

Proposed Rule Change by American Stock Exchange  
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial <input checked="" type="checkbox"/>	Amendment <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) <input type="checkbox"/>	Section 19(b)(3)(A) <input checked="" type="checkbox"/>	Section 19(b)(3)(B) <input type="checkbox"/>
Pilot <input type="checkbox"/>			Rule		
Extension of Time Period for Commission Action <input type="checkbox"/>		Date Expires <input type="text"/>	<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	
			<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input checked="" type="checkbox"/> 19b-4(f)(6)	

Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>
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**Description**  
Provide a brief description of the proposed rule change (limit 250 characters).

**Contact Information**  
Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name  Last Name   
 Title   
 E-mail   
 Telephone  Fax

**Signature**  
Pursuant to the requirements of the Securities Exchange Act of 1934,  
  
has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date   
 By  Vice President and Associate General Counsel  
 (Name) (Title)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

**Form 19b-4 Information**

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change**

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

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Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

**1. Text of the Proposed Rule Change**

(a) The American Stock Exchange LLC (“Amex” or “Exchange”) proposes to amend Rules 759, 783, 784, 789 and adopt new Rule 798 to standardize the Exchange’s buy-in procedures. The text of the proposed rule change appears in Exhibit 5.

(b) Not applicable

(c) Not applicable

**2. Procedures of the Self-Regulatory Organization**

The proposed rule change was approved by the Exchange’s Board of Governors on April 20, 2005. No further action by the Board or the membership of the Exchange is required to be taken.

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

(a) Purpose

The Exchange proposes to amend its Rules 783, 784, 789 and adopt new Rule 798 to permit buyer executed buy-ins,<sup>1</sup> reduce the waiting period to execute a buy-in from twenty-one (21) days to three (3) days and to otherwise provide more standardized and consistent industry buy-in rules and procedures. The Exchange also proposes to make conforming changes to Rules 759, 784 and 789. This proposal seeks to substantially mirror the recent New York Stock Exchange (the “NYSE”) amendments to its buy-in rules<sup>2</sup> approved by the Commission largely for the purpose of achieving industry uniformity.

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<sup>1</sup> A “buy-in” is a transaction between brokers where the securities are not delivered on time by the broker on the sell-side thereby forcing the broker on the buy-side to obtain shares from other sources.

<sup>2</sup> See Securities Exchange Act Release Nos. 52475 (September 20, 2005), 70 FR 56757 (September 28, 2005) and 52842 (November 28, 2005), 70 FR 72321 (December 2, 2005) (SR-NYSE-2005-50).

## Introduction

The buy-in rules apply to transactions that are not subject to the rules of a Qualified Clearing Agency such as the Depository Trust Company (“DTC”)<sup>3</sup> and the National Securities Clearing Corporation (“NSCC”)<sup>4</sup>, including the Continuous Net Settlement (“CNS”)<sup>5</sup> transactions that settle through them.<sup>6</sup> For those non-CNS transactions and CNS buy-ins in Exchange-listed securities, the Exchange buy-in rules apply. However, under current Amex Rules that place the responsibility for the actual execution of the buy-in on the defaulting member or member organization (the “defaulting member” or “seller”), there are disincentives for the defaulting member to execute the buy-in. For example, the defaulting member could potentially manipulate the extent to which it has market exposure by timing its purchase of the necessary securities to benefit itself. Therefore, an initiating member or member organization (the “initiating member” or “buyer”) may receive negative customer reaction if they learn that their trade has not been settled and their securities are not available because a buy-in has not been executed by the defaulting member, or has not been executed in a timely manner.

Other self-regulatory organizations (“SROs”) recognize this conflict of interests and their buy-in rules assign responsibility accordingly by allowing the buyer to

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<sup>3</sup> DTC is a member of the U.S. Federal Reserve System, a limited-purpose trust company under New York State banking law and a registered clearing agency with the Securities and Exchange Commission (the “Commission”).

<sup>4</sup> NSCC is a central counterparty that provides centralized clearance, settlement and information services for virtually all broker-to-broker equity, corporate bond and municipal bond, exchange-traded funds and unit investment trust trades in the U.S. NSCC provides clearing and settlement, risk management, central counterparty services and a guarantee of completion for trades. NSCC also nets trades and payments among its participants, reducing the volume of securities and payments that need to be exchanged each day.

<sup>5</sup> CNS is an automated accounting system that centralizes the settlement of compared security transactions and maintains an orderly flow of security and money balances.

<sup>6</sup> See Securities Exchange Act Release No. 53528 (March 21, 2006), 71 FR 15506 (March 28, 2006) (approving NSCC’s CNS Buy-in Rules).

execute the buy-in.<sup>7</sup> By allowing buyers to execute their own buy-ins, the defaulting member's conflict of interest is avoided and the process is expedited.

The Securities Industry Association ("SIA") Securities Operations Division Buy-In Committee (the "Committee") has expressed a strong preference that the Exchange considers amending its buy-in rules to eliminate the notice procedures described above and change who executes the buy-in to the initiating member from the seller. The purpose of the SIA Committee<sup>8</sup> recommendation is to identify and standardize various buy-in rules and procedures regarding the close-out process related to non-CNS system contracts and to help formulate uniformity among industry rules. The Committee requested that the Amex conform its rules to those of the other exchanges who allow the initiating member to execute buy-ins to close out a contract.

### **Current Requirements**

Amex Rule 784 sets forth the process by which a buyer is required to close-out a contract, which has not been completed by the seller for a period of twenty-one (21) business days – a "mandatory closing of fails." A mandatory closing of fails requires that a notice of intention be delivered, in quadruplicate and on the twenty-first (21<sup>st</sup>) business day after the original due date of the contract, by the initiating member to the seller. The member organization receiving the notice of intention must indicate its position – whether it can deliver or otherwise – with respect to the resolution of the item and return the notice of intention to the initiating member no later than three business days after the notice was sent. If the notice of intention has not been returned when due

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<sup>7</sup> See Securities Exchange Act Release Nos. 52475 (September 20, 2005), 70 FR 56757 (September 28, 2005) and 52842 (November 28, 2005), 70 FR 72321 (December 2, 2005) (SR-NYSE-2005-50).

