

Effective date: As of the date of issuance and shall be implemented within 60 days of issuance.

Amendment No.: 221.

Facility Operating License No. (DPR-41): Amendment revised the Technical Specifications.

Public comments requested as to proposed no significant hazards consideration (NSHC): Yes. August 5, 2004 (69 FR 47467). The licensee's August 5, 2004 submittal of supplemental information did not affect the original no significant hazards consideration determination, and did not expand the scope of the request as noticed on August 5, 2004. The notice provided an opportunity to submit comments on the Commission's proposed NSHC determination. No comments have been received. The notice also provided an opportunity to request a hearing by August 19, 2004, but indicated that if the Commission makes a final NSHC determination, any such hearing would take place after issuance of the amendment.

The Commission's related evaluation of the amendment, finding of exigent circumstances, state consultation, and final NSHC determination are contained in a safety evaluation dated August 20, 2004.

Attorney for licensee: M.S. Ross, Attorney, Florida Power & Light, P.O. Box 14000, Juno Beach, Florida 33408-0420.

NRC Section Chief: Michael L. Marshall, Jr. (Acting).

Dated at Rockville, Maryland, this 3rd day of September 2004.

For the Nuclear Regulatory Commission.

Ledyard B. Marsh,

Director, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50331; File No. PCAOB-2004-06]

Public Company Accounting Oversight Board; Order Approving Proposed Rule 3101, Certain Terms Used in Auditing and Related Professional Practice Standards and an Amendment to Rule 1001, Definitions of Terms Employed in Rules

September 8, 2004.

I. Introduction

On June 18, 2004, the Public Company Accounting Oversight Board

(the "Board" or the "PCAOB") filed with the Securities and Exchange Commission (the "Commission") proposed Rule 3101, *Certain Terms Used in Auditing and Related Professional Practice Standards* ("Rule 3101"), and an amendment to paragraph (a)(xii) of Rule 1001, *Definitions of Terms Employed in Rules* ("Rule 1001(a)(xii)"), pursuant to the Sarbanes-Oxley Act of 2002 (the "Act")¹ and Section 19(b) of the Securities Exchange Act of 1934 (the "Exchange Act"). Rule 3101 sets forth the terminology the PCAOB will use to describe the degree of responsibility that the auditing and related professional practice standards impose on auditors that conduct engagements pursuant to the standards of the PCAOB and Rule 1001(a)(xii) defines the term "auditor" when applied to rules and standards adopted by the PCAOB. Notice of proposed Rule 3101 and Rule 1001(a)(xii) was published in the **Federal Register** on August 2, 2004,² and the Commission received five comment letters. For the reasons discussed below, the Commission is granting approval of Rule 3101 and Rule 1001(a)(xii).

II. Description

The Act establishes the PCAOB to oversee the audits of public companies and related matters, to protect investors, and to further the public interest in the preparation of informative, accurate and independent audit reports.³ Section 103(a)(3) of the Act also states that the Board may adopt any statement of auditing or related professional practice standards developed by a professional group of accountants as interim or transitional standards, with the Board retaining full authority to modify, supplement, revise or subsequently amend, modify or repeal, in whole or in part, any such statements. Pursuant to this authority, the PCAOB adopted the auditing and related professional practice standards of the American Institute of Certified Public Accountants, as they existed on April 16, 2003, as interim or transitional standards (the "interim standards").⁴

The Board's proposed Rule 3101 sets forth the terminology the PCAOB will use to describe the degree of responsibility that the auditing and related professional practice standards impose on auditors that conduct

engagements pursuant to the standards of the PCAOB. The accounting profession had not previously defined imperative terms, such as "should" or "must," used to describe different degrees of auditor responsibility when conducting engagements in accordance with professional standards. The PCAOB determined that defining the level of imperatives would assist auditors with their work by clarifying their responsibilities and thus would enhance the consistency of the work and the quality of the audits. In addition, clear definitions would aid the PCAOB in writing new standards in a uniform and understandable language. Thus, the PCAOB decided that it was important to clarify the meaning of these imperatives, since they are an integral part of every standard adopted or established by the PCAOB.

The general requirements of the proposed rule create three categories of imperatives, which impose different degrees of responsibility on the part of the auditor:

(1) *Unconditional Responsibility:* The words "must," "shall," and "is required" indicate unconditional responsibilities. The auditor must fulfill responsibilities of this type in all cases in which the circumstances exist to which the requirement applies.

(2) *Presumptively Mandatory Responsibility:* The word "should" indicates responsibilities that are presumptively mandatory. The auditor must comply with requirements of this type specified in the Board's standards unless the auditor demonstrates that alternative actions he or she followed in the circumstances were sufficient to achieve the objectives of the standard.

(3) *Responsibility To Consider:* The words "may," "might," "could," and other similar terms and phrases describe actions and procedures that auditors have a responsibility to consider. Matters described in this fashion require the auditor's attention and understanding. How and whether the auditor implements these matters in the audit will depend on the exercise of professional judgment in the circumstances consistent with the objectives of the standard.

Proposed Rule 1001(a)(xii) defines the term "auditor," which means both public accounting firms registered with the PCAOB and associated persons thereof.

III. Discussion

The Commission's comment period on the proposed rules ended on August 23, 2004, with the Commission receiving five comment letters. The comment letters came from four

¹ Sections 101, 103, and 107 of the Act.

² Release No. 34-50077 (July 26, 2004); 69 FR 46189 (August 2, 2004).

