

result, members and the public will possess more accurate information when making investment decisions.

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

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

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

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposal has become effective pursuant to section 19(b)(3)(A)(i) of the Act,¹⁰ and Rule 19b-4(f)(1)¹¹ thereunder, in that it constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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. 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 in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All

submissions should refer to file number SR-NASD-2003-83 and should be submitted by July 30, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48118; File No. SR-NYSE-2003-18]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Fingerprint-Based Background Checks of Exchange Employees and Others

July 1, 2003.

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 May 15, 2003, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. On May 30, 2003, the NYSE filed an amendment to the proposed rule change.³ On June 27, 2003, the NYSE filed a second amendment to the proposed rule change.⁴ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons and to grant accelerated approval of the proposed rule change.

¹² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, from Darla C. Stuckey, Corporate Secretary, NYSE (May 28, 2003) ("Amendment No. 1"). In Amendment No. 1, the NYSE eliminated all references related to the possible application of the proposed rule to members of the media.

⁴ See letter to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, from Mary Yeager, Assistant Secretary, NYSE (June 27, 2003) ("Amendment No. 2"). In Amendment No. 2, the NYSE eliminated the following proposed rule text "; or other circumstances in which the Exchange concludes that the person's access to facilities and records does not place the security thereof at risk." The Exchange opted to delete the rule text due to the Commission's concern that such language was overbroad.

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

The NYSE proposes to adopt a new rule pursuant to which the Exchange would obtain fingerprints from prospective and current employees, temporary personnel, independent contractors, and service providers of each of the Exchange and its principal subsidiaries; submit those fingerprints to the Attorney General of the United States or his or her designee for identification and processing; and receive criminal history record information from the Attorney General of the United States or his or her designee for evaluation and use, in accordance with applicable law, in enhancing the security of the facilities, systems, data, and/or records of the Exchange or its principal subsidiaries (collectively, "facilities and records"). The text of the proposed rule change is below. Proposed new language is in italics.

* * * * *

NYSE Rule 28—Fingerprint-Based Background Checks of Exchange Employees and Others

(a) In order to enhance the security of the respective facilities, systems, data, and/or records of the New York Stock Exchange, Inc. ("the Exchange") and its principal subsidiaries (collectively, "facilities and records"), the Exchange shall obtain fingerprints from, and conduct a fingerprint-based background check of, all prospective and current employees, temporary personnel, independent contractors, and service providers of each of the Exchange and its principal subsidiaries. However, the Exchange may determine not to obtain fingerprints from, or to seek fingerprint-based background information with respect to, a person due to that person's limited, supervised, or restricted access to facilities and records, or the nature or location of his or her work or services. The Exchange shall apply this rule in all circumstances where permitted by applicable law.

(b) The Exchange shall submit fingerprints obtained pursuant to this rule to the Attorney General of the United States or his or her designee for identification and processing. The Exchange shall at all times maintain the security of all fingerprints provided to, and all criminal history record information received from, the Attorney General or his or her designee. The Exchange, however, may provide a subsidiary with access to information from background checks based on fingerprints obtained from that

¹⁰ 15 U.S.C. 78s(b)(3)(A)(i).

¹¹ 17 CFR 240.19b-4(f)(1).

subsidiary. The Exchange shall not disseminate fingerprints or information to the extent prohibited by applicable law.

(c) The Exchange shall evaluate information received from the Attorney General or his or her designee and otherwise administer this rule in accordance with Exchange fingerprint procedures as in effect from time to time and the provisions of applicable law. Fingerprint-based background information, such as a felony or serious misdemeanor conviction, will be a factor in making employment decisions; engaging or retaining any temporary personnel, independent contractors, or service providers; or permitting any fingerprinted person access to facilities and records.

Supplementary Material

10 Fingerprints and the Issuance of Identification Badges. The Exchange intends, with limited exceptions, to obtain fingerprints from, and fingerprint-based background information with respect to, all employees, temporary personnel, independent contractors, and service providers who receive Exchange-issued photo badges or other identification permitting them access to facilities and records for more than one day ("Long-Term Badges"). The Exchange has the capacity electronically to immediately limit or terminate the access to facilities and records that Long-Term Badges permit, and reserves the right to do so. On a case-by-case basis, the Exchange may determine not to obtain fingerprints from a person to whom a Long-Term Badge is issued, based on the decision of a committee of Exchange officers who oversee application of the rule that there exists an exception to obtaining the fingerprints, as contemplated by the rule.

* * * * *

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 III 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 events of September 11, 2001, including the resulting temporary disruption in the securities markets, have led national securities exchanges and other industry participants to carefully re-evaluate their security measures, with the objectives of enhancing investor protection, business continuity, and workplace safety.

The Exchange believes that fingerprint-based background checks of prospective and current employees, temporary personnel, independent contractors, and service providers of the Exchange and each of its principal subsidiaries, will assist the Exchange in satisfying those objectives and its other responsibilities under the Act by better preventing certain persons with criminal backgrounds from gaining access to facilities and records. As a condition of employment, new employees already undergo rigorous pre-hire review and screening, including education and employment verification and individual reference checks, under the direction of human resources professionals. Criminal records in local court files also may be reviewed based on locations of residence and employment provided by the candidate. This process, however, is dependent upon the candidate providing complete and accurate information.

