

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 Section. Copies of such filing also will be available for inspection and copying at the principal office of the ISE. 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-ISE-2005-58 and should be submitted on or before January 30, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>5</sup>

Nancy M. Morris,  
Secretary.

[FR Doc. E6-255 Filed 1-12-06; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-53071; File No. SR-NYSE-2005-91]

### Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Revise Certain of the Exchange's Facility and Equipment Fees and System Processing Fees Charged to Members

January 6, 2006.

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 29, 2005, the New York Stock Exchange, Inc. ("Exchange" or "NYSE") 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. The NYSE has designated this proposal as establishing or changing a due, fee, or other charge imposed by a self-regulatory organization pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The NYSE proposes to revise certain of its Facility and Equipment Fees and System Processing Fees charged to members. The text of the proposed rule change is available on the NYSE Web site, (<http://www.nyse.com>), at the NYSE's principal office, and at the Commission's Public Reference Room.

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

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

###### 1. Purpose

The Exchange has undertaken a thorough analysis of its various fees charged to Exchange members for floor and equipment and system processing services. This analysis has taken into account the changing business models of the Exchange's members. In most cases, the Exchange's fees have not been meaningfully revised for a period of five to 15 years.

In response to this analysis, the Exchange proposes to revise its fee schedules for certain floor and equipment and system processing services. These revisions to the Exchange's fee schedules would take effect January 1, 2006 and form part of the Exchange's 2006 Price List. The

proposed changes are defined by certain core objectives:

- Establish a fee structure that more accurately and equitably reflects member firms' utilization of floor and equipment and system processing services;
- Simplify the Exchange's fee schedules and make them easier to understand;
- Recognize the overall costs members incur in order to trade at the Exchange; and
- Encourage participation in the NYSE's marketplace.

The Exchange proposes to revise the pricing of trading floor services in four primary areas: Specialist Fees, Booth Fees, Clerk Badge Fees, and Usage-Based Fees.

*Specialist Fees.* The Exchange will charge specialist firms a new "Trading Privilege Fee" that will replace several existing Exchange fees including the Specialist Floor Fee, the Specialist Post Fee, Specialist Odd Lot Charges, and Specialist System Charges. This Trading Privilege Fee will be assessed monthly on the Exchange's specialist firms for each security, including any investment company unit ("ICU") traded,<sup>5</sup> and will be determined based on each security's consolidated average daily dollar volume.

The Exchange anticipates that this Trading Privilege Fee will:

- Further increase transparency and simplify Exchange fees for specialists by replacing four separate fees with one new fee;
- Position the Exchange's floor revenues to grow with potential future growth in the NYSE's new listings business;
- More closely align the Exchange's floor-related fees from specialists with the fundamental driver of their business activity; and
- Help offset the costs incurred to provide technology and other infrastructure to support specialist firms operating on the floor of the Exchange.

*Booth Fees.* Currently, the Exchange charges an annual fee per booth,<sup>6</sup> billed monthly on a pro-rated basis,<sup>7</sup> that is

<sup>5</sup> Includes securities and ICUs admitted to dealings on an unlisted trading privileges (UTP) basis.

<sup>6</sup> Booths are workspaces located around the perimeter of the trading floor where member firms and independent brokers receive orders.

<sup>7</sup> In its filing, the Exchange described this fee as a monthly fee. The Exchange confirmed in a telephone conference between John Carey, Assistant General Counsel, NYSE, and David L. Orlic, Attorney, Division of Market Regulation, Commission, on January 6, 2006 that the fee is in fact an annual fee billed monthly on a pro-rated basis.

<sup>5</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)(2).

determined based on the particular size and location of each booth within the Exchange's five trading rooms. Under its revised booth pricing schedule, the Exchange will charge a flat fee per booth based solely on the trading room where each booth is located. This change will allow the Exchange to simplify its price schedule by reducing the number of booth fees from several hundred to four and will enable member firms to more easily assess their booth-related floor costs. In order to further simplify the current booth pricing schedule, and to ensure that members are only charged for services actually utilized on the trading floor, the Exchange is also eliminating the minimum Floor Privilege Fee.

**Clerk Badge Fees.** Currently, the Exchange maintains two different rates for Telephone Clerk Tickets, depending upon the ratio of telephone clerks per booth or post space. The Exchange will now charge one flat fee per eligible person. This flat fee is intended to simplify for member firms the process of calculating the incremental cost of an individual employee on the floor and to provide greater transparency to member firms with respect to the subsidized services their employees utilize at the Exchange, such as security and subsidized cafeteria and medical services. In addition, the name of this fee is being changed from Telephone Clerk Ticket to Clerk Badge Fee to further enhance the transparency of the Exchange's price structure.

