

companies incurring these added out of pocket costs defray these costs by paying the proposed \$20,000 appeal fee.<sup>11</sup>

## II. Discussion

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>12</sup> In particular, the Commission finds that the proposal, as amended, is consistent with sections 6(b)(4), 6(b)(5) and 6(b)(7) of the Act.<sup>13</sup> Section 6(b)(4) of the Act<sup>14</sup> requires that exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. Section 6(b)(5) of the Act<sup>15</sup> requires, among other things, that the Exchange's rules be designed to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest. Section 6(b)(7) of the Act<sup>16</sup> requires, among other things, that the Exchange's rules provide fair procedures for prohibiting or limiting any person with respect to access to services offered by the exchange or member thereof.

The Commission believes that the proposal is consistent with sections 6(b)(5) and 6(b)(7) of the Act because the new procedures set forth specific time frames for scheduling and conducting a review of an appeal to ensure that the appeal is done in a timely manner. In particular, the review will be scheduled

<sup>11</sup> The Exchange does not believe that the appeal fee will deter companies from taking reasonable appeals. According to the Exchange, most companies that do appeal Exchange staff determinations are represented in that appeal by their own outside counsel, suggesting that they are able to invest a significant sum in the prosecution of their appeal. While the proposed Exchange appeal fee is greater than the amount charged at other listing markets, the Exchange notes that its original and continuing annual listing fees are also higher than those at other markets, and that its listed company population in general represents larger capitalization companies than on the other markets. The Exchange also notes that, particularly in the case of companies that have been delisted after attempting to utilize the financial plan process outlined in Section 802 of the NYSE *Listed Company Manual*, companies delisted by the Exchange typically have received a significant quantum of service and attention from the Exchange's Financial Compliance staff.

<sup>12</sup> In approving this proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>13</sup> 15 U.S.C. 78f(b)(4); 15 U.S.C. 78f(b)(5); 15 U.S.C. 78f(b)(7).

<sup>14</sup> 15 U.S.C. 78f(b)(4).

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

<sup>16</sup> 15 U.S.C. 78f(b)(7).

at the next review date, which will be at least 25 business days from the date the request for review is filed with the NYSE unless the next subsequent review date must be selected to accommodate the Committee's schedule.<sup>17</sup> This change should help to ensure that the review process will not continue indefinitely and will provide clarity to the parties involved, especially since the existing rules were silent as to the timing of the Committee review date.

The new procedures also define the scope of the Committee's review on appeal and the guidelines pursuant to which the Committee may decide to hear new issues or evidence not identified in an issuer's original request for review. The procedures specify that document discovery and depositions will not be permitted. However, the Commission notes that the issuer may ask the Committee for leave to adduce additional evidence or raise arguments not identified in its request for review, if it can demonstrate that the proposed additional evidence or new arguments are material to its request for review and that there was reasonable ground for not adducing such evidence or identifying such issues earlier. If the case is remanded back to Exchange staff, the rules would require specific time frames for the Committee to hear the staff's conclusions. The Commission believes that these time frames should help to ensure that appeals are considered in a timely manner and resolved promptly. The Commission believes that this is particularly important since, as noted above, the NYSE may permit an issuer to continue to trade during the appeal process. In summary, the Commission believes that the procedures as proposed will provide issuers and Exchange staff a fair and reasonable process, and clarifies the procedures used, to present their arguments on appeal. The procedures also may contribute to a more proficient appeals process, by reducing unnecessary delay between the issuer's request for appeal, the hearing before the Committee, and its final determination. Therefore, the Commission finds the procedures are consistent with sections 6(b)(5) and 6(b)(7) of the Act.

The Exchange also proposes to institute a non-refundable appeal fee in the amount of \$20,000. The Commission believes that the proposed fee is consistent with section 6(b)(4) of the Act<sup>18</sup> because it is designed to recoup the costs of processing requests for

<sup>17</sup> NYSE stated in its filing that the Committee For Review typically meets every two months.

