

Data Service Utilization Fee”, which is a usage-based fee at the same rate as the radio paging fee, to make it clear that radio paging services and other types of wired and wireless network services, including Internet-based services, qualify for this usage-based fee. These terminology changes will have no effect on the fees paid to OPRA by any persons.

The proposed increase in device-based professional subscriber fees ranges from 4.55% to 6.90% of the existing fees. Professional subscriber fees charged to members will continue to be discounted by two percent for members who preauthorize payment by electronic funds transfer through an automated clearinghouse system. OPRA estimates that the overall effect of the proposed increase in professional subscriber fees will be to increase revenues derived from professional subscriber fees by approximately five percent. Professional subscribers are those persons who subscribe to OPRA Data and do not qualify for the reduced fees charged to nonprofessional subscribers.

As an alternative to device-based fees, professional subscribers may pay an Enterprise Rate Professional Subscriber Fee based on the number of their U.S. registered representatives. This amendment proposes to expand the entitlement of professional subscribers that elect to pay OPRA’s Enterprise Rate Professional Subscriber Fee by allowing OPRA’s Basic Service to be made available to independent investment advisers who contract with such subscribers to provide investment advisory services to the subscribers’ customers. Heretofore such investment advisers have had to pay OPRA’s regular, device-based professional subscriber fee in order to access OPRA data. All investment advisers who contract with an Enterprise Rate professional subscriber to provide investment advisory services to the subscriber’s customers, and who will therefore be entitled to access OPRA data under the sponsorship of the subscriber, will be added to the subscriber’s count of registered representatives for purposes of calculating the subscriber’s Enterprise Rate Professional Subscriber Fee. No other changes are proposed to be made to the Enterprise Rate Professional Subscriber Fee.

The proposed increases in the device-based professional subscriber fee, the direct access fee, and the Internet-only redistribution fee are intended to generate additional revenues for OPRA in order to cover actual and anticipated increases in the costs of collecting,

consolidating, processing and disseminating options market. These increases reflect the costs of continuing enhancements to and upgrades of the OPRA system to enable it to handle a greater volume of market information as a result of the continuing expansion of listed options trading and the implementation of decimal pricing. The proposed expanded entitlement of Enterprise Rate subscribers to include independent investment advisers reflects the expanded utilization of independent investment advisers by retail brokerage firms, and is intended to lower the cost of access to OPRA data to those firms and to their independent investment advisers.

## II. Implementation of the Plan Amendment

OPRA represents that the proposed OPRA Plan amendment establishes or changes a fee or other charge collected on behalf of all of the OPRA participants in connection with access to or use of OPRA facilities and is, therefore, effective upon filing, pursuant to Rule 11Aa3-2(c)(3)(i) under the Act.<sup>6</sup> In order to give persons subject to the fees advance notice of the changes, OPRA proposes to put them into effect commencing February 1, 2002. At any time within 60 days of the filing of the OPRA Plan amendment, the Commission may summarily abrogate the amendment and require that such amendment be filed in accordance with Rule 11Aa3-2(b)(1) under the Act<sup>7</sup> and reviewed in accordance with Rule 11Aa3-2(c)(2) under the Act<sup>8</sup> if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets; to remove impediments to, and perfect the mechanisms of, a national market system; or otherwise in furtherance of the purposes of the Act.

## III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed OPRA Plan amendment 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. Copies of the submission, all subsequent amendments, and all written statements with respect to the proposed OPRA Plan amendment that are filed

with the Commission, and all written communications relating to the proposed OPRA Plan amendment between the Commission and any person, other than those 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 the filing will also be available at the principal offices of OPRA. All submissions should refer to File No. SR-OPRA-2001-05 and should be submitted by February 20, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

**J. Lynn Taylor,**

*Assistant Secretary.*

[FR Doc. 02-2214 Filed 1-29-02; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45326; File No. SR-NYSE-99-51]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Order Tracking and Amendment Nos. 1, 2 and 3 Thereto

January 23, 2002.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 27, 1999, 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, II, and III below, which Items have been prepared by the Exchange. On May 24, 2000, the Exchange filed Amendment No. 1 to the proposal.<sup>3</sup> On August 14, 2001, the Exchange filed Amendment No. 2 to the proposal.<sup>4</sup> On

<sup>9</sup> 17 CFR 200.30-3(a)(29).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Letter from James E. Buck, Senior Vice President and Secretary, NYSE, to Jennifer Colihan, Attorney, Division of Market Regulation (“Division”), Commission, dated May 22, 2000 (“Amendment No. 1”). In Amendment No. 1, the Exchange deleted the phrase “or execution” from proposed Rule 132B(a)(1)(C) as unnecessary for application of the Rule.