**Usage-Based Fees.** The Exchange is changing its fees for several usage-based services provided by the Exchange, including eBroker handheld devices, telephone lines, the Online Comparison System, and Exceptional System Messages.

- **eBroker Handheld Devices.** The Exchange currently provides its proprietary eBroker handheld device to brokers on the floor of the Exchange free of charge. The Exchange is introducing an annual charge of \$5,000 per eBroker device in order to:

- Allow the Exchange to recoup a portion of the costs incurred to develop and maintain the proprietary eBroker system;
- Encourage competition and technological development by outside vendors in the provision of products such as handheld devices for use on the trading floor; and

- Recognize that eBroker is not used by all brokers, thus creating an incentive for those brokers who do use it to do so efficiently.

- **Telephone Lines.** The Exchange currently charges brokers for telephone lines that originate on the floor of the

Exchange and terminate at a customer site, and the Exchange does not currently charge for telephone lines that terminate at a broker's own back-office or trading room. The Exchange will now charge brokers a fee for each telephone line, regardless of where the line terminates. The Exchange believes this change in the telephone line charge will:

- Establish a more equitable usage-based pricing structure by imposing a standard rate per telephone line, regardless of where the line terminates; and

- Create an incentive for member firms to more efficiently use the Exchange's telephone capacity and systems.

- **Online Comparison System.** The Exchange has not revised any fees related to its Online Comparison System ("OCS") since the system was first introduced in 1989. The Exchange is revising the prices for OCS access and per-submission fees in order to:

- Recover incremental fees to help offset OCS development and maintenance costs, which have continued to increase as a result of ongoing system improvements; and

- Establish a more simplified and equitable usage-based fee schedule by: (i) Establishing a flat remote access fee regardless of how a member firm chooses to access the OCS system; and (ii) establishing a flat per-submission fee rather than differentiating pricing based on the size of each particular transaction, which has no bearing on the actual cost to process a submission.

- **Exceptional System Message Fee.** A new fee of \$0.01 per "Exceptional System Message" will be applied. An Exceptional System Message is defined as any system<sup>8</sup> message, as measured by mnemonic<sup>9</sup> on a daily basis, that exceeds the following criteria: (i) The ratio of a mnemonic's share of the total system messages to the mnemonic's share of total executed system volume exceeds 10:1; and (ii) the mnemonic's cancelled system orders as a percentage of its total system orders exceeds 90.0%. If a mnemonic exceeds these two thresholds for a particular trading day, the Exceptional System Message fee will be applied only towards those cancelled system messages in excess of 90.0% of that mnemonic's total system orders for the day. Any fees incurred as a result of this Exceptional System Message fee will not be applied towards either the

<sup>8</sup> The relevant system is SuperDOT®, the Exchange's Designated Order Turnaround System.

<sup>9</sup> Mnemonics, which are alphabetical identifiers issued by the NYSE to its member firms and their customers, are required for order entry and identification purposes.

monthly dollar cap on transaction fees (which is currently set at \$600,000) or the commission-based 2% cap on transaction fees. It is intended that this fee will help to compensate the Exchange for the cost of the incremental system capacity that must be readily available to accommodate trading strategies that result in significant volumes of system messages and cancellations.

#### 1. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act<sup>10</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>11</sup> in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members.

#### 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 comments on the proposed rule change.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>12</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder,<sup>13</sup> because it establishes or changes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of such 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.<sup>14</sup>

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

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

<sup>11</sup> 15 U.S.C. 78f(b)(4).

<sup>12</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>13</sup> 17 CFR 240.19b-4(f)(2).

<sup>14</sup> See 15 U.S.C. 78s(b)(3)(C).

Comments may be submitted by any of the following methods:

#### 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-NYSE-2005-91 on the subject line.

#### Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-9303.

All submissions should refer to File Number SR-NYSE-2005-91. 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 the filing also will be available for inspection and copying at the principal office of the NYSE. 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-NYSE-2005-91 and should be submitted on or before February 3, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>15</sup>

**Nancy M. Morris,**  
Secretary.

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**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-53053; File No. SR-OCC-2003-13]

### Self-Regulatory Organizations; The Options Clearing Corporation; Order Approving Proposed Rule Change To Establish a Comprehensive Standard of Care and Limitation of Liability With Respect to Clearing Members

January 5, 2006.

