available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR–NASD–2003–01 and should be submitted by February 7, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–1111 Filed 1–16–03; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47161; File No. SR–NYSE–2001–46]

Self-Regulatory Organizations; Order Approving a Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the New York Stock Exchange, Inc. Amending Section 804 to the NYSE Listed Company Manual and NYSE Rule 499

January 10, 2003.

On October 29, 2001, the New York Stock Exchange, Inc. (''NYSE'' 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 modify the Exchange's procedures for issuer appeals of delisting determinations, and to institute a non-refundable appeal fee. On October 30, 2002, the Exchange submitted Amendment No. 1 to the proposed rule change.[3] On November 7, 2002, the Exchange submitted Amendment No. 2 to the proposed rule change.[4] The proposed rule change, as amended, was published in the **Federal Register** on November 19, 2002.[5] No comments were received on the proposed rule change. This order approves the proposed rule change, as amended.

I. Description of the Proposal

The Exchange proposes to amend Section 804 of the NYSE Listed Company Manual and NYSE Rule 499 to make the procedures for appealing delisting determinations, in its view, more efficient and effective, and to charge issuers a non-refundable appeal fee in the amount of $20,000.

Under the current procedures, both the issuer and the Exchange staff are required to file their appeal briefs at the same time. The Exchange believes that having the appellant submit its brief first would more effectively utilize the resources of both the Committee and the Exchange staff. Accordingly, the Exchange proposes to amend the procedures to specify that the issuer must submit its written brief first, including any accompanying materials. The Exchange will be permitted to respond to the issuer's brief. The proposal further states that the issuer and the Exchange will be given substantially equal periods for the submission of their briefs. In addition, the Exchange proposes to clarify that the briefing schedule will be set to provide the Committee with adequate time to review the materials submitted to it in advance of the review date.[6]

To assist in the Committee's evaluation, an issuer will be required to specify in its written request for review the grounds on which it intends to challenge the Exchange staff's determination, and whether it is requesting to make an oral presentation to the Committee.[7] The Exchange will state that document discovery and depositions are not permitted. The Exchange's proposed rules also provide the scope of the Committee's review of appeals, including 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.[8]

In addition, the Exchange proposes to institute a non-refundable appeal fee in the amount of $20,000. The Exchange has not previously considered it necessary to charge a separate fee to companies appealing an Exchange delisting decision. However, in its filing, the Exchange noted that changes in policies and procedures adopted or formalized by the Exchange in recent years have resulted in a significant increase of issuers that are delisted.[9] During the 12 months ending December 31, 2001, the Exchange represented that it paid slightly in excess of $300,000 in legal fees to cover 11 delisting appeals completed during that time,[10] giving an average out of pocket cost of slightly less than $30,000 for each appeal. This does not include the resources of the Exchange's own Financial Compliance and Office of the General Counsel personnel consumed in servicing these appeals. According to the Exchange, it is only fair and appropriate that the

[7] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] Letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy Sanow, Assistant Director, Division of Market Regulation (''Division''), Commission, dated October 29, 2002 (''Amendment No. 1''). Amendment No. 1 replaces the original proposed rule change in its entirety, and clarifies: (1) The scope of the NYSE Committee for Review's review on appeal; (2) that neither document discovery nor depositions are available; and (3) the rationale for requiring payment of a non-refundable fee in connection with a request for review.

[4] Letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy Sanow, Assistant Director, Division, Commission, dated November 7, 2002 (''Amendment No. 2''). Amendment No. 2 makes a minor technical correction to the proposed rule change.

[5] Securities Exchange Act Release No. 46802 (November 8, 2002), 67 FR 69789.

[6] The Exchange's Office of the General Counsel, which oversees the appeals process on behalf of the Committee, will schedule reviews on the first review day that is at least 25 business days from the date an issuer files the request for review, unless the next subsequent Review Day must be selected to accommodate the Committee's schedule, and can establish a briefing schedule that takes account of both the Committee's caseload and the complexities of the specific case. The Exchange represents that the Committee For Review typically meets every two months.

[7] The Exchange represented that the Committee's review shall be based on oral argument (if any) and the written briefs and accompanying materials submitted by the parties. Typically, accompanying materials include materials the issuer or NYSE staff relies on in support of its position and are supplied as exhibits to the brief submitted by the party.

[8] In this regard, the Commission specifically notes that the NYSE's proposal would not permit the issuer to argue grounds for reversing the NYSE staff's decision that are not identified in its request for review. However, the issuer would be permitted to 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. The proposed rule language would not, however, (i) authorize an issuer to seek to file a reply brief in support of its request for review or (ii) be deemed to limit the NYSE staff's response to a request for review to the issues raised in the request for review. Upon review of a properly supported request, the Committee may in its sole discretion permit new arguments or additional evidence to be raised before the Committee. Following such event, the Committee may, as it deems appropriate, (i) itself decide the matter, or (ii) remand the matter to the NYSE staff for further review. Should the Committee remand the matter to the staff, the proposed rules provide that the Committee will instruct the staff to (i) give prompt consideration to the matter, and, (ii) complete its review and inform the Committee of its conclusions no later than seven (7) days before the first Review Day which is at least 25 business days from the date the matter is remanded to the staff.

[9] The Exchange believes this increase is a result of changes in appeal procedures whereby a company that has appealed a delisting likely will be permitted to trade on the NYSE while the appeal is pending. *See* Securities Exchange Act Release No. 42863 (May 30, 2000), 65 FR 36488 (June 8, 2000). As an example, the Exchange noted that there were an average of 22 financial delistings per year during the three years from 1996 through 1998, but an average of 61 per year during the period 1999 through 2001. Regarding appeals, in a 21-month period since new appeal procedures were in effect in 2000, there were 18 appeals out of 114 delisting determinations. In contrast, during a previous 21-month period, there were only 6 appeals out of 104 delisting determinations.

[10] The Exchange has elected to use outside counsel to represent the Exchange's Financial Compliance staff in delisting appeals.

companies incurring these added out of pocket costs defray these costs by paying the proposed $20,000 appeal fee.[11]

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.[12] 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.[13] Section 6(b)(4) of the Act [14] 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 [15] 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 [16] 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 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.[17] 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 [18] because it is designed to recoup the costs of processing requests for 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.[19]

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[20] 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.[21]

Margaret H. McFarland,

Deputy Secretary.

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

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[11] 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.

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

[13] 15 U.S.C. 78f(b)(4); 15 U.S.C. 78f(b)(5); 15 U.S.C. 78f(b)(7).

[14] 15 U.S.C. 78f(b)(4).

[15] 15 U.S.C. 78f(b)(5).

[16] 15 U.S.C. 78f(b)(7).

[17] NYSE stated in its filing that the Committee For Review typically meets every two months.

[18] 15 U.S.C. 78f(b)(4).

[19] 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.

[20] 15 U.S.C. 78s(b)(2).

[21] 17 CFR 200.30–3(a)(12).

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''),[1] and Rule 19b–4 thereunder,[2] 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'')

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

[2] 17 CFR 240.19b–4.