<sup>4</sup> See Letter from Darla C. Stuckey, Assistant Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division, Commission, dated August 14, 2001 (“Amendment No. 2”). In Amendment No. 2, the Exchange proposed to: (1) Amend Rule 123 by adding proposed paragraph (f) which would set forth the details required to be recorded of each execution report, including a unique order identifier, and (2) amend Rule 132.30 by deleting

Continued

<sup>6</sup> 17 CFR 240.11 Aa3-2(c)(3)(i).

<sup>7</sup> 17 CFR 240.11 Aa3-2(b)(1).

<sup>8</sup> 17 CFR 240.11 Aa3-2(c)(2).

January 17, 2002, the Exchange filed Amendment No. 3 to the proposal.<sup>5</sup>

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 amendments NYSE Rule 123, Interpretation .30 to NYSE Rule 132, and the proposed adoption of new NYSE Rules 132A, B and C, which will govern order tracking. The text of the proposed rule change is as follows (additions are italicized; deletions are bracketed):

**Rule 123—Records of Orders**

*(f) Reports of Order Executions*

*Order execution reports must be entered into the same database as required by this rule for the entry of orders. Any member organization proprietary system used to record the details of an order pursuant to paragraph (e) must also be capable of transmitting a report of the order's execution to such database. Order execution reports must be entered into such system within such time frame as the Exchange may prescribe. The details of each execution report required to be recorded shall include the following data elements, and any modifications to the report, in such form as the Exchange may from time to time prescribe:*

1. *Order identifier that uniquely identifies the order as required by paragraph (e);*
2. *Symbol;*
3. *Number of shares or quantity of security;*
4. *Transaction price;*
5. *Time the trade was executed;*
6. *Executing broker badge number, or alpha symbol as may be used from time*

132.30(10), which would have required a unique order identifier be added to the data elements in post trade processing. The Exchange represents that this change will ensure that a unique order identifier will be attached throughout the life of an order, thus simplifying the tracking process.

<sup>5</sup> See Letter from Darla Stuckey, Corporate Secretary, NYSE, to Belinda Blaine, Associate Director, Division, Commission, dated January 17, 2002 ("Amendment No. 3"). In Amendment No. 3, the Exchange explained that it did not believe that it was cost-effective to store all order tracking data collected from members on a daily basis, and clarified that therefore members would be required to submit data to the NYSE on an "as requested" basis rather than daily as a matter of routine. The Exchange also represented that the data collected would be used solely for regulatory purposes, and that it would not use data received from its members pursuant to the proposed rules to gain a competitive advantage over another self-regulatory organization or broker-dealer. Lastly, the Exchange explained what it considered order origination and time of receipt of an order.

*to time, in regard to its side of the contract;*

7. *Executing broker badge number, or alpha symbol as may be used from time to time, of the contra side to the contract;*

8. *Clearing firm number, or alpha symbol as may be used from time to time, in regard to its side of the contract;*

9. *Clearing firm number, or alpha symbol as may be used from time to time, in regard to the contra side of the contract;*

10. *Whether the account for which the order was executed was that of a member or member organization or of a non-member or non-member organization;*

11. *Identification of member or member organization which recorded order details as required by paragraph (e);*

12. *Date the order was entered into an Exchange system;*

13. *Indication as to whether this is a modification to a previously submitted report;*

