

requirements. Further, relevant information about these companies is already contained in Nasdaq's compliance systems. Finally, Nasdaq anticipates that there would be fewer questions concerning the company's financial statements given that these companies will often have undergone extensive review by their auditors and, in some cases, by independent investigators and the Commission or other regulatory entities, in order to resolve the issues that caused the late filings.

Nasdaq is implementing these waivers to incent companies to re-list on Nasdaq once they regain compliance with the periodic filing requirement, rather than seek a listing elsewhere. Nasdaq believes that this waiver is appropriate, especially because Nasdaq's rules governing the delisting of companies that are delinquent in periodic reports are generally stricter than those of other markets. As such, the proposed waivers will promote competition between Nasdaq and other exchange markets.

The proposed rule change will not affect Nasdaq's commitment of resources to its regulatory oversight of the listing process or its other regulatory programs. Specifically, Nasdaq will still conduct a complete review of these companies for compliance with Nasdaq listing standards in the same manner as any other company applying for listing on Nasdaq. Any fee waiver under this proposed rule is predicated on the Company successfully completing that review process and demonstrating compliance with the initial listing requirements.

Finally, Nasdaq proposes to delete a duplicative provision in Rule 4520(b). Currently, Rule 4520(b)(6) is identical to Rule 4520(b)(2). As such, Nasdaq proposes to delete Rule 4520(b)(6).

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>6</sup> in general, and with Section 6(b)(4) of the Act,<sup>7</sup> in particular. Nasdaq believes that the proposed waivers are equitable and reasonable because these companies previously paid entry and annual fees to Nasdaq and to again charge such fees would impose duplicative costs.

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

Nasdaq 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*

Written comments were neither solicited nor received.

## III. 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. 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-NASDAQ-2007-040 on the subject line.

### *Paper Comments*

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2007-040. 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 Nasdaq. 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-NASDAQ-2007-040 and

should be submitted on or before May 16, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>8</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E7-7838 Filed 4-24-07; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-55646; File No. SR-NYSE-2007-02]

### **Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto To Adopt New Rule 447 ("Emergency Powers")**

April 19, 2007.

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, 2007, New York Stock Exchange LLC ("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 substantially prepared by NYSE. On April 18, 2007, NYSE submitted Amendment No. 1 to the proposed rule change.<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 Exchange proposes to adopt new Rule 447 ("Emergency Powers") which would allow the Exchange to grant exemptive regulatory relief in the event of an emergency, e.g. a pandemic-like situation. The text of the proposed rule change is available at NYSE, the Commission's Public Reference Room, and <http://www.nyse.com>.

#### **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 had received on the

<sup>8</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> Amendment No. 1 replaced and superseded the original filing in its entirety.

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

<sup>7</sup> 15 U.S.C. 78f(b)(4).

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

Introduction

Currently, the Exchange does not, in the normal course, grant plenary exemptive relief to member organizations from the requirements of NYSE rules. The Exchange is proposing to obtain authorization to provide such relief, in the rare event of overwhelming need, such as a pandemic, by way of the new proposed NYSE Rule 447.

In the wake of recent media attention and industry concern regarding the potential for a pandemic flu outbreak,<sup>4</sup> proposed Rule 447 would provide the Exchange with a basis of authority pursuant to which it may consider granting exemptive regulatory relief during such an emergency.

In implementation of the duty to enforce regulatory compliance, self-regulatory organizations ("SROs") possess inherent authority to administer and interpret their own rules. This authority comprehends the ability to grant relief from the formal strictures of a specific provision where the conduct sought to be effected, in any single given instance, is otherwise consistent with the purpose and intent of that rule. However, the Exchange does not have a medium for granting interim, but categorical relief to a class of its membership across rule lines—as circumstances may necessitate, and/or to impose additional and more rigorous requirements in response to emergency conditions. The purpose of the proposed rule is to provide such a mechanism and thereby grant the Exchange the regulatory flexibility to grant member organizations relief in the event of an emergency, as defined.

Indeed, many of the types of relief envisioned under the proposed rule illustrate the general circumspection with respect to which requests for relief would be viewed. While recourse to the rule would be limited to "major disturbances" in regard to which the Commission is statutorily authorized to alter, suspend, or impose requirements or restrictions of matters subject to

regulation by it or SROs, the nature of the relief to be granted would necessarily serve to mitigate the effects of the disruption so that the markets may perform in a manner consistent with customer expectations. Likely, the same manner of consequences to affect the investing public would similarly impact personnel of the securities industry such that they would equally need to address these external forces and factors.

