

the NSCC Equity Options Service, Deriv/SERV will provide any such information in its possession to NSCC so that NSCC may provide such information to the Commission.

NSCC is responsible neither for the content of the messages transmitted through the NSCC Equity Options Service nor for any errors, omissions, or delays that may occur relating to the NSCC Equity Options Service in the absence of gross negligence on NSCC's part. Both the Service Agreement and the Deriv/SERV Operating Procedures provide that NSCC has no liability in connection with the NSCC Equity Options Service in the absence of gross negligence on NSCC's part. The NSCC Equity Options Service does not involve netting or money settlement through the facilities of NSCC, and it is a nonguaranteed service of NSCC.<sup>6</sup>

Deriv/SERV will charge its users fees in connection with the Deriv/SERV Equity Options Service and pursuant to the Service Agreement will make payments to NSCC for the services that NSCC provides. NSCC will file proposed rule changes under Section 19(b) of the Act for fees that NSCC charges to Deriv/SERV for the NSCC Equity Options Service and for any changes made by NSCC to the Equity Options Service.

### III. Discussion

Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions.<sup>7</sup> The Commission finds the proposed rule change to be consistent with Section 17A(b)(3)(F) of the Act because the NSCC Equity Options Service should provide for the prompt and accurate clearance and settlement of U.S. OTC equity option transactions by facilitating the transmission of automated, standardized information on a centralized communications platform. This should reduce processing errors, delays, and risks that are typically associated with manual processes.

NSCC has requested that the Commission approve the proposed rule change prior to the thirtieth day after

the date of publication of notice of the filing. The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of the notice of the filing because the Commission's current approval of NSCC's Equity Options Service expires May 31, 2005.

### IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR-NSCC-2005-04) be and hereby is approved on an accelerated basis.

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

Margaret H. McFarland,

Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51747; File No. SR-NYSE-2005-26]

### Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto to Extend the Closing Time of Crossing Session II and to Amend its Crossing Sessions III and IV to Eliminate the Share Size Restriction and the Process by Which an Order is Executed if There is No Execution Prior to 4 p.m.

May 26, 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 April 8, 2005, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") submitted to 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 May 19, 2005, 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, 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 its Off-Hours Trading Facility ("OHTF")—Crossing Sessions II, III, and IV, in particular. The Exchange proposes to extend the closing time of Crossing Session II from 6:15 p.m. to 6:30 p.m. The NYSE also proposes to amend rules governing Crossing Sessions III and IV to eliminate the 10,000 share size restriction and the process by which an order is executed if there is no execution prior to 4 p.m. 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'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 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

##### Background

The Exchange's OHTF consists of four sessions. Crossing Session I permits the execution, at the Exchange's closing price, of single-stock, single-sided closing price orders and crosses of single-stock, closing price buy and sell orders. Crossing Session II provides an opportunity for members and member organizations to cross program trading orders in NYSE-listed securities on the Exchange between 4 p.m. and 6:15 p.m., based on the aggregate price of the program. Matched buy and sell orders for a minimum of 15 NYSE-listed stocks that have a minimum dollar value of \$1 million may be transmitted to the Exchange for execution in Crossing Session II. These orders are transmitted via the Exchange's Electronic Filing Platform, detailing the total number of stocks, total number of shares, and total dollar value.

<sup>6</sup> The NSCC Equity Options Service is a nonguaranteed service limited to the matching and communication of information and does not involve settlement of securities transactions or funds through the facilities of NSCC. In its Matching Release, the Commission concluded that matching (*i.e.*, the "comparison of data respecting the terms of settlement of securities transactions") constitutes a clearing agency function within the meaning of Section 3(a)(23)(A) of the Exchange Act. Securities Exchange Act Release No. 39829 (April 6, 1998), 63 FR 17943 [File No. S7-10-98].

<sup>7</sup> 15 U.S.C. 78q-1(b)(3)(F).

<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 made clarifying changes to the Purpose section of the filing.

Crossing Session III allows for the execution on the NYSE of "guaranteed price coupled orders," whereby member organizations could fill the unfilled balance of a customer order at a price which was guaranteed to the customer prior to the close of the Exchange's 9:30 a.m. to 4 p.m. trading session. Crossing Session IV is a facility whereby member organizations may fill the unfilled balance of a customer's order at a price such that the overall order is filled at a price that is no worse than the volume weighted average price ("VWAP") for the subject security on that trading day. The member organization is required to document its VWAP agreement with the customer and the basis upon which the VWAP price would be determined.

