proposed, the Commission has considered its impact on efficiency, competition, and capital formation.[8]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[9] that the proposed rule change (SR–NASD–98–90) relating to proposed amendments to the Rules of the Association to permit the Office of Disciplinary Affairs of NASD Regulation to authorize all enforcement actions, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–298 Filed 1–6–99; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40858; File No. SR–NYSE–98–28]

Self Regulatory Organizations; Order Approving Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Arbitration Rules

December 29, 1998.

I. Introduction

On September 15, 1998, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4 thereunder.[2] The proposed rule change would amend NYSE Rules 347 and 600 to exclude claims of employment discrimination, including sexual harassment, in violation of a statute from arbitration unless the parties have agreed to arbitrate the claim after it has arisen. Notice of the proposed rule change, together with the substance of the proposal, was provided in a Commission release and in the **Federal Register**.[3] The Commission received three comment letters and a response to those letters from the Exchange. The Commission is approving the proposed rule change.

II. Description

The proposed rule change will modify the current requirement in NYSE Rule 347 that any employment-related disputes between a registered representative and a member or member organization be settled by arbitration. The proposal provides that statutory employment discrimination claims are eligible for arbitration at the Exchange only if the parties agree to arbitrate the claims after they arise.

Background

NYSE Rule 347 has been in effect since the late 1950's and requires that any employment-related disputes between a registered representative and a member or member organization be settled by arbitration.[4] In order to become ''registered'' an individual is required to sign and file with the Exchange a Form U–4 (Uniform Application for Securities Registration or Transfer). Form U–4 requires registered persons to submit to arbitration any claim that must be arbitrated under the rules of the self-regulatory organizations (''SROs'') with which they register.

Until the 1990's, the rule was generally invoked to arbitrate business and contract disputes, such as wrongful discharge, breach of contract or claims regarding compensation. In 1991, the Supreme Court held in *Gilmer* v. *Interstate/Johnson Lane*,[5] that a registered representative could be compelled to arbitrate his claim under the Age Discrimantion in Employment Act (''ADEA'') pursuant to Form U–4 and NYSE Rule 347. Subsequent courts have held that claims alleging employment discrimation, including sexual harassment claims, may be compelled to arbitration.[6]

In 1994, the General Accounting Office (''GAO'') conducted a study on the arbitration of employment discrimination disputes in the securities industry.[7] The GAO Report did not critize the fairness of arbitration as a means of resolving employment discrimination disputes, but did make recommendations for improving the arbitration process. Despite steps to improve the process, registered representatives and others continue to oppose arbitration of discrimination claims pursuant to the Form U–4 and other pre-dispute agreements. In July 1997, the U.S. Equal Employment Opportunity Commission (''EEOC'') issued a policy statement that mandatory pre-dispute agreements to arbitrate statutory employment discrimination claims are consistent with the purpose of the federal civil rights laws.[8]

In support of the EEOC's position, the Ninth Circuit Court of Appeals held in May 1998, in *Duffield* v. *Robertson Stephens & Company*,[9] that employers could not compel employees to waive their right to a judicial forum under Title VII, and therefore plaintiff could not be compelled to arbitrate her statutory employment discrimination claims pursuant to Form U–4.[10] Other federal courts consistently upheld the arbitration of employment discrimination claims pursuant to the Form U–4.

On June 22, 1998, the Commission approved a proposed rule change by the National Association of Securities Dealers, Inc. (''NASD'') to remove the requirement from its rules that registered representatives must arbitrate statutory employment discrimination claims.[11] Under the NASD's rule, an employee could file such a claim in court unless he or she was obligated to arbitrate pursuant to a separate agreement entered into either before or after the dispute arose.

The Commission's order approving the NASD rule change noted that the NASD intends to make changes to its arbitration program to make arbitration more attractive to parties for the resolution of discrimination claims.[12] An NASD ''Working Group'' that includes attorneys who represent employees, member firms and neutrals

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[8] 15 U.S.C. 78(c)f.

[9] 15 U.S.C. 78s(b)(2).

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 40479 (September 24, 1998) 63 FR 52782 (October 1, 1998).

[4] NYSE Rule 347 provides ''Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.''

[5] 500 U.S. 20 (1991).