14. *Settlement Instructions (e.g., cash, next day, or seller's option);*

15. *Special Trade Indication, if applicable;*

16. *Online Comparison System (OCS) Control Number;*

17. *Such other information as the Exchange may from time to time require*

**Comparison and Settlement of Transactions Through A Fully-Interfaced or Qualified Clearing Agency**

*Rule 132*

\* \* \* \* \*

.30 Regardless of whether or not a Fully-Interfaced or Qualified Clearing Agency is being used for the comparison and/or settlement of a round-lot regular way contract for the purchase or sale of a security entered into on the Exchange, each clearing member organization that is a party to such contract shall submit to a Fully-Interfaced or Qualified Clearing Agency, as defined above, in such form and within such time periods as may be prescribed by the Clearing Agency, or the Exchange, as appropriate, each of the following trade data elements:

- (1) Name or identifying symbol of the security, as may be required by the clearing agency;
- (2) Number of shares or quantity of security;
- (3) Transaction price;
- (4) Time the trade was executed;
- (5) Executing broker badge number, or alpha symbol as may be used from time to time, in regard to its side of the contract;
- (6) Executing broker badge number, or alpha symbol as may be used from time

to time, of the contra side to the contract;

(7) Clearing firm number, or alpha symbol as may be used from time to time, in regard to its side of the contract;

(8) Clearing firm number, or alpha symbol as may be used from time to time, in regard to the contra side of the contract;

(9) Whether the account for which the order was executed was that of a member or member organization or of a non-member or non-member organization;

[(10) The order identifier for the order as prescribed in Rule 132B(e);]

(10) [(11)] Such other information as the Exchange may from time to time require.

Each clearing member organization that is a party of a round lot non-regular way contract for the purchase or sale of a security entered into on the Exchange shall submit each of the trade data elements referred to above to the Exchange, in such form and within such time periods as the Exchange may prescribe.

\* \* \* \* \*

**Rule 132A. Synchronization of Member Business Clocks**

*Each member and member organization shall synchronize its business clocks that are used for purposes of recording the date and time of any event that must be recorded pursuant to the Rules of the Exchange, with reference to a time source as designated by the Exchange, and shall maintain the synchronization of such business clocks in conformity with such procedures as are prescribed by the Exchange.*

**Rule 132B. Order Tracking Requirements**

(a) *Procedures.*

1. *With respect to any security listed on the New York Stock Exchange, each member and member organization shall:*

A. *immediately following receipt or origination of an order, record each item of information described in paragraph (b) of this Rule that applies to such order, and record any additional information described in paragraph (b) of this Rule that applies to such order immediately after such information is received or becomes available; and*

B. *immediately following the transmission of an order to another member, or from one department to another within the same member organization, record each item of information described in paragraph (c) of this Rule that applies with respect to such transmission; and*

C. immediately following the modification or cancellation of an order, record each item of information described in paragraph (d) of this Rule that applies with respect to such modification or cancellation.

2. Each required record of the time of an event shall be expressed in terms of hours, minutes, and seconds.

3. Each member or member organization shall, by the end of each business day, record each item of information required to be recorded under this Rule in such electronic form as is prescribed by the Exchange from time to time.

#### 4. Maintaining and Preserving Records

A. Each member and member organization shall maintain and preserve records of the information required to be recorded under this Rule for the period of time and accessibility specified in SEC Rule 17a-4(b).

B. The records required to be maintained and preserved under this Rule may be immediately produced or reproduced on "micrographic media" as defined in SEC Rule 17a-4(f)(1)(i) or by means of "electronic storage media" as defined in SEC Rule 17a-4(f)(1)(ii) that meet the conditions set forth in SEC Rule 17a-4(f) and be maintained and preserved for the required time in that form.

(b) Order Origination and Receipt  
Unless otherwise indicated, the following order information must be recorded under this Rule when an order is received or originated:

1. an order identifier meeting such parameters as may be prescribed by the Exchange assigned to the order by the member or member organization that uniquely identifies the order for the date it was received;

2. the identification symbol assigned by the Exchange to the security to which the order applies;

3. the market participant symbol assigned by the Exchange to the member or member organization;

4. the identification of any department or the identification number of any terminal where an order is received directly from a customer;

5. where the order is originated by a member or member organization, the identification of the department (if appropriate) of the member that originates the order;

6. the number of shares to which the order applies;

7. the designation of the order as a buy or sell order;

8. the designation of the order as a short sale order;

9. the designation of the order as a market order, limit order, stop order or stop limit order;

10. any limit and/or stop price prescribed in the order;

11. the date on which the order expires, and, if the time in force is less than one day, the time when the order expires;

12. the time limit during which the order is in force;

13. any request by a customer that an order not be displayed pursuant to Rule 11Acl-4(c) under the Securities Exchange Act of 1934;

14. special handling requests, specified by the Exchange for purposes of this Rule;

15. the date and time the order is originated or received by a Member or member organization; and

16. the type of account, i.e., retail, wholesale, employee, proprietary, or any other type of account designated by the Exchange, for which the order is submitted.

