

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission finds that the NYSE's proposal to permit the use of automated telephone voting systems by member organizations or their proxy agents is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. The Commission believes that the use of automated telephone voting systems by member organizations or their proxy agents is consistent with Sections 6⁹ and 14¹⁰ of the Act. In particular, the proposal is consistent with the Section 6(b)(5)¹¹ requirements that the rules of an exchange be designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest and Section 14 of the Act which sets forth the requirements for the solicitation of proxies.

The NYSE, consistent with Section 14 of the Act, has rules governing the forwarding of proxy materials to beneficial holders. Pursuant to these rules, member firms are required to forward to beneficial holders a proxy statement and a voting authorization form on which the holder would indicate his voting selections and mail the form back to the member firm. The NYSE is now proposing to adopt rules that would permit member firms or their proxy agents to use an Exchange approved automated telephone voting system that operates in a manner consistent with Section 14(a) of the Act as an alternative to written voting instructions.¹² Under the proposed rules, the automated system must at a minimum provide an identification code for beneficial owners and provide an opportunity for beneficial owners to validate instructions to ensure that they were received correctly. In addition, the automated system must provide beneficial owners with the same power

and authority to issue, revoke, or otherwise change voting instructions as currently exists for instructions communicated in written form. Further, member organizations or their agents utilizing this method must maintain records of voting which include information sufficient to evidence validity of voting instructions, including the name of the beneficial owner, the date of receipt of the instructions, and the voting instructions as transmitted.

The Commission believes that the proposal will be beneficial to both shareholders and member organizations in fulfilling the proxy requirements under the Act and NYSE rules for several reasons.

First, the use of an automated telephone voting system is a simpler and more efficient means of communicating voting instructions than the current method, which requires a beneficial owner to mail a voting authorization form to the member organization, who would vote the proxy. In this regard, the Commission notes that the proposed rule change will permit beneficial owners to make more timely decisions on corporate matters. For these reasons, the Commission believes that the proposed rule change appropriately gives beneficial owners the ability to use a more convenient and efficient means of providing voting instructions. Second, the use of an automated telephone voting system should prove to be more efficient and accurate than the current system in communicating voting instructions. As the NYSE has indicated, the automated telephone voting system is deemed less prone to tabulation errors than the scanners that are currently used to calculate the votes from the written voting authorization forms.¹³ In addition, the automated telephone voting system utilizes identification codes and provides a validation opportunity for the beneficial owner to confirm that voting instructions were received correctly. Finally, the automated telephone voting system is generally viewed as more cost efficient for member organizations because this system can handle a higher volume of voting instructions than the scanners that are currently used to calculate voting instructions from the voting authorization forms.¹⁴

In summary, the Commission believes that the use of identification codes, the opportunity to confirm that voting

instructions were received correctly, and the purported improved accuracy in the new system will be beneficial to shareholders and member organizations and is consistent with the public interest and the protection of investors. Despite these benefits, the Commission notes that the automated voting system is an alternative to the current method of communicating voting instructions by mail. Shareholders will still have the option to choose their preferred method of communicating their voting instructions. In addition, the NYSE rules will continue to ensure that an adequate record is kept of all voting, including voting done through the automated telephone voting system.

The Commission finds good cause for approving the proposed rule change, including Amendments No. 1, 2, and 3, prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. The Commission believes that accelerated approval of the use of automated telephone voting systems by member organizations or their proxy agent should provide an immediate benefit to investors by affording them a more convenient means of communicating their voting instructions, as well as a more efficient method of transmitting voting instructions. In addition, the Commission notes that the rule change continues to permit investors who wish to communicate their voting instructions by mailing the voting authorization form to the member organization to do so. The use of the automated telephone voting system is merely an alternative to the current system. For these reasons, the Commission finds good cause for accelerating approval of the proposed rule changes as amended.

It is therefore ordered, pursuant to Section 19(b)(2)¹⁵ that the proposed rule change, including Amendments No. 1, 2, and 3, is hereby approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁶

Margaret H. McFarland,

Deputy Secretary.

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⁹ 15 U.S.C. 78f.

¹⁰ 15 U.S.C. 78n.

¹¹ 15 U.S.C. 78f(b)(5).

