

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49218; File No. SR-NYSE-2003-31]

### Self-Regulatory Organizations; Notice of Filing of a Proposed Rule Change and Order Granting Accelerated Approval to the Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc. Relating to Minor Revisions to Sections 303A.08, 303.00, and 312.03 of the NYSE's Listed Company Manual

February 11, 2004.

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 October 9, 2003, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. On February 9, 2004, the NYSE filed 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 from interested persons and is approving the proposal and Amendment No. 1 on an accelerated basis.

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

The NYSE proposes to amend section 303.00 ("Corporate Governance Standards"), section 303A.08 ("Shareholder Approval of Equity Compensation Plans"), and section 312.03 ("Shareholder Approval") of the NYSE's Listed Company Manual. The NYSE represents that the proposed rule amendments reflect a need for minor clean-up revisions that became apparent following the addition of section 303A.08 to the NYSE's Listed Company Manual.

The text of the proposed rule change is available at the Office of the Secretary, the NYSE, and at the Commission.

#### 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

On August 16, 2002, the NYSE filed with the Commission amendments to its Listed Company Manual to implement significant changes to its listing standards aimed at helping to restore investor confidence by empowering and ensuring the independence of directors and strengthening corporate governance practices (the "Corporate Governance Proposals").<sup>4</sup> On October 7, 2002, the NYSE filed certain of the proposals included in the Corporate Governance Proposals, including section 303A.08 providing for shareholder approval of equity-compensation plans and amendments to NYSE Rule 452, "Broker No-Votes," to comply with a request from the Commission staff to address this issue separately from the remainder of the Corporate Governance proposals (the "October Proposals"). That filing was approved by the SEC on June 30, 2003.<sup>5</sup>

Following approval of the October Proposals, the NYSE's Listed Company Manual was updated to reflect the approved amendments. During that process, it became apparent to the NYSE that minor clean-up revisions were necessary. The amendments proposed in this filing reflect the need for these revisions. The NYSE proposes to revise Section 312.03(a) to clarify that the section applies to equity-compensation plans, and to include a cross-reference to section 303A.08. The NYSE proposes to clarify through these proposed amendments that shareholder approval is also required for equity-compensation plans under section 312.03, its shareholder approval policy. The NYSE also proposes to delete a provision of section 303.00 that was duplicated in different formats in both the October Proposals and the Corporate Governance Proposals. The format approved in the

Corporate Governance Proposals will be retained in section 303.00.

In addition, the NYSE proposes to delete two paragraphs in section 303A.08 that relate to broker voting. These paragraphs relate to amendments approved to NYSE Rule 452 regarding broker voting and were inadvertently included in the rule text relating to equity-compensation plans, rather than in NYSE Rule 452 itself. One of these paragraphs relates to a 90-day transition period regarding a prohibition on broker voting on equity-compensation plans, which expired as of September 29, 2003. The other paragraph relates to the NYSE's intention to establish a working group to advise with respect to the need for, and design of, mechanisms to facilitate implementation of the requirement that brokers may not vote on equity-compensation plans presented to shareholders without instructions from the beneficial owners. Since September 29, 2003, the date the rule change went into effect, the working group has been monitoring stockholder meetings of companies at which equity-compensation plans were subject to shareholder approval. The NYSE represents that there have been 65 such situations to date. To the NYSE's knowledge, only one equity-compensation plan failed to receive shareholder approval; that plan also would have required that brokers not vote under the former rule due to the fact that the number of shares reserved for the plan exceeded 5% of the company's outstanding shares. The NYSE has also solicited feedback from Automatic Data Processing, Inc. ("ADP") and the proxy solicitor community on whether difficulties were being encountered with respect to the amended rule. No problems were reported for listed companies. In addition, the NYSE represents that the working group has not received any complaints directly from listed companies following effectiveness of the amended rule. The NYSE further represents that the working group will continue to monitor this issue throughout the 2004 proxy season.<sup>6</sup>

###### 2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with section 6 of the Act<sup>7</sup> in general and furthers the objectives of section 6(b)(5)<sup>8</sup> in particular in that it is

<sup>4</sup> See File No. SR-NYSE-2002-33. This filing was approved on November 4, 2003. See Securities Exchange Act Release No. 48745 (November 4, 2003), 68 FR 64154 (November 12, 2003).

<sup>5</sup> See Securities Exchange Act Release No. 48108 (June 30, 2003), 68 FR 39995 (July 3, 2003) (SR-NYSE-2002-46).

<sup>6</sup> The Commission notes that the paragraph on the working group that the NYSE is proposing to delete only refers to the intention to establish a working group.

