

of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder.<sup>2</sup> The proposed rule change revises the fee structure for the Mutual Fund Quotation Service ("MFQS" or "Service") and updates the name of the Service in the NASD Rules. Notice of the proposed rule change, together with the substance of the proposal, was issued by Commission release (Securities Exchange Act Release No. 36840, February 13, 1996) and by publication in the Federal Register (61 FR 6674, February 21, 1996). No comment letters were received. The Commission is approving the proposed rule change.

### I. Background

The purpose of the proposed rule change is to revise the fee structure for the Service to account for significant enhancements and to reflect more accurately the value of the Service in today's market. The Service facilitates the public dissemination of daily price information for mutual funds and money market funds through the broadcast media and the newspapers. After the market close each day, mutual fund companies or their agents calculate the net asset value ("NAV"), and in some cases the dividend, capital gain, and other pertinent information for each fund. This information is submitted to the NASD by computer, which in turn disseminates it out to the media in a static batch transmission at approximately 5:40 p.m. Depending on the size and number of shareholders, funds may qualify for inclusion in either the News Media List or the Supplemental List.

### II. The terms of Substance of the Proposed Rule Change

The proposed rule change amends Part VIII and Part XIV of Schedule D to the NASD B-Laws.<sup>3</sup> Under the proposed rule change, new mutual funds will be assessed a one-time application processing fee of \$250 per fund. In addition, the fee to include a fund in the News Media List will increase from \$150 to \$275 per year. The fee to include a fund in the Supplemental List will increase from \$100 to \$200 per year.

<sup>1</sup> 15 U.S.C. 78s(b)(1) (1988).

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

<sup>3</sup> Pursuant to a new rule numbering system for the NASD Manual anticipated to be effective no later than May 1, 1996, the rules that are the subject of this proposed rule change will become Rule 7090 (regarding fee structure), and Rule 6800 (regarding description of the Service). See Exchange Act Release No. 36698 (January 11, 1996), 61 FR 1419 (January 19, 1996) (order approving new rule numbering system).

### III. Discussion

The Commission believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Act, which requires that the rules of a national securities association provide for the equitable allocation of reasonable dues, fees, and other charges among members and issues and other persons using any facility or system which the association operates or controls. The current fees have remained unchanged over a ten year period since inception of the Service, although the number of funds and shareholder accounts have increased more than three-fold. In addition, the one-time application fee for new funds is intended to defray the costs incurred in processing applications.

The fee increases are necessary to provide benefits to mutual funds, their agents, and the media. Several enhancements to the Service, including the establishment of a system of rolling dissemination of prices, will improve the distribution to the media of price information in a timely fashion. Rolling dissemination of prices will allow mutual funds and their agents to enter real-time updates throughout the day which will decrease rushed end-of-day transmissions of price information. The media will have more time to prepare its daily fund tables for inclusion in newspapers because the media will be receiving fund NAVs when they are available. Furthermore, the public that has increased its reliance on daily price information will benefit from real-time updates of price information which reduce the risk that the media will not receive any price information for publication. If a transmission problem occurs between 4:00 p.m. and 5:40 p.m., the media already will have received some fund information for publication, instead of relying on a single batch transmission at 5:40 p.m., as in the case today.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act, that the proposed rule change SR-NASD-96-05 be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Jonathan G. Katz,

Secretary.

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[Release No. 34-37015; File No. SR-NYSE-96-02]

### Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Granting Approval to Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 1 Relating to Voting of Proxies by Member Firms for Holders of Auction Rate Preferred Securities

March 22, 1996.

#### I. Introduction

On February 1, 1996, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") submitted to the Securities and Exchange Commission ("SEC" or "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 that would allow the Exchange's member firms, under certain conditions, to vote the shares of auction rate preferred securities<sup>3</sup> that they hold on behalf of their customers, notwithstanding the failure of the beneficial holders to provide instructions regarding the voting of such shares.

The proposed rule change was published for comment in Securities Exchange Act Release No. 36813 (February 6, 1996), 61 FR 5592 (February 13, 1996). One comment letter was received on the proposal.<sup>4</sup> The NYSE filed Amendment No. 1 with the Commission on March 18, 1996.<sup>5</sup> This order approves the proposal, including Amendment No. 1 on an accelerated basis.

#### II. Description

Auction rate preferred securities are preferred securities with dividend rates that are established periodically by auction or remarketing at specified reset periods. At the auction date, which typically runs every seven days but in some instances can be one to five years, the investors receive their entire investment along with accrued dividends, and may, if they so chose, participate in the repurchase of shares at

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

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

<sup>3</sup> The proposed rule change defines an auction rate preferred security as a preferred security pursuant to which the dividend rate is established periodically by auction or remarketing at specified reset periods.

<sup>4</sup> See Letter from Dorothy M. Donohue, Assistant Counsel, Investment Company Institute, to Jonathan G. Katz, Secretary, SEC, dated March 5, 1996.

<sup>5</sup> Amendment No. 1 made clarifying changes to the text of the rule proposal. See Letter dated March 13, 1996, from James E. Buck, Senior Vice President and Secretary, NYSE, to Glen Barrentine, Team Leader, SEC.

the new dividend rate for the ensuing rate period.