¹² See letter from James E. Buck, Senior Vice President and Secretary, NYSE, to Sharon Lawson, Assistant Director, SEC, dated May 25, 1995. As described above, Amendment No. 2 clarifies that the Exchange will consult with the Commission staff to determine whether the proposed system operates in a manner consistent with Section 14(a) of the Act and the rules and regulations thereunder, prior to the Exchange approving any automated system.

¹³ Telephone conversation between Gary Tuttle, Director of Securities Operation Department, NYSE, and Elisa Metzger, Senior Counsel, SEC, on June 16, 1995.

¹⁴ *Id.*

¹⁵ 15 U.S.C. 78s(b)(2).

¹⁶ 17 C.F.R. 200.30-3(a)(12).

[Release No. 34-36043; File No. SR-NYSE-95-21]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Granting Accelerated Approval of Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 to Proposed Rule Change Relating to Amendments to 460.20

August 1, 1995.

I. Introduction

On May 26, 1995, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") submitted to the Securities and Exchange Commission ("SEC" or "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 Exchange Rule 460.20 to require an associated specialist of an approved person acting as an underwriter in a distribution of a security in which the associated specialist is registered to "give up the book" if the associated specialist and approved person do not have an exemption from Rule 10b-6 or Rule 10b-13.

The proposed rule change was published for comment in Securities Exchange Act Release No. 35929 (June 30, 1995), 60 FR 35759 (July 11, 1995). No comments were received on the proposal. On July 27, 1995, the Exchange submitted Amendment No. 1 to the proposed rule change.³ This order approves the proposed rule change, including Amendment No. 1, on an accelerated basis.

II. Description of Proposal

Rule 10b-6 under the Act requires a specialist organization to withdraw from the market when an affiliated entity is participating in a distribution of a security in which the specialist organization is registered commencing with the applicable cooling off period specified in Rule 10b-6 until the affiliate has completed its participation in the distribution.⁴ Currently, to ensure

compliance with Rule 10b-6, NYSE Rule 460.20 requires a specialist organization to "give up the book" (*i.e.* suspend its specialist activities) to a specialist organization unaffiliated with any distribution participant, which then assumes all specialist responsibilities under NYSE rules until the approved person (affiliate) has completed its participating in the distribution.⁵ At the conclusion of the approved person's participation, the regular specialist organization regains the "book" and resumes its specialist activities.

The Exchange has filed a request with the Division of Market Regulation ("Division"), separately from this proposed rule change, for exemptive relief from certain provisions of Rules 10b-6 and 10b-13⁶ ("Petition for Exemptive Relief").⁷ This request was based on competitive concerns in light

such securities, any security of the same class and series as those securities, or any right to purchase any such security ("related securities") until they have completed their participation in a distribution. The provisions of Rule 10b-6 apply to issuers, selling shareholders, underwriters, prospective underwriters, dealers, brokers, and other persons who have agreed to participate or are participating in the distribution, as defined in Rule 10b-6(c)(5), and their "affiliated purchasers," as defined in Rule 10b-6(c)(6), including broker-dealer affiliates. The applicable cooling off period is described in (xi) and (xii) of Rule 10b-6(a)(4). See 17 CFR 240.10b-6.

⁵ Exchange Rule 460.10 prohibits an approved person of a specialist organization from engaging in any business transaction with any company whose stock the specialist is registered or accept a finder's fee from such company. See NYSE Rule 460. NYSE Rule 98, however, affords exemptive relief for approved persons of a specialist organization from restrictions found in various NYSE rules, including certain provisions of rule 460, that would otherwise be applicable to such approved persons' transactions in NYSE securities in which the specialist organization is registered or to business transactions with the issuers of such securities. See NYSE Rule 98, *infra* note 9. Therefore, an approved person of a specialist organization must be entitled to an exemption from Rule 460.10 pursuant to Rule 98 to act as an underwriter in any capacity for a distribution of securities in which an associated specialist is registered.

⁶ Rule 10b-13 under the Act, among other things, prohibits a person making a tender offer or exchange offer for any equity security from, directly or indirectly, purchasing or making any arrangement to purchase any such security (or any security that is immediately convertible or exchangeable for such security), otherwise than pursuant to the offer, from the time the offer is publicly announced until its expiration, including any extension thereof. Rule 10b-13 also applies to the dealer-manager of a tender offer because the dealer-manager acts as the agent of the bidder to facilitate the bidder's objectives. See 17 CFR 240.10b-13.

