

*Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2005-53 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-9303.

All submissions should refer to File Number SR-CBOE-2005-53. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CBOE-2005-53 and should be submitted on or before August 9, 2005.

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

**Jill M. Peterson,**

*Assistant Secretary.*

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**BILLING CODE 8010-01-P**

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-52016; File No. SR-NYSE-2005-29]

**Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Granting Approval of a Proposed Rule Change To Remove Incorrect Reference in Its Rule Relating to Failure To Honor an Arbitration Award**

July 12, 2005.

On April 25, 2005, the New York Stock Exchange, Inc., ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change to amend NYSE Rule 637. The proposed rule change was published for comment in the **Federal Register** on May 6, 2005.<sup>3</sup> The Commission received one comment on the proposal.<sup>4</sup> On July 5, 2005, the NYSE filed a response to the comment letter.<sup>5</sup> This order approves the proposed rule change.

**I. Description of Proposed Rule Change**

Current NYSE Rule 637 provides that Exchange members, allied members, registered representatives, and member organizations that fail to honor arbitration awards of the NYSE, other self-regulatory organizations, or the American Arbitration Association are "subject to disciplinary proceedings in accordance with NYSE Rule 476, NYSE Rule 476A<sup>6</sup> or Article IX" of the NYSE Constitution and Rules.

Although current NYSE Rule 637 specifies NYSE Rule 476A as a possible

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

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

<sup>3</sup> See Securities Exchange Act Release No. 51622 (April 27, 2005), 70 FR 24146.

<sup>4</sup> See letter from Robert S. Clemente to Jonathan G. Katz, Secretary, Commission, dated May 13, 2005 ("Clemente Letter").

<sup>5</sup> See letter to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, from Mary Yeager, Assistant Secretary, NYSE, dated July 5, 2005 ("NYSE Response Letter").

<sup>6</sup> NYSE Rule 476A provides that the Exchange may impose a fine, not to exceed \$5000, on any member, member organization, allied member, approved person, or registered or non-registered employee of a member or member organization for a minor violation of certain specified Exchange rules. The NYSE represents that the purpose of the NYSE Rule 476A procedure is to provide a meaningful sanction for a rule violation when the initiation of a disciplinary proceeding under NYSE Rule 476 would be more costly and time consuming than would be warranted given the minor nature of the violation, or when the violation calls for a stronger regulatory response than an admonition letter would convey. The NYSE states that NYSE Rule 476A preserves due process rights, identifies those rule violations that may be the subject of summary fines, and includes a schedule of fines.

vehicle for disciplinary action to remedy violations of NYSE Rule 637, NYSE Rule 637 was never added to NYSE Rule 476A's "List of Exchange Rule Violations and Fines Applicable Thereto Pursuant to NYSE Rule 476A." This discrepancy could be eliminated by adding NYSE Rule 637 to the list of rules in NYSE Rule 476A. However, due to the serious nature of any failure to honor an arbitration award,<sup>7</sup> the Exchange's management concluded that violations of NYSE Rule 637 are not properly remedied through the minor fine provisions of NYSE Rule 476A. Therefore, the discrepancy would be more appropriately eliminated through an amendment deleting NYSE Rule 637's reference to NYSE Rule 476A.

**II. Summary of Comment and NYSE's Response**

The Commission received a comment letter on the proposed rule change that supported the adoption of the proposal.<sup>8</sup> The commenter further suggested that the NYSE propose another change to NYSE Rule 637 to conform to NASD Rule 9554 by extending the penalty of disciplinary action to cover failure to honor an arbitration award to any settlement agreement in any dispute submitted to the NYSE. In its response to the comment, the NYSE maintained that the amendment to NYSE Rule 637 suggested by the commenter is beyond the scope of the proposed rule change.<sup>9</sup>

**III. Discussion**

The Commission has carefully reviewed the proposed rule change, the comment letter, and the NYSE's response and 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.<sup>10</sup> In particular, the Commission believes that the proposed rule change is consistent with Section 6(b)(6) of the Act<sup>11</sup> because it is designed to provide that NYSE's members and persons associated with its members be appropriately disciplined for violation of Exchange rules.

The Exchange has proposed to delete a cross-reference in NYSE Rule 637 that states that a failure to honor an arbitration award is punishable under the Exchange's minor rule violation

<sup>7</sup> The NYSE represents that Exchange arbitration awards rarely remain unsatisfied.

<sup>8</sup> See Clemente Letter, *supra* note 4.

<sup>9</sup> See NYSE Response Letter, *supra* note 5.

<sup>10</sup> In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>11</sup> 15 U.S.C. 78f(b)(6).