<sup>8</sup> The Committee is made up of representatives from a broad cross-section of broker-dealers, industry groups and regulatory bodies.

or is returned with the indication that the contract is not known, the initiating member shall itself close the contract by buying or selling the securities involved through its own floor representative. If the notice of intention is returned when due, with an indication that the contract is known but that delivery cannot be made, and the contract is one which has been designated as acceptable for clearance as a fail item by a registered clearing agency of which both parties are clearing members, it shall be submitted for clearance by the defaulting member. If the notice of intention is returned when due, with an indication that the contract is known but that delivery cannot be made, and the contract is one which has not been designated as acceptable for clearance as a fail item by a registered clearing agency of which both parties are clearing members, the initiating member shall close the contract according to the procedures in Amex Rule 783. Therefore, the Rule currently provides that more than three weeks may lapse before the contract is closed.

Amex Rule 783 sets forth a permissive procedure by which an initiating member may close-out a contract, which has not been executed by the defaulting member. The initiating member must provide notice of its intention to make a closing. Pursuant to Amex Rule 783, the Exchange determines the times for the delivery of such notices of intention to close and orders to close and the time for the closing of contracts, and if the times within which securities may be delivered shall be extended or shortened, the time limits established by the Exchange may be similarly extended or shortened.<sup>9</sup> Once the initiating member sends the default notice to the defaulting member, the defaulting member shall be given a copy of the order to close for execution on that day.

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<sup>9</sup> Contracts made for cash within one hour and one-half before the close of trading are given different treatment with respect to timing. When a contract made for cash within one hour and one-half before the close of trading is to be closed on the same day, the time of the transaction shall be stated on the order and notice, which shall be delivered within thirty minutes after the time of the transaction and the contract shall not be closed until thirty-five minutes after the time of the transaction.

If the order is not executed, the defaulting member shall return the original order indicating why it cannot be executed within fifteen minutes of the close of trading and the buy-in desk will deliver a copy of the floor report to the initiating member. The initiating member may then close the contract and must notify the party against whom the contract has been closed with respect to any money differences that it will claim as damages. If the order is executed by the defaulting member, it shall furnish a copy of the order to close and a copy of the floor report to the buy-in desk on the floor.

Exchange Rule 789 requires an initiating member to accept physical delivery of some or all of the securities that are the subject of a buy-in, thereby halting the buy-in execution for those securities, if those securities are tendered prior to the buy-in. The defaulting member must promptly tender the securities and if they are not promptly delivered, such member or member organization is liable for any resulting damages.

### **Proposal**

The Exchange proposes to amend Rule 784 to allow the member or member organization failing to receive the securities to execute the buy-in, and to reduce the waiting period to execute a buy-in from twenty-one (21) days to three (3) days after delivery on the contract was due. The proposed elimination of Commentary .01 through .06 to Rule 784 is intended to facilitate the amendments to the buy-in procedures. The proposed amendments to these procedures are largely proposed in the text of Rule 784. The Exchange believes that once the responsibility is shifted to the buy-side of the transaction, the buy-in process will work more efficiently.

The amendments to Rule 784 provide that the initiating member may close a contract no sooner than three business days after the original due date for delivery (the “Effective Date”). The initiating member must deliver a written notice to the defaulting member at least two days before the proposed buy-in. After receipt of the buy-in notice, the defaulting member must then send a signed, written response to the initiating member stating its position. If the response is not received by 5 p.m. ET or it is returned with an indication that the contract is not known or that it is known but that delivery cannot be made, the buy-in may be executed on the Effective Date. However, the initiating member shall be required to accept any portion of the securities called for by the contract from the defaulting member that the defaulting member submits prior to the execution of the buy-in, but the initiating member shall not be required to accept any securities from the defaulting member if the buy-in has already been executed and it could not have been reasonably cancelled by the initiating member. Once the buy-in has been executed, the initiating member shall notify the defaulting member confirming the purchase along with a bill or payment.

The Exchange is also proposing to eliminate the requirements for quadruplicate paper notices and to permit electronic notices, including notices from a computerized network facility, or the electronic functionality of a Qualified Clearing Agency, such as DTC and NSCC. The proposed amendments also amend existing time deadlines for delivering notices, securities and executions and are using those used by other self-regulatory organizations (i.e. DTC and NSCC).

The Exchange also proposes new Commentary .01 to Rule 784 to ensure that members and member organizations comply with the close-out requirements of

Regulation SHO<sup>10</sup> under the Securities Exchange Act of 1934 (the “Exchange Act”).<sup>11</sup> Members and member organizations are obligated to comply with the marking, locate and delivery requirements of Regulation SHO for short sales of equity securities. As a result, members and member organizations should have policies and procedures in place to comply with these rules, including close-out procedures.<sup>12</sup>

The Exchange proposes to rescind Rule 783 and has incorporated the permissive buy-in procedures of Rule 783 into Rule 784. The Exchange also proposes to amend Rule 789 to conform it to this proposal to permit buyer executed buy-ins and to create a Rule 798 to clarify the requirements and timeframes upon which a defaulting member may deliver against a buy-in notice. Finally, the Exchange proposes technical amendments to Rules 759, 784 and 789 to better coordinate the rules with industry practice.

The Amex believes that the revisions to its buy-in rules will help standardize the Exchange’s procedure and practice by allowing members and member organizations to clean-up fails and efficiently deliver Amex-listed securities.