Crossing Sessions III and IV were approved by the Commission as pilot programs (the "Pilots") in SR-NYSE-2002-40.<sup>4</sup> The Pilots are currently approved until February 1, 2006.<sup>5</sup>

The Exchange proposes to make the following amendments to Crossing Sessions II, III, and IV.

#### Crossing Session II

The Exchange proposes to expand the hours of operation of Crossing Session II from 6:15 p.m. to 6:30 p.m. each day that the Exchange is open for its regular 9:30 a.m. to 4 p.m. trading session.<sup>6</sup> Expanding the time of operation of Crossing Session II is intended to enhance the usefulness and practicality of Crossing Session II by making it available to member organizations for a greater time period and to make it consistent with the closing time of Crossing Sessions III and IV. Orders in both Crossing Sessions III and IV can be entered beginning at 4 p.m. and must be completed by 6:30 p.m.

Exchange Rule 51 provides for the operation of Off-Hours Trading "during such hours as the Exchange may from time to time specify." Should the Commission approve the proposed rule change, the Exchange will alert its membership and other market participants of the new operating hours for Crossing Session II.

#### Crossing Sessions III and IV

Exchange Rule 907 (iii) states that a guaranteed price coupled order or an order to be executed at the VWAP is for

the portion of the customer's order that could not be executed prior to 4 p.m., but in any event must be at least 10,000 shares. The Exchange is proposing to eliminate the 10,000 share size restriction in Exchange Rule 907 (iii) for both types of orders in Crossing Sessions III and IV, in order to increase the availability of Crossing Sessions III and IV to member organizations. In addition, the Exchange is proposing to amend the rule to provide that if there is no execution prior to 4 p.m., the entire order would be eligible for execution in the crossing session, rather than just the portion of the customer's order that could not be executed prior to 4 p.m.

#### 2. Statutory Basis

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

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

The Exchange believes that the proposed rule change would not 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 not solicited comments regarding the proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

#### 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 the Exchange 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, as amended, 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-2005-26 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number SR-NYSE-2005-26. 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 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-2005-26 and should be submitted on or before June 29, 2005.

<sup>4</sup> See Securities Exchange Act Release No. 48857 (December 1, 2003), 68 FR 68440 (December 8, 2003).

<sup>5</sup> See Securities Exchange Act Release No. 51091 (January 28, 2005), 70 FR 6484 (February 7, 2005) (SR-NYSE-2005-01).

<sup>6</sup> See Securities Exchange Act Release No. 46547 (September 25, 2002), 67 FR 61706 (October 1, 2002) (SR-NYSE-2002-38) (expanding hours of operation of Crossing Session from 5:15 p.m. to 6:15 p.m.).

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

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

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

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

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51777; File No. SR-NYSE-2004-49]

### Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Approving Proposed Rule Change and Amendment No. 3 Thereto Relating to Procedures for Companies That Fail To File Annual Reports in a Timely Manner

June 2, 2005.

#### I. Introduction

On August 19, 2004, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") submitted to the Securities and Exchange Commission ("Commission" or "SEC"), 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 codifying existing procedures followed where companies fail to satisfy the Commission's filing requirements for annual reports on Forms 10-K, 10-KSB, 20-F, 40-F, or N-CSR in a timely manner. The proposed rule change was published for public comment in the **Federal Register** on October 1, 2004.<sup>3</sup> The Exchange filed Amendments No. 1<sup>4</sup> and 2<sup>5</sup> on October 29, 2004 and November 29, 2004, respectively. On December 21, 2004, the Exchange filed Amendment No. 3 to the proposed rule change.<sup>6</sup> Amendment No. 3 was published for public comment in the **Federal Register** on January 14, 2005.<sup>7</sup>

The Commission received two comment letters regarding the proposed rule change.<sup>8</sup> On March 1, 2005, the Exchange submitted a response to the comments.<sup>9</sup> This order approves the proposed rule change, as amended.

#### II. Description of the Proposed Rule Change

The Exchange is proposing to codify existing procedures followed where companies fail to satisfy the Commission's filing requirements for annual reports on Forms 10-K, 10-KSB, 20-F, 40-F, or N-CSR in a timely manner. The proposed rule change would apply with full effect to companies that are already late in filing their annual report on Form 10-K, 20-F, 40-F, or N-CSR with the SEC as of the date that the Commission approves this rule filing.<sup>10</sup> Specifically, a company that fails to file its annual report with the Commission in a timely manner would be subject to the following procedures under new Paragraph 802.01E of the Listed Company Manual:

Under Paragraph 802.01E, once the Exchange identifies that a company has failed to file a timely periodic annual report with the Commission by the later of (a) the date that the annual report was required to be filed with the Commission by the applicable form or (b) if a Form 12b-25 was timely filed with the Commission, the extended filing due date for the annual report, the Exchange would notify the company in writing of its status. The later of these two dates would be referred to as the "Filing Due Date."