#### (a) Order Transmittal.

Order information required to be recorded under this Rule when an order is transmitted includes the following:

1. When a member or member organization transmits an order to another department within the member, other than to the trading department, the member or member organization shall record:

A. the order identifier assigned to the order by the member or member organization,

B. the market participant symbol assigned by the Exchange to the member or member organization,

C. the date the order was first originated or received by the member or member organization, D. an identification of the department to which the order was transmitted, and

E. the date and time the order was received by that department;

1. When a member or member organization transmits an order to another member or member organization:

A. the transmitting member or member organization shall record:

(i) whether the order was transmitted manually or electronically,

(ii) the order identifier assigned to the order by that member or member organization,

(iii) the market participant symbol assigned by the Exchange to that member or member organization,

(iv) the market participant symbol assigned by the Exchange to the member or member organization to which the order is transmitted,

(v) the date the order was first originated or received by the transmitting member or member organization,

(vi) the date and time the order is transmitted, (vii) the number of shares to which the transmission applies, and (viii) for each order to be included in a bunched order, the bunched order route indicator assigned to the bunched order by the member or member organization; and

B. the receiving member or member organization shall record, in addition to all other information items in Rule 132B that apply with respect to such order:

(i) the fact that the order was received manually or electronically;

(ii) the order identifier assigned to the order by the member or member organization that transmits the order, and

(iii) the market participant symbol assigned by the Exchange to the member or member organization that transmits the order.

C. The requirement in paragraph 2A above to record information regarding the transmission of an order to another member or member organization shall not apply to:

(i) the transmitting member or member organization where the order was transmitted to the Floor by means of the SuperDOT system; or

(ii) the transmitting member on the Floor, where the order is transmitted on the Floor to another member, and the order had been entered into an Exchange data base pursuant to Exchange Rule 123(e) or had been received on the Floor by means of the SuperDOT system, except that the transmitting member shall record the order identifier as specified in paragraph (e) of this Rule, and the market participant symbol assigned by the Exchange to the member or member organization to which the order was transmitted.

D. The requirement in paragraph 2B above to record information regarding the receiving of an order shall not apply where:

(i) the receiving member or member organization received the order by means of the SuperDOT system; or

(ii) the receiving member received the order on the Floor from another member on the Floor, and the order had been entered into an Exchange data base pursuant to Exchange Rule 123(e) or had been received on the Floor by means of the SuperDOT system, except that the receiving member shall record the order identifier as specified in paragraph (e) of this Rule, and the market participant symbol assigned by the Exchange to the member or member organization from which the order was received.

3. When a member or member organization transmits an order to a

non-member, the member or member organization shall record:

A. the fact that the order was transmitted to a non-member,

B. the order identifier assigned to the order by the member or member organization,

C. the market participant symbol assigned by the Exchange to the member or member organization,

D. the date the order was first originated or received by the member or member organization,

E. the date and time the order is transmitted,

F. the number of shares to which the transmission applies, and

G. for each manual order to be included in a bunched order, the bunched order route indicator assigned to the bunched order by the member or member organization.

(d) Order Modifications and Cancellations.