[6] Indeed, they have extended the reasoning of Gilmer to cover disputes arising under: Title VII of the Civil Rights Act of 1964, *see, e.g., Alford* v. *Dean Witter Reynolds, Inc.*, 939 F. 2d 229 (5th Cir. 1991), *Cremin* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 957 F. Supp. 1460 (N.D. III. 1997), *but see Rosenberg* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 1998 U.S. Dist. Lexis 877 (D. Mass. 1998)); the Americans with Disabilities Act, (*see, e.g., Austin* v. *Owens-Brockway Glass Container, Inc.*, 78 F. 3d 875, 881 (4th Cir.) cert. denied, 117 S. Ct. 432 (1996); and state statutes of a similar nature (*see, e.g., Kalider* v. *Shearson Lehman Hutton, Inc.*, 789 F. Supp. 179, 180 (W.D. Pa. 1991)).

[7] Employment Discrimination: How Registered Representatives in Discrimination Disputes (GAO/HEHS–94–17, March 30, 1994).

[8] EEOC Notice No. 915.002, July 10, 1997.

[9] 1998 WL 227469 (9th Cir.).

[10] In January 1998, a U.S. District Court in Massachusetts, in *Rosenberg* v. *Merrill Lynch*, 76 FEP 681 (D.Mass 1998), declined to compel arbitration of plaintiff's Title VII and the ADEA claims pursuant to the agreement to arbitrate contained in the Form U–4 plaintiff was required to sign as a condition of her employment.

[11] Exchange Act Release No. 40109 (June 22, 1998) 63 FR 35299 (June 29, 1998).

[12] *Id.*

is developing improvements to the NASD's arbitration procedures for discrimination cases. A representative of the Exchange is participating as an observer in the Working Group's discussions.

The Exchange's proposed rule change will create a narrow exception to the NYSE rule that requires arbitration of all employment-related claims of a registered representatives. Paragraph (a) of the proposed amendment to NYSE Rule 347 adds language indicating that paragraph (b) contains an exception to the requirement to arbitrate employment disputes. Paragraph (b) provides that ''a claim alleging employment discrimination,including any sexual harassment claim, in violation of a statute shall be eligible for arbitration only where the parties have agreed to arbitrate the claim after it has arisen.'' [13]

In addition, under the proposal, statutory employment discrimination claims will not be eligible for arbitration pursuant to any pre-dispute agreement to arbitrate. The Exchange has stated that its action brings its arbitration policy into conformity with the EEOC's ''Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment.'' [14]

In its December 1997 comment letter to the SEC regarding the NASD proposal, the EEOC stated its position ''that *pre*-dispute arbitration agreements, particularly those that mandate binding arbitration of discrimination claims as a condition of employment, are contrary to the fundamental principles reflected in this nation's employment discrimination laws. We recommend therefore, that the proposed rule be revised to permit arbitration of statutory employment discrimination claims only under *post*-dispute arbitration agreements.'' [15]

The Exchange has had a general arbitration provision in its Constitution since 1817. NYSE Rule 600 requires the arbitration of disputes between customers or non-members and members or member organizations, pursuant to any written agreement to arbitrate or upon the demand of the customer or non-member.[16] The vast majority of disputes resolved by Exchange arbitration are business disputes arising out of securities transactions with investors, and contractual disputes between members and their employees. Since 1992, the year following the *Gilmer* decision, the Exchange has received an average of 18 discrimination claims a year.[17] The Exchange's proposed amendments will limit the availability of the Exchange's forum for the resolution of employment discrimination claims to those cases where the parties have agreed to arbitrate the claim after it has arisen, as recommended by the EEOC.

The Exchange is also proposing to amend NYSE Rule 600, adding paragraph (f) that provides that claims alleging employment discrimination, including any sexual harassment claim, shall be eligible for submission to arbitration only where the parties have agreed to arbitrate the claim after it has arisen. This amendment excludes from Exchange arbitration statutory employment discrimination claims of non-registered employees pursuant to pre-dispute arbitration agreements. NYSE Rule 347 only applies to ''registered'' employees.

The EEOC and several members of Congress have endorsed arbitration as an effective means of resolving discrimination claims, provided the parties agree to arbitrate after the claim has arisen. The Exchange's proposed amendment provides a forum for those employees who choose, after a claim has arisen, to resolve their statutory employment discrimination claims through arbitration.