The Exchange is seeking relief from Rule 10b-13 to allow affiliated specialists to continue their market making functions in their respective specialty securities in connection with certain mergers or tender or exchange offers in which an affiliated broker-dealer is participating.

⁷ See letter from James E. Buck, Senior Vice President and Secretary, NYSE, to Jonathan G. Katz, Secretary, SEC, dated April 28, 1995.

of the amendments to Rule 10b-6 and new Rule 10b-6A that permit NASD market makers to continue to make markets in a stock while participating in an underwriting of that stock, subject to several restrictions on their level of market making activity ("passive market making").⁸ In this regard, the Exchange believed that the failure to provide some type of exemptive relief from Rule 10b-6 for NYSE specialist units affiliated with underwriting firms may have a detrimental effect on the Exchange's ability to compete for issuer listings and on the willingness of large firms to invest capital in the specialist business. The Exchange further believed that the Commission's passive market making restrictions could not be extended appropriately to Exchange specialists, who are subject to an affirmative obligation to deal when necessary to maintain a fair and orderly market. The Exchange believed, however, that exemptive relief was appropriate in light of the restrictions on the flow of information between the affiliated specialists and its approved person contained in Exchange Rule 98⁹ along with the additional safeguards specified in its Petition for Exemptive Relief.

Under this proposal, the Exchange proposes to replace the current "give up the book" provision with one that would make NYSE Rule 460.20 compatible with the Exchange's Petition for Exemptive Relief. The proposed rule change would allow an affiliated specialist to continue to make a market in the securities in which the affiliated

⁸ See Securities Exchange Act Release No. 32117 (Apr. 8, 1993), 58 FR 19528. In general, Rule 10b-6A permits "passive market making" in connection with the distributions of certain securities quoted on the Nasdaq Stock Market during the Rule 10b-6 cooling-off period, the period when the rule's provisions otherwise would prohibit such transactions. A passive market maker's bids and purchases, however, are limited to the highest current independent bid *i.e.*, a bid of a market maker who is not participating in the distribution and is not an affiliated purchaser of a participating market maker. Furthermore, Rule 10b-6A contains certain eligibility criteria, volume limitations on purchases, and notification and disclosure requirements. See Rule 10b-6A(c)(2) (Level of Bid), (c)(3) (Requirements to Lower the Bid), (c)(4) (Purchase Limitation), (c)(5) (Limitation on Displayed Size), (c)(6) (Identification of a Passive Market Making Bid), (c)(7) (Notification and Reporting to the NASD). See 17 CFR 240.10b-6A(c)(2) through (c)(6).

⁹ Pursuant to Rule 98 and the guidelines promulgated thereunder, the specialist organization and affiliated entities must be operated as separate and distinct organizations, and "information barriers" must be established that place substantial limits on access to, and communications of, trading information, including positions and strategies, between the two organizations. Rule 98 exemptive relief is conditioned on the organizations receiving prior written approval from the NYSE, which conducts an annual review of each firm to ensure that all conditions for the exemption are being met.

¹ 15 U.S.C. 78s(b)(1) (1988).

² 17 CFR 240.19b-4 (1994).

³ See letter from James E. Buck, Senior Vice President and Secretary, NYSE, to Glen Barrentine, Senior Counsel, SEC, dated July 26, 1995. In Amendment No. 1, the Exchange amended the NYSE rule to reflect more accurately the requirements under Rules 10b-6 and 10b-13 for specialists to give up the book if the specialists and their approved persons do not have an exemption from such rules. See *infra* note 10 and accompanying text.

⁴ Rule 10b-6 is an anti-manipulation rule that, subject to certain exceptions, prohibits persons engaged in a distribution of securities from bidding for or purchasing, or inducing others to purchase,

specialist was registered during distribution, provided that it has obtained an Exchange exemption from Rule 460.10 pursuant to Rule 98 and a Commission exemption from Rule 10b-6 or Rule 10b-13.¹⁰ Under the new provision, an associated specialist would still be required to "give up the book" in the subject security to another specialist member organization satisfactory to the Exchange, in situations where the associated specialist and approved person do not have an exemption from Rule 10b-6 or Rule 10b-13, until the book may be reacquired by the associated specialist in accordance with Rule 10b-6 or Rule 10b-13.

III. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b).¹¹ The Commission believes the proposal is consistent with the Section 6(b)(5) requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, and, in general, to protect investors and the public interest.

