

days and the 30-day operative delay, as specified in Rule 19b-4(f)(6)(iii).<sup>17</sup> The Commission believes waiving the five-day pre-filing notice requirement and the 30-day operative delay is consistent with the protection of investors and the public interest. Acceleration of the operative date will allow the pilot to operate continuously through May 15, 2003, while the Commission considers Nasdaq's request for permanent approval. For these reasons, the Commission waives both the five-day pre-filing requirement and the 30-day operative waiting period.<sup>18</sup>

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the 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 NASD. All submissions should refer to file number SR-NASD-2002-159 and should be submitted by December 17, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>19</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46852; File No. SR-NYSE-2002-39]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Proposed Amendment to Exchange Rule 123D: Openings and Halts in Trading

November 19, 2002.

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 August 29, 2002, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. 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 proposed rule change consists of an amendment to NYSE Rule 123D<sup>3</sup> with respect to openings, reopenings and halts in trading for stocks traded on the Exchange. Specific changes to shorten the minimum time period between tape indications and reopenings in stocks that are subject to a trading halt during the trading day are proposed to be made.

The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets.

\* \* \* \* \*

#### Rule 123D: Openings and Halts in Trading

(1) Delayed Openings/Halts in Trading—It is the responsibility of each specialist to ensure that registered stocks open as close to the opening bell as possible, while at the same time not unduly hasty, particularly when at a price disparity from the prior close. Openings and reopenings should be timely, as well as fair and orderly, reflecting a professional assessment of market conditions at the time, and appropriate consideration of the balance of supply and demand as reflected by orders represented in the market.

Specialists should, to the best of their ability, provide timely and impartial information at all phases of the opening process. Specialists should ensure adequate personnel are assigned and call upon additional clerical and relief specialist resources to assist in order management and Crowd communication, when appropriate. It is also incumbent upon specialists to seek the advice of Floor Officials when openings are delayed or when a halt in trading may be appropriate due to unusual market conditions.

Brokers should recognize the difficulty in providing accurate information in a constantly changing situation, and that significant changes are often occasioned by single orders or substantial interests delivered via DOT. Brokers should make every effort to ascertain the client's interest as early as possible and to inform the specialist so that such interest can be factored into the opening process. Brokers should communicate to clients the problems caused by delaying their interest until the last minute. Brokers should expect to have time to communicate the essential facts to their clients and to react to the changing picture. They should not expect, however, to be able to delay the opening for every last fragment of this change, and should recognize their obligation to a timely opening. Once a relatively narrow range of opening possibilities is given, the broker and his or her client should have sufficient information to enter a final order. In this regard, brokers should advise their clients against limits which are not firm, or are based solely on where the opening looked at the time the information was given. Brokers should not expect to be given endless opportunities to adjust those limits. Whenever possible the broker should have discretion within a range of the client's interest, and have the power to react to last minute changes without having to go back to the phone. This is particularly true for orders in amounts that represent a small fraction of the total opening volume, but applies to all orders. Brokers must recognize that orders or cancellations merely dropped on the counter can be lost or misplaced, and should hand the order directly to the specialist or his or her assistant and orally state the terms. Failure to do so could result in a monetary error to the broker as well as the specialist.

Floor Officials participate in the regulatory process by providing an impartial professional assessment of unusual situations, as well as advice with respect to pricing when a significant disparity in supply and demand exists. The specialist, however,

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

<sup>18</sup> For purposes only of 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>19</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> See SR-NYSE-2002-31 (August 12, 2002) (codifying the Exchange's policy on trading halts and delayed openings in NYSE Rule 123D).

has ultimate responsibility in this regard, and while a Floor Official's approval may be a mitigating factor, it will not exonerate a specialist when performance has been deemed not satisfactory.

A specialist should consider the following areas of specialist performance when involved in an unusual market situation:

- An opening price change that is not in proportion to the size of an imbalance;
- Absence of an indication before a large opening price change;
- Inadequate support after a large opening price change, *i.e.*, lack of sufficient continuity and depth in the aftermarket;
- Absence of trading without good cause or Floor Official approval (or an unjustified or unreasonably delayed opening or halt in trading);
- Not obtaining appropriate Floor Official approvals for opening delays, trading halts, and wide price variations.