(b) Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Exchange Act in general and furthers the objectives of Section 6(b)(5) in particular in that it is designed to prevent fraudulent and manipulative acts and practices,

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<sup>10</sup> 17 CFR 242.200 through 242.203. Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (August 6, 2004), [File No. S7-23-03] (adoption of Regulation SHO).

<sup>11</sup> 15 U.S.C. 78a et seq.

<sup>12</sup> At the same time the changes noted above were being developed, the SEC implemented Regulation SHO – Regulation of Short Sales, which shares a similar purpose with the buy-in rules – the reduction of fails to deliver. Rule 203 to Regulation SHO imposes locate and borrowing/ delivery requirements on broker-dealers that sell equity securities, including close-out requirements on certain open fail to deliver positions.

to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to 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 Exchange believes that the proposal is consistent with Sections 6(b) and 6(b)(5) of the Act because by amending the Amex buy-in rules to permit buyers to execute a buy-in, firms are expected to find it easier to execute buy-ins of Exchange-listed securities. In addition, the amendments seek to remove inefficient requirements and amend time deadlines to conform to current industry practice.

**4. Self-Regulatory Organization's Statement on Burden on Competition**

The proposed rule change will impose no burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

**5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others**

No written comments were solicited or received with respect to the proposed rule change.

**6. Extension of Time Period for Commission Action**

The Exchange does not consent to an extension of the time period for Commission consideration of the proposed rule change specified in Section 19(b)(2) of the Act.

**7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)**

(a) This filing is made pursuant to Paragraph (A) of Section 19(b)(3) and Rule 19b-4(f)(6) thereunder.

(b) The Exchange believes that the proposed rule change (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest; provided that the Exchange has given the Commission notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange requests that the Commission waive the 30-day delayed operative date of Rule 19b-4(f)(6) such that the proposed rule change is operative upon filing. The NYSE has similarly amended its buy-in rules to permit buyer executed buy-ins and to provide more standardized and consistent industry buy-in rules and procedures. Accordingly, the Exchange believes that this rule change qualifies for expedited approval as a “non-controversial” rule change pursuant to Rule 19b-4(f)(6) because the proposal raises no new regulatory issues, and is concerned solely with a matter that is not likely to engender adverse comments or require the degree of review attendant with more controversial filings. Waiver of this period will allow the Exchange to immediately implement this proposal.

(c) Not applicable.

(d) Not applicable.

8. **Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission**

NASD Rule 11810 (Buying-In) is operationally similar to this proposal. Also, the proposal is substantially similar to the NYSE buy-in rules.<sup>13</sup>

9. **Exhibits**

List of Exhibits Filed:

1. Form of Notice of Proposed Rule Change for publication in the *Federal Register*.
2. Not applicable.
3. Not applicable.
4. Not applicable.
5. Text of the Proposed Rule Change.

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<sup>13</sup> See Securities Exchange Act Release Nos. 52475 (September 20, 2005), 70 FR 56757 (September 28, 2005) and 52842 (November 28, 2005), 70 FR 72321 (December 2, 2005) (SR-NYSE-2005-50).

**EXHIBIT 1**

**SECURITIES AND EXCHANGE COMMISSION**  
**(Release No. 34-\_\_\_\_\_ ; File No. SR-Amex -2007-04)**  
**Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a**  
**Proposed Rule Change by American Stock Exchange LLC; Order Approving**  
**Proposed Rule Change Relating to Buy-In Rules**

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Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”), 15 U.S.C 78s(b)(1), notice is hereby given that on \_\_\_\_\_, 2007, the American Stock Exchange LLC (“Amex” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. Amex has designated this proposal as non-controversial under Section 19(b)(3)(A)(iii)<sup>1</sup> of the Act and Rule 19b-4(f)(6)<sup>2</sup> thereunder, which renders the proposed rule change 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 amend Rules 759, 783, 784, 789 and adopt new Rule 798 to standardize the Exchange’s buy-in. The text of the proposed rule change appears in Exhibit 5.

The text of the proposed rule change is available on the Amex’s website at <http://amex.com>, the Amex Office of the Secretary, the Amex and at the Commission’s Public Reference Room.

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<sup>1</sup> 15 U.S.C. 78s(b)(3)(A)(iii)

<sup>2</sup> 17 CFR 240.19b-4(f)(6)

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

In its filing with the Commission, Amex 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. Amex 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 the Statutory Basis for, the Proposed Rule Change

(1) Purpose

The Exchange proposes to amend its Rules 783, 784, 789 and adopt new Rule 798 to permit buyer executed buy-ins,<sup>3</sup> reduce the waiting period to execute a buy-in from twenty-one (21) days to three (3) days and to otherwise provide more standardized and consistent industry buy-in rules and procedures. The Exchange also proposes to make conforming changes to Rules 759, 784 and 789. This proposal seeks to substantially mirror the recent New York Stock Exchange (the "NYSE") amendments to its buy-in rules<sup>4</sup> approved by the Commission largely for the purpose of achieving industry uniformity.

**Introduction**

The buy-in rules apply to transactions that are not subject to the rules of a Qualified Clearing Agency such as the Depository Trust Company ("DTC")<sup>5</sup>

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<sup>3</sup> A "buy-in" is a transaction between brokers where the securities are not delivered on time by the broker on the sell-side thereby forcing the broker on the buy-side to obtain shares from other sources.

<sup>4</sup> See Securities Exchange Act Release Nos. 52475 (September 20, 2005), 70 FR 56757 (September 28, 2005) and 52842 (November 28, 2005), 70 FR 72321 (December 2, 2005) (SR-NYSE-2005-50).