<sup>9</sup> 17 CFR 200.30-3(a)(12).

plan, when in fact it is not. The Commission believes that clarifying the Exchange's rules in this manner is appropriate. The one comment received by the Commission only makes suggestions for further Exchange rulemaking and, as such, does not raise any issue that would preclude approval of the instant proposal.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>12</sup> that the proposed rule change (SR-NYSE-2005-29) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-52018; File No. SR-NYSE-2005-39]

### Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend NYSE Rule 440H Relating to Activity Assessment Fees

July 12, 2005.

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 June 1, 2005, 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, II and III below, which Items have been prepared by the NYSE. On July 6, 2005, the NYSE filed Amendment No. 1 to the proposal.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The NYSE proposes to amend NYSE Rule 440H to reflect the revised procedures by which the Exchange collects fees from its members and member organizations ("Membership") to offset its fee obligations under Section 31 of the Act.<sup>4</sup> The text of the proposed rule change is available on the NYSE's Web site (<http://www.nyse.com>), at the NYSE's principal office, and at the Commission. The text of the proposed rule change also appears below. Additions are italicized; deletions are bracketed.

#### Rule 440H

[Transaction Fees]

*Activity Assessment Fees*

\* \* \*Supplementary Material:

[Report on Form 120-A]

.10 Statutory background.—Section 31 of the Securities Exchange Act of 1934 ("Exchange Act" [¶4721]), as amended, requires [that every] national securities exchanges *and associations* to [each year] pay to the Securities and Exchange Commission ("SEC") *certain fees and assessments on specified securities transactions*. [such sum as is required by Section 31 based on the aggregate dollar amount of the sales of securities (other than bonds, debentures and other evidences of indebtedness and any sale or any class of sales of securities which the SEC may, by rule, exempt from the imposition of the fee) transacted during the preceding year on such exchange.

The Exchange has issued the following directions:

(1) .20 *Calculation and payment of Activity Assessment Fees.*—Each member and each member organization *that effects securities* [engaged in clearing or settling] transactions [effected] upon the Exchange *that are defined in Section 31 of the Exchange Act as "covered sales" of securities shall pay to the Exchange Activity Assessment Fees based upon all of their covered sales. The Exchange shall calculate Activity Assessment Fees by multiplying the aggregate dollar amount of covered sales effected upon the Exchange by the member or member organization during the appropriate computational period by the Section 31(b) fee rate in effect during that computational period. Activity Assessment Fees shall be due and payable at such times and intervals as prescribed by the Exchange.* [shall maintain a daily record of the aggregate

dollar amount of the sales of securities made upon the Exchange and cleared or settled by him or it. The amount of money shall be computed upon the actual sales price, disregarding commissions and taxes. Blotter dates shall be used throughout. All sales of securities on the Exchange shall be included, other than bonds, debentures and other evidences of indebtedness and any sale or any class of securities which the SEC may, by rule, exempt from the imposition of the fee which the SEC imposes upon the Exchange under Section 31 of the Securities Exchange Act of 1934. Odd-lot dealers shall record both the round lots and the odd lots which they sell on the Exchange Floor. If a member or member organization clears and settles a transaction for a member or member organization which in turn clears it for another principal, only the member or the member organization settling the transaction shall include the transaction in its record kept pursuant to this paragraph. Monthly reports (Form 120-A) of the daily totals above referred to shall be submitted to the Exchange in the manner described below.

(2) Each such reporting member or member organization shall pay to the Exchange as a "Transaction Fee" a sum equal to the dollar amount as prescribed in Section 31 of the Securities Exchange Act of 1934 based on the total aggregate dollar sales volume reported monthly on Form 120-A. Such transactions as may from time to time be required to be reported on Form 120-A are hereinafter referred to as "120-A Transactions". The total amount payable as shown on the Form 120-A report shall be due and payable monthly, on such date each month as the Exchange's Rule 440 shall require the Form 120-A referred to therein to be filed with the Exchange, and payment of such charge, if any, as shall be due with respect to 120-A Transactions in a month shall be and hereby is required to accompany the Form 120-A filed with respect to such month.

At or before 10:30 a.m. on the 10th day of each month each member and each member organization required to report shall submit to the Treasurer's Department a report on Form 120-A showing with respect to 120-A Transactions settled during the preceding month; aggregate dollar sales volume; the Transaction Fee due thereon; number of shares of stock; number of warrants and number of rights to subscribe.] Members[,] and member organizations *that* [which] cease [the] *to effect* [clearing and settling of] securit[y]ies transactions *upon the Exchange* [shall promptly

<sup>12</sup> 15 U.S.C. 78s(b)(2).

<sup>13</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> See letter from Ronald Rubin, Senior Special Counsel, NYSE, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission dated July 6, 2005. In Amendment No. 1, the NYSE added language to its statement of the purpose of the proposed rule change.

<sup>4</sup> 15 U.S.C. 78ee.