<sup>18</sup> 15 U.S.C. 78f(b)(4).

appeal and holding the subsequent proceedings, and thus is an equitable allocation of dues and fees among issuers. As noted above, the NYSE has indicated that there has been a significant increase in appeals recently due to changes whereby a company that has appealed a delisting would likely be permitted to trade on the Exchange during the appeal process. This has substantially increased the Exchange's overall legal costs in handling appeals. In addition to legal fees, the Exchange represents that it incurs additional administrative and personnel costs in servicing issuers. Although, the proposed appeal fee is greater than the amount currently charged at other listing markets, the Commission believes that the appeals fee is not overly excessive or burdensome to the extent that an issuer would be deterred from employing its due process right to appeal an Exchange staff determination and therefore is consistent with section 6(b)(7) of the Act.<sup>19</sup>

It is therefore ordered, pursuant to section 19(b)(2) of the Act,<sup>20</sup> that the proposed rule change (SR-NYSE-2001-46), as amended, is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>21</sup>

**Margaret H. McFarland,**  
*Deputy Secretary.*

[FR Doc. 03-1050 Filed 1-16-03; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47160; File No. SR-NYSE-2002-63]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Amendments to Rules 98, 104A.50, 105, and 900 to Permit Single Stock Futures Hedging by Specialists

January 10, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 21, 2002, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission")

<sup>19</sup> The Commission notes, however, that if the appeals fee was higher, it would have to determine whether the fee is consistent with section 6(b)(7) of the Act and acts as a deterrent to issuers exercising their due process rights.

<sup>20</sup> 15 U.S.C. 78s(b)(2).

<sup>21</sup> 17 CFR 200.30-3(a)(12).

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

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

the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### **I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

This proposal is to amend NYSE Rules 98, 104A.50, 105, and 900 to permit specialists to use exchange-traded single stock futures to hedge existing specialty stock positions in a manner comparable to stock options.

### **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 Exchange is proposing to permit specialists to use exchange-traded "security futures"<sup>3</sup> overlying single securities (hereinafter referred to as "single stock futures") to hedge specialty stock positions in a manner comparable to stock options. Single stock futures are contracts of sale, traded on a national exchange, such as OneChicago, LLC or Nasdaq Liffe, for the future delivery of a single security.

Rules 105, 98, 104A.50, and 900(d)(v) are proposed to be amended to make reference to "single stock futures" wherever stock options are referenced.

#### *Background*

Currently, Rule 105 permits the use by NYSE specialists of options on their specialty stocks subject to certain limitations and restrictions. The rule allows a specialist to acquire and hold, in his specialist trading account, a position in listed options on any of his specialty stocks "where appropriate . . . to offset the risk of making a market

in the underlying stock." Under the rule, a specialist may not establish and maintain an options position which is excessive either in terms of his or her existing position in the underlying specialty stock or in terms of a reasonable estimate of potential losses that may be incurred in relation to any such equity position.

In approving previous amendments to Rule 105, the Commission balanced the regulatory concerns regarding possible stock/option manipulation and the specialists' perceived information advantages against the benefits to the market to be derived from the Rule, namely enhanced market depth and liquidity. The Commission determined that the use of options by NYSE specialists resulted in substantial benefits to the markets for these stocks as well as the options markets.<sup>4</sup> By analogy, the Commission should determine that the use of single stock futures by specialists would result in similar substantial benefits to the markets for these stocks; this additional hedging mechanism would enable specialists to add to overall stock market liquidity and depth by taking specialty stock positions they might not otherwise assume or by reducing risks on positions they are required to assume.

#### *Proposed Amendments to Rule 105*

The Exchange is proposing to amend Rule 105(b) to define a "single stock future" as a contract of sale, traded on a national commodities exchange, for the future delivery of a single security. Appropriate cross-references to "single stock futures" have been added to Rule 105(a)-(d) to reflect that single stock futures can be used wherever options transactions are made.

In addition, paragraph (d) of the Guidelines to Rule 105 (the "Guidelines") would be added to explain the conditions for single stock futures transactions to hedge an existing specialty stock position with a net futures position. As with options, no anticipatory hedging would be allowed; only existing specialty stock positions may be hedged.

The proposed rule (paragraph (d)) states three conditions (similar to options conditions) that single stock futures transactions must meet:

(i) The transaction must result in a net futures position on the *opposite* side of the market from the underlying specialty stock position;

(ii) the transaction must be effected solely to offset the risk of making a

market in the underlying specialty stock; and

(iii) the resulting net futures position must not exceed the number of shares of the specialty stock position that the specialist is offsetting.

Any single stock futures transaction that does not meet *all three* of the above conditions would be deemed to be in violation of Rule 105.

One single stock futures contract would be able to be used to hedge each 100 shares of the existing specialty stock position. (See proposed Rule 105(d), Example 5).

As with options contracts, a hedge that subsequently exceeds the specialty stock position being hedged as a result of 25% or more in the specialist's stock position or which becomes on the same side of the market as the specialty stock position, must be liquidated, unless the equivalent share position is 5000 shares or less. (See proposed paragraph (e) to the Guidelines, Examples 9 and 11).

