SECURITIES AND EXCHANGE COMMISSION

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Exemptions From Rules 10b–6 and 10b–13 for New York Stock Exchange Specialists

August 1, 1995.

Pursuant to delegated authority, on July 31, 1995, the Division of Market Regulation issued a letter ("NYSE Specialist Letter") granting exemptions from Rules 10b-6 and 10b-13 under the Securities Exchange Act of 1934 to allow New York Stock Exchange specialists to continue to act in their specialist capacity during a distribution of or a tender offer for specialty securities when they otherwise would be subject to those rules because of their affiliates' participation in such a distribution or tender offer. The NYSE Specialist Letter has been issued in the context of a continuing review of Rule 10b-6, and is published to provide notice of the availability of these exemptions.

Margaret H. McFarland,

Deputy Secretary.
April 28, 1995.
Mr. Jonathan G. Katz,
Secretary, Securities and Exchange
Commission, 450 Fifth Street NW.,
Washington, DC 20549

Dear Mr. Katz: The New York Stock Exchange, Inc. (the "Exchange" or "NYSE") is writing to request relief from the restrictions of Rule 10b–6 for certain specialist organizations that are affiliated with an organization engaged in a fixed price, firm commitment underwriting (hereafter referred to as a "distribution") of a security in which the specialist organization makes a market (a "specialty stock") where the two organizations are conducting their respective operations pursuant to NYSE Rule 98.

The Exchange is also requesting relief from the restrictions of Rule 10b–6 and Rule 10b–13 for such specialist organizations that are affiliated with the dealer-manager of an exchange or tender offer of a specialty stock, to the extent the specialist organization is bidding for or purchasing the security in the course of market making activities and not for the purpose of participating in the exchange or tender offer.

The Exchange believes that exemptive relief is appropriate in that (i) NYSE specialist organizations are subject to strict affirmative and negative obligations that restrict the specialist's ability to influence the price of, or condition the market for, a specialty stock; (ii) the Exchange's Rule 98 procedures mandate information barriers that preclude the flow of material non-public market information between a specialist organization and its affiliates; and (iii) the Exchange has appropriate surveillance capability and will conduct detailed surveillances and reviews of trading in

conjunction with activities subject to Rule 10b–6 and Rule 10b–13. The Exchange proposes that the exemptive relief sought herein be subject to the conditions specified below. The Exchange undertakes to submit such monitoring reports as the Commission deems appropriate.

Under separate cover, the Exchange is submitting, pursuant to the Commission's Rule 19b–4, a filing to amend NYSE Rule 460.20 to delete references to "giving up the book" by an Exchange specialist associated with a broker dealer that has obtained exemptive relief from specified NYSE rules pursuant to NYSE Rule 98.

Current Application of Rule 10b-6 to NYSE Specialists Affiliated With a Participant in a Distribution

NYSE Rule 460.10 prohibits Exchange specialist organizations and their affiliates from engaging in any "business transaction" with any company in whose stock the specialist organization is registered. The term "business transaction" is interpreted to include, among other matters, participating in a distribution of a security issued by such company.

Exchange Rule 98 provides an exemption from Rule 460.10 for affiliates of a specialist organization that conduct their operations pursuant to the Rule's requirements. The Rule 98 exemption is available only to the *affiliate*; under no circumstances may the specialist organization itself participate in any distribution of a security issued by a company in whose stock the specialist organization is registered.

Today, when an affiliated entity is participating in a distribution of a security stock, the specialist organization is required to withdraw from the market commencing with the applicable Rule 10b-6, "cooling off" period until the affiliate has completed its participation in the distribution. NYSE Rule 460.20 provides that the specialist organization must "give up the book" (i.e., cease to function as market maker) to an unaffiliated specialist organization, which then assumes all market making responsibilities under NYSE rules, until the approved person (affiliate) has completed its participation in the distribution, at which time the regular specialist organization regains the "book" and resumes its market making activities.

Current Application of Rule 10b–3 to NYSE Specialists Affiliated With a Dealer-Manager of an Exchange or Tender Offer

Rule 10b-13 generally prohibits any person making a tender offer from purchasing or making arrangements to purchase the security that is the subject of a tender offer from the time of the public announcement of the tender offer until its expiration. The Exchange understands that the Commission staff appears to have taken the interpretive position the Rule 10b-13 applies generally to the dealer-manager in connection with a tender offer. Thus, under Rule 10b-13, absent exemptive relief, a specialist organization affiliated with such dealer-manager would be prohibited from purchasing any such security that was a specialty stock during an exchange or tender offer.

In September 1992, the Division of Market Regulation granted the Exchange's request that a specialist organization be exempt from Rules 10b-6 and 10b-13, under specified conditions, where an affiliate that had obtained an exemption pursuant to Rule 98 was participating in a distribution or acting as dealer-manager of a tender or exchange offer. The exemption permits the specialist organization to continue to function in its market capacity up until the period commencing five business days before the scheduled termination of the subject offer. The Exchange is seeking herein to broaden the exemption to permit the specialist organization to continue to function in its market making capacity during the entire offer period.

Disparities in Regulation

The Exchange wishes to note that currently there is a disparity between regulatory treatment of over-the-counter market makers and Exchange specialists. Market makers for over-the-counter issuers need not withdraw from the market if they are participating in a distribution of an issuer's securities, as they can continue to make markets subject to the passive market making tests. An NYSE specialist affiliated with a participant in a distribution of specialty security must, however, withdraw from the market, with the market making function then being assumed by a relief specialist. An over-the-counter issuer may view this disparate treatment of market makers as a possible reason to remain listed in the over-the-counter market, as it may perceive less potential disruption of the market making function in the over-thecounter market. Thus, the current regulatory scheme may have a negative impact on the Exchange's ability to attract new listings.

The current disparity in regulation may also operate as a disincentive for large, diversified NYSE member firms to enter, and commit capital to, the specialist business. Such firms may have to weight investment banking opportunities against the potential negative impact, both in terms of issuer relations and operational efficiencies, that may result when an affiliated Specialist is required to cease all market making activity in a specialty security subject to distribution. Such a potential negative impact may make specializing on the NYSE appear to be less attractive as a business proposition.

Affirmative and Negative Obligations of Specialists Under Exchange Rules

Exchange specialists are subject to affirmative and negative obligations with respect to their responsibilities to maintain fair and orderly markets. The negative obligation is codified in Exchange Rule 104, which provides that a specialist shall not effect a proprietary transaction in a specialty stock "unless such dealings are reasonably necessary to permit such specialist to maintain a fair and orderly market, or to act as an odd-lot dealer in such security." The

¹ See letter from William Heyman, Director, Division of Market Regulation, Securities and Exchange Commission to Robert McSweeney, Senior Vice President, Market Surveillance Division, New York Stock Exchange, dated September 15, 1992.