<sup>5</sup> DTC is a member of the U.S. Federal Reserve System, a limited-purpose trust company under New York State banking law and a registered clearing agency with the Securities and Exchange Commission (the "Commission").

and the National Securities Clearing Corporation (“NSCC”)<sup>6</sup>, including the Continuous Net Settlement (“CNS”)<sup>7</sup> transactions that settle through them.<sup>8</sup> For those non-CNS transactions and CNS buy-ins in Exchange-listed securities, the Exchange buy-in rules apply. However, under current Amex Rules that place the responsibility for the actual execution of the buy-in on the defaulting member or member organization (the “defaulting member” or “seller”), there are disincentives for the defaulting member to execute the buy-in. For example, the defaulting member could potentially manipulate the extent to which it has market exposure by timing its purchase of the necessary securities to benefit itself. Therefore, an initiating member or member organization (the “initiating member” or “buyer”) may receive negative customer reaction if they learn that their trade has not been settled and their securities are not available because a buy-in has not been executed by the defaulting member, or has not been executed in a timely manner.

Other self-regulatory organizations (“SROs”) recognize this conflict of interests and their buy-in rules assign responsibility accordingly by allowing the buyer to execute the buy-in.<sup>9</sup> By allowing buyers to execute their own buy-ins, the defaulting member’s conflict of interest is avoided and the process is expedited.

The Securities Industry Association (“SIA”) Securities Operations Division Buy-In Committee (the “Committee”) has expressed a strong preference that the

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<sup>6</sup> NSCC is a central counterparty that provides centralized clearance, settlement and information services for virtually all broker-to-broker equity, corporate bond and municipal bond, exchange-traded funds and unit investment trust trades in the U.S. NSCC provides clearing and settlement, risk management, central counterparty services and a guarantee of completion for trades. NSCC also nets trades and payments among its participants, reducing the volume of securities and payments that need to be exchanged each day.

<sup>7</sup> CNS is an automated accounting system that centralizes the settlement of compared security transactions and maintains an orderly flow of security and money balances.

<sup>8</sup> See Securities Exchange Act Release No. 53528 (March 21, 2006), 71 FR 15506 (March 28, 2006) (approving NSCC’s CNS Buy-in Rules).

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Exchange considers amending its buy-in rules to eliminate the notice procedures described above and change who executes the buy-in to the initiating member from the seller. The purpose of the SIA Committee<sup>10</sup> recommendation is to identify and standardize various buy-in rules and procedures regarding the close-out process related to non-CNS system contracts and to help formulate uniformity among industry rules. The Committee requested that the Amex conform its rules to those of the other exchanges who allow the initiating member to execute buy-ins to close out a contract.

### **Current Requirements**

Amex Rule 784 sets forth the process by which a buyer is required to close-out a contract, which has not been completed by the seller for a period of twenty-one (21) business days – a “mandatory closing of fails.” A mandatory closing of fails requires that a notice of intention be delivered, in quadruplicate and on the twenty-first (21<sup>st</sup>) business day after the original due date of the contract, by the initiating member to the seller. The member organization receiving the notice of intention must indicate its position – whether it can deliver or otherwise – with respect to the resolution of the item and return the notice of intention to the initiating member no later than three business days after the notice was sent. If the notice of intention has not been returned when due or is returned with the indication that the contract is not known, the initiating member shall itself close the contract by buying or selling the securities involved through its own floor representative. If the notice of intention is returned when due, with an indication that the contract is known but that delivery cannot be made, and the contract is one which has been designated as acceptable for clearance as a fail item by a registered clearing

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<sup>10</sup> The Committee is made up of representatives from a broad cross-section of broker-dealers, industry groups and regulatory bodies.

agency of which both parties are clearing members, it shall be submitted for clearance by the defaulting member. If the notice of intention is returned when due, with an indication that the contract is known but that delivery cannot be made, and the contract is one which has not been designated as acceptable for clearance as a fail item by a registered clearing agency of which both parties are clearing members, the initiating member shall close the contract according to the procedures in Amex Rule 783. Therefore, the Rule currently provides that more than three weeks may lapse before the contract is closed.

Amex Rule 783 sets forth a permissive procedure by which an initiating member may close-out a contract, which has not been executed by the defaulting member. The initiating member must provide notice of its intention to make a closing. Pursuant to Amex Rule 783, the Exchange determines the times for the delivery of such notices of intention to close and orders to close and the time for the closing of contracts, and if the times within which securities may be delivered shall be extended or shortened, the time limits established by the Exchange may be similarly extended or shortened.<sup>11</sup> Once the initiating member sends the default notice to the defaulting member, the defaulting member shall be given a copy of the order to close for execution on that day. If the order is not executed, the defaulting member shall return the original order indicating why it cannot be executed within fifteen minutes of the close of trading and the buy-in desk will deliver a copy of the floor report to the initiating member. The initiating member may then close the contract and must notify the party against whom the contract has been closed with respect to any money differences that it will claim as

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<sup>11</sup> Contracts made for cash within one hour and one-half before the close of trading are given different treatment with respect to timing. When a contract made for cash within one hour and one-half before the close of trading is to be closed on the same day, the time of the transaction shall be stated on the order and notice, which shall be delivered within thirty minutes after the time of the transaction and the contract shall not be closed until thirty-five minutes after the time of the transaction.

damages. If the order is executed by the defaulting member, it shall furnish a copy of the order to close and a copy of the floor report to the buy-in desk on the floor.

Exchange Rule 789 requires an initiating member to accept physical delivery of some or all of the securities that are the subject of a buy-in, thereby halting the buy-in execution for those securities, if those securities are tendered prior to the buy-in. The defaulting member must promptly tender the securities and if they are not promptly delivered, such member or member organization is liable for any resulting damages.