Because of the short-term nature of these securities, auction rate preferred shareholders generally have little economic interest in the performance of the issuer and its governance structure. As a result, the Exchange has represented that corporate issuers of these securities often find it difficult to obtain a quorum of auction rate preferred shareholders when such a requirement exists. Such failure blocks the approval of matters that require such a quorum.

The proposed rule change would allow member firms to vote the shares of auction rate preferred securities with auction reset periods of less than one year, on non-routine items,<sup>6</sup> in proportion to those votes cast by beneficial holders of each class of such securities (or of each series where an item must be voted upon separately by each series), as long as:

- (i) The issuer has transmitted proxy soliciting material to the beneficial owner or its designee;<sup>7</sup>
- (ii) It has not received voting instructions from the beneficial owner or its designee within the time period specified in the proxy material;
- (iii) At least 30% of the outstanding shares of the same class or series (where a series vote is required) has been voted by preferred security holders;
- (iv) Less than 10% of the outstanding shares of the same class or series (where a series vote is required) has been voted by preferred security holders against the proposal;<sup>8</sup>
- (v) For any proposal as to which both the common and the preferred holders vote as a single class, proportional voting would not be allowed unless common shareholders have also approved the item;

<sup>6</sup> Voting by member firms on routine items is governed by NYSE Rule 452.10, which allows member firms to vote without customer instructions on routine items, provided that the member has transmitted proxy soliciting material to the beneficial owner in accordance with NYSE Rule 451 and the member has not received voting instructions from the beneficial owner by the date specified in the statement accompanying such material.

<sup>7</sup> The transmittal of proxy soliciting material to the beneficial owner must be undertaken in accordance with NYSE Rule 451.

<sup>8</sup> Because the 10% threshold is based upon the outstanding shares of a class or series rather than the shares actually voted, the proportion of negative votes among the shares actually voted is likely to be significantly higher than the 10% threshold. For example, where only 30% of the outstanding shares of a class vote, a negative vote of at least 33% of the shares of such class that actually vote would be necessary to exceed the 10% threshold. However, even a situation where the proportion of negative votes approached the 10% threshold, the measure will have been approved by a substantial majority of the outstanding shares voting.

- (vi) A majority of the independent directors of the issuer's board of directors have approved the item; and
- (vii) Adequate disclosure of proportional voting has been provided.

The proposed rule change will insert a new Rule 452.12 into the Exchange's Rules of the Board of Governors as well as an identical Paragraph 402.08(C) into the Exchange's Listed Company Manual.<sup>9</sup>

### III. Summary of Comments

The Commission received one comment letter from the Investment Company Institute (the "Comment Letter").<sup>10</sup> The Comment Letter supported the proposed amendment and urged the Commission to approve it promptly. It did note its belief, however, that the term "issue," as used in conditions (3) and (4) of the proposed rule, was ambiguous.<sup>11</sup> The Comment Letter stated its understanding that the term "issue" was intended to refer to all of the outstanding preferred shares of an issuer rather than the separate series of the issuer's preferred shares and recommended that it be defined in the proposed rules in such manner or that such understanding be reflected in the Commission's release adopting the proposed amendment.

In response, the NYSE submitted Amendment No. 1 amending conditions (3) and (4) of the proposed rules. These provisions set forth conditions that must be satisfied before a member organization may vote auction rate preferred securities. As proposed to be amended by Amendment No. 1, these provisions would prohibit a member firm from voting the shares of auction rate preferred securities that it held on behalf of its customers unless at least 30% of the outstanding shares of each class or each series, where a series vote is required, vote and less than 10% of each such class or series vote against the proposal.

### IV. Discussion

After careful consideration, the Commission finds that the proposed

<sup>9</sup> The proposed rule change also rennumbers existing Exchange Rules 452.12 through 452.16 without change to Rules 452.13 through 452.17 and Listed Company Manual Paragraphs 402.08 (C) through (G) without change to 402.08 (D) through (H).

<sup>10</sup> See letter from Dorothy M. Donohue, Assistant Counsel, Investment Company Institute, to Jonathan G. Katz, Secretary, SEC, dated March 5, 1996 ("Comment Letter").

<sup>11</sup> These provisions set forth conditions that must be satisfied before a member organization may vote auction rate preferred securities and, as originally proposed, required that at least 30% of the outstanding issue be voted by beneficial holders and that less than 10% of the issue voted against the proposal.

rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a Commission believes the proposal is consistent with the Section 6(b)(5) requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, and, in general, to protect investors and the public.

The Commission has reviewed carefully the Exchange's proposal to amend its rules to allow member firms, under very limited conditions, to vote on non-routine matters the auction rate preferred securities that they hold on behalf of their customers, notwithstanding the failure of the beneficial holders to provide instructions regarding the voting of such shares. The Commission believes that such proposal adequately addresses the particular needs of issuers of such securities to be able to obtain a quorum of preferred shareholders, while, at the same time, protecting the rights of the holders of such shares.