Some employment disputes may contain contract or tort claims as well as statutory employment discrimination claims. Under amended NYSE Rule 347 (and NYSE Rule 600 for non-registered employees who have executed pre-dispute arbitration agreements) these cases may be bifurcated. The employment discrimination claims may be heard in a forum other than the Exchange, such as court, while any claims subject to arbitration may continue to be heard at the Exchange.[18] However, NYSE Rule 347 requires arbitration of claims ''at the instance'' of either party, and therefore may be waived, allowing the entire case to be heard in court. The parties may also avoid bifurcation by agreeing to proceed with all claims in a single forum. Given a choice, after a dispute has arisen, employees in many instances believe that arbitration is preferable to protracted and expensive litigation and will willingly make that choice.[19]

III. Summary of Comments

The Commission received three comment letters on the proposed rule change.[20] Two of the letters supported the proposal [21] and the other oppose it.[22] The comment letter primarily focused on section 3(f) of the Exchange Act and the Federal Arbitration Act (''FAA''). The Exchange responded to the comment letters.[23]

Overview of the Proposed Rule Change

One commenter that supported the proposal did so because it believes that it complies with EEOC policy and the letter and spirit of Tile VII.[24] A second commenter that supported the proposal did so because it believes that arbitration may not be well-adapted for employment discrimination claims, since employees and others have challenged its fairness in employment-related disputes.[25] While supporting the proposal, this commenter suggested that the proposal be modified to include common law employment-related claims (*e.g.*, wrongful termination, defamation) and preserve punitive damages.

The one commenter that opposed the proposal said that it is inconsistent with

[13] Claims ''in violation of a statute'' are not limited to the federal civil rights laws and include all federal, state and local anti-discrimination statutes.

[14] EEOC Notice No. 915.002, July 10, 1997.

[15] Letter from Gilbert F. Casellas, Chairman, EEOC, to Jonathan G. Katz, Secretary, SEC, Re: NASD Proposed Rule Change on Arbitration of Employment Discrimination Claims, December 1997.

[16] NYSE Rule 600(a) provides: ''Any dispute, claim or controversy between a customer or non-member and a member, allied member, member organization and/or associated person arising in connection with the business of such member, allied member, member organization and/or associated person in connection with his activities as an associated person shall be arbitrated under the Constitution and Rules of the New York Stock Exchange, Inc. as provided by any duly executed and enforceable written agreement or upon the demand of the customer or non-member.''

[17] Historically, discrimination claims accounted for less than two percent of the total claims filed at the Exchange, except for 1996 (when discrimination claims accounted for two point six percent) and the first six months of 1998 where, due to a steady decline in case filings generally, discrimination claims accounted for three percent of the cases filed.

[18] The bifurcation of securities industry claims is not unprecedented. Before the Supreme Court's decision in *Shearson* v. *McMahon*, 482 U.S. 220 (1987) (holding that claims under the Exchange Act could be compelled to arbitration), the Supreme Court decided *Dean Witter Reynolds, Inc.* v. *Byrd*, 105 S. Ct. 1238 (1985). In Byrd, the dispute involved allegations of federal securities laws violations and pendent state law claims. The Court compelled the state law claims to arbitration and held that the federal securities laws claims could be heard in court.

[19] *See Duffield* v. *Robertson Stephens & Company*, 1998 WL 227469 (9th Cir.).

[20] October 16, 1998 National Employment Lawyers Association Letter (NELA Letter); October 21, 1998 Securities Industry Association Letter (SIA Letter); and October 21, 1998 New York State Attorney General Dennis Vacco (NY Attorney General Letter).

[21] NELA Letter; and NY Attorney General Letter.

[22] SIA Letter.

[23] Letter from James E. Buck, Senior Vice President and Secretary, NYSE, to Jonathan G. Katz, Secretary, SEC, dated December 2, 1998.

[24] NELA letter.

[25] NY Attorney General Letter.

section 3(f) of the Exchange Act and the FAA, and that it will lead to unnecessary bifurcation of claims, since it differs from the NASD's recent rule change.[26] This commenter disagreed with the Exchange's interpretation of the relevant case law. It also asserted that arbitration is faster and cheaper than litigation and that plaintiffs are more likely to win in arbitration than in litigation.

Comments Concerning Section 3(f) of the Exchange Act

The SIA said that the proposal, which provides the Exchange as an arbitration forum only for post-dispute arbitration agreements, is inconsistent with section 3(f) of the Exchange Act[27] because it differs from the recent NASD rule change, which does not affect pre-dispute arbitration agreements. The SIA claimed that this would create a system of inconsistent regulations that would eliminate the efficacy of arbitration agreements and create disparate treatment for similarly situated cases at different SROs. It also argued that this would result in bifurcation of claims and an unwarranted increase in litigation.