### **Proposal**

The Exchange proposes to amend Rule 784 to allow the member or member organization failing to receive the securities to execute the buy-in, and to reduce the waiting period to execute a buy-in from twenty-one (21) days to three (3) days after delivery on the contract was due. The proposed elimination of Commentary .01 through .06 to Rule 784 is intended to facilitate the amendments to the buy-in procedures. The proposed amendments to these procedures are largely proposed in the text of Rule 784. The Exchange believes that once the responsibility is shifted to the buy-side of the transaction, the buy-in process will work more efficiently.

The amendments to Rule 784 provide that the initiating member may close a contract no sooner than three business days after the original due date for delivery (the “Effective Date”). The initiating member must deliver a written notice to the defaulting member at least two days before the proposed buy-in. After receipt of the buy-in notice, the defaulting member must then send a signed, written response to the initiating member stating its position. If the response is not received by 5 p.m. ET or it is

returned with an indication that the contract is not known or that it is known but that delivery cannot be made, the buy-in may be executed on the Effective Date. However, the initiating member shall be required to accept any portion of the securities called for by the contract from the defaulting member that the defaulting member submits prior to the execution of the buy-in, but the initiating member shall not be required to accept any securities from the defaulting member if the buy-in has already been executed and it could not have been reasonably cancelled by the initiating member. Once the buy-in has been executed, the initiating member shall notify the defaulting member confirming the purchase along with a bill or payment.

The Exchange is also proposing to eliminate the requirements for quadruplicate paper notices and to permit electronic notices, including notices from a computerized network facility, or the electronic functionality of a Qualified Clearing Agency, such as DTC and NSCC. The proposed amendments also amend existing time deadlines for delivering notices, securities and executions and are using those used by other self-regulatory organizations (i.e. DTC and NSCC).

The Exchange also proposes new Commentary .01 to Rule 784 to ensure that members and member organizations comply with the close-out requirements of Regulation SHO<sup>12</sup> under the Securities Exchange Act of 1934 (the “Exchange Act”).<sup>13</sup> Members and member organizations are obligated to comply with the marking, locate and delivery requirements of Regulation SHO for short sales of equity securities. As a

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<sup>12</sup> 17 CFR 242.200 through 242.203. Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (August 6, 2004), [File No. S7-23-03] (adoption of Regulation SHO).

<sup>13</sup> 15 U.S.C. 78a et seq.

result, members and member organizations should have policies and procedures in place to comply with these rules, including close-out procedures.<sup>14</sup>

The Exchange proposes to rescind Rule 783 and has incorporated the permissive buy-in procedures of Rule 783 into Rule 784. The Exchange also proposes to amend Rule 789 to conform it to this proposal to permit buyer executed buy-ins and to create a Rule 798 to clarify the requirements and timeframes upon which a defaulting member may deliver against a buy-in notice. Finally, the Exchange proposes technical amendments to Rules 759, 784 and 789 to better coordinate the rules with industry practice.

The Amex believes that the revisions to its buy-in rules will help standardize the Exchange's procedure and practice by allowing members and member organizations to clean-up fails and efficiently deliver Amex-listed securities.

(2) Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Exchange Act in general and furthers the objectives of Section 6(b)(5) in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

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<sup>14</sup> At the same time the changes noted above were being developed, the SEC implemented Regulation SHO – Regulation of Short Sales, which shares a similar purpose with the buy-in rules – the reduction of fails to deliver. Rule 203 to Regulation SHO imposes locate and borrowing/ delivery requirements on broker-dealers that sell equity securities, including close-out requirements on certain open fail to deliver positions.

The Exchange believes that the proposal is consistent with Sections 6(b) and 6(b)(5) of the Act because by amending the Amex buy-in rules to permit buyers to execute a buy-in, firms are expected to find it easier to execute buy-ins of Exchange-listed securities. In addition, the amendments seek to remove inefficient requirements and amend time deadlines to conform to current industry practice.

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.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become immediately effective pursuant to Section 19(b)(3)(A)<sup>15</sup> of the Securities Exchange Act of 1934 and Rule 19b-4(f)(6)<sup>16</sup> under the Act because: (i) it does not significantly affect the protection of investors or the public interest; (ii) it does not impose any significant burden on competition; and (iii) by its terms, it does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest; provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change, along with a

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

<sup>16</sup> 17 CFR 240.19b-4(f)(6).

brief description and text of the proposed rule change, at least five (5) business days prior to the date of filing of the proposed rule change.

A proposed rule change filed under Rule 19b-4(f)(6) may not become operative prior to thirty (30) days after the date of filing. However, Rule 19b-4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange seeks to have the proposed rule change become immediately effective to allow it to implement the amended buy-in rules immediately.

The Commission believes that it is consistent with the protection of investors and the public interest for the proposed rule change to become operative immediately. At any time within sixty (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.

#### 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. Comments may be submitted by any of the following methods:

##### Electronic Comments:

Use the Commission's Internet comment form at <http://www.sec.gov/rules/sro.shtml> or send an e-mail to [rulecomments@sec.gov](mailto:rulecomments@sec.gov). Please include File No. SR-Amex-2007-04 on the subject line.

Paper Comments:

Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549–1090.

All submissions should refer to File No. SR-Amex-2007-04. 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 at <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, 100 F Street, NE., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. 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 No. 2007-04 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission by the Division of Market Regulation, pursuant to delegated authority<sup>17</sup>

Nancy M. Morris

Secretary  
Dated:

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

**SR-Amex-2007-04**  
**EXHIBIT 5**

AMERICAN STOCK EXCHANGE LLC

Proposed Rule Change

It is proposed that the following provisions of the American Stock Exchange Rules be amended as set forth below. [Bracketing] indicates text to be deleted and underlining indicates text to be added.