Under the Exchange's proposal, member firms would be allowed to vote auction rate preferred securities that are held on behalf of their customers in proportion to the voting instructions received from holders of the same class (or of the same series where the item must be voted upon separately by each series) only under very limited circumstances. These circumstances would include a condition that the securities must have reset periods of one year or less, which serves to limit this provision to those securities that, because of their short-term nature, leave shareholders with little economic interest in the performance of the issuer. Further, the issuer must have transmitted proxy those securities that, because of their short-term nature, leave shareholders with little economic interest in the performance of the issuer. Further, the issuer must have transmitted proxy soliciting material to the beneficial owner or its designee in accordance with NYSE Rule 451. This condition ensures that beneficial holders will continue to have the choice of voting their shares if they so desire and the information necessary to allow them to make an informed voting decision.<sup>13</sup> The shareholder also must receive adequate disclosure of the member firm's ability to vote such

<sup>13</sup> Of course, where the beneficial shareholder actually does vote his or her shares, the proposed rules would prohibit the member firm from proportionally voting such shares.

shares in the absence of the beneficial holder exercising such right.

Moreover, under the proposal a member firm's right to vote such shares would be limited to proposals that have received the vote of at least 30% of the outstanding shares of each class or series (where a series vote is required) of the auction rate preferred shares. This will ensure that the member firm's proportional vote mirrors the vote of a significant portion of the total outstanding auction rate preferred shares. In addition, the member firm would be prohibited from voting where 10% or more of the outstanding shares of the same class or series (where a series vote is required) voted against the proposal and, in the case of a proposal that requires both the common and the preferred holders to vote as a single class, where the proposal does not receive the separate approval of the common shareholders.<sup>14</sup> These provisions effectively limit the member firm's proportional vote to matters that are strongly supported by those auction rate preferred holders who do vote and, where necessary, approved by the common shareholders. Finally, to further ensure fairness, the member firm may only vote on matters that have been approved by a majority of an issuer's independent directors.

The Commission believes that these conditions protect the rights of the holders of auction rate preferred securities by sufficiently limiting the right of member firms to vote, on non-routine items, the shares of such securities that they hold on behalf of their customers. At the same time, the Exchange's proposal should meet its objective of assisting issuers in obtaining approval of matters that are overwhelmingly supported by auction rate preferred shareholders who do vote.

Moreover, the Commission believes that the amended language adopted by the Exchange with regard to subsections (iii) and (iv) of the proposed rule change

is preferable to the alternative offered in the Comment Letter. The Exchange's approach, which applies the 30% and 10% thresholds to the same class or series (where a series vote is required) instead of to all of the outstanding preferred shares, offers greater protection to the voting interests of holders of each class or series, as applicable.

The Commission finds good cause for approving Amendment No. 1 prior to the thirtieth day after the date of publication of notice thereof in the Federal Register. Amendment No. 1 made clarifying, technical changes to the text of the rule, and did not propose new substantive provisions to the proposed rule change. Accordingly, the Commission believes that consistent with Section 19(b)(2), good cause exists to accelerate approval of Amendment No. 1.

#### V. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 1 to the proposed rule change. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rules change that are filed with the Commission, and all written communications relating to Amendment No. 1 between the Commission and any persons, other than those that may be withheld from the public in for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of such filing will also be available at the principal office of the NYSE. All submissions should refer to File No. SR-NYSE-96-02 and should be submitted by April 19, 1996.

#### VI. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>15</sup> that the proposed rule change (SR-NYSE-96-02), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>16</sup>

Jonathan G. Katz,

Secretary.

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### Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change by the New York Stock Exchange, Inc. Relating to an Amendment of NYSE

March 22, 1996.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on March 11, 1996, 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 NYSE. The Commission is approving the proposal on an accelerated basis, in addition to 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 an amendment to NYSE Rule 104 to facilitate trading in Investment Company Units ("Units"),<sup>2</sup> including CountryBaskets.<sup>3</sup>

#### 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 self-regulatory organization 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 self-regulatory organization 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

The Exchange proposes to amend its Rule 104 to facilitate specialist market

<sup>14</sup> As to any proposal that requires the common and preferred holders to vote as a single class, the above provisions, if read in combination, could be understood as conditioning the member firm's right to vote on the requirement that less than 10% of the outstanding shares of such combined class not vote against the proposal. The Exchange has informed the Commission, however, that it would interpret the 10% threshold as applying only to the outstanding preferred shares such that a member would not be prohibited from voting if 10% or more of the outstanding shares of a combined class of common and preferred voted against the proposal so long as less than 10% of the preferred shares did not vote against the proposal. The Exchange has further represented that it intends to notify its members of this interpretation through an Interpretation Memo. Telephone conversation between John Longobardi, Managing Director, NYSE, and Glen Barrentine, SEC, dated March 21, 1996.

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

<sup>16</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1) (1988).

<sup>2</sup> NYSE Listed Company Manual Section 703.16 defines a Unit as a security that represents an interest in a registered investment company that could be organized as a unit investment trust, an open-end management investment company, or a similar entity.

<sup>3</sup> "CountryBasket," "CountryBaskets" and "CB" are trademarks of Deutsche Bank Securities Corporation.