The Commission believes that the rule change is consistent with the requirements of the Act in that the proposal will allow the NYSE rules to reflect accurately the current state of the law. In response to the NYSE's Petition for Relief, the Division has granted exemptions from Rules 10b-6 and 10b-13 to permit NYSE specialists ("Affiliated Specialists") affiliated with a NYSE member firm ("Affiliated Broker-Dealer") to remain in the market and to continue their normal specialist activities during the period when the Affiliated Broker-Dealer is engaged in a distribution of a specialty security or is acting as a dealer manager in a tender or exchange offer for a specialty security.¹²

¹⁰ Absent an exemption from or exception to Rule 10b-6, Exchange specialists that are affiliated with a person participating in a distribution of securities would be precluded from bidding for or purchasing such securities or any related securities.

¹¹ 15 U.S.C. 78f(b) (1988 & Supp. V 1993).

¹² See Letter regarding Application of Rules 10b-6 and 10b-13 to New York Stock Exchange Specialists (File No. TP94-293) (July 31, 1995). The exemptions provided in this letter will expire in two years from the effective date of the exemptions unless otherwise extended. This sunset provision is consistent with the NYSE's proposed rule change, which would require an associated specialist of an

In providing the requested relief to the NYSE specialists, the Division has placed certain terms and conditions on the exemptions as well as limitations on their scope. As conditions to the exemptions, the Affiliated Specialist and the Affiliated Broker-Dealer must comply with the terms of, and the enumerated obligations imposed by, the exemptive letter. Moreover, the NYSE also has certain responsibilities to conduct surveillance of Affiliated Specialists and Affiliated Broker-Dealers for compliance with the conditions of the exemptions, to guard against manipulative conduct, and to provide an analysis of the operation of the exemptions to the Division.

The amendment to Rule 460.20 would require the NYSE specialists to "give up the book" during a distribution in which an approved person participates if the associated specialist and approved person do not have an exemption from Rule 10b-6 or Rule 10b-13. The Commission, therefore, believes that Exchange Rule 460.20 is consistent with Rules 10b-6 and 10b-13 and any exemption as granted by the Division. The proposed rule change would also reaffirm, through an exchange rule, the obligations under Rules 10b-6 and 10b-13 of an associated specialist to "give up the book" where such specialist does not have an exemption from such rules.

The Commission notes that the exemptions as provided by the Division are subject to modification or revocation at any time the Commission or the Division determines that such action is necessary or appropriate in furtherance of the purposes of the Act. Therefore, it is the responsibility of the associated specialist and the approved person to become aware of any changes in the exemptions and to determine whether an exemption continues to apply to their activities. Moreover, the Exchange should notify its members of any modifications or revocation of the exemptions granted by the Division.

Moreover, the Commission finds good cause for approving the proposed rule change, including Amendment No. 1, prior to the thirtieth day after the date of publication of notice of filing thereof. The Exchange's original proposal was published in the **Federal Register** for comment and no comments were received.¹³ Amendment No. 1 merely codifies the intention of, and what necessarily must be implied from, the proposed rule change: that associated

approved person acting as an underwriter in a distribution to "give up the book" if the associated specialist and approved person do not have an exemption from Rule 10b-6 or Rule 10b-13.

¹³ See Securities Exchange Act Release No. 35929 (June 30, 1995), 60 FR 35759 (July 11, 1995).

specialists do not have to give up the book if the associated specialists and approved persons have an exemption from Rule 10b-6 or Rule 10b-13. Amendment No. 1 does not alter the substance of the NYSE's original proposal as previously published. Moreover, the proposed rule change, as amended, merely makes Exchange Rule 460.20 compatible with the exemptions granted by the Division; the rule change does not independently create any rights or obligations for NYSE specialists. Based on the above, the Commission finds that there is good cause, consistent with Section 6(b)(5) of the Act, to accelerate approval of the amended proposed rule change.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 1. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. 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 at the Commission's Public Reference Section, 450 Fifth Street NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-NYSE-95-21 and should be submitted by August 28, 1995.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁴ that the proposed rule change (SR-NYSE-95-21), as amended, is approved.

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

Margaret H. McFarland,

Deputy Secretary.

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¹⁴ 15 U.S.C. 78s(b)(2) (1988).

¹⁵ 17 CFR 200.30-3(a)(12) (1994).