Order information required to be recorded under this Rule when an order is modified or canceled includes the following:

1. When a member or member organization modifies or receives a modification to the terms of the order, the member or member organization shall record, in addition to all other applicable information items (including a new order identifier) that would apply as if the modified order were originated or received at the time of the modification:

A. the order identifier assigned to the order by the member or member organization prior to the modification,

B. the date and time the modification was originated or received and

C. the date the order was first originated or received by the member or member organization.

2. When the member or member organization cancels or receives a cancellation of an order, in whole or part, the member or member organization shall record:

A. the order identifier assigned to the order by the member or member organization,

B. the market participant symbol assigned by the Exchange to the member or member organization,

C. the date the order was first originated or received by the member or member organization,

D. the date and time the cancellation was originated or received,

E. if the open balance of an order is canceled after a partial execution, the number of shares canceled, and

F. whether the order was canceled on the instruction of a customer or the member or member organization.

3. The requirements in paragraphs 1 and 2 above regarding the recording of

information with respect to receiving a modification or cancellation of an order shall not apply where:

(i) the receiving member or member organization received the modification or cancellation by means of the SuperDOT system; or

(ii) the receiving member received the modification or cancellation on the Floor from another member on the Floor, and such modification or cancellation had been entered into an Exchange database pursuant to Exchange Rule 123(e), or had been received on the Floor by means of the SuperDOT system.

(e) The order identifier referred to in paragraph (b)(1) above shall be the order identifier required by Exchange Rule 123(e) with respect to any order transmitted by a member or member organization to the Floor for execution, and to any order received on the Floor by a member or member organization from off the Floor, except that the order identifier with respect to an order transmitted to the Floor by means of the SuperDOT system shall be the order identifier assigned to such order.

(f) The provisions of this Rule shall not apply to members effecting on the Floor proprietary transactions when they are acting in the capacity of a specialist, a Registered Competitive Market Maker, or a Competitive Trader.

Rule 132C: Transmission of Order Tracking Information to the Exchange

Members and member organizations shall be required to transmit to the Exchange, in such format as the Exchange may from time to time prescribe, such order tracking information as the Exchange may request.

\* \* \* \* \*

## 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 these 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 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 Exchange proposes to add new provisions and procedures in its rules to require the recording of details of orders in Exchange listed securities by its members and member organizations. The requirements of amended Rule 123, Rule 132 and new Rules 132A, B and C will be integrated into existing Exchange procedures and systems to create a complete order audit trail from origination through execution and cancellation.

#### a. Summary of Proposed Rules.

The Exchange proposes the adoption of four new rules which will require members and member organizations (herein referred to collectively as "members") to record and retain order information, to synchronize their time keeping equipment with a time source designated by the Exchange and to provide the Exchange with information on orders when so requested. Specifically, the Exchange has adopted requirements for the electronic capture of orders at the point of sale (front end systemic capture, or "FESC")<sup>6</sup> and is proposing requirements for the electronic capture of orders at the point of receipt (order tracking system, or "OTS"). The purpose of the requirements is to create a complete systemic record of orders handled by members and member organizations. These requirements will provide benefits both to the Exchange and members in terms of recordkeeping, surveillance and order processing. The design of FESC and OTS includes linking them to other Exchange systems in order to maximize their use. A key to linking is the provision for a unique order identifier in Rule 123(e). This order identifier is required to be included in each phase of processing as the order moves from entry through execution (or modification or cancellation) into reporting of an execution. With this unique identifier attached throughout the life of the order, tracking the order will be simplified. The order identification requirement would actually become effective when Rule 123(f) is implemented, which would be concurrent with the Exchange's implementation of proposed Rules 132A, B, and C. The proposed

<sup>6</sup> See Securities Exchange Act Release No. 43689 (December 7, 2000), 65 FR 79145 (December 18, 2000).

rules and amendments are detailed below.

i. *Rule 123(f)*

Proposed Rule 123(f) requires that order execution reports be entered into FESC, and that any member organization proprietary system used to record the details of an order must also be capable of transmitting a report of the order's execution to FESC. The proposed rule further requires that the details of each execution report required to be recorded must include the following data elements: (1) Order identifier that uniquely identifies the order as required by paragraph 123(e); (2) symbol; (3) number of shares or quantity of security; (4) transaction price; (5) time the trade was executed; (6) executing broker badge number, or alpha symbol as may be used from time to time, in regard to its side of the contract; (7) executing broker badge number, or alpha symbol as may be used from time to time, of the contra side to the contract; (8) clearing firm number, or alpha symbol as may be used from time to time, in regard to its side of the contract; (9) clearing firm number, or alpha symbol as may be used from time to time, in regard to the contra side of the contract; (10) whether the account for which the order was executed was that of a member or member organization or of a non-member or non-member organization; (11) identification of member or member organization which recorded order details as required by paragraph (e); (12) date the order was entered into an Exchange system; (13) indication as to whether this is a modification to a previously submitted report; (14) settlement instructions (e.g., cash, next day, or seller's option); (15) Special Trade Indication, if applicable; (16) online Comparison System (OCS) Control Number; and (17) such other information as the Exchange may from time to time require.