#### I. Introduction

On November 5, 2003, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") and on August 18, 2004, amended<sup>1</sup> proposed rule change SR-OCC-2003-13 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").<sup>2</sup> Notice of the proposal was published in the **Federal Register** on November 23, 2005.<sup>3</sup> No comment letters were received. For the reasons discussed below, the Commission is approving the proposed rule change.

#### II. Description

In its 1980 release setting forth standards for registration of clearing agencies, the Commission's Division of Market Regulation stated that it was "of the view that clearing agencies should undertake to perform their obligations with a high degree of care."<sup>4</sup> In its 1983 order registering nine clearing agencies, the Commission stated that it did "not believe sufficient justification exists at this time to require a unique federal standard of care for registered clearing agencies."<sup>5</sup> The Commission has left to user-governed clearing agencies the question of how to allocate losses associated with, among other things, clearing agency functions. Along this line, in its 1986 order approving a proposed rule change of the Midwest Securities Trust Company ("MSTC") to clarify the rights and liabilities of MSTC and its participants with respect to certain services, the Commission stated:

The Act does not specify the standard of care that must be exercised by registered clearing agencies and the Commission has determined that imposition of a unique federal standard of care for registered

clearing agencies is not appropriate at this time. [citing Securities Exchange Act Release No. 20221, *supra* note 6] For those reasons the Commission believes that the clearing agency standard of care and the allocation of rights and responsibilities between a clearing agency and its participants applicable to clearing agency services generally may be set by the clearing agency and its participants. The Commission believes it should review clearing agency proposed rule changes in this area on a case-by-case basis and balance the need for a high degree of clearing agency care with the effect resulting liabilities may have on clearing agency operations, costs, and safeguarding of securities and funds.<sup>6</sup>

Because standards of care represent an allocation of rights and liabilities between a clearing agency and its users, which are generally sophisticated financial entities, the Commission has continued to refrain from establishing a unique federal standard of care and has allowed clearing agencies and other self-regulatory organizations and their users to establish their own standards of care.<sup>7</sup>

With this rule change, OCC is establishing a comprehensive gross negligence standard of care and limitation of liability with respect to its clearing members. In connection with this filing, OCC has made the following representations. OCC states in its original filing that since its founding in 1973, it has performed its clearing services with an exemplary level of care. Its record of fulfilling its commitments to its clearing members for over 30 years reflects OCC's commitment to serving the best interests of its clearing members. It has comprehensive systems and operating procedures in place to ensure that its clearing functions are executed with the highest level of accuracy. In addition to its own concern for accuracy, it is subject to extensive regulatory oversight by the Commission. Furthermore, in its amendment to the filing, OCC states that (1) gross negligence is the standard of care generally used by other clearing agencies such as the Fixed Income Clearing Corporation, (2) the decision to apply a gross negligence standard of care to OCC is a conscious allocation of risk between OCC and its members, (3) the filing was unanimously approved by OCC's directors, a majority of whom are officers of clearing members, and (4) the

<sup>1</sup> Letter from William H. Navin, Executive Vice President, General Counsel, and Secretary, OCC (August 17, 2005).

<sup>2</sup> 15 U.S.C. 78s(b)(1).

<sup>3</sup> Securities Exchange Act Release No. 52783 (November 16, 2005), 70 FR 70910.

<sup>4</sup> Securities Exchange Act Release No. 16900 (June 17, 1980), 45 FR 45167 (June 23, 1980).

<sup>5</sup> Securities Exchange Act Release No. 20221 (September 23, 1983), 48 FR 45167 (October 3, 1983).

<sup>6</sup> Securities Exchange Act Release No. 22940 (February 24, 1986), 51 FR 7169 (February 28, 1986).

<sup>7</sup> See, e.g., Securities Exchange Act Release Nos. 51669 (May 9, 2005), 70 FR 25634 (May 13, 2005) [File No. SR-NSSC-2004-09]; 48201 (July 21, 2003), 68 FR 44128 (July 25, 2003) [File No. SR-GSCC-2002-10]; 37563 (August 14, 1996), 61 FR 43285 (August 21, 1996) [SR-PSE-96-21]; and 37421 (July 11, 1996), 61 FR 37513 (July 18, 1996) [SR-CBOE-96-02].

<sup>15</sup> 17 CFR 200.30-3(a)(12).