Within five days of receipt of this notification, the company would be required to (a) contact the Exchange to discuss the status of the annual report filing, and (b) if it has not already done so, issue a press release disclosing the status of the filing. If the company failed to issue this press release in a timely manner, the Exchange would itself issue a press release stating that the company has failed to timely file its annual report with the Commission.

During the nine-month period from the Filing Due Date, the Exchange would monitor the company and the

status of the filing, including through contact with the company, until the annual report is filed. Under the procedure, if the company failed to file the annual report within nine months from the Filing Due Date, the Exchange would be permitted, in its sole discretion, to allow the company's securities to be traded for up to an additional three-month trading period depending on the company's specific circumstances. If the Exchange determined that an additional trading period of up to three months is not appropriate, suspension and delisting procedures would commence in accordance with the procedures set out in Paragraph 804.00 of the Listed Company Manual.<sup>11</sup> The new rule specifically states that a company would not be eligible to follow the procedures outlined in Paragraphs 802.02 and 802.03 with respect to this criteria.<sup>12</sup>

In determining whether an additional trading period of up to three-months is appropriate, the rule specifically states that the Exchange would consider the likelihood that the filing could be made during the additional period, as well as the company's general financial status, based on information provided by a variety of sources, including the company, its audit committee, its outside auditors, the staff of the Commission and any other regulatory body. The new procedures also state that the Exchange strongly encourages companies to provide ongoing disclosure on the status of the annual report filing to the market through press releases, and that the Exchange will take the frequency and detail of such information into account in determining whether an additional three-month trading period is appropriate. If the Exchange determined that an additional, up to three-month trading period was appropriate and the company failed to file its periodic annual report by the end of the additional period, suspension and delisting procedures would commence in accordance with the procedures set out in Paragraph 804.00 of the Listed Company Manual.<sup>13</sup>

<sup>11</sup> Paragraph 804 sets forth the procedures the Exchange follows when it determines a security should be delisted, and the issuer's right of review of such decisions.

<sup>12</sup> Paragraphs 802.02 and 802.03 provide generally, among other things, that when a listed company is not in compliance with the Exchange's continued listing criteria, the Exchange notifies the company of its status and the company is given the opportunity to provide a plan advising the Exchange of the definitive action the company intends to take that would bring it into conformity with continued listing standards.

<sup>13</sup> See also *supra* notes 11 and 12. In such a case, the procedures of Paragraphs 802.02 and 802.03 would not be available, as discussed above.

<sup>9</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> Securities Exchange Act Release No. 50452 (September 27, 2004), 69 FR 58987.

<sup>4</sup> See letter from Mary Yeager, Assistant Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated October 28, 2004 ("Amendment No. 1").

<sup>5</sup> Amendment No. 2 replaced and superseded Amendment No. 1. On December 21, 2004, the Exchange withdrew Amendment No. 2.

<sup>6</sup> Amendment No. 3 clarified that the proposed rule change would apply to companies that are already late in filing their annual reports as of the date that the Commission approves the proposed rule change.

<sup>7</sup> Securities Exchange Act Release No. 50982 (January 6, 2005), 70 FR 2686. Amendment No. 3 clarified that the proposed rule change would apply to companies that are already late in filing their annual reports as of the date that the Commission approves the proposed rule change.

<sup>8</sup> See letters from James J. Angel, Associate Professor of Finance, McDonough School of Business, Georgetown University ("Angel"), to Jonathan G. Katz, Secretary, Commission ("Angel Letter"), and Edward S. Knight, Executive Vice President and General Counsel, The Nasdaq Stock Market, Inc. ("Nasdaq"), to Jonathan G. Katz, Secretary, Commission, dated February 4, 2005 ("Nasdaq Letter").

<sup>9</sup> See letter from Mary Yeager, Assistant Secretary, NYSE, to Sharon Lawson, Division of Market Regulation, Commission, dated March 1, 2005.

<sup>10</sup> See Amendment No. 3, *supra* note 6.