ii. *Rule 132A*

Proposed Rule 132A requires members to synchronize the business clocks used to record the date and time of any event that the Exchange requires to be recorded. The Exchange will require that the date and time of orders in securities listed on the Exchange be so recorded. The proposed Rule also requires that members maintain the synchronization of this equipment in conformity with procedures prescribed by the Exchange. The Exchange intends to coordinate time synchronization with the National Association of Securities Dealers Inc.'s ("NASD") identical requirements.<sup>7</sup>

iii. *Rule 132B*

Proposed Rule 132B prescribes requirements and procedures with respect to orders in any security listed on the Exchange received or originated by a member. Paragraph (a) of the proposed rule requires immediate recordation of the data elements described in paragraph (b). If an order is transmitted to another member or is transmitted to another department of the same member, information detailed in paragraph (c) must be recorded. If an order is modified or cancelled, information required by paragraph (d) must be recorded. The various data elements and information required by the proposed rule must be recorded in an electronic format prescribed by the Exchange. Time records must be expressed in hours, minutes and seconds. The Rule makes clear that the records required therein must be preserved pursuant to Rule 17a-4(b) under the Act and that these records may be produced or reproduced on "micrographic media" as contemplated under Rule 17a-4(f) under the Act.

Paragraph (b) of the proposed rule contains the sixteen data elements to be recorded for an order. These include: (1) An order identifier; (2) stock symbol; (3) identification of the member; (4) department identification of the member or terminal identification number for orders received via a SuperDOT terminal; (5) department of the member which originated the order; (6) number of shares; (7) buy or sell order designation; (8) whether the order is a short sale order; (9) whether the order is a market, limit, stop or stop limit order (which terms are defined in Rule 13 of the Exchange); (10) any limit price, stop price or stop limit price prescribed in the order; (11) the date, if any, that an order expires or, if the order is in force for less than a day, the time when it expires; (12) the time limit the order is in force; (13) any request by the customer that the order not be displayed pursuant to Rule 11Ac1-4 under the Act; (14) any special handling requests (such as fill or kill, market-on-close, limit-on-close, not held, etc); (15) date and time of origination or receipt of the order;<sup>8</sup> and (16) the type of account for which the order is entered. Each of

<sup>8</sup> For purposes of Rule 132B(b)(15), for electronic orders, the Exchange will consider order origination and time of receipt of an order to be the time the order is captured by a member organization's electronic order-routing or execution system. For manual orders, the Exchange will consider order origination and time of receipt of an order to be the time the order is first received by the member organization from the customer. See Amendment No. 3, *supra* note 5.

these data elements are commonly understood and used by members.

Paragraph (e) of the proposed rule explains that the order identifier is the order identifier required by NYSE Rule 123(e). As explained above, this is the identifier assigned to an order in connection with the Exchange's FESC initiative. Under Rule 123(e), before an order is represented or executed on the Floor of the Exchange, a member must assign a unique identifier to it. This identifier will stay with the order throughout its processing life, through cancellation or execution.

Paragraph (c) of proposed rule 132B requires that certain information be recorded when an order is transmitted to another department within the member, to another member, or to a non-member. When transmitted to another department, the following must be recorded: the order identifier, identification of the member, the date of receipt or origination of the order, the identification of the department to which the order was transmitted and the date and time the order was received by the department.

Paragraph (c)(2) contains requirements for both receiving and transmitting members when an order is transmitted from one member to another. The transmitting member must record whether the order was transmitted manually or electronically, the order identifier, market participant symbol for both receiver and transmitter, date of origination or receipt by the transmitting member, the date and time the order was transmitted, the number of shares so transmitted and, if the order is included in a bunched order, the bunched order route indicator assigned by the member. A bunched order is any aggregation of two or more orders. The receiving member must record whether the transmitted order was received manually or electronically, the order identifier and the identifier of the member transmitting the order.