In addition, a Floor Official should be consulted as soon as it becomes apparent that an unusual situation exists, and a Floor Governor should be consulted if it is anticipated that the opening price may be at a significant disparity from the prior close. If an unusual situation exists, such as a large order imbalance, tape indications should be disseminated, including multiple indications if appropriate with the supervision of a Floor Official. A second Floor Official's opinion in a delayed opening is required if there is difficulty in arriving at a decision; if the size of the price change from the previous NYSE close is three points or more or represents a 10% change in price; or if the stock has not opened within 50 minutes after the opening of business or 20 minutes after an extended delayed opening time frame. All tape indications require Floor Official approval. (See Appendix—Floor Official Approval Form #3)

Exchange policy requires the dissemination of an indication in connection with any delayed opening—involving any stock which has not opened (or been quoted) by 10 a.m. In addition, the dissemination of an indication is mandatory for an opening which will result in a significant price change from the previous close:

Previous NYSE closing price.*	Price change (equal or greater than)
Under \$10 .....	1 point.
\$10–\$99.99 .....	The lesser of 10% or 3 points.

Previous NYSE closing price.*	Price change (equal or greater than)
\$100 and over .....	5 points

\*The above guidelines are applicable to Initial Public Offerings based on the offering price.

All indications require the supervision and approval of a Floor Official. If it involves a bank or brokerage stock, a Floor Director's approval is required. If a Floor Director is unavailable, a Floor Governor's or Senior Floor Official's approval must be obtained. In addition to the mandatory criteria, specialists should use their judgment as to when it is appropriate to seek Floor Official approval for disseminating a price indication.

Mandatory indication policy applies to a foreign-listed security only if the opening price will be at a significant price change (see chart above) from its closing price in the foreign market or the current price in the foreign market.

Mandatory indications for convertible preferred stocks are only required if an indication was disseminated in the underlying common stock.

In this regard the following procedures should be followed for delayed opening and trading halt indications:

- The length of time for the dissemination of indications should be in proportion to the anticipated disparity of the opening or reopening price from the prior sale.
- The number of indications should increase in proportion to the anticipated disparity in the opening or reopening price, with increasingly definitive, "telescoped" indications when an initial narrow indication spread is impractical.
- An indication should be published immediately when trading is halted for a non-regulatory order imbalance. Such indications should be broad enough to allow flexibility, but narrow enough to convey as accurate a picture of supply and demand as possible at the time. In most cases, a final indication with a one point spread would be appropriate. Further telescoping to one-half point could result in unnecessary delay due to a change in the terms of a pivotal order. Even if an indication is not disseminated, specialists should endeavor to provide brokers with an approximate range within which they believe a stock will open.
- Tape indications before the opening should be disseminated at 9:15 a.m., if possible, but any tape indications disseminated prior to 9:30 a.m. require the approval of a Floor Director or Floor Governor, or the approval of a Floor

Official if it relates to a spin-off or if trading had been halted and not resumed the prior day.

ITS Pre-Opening Applications must be followed when necessary based upon the anticipated opening price. For example, a Pre-Opening Notification must be issued if a stock is going to open more than .10 of a point from a composite last sale under \$15 or more than .25 of a point from a composite last sale of \$15 or higher. The spread in the Pre-Opening Application may not exceed .50 of a point if the consolidated close is under \$50 or one point if the consolidated close is \$50 or higher with limited exception. If a Pre-Opening Application is required on an opening or any reopening and a tape indication is also issued, the indication satisfies the Pre-Opening Application requirement if it is also sent to the ITS participants by the specialist in the form of Pre-Opening Notification. In that case, the maximum ITS spread would not apply. Three minutes must elapse from the time a Pre-Opening Application is issued, and an additional one minute if subsequent notifications are required, before a stock should open.

As with other openings, tape indications are discretionary for IPO's with the approval of a Floor Director or Floor Governor except that it is mandatory if the opening price change as measured from the offering price meets the requirements for a mandatory indication.