**Section 3. Delivery of Securities**

**Delivery on “When Issued” Special Settlements**

**Rule 759.** If the Exchange shall rule that contracts in securities, “when, as and if issued” may be settled prior to a final settlement date, by the seller giving to the buyer one day’s written notice of his intention to make delivery, notice so given shall remain in full force until delivery is made. If the seller fails to make delivery, the buyer may file with the Exchange, on the delivery date established by such seller’s notice or subsequent thereto, an order to close such contract, and a notice of intention to make such closing must be delivered [at the registered address of] to the member, member firm or member corporation in default, in accordance with Rule [783]784.

**Section 4. Closing Contracts**

**Normal Buy-Ins**

**Rule 783.** Rescinded [Unless otherwise specified by the provisions of Rule 203 (Borrowing and delivery requirements) of Regulation SHO under the Securities Exchange Act of 1934, a contract in securities admitted to dealings on the Exchange, (other than a contract which has been accepted for settlement by a registered clearing agency and such clearing agency has assumed responsibility for payment and delivery, as the case may be), which has been fulfilled according to the terms thereof, may be closed pursuant to the following procedures:

(a) The order to close such contract shall be delivered in duplicate to the Market Operations Division of the Exchange, and the member or member organization giving such order shall deliver at the office of the member or member organization in default notice of intention to make such closing. Every such order and every such notice shall be in writing, and shall state the name of the member or member organization by whom the order is given, the date of the original contract to be closed, the maturity date and the price of such contract, and for whose account. The Exchange shall determine the times for the delivery of notices of intention to close and orders to close, and the time for the

closing of contracts; and if the time, within which securities may be delivered shall be extended or shortened, the time limits established by the Exchange may be similarly extended or shortened. When a contract made for "cash" within an hour and one-half before the close of trading, on a business day, is to be closed on the same day, the time of the transaction shall be stated on the order and notice, which shall be delivered within thirty minutes after the time of the transaction, and the contract shall not be closed until thirty-five minutes after the time of the transaction.

(b) The order to close will be given for execution to a member of, or a member designated by, the member organization listed on the order as being in default. Such order shall be executed on that day, unless (i) a Floor Official shall defer the execution thereof because, in his opinion, a fair market in which to close the contract does not exist, or (ii) the party in default has physical possession of the securities in good deliverable form and has notified the member or member organization which initiated the order that it intends to make immediate delivery, provided, however, that this paragraph (b) shall not apply if it would result in a conflict with the provisions of Rule 203 of Regulation SHO.

(c) The member to whom such order is given for execution shall promptly after the execution thereof furnish a copy of the order to close and a copy of the Floor report, indicating the details of the execution of such order, to the Buy-in Desk on the Floor. If such order is not executed, he shall return the original order to the Buy-in Desk within fifteen minutes after the close of trading, indicating the reason for its nonexecution. When a Floor Official has deferred execution of an order to close, his signature shall appear thereon.

(d) The Buy-in Desk will deliver a copy of the Floor report to the booth of the member or member organization which initiated the order. The executing broker will have the responsibility of notifying promptly as to the details of the execution, the member or member organization listed on the order as being in default.

(e) The member or member organization which initiated the order shall promptly notify the party against whom the contract has been closed with respect to any money difference claimed as damages and may include therein any commissions paid or payable in connection with the execution of such order.

(f) Rules 793, 794 and 795 regarding evidence shall not apply to the closing of contracts in rights or warrants.

••• *Commentary* -----

**.01** An order to close a contract pursuant to this Rule may direct that such contract be closed on a "cash" basis only, or for "regular way" delivery or "next day" delivery in the event it cannot be readily executed on a "cash" basis. If the order does not specifically authorize "regular way" delivery or "next day" delivery, the order will be handled as one to be executed on a "cash" basis only.

**.02** A notice of cancellation or change in the quantity of an order to close by the member organization initiating such order pursuant to this Rule must be delivered to the Market Operations Division at least an hour and one-half before the close of trading. After that time such notice must be delivered to the member to whom the order has been given for execution.

If an order to close is effectively cancelled in whole or in part by receipt of a notice of cancellation by the member to whom the order has been given for execution, the order should be returned together with the notice of cancellation or change in quantity to the Buy-in Desk.

If the defaulting party gives notice to the member organization which initiated the order to close that it has physical possession of some or all of the securities and will promptly deliver the same in accordance with Rule 789, it shall be the responsibility of such defaulting party to give notice thereof to the member to whom the order has been given for execution.

**.03** See also Rules 785, 786, 787, 788, 789, 790 and 792.]

#### **[Mandatory Closing of Fails] Buy-In Procedures**

**Rule 784.** (a) Unless otherwise specified by the provisions of Rule 203 (Borrowing and delivery requirements) of Regulation SHO under the Securities Exchange Act of 1934, a contract in securities admitted to dealings on the Exchange (other than a contract which has been accepted for settlement by a registered clearing agency and such clearing agency has assumed responsibility for payment and delivery, as the case may be), which has not been [fulfilled] completed by the seller in accordance with its terms, [for a period of twenty business days] may be closed-out by the buyer (i.e., the initiating member organization) no sooner than three business days after the original due date for delivery, [shall be resolved] pursuant to the following procedures:

(1) [A notice of intention to close the contract shall be delivered (in quadruplicate)]An initiating member organization (buyer) may deliver a written “buy-in” notice to the defaulting member organization [in default] at or before 12:00 [p.m.] noon Eastern Time (“ET”) at least two (2) business days before the proposed execution of a “buy-in” [on the twenty-first business day after the original due date of the contract] (the buy-in execution date shall be referred to as the “effective date” of the notice). [Such twenty-first business day shall, for the purpose of this Rule, be referred to as the effective date of notice. A copy of the signed comparison, receive or deliver order issued by a registered clearing agency, bond order or bond memorandum must accompany the notice when delivered. If none of these documents is available, other evidence of the contract must accompany the notice. A fifth copy of the notice of intention shall be delivered to the Market Operations Division of the American Stock Exchange, before 1:00 p.m. on the same day.] Receipt of delivery to the defaulting

member organization must be maintained with the notice as part of the initiating member organization's books and records.

