stock, Target Stock, Warrants and Rights

The Exchange proposes to rename the section entitled “Spin-offs and listing of related companies” to also include “related securities” in order to address the assignment of warrants and rights.⁴⁶ Proposed NYSE Rule 103B, Section VI(A) continues to allow the listing company to remain with the specialist unit registered in the related spin-off or related company and will also allow the listing company to be referred for allocation through the allocation process pursuant to proposed NYSE Rule 103B, Section III, if it so chooses. If the spin-off company, company related to a listed company or relisting chooses to have its specialist unit selected by the Exchange pursuant to NYSE Rule 103B, Section III(B), and requests not to be allocated to the specialist unit that was its listed company’s specialist unit, such request will be honored.

The Exchange further proposes that common stock (listed after preferred stock) be referred for allocation through the allocation process pursuant to proposed NYSE Rule 103B, Section III.⁴⁷

In addition, NYSE Rule 103B, Section VI(A) will be amended to codify that a warrant issued by a listed company and traded on the Exchange is allocated to the specialist unit registered in the underlying security of the listed company.⁴⁸ Upon request by the issuer, the

⁴⁵ Proposed Rule Text, NYSE Rule 103B, Section VI(F).

⁴⁶ Proposed Rule Text, NYSE Rule 103B, Section VI(A).

⁴⁷ Proposed Rule Text, NYSE Rule 103B, Section VI(A).

⁴⁸ Proposed Rule Text, NYSE Rule 103B, Section VI(A)(2).

warrant may be allocated through the allocation process pursuant to proposed NYSE Rule 103B, Section III.⁴⁹

Moreover, the Exchange proposes to further codify that rights are not subject to the allocation process pursuant to proposed NYSE Rule 103B, Section III. Rights are considered short-term securities, which are exempt from registration under the Act.⁵⁰ Accordingly, rights are not treated as listed securities on the Exchange and are not subject to the allocation process pursuant to proposed NYSE Rule 103B, Section III. Rights are assigned, when issued, to the specialist unit by the Exchange.⁵¹

Specialist units that are ineligible to receive a new allocation due to its failure to meet the requirements of proposed NYSE Rule 103B, Section (II)(D) and (E) will remain eligible to receive an allocation pursuant to Section 103B(VI) of the Proposed Rule.

K. Listed Company Mergers

When two NYSE listed companies merge, the merged entity is assigned to the specialist in the company that is determined to be the survivor-in-fact (dominant company). Where no surviving/dominant entity can be identified after two NYSE listed companies merge, the NYSE proposes that the merged company may select one of the units trading the merging companies without the security being referred for reallocation, or it may request that the matter be referred for allocation through the allocation process pursuant to NYSE Rule 103B, Section III.⁵²

⁴⁹ Proposed Rule Text, NYSE Rule 103B, Section VI(A)(2).

⁵⁰ See Rule 12a-4 under the Act; see also NYSE Listed Company Manual, Section 703.03(O).

⁵¹ Proposed Rule Text, NYSE Rule 103B, Section VI(A)(4). The Exchange Market Watch, Security Operations, Records Management Division is responsible for assigning rights to the specialist unit.

⁵² Proposed Rule Text, NYSE Rule 103B, Section VI(D)(1).

Specialist units that are ineligible to receive a new allocation due to its failure to meet the requirements of NYSE Rule 103B, Section II(D) and (E) will remain eligible to receive an allocation pursuant to this section.⁵³

In situations involving the merger of a listed company and an unlisted company, where the unlisted company is determined to be the survivor-in-fact, such company may choose to remain registered with the specialist unit that had traded the listed company entity in the merger, or it may request that the matter be referred for allocation through the allocation process pursuant to proposed NYSE Rule 103B, Section III.⁵⁴ If the unlisted company chooses to have its specialist unit selected by the Exchange, the company may not request that the Exchange exclude from consideration the specialist unit that had traded the listed company.⁵⁵

L. Allocation Sunset Policy

The Exchange is proposing to extend the effectiveness of allocation decisions with respect to any initial public offering listing company which lists on the Exchange from three months to six months.⁵⁶ In situations in which the selected specialist unit merges or is involved in a combination within the six month period, the company may choose whether to stay with the selected specialist unit, or be referred to allocation. If a listing company does not list within six months, the matter shall be referred for allocation through the allocation process pursuant to proposed NYSE Rule 103B, Section III.⁵⁷

⁵³ Proposed Rule Text, NYSE Rule 103B, Section VI(D)(1).

⁵⁴ Proposed Rule Text, NYSE Rule 103B, Section VI(D)(3).

⁵⁵ Proposed Rule Text, NYSE Rule 103B, Section VI(D)(4).

⁵⁶ Proposed Rule Text, NYSE Rule 103B, Section VI(H).