If an indication is disseminated after the opening bell, it must be considered a delayed opening. In addition, any stock that is not opened with a trade or reasonable quotation within 30 minutes after the opening of business must be considered a delayed opening (except for IPO's) and requires Floor Official supervision, as well as an indication. That 30-minute time frame may only be extended by a Floor Director on a Floor-wide basis.

More than one indication should be disseminated if an opening will be outside the first indication or if the first indication had a wide spread, especially if the time frame for delayed openings has been extended by the Floor Director. A reduction in time between indications can be used when multiple indications are disseminated. Generally, a minimum of 10 minutes must elapse between the first indication and a stock's opening as measured by the time the indication appears on the PDU. However, when more than one indication is disseminated, a stock may open five minutes after the last indication provided that at least 10 minutes must have elapsed from the dissemination of the first indication.

*With respect to a post-opening trading halt, a minimum of five minutes must elapse between the first indication and a stock's reopening. However, where more than one indication is disseminated, a stock may re-open three minutes after the last indication, provided that at least five minutes must have elapsed from the dissemination of the first indication.*

Tape indications must be disseminated with the approval of a Floor Official prior to the opening or reopening in a stock subject to a regulatory or nonregulatory halt in trading or a delayed opening. A Floor Governor should be consulted if a significant price change is anticipated.

A Floor Director or Floor Governor should be consulted in any case where there is not complete agreement among the Floor Officials participating in the discussion.

Floor Governors should keep apprised of developments when consulted, and should seek the assistance of Floor Directors, when appropriate, as soon as possible. Floor Governors should be prepared to balance the opportunity for brokers to participate in the opening with the need for timeliness, and should assist in identifying opportunities for opening the security, based upon the shifting supply and demand in conjunction with appropriate specialist participation.

Specialists should make every effort to balance timeliness with the opportunity for customer reaction and participation. Although the correct price based on information available at the time is always the goal, specialists and supervising Floor Governors should recognize customers' desires for a timely opening. When the specialist and Floor Governor agree that all participants have had a reasonable opportunity to participate, the specialist should open the stock.

Once trading has commenced, trading may only be halted with the approval of a Floor Governor or two Floor Officials. A Floor Director, or in their absence a Senior Floor Governor, should be consulted if it is felt that trading should be halted in a bank or brokerage stock due to a potential misperception regarding the company's financial viability.

Sometimes the Client Service Division is notified by a listed company in advance of publication concerning news which might have a substantial market impact. That Division will immediately notify the Floor Operations Division, which will advise a Floor Director or Floor Governor, or in their absence a Floor Official.

If Client Service Division makes a recommendation that trading should be halted in a stock pending a public announcement by the company and the Floor Director or Floor Governor disagrees, he or she should seek the opinion of another Floor Director or Floor Governor. If the Floor Directors or Floor Governors are in agreement that trading should not be halted, trading should continue. If one of the two is in agreement with the recommendation to halt trading, then trading should be halted. While the time period may vary from case-to-case as a result of the particular circumstances involved, normally if the announcement is not made within approximately 30 minutes after the delay or halt is implemented, the Exchange may commence the opening or reopening of trading in the stock. Special care is taken to ensure that material non-public information is not disclosed, even inadvertently, as a result of someone overhearing details relating to trading halts or delayed opening situations.

Stopped stock prior to a halt should be printed as "sold" with the specialist as contra and adjusted if the reopening is at a more advantageous price.

It is important that all appropriate Floor Official forms are completed.

(2) Equipment Changeover—The Exchange has established a non-regulatory trading halt condition designated as "Equipment Changeover".

This condition may be used when trading in a particular security is temporarily inhibited due to a systems, equipment or communications facility problem or for other technical reasons.