Similarly, as with options contracts, Rule 105 has been amended to specify that as with options contracts, specialists may also not front-run blocks (paragraph (h) to the Guidelines) and must record futures positions in a separate "memo" account (paragraph (i) to the Guidelines). Additionally, specialists must report to the Exchange: (i) accounts in which single stock futures positions are held (paragraph (j)) and (ii) their positions in single stock futures (paragraph (k)).

Currently, paragraph (l) of the Guidelines to Exchange Rule 105 ("Rule 105(l)") permits an approved person of a specialist to act as a primary market maker or specialist with respect to an option on a specialty stock, provided all the requirements of the Rule 98 exemptive program are met.<sup>5</sup> This paragraph has been re-lettered as paragraph (m) and incorporates references to market makers in single stock futures contracts. Thus, it is proposed that an approved person of an equity specialist may act as a primary market maker or specialist with respect to a stock futures contract, provided all the requirements of the Rule 98 exemptive program are met.

Paragraph (l) currently prohibits an approved person of an equity specialist acting as a market maker in any equity security in which the associated specialist is registered as such and which underlies an option as to which the approved person acts as an options market maker. Paragraph (l) has been re-

<sup>3</sup> The term "security future" is defined in Section 3(a)(55) of the Act. 15 U.S.C. 78c(a)(55).

<sup>4</sup> See Securities Exchange Act Release No. 28971 (March 13, 1991), 56 FR 11808 (March 20, 1991)(SR-NYSE-90-31).

<sup>5</sup> See Securities Exchange Act Release No. 45454 (Feb. 15, 2002), 67 FR 8567 (Feb. 25, 2002), approving SR-NYSE-2001-43 and amendments thereto.

lettered as (m) and provides the same prohibition with respect to market makers in single stock futures contracts.

Paragraph (n) is proposed to be added to explain the use of both options and single stock futures to hedge specialty stock positions. If a specialist chooses to hedge a specialty stock position with positions in both options and futures contracts, the resulting total market position, when established, may not exceed the size of the existing specialty stock position being hedged. Any excess or same side of the market equivalent position must be liquidated in accordance with the provisions of Rule 105.

#### *Other Rule Amendments*

Rules 98, 104A.50, and 900(d)(v) are proposed to be amended to incorporate references to single stock futures, where they currently refer to options.

Rule 98 would be amended to add single stock futures to the Rule's reference to Rule 105.

Rule 104A.50 would be amended to add a reference to single stock futures as an aspect of specialists' reporting requirements. Thus, every specialist must keep a record of all single stock futures purchases and sales (as they do with options currently) to hedge his specialty stock positions as permitted by Rule 105. Such transactions would be reported in such format and with such frequency as prescribed by the Exchange.

Rule 900(d)(v) currently prohibits a specialist against entering an order in the Exchange's Off-Hours Trading Facility if a resulting execution would result in the specialist having to take liquidating action pursuant to Rule 105. The rule would be amended to add a reference to single stock futures to the above prohibition against taking liquidating action.

#### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b)<sup>6</sup> of the Act, in general, and furthers the objectives of section 6(b)(5),<sup>7</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act.

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

The Exchange has neither solicited nor received written comments on the proposed rule change.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve the proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

#### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room.

Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. All submissions should refer to the file number SR-NYSE-2002-63 and should be submitted by February 7, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>8</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 03-1051 Filed 1-16-03; 8:45 am]

BILLING CODE 8010-01-P

## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-47174; File No. SR-NYSE-2002-66]

### **Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc., Relating to Fee Increases and New Fees Applicable to Members and Member Organizations**

January 13, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 23, 2002, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed a proposed rule change with the Securities and Exchange Commission ("SEC" or "Commission"). On January 10, 2003, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>3</sup> The proposed rule change is described in items I, II and III below, which items have been prepared by the Exchange. The NYSE has designated this proposal as one establishing or changing a due, fee, or other charge imposed by the Exchange under section 19(b)(3)(A)(ii) of the Act,<sup>4</sup> which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### **I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes changes to certain fees applicable to members and member organizations. The Exchange will (1) increase the existing cap on transaction charges; (2) increase existing fees for branch offices; (3) impose a new transaction charge for principal transactions; (4) impose new fees for Exchange technology services provided to brokers and specialists; and (5) change the fees charged to subscribers to

<sup>8</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> Amendment No. 1 replaces in their entirety Form 19b-4 and Exhibit 1 of the original filing.

<sup>4</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>6</sup> 15 U.S.C. 78f(b).

<sup>7</sup> 15 U.S.C. 78f(b)(5).