Background

Existing NYSE Rules

NYSE Rule 446 ("Business Continuity and Contingency Plans") governs business continuity and contingency planning for member organizations. While the rule does not require that member organizations remain in business in the event of a significant business disruption, it does require firms to have a plan in place establishing procedures reasonably designed to enable the member organization to meet existing obligations to customers, other broker-dealers, and counter-parties.<sup>5</sup> In an effort to assist and enable member organizations in the context of an emergency to remain in compliance with NYSE rules, the Exchange is proposing new Rule 447 to apply where regulatory flexibility may be necessary to address the emergency atmosphere which could result in the event of a pandemic or other similar type event. Easing circumstances for facilitating member organizations to remain in business would facilitate the orderly flow of the markets while also providing for the protection of investors.

Federal Exemptive Relief

Section 12(k)(2) of the Act<sup>6</sup> empowers the SEC, in an emergency, to take summary action to alter, suspend, or supplement requirements or restrictions with respect to any matter subject to regulation by the Commission or an SRO. Section 12(k)(7) of the Act<sup>7</sup> defines the term "emergency" to include "a major disturbance that substantially disrupts, or threatens to substantially disrupt the functioning of securities markets, investment companies, or any other significant portion or segment of the securities markets\* \* \*."

<sup>5</sup> See NYSE Information Memos 04-24 (May 3, 2004) and 05-80 (October 13, 2005) for additional guidance.

<sup>6</sup> 15 U.S.C. 78l(k)(2).

<sup>7</sup> 15 U.S.C. 78l(k)(7).

Proposed NYSE Rule 447

General Rule

Proposed Rule 447 allows the Exchange, with the concurrence of the Commission that an "emergency" exists, where it is necessary in the public interest and for the protection of investors, and on such conditions, if any, which it may impose, to grant certain regulatory relief to member organizations. The Exchange may take action in implementation of the proposed rule at its discretion, after seeking the concurrence of the Commission as to the type of relief that may be appropriate in the circumstances, in respect of any member organization, any class or category of member organization, or in respect of all member organizations and/or their personnel.

The Exchange would seek the concurrence of the SEC by alerting Commission staff electronically or via telephone as to the type of action the Exchange would take in implementation of the proposed rule. NYSE staff would make a good faith effort to have a conversation with Commission staff. However, if NYSE staff is unable to reach SEC staff, it may take action and advise the SEC of such action in an expedient manner. Pursuant to conversations with Commission staff, the Exchange may move forward with the appropriate relief in good faith without formal agreement from the Commission so as to provide timely relief to member organizations in an emergency.

Specific Regulatory Relief

Under the proposed rule, the Exchange may elect to defer or extend Exchange-imposed time frames (otherwise applicable) for: Filing documents or reports with the Exchange (other than trade reports or reports arising from the settlement of transactions); obtaining Exchange approval, where such approval is required; requesting margin extensions via Exchange automated extension processing systems; or complying with testing, training, or continuing education requirements. The Exchange may "defer" time frames where it is appropriate to put off or delay the due dates for submissions or approvals until an unknown date, based on the circumstances of the emergency. Otherwise, the Exchange may "extend" time frames to a fixed date in the future.

In addition, the proposed rule gives the Exchange authority, upon customer consent, to permit recourse to means and systems not customarily utilized by broker-dealers for: The direct receipt,

<sup>4</sup> See NYSE Information Memo 06-30 (May 5, 2006) for further guidance.

transmission, or delivery of funds and securities, to and from customers; the valuation of securities; and the transmission of statements, confirmations, proxy materials, and other functionally equivalent material. This would allow broker-dealers to work with the Exchange to determine alternative means and systems to most effectively serve their customers and the public interest in the event of an emergency.

The proposed rule would allow the Exchange to permit the closure of main offices during an emergency. The Exchange may also elect to recognize alternative testing and/or qualification criteria for tests or criteria otherwise required as a prerequisite to the assumption of a position or function.