Fingerprint-based background checks would enhance the ability to screen adequately employees and non-employees to determine better, in accordance with applicable law, whether there are unacceptable risks associated with granting such persons access to facilities and records. Through access to state-of-the-art information systems administered and maintained by the Federal Bureau of Investigation ("FBI") and its Criminal Justice Information Services Division, the Exchange would receive centrally-maintained "criminal history record information," which is arrest-based data and derivative information, and may include personal descriptive data; FBI number; conviction status; sentencing, probation and parole information; and such other information as the FBI may now or hereafter make available to the Exchange. This information is supplied to the FBI by various local, state, federal and/or international criminal justice agencies. Thus, the information obtained through fingerprint-based background checks would provide a

more exhaustive and reliable profile of a candidate's criminal record, and thereby better facilitate risk assessment, than a physical review of court records based on information provided by the candidate.

Access to the FBI's nationwide database is particularly crucial with respect to the screening of temporary personnel, independent contractors, and service providers who are not employees of the Exchange or its principal subsidiaries and who therefore are not subject to the pre-hire review described above, but whose work frequently requires the same or similar access to facilities and records as that provided to employees of the Exchange or its principal subsidiaries. In furtherance of its commitment to utilize and improve technology and systems applications to better serve investors, disseminate market information, and ensure reliable order handling and execution for all market participants, the Exchange regularly retains outside vendors whose specialized expertise is required for the development, installation and servicing of this technology. Such vendors complement the work of Exchange technology staff in providing the investment community with an efficient and technologically advanced marketplace. Examples of persons from whom fingerprints may be obtained under the proposed rule change include the following,⁵ all of whom are anticipated to need Exchange-issued photo badges or other identification permitting them access to facilities and records for more than one day: personnel providing temporary services to the Exchange but who are employed and provided by a staffing service and non-employee technicians whose work with Exchange software and equipment, although temporary, necessitates broad access to Exchange facilities.

The proposed access to criminal history information is consistent with federal law. Section 17(f)(2) of the Act⁶ and Rule 17f-2 thereunder⁷ require, subject to certain exemptions, a variety of securities industry personnel to be fingerprinted, including every member of a national securities exchange; brokers, dealers, transfer agents, and clearing agencies; and employees of such entities. Although section 17(f)(2) does not require the Exchange or other self-regulatory organizations to fingerprint their own employees,

⁵ The proposed rule change would not be applicable to personnel of the Securities and Exchange Commission.

⁶ 15 U.S.C. 78q(f)(2).

⁷ 17 CFR 240.17f-2.

temporary personnel, independent contractors, or service providers, the statute specifically permits self-regulatory organizations designated by the SEC to have access to "all criminal history record information."⁸

The proposed access to criminal history information is also consistent with a recently enacted amendment to New York's General Business Law ("GBL"), which, among other things, requires self-regulatory organizations in New York to fingerprint their employees and those non-employee service providers whose access to facilities or records places the self-regulatory organization at risk.⁹

As stated in the proposed rule change, the Exchange will comply with all applicable laws relating to the use and dissemination of criminal history record information obtained from the FBI.

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with the provisions of section 6(b) of the Act,¹⁰ in general, and section 6(b)(5) of the Act,¹¹ in particular, which requires, among other things, that the rules of an exchange be 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.

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

The Exchange does not believe that the proposed rule change, as amended, 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. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing,

including whether the proposed rule change, as amended, 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, 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 office of the Exchange. All submissions should refer to File No. SR-NYSE-2003-18 and should be submitted by [insert date 21 days from the date of publication].

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

The Commission finds that the proposed rule change, as amended, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange,¹² and, in particular section 6(b)(5) of the Act.¹³ The Commission believes that the proposed rule change should promote the objectives of the Act. The Commission notes that the Exchange is an important component of the National Market System and that a serious disruption in the operation of the Exchange could have a significant deleterious impact on the U.S. financial markets. The proposed rule change should promote the objectives of the Act by establishing procedures that help prevent a serious disruption in the operation of the Exchange. Specifically, the proposal should provide the Exchange with an effective tool for identifying individuals whose prior criminal activities may indicate that the individuals pose a heightened threat to the security of the Exchange's operations. Moreover, the Commission notes that, notwithstanding any other provisions of law, it has been granted the authority to designate self-regulatory organizations to receive all criminal history record information held by the

Attorney General.¹⁴ In approving this proposed rule filing, the Commission so designates the Exchange as being authorized to receive such criminal history record information held by the Attorney General.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. The Commission believes that granting accelerated approval to the proposed rule change will allow the Exchange to implement expeditiously its fingerprinting program and increase the security of the Exchange, generally. In addition, the Commission believes that accelerated approval is appropriate in this case because the instant NYSE rule proposal is substantially similar to a recently approved Nasdaq Stock Market, Inc. ("Nasdaq") rule.¹⁵

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,¹⁶ that the proposed rule change (SR-NYSE-2003-18), as amended, is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁷

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48112; File No. SR-Phlx-2003-39]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Increasing Index Option Transaction Charges

June 30, 2003.

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 May 30, 2003, the Philadelphia Stock Exchange,

¹⁴ See Section 17(f)(2) of the Act, 15 U.S.C. 78q(f)(2).

¹⁵ See Nasdaq Rule 140, Fingerprint-Based Background Checks of Nasdaq Employees and Independent Contractors. See also Securities Exchange Act Release No. 47240 (January 23, 2003), 68 FR 4810 (January 30, 2003) (approving Nasdaq Rule 140).

¹⁶ 15 U.S.C. 78s(b)(2).

¹⁷ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

⁸ 15 U.S.C. 78q(f)(2).

⁹ N.Y. Gen. Bus. Law 359-e (12-a) (McKinney 2003). New York's Labor Law prohibits fingerprinting for employment purposes unless otherwise permitted by law. N.Y. Labor Law 201-a (McKinney 2003). The GBL amendment ensures that such fingerprinting would not violate New York's Labor Law.

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(5).

¹² In granting approval of the proposal, the Commission has considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹³ 15 U.S.C. 78f(b)(5).