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

<sup>8</sup> 15 U.S.C. 78f(b)(5).

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

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

<sup>3</sup> Amendment No. 1 replaces the NYSE's original 19b-4 filing in its entirety.

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, 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 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, 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. Comments may also be submitted electronically at the following e-mail address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-NYSE-2003-31. This file number should be included on the subject line if e-mail is used. To help the Commission process and review comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. 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 at 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-2003-31 and should be submitted by March 11, 2004.

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

After careful review, the Commission finds that the NYSE's proposed rule change, as amended, is consistent with the Act and the rules and regulations promulgated thereunder applicable to a national securities exchange and, in particular, with the requirements of section 6(b) of the Act.<sup>9</sup> Specifically, the Commission finds that approval of the NYSE's proposed rule change, as amended, is consistent with section 6(b)(5) of the Act<sup>10</sup> in that it is designed to, among other things, facilitate transactions in securities; 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.

The Commission believes that the proposed clarification to section 312.03(a) of the NYSE's Listed Company Manual ("Shareholder Approval") to explicitly state that shareholder approval is required under that section for equity-compensation plans, in addition to the equity-compensation plan shareholder approval requirements set out in section 303A.08 of the NYSE's Listed Company Manual ("Shareholder Approval of Equity Compensation Plans"), should help to explicitly clarify that shareholder approval is required for equity-compensation plans pursuant to section 312.03, its shareholder approval policy. Furthermore, the Commission believes that the cross-reference in section 312.03(a) to the section 303A.08 shareholder approval requirements for equity-compensation plans should provide companies with further guidance as to the shareholder approval requirements for such plans.

Moreover, the Commission believes that it is appropriate for the NYSE to delete the two paragraphs under section 303A.08, which relate to broker voting. The Commission notes these two paragraphs, which apply to NYSE members, should have been incorporated into NYSE Rule 452 ("Giving Proxies by Member Organization") instead of section 303A.08, which applies to NYSE-listed companies. The Commission further notes that the paragraph regarding a 90-

day transition period for the implementation of amendments to NYSE Rule 452 restricting broker voting on equity compensation plans is no longer necessary because the 90-day transition period expired on September 29, 2003. Therefore, the Commission agrees with the NYSE that this rule language is no longer necessary. In addition, the Commission believes that it is appropriate for the NYSE to delete the paragraph concerning the working group because it only refers to the NYSE's intention to establish a working group to advise on, and to facilitate, the implementation of the new broker voting prohibition for equity-compensation plans. In its filing, the NYSE stated that it established the working group, which has been monitoring the implementation of the amendment to NYSE Rule 452 since it became effective on September 29, 2003. In addition, the NYSE has represented that the working group will continue to monitor this issue during the 2004 proxy season.

Finally, the Commission believes that the NYSE's proposed deletion of a duplicative provision in section 303.00 of the NYSE's Listed Company Manual ("Corporate Governance Standards") should eliminate any confusion and provide clarity as to the rule requirements.

The Commission finds good cause for approving the NYSE's proposal and Amendment No. 1 thereto prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. The NYSE has requested accelerated approval of this proposal, as amended, because it believes that the proposed amendments are non-controversial in nature and reflect minor clean-up revisions of rule text following the Commission's approval of section 303A.08. The proposal makes minor clean-up changes to sections 303.00, 303A.08, and 312.03 of the NYSE's Listed Company Manual. The Commission believes that accelerated approval of these minor clean-up revisions should help to facilitate the updating and accuracy of the NYSE's rules and Listed Company Manual and avoid confusion about outdated provisions. Based on the above, the Commission finds good cause, consistent with sections 6(b)(5) and 19(b)(2) of the Act,<sup>11</sup> to approve the NYSE's proposal and Amendment No. 1 on an accelerated basis.

<sup>9</sup> 15 U.S.C. 78f(b). In approving the NYSE's proposal, as amended, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

<sup>11</sup> 15 U.S.C. 78f(b)(5) and 78s(b)(2).

## V. Conclusion

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act,<sup>12</sup> that the proposed rule change (SR-NYSE-2003-31) and Amendment No. 1 are hereby approved on an accelerated basis.