Under proposed Rule 447, the Exchange may modify or waive, in whole or in part, requirements pertaining to the registration and supervision of branch offices and their personnel and the payment of late fees. This relief would not apply to the requirements relating to the maintenance of books and records or the obligation for a member organization to maintain essential supervision of all its associated persons. The Exchange may provide relief which allows member organizations to implement remote supervision<sup>8</sup> of branch offices (including locations otherwise not eligible for such) in an emergency, which would provide flexibility for member organizations to retain the essential supervision of associated persons.

Pursuant to proposed Rule 447, the Exchange may take certain action to restrict the activities of member organizations in an emergency. The proposed rule would allow the Exchange to alter or rescind approval of a member organization's outsourcing arrangements or expand the requirements or prerequisites applicable to such. The Exchange may also require the curtailment or reduction of business activity and/or solicitation of new accounts or new products.<sup>9</sup> Moreover, the Exchange may require the enhancement of insurance coverage; the closure of offices or locations; and/or

the addition of supervisory personnel or procedures.

In addition to the actions noted above, the proposed rule gives the Exchange authority to take such other similar action, or withhold taking similar action, in anticipation of, during the course of, or as a consequence of, an emergency.

#### Timing

In implementation of the proposed rule, the Exchange would grant regulatory relief for a maximum of 90 days, and would be wary of situations which would impede access by customers to their funds or securities. Upon the passage of 90 days from the initial action by the Exchange, the Exchange may find, with the concurrence of the Commission, that an emergency continues to exist. Upon such a finding, the Exchange would re-evaluate the types of relief granted and, after seeking the concurrence of the Commission, determine whether to further extend such relief, provide alternative relief, or cease the grant of such relief.

If the Exchange determines not to extend the regulatory relief past 90 days, it would alert member organizations to the date on which the relief would expire via Information Memo and/or the Exchange's Electronic Filing Platform ("EFP").<sup>10</sup> The Exchange would supply a reasonable expiration date to allow adequate time for member organizations to adjust to the reinstatement of customary regulatory requirements.

Inasmuch as the purpose of this proposed rule is to grant authority to the Exchange to act creatively in the event of an emergency, the terms of the rule are, to a certain extent, broad and inclusive. However, the Exchange would act in a manner consistent with the public interest and for the protection of investors, and it intends to be bound by and guided by these underlying precepts should there be need to invoke the rule and exercise the power therein.

#### 2. Statutory Basis

The statutory basis for this proposed rule change is Section 6(b)(5) of the Act.<sup>11</sup> Section 6(b)(5) requires, among other things, that rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and national market system, and in

general, to protect investors and the public interest. The proposed rule will provide the Exchange with the regulatory flexibility to grant member organizations relief, as necessary, in the event of an emergency, as defined.

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

The Exchange 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.

#### 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 date of 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 NYSE consents, the Commission will:

(A) By order approve such 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 proposed rule change is consistent with the Act. 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-2007-02 on the subject line.

##### Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2007-02. This file number should be included on the subject line if e-mail is used. To help the

<sup>8</sup> See NYSE Information Memo 05-74 (October 6, 2005); see also SEC Staff Legal Bulletin No. 17 (March 19, 2004) regarding supervision of remote locations.

<sup>9</sup> Under NYSE Rule 326, the Exchange may impose restrictions on a member organization's business activities if it fails to maintain, among other things, the capital requirements of Rule 15c3-1 under the Act. The proposed rule grants the Exchange authority to require member organizations to limit or reduce business activities in an emergency, regardless of whether the firm is in compliance with these provisions.

<sup>10</sup> EFP is an extranet built by the NYSE to support authenticated, encrypted, two-way communications between the NYSE and its membership. It is used to communicate information to certain key personnel of member organizations.

<sup>11</sup> 15 U.S.C. 78f(b)(5).

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 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 publicly available. All submissions should refer to File Number SR-NYSE-2007-02 and should be submitted on or before May 16, 2007.

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

**Florence E. Harmon,**  
*Deputy Secretary.*

[FR Doc. E7-7836 Filed 4-24-07; 8:45 am]

**BILLING CODE 8010-01-P**

## UNITED STATES SENTENCING COMMISSION

### Sentencing Guidelines for United States Courts

**AGENCY:** United States Sentencing Commission.

**ACTION:** Notice of a temporary, emergency amendment to sentencing guidelines, policy statements, and commentary.

**SUMMARY:** Pursuant to section 4 of the Telephone Records and Privacy Protection Act of 2006 (the "Telephone Act"), Pub. L. 109-476, the Commission hereby gives notice of a temporary, emergency amendment to the sentencing guidelines, policy statements, and commentary. This notice sets forth the temporary, emergency amendment and the reason for amendment.