Exceptions to the requirement for recording information for both the transmitting and receiving member are contained in proposed Rule 132B(c)(2)(C) and 132(c)(2)(D). These exceptions are for orders transmitted to the Floor via SuperDOT, the Exchange's automated order routing system, and orders transmitted to another member on the Floor of the Exchange, where the order was entered into an Exchange data base pursuant to Rule 123(e), the Exchange's front-end systemic order capture requirements. In light of the objective of being able to identify an order from start to finish, both the receiving and transmitting members

<sup>7</sup> See NASD Rule 6953.

must record the order identifier and the identity of the member transmitting and receiving the order.

For orders transmitted to a non-member, the member must record that fact as well as the order identifier, member's identity, date of receipt or origination of the order, date and time of the order, number of shares, and, if applicable, any bunched order route indicator.

If an order is modified, proposed Rule 132B(d) requires that the order identifier (and any new order identifier, if applicable), date and time of modification and date the original order was received or originated be recorded. If an order is cancelled, (d)(2) requires the date and time of cancellation, whether the customer or the member cancelled the order, and the number of shares cancelled if there is a partial execution. This is in addition to the basic requirements to record the order identifier, identity of the member and the date and time when the order was first received or originated.

The same exceptions with respect to SuperDOT orders and orders on the Floor entered into a database under Rule 123(e) will apply to modifications and cancellations. Modification and cancellation will be elements captured in these systems, and will not need to be captured by the member on the Floor.

Paragraph (f) of proposed rule 132B provides an exception to the Rule for proprietary transactions of specialists, Registered Competitive Market Makers and Competitive Traders. The transactions these members effect for their own accounts are not, in effect, orders as contemplated by the Rule. Information with respect to these transactions is recorded and maintained by these members pursuant to the recordkeeping requirements of Exchange and Commission Rules.

#### *iv. Rule 132C*

New Rule 132C requires members, upon request, to transmit order tracking data to the Exchange. This parallels the approach used under Rule 410A (Automated Submission of Trading Data) for submission of transaction information. The Exchange will make requests for order tracking information on an as-needed basis in order for the Exchange to carry out its surveillance and regulatory functions. The Commission recognizes that the NYSE, in its regulatory capacity, can obtain sensitive market data that could benefit the NYSE's market operation if used for competitive purposes. The NYSE has assured the Commission that this information is being collected solely for regulatory purposes and that it will not use OTS data to gain an unfair

competitive advantage over other market participants.<sup>9</sup>

Members will be required to submit the data in an automated format. It is the Exchange's experience that submission of data by request has proven to be effective and efficient from both the Exchange's and its members' viewpoint.

#### *b. Integration with Existing Exchange Requirements*

With the implementation of Rule 132B, Exchange rules will provide a complete audit trail of orders from receipt through execution. As mentioned above, NYSE Rule 123(e) provides for the systemic capture of orders before they are represented or executed on the Floor. This includes the assignment of the unique identifier to each order. In addition, the Exchange intends to require that, in the future, all orders be systemically delivered to its Floor, thus providing an electronic capture of order data from receipt or origination of an order. The audit trail requirements of proposed Rule 132B require information on the execution and clearance of transactions, the so-called "back end" of orders. With the addition of Rule 123(f), which requires recordation of the unique order identifier as part of the execution report, the Exchange represents that an order could be tracked throughout the life of the order. The unique order identifier would link the execution report to the original order.

#### *c. Violation of Order Tracking Requirements*

If, upon investigation, the Exchange determines that a violation of the Rule proposed to be amended or adopted herein has occurred, the Exchange will take appropriate action under the procedures of its disciplinary rules, including Rule 476. If a particular violation is deemed minor in nature, this could include issuance of a cautionary letter. In the future, the Exchange will consider seeking approval to add these rules to the list of rules contained in Rule 476A which provides for the imposition of fines for minor violations of rules.

#### *d. Effective Date*

The Exchange will require that the provisions of the rules and amendments proposed herein become effective fifteen months after the Commission's approval.

