

#### Required Adoption and Disclosure of Corporate Governance Guidelines

A number of commentators argued that companies should have broader discretion in drafting their governance guidelines.

#### Required Adoption and Disclosure of a Code of Business Conduct and Ethics

Many of those who commented on this recommendation urged that only material waivers of the business ethics policy be required to be disclosed.

#### Disclosure by Foreign Private Issuers

Two commentators urged tougher treatment of foreign companies, with one suggesting that exemptions from listing requirements for foreign private issuers should be the exception rather than the rule.

#### CEO Certification

More than half of the commenting companies and organizations opposed this recommendation. The overwhelming majority of comments protested that the requirement would duplicate the recent SEC rules requiring CEO certification for periodic reports. They opposed the expansion of the certification requirement to all statements made by the company to investors and urged the NYSE to defer final action on this subject until the SEC issues a final rule, or to coordinate its action on this issue with the SEC, so as to avoid different standards by different regulatory bodies. Some commentators suggested language enabling the CEO to rely on the CFO, external auditors, internal auditors, the audit committee, inside and outside counsel and other consultants in making his or her certification.

A few commentators expressed concern that the recommendation raised potential for pernicious private litigation and urged the NYSE to make clear that the certification requirement, if adopted, creates no private cause of action.

The Exchange has decided not to require its own CEO certification of financials in light of the certifications required by the Sarbanes-Oxley legislation and SEC rules.

#### Public Reprimand Letter From NYSE

Several companies stressed the importance of providing offenders with due process through notice and an opportunity to cure prior to any public reprimand.

### 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 self-regulatory organization consents, the Commission will:

A. By order approve the 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 amended proposal 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. 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 will also be available for inspection and copying at the principal office of the NYSE. All submissions should refer to File No. SR-NYSE-2002-33 and should be submitted by May 8, 2003.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47667; File No. SR-NYSE-2003-09]

#### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Elimination of the Exception to Rule 123(e) for Exchange-Traded Funds

April 11, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the "Exchange Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 9, 2003, the New York Stock Exchange, Inc. ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The NYSE proposes to eliminate the exception to NYSE Rule 123(e), which provided that orders in Exchange-Traded Funds ("ETFs") must be entered into an electronic data base (front end systemic capture, or "FESC") on the Floor within 90 seconds of execution. This amendment originally became effective on a pilot basis for one year.<sup>3</sup> Thereafter the pilot was extended for an additional year, and is set to expire on January 5, 2004.<sup>4</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 NYSE included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NYSE has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

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

<sup>3</sup> See Securities Exchange Act Release No. 45246 (January 7, 2002), 67 FR 1527 (January 11, 2002) (SR-NYSE-2001-52), adopting Supplementary Material .23 of NYSE Rule 123(e).

<sup>4</sup> See Securities Exchange Act Release No. 46713 (October 23, 2002), 67 FR 66033 (October 29, 2002) (SR-NYSE-2002-48).

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

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

1. Purpose

NYSE Rule 123(e) provides that all orders in any security traded on the Exchange be entered into an electronic database (front end systemic capture, or "FESC") before they can be represented in the Exchange's auction market.

On December 20, 2001, the Exchange filed a proposed rule change (a one-year pilot) to amend Rule 123(e) to provide that orders in ETFs must be entered into FESC within 90 seconds of execution.<sup>5</sup> The pilot was subsequently extended for an additional year and is set to expire on January 5, 2004.<sup>6</sup> The NYSE submitted the proposed rule change to make the pilot effective on the premise that ETF products are derivatively priced, and trade very rapidly in response to changes in the underlying value of fund components and prices of options and futures contracts on the funds. In addition, the proposed rule change was in response to market participants who thought that the FESC requirement might possibly be a disincentive to sending order flow to the Exchange as it may have been perceived as unduly slowing down the trading process and interfering with trading strategies dependent upon speed of execution. Market participants noted that the Exchange is competing for order flow with other market centers that do not have any FESC-type requirements. In the Exchange's experience, however, that rule change did not have a material impact on the Exchange's market share in ETF products. Thus, the Exchange is proposing to remove the exception from NYSE Rule 123(e) at this time.<sup>7</sup> In addition, removal of the exception will aid in the Exchange's ability to surveil for on-Floor trading in ETF products if the Commission approves the Exchange's proposal to allow portable phones on the Floor.<sup>8</sup>

<sup>5</sup> See note 3, *supra*.