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

**Margaret H. McFarland,**  
*Deputy Secretary.*

[FR Doc. 04-3542 Filed 2-18-04; 8:45 am]

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## DEPARTMENT OF STATE

### [Public Notice 4591]

#### Advisory Committee on Historical Diplomatic Documentation; Notice of Meeting

**SUMMARY:** The Advisory Committee on Historical Diplomatic Documentation will meet in the Department of State, 2201 "C" Street NW., Washington, DC, March 8-9, 2004, in Conference Room 1107. Prior notification and a valid government-issued photo ID (such as driver's license, passport, U. S. government or military ID) are required for entrance into the building. Members of the public planning to attend must notify Gloria Walker, Office of the Historian (202-663-1124) no later than February 20, 2004 to provide date of birth, valid government-issued photo identification number and type (such as driver's license number/state, passport number/country, or U.S. government ID number/agency or military ID number/branch), and relevant telephone numbers. If you cannot provide one of the enumerated forms of ID, please consult with Gloria Walker for acceptable alternative forms of picture identification.

The Committee will meet in open session from 1:30 p.m. through 3 p.m. on Monday, March 8, 2004, in Room 1107 to discuss declassification and transfer of Department of State records to the National Archives and Records Administration and the status of the Foreign Relations series. The remainder of the Committee's sessions from 3:15 p.m. until 4:30 p.m. on Monday, March 8, 2004, and 9 a.m. until 1 p.m. on Tuesday, March 9, 2004, will be closed in accordance with Section 10(d) of the Federal Advisory Committee Act (Pub. L. 92-463). The agenda calls for discussions of agency declassification decisions concerning the Foreign Relations series and other

declassification issues. These are matters not subject to public disclosure under 5 U.S.C. 552b(c)(1) and the public interest requires that such activities be withheld from disclosure.

Questions concerning the meeting should be directed to Marc J. Susser, Executive Secretary, Advisory Committee on Historical Diplomatic Documentation, Department of State, Office of the Historian, Washington, DC, 20520, telephone (202) 663-1123, (e-mail [history@state.gov](mailto:history@state.gov)).

Dated: February 5, 2004.

**Marc Susser,**

*Executive Secretary, Department of State.*  
[FR Doc. 04-3601 Filed 2-18-04; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

#### Aviation Proceedings, Agreements Filed the Week Ending February 6, 2004

The following Agreements were filed with the Department of Transportation under the provisions of 49 U.S.C. Sections 412 and 414. Answers may be filed within 21 days after the filing of the application.

*Docket Number:* OST-2004-17031.

*Date Filed:* February 3, 2004.

*Parties:* Members of the International Air Transport Association.

*Subject:* PTC COMP 1121 dated 6 February 2004, Mail Vote 349—Resolution 011a (Amending), Mileage Manual Non-TC Member/Non-IATA Carrier Sectors.

*Intended Effective Date:* 16 February 2004, (for implementation 1 April 2004).

*Docket Number:* OST-2004-17050.

*Date Filed:* February 4, 2004.

*Parties:* Members of the International Air Transport Association.

*Subject:* PTC12 SATL-EUR 0118 dated 6 February 2004, South Atlantic-Europe Expedited Resolution 002s r1.

*Intended Effective Date:* 15 March 2004.

**Andrea M. Jenkins,**

*Program Manager, Docket Operations, Federal Register Liaison.*

[FR Doc. 04-3617 Filed 2-18-04; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

#### Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (formerly Subpart Q) During the Week Ending February 6, 2004

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 *et seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

*Docket Number:* OST-1998-4660.

*Date Filed:* February 4, 2004.

*Due Date for Answers, Conforming Applications, or Motion to Modify Scope:* February 25, 2004.

*Description:* Application of Continental Micronesia, Inc., requesting renewal of its certificate of public convenience and necessity for its Route 171, Segment 7 authority to provide scheduled foreign air transportation of persons, property, and mail between Guam and Saipan, Commonwealth of the Northern Mariana Islands, on the one hand, and Naha, Japan, on the other hand. Continental Micronesia also requests, renewal of the right to combine this authority with its authority in other markets to the extent permitted by applicable bilateral agreements.

*Docket Number:* OST-1999-5002.

*Date Filed:* February 4, 2004.

*Due Date for Answers, Conforming Applications, or Motion to Modify Scope:* February 25, 2004.

*Description:* Application of Continental Micronesia, Inc., requesting renewal of its certificate of public convenience and necessity for its Route 171, Segment 14 authority to provide scheduled foreign air transportation of persons, property, and mail between Guam and Saipan, Commonwealth of the Northern Mariana Islands, on the one hand, and Osaka, Japan, on the other hand. Continental Micronesia also requests, renewal of the right to combine this authority with its authority in other markets to the extent permitted by applicable bilateral agreements.

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

<sup>13</sup> 17 CFR 200.30-3(a)(12).