**DATES:** The Commission has specified an effective date of May 1, 2007, for the emergency amendment.

**FOR FURTHER INFORMATION CONTACT:** Michael Courlander, Public Affairs Officer, Telephone: (202) 502-4590.

**SUPPLEMENTARY INFORMATION:** The Commission must promulgate a temporary, emergency amendment to implement the directive to section 4 of the Telephone Act by July 11, 2007. On January 30, 2007, the Commission published in the **Federal Register** an issue for comment regarding the implementation of this directive.

The temporary, emergency amendment set forth in this notice also may be accessed through the Commission's Web site at <http://www.ussc.gov>.

**Authority:** 28 U.S.C. 994(a), (o), (p), (x); section 4 of Pub. L. 109-497.

**Ricardo H. Hinojosa,**  
*Chair.*

### Pretexting

Amendment: Section 2H3.1 is amended in the heading by striking "Tax Return Information" and inserting "Certain Private or Protected Information".

Section 2H3.1(b)(1) is amended by inserting "(A) the defendant is convicted under 18 U.S.C. § 1039(d) or (e); or (B)" after "If".

The Commentary to § 2H3.1 captioned "Statutory Provisions" is amended by inserting "§ 1039," after "18 U.S.C. §".

The Commentary to § 2H3.1 captioned "Application Notes" is amended by striking Note 1; by redesignating Note 2 as Note 1; and by inserting after Note 1, as redesignated by this amendment, the following:

"2. Imposition of Sentence for 18 U.S.C. § 1039(d) and (e).—Subsections 1039(d) and (e) of title 18, United States Code, require a term of imprisonment of not more than 5 years to be imposed in addition to any sentence imposed for a conviction under 18 U.S.C. § 1039(a), (b), or (c). In order to comply with the statute, the court should determine the appropriate 'total punishment' and divide the sentence on the judgment form between the sentence attributable to the conviction under 18 U.S.C. § 1039(d) or (e) and the sentence attributable to the conviction under 18 U.S.C. § 1039(a), (b), or (c), specifying the number of months to be served for the conviction under 18 U.S.C. § 1039(d) or (e). For example, if the applicable adjusted guideline range is 15–21 months and the court determines a 'total punishment' of 21 months is appropriate, a sentence of 9 months for conduct under 18 U.S.C. § 1039(a) plus 12 months for 18 U.S.C. § 1039(d) conduct would achieve the 'total

punishment' in a manner that satisfies the statutory requirement.

3. Upward Departure.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such a case, an upward departure may be warranted. The following are examples of cases in which an upward departure may be warranted:

(i) The offense involved confidential phone records information of a substantial number of individuals.

(ii) The offense caused or risked substantial non-monetary harm (e.g. physical harm, psychological harm, severe emotional trauma, or a substantial invasion of privacy interest) to individuals whose private or protected information was obtained."

The Commentary to § 2H3.1 is amended by striking the Background Commentary. Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 1038 the following new line:

"18 U.S.C. § 1039 2H3.1".

Reason for Amendment: This amendment implements the emergency directive in section 4 of the Telephone Records and Privacy Protection Act of 2006, Pub. L. 109-476. The directive, which requires the Commission to promulgate an amendment under emergency amendment authority by July 11, 2007, instructs the Commission to "review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of any offense under section 1039 of title 18, United States Code." Section 1039 criminalizes the fraudulent acquisition or disclosure of confidential phone records. The penalties for violating the statute include fines and imprisonment for a term not to exceed 10 years. The statute also includes enhanced penalties for certain forms of aggravated conduct, providing for up to a five year term of imprisonment, in addition to the penalties for a violation of section 1039(a), (b), or (c). See 18 U.S.C. 1039(d), (e).

The amendment refers the new offense at 18 U.S.C. 1039 to § 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Tax Return Information). The Commission concluded that disclosure of telephone records is similar to the types of privacy offenses referenced to this guideline. In addition, this guideline includes a cross reference, instructing that if the purpose of the offense was to facilitate another offense, that the guideline applicable to an attempt to commit the other offenses

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