<sup>6</sup> See note 4, *supra*.

<sup>7</sup> Telephone conversation between Don Siemer, Director, Market Surveillance, NYSE, and Marc McKayle, Special Counsel, Division of Market Regulation, Commission, on April 9, 2003.

<sup>8</sup> See File No. SR-NYSE-2002-11. In NYSE-2002-11 the Exchange proposes to authorize the use of and provide portable phones on the Exchange Floor on a six-month pilot basis. Originally under the proposed rule change, the Exchange proposed not to permit portable communications at the point of sale for orders in Investment Company Units (as defined in Section 703.16 of the Listed Company Manual), also known as ETFs, since under an exception to NYSE Rule 123(e) orders in ETFs can first be executed and then entered into an electronic data base (FESC). To implement this facet of the proposal, the Exchange proposed creating technical

The Exchange believes that requiring orders in ETFs to be first entered into FESC before execution or representation on the Floor will place them on an equal footing with orders in other securities with respect to order entry and recording procedures. The Exchange notes that the same surveillance procedures applicable to trading in all other equities will also apply to ETFs.

By requiring orders to be first entered into FESC before execution or representation on the Floor, the Exchange can track more accurately, via systemic records, the time an order is received on the Floor. Therefore, the Exchange's ability to surveil for anomalous trading situations—such as on-Floor trading and the creation of inaccurate records, frontrunning of orders and improper execution of customers' orders—would be enhanced.

2. Statutory Basis

The basis under the Exchange Act for this proposed rule change is the requirement under section 6(b)(5)<sup>9</sup> that an Exchange have rules that are 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 Exchange 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, and does not intend to solicit, 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**

Because the foregoing proposed rule: (1) Does not significantly affect the

restraints to block the use of portable phones in the Expanded Blue Room, where ETFs trade. However, due to an inability to develop technical restraints to prevent the use of portable phones where ETFs currently trade, the Exchange amended the filing, in Amendment No. 2 to NYSE-2002-11, to allow the use of portable phones for orders in ETFs in conjunction with this proposal to eliminate the NYSE Rule 123 ETF FESC entry exception.

<sup>9</sup> 15 U.S.C. 78f(b)(5).

protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, and the Exchange provided the Commission with written notice of its intent to file the proposed rule change at least five days prior to the filing date, the proposed rule change has become effective pursuant to section 19(b)(3)(A) of the Act,<sup>10</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>11</sup> At any time within 60 days of the filing of the proposed rule change the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

The Exchange requests that the Commission waive the 30-day delayed operative date of Rule 19b-4(f)(6)(iii). Waiver of this period will allow the Exchange to discontinue the exception to FESC under NYSE Rule 123(e) for ETFs. The Exchange believes this will enhance its ability to surveil for anomalous trading situations such as on-Floor trading and the creation of inaccurate records, frontrunning of orders and improper execution of customers' orders. In addition, this will aid the Exchange's ability to surveil the market if the Commission approves the Exchange's proposal to allow Exchange-provided and authorized portable phones on the Floor. The Exchange believes that this is in the public interest.

The Commission believes that it is consistent with the protection of investors and the public interest to waive the 30-day operative delay and make this proposed rule change immediately effective as of April 9, 2003.<sup>12</sup> The Commission believes that the elimination of the ETF FESC entry exception to NYSE Rule 123 will enhance the Exchange's ability to meet its surveillance obligations under the Exchange Act and the SEC Order relating to NYSE's floor broker regulatory program.<sup>13</sup> The waiver of the

<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>11</sup> 17 CFR 240.19b-4(f)(6).

<sup>12</sup> For purposes of only accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

<sup>13</sup> See In the Matter of New York Stock Exchange, Inc., SEC Release No. 34-41574, June 29, 1999;

30-day operative delay will permit the NYSE to implement this change immediately, which should benefit the public, investor protection and improve the NYSE's surveillance capabilities for ETFs.<sup>14</sup>

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Exchange Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the File No. SR-NYSE-2003-09 and should be submitted by May 8, 2003.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

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#### SOCIAL SECURITY ADMINISTRATION

##### Statement of Organization, Functions and Delegations of Authority

This statement amends part S of the Statement of the Organization, Functions and Delegations of Authority which covers the Social Security Administration (SSA). Chapter S2 covers the Deputy Commissioner, Operations. Notice is given that

Administrative Proceeding File No. 3-9925 ("SEC Order").