³ Section 101(a) of the Act.

⁴ The Commission approved the PCAOB's action in Release No. 34-47745, *Order Regarding Section 103(a)(3)(B) of the Sarbanes-Oxley Act of 2002*, (April 25, 2003).

registered public accounting firms and one professional association.

In general, commenters were supportive of the changes made by the PCAOB to its initially proposed rules. Two of the comment letters expressed general support and contained no suggestions. However, regarding Rule 3101, one commenter expressed concern about the requirement for auditors to document their decisions not to perform actions or procedures in the Board's standards that are presumptively mandatory. The commenter indicated that the lack of specificity in the proposed rule may prompt auditors to produce extensive and unnecessary documentation in circumstances where a procedure is not followed simply because it is not applicable. In its adopting release, the PCAOB concluded that for a presumptively mandatory responsibility, circumstances will be rare in which the auditor will perform an alternative procedure, thus, the documentation requirement ought not to result in unduly onerous consequences. The same commenter also was concerned that standard setters may be inclined to over use the terms "must," "shall," or "is required" in formulating new standards, which could ultimately be counterproductive and detrimental to audit quality, because the use of mandated procedures in inappropriate circumstances may provoke unthinking performance on the part of auditors. We note, however, that in proposing this rule, the PCAOB concluded that "must" appears infrequently in the interim standards, and that it expects unconditional responsibilities will be used sparingly in future PCAOB standards.

Two comment letters focused on the effective date. Proposed Rule 3101 provides that the documentation requirement for not performing a presumptively mandatory responsibility would apply to audits or other engagements performed for fiscal years ending (as opposed to "beginning") on or after the later of November 15, 2004 or 30 days after the date of approval of the final rule by the Commission. The commenters indicated that in many instances audit procedures are performed throughout the period of audit, and documentation to support these procedures is prepared contemporaneously with the audit, creating the potential need to update already created documentation. As previously noted, the PCAOB concluded that circumstances will be rare in which the auditor will perform an alternative procedure for a presumptively mandatory responsibility. Based on that conclusion, the frequency of such

situations occurring during the transition period should be limited. The PCAOB also concluded that the documentation requirements in the proposed rule for a presumptively mandatory responsibility should coincide with the effective date for PCAOB Auditing Standard No. 3, *Audit Documentation*.

IV. Conclusion

On the basis of the foregoing, the Commission finds that proposed Rule 3101 and Rule 1001(a)(xii) are consistent with the requirements of the Act and the securities laws and are necessary and appropriate in the public interest and for the protection of investors.

It is therefore ordered, pursuant to Section 107 of the Act and Section 19(b)(2) of the Exchange Act, that proposed Rule 3101, *Certain Terms Used in Auditing and Related Professional Practice Standards*, and amendment to Rule 1001, *Definitions of Terms Employed in Rules* (File No. PCAOB-2004-06), be and hereby are approved.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50326; File No. SR-Amex-2004-51]

Self-Regulatory Organizations; Order Granting Approval to Proposed Rule Change by the American Stock Exchange LLC To Apply the Current Member Firm Guarantee in Equity Options to Index Options

September 7, 2004.

On June 30, 2004, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend Commentary .02(d) to Amex Rule 950(d) to extend the Exchange's current member firm guarantee in facilitation cross transactions to index options. The proposed rule change was published for comment in the **Federal Register** on July

30, 2004.³ The Commission received no comments on the proposal.

Pursuant to Commentary .02 to Amex Rule 950(d), a floor broker representing a member firm seeking to facilitate its own public customer's order is entitled to a participation guarantee of 20% if the order is traded at the best bid or offer ("BBO") provided by the trading crowd, or 40% if the order is traded at a price that improves the trading crowd's market, *i.e.*, at a price between the BBO.⁴ These participation guarantees currently apply only to transactions in equity options. The Exchange proposes to amend Commentary .02(d) to provide the same participation guarantees for transactions in index options.⁵

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange,⁶ and, in particular, the requirements of Section 6(b)(5) of the Act.⁷ The Commission believes that participation guarantees are reasonable and within the business judgment of the Exchange, as long as they do not restrict competition and do not harm investors. The Commission has found, with respect to participation guarantees in other contexts, that guarantees of as much as 40% of an order in options trading are not inconsistent with statutory standards of competition and free and open markets.⁸

The Commission notes that, pursuant to Commentary .02(d) to Amex Rule 950(d), if a facilitation trade takes place in a situation in which the specialist is entitled to a participation guarantee, the total number of contracts guaranteed to be allocated to the floor broker and the specialist in the aggregate shall not exceed 40% of the facilitation transaction.⁹

³ See Securities Exchange Act Release No. 50081 (July 26, 2004), 69 FR 45856 (July 30, 2004) ("Notice").

⁴ These guarantees apply only when the original order is equal to or larger than 400 contracts, or other eligible size as established by the Exchange, but in no case less than 50 contracts. See Commentary .02(d)(1)-(2) to Amex Rule 950(d).

⁵ All other rules that apply to participation guarantees for transactions in equity options would also apply to transactions in index options. See Notice.

⁶ In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f)

⁷ 15 U.S.C. 78f(b)(5)

⁸ See, *e.g.*, Securities Exchange Act Release No. 42455 (February 24, 2000), 65 FR 11388 (March 2, 2000) at 11398.

⁹ See Commentary .02(d)(3) to Amex Rule 950(d). In such a situation, if the facilitation transaction occurs at the specialist's bid or offer, the specialist

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.