(2) The defaulting member organization receiving the [notice of intention] "buy-in" notice must [indicate on the copies of the notice] send a signed, written response to the initiating organization stating its position with respect to the resolution of the item [and then return, to the initiating member organization, a copy thereof signed by a member, officer or authorized representative of such member organization] no later than [1]5:00 p.m. ET on [the third business day after the effective date of notice] the date of issuance of the "buy-in" notice (the "buy-in" notice date). [A copy of the response must be filed by the defaulting member organization with the Market Operations Division no later than 1:00 p.m. on the same day. (See Rule 785—Retransmission of Notice).]

(3) [If the notice of intention is returned to the initiating party "DK'd" or if the notice is not returned duly signed when due, the initiating party shall itself close the contract forthwith by buying or selling the securities involved through its own Floor representative. A party which has returned a notice "DK'd" or has failed to return the notice duly signed when due may not thereafter seek to fulfill the contract by delivering or requiring delivery of the securities if the contract has been closed by the initiating party. The closing of a contract by the initiating member organization as herein provided shall not preclude it from recovering any resulting damages from the defaulting party.] If the "buy-in" notice has not been returned by 5:00 p.m. ET on the "buy-in" notice date, or the "buy-in" notice is returned as "DK'd," or the "buy-in" notice is returned with the indication that the contract is known but that delivery cannot be made, a "buy-in" shall be executed on the "effective date" by the initiating member organization by purchasing all or part of the securities necessary to satisfy the amount requested in the "buy-in" notice.

(4) [If the notice of intention is returned duly signed, with an indication that the contract is known but that delivery cannot be made, and the contract is one which has been designated as acceptable for clearance as a fail item by a registered clearing agency of which both parties are clearing members (or by different registered clearing agencies having an appropriate interfacing capacity to handle fail items), it shall be submitted for clearance, by the defaulting member organization, in accordance with the rules of such registered clearing agency relating to fail items.] Where the buyer is a customer (other than another member organization), upon failure of a defaulting member organization to effect delivery in accordance with a "buy-in" notice, the contract may be closed-out by purchasing for "cash" in the best available market, or at the option of the initiating member organization, for guaranteed delivery for all or any part of the securities necessary to complete the contract. "Buy-ins" executed in accordance with this paragraph shall be for the account and risk of the defaulting member organization.

(5) [If the notice of intention is returned duly signed, with an indication that the contract is known but that delivery cannot be made, and the contract is one which has not been designated as acceptable for clearance as a fail item by a registered clearing

agency of which both parties are clearing members (or by different registered clearing agencies having an appropriate interfacing capacity to handle fail items), the initiating member shall close such contract pursuant to the procedures outlined in paragraphs (b), (c), (d) and (e) of Rule 783.] Every “buy-in” notice shall state the date of the contract to be closed, the quantity and the contract price of the securities covered by said contract, the settlement date of said contract and any other information deemed necessary to properly identify the contract to be closed. Such notice shall state further that unless delivery of the underlying securities is effected at or before 3:00 p.m. ET on the “effective date” of the “buy-in” notice, the security may be “bought in” on the date specified for the account of the initiating member organization. Each “buy-in” notice shall also state the name and telephone number of the individual authorized to pursue further discussions concerning the “buy-in.

(6) Securities delivered subsequent to the receipt of the “buy-in” notice should be considered as received pursuant to the “buy-in” notice. Delivery of the requisite number of shares, as stated in the “buy-in” notice, or execution of the “buy-in” will also operate to close-out all contracts covered under re-transmitted notices of “buy-ins” issued pursuant to the original notice of “buy-in,” pursuant to Rule 785. If a re-transmitted “buy-in” is executed, it will operate to close-out all contracts covered under the re-transmitted notice. A “buy-in” may be executed by the initiating member organization from its long position and/or from customers’ accounts maintained with such member organization.

(7) Prior to the closing of a contract on which a “buy-in” notice has been given, the initiating member organization shall accept any portion of the securities called for by the contract, provided the portion remaining undelivered at the time the initiating member organization proposed to execute the “buy-in” is not an amount which includes an odd-lot which was not part of the original transaction.

(8) The initiating member organization executing the “buy-in” shall immediately upon execution, but no later than 5:00 p.m. ET, notify the defaulting member organization as to the quantity purchased and the price paid. Such notification shall be in written or electronic form having contemporaneous receipt capabilities, or if not available, the telephone shall be used for the purpose of same day notification, provided that written or similar electronic notification having next day receipt capabilities must also be sent out simultaneously. In either case, formal confirmation of purchase along with a billing or payment, as appropriate, should be forwarded as promptly as possible after the execution of the “buy-in.”

(9) In situations where securities have been delivered by the defaulting member organization after the “buy-in” order was placed, the securities may be returned if the “buy-in” was executed before it could reasonably be cancelled by the initiating member organization.

(10) For purposes of this Rule, written notice shall include an electronic notice through a medium that provides contemporaneous return receipt capability. Such

electronic media shall include but not be limited to facsimile transmission, a computerized network facility, or the electronic functionality of a Qualified Clearing Agency, etc.

[(b) The procedures under this Rule shall not prevent a member organization from closing any open contract at any time in accordance with the provisions of Rule 783 or Rule 791 if such contract has not been fulfilled in accordance with its terms on the original due date for delivery of the securities thereunder; provided, however, that once a notice of intention has been delivered pursuant to paragraph (a) of this Rule the contract which is the subject of such notice shall be closed only in accordance with the provisions of this Rule, unless the Exchange shall otherwise approve the closing thereof upon application by the party delivering such notice or unless the provisions of Rule 781 shall become applicable to such contract.]