#### 2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)<sup>10</sup> that an exchange have rules that are designed to

promote just and equitable principles of trade, to remove impediments to and to 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 will enable the Exchange to fulfill its regulatory responsibilities to effectively surveil its market. The proposed rule change fulfills an undertaking contained in an order issued by the Commission<sup>11</sup> relating to the Exchange's regulatory responsibilities. Specifically, the Order directed the Exchange to "design and implement \* \* \* an audit trail sufficient to enable the NYSE to reconstruct its market promptly. \* \* \*" The Order called for "an accurate, time-sequenced record of orders" throughout an order's life, from receipt through execution or cancellation and for synchronization of clocks used in connection with the audit trail of orders.

#### *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**

Within 35 days of the 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 Exchange 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 proposal is consistent with the Act. In particular,

<sup>11</sup> See In the Matter of New York Stock Exchange, Inc. SEC Release No. 41574 (June 29, 1999); Administrative Proceeding File No. 3-9925 ("Order").

<sup>9</sup> See Amendment No. 3, *supra* note 5.

<sup>10</sup> 15 U.S.C. 78f(b)(5).

the Commission solicits comments on when the Exchange should consider a manual order "received" for purposes of proposed NYSE Rule 132B(b)(15). As proposed, the Exchange will consider the time of receipt of such as order as the time the firm first receives the order from a customer. However, the Commission and the Exchange are aware that there are occasions when members receive orders after business hours, and at remote locations. For these reasons, the Commission requests comment on whether it is reasonable to interpret time of receipt of a manual order to be when the order is first received by the member without further consideration given to when and/or where the order was received by the member. To the extent commenters believe that modification to the interpretation is needed, the Commission requests that commenters provide specific suggestions on what the time of receipt for manual orders should be.

The Commission also requests comment on whether NYSE members that are also members of the NASD required to comply with NASD's Order Audit Trail System ("OATS") rules will be able to use the internal systems they currently have in place for collecting and storing order tracking data in order to comply with the proposed NYSE rules, or whether they will need to make system changes.

Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. 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 Room. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. All submissions should refer to File No. SR-NYSE-99-51 and should be submitted by February 20, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

**J. Lynn Taylor,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45332; File No. SR-NYSE-2002-05]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc. To Amend NYSE Rule 440H To Conform the Rule With Recent Amendments to Section 31 of the Securities Exchange Act of 1934

January 24, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 9, 2002, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange filed the proposal pursuant to section 19(b)(3)(A) of the Act,<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission.<sup>5</sup> 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 Exchange proposes to amend NYSE Rule 440H, Transaction Fees, to conform it to Congress' recent amendment of section 31 of the Act.<sup>6</sup> The text of the proposed rule change is available at the NYSE and at the Commission.

<sup>12</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

<sup>5</sup> The NYSE asked the Commission to waive the 30-day operative delay. See Rule 19b-4(f)(6)(iii). 17 CFR 240.19b-4(f)(6)(iii).

<sup>6</sup> 15 U.S.C. 78ee.

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

In its filing with the Commission, the NYSE included statements concerning the purpose of and basis for its proposal and discussed any comments it received regarding the proposal. The text of these 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 aspects of such statements.

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

###### 1. Purpose

Until recently, section 31 of the Act<sup>7</sup> has required the remittance of a fee to the SEC of 1/300 of one percent of the aggregate dollar amount of the sales of securities. Excluded from this requirement is the sale of any bonds, debentures, or other evidences of indebtedness and any sale or class of sales of securities that the SEC may, by rule, exempt from the imposition of this fee.

Congress recently passed the "Investor and Capital Markets Relief Act" ("ICMRA"), which amends section 31 of the Act. The ICMRA reduces the fee to \$15 per \$1 million of the aggregate dollar amount of the sale of securities, effective as of December 28, 2001. The ICMRA provides that the SEC will, twice yearly, determine the amount of any future changes in the fee.

The Exchange proposes to amend NYSE Rule 440H to conform references to the fee amounts to Congress' amendments to section 31 of the Act.<sup>8</sup>

###### 2. Statutory Basis

The Exchange believes that the proposed rule is consistent with the provisions of section 6(b)(5) of the Act<sup>9</sup> that require an Exchange to have rules that are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

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

The Exchange does not believe that the proposed rule change will impose

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> 15 U.S.C. 78f(b)(5).