The Exchange stated in its response letter that section 3(f) does not require that SROs have precisely the same rules. It noted that its proposal is substantially similar to the NASD's recent rule change, since both leave parties' substantive rights and remedies largely unchanged.[28] Further, the Exchange said that bifurcation would only occur if a prospective plaintiff chose to bifurcate his or her claims.

In its letter, the SIA offers a hypothetical case in which a registered representative signs a Form U–4 and an agreement to arbitrate all disputes, including statutory employment discrimination claims. The SIA concludes that under the Exchange's proposal, only the economic claims can be arbitrated. The Exchange interpreted its proposal differently. The Exchange stated that under the NASD's rules, the entire dispute in the SIA's hypothetical would be eligible for arbitration at the NASD or another forum provided for in the Form U–4 or arbitration agreement.

The Exchange also noted that after a dispute has arisen, the parties can agree to proceed with all claims in arbitration or in court. The Exchange recognized that there is some potential for bifurcation, but believes that in most instances parties will, in their own best interests, agree to proceed in a single forum. The Exchange also disagreed with the SIA's argument that the proposal will lead to motion practice or forum shopping.

The Exchange also noted that it has received relatively few claims alleging employment discrimination and only 126 since 1992 (or about two each month). The NASD, in contrast, received 139 such claims in 1997 alone. Nevertheless, the Exchange stated that it will monitor its actual experience under the porposal, including bifurcation, and consider appropriate action in the future if warranted.

The Exchange further stated that its proposal represents a policy decision not to adopt identical procedures because it receives relatively few employment-discrimination claims. The Exchange stated that its decision would not significantly harm securities industry arbitration. The Exchange also noted that even though most Exchange members and member organizations are also NASD members, the few Exchange members that are not may still proceed with arbitration of employment discrimination claims in another forum, such as the American Arbitration Association.

Comments Concerning the FAA

The SIA disagreed with the Exchange's analysis of the case law interpreting the FAA, stating that the Exchange's proposal violates the FAA. The SIA argued that for member firms that have pre-dispute arbitration agreements, the proposal would vitiate an otherwise valid arbitration agreement. The Exchange disagreed. The Exchange stated that the FAA does not mandate arbitration of all claims, but merely the enforcement, upon motion of a party, of privately megotiated arbitration agreements. The Exchange also noted that the FAA does not require an arbitration provider such as the Exchange to make its forum available to hear particular types of cases.

The Exchange also noted that the proposal would not prevent parties with pre-dispute arbitration agreements from agreeing to arbitrate after the dispute arises. Further, as discussed above, the Exchange noted that the proposal neither invalidates pre-disputes arbitration agreements nor forces parties to litigate statutory employment discrimination claims—it merely removes the Exchange as an arbitration forum for such claims.

Comments Concerning Other Issues

The SIA also argued that arbitration is better for plaintiffs in employment dispute cases than litigation in Fedral court, citing its own study in support.[29] The SIA said that, among other things, in arbitration: plaintiffs prevail more frequently; claims are resolved more quickly; and arbitration is less expensive. In its response, the Exchange neither agreed with nor disputed these SIA statements, stating that its proposal allows plaintiffs to choose the forum they believe is better for them. The Exchange stated that under its proposal, statutory employment discrimination claims are eligible for arbitration at the Exchange if the parties agree to arbitrate after the dispute arises.

Finally, one commenter suggested that voluntary post-dispute arbitration agreements should only be encouraged if they preserve the substantive protections and remedies afforded by statutes. The Exchange responded that the commenter's concern was unwarranted in the post-dispute context. It argued that any disparity in bargaining power between the parties that exists before a dispute arises is missing after the dispute arises, and the employee may freely agree that he or she is better off arbitrating statutory employment discrimination claims. The Exchange also noted that the EEOC supports post-dispute agreements.

IV. Discussion

Under the Act, SROs like the Exchange are assigned rulemaking and enforcement responsibilities to perform their role in regulating the securities industry for the protection of investors and other related purposes. Pursuant to section 19(b)(2) of the Act, the Commission is required to approve an SRO rule change like the Exchange's if it determines that the proposal is consistent with applicable statutory standards.[30] These standards include section 6(b)(5) of the Act, which

[26] SIA Letter.

[27] Section 3(f) of the Exchange Act provides that when the Commission reviews a proposed rule change from an SRO, it must ''consider or determine whether an action is necessary or appropriate in the public interest * * * (and) consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. 15 U.S.C. 78c(f).''

[28] In its response to the comment letters, the Exchange noted that its rule change is ''similar to the recently approved NASD rules in that they exclude claims of statutory employment discrimination from the Exchange's requirement that all employment disputes between a registered representative and a member or member organization be arbitrated.''