⁵⁷ Proposed Rule Text, NYSE Rule 103B, Section VI(H).

M. Provisions For Allocation Of Listing Companies Transferring From NYSE ARCA, Inc. ("NYSE ARCASM") To The NYSE

The Exchange further proposes that if a listing company transferring from NYSE ArcaSM to the NYSE was assigned a NYSE Arca Lead Market Maker unit, the listing company can choose to follow the regular allocation process and refer the matter for allocation through the allocation process pursuant to NYSE Rule 103B.⁵⁸ Since the Exchange is proposing elimination of the Allocation Committee, the Exchange believes that this amendment is appropriate.

III. CONFORMING CHANGES TO NYSE RULE 476A, NYSE RULE 123E AND NYSE LISTED MANUAL SECTION 106.02

A. NYSE Rule 476A

The Exchange seeks to make a conforming amendment to NYSE Rule 476A by removing failure to complete the SPEQ from the list of minor rule violations. NYSE Rule 476A provides for the imposition of fines for Minor Violation(s) of NYSE Rules. The Supplementary Material of NYSE Rule 476A enumerates the specific rules and conduct eligible for the imposition of a fine. Included in this list is "Participation in the Specialist Performance Evaluation Questionnaire (SPEQ) Process (Rule 103A)." Since the Exchange proposes the elimination of the SPEQ process in the New Allocation Policy, the Exchange further proposes to amend NYSE Rule 476A to reflect this rescission.

B. NYSE Rule 123E

The Exchange also seeks to make conforming amendments to NYSE Rule 123E to change specialist "organization" to specialist "unit" and "stock" to "security" throughout the proposed rule. The Exchange further proposes to delete and replace all references to the Quality

⁵⁸ Proposed Rule Text, NYSE Rule 103B, Section VIII.

of Markets Committee (“QoMC”) and the MPC with “the Exchange.”⁵⁹ Given the proposed changes to NYSE Rule 103A that rescind MPC’s responsibility to monitor specialist performance, the Exchange seeks to assume responsibility for conducting a review of a proposed specialist combination. Similarly, the Exchange seeks to make a conforming amendment to eliminate the specialist performance measures from NYSE Rule 123E that are also proposed for deletion in connection with the proposed amendments to NYSE Rule 103B. Finally, the Exchange seeks to correct a typographical error from the existing rule.

C. NYSE Listed Company Manual

Finally, the Exchange seeks to make conforming changes to Section 106.02 of the NYSE Listed Company Manual. Currently Section 106.02 provides in pertinent part:

As soon as the Exchange makes the allocation decision, the company is immediately notified by telephone and in writing of the name of the specialist unit, selected background information on the unit and the reasons why the unit was selected.

Section 106.02 gives the reader the impression that the Exchange is always responsible for the selection of the specialist unit to be allocated a listing company’s security. The Exchange proposes to clarify Section 106.02 by amending it to read as follows:

In instances where a company has delegated to the Exchange the selection of its specialist unit, the Exchange will immediately notify the company by telephone and in writing of the name of the specialist unit, selected background information on the unit and the reasons why the unit was selected.

⁵⁹ In March 2006 after the NYSE’s business combination with Archipelago Holdings, Inc., the QoMC ceased to exist upon completion of the revised corporate structure.

IV. CONCLUSION

The proposed Allocation Policy is in keeping with the Exchange's overall objective to maintain the integrity of the market and to further the Exchange's goal of an allocation system that is based primarily on an objective measure of specialist unit performance. The new objective measure is designed to promote fairness and consistency, reward performance, provide an incentive for a specialist unit to continually improve its performance and give the issuer more choice in the selection of its assigned specialist unit. The Exchange believes that the establishment of an objective minimum performance standard on which to determine a specialist unit's eligibility to participate in the allocation or reallocation process protects the investor and the public interest because it creates a system that provides specialist units with incentive for maximum performance which the Exchange believes will result in a better quality market.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with and furthers the objectives of Section 6(b)(5) of the Act,⁶⁰ in that it is designed to prevent fraudulent and manipulative acts and practices, 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 is consistent with these objectives in that it enables the Exchange to further enhance the process by which securities are allocated. The Exchange seeks to create an allocation policy that is rooted in an objective performance measure that accommodates the increased electronic trading environment. The Exchange believes that the quantifiable measure of specialist unit performance proposed in this current rule filing provides the objective criteria to continue an

⁶⁰ 15 U.S.C. 78f(b)(5).

allocation process that is not designed to permit unfair discrimination between specialist units as it relates to a specialist unit's receipt of an allocation.

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

No written comments were solicited or received 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
- (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-2008-52 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2008-52. 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, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. Copies of the 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-2008-52 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶¹

Florence E. Harmon
Acting Secretary

⁶¹ 17 CFR 200.30-3(a)(12).