<sup>14</sup> The Commission emphasizes that when a self-regulatory organization ("SRO") determines that the rationale for an exception to an important regulatory initiative such as FESC order entry is no longer applicable, that SRO is expected to submit a proposed rule change to reflect the change in circumstances as soon as practicable.

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

Subchapter S2R, the Office of Central Operations, is being amended. The new material and changes are as follows:

Section S2R.10 The Office of Central Operations—(Organization):

C. The Immediate Office of the Associate Commissioner, Office of Central Operations (S2R).

4. The Assistant Associate Commissioner for Management and Operations Support (S2RC).

Retitle:

a. The "Center for Systems and Logistics Support (S2RC1)" to the "Center for Information Technology (S2RC1)"

d. The "Center for Material Resources Support (S2RC4)" to the "Center for Material Resources (S2RC4)"

Section S2R.20 The Office of Central Operations—(Functions):

C. The Immediate Office of the Associate Commissioner, OCO (S2R) provides internal operations and management support and assistance to the Associate Commissioner and all OCO components.

4. The Assistant Associate Commissioner for Management and Operations Support (S2RC) is responsible for the direction of six centers which perform systems, management, program, material resources, personnel management services and security and integrity support functions for OCO.

Retitle:

a. The "Center for Systems and Logistics Support (S2RC1)" to the "Center for Information Technology (S2RC1)".

Delete: Number 2.

Re-number: Numbers 3, 4 and 5 to 2, 3 and 4.

Delete: Number 6.

Delete: From Number 10, "health and safety matters, laborer services, transportation, projects concerning the maintenance and performance of capitalized equipment and other property inventories, and provides input to budget submittals for equipment, furniture and supplies"

Re-number: Numbers 7, 8, 9 and 10 to 5, 6, 7 and 8.

b. The Center for Management Support (S2RC2):

1. Provides administrative support to the Associate Commissioner, OCO; and the OCO Assistant Associate Commissioners in such areas as:

Amend as follows:

Delete: "—Performance Management and Recognition." "—Budget Development and Management."

Add: "—Equal Employment Opportunity."

Retitle:

d. The "Center for Material Resources Support (S2RC4)" to the "Center for Material Resources (S2RC4)":

Add:

8. Serves as SSA Liaison with the Department of the Treasury to ensure timely benefit payments.

9. Procures items within the limits of the delegated authorities afforded OCO, essential to the operation.

10. Coordinates health and safety matters, laborer services, transportation, projects concerning the maintenance and performance of capitalized equipments and submittals for equipment, furniture and supplies.

11. Coordinates OCO Budget Development and Management.

e. The Center for Human Resources (S2RC5):

Add: 13. Performance Management and Recognition.

Dated: April 2, 2003.

**Reginald F. Wells,**

*Deputy Commissioner for Human Resources.*

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#### DEPARTMENT OF TRANSPORTATION

##### Federal Aviation Administration

##### Notice of Intent To Release Certain Properties From All Terms, Conditions, Reservations and Restrictions of a Grant Agreement Between Palm Beach County and the Federal Aviation Administration for the Palm Beach International Airport, West Palm Beach, FL

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Request for public comment.

**SUMMARY:** The FAA hereby provides notice of intent to release certain airport properties (approximately 8.5 acres) at the West Palm Beach International Airport, West Palm Beach, FL from the conditions, reservations, and restrictions as contained in a grant agreement between the FAA and Palm Beach County, dated September 29, 1993, and September 27, 1994. The release of property will allow Palm Beach County to dispose of the property for other than aeronautical purposes. The property is located on the North side of Belvedere Road eastward from the South end of Country Club Drive. The parcel is currently designated as non-aeronautical, revenue generation property. The property will be disposed of for construction of a commercial shopping center.

The fair market value of the property has been determined by appraisal to be