[29] Atached to the SIA Letter was its General Counsel's Congressional testimony, which described the SIA study.

[30] The Commission oversees the arbitration programs of the SROs, including the Exchange's, through inspections of the SRO facilities and the review of SRO arbitration rules. Inspections are conducted to identify areas where procedures should be strengthened, and to encourage remedial steps either through changes in administration or through the development of rule changes.

provides that the Exchange's rules must be designed to, among other things, ''promote just and equitable principles of trade'' and ''protect investors and the public interest.'' Section 6(b)(5) also provides that the Exchange's rules may not be designed to ''regulate . . . matters not related to the purposes of the (Exchange Act) or the administration of the (Exchange).''

By changing its rules, the NYSE proposal provides that statutory employment discrimination claims are eligible for submission to arbitration at the Exchange only if the parties agree to arbitrate the claims after they arise. This narrow amendment to the NYSE's rules affects only the arbitration of employment discrimination claims between NYSE members and their employees.[31] This proposal is consistent with the applicable statutory standards.[32] The statutory employment anti-discrimination provisions reflect an express intention that employees receive special protection from discriminatory conduct by employers. Such statutory rights are an important part of this country's efforts to prevent discrimination. It is reasonable for the NYSE to make a policy determination that in this unique area it will not, as an SRO, require or permit arbitration unless there is a post-dispute agreement. It is also proper under the Exchange Act for one SRO's policy determination to differ from that of another.

Section 3(f), raised by one commenter, addresses issues concerning efficiency, competition, and capital formation. The Exchange's proposal fosters competition by providing different approaches for dispute resolution among markets and among brokers and dealers.

The benefits of the Exchange's proposal to employees with employment discrimination claims and to the employer/employee relationship are clear. The Exchange's provision of an arbitration forum for employment discrimination disputes where the parties choose arbitration after the dispute arises is consistent with section 3(f).

With respect to the bifurcation issue raised by the commenters, the Supreme Court, in *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 217 (1985), acknowledged the appropriateness of bifurcation between federal statutory and pendant state law claims. The Exchange noted in its response that there is a potential for bifurcation in some cases. However, in many instances it is likely that parties will agree to proceed in a single forum. The Commission notes that the Exchange stated that it will monitor its actual experience under the proposal, including bifurcation, and consider appropriate action in the future if warranted.

The proposal is not, as one commenter suggested, inconsistent with the FAA. The FAA does not mandate that all claims be arbitrated. The FAA provides that privately negotiated arbitration agreements should be enforced, upon motion of a party. Further, the FAA does not require an arbitration provider such as the Exchange to make its forum available to hear particular types of cases.

With respect to other comments that suggested that the NYSE should enact other rules concerning employer/employee arbitration agreements or extend this rule to other causes of action, these issues are left to the NYSE to consider in the first instance.

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Exchange Act,[33] that the proposal, SR–NYSE–98–28 be and hereby is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[34]

Margaret H. McFarland,

Deputy Secretary.

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[31] The amendment in no way affects the obligation, under NYSE rules, of Exchange members or their employees to arbitrate claims brought by customers against them.

[32] U.S.C. 78o–3(b)(6).

[33] 15 U.S.C. 78s(b)(2).

[34] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40841; File No. SR–NYSE–98–43]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange, Inc., To Set the Monthly Limit on Transaction Charges for 1999 at $400,000 per Member Firm

December 28, 1998.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 1, 1998, 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. On December 19, 1998, the Exchange submitted Amendment No. 1 to the proposed rule change.[3] 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 current fee structure provides for a $400,000 cap on an individual member firm's monthly transaction charges and is in effect through the end of 1998. The proposed revision sets the monthly transaction charge cap at $400,000 for 1999.

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 purpose of the change is to respond to the needs of our constituents with respect to overall competitive market conditions and customer satisfaction.

2. Statutory Basis

The Basis under the Act for the proposed rule change is the requirement under Section 6(b)(4)[4] that an Exchange have rules that provide for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its services.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Letter from James E. Buck, Senior Vice President, NYSE, to Joseph Corcoran, Attorney, Division of Market Regulation, Commission, dated December 19, 1998 (''Amendment No. 1''). In Amendment No. 1, the NYSE proposes to amend its fee schedule to reflect the continuation of the $400,000 cap on an individual member firm's monthly transaction charge.

[4] 15 U.S.C. 78f(b)(4).