In making a determination on whether to halt trading in a security because of an "Equipment Changeover" condition, it is important to keep in mind that once halted, trading cannot be resumed for at least 5 minutes even though, in many cases, the systems or equipment problem may be corrected in a much shorter period of time. Further, if, during the "Equipment Changeover" trading halt, a significant order imbalance (one which would result in a price change from the last sale of one point or more for stocks under \$10, the lesser of 10% or three points for \$10–\$99.99 and five points if \$100 or more—unless a Floor Governor deems circumstances warrant a lower parameter) develops or a regulatory condition occurs, the nature of the halt will be changed, notice must be disseminated and trading cannot resume until 10 minutes after the first indication after the new halt condition. This factor should be taken into consideration along with market condition factors in making a

determination on whether to declare an official trading halt.

As with any other halt, an "Equipment Changeover" trading halt requires the approval of a Floor Governor or two Floor Officials. All other policies relating to non-regulatory halts would apply including price indications.

\* \* \* \* \*

## **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 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**

The current policy on reopening trading after a stock has been halted during the trading day requires a minimum of 10 minutes to elapse between the first price indication and the reopening of a stock, and a minimum of 5 minutes to elapse after the last indication, when it does not overlap the prior indication, or a minimum of 5 minutes to elapse after the last indication when it overlaps the prior indication, provided in all cases that the minimum 10 minutes has elapsed since the first indication. It is proposed that these minimum time periods before reopening a stock be compressed from 10 to 5 minutes after the first indication, and to 3 minutes after the last indication, provided that the minimum 5 minutes has elapsed since the first price indication.

Over the years, in developing procedures for openings and reopenings, the Exchange has focused on providing a balance between timeliness and appropriateness of price discovery, *i.e.*, achieving a price that reflects market conditions at the time. As the speed of communications has increased, the Exchange believes it is desirable to provide the flexibility to react more quickly if circumstances are such so as to permit a reopening of trading in a shorter period of time. The Exchange believes that the revised

procedures for reopening after a trading halt strike an appropriate balance between preserving the price discovery process while providing timely opportunities for investors to participate in the market. It should be noted, however, that it is not mandatory that a stock reopen at the end of the new, shorter time period. If at the end of the 5 minute period, an equilibrium has been established, there would be no purpose served by extending the halt for a longer period. It may be however, that more time will be needed to bring supply and demand into balance. Trading halts are overseen by Floor Officials who will use their judgment to see that the stock reopens at an appropriate time.

## 2. Statutory Basis

The NYSE believes that the basis under the Act for this proposed rule change is the requirement under section 6(b)(5)<sup>4</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. The proposed rule change also is designed to support the principles of section 11A(a)(1)<sup>5</sup> of the Act in that it seeks to assure economically efficient execution of securities transactions, make it practicable for brokers to execute investors' orders in the best market and provide an opportunity for investors' orders to be executed without the participation of a dealer.

### *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*

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 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 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 number SR-NYSE-2002-39 and should be submitted by December 17, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority<sup>6</sup>.

**Jill M. Peterson,**

*Assistant Secretary.*

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**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46847; File No. SR-NYSE-2002-61]

### **Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc. Establishing Fees for the NYSE Broker Volume Service**

November 19, 2002.

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 November 12, 2002, 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, II and III below, which items have been prepared by the Exchange. The Exchange filed the proposal pursuant to section 19(b)(3)(A) of the Act,<sup>3</sup> and rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. 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 Exchange proposes to establish fees for the NYSE Broker Volume service (“Service”), a new information service that the Exchange plans to make available. The text of the proposed rule change is available at 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 NYSE included statements concerning the purpose of and basis for its proposal and discussed any comments it received regarding the proposal. 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

The NYSE proposes to establish fees for the Service, which provides access to the NYSE Broker Volume Database (“Database”), and permits vendors to provide subscribers with NYSE Broker Volume Reports. The Database is an electronic database of share volume information relating to trades that each participating Exchange member has entered into on the Exchange in each

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

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

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

<sup>4</sup> 17 CFR 240.19b-4(f)(6). The NYSE provided the Commission with at least five business days' written notice of its intention to file this proposed rule change.

<sup>4</sup> 15 U.S.C. 78f(b)(5).

<sup>5</sup> 15 U.S.C. 78k-1(a)(1).

<sup>6</sup> 17 CFR 200.30-3(a)(12).