[(c) Every reasonable means to borrow securities in order to make delivery on open contracts shall be employed by member organizations. If, however, unusual circumstances exist whereby securities cannot be borrowed, application for suspension of paragraph (a) of this Rule with respect to a specific contract may be made to the Exchange by the member organization which is failing to deliver, by the seventeenth business day after the original due date for delivery. Such application shall set forth the unusual circumstances as well as the unsuccessful efforts made by the member organization to borrow securities in order to effect delivery.

If, in the opinion of the Exchange, unusual circumstances exist, the Exchange may direct that the operation of paragraph (a) of this rule shall be temporarily suspended for such period of time as it may determine, either with respect to the market generally, with respect to a specific security or securities or with respect to a specific contract or contracts, but no such suspension shall relieve the party in default of any resulting damages, provided, however, that this paragraph (c) shall not apply if it would result in a conflict with the provisions of Rule 203 of Regulation SHO.]

••• *Commentary* -----

.01 Members and member organizations are obligated to comply with the close-out provisions of Regulation SHO, promulgated under the Securities Exchange Act of 1934. Specifically, Exchange “buy-in” rules (i.e. Rules 782, 784, 785, 786, 787, 788, 789, 790 and 796 and 798) do not abrogate a member’s or a member organization’s responsibilities or obligations to comply with Regulation SHO and the close out provisions of Rule 203(b)(3). [The provisions of this Rule apply to all open contracts—including "fails to deliver" as well as "fails to receive." A member organization which has attempted to deliver securities pursuant to an open contract and has been unable to do so because the member organization on the other side has refused delivery, must close the contract in accordance with the provisions hereof. If a notice of intention to close a contract relates to securities to be delivered by the initiating party and such notice is returned "DK'd" or has not been returned when due, the initiating party shall sell out such securities in accordance with paragraph (a) (3) of this Rule.

**.02** Paragraph (a)(1) of this Rule requires that a notice of intention to close a contract be delivered to a defaulting member organization in quadruplicate. Copy IV should be stamped by the member organization to whom it is addressed to acknowledge receipt and then returned to and retained by the initiating party for its own records. When the member organization receiving the notice has completed Copies I, II and III thereof, Copies I and II should be returned to the initiating member organization, together with any securities, and Copy III should be returned, at the same time, to the Market Operations Division of the Exchange; Copy II should be stamped by the initiating member organization to acknowledge receipt and then returned to and retained by the member organization to whom it was addressed for its own records.

**.03** Paragraph (a) (4) of the Rule requires that, if the notice of intention is returned duly signed with an indication that the contract is known but that delivery cannot be made, the defaulting member organization must submit copies of the "fail add by seller" notice to the appropriate registered clearing agency. Copies I and II of such notice should be used for this purpose and should be submitted in accordance with the rules of such registered clearing agency applicable to fail items, but in any event should be submitted on or before the fourth business day after the effective date of notice. (While the rules of registered clearing agencies through which fail items may be handled may vary, it is anticipated that the procedures will in general be as follows. Copy I of such notice will be utilized by the clearing agency as input for the clearance of the fail item and Copy II thereof will be directed to the initiating member organization. All fail items will thereafter be listed and submitted to the parties on separate supplemental contract lists which will carry the original settlement value and the new settlement price. The difference will represent the amount of the cash adjustment that will be debited or credited, accordingly, to the accounts of the member organization. The fail items will thereafter be included in the regular clearance operation.

**.04** Paragraph (a) (5) requires that contracts which are designated as unacceptable for clearance must be closed. The procedure to be followed shall be the same as that followed in paragraphs (b), (c), (d) and (e) of Rule 783. Examples of contracts which normally are unacceptable for clearance as fail items include bond contracts, odd lot contracts where a specialist clearing agent is not involved and contracts involving securities which have not at the time been integrated into the fail clearance procedures of any registered clearing agency under Rule 784.

**.05** A notice of intention to close a contract and a "fail add by seller" notice used pursuant to the provisions of this Rule shall be in such form and contain such information as shall be prescribed by the Exchange.

**.06** Application for suspension of Paragraph (a) of this Rule with respect to a specific contract shall be delivered to the Market Operations Division of the Exchange by 12:00 noon on the seventeenth business day after the original due date for delivery.]

### **Duty of Member Giving Notice to Close**

**Rule 789.** When a member or member organization has [given notice of intention to close a contract for non-delivery] delivered a buy-in notice pursuant to Rule 784, or has retransmitted notice thereof as provided in Rule 785, [he] the initiating member organization must receive and pay for those securities [due upon such contract] subject to the buy-in notice if tendered [at his office] prior to [the closing] buy-in of such contract.

If the defaulting member or member organization, against whom an order to [close] buy-in a contract has been filed pursuant to Rule 78[3]4, shall notify the initiating member or member organization [initiating such order] that some or all of the securities but not less than one trading unit are in his physical possession and will be promptly delivered, then the order to [close] buy-in shall not be executed with respect to such securities, and the initiating member or member organization who has given the original order to [close] buy-in shall accept and pay for such securities, if tendered promptly.

If such securities [be] are not promptly tendered, the defaulting member or member organization who has stated that they would be promptly delivered shall be liable for any resulting damages.

### **Defaulting Party May Deliver After Buy-In Notice**

**Rule 798.** A defaulting member or member organization (seller) who has received a “buy-in” notice, pursuant to Rule 784, or re-transmitted notice thereof, may deliver the securities to the initiating member or member organization (buyer) issuing such notice up to 3:00 p.m. ET. The defaulting member organization may deliver such securities after 3:00 p.m. ET on the “effective date” of the buy-in notice if: (i) agreed to by the initiating member organization, (ii) before the execution of the order and (iii) the defaulting member organization has physical possession of the securities.