SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-49521; File No. SR-NYSE-2004-18)

April 2, 2004

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Arbitration

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on March 24, 2004, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by NYSE.[3] NYSE filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act[4] and Rule 19b-4(f)(6) thereunder,[5] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice 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 proposed rule change consists of an extension, until September 30, 2004, of NYSE Rule 600(g), relating to arbitration.

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

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 Commission staff made non-substantive changes to the description of the proposed rule change with the permission of the NYSE. Telephone conversations between Daniel Beyda, Vice President – Arbitration and Hearing Board, NYSE, and Andrew Shipe, Special Counsel, Division of Market Regulation, Commission, April 1, 2004.

4 15 U.S.C. 78s(b)(3)(A).

5 17 CFR 240.19b-4(f)(6).

purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NYSE has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The proposed rule change is intended to extend until September 30, 2004, NYSE Rule 600(g), a pilot program that was most recently extended for a six-month period ending March 31, 2004.[6]

NYSE Rule 600(g) states:

> This paragraph applies to the Ethics Standards for Neutral Arbitrators in Contractual Arbitrations promulgated by the Judicial Council of California (the "California Standards"), which, were they to have effect in connection with arbitrations conducted pursuant to this Code, would conflict with this Code. In light of this conflict, the affected customer(s) or an associated person of a member or member organization who asserts a claim against the member or member organization with which she or he is associated may:
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> - Request the Director to appoint arbitrators and schedule a hearing outside California, or
> - Waive the California Standards and request the Director to appoint arbitrators and schedule a hearing in California. A written waiver by a

[6] Release No. 34-48552 (September 26, 2003), 68 FR 57496 (October 3, 2003) (SR-NYSE-2003-28).

> customer or associated person who asserts a claim against the member or member organization with which he or she is associated on a form provided by the Director of Arbitration under this Code shall also constitute and operate as a waiver for all other parties to the arbitration who are members, allied members, member organizations, and/or associated persons of a member or member organization.

According to the NYSE, Rule 600(g) was adopted by the Exchange in response to the purported imposition of California state law on arbitrations conducted under the auspices of the Exchange and pursuant to a set of nationally-applied rules approved by the Commission.[7] The Exchange states that on July 1, 2002, as a result of the purported application of the Ethics Standards for Neutral Arbitrators in Contractual Arbitrations (the "California Standards") to Exchange arbitrations and arbitrators, the Exchange suspended the appointment of arbitrators for cases pending in California. The Exchange and NASD Dispute Resolution, Inc. sought a declaratory judgment that the California Standards are pre-empted by federal law. On November 12, 2002, Judge Samuel Conti dismissed the action on Eleventh Amendment grounds.[8] A Notice of Appeal from Judge Conti's decision has been filed with the United States Court of Appeals for the Ninth Circuit.[9] The Exchange has determined that, in the absence of a final judicial

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7 Release No. 34-46816 (November 12, 2002); 67 FR 69793 (November 19, 2002) (SR-NYSE-2002-56).

8 NASD Dispute Resolution, Inc. and New York Stock Exchange, Inc. v. Judicial Council of California, No. C 02 3485 (N.D. Cal.).

9 In another district court decision, Mayo v. Dean Witter Reynolds, Inc., Morgan Stanley Dean Witter & Co. dba Morgan Stanley Dean Witter, and Does 1-50, No. C-01-20336 JF, 2003 WL 1922963 (N.D. Cal. Apr. 22, 2003), Judge Jeremy Fogel held that application of the California Standards to the Exchange and other self-regulatory organizations ("SROs") is preempted by the Act, the comprehensive system of federal regulation of the securities industry established pursuant to the Act, and the Federal Arbitration Act ("FAA"). The Mayo decision was not appealed. Since the decision in Mayo, the question of the applicability of the California Standards to SROs has been presented in another case in federal court in California, Credit Suisse First Boston Corp. v. Grunwald, No. C 02-2051 SBA (N.D. Cal. Mar. 31, 2003). The Grunwald court concluded that the California Standards cannot apply to SRO-appointed arbitrators

determination or legislative resolution of the pre-emption issue, there is a continuing need for the waiver option provided by Rule 600(g).

2. Statutory Basis

The Exchange states that the proposed changes are consistent with Section 6(b)(5) of the Act[10] in that they promote just and equitable principles of trade by ensuring that members and member organizations and the public have a fair and impartial forum for the resolution of their disputes.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

The Exchange 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

The NYSE has stated that because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on

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because such arbitrators do not fall within the statutory definition of "neutral arbitrators." The appeal in Grunwald has been fully briefed and argued, and the Ninth Circuit is considering it on an expedited basis. The Commission and the Judicial Council submitted amicus briefs in the Ninth Circuit, and NASD Dispute Resolution and the Exchange were permitted to submit an amicus brief. The appeal from Judge Conti's decision in NASD Dispute Resolution, Inc. and New York Stock Exchange, Inc. v. Judicial Council of California is currently stayed pending a decision in Grunwald. NASD Dispute Resolution and the Exchange also submitted an amicus brief in Jevne v. Superior Court, 6 Cal. Rptr. 3d 542, 113 Cal. App. 4th 486 (2d Dist. 2003), in which the California Court of Appeal held that the Judicial Council acted within its authority in drafting the California Standards, that the California Standards are not pre-empted by the FAA, but that they are pre-empted by the Act. On March 17, 2004, the California Supreme Court granted review in Jevne, and NASD Dispute Resolution and the Exchange have moved to intervene on appeal or, in the alternative, for leave to file an amicus brief with the California Supreme Court.

[10] 15 U.S.C. 78f(b)(5).

competition; and (iii) become operative for 30 days (or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest), it has become effective pursuant to Section 19(b)(3)(A) of the Act[11] and Rule 19b-4(f)(6) thereunder.[12] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that the action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

Pursuant to Rule 19b-4(f)(6)(iii) under the Act,[13] the proposal may not become operative for 30 days after the date of its filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, and the SRO must file notice of its intent to file the proposed rule change at least five business days beforehand. The Exchange has requested that the Commission waive the five-day pre-filing requirement and the 30-day operative delay so that the proposed rule change will become immediately effective upon filing.

The Commission believes that waiving the five-day pre-filing provision and the 30-day operative delay is consistent with the protection of investors and the public interest.[14] Waiving the pre-filing requirement and accelerating the operative date will merely extend a pilot program that is designed to inform aggrieved parties about their options regarding mechanisms that are available for resolving disputes with broker – dealers. During the period of this extension, the Commission and NYSE will continue to monitor the status of the previously discussed litigation.

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11 15 U.S.C. 78s(b)(3)(A).

12 17 CFR 240.19b-4(f)(6).

13 17 CFR 240.19b-4(f)(6)(iii).

14 For purposes only of accelerating the operative date of this proposal, the Commission has considered the

For these reasons, the Commission designates the proposed rule change as effective and operative immediately.

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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. Comments should be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. SR-NYSE-2004-18. 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, comments should be sent in hard copy or by e-mail but not by both methods. 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 will also be available for inspection and copying at the principal

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proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

office of the NYSE. All submissions should refer to File No. SR-NYSE-2004-18 and be submitted by [insert date 21 days from publication].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

J. Lynn Taylor
Assistant Secretary

[15] 